HOUSE OF LORDS

SESSION 2004–05

[2005] UKHL 33

on appeal from: [2003] EWCA Civ 182

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

In re D (a child appearing by her guardian ad litem) (Respondent)

ON

THURSDAY 12 MAY 2005

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe

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LORD NICHOLLS OF BIRKENHEAD

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. I agree that for the reasons he gives this appeal should be dismissed.

LORD STEYN

My Lords,

2. I have had the advantage of reading the opinion of my noble and learned friend Lord Walker of Gestingthorpe. I agree with it. I would also dismiss the appeal.

LORD HOFFMANN

My Lords,

3. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

4. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. While I have in the end reached the same conclusion as he has done, the appeal seemed to me to raise some very real problems and I have found the decision far from easy. So I would like to explain in my own words why, with some hesitation, I too would dismiss the appeal.

5. There is no doubt that the widening of the frontiers of human existence by the use of assisted reproduction technologies has raised new questions about how the legal relationships that result from their use are to be identified. The law has always attached a special significance to a person's status. In *The Ampthill Peerage* [1977] AC 547, 568G-H, Lord Wilberforce said:

> "There can hardly be anything of greater concern to a person than his status as the legitimate child of his parents: denial of it, or doubts as to it, may affect his reputation, his standing in the world, his admission into a vocation, or a profession, or into social organisations, his succession to property, his succession to a title. It is vitally necessary that the law should provide a means for any doubts which may be raised to be resolved, and resolved at a time when witnesses and records are available. It is vitally necessary that any such doubts once disposed of should be resolved once and for all and that they should not be capable of being reopened whenever, allegedly, some new material is brought to light which might have borne upon the question."

6. Lord Wilberforce was describing there the status of legitimacy under the then current law in the context of a disputed peerage claim. But a similar view, with appropriate modifications, may be taken of the significance of the status of parentage in view of the legal consequences that flow from that relationship. The conferring of the status of father on a man who is not related to the child by blood or by marriage to the child's mother is a very serious matter, for the reasons which were mentioned by Hale LJ in the Court of Appeal: *Re R (a child) (IVF:*

paternity of child) [2003] Fam 129, 137, para 20. It affects not only the relationship between father and the child but also the relationships between the child and the whole of the father's family. It has other important consequences. The law of succession confers entitlement to participate in the father's estate, and there may be a dependent claim against the tortfeasor in the event of the father's death due to negligence. The question whether a man is the child's father has a special significance during the child's minority, but the law of succession may require it to be answered much later in life. In keeping with other family relationships, it will have a vital and long lasting part to play throughout the child's lifetime.

7. The first step which was taken to recognise that a relationship of parentage could be created outside the blood relationship as a result of assisted reproduction technology was in section 27 of the Family Law Reform Act 1987, following a recommendation of the Law Commission in its Report on Illegitimacy (1982) (Law Com No 118), paras 12.1-12.27. That section provided that a child born to a married woman who had been artificially inseminated with the semen of some person other than the other party to her marriage was to be treated in law as the child of the parties to that marriage unless it was proved to the satisfaction of the court that the other party to the marriage did not consent to the insemination. The Law Commission's recommendation had been endorsed by the Warnock Committee of Enquiry into Human Fertilisation and Embryology (1984) (Cmnd 9314), para 4.17. The Warnock Committee recommended that the same approach should be taken in relation to ovum donation and embryo transfer: paras 4.22- 4.25 and 6.8. But that was a step too far for the time being, so far as the framers of the 1987 Act were concerned. Section 27 was sufficiently controversial in itself. As Professor Michael Freeman observed in his comment on this section in his annotations to the 1987 Act in *Current Law Statutes*, it was inconsistent with the rest of the Act which was informed by a desire to recognise the true father as the lawful father of the child. What section 27 did was to recognise as the father of the child someone who, because the semen was not his, was not the child's genetic father. But it did so only in the case of married couples.

8. Section 27 of the Family Law Reform Act 1987 was extended to all the assisted reproduction techniques that were currently available by sections 27(1) and 28(2) of the Human Fertilisation and Embryology Act 1990. As these techniques include treatment by the use of a donated embryo or of donated eggs as a result of which the woman carrying the child is not the child's genetic mother it was first necessary to identify the person who is to be treated in these circumstances as the mother of

the child. Section 27(1) of the 1990 Act achieves this in plain and simple language. The woman who is carrying or has carried a child as a result of the use of these techniques, and no other woman, is to be treated as the mother of the child. Turning then to the question who is to be treated as the father of the child, section 28(2) adopts the same formula as was used in section 27 of the 1987 Act. It addresses the situation where the woman was a party to a marriage at the time of the placing in her of the embryo or the sperm and eggs or of her insemination and the creation of the embryo was not brought about with the sperm of the other party to the marriage. It provides that, unless it is shown that he did not consent to this, the other party to the marriage is to be treated as the father of the child. Here too the test that the subsection lays down for establishing the relationship of fatherhood is a plain and simple one which leaves no room for doubt. The moment of time to which the question whether she was a party to a marriage is addressed is the time when the embryo or the sperm and eggs are placed in the woman. If she was a party to a marriage at that time, the marriage relationship that then existed is used to identify the person who will become the child's father when it is born.

9. So far so good. But what if the mother is not a party to a marriage but is in a relationship with a man at the time when the embryo or the sperm and eggs are placed in her? The simple rule which section 28(2) lays down cannot be applied in that case. Is the child born as a result of that treatment then to be fatherless, and is the other partner to that relationship to be denied the opportunity of becoming a father simply because he is not married to the person who will become the child's mother? That is the problem to which section 28(3) is addressed. This subsection is the result of an amendment which was introduced at third reading in the House of Lords by the Lord Chancellor, Lord Mackay of Clashfern, following his consideration of an amendment of a similar nature which had been proposed and discussed during the report stage. He gave this explanation for the amendment: Hansard (HL Debates) 20 March 1990, cols 209-210:

> "The conclusion I have reached is that if it is to remain possible for unmarried couples to receive the benefit of treatment to bring a child into being, both should have imposed upon them the responsibility for the child. I was most concerned that this proposal should not be seen as encouraging unmarried people to use infertility treatments, thus perhaps undermining marriage, or leading to children having unsuitable social fathers because of the difficulty in distinguishing partners to stable relationships from more

> transitory ones. On reflection, having regard to the other provisions of the Bill, these considerations should not deter us from inserting this amendment."

10. My noble and learned friend Lord Walker has set out sub-sections (1)–(4) of section 28 so that subsection (3) can be seen in its context, so I do not need to repeat this exercise. In summary what section 28(3) does is to deal with the situation where, because woman was not a party to a marriage when the embryo or the sperm and eggs were placed in her, no man is treated as the father of the child by virtue of section 28(2) and, because the creation of the embryo was not brought about with his own sperm, the man is not the child's genetic father. It assumes that the treatment has been sought by the man and the woman together, in the Lord Chancellor's words, as an "unmarried couple". It then uses the fact that they were being provided with the treatment services "together", rather than the mere fact of their relationship as an unmarried couple, to lay down the test that is to be applied to determine whether the man is to be treated as the father of the child. It does this by providing that the man shall be treated as the father of the child if 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."

11. This test has built into it two important requirements which were mentioned by the Lord Chancellor when he was introducing the amendment. The first requirement is that the treatment services which resulted in the placing of the embryo or the sperm and eggs in the woman, or her artificial insemination, were being provided to the man and the woman "together" as an unmarried couple. It is, of course, true that the use of these techniques does not require the participation by the man in any way in the treatment which is being given to the woman. In the physical sense, as the subsection refers to a man whose sperm was not used in the procedure, it is the woman only, and not the man, who is being treated. But the subsection assumes that this is in reality a joint enterprise – that the treatment is being sought by the woman and the man together because they both wish to receive the benefit of the treatment to bring a child into being jointly as their child. It is the infertility of the woman and the man as a couple that is being treated by the treatment that is being given to the woman. The second requirement is that these services were being provided by a person "to whom a licence applies". This identifies the context for which the test was devised. As the Lord Chancellor explained, it was having regard to the

other provisions of the Bill that he was persuaded on reflection that the amendment should be inserted.

12. The other provisions to which he was referring include the conditions which the Act lays down for the granting of a licence for treatment under the Act. Section 13(2) provides, as one of the conditions of a licence, that such information shall be recorded as the Human Fertilisation and Embryology Authority may specify about, among other things -

> “(a) the persons for whom the services are provided in pursuance of the licence,
>
> (b) the services provided for them.
>
> …
>
> (d) any child appearing to the person responsible to have been born as a result of treatment in pursuance of the licence.”

Section 13(5) provides:

> “A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.”

Section 13(6) provides:

> “A woman shall not be provided with any treatment services involving –
>
> …
>
> (b) the use of any embryo the creation of which was brought about *in vitro*
>
> …
>
> unless the woman being treated and, where she is being treated together with a man, the man have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and have

been provided with such relevant information as is proper."

13. How then is the test which section 28(3) lays down to be understood in the light of these requirements? First there is a question of timing. At what point of time is the test to be applied? The answer to this question is relatively straightforward. The language of the subsection tells us that the man shall be treated as the father if 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 the man together. These words make it plain that the point of time is the time when the embryo or the sperm and eggs were placed in the woman or she was artificially inseminated. As Hale LJ put in the Court of Appeal, [2003] Fam 129, 138, para 21, the question whether this was done "in the course of treatment services provided for her and a man together" should be answered at that time and no other.

14. But the question of timing is not the only question that has to be answered. The treatment services that the woman was receiving at that time must have been "provided for her and a man together." As Wilson J observed in *U v W (Attorney General Intervening)* [1997] 2 FLR 282, 295B-C, the test is not whether the man consented either to be deemed in law to be the father of the prospective child or to become legally responsible for him. That would have been a simple and convenient test, which could have been met by appropriate record-keeping. But that is not what section 28(3) requires, no doubt because it was too simple. As the Lord Chancellor explained, he was most concerned that the proposal should not be seen as encouraging persons who were not married to each other to resort to these techniques. So the subsection concentrates instead on what would be expected of unmarried couples in a stable relationship who are seeking to bring a child into being jointly as their child. The test which it adopts is whether the relevant treatment services were provided for the woman and the man together. This raises an issue of fact. The question is how this crucial fact – crucial, as the question whether or not the relationship of fatherhood is established in law is wholly dependent upon it – is to be proved if there is a dispute about it. That is the issue in this appeal.

15. In many cases – indeed in most, as your Lordships were told that disputes such as that which has arisen in this case are very rare – there will be no difficulty. If the relationship is a stable one, it will be easy to demonstrate that there was a continuous course of conduct and the

relationship which section 28(3) seeks to create will be acknowledged on all sides. The man will assume the responsibilities that come with fatherhood and the child will enjoy all the benefits that come with it. But if the relationship is unstable, the question of fact may be much more difficult to answer. How then is it to be approached? Does the answer to it depend on whether both the man and the woman thought at the relevant time that the treatment services were being provided for them together? Or does it depend on what is shown by the records of the person to whom the licence applies? Is the question, in other words, to be approached from the perspective of the provider of the treatment services or that of the recipients. In *U v W (Attorney General Intervening)* [1997] 2 FLR 282, 295C, Wilson J was approaching the matter from the perspective of the provider rather than that of the recipients of the treatment services when he said:

> "In my view what has to be demonstrated is that, in the provision of treatment services with donor sperm, the doctor was responding to a request for that form of treatment made by the woman and the man as a couple, notwithstanding the absence in the man of any physical role in such treatment."

16. In the Court of Appeal Hale LJ said that it would be wrong to regard the words which were used by Wilson J as laying down a test to be applied in all cases, as to do this would be to add a gloss to the clear words of the subsection: [2003] Fam 129, 138, para 23. She said that a simple approach, based on the clear words of the subsection was preferable. She made the same comment about the approach which Hedley J adopted in this case, which was that the provision of the services continues until either party or the clinic expressly withdraws from the understanding that the woman and the man are being treated together. The simple approach to which she was referring was that set out in the last sentence of para 22 of her opinion at p 138:

> "There must be a point of time when the question has to be judged. The simple answer is that the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together."

It seems to me, however, that the simple approach still leaves unanswered the question how it is to be determined, in the event of a dispute which may perhaps not emerge until many years after the event,

whether the services were being provided for the woman and the man together at the time when the embryo or the sperm and eggs were placed in the mother or she was artificially inseminated.

17. The language of the subsection does not provide a clear answer to this question. But there are good reasons for thinking that it ought to be read and applied in a way that creates as much certainty as possible. Section 28(2) uses the fact that the woman was a party to a marriage at the relevant time as the test. This is consistent with the common law presumption *pater est quem nuptiae demonstrant*. Where there is no marriage some other test is needed that will stand the test of time and reduce to a minimum the opportunities for uncertainty. The recording by the provider of the information referred to in section 13(2) is likely to have that effect. The subsection refers to a "course of treatment services provided…by a person to whom a licence applies." This assumes that the provider will have decided to provide a course of treatment services for the woman and the man together which will have a beginning and an end, that at the relevant time that course of treatment was still in progress and that the provider of the services will have kept records which will demonstrate that this is so. The records are likely to provide all that is needed as evidence to show that, so far as the provider was concerned, the woman and the man were being treated together at the relevant time.

18. On the other hand this approach places a high premium on regular and accurate record-keeping – on what, as Hedley J put it, is spelled out in the consent form of the mother, which the man joins in by acknowledging the legal consequences to him of the treatment which she is to receive – and on keeping the records up to date throughout the course of the treatment which, as this case shows, may extend over several years. It places the onus on the man to inform the provider if and as soon as he wishes to withdraw from the arrangement. Yet, as he will not be participating in the treatment in any way, he may be quite unaware of the steps that the provider is taking as the course proceeds. He need not be present during any part of it. So the date that has been fixed for any stage in the treatment of the woman may be unknown to him, especially if the relationship is an unstable one. In the present case the man wishes to be the father of the child and is willing to accept the responsibilities that will flow from this. But it is easy to envisage cases where the man was no longer willing to be associated with the treatment but had not realised, because he was not being kept fully informed, that it was still continuing.

19. The lack of clear guidance in section 28(3) on such an important issue is regrettable. But in the end I think that, despite Miss Macur QC's persuasive argument to the contrary, the solution to the problem was best expressed by Mr McFarlane QC when he said that the question whether the treatment services were being provided for the woman and the man together at the relevant time simply raises a question of fact which must be determined by the judge in the light of all the evidence. The perspective of the clients is therefore to be treated as part of the relevant evidence. So too is the perspective of the provider of the services, as demonstrated by the records which the provider has kept as required by the licensing authority. Neither has any priority over the other in terms of the statute. Each is as vulnerable to human error, deceit, mistake or misunderstanding as the other. To elevate one over the other when the statute does not clearly require this would be to create an unnecessary gloss. It could result in a decision which was imposed on the man by default and which, when looked at in the light of all the evidence, was quite wrong. When he was moving the amendment the Lord Chancellor referred, as one of the benefits of the scheme, to the fact that there would be fewer fatherless children: Hansard (HL Debates) 20 March 1990, col 210. But the statute does not say that the avoidance of fatherlessness is an end in itself. The child's welfare comes first: see section 13(5). There is great force in Hale LJ's observation at p 139, para 25 that the question whether the treatment should be continued ought to be reviewed in the child's best interests if and as soon as it is known that the man is unwilling to continue to be a party to it. I find further support here for the view that the preferable approach is to examine all the evidence in order to see whether at the relevant date the statutory test was satisfied.

20. For these reasons, which amplify those of the Court of Appeal in the light of the fuller argument which was addressed to us, and for the further reasons given by Lord Walker, I have concluded that the appeal should be dismissed.

LORD WALKER OF GESTINGTHORPE

My Lords,

Section 28 (3) of the 1990 Act

21. Your Lordships' House has on two recent occasions had to consider the scheme and scope of the Human Fertilisation and Embryology Act 1990 ("the Act"). The background to the Act can be found in the report, published in 1984, of the Warnock Committee (Report of the Committee of Inquiry into Human Fertilisation and Embryology, Cmnd 9314) and the White Paper, published in 1987, which largely accepted the Warnock Committee's recommendations (Human Fertilisation and Embryology: a Framework for Legislation, Cm 259). These matters were fully considered by the House in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 and *Quintavalle (on behalf of Comment on Reproductive Ethics) v Human Fertilisation and Embryology Authority* [2005] UKHL 28. It is unnecessary to cover that ground again. This appeal is concerned with a group of sections in the Act (sections 27-30) dealing with the status (in terms of legal parentage) of a child born as a result of fertility treatment licensed under the Act.

22. The statutory provision of central importance is section 28 (3), but it needs to be set in its context.

> "27. Meaning of 'mother'
>
> (1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.
>
> . . .
>
> 28. Meaning of 'father'
>
> (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, subject to subsection (5) below, 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, subject to subsection (5) below, that man shall be treated as the father of the child.

(4)Where a person is treated as the father of the child by virtue of subsection (2) or (3) above, no other person is to be treated as the father of the child."

Subsections (2) and (3) of section 27 and subsections (5) to (9) of section 28 contain various qualifications and ancillary provisions which are not material on the facts of this appeal, and are not suggested to affect the construction of section 28 (3). Section 29 spells out the legal effect of sections 27 and 28, and section 30 provides for parental orders in favour of gamete donors in certain circumstances.

23. The crucial words in section 28 (3) are "in the course of treatment services provided for [a woman who bears a child] and a man together." Treatment services are defined in section 2 (1) of the Act as:

> "medical, surgical or obstetric services provided to the public or a section of the public for the purpose of assisting women to carry children."

The rather compressed wording of section 28 (3) gives rise to two associated problems.

24. First, infertility treatment is often a protracted and stressful process, especially for an unmarried couple. As this case illustrates, the process may involve preliminary tests and diagnosis, social inquiries, counselling, and the granting of formal approval and consents before any positive treatment is given. The demand for treatment services under the National Health Service exceeds supply, and the couple may encounter waiting lists at any stage. The actual treatment may start with a trial of one technique (in this case, artificial insemination by donor) and go on to another technique (IVF treatment) if the first proves unsuccessful. Even then the skill of the medical staff and the patience and perseverance of the couple may end in disappointment. In this case about six and a half years elapsed between the mother's original referral to a fertility clinic and her becoming pregnant as a result of IVF using embryos created with donor sperm. The two forms of acknowledgment or consent signed by her then partner were completed about thirty months and nine months respectively before she became pregnant. That is the sort of time-scale against which the expression "treatment services provided for [a woman who bears a child] and a man together" may have to be construed.

25. The second problem is understanding what the expression means in a case where the woman eventually becomes pregnant as a result of IVF with embryos created with donor sperm. In a case of that sort the infertile male partner does not receive any positive treatment of any kind (although he may have undergone tests, and received counselling, at an earlier stage). This problem would arise regardless of the duration of the treatment, but protracted treatment may exacerbate it, since the feelings and perceptions of the two partners, and the degree to which the man actively supports the woman may change in the course of treatment (although your Lordships were told that the complete breakdown of a relationship during fertility treatment is in practice quite rare, despite the stresses which the treatment must very often impose).

26. In some cases the facts will be such that the requirement of "treatment services . . . together" must be satisfied on any reasonable construction of section 28 (3). When an unmarried cohabiting couple first decide to seek help at a fertility treatment clinic, they will normally attend the clinic together and both will cooperate in tests to establish the cause of the infertility, in the same way as a married couple would. Sometimes it will be found that each of them has a medical condition

contributing to the problem (as was the case here, although the man's condition was much worse and beyond any possibility of treatment). In such a case there is no difficulty (especially if the male partner's sperm is eventually used for artificial insemination or IVF) in recognising that the partners are receiving treatment together, or as a couple (that was the phrase used by Wilson J in *U v W (Attorney-General intervening)* [1997] 2 FLR 282, 295, although the Court of Appeal in this case regarded it, [2003] Fam 129, 138, para 23, as an unnecessary gloss). But where there is IVF treatment using embryos created with donor sperm, the infertile male partner cannot easily be described as participating in the treatment. If he is to be regarded as participating he must do more than simply consent to his partner's treatment. His conduct must be such as to make his partner's treatment something of a joint enterprise (an expression used by Bracewell J in *Re B (Parentage)* [1996] 2 FLR 15, 21, although in that case the ex-partner was the biological father). In practice, fertility clinics try to reduce the risk of disputes by the use of a written form of acknowledgment, but this case shows that their procedures have not always been effective and (in common, as I understand it, with the rest of your Lordships) I consider that more reliable safeguards are needed in a matter directly affecting a child's legal parentage. I shall return to this point below.

The facts

27. Not all the facts of this case have been clearly established. That does not imply any criticism of the first-instance judge. It is a reflection of the rather convoluted way in which this litigation has developed, and it may be helpful to start with an outline of the litigation. The mother, D, gave birth to a daughter, R, on 5 February 2000. D's former partner, B, promptly made an application in the County Court for contact and parental responsibility orders. The Official Solicitor was asked to act for R and his representative interviewed both B and D. There was a two-day hearing early in September 2000 before His Honour Judge Hedley. The judge heard oral evidence from B and D. There were strong conflicts of evidence which the judge had to resolve. But he did not have to consider section 28 (3) because it was common ground before him that B was R's father and that the Court had jurisdiction to make the Orders which B was asking for. The judge did not have before him any medical records from the fertility clinic.

28. In a reserved judgment delivered on 20 September 2000 the judge was very critical of D's evidence. He found her a wholly unreliable witness whose evidence was uncorroborated in circumstances (such as

alleged complaints to the police) where corroboration would be expected. She had admitted misleading the clinic and she had admitted lying to the judge. The judge rejected any allegation of improper conduct against B. Because of the concession the judge did not make any detailed findings about the course of the treatment at the clinic, but he did (without having the medical records before him) find that B

> "entered wholeheartedly into the IVF treatment and was in his own way as devastated as the mother when it failed."

(The successful second round of IVF treatment came after the end of the relationship, as explained below).

29. His Honour Judge Hedley made an order permitting B to have indirect contact with R, and adjourned the application for a parental responsibility order. D applied to the Court of Appeal for permission to appeal. The Court of Appeal (Dame Elizabeth Butler-Sloss P, Hale and Arden LLJ) refused permission but expressed concern about the concession on jurisdiction. The matter came back to Hedley J (as he had by then become) on the application for a parental responsibility order and he directed that the issue of jurisdiction should be heard as a preliminary issue. At the hearing of that issue he had the medical records but did not (it seems) hear any further oral evidence. On 22 February 2002 he decided the preliminary issue in favour of B and made a declaration of paternity. His decision is reported as *B and D v R* [2002] 2 FLR 843. On 19 February 2003 the Court of Appeal (Sir Andrew Morritt V-C, Hale and Dyson LJJ) allowed D's appeal in a judgment of the Court delivered by Hale LJ, reported as *Re R (a child) (IVF: paternity of child)* [2003] Fam 129.

30. The roundabout course of the litigation has left some loose ends in the findings of fact. But a helpful chronology prepared by Miss Macur QC and Mr James Gatenby (for D), supported by the medical records, establishes the main landmarks in the protracted sequence of events. D was referred to the clinic in November 1992. The referral letter identified B as a "consort of four years' duration" who had had a bilateral orchidectomy because of testicular cancer. In May 1994 the specialist at the clinic saw D and B together, noted that they did not live together, and said that there was a need for counselling. The first appointment for counselling, attended by both partners, took place in April 1995. Both attended two further meetings for counselling. In March 1996 they were approved for treatment.

31. There were some delays before treatment began. On 27 November 1996 B signed a form headed "male partner's acknowledgement". It stated,

> "I am not married to [D] but I acknowledge that she and I are being treated together, and that I intend to become the legal father of any resulting child."

D signed various consent forms and (on 27 January 1997) she signed a form (headed "Accounting for the interests of the child") which stated, among other things, that she had been living with B for two years. It appears that B had his own accommodation throughout but was at this time living with D and her mother.

32. The first stage of positive treatment took place during 1997. There were three attempts at artificial insemination with donor sperm, all unsuccessful. On 14 January 1998 the specialist wrote to his colleagues in the IVF unit, stating that following the failure of the three attempts, D had been put on their waiting list. On 3 August 1998, B signed a further form (paragraph headed "male partner's consent") in substantially the same terms as the previous form.

33. In October 1998 at least twelve eggs were collected from D and fertilised with donor sperm. The first implantation failed. The second implantation (using embryos which had been stored since their fertilisation) was effected on 4 May 1999. D had a positive pregnancy test on 13 May 1999. But by then D's relationship with B had come to an end. In his judgment on the preliminary issue as to jurisdiction the judge found ([2002] 2 FLR 843, 844, para 4):

> "that treatment services were originally provided to the parties together. No one in this case really sought strenuously to argue to the contrary."

But equally it was not seriously disputed that they had separated (at latest) by mid-March 1999 (D's evidence was that it had been some months earlier) before the second, successful, implantation. On a form which she signed on 18 May 1999, D left "partner's name" blank. By then she had, on her own evidence, met her new partner, S, and S attended at her second implantation. During her first day's evidence at

the original contact hearing, D said that she had told the specialist about S, at or before the time of the second successful implantation. But at the start of the second day's hearing her counsel (having exceptionally been given leave to speak to her client while she was still in the witness box) corrected that untruthful evidence. It was not until 20 September 1999 that D wrote to her specialist informing him that she and B were no longer together.

The welfare of the child

34. Section 13 (5) of the Act provides:

> "A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth."

Section 25 provides for the Human Fertilisation and Embryology Authority ("the Authority") to maintain and publish a code of practice, and the code's guidance is to include (section 25 (2)):

> "guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (including a child's need for a father), and of other children who may be affected by such births."

35. In view of section 13 (5), and the guidance given in the code of practice, medical staff at licensed clinics are rightly cautious about providing assisted conception services for unmarried women. As a general rule (but subject, as your Lordships were told, to increasingly frequent exceptions in recent years) clinics would expect an unmarried woman to be in a stable heterosexual relationship if she was to receive treatment. Your Lordships are not on this appeal concerned with the policies which different clinics may adopt, or the inquiries which they make in the course of implementing their policies, except so far as these matters bear on the issue of "treatment . . .together" for the purposes of section 28 (3). But that is a very important exception. If an unmarried man is to become the legal father of a child of which he is not the

biological father, that is a momentous matter for both father and child, and one which must be brought home to the prospective father as clearly as possible.

36. The House has been shown the fourth edition of the code of practice, as revised in July 1998. Paragraph 5.8 was in the following terms:

> "If a woman is being treated together with a male partner, using donated sperm, and she is unmarried or judicially separated or her husband does not consent to the treatment, her male partner will be the legal father of any resulting child. Centres should explain this to them both and record at each appointment whether or not the man was present. Centres should try to obtain the written acknowledgment of the man both that they are being treated together and that donated sperm is to be used. Centres should also explain that when a child is born to an unmarried couple the male partner may not have parental responsibility for that child. Unmarried couples concerned about how parental responsibility affects their legal rights should seek their own legal advice."

This guidance is no doubt the origin of the forms of acknowledgment and consent signed by B. But the rather half-hearted advice on attempting to obtain an acknowledgment is an inadequate recognition of the importance of establishing whether or not a child born as a result of licensed treatment has a father, and whether the mother's male partner is to have the legal responsibility of fatherhood. It is for consideration whether licensed clinics ought not to require the unmarried male partner either to sign a form of acknowledgment or to explain why he was unwilling to do so (with a refusal to sign leading to a review of the decision to provide treatment services). Clinics should also take steps to ensure, during any protracted course of treatment, that acknowledgments are renewed at regular intervals, and in any case before any embryo replacement (this is required by paragraph 6.36 of the current (6th) edition of the code). If more robust procedures had been in place in this case a good deal of distress (and this expensive litigation) might have been avoided (although it must be accepted that no system can be proof against deliberate deception).

37. There are some other material changes in the current edition of the code of practice (paras 6.32 to 6.38), possibly as a result of the passage of this case through the lower courts. But I still think it desirable that this matter should be given detailed consideration as part of the current review of welfare aspects of assisted conception treatment (see Tomorrow's Children, a consultation paper published by the Authority in January 2005).

The decisions below

38. Hedley J's judgment laid emphasis on the need for clarity and certainty on an issue which might attain practical importance only after the lapse of many years. If a male partner changed his mind about treatment services he could withdraw his acknowledgment, and a clinic, if informed of a change of circumstances, should reconsider the position. But in the absence of the partner expressly withdrawing his acknowledgment or a review by the clinic ([2002] 2 FLR 843, 846, para 10):

> ". . . then in my judgment the original course of treatment continues as treatment services provided to both of them together and, if a child is conceived in the course of that, the man will be the father. This approach affords clarity, simplicity and certainty."

39. The Court of Appeal, in the judgment of the Court delivered by Hale LJ, took a different view. Hale LJ agreed with the submission of Mr Jackson QC ([2003] Fam 129, 137, para 20):

> "that section 28 (3) is an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage. Conferring such relationships is a serious matter, involving as it does not only the relationship between father and child but also between the whole of the father's family and the child. The rule should only apply to those cases which clearly fall within the footprint of the statutory language."

She analysed the structure of section 28 (2) and (3) and found an indication that both referred to the same time as critical for legal

paternity, that is when the embryo or the sperm and eggs (which eventually result in the birth of a child) are placed in the woman. She noted that "treatment services" are widely defined, and are not limited to a particular cycle or course of treatment. She concluded (p138, para 22),

> "There must be a point in time when the question has to be judged. The simple answer is that the embryo must be placed in the mother at a time when treatment services are being provided for the woman and the man together."

40. Hale LJ considered that this conclusion supported rather than undermined the legislative purpose of regulating treatment services in a way that takes account of the welfare of any child who may be born. She observed (p139, para 25),

> "The Act requires that consideration be given to the welfare of the child and that counselling be offered to the prospective parents. If the circumstances which were taken into account when the couple were together change dramatically, it would better serve the purposes of the Act if the matter had to be reconsidered and fresh counselling offered before a further attempt at implantation is offered. That can only be beneficial to the children born as a result. [Counsel then appearing for B] accepted that had the mother not misled the centre, the treatment would have had to stop and a fresh assessment be made. She stopped short of accepting that had the clinic gone ahead regardless of the changed situation the subsection would not have applied. But that must be the inescapable result."

Conclusions

41. My Lords, I consider that the Court of Appeal was right to allow the appeal. For my part I would be content to adopt the reasoning and conclusions of the Court of Appeal, in the judgment delivered by Hale LJ, as my own. But in deference to Miss Macur's submissions (in an appeal which has been argued by all counsel with conspicuous clarity and conciseness) I would add three observations.

42. First, the appellant stressed the need for certainty and clarity, a point which had carried the day before Hedley J. But important though legal certainty is, it is even more important that the very significant legal relationship of parenthood should not be based on a fiction (especially if the fiction involves a measure of deception by the mother). Infertility treatment may be very protracted and a general rule of "once together, always together" (absent express withdrawal of his acknowledgment by the male partner, or review by the clinic) could produce some very undesirable and unjust consequences.

43. Second, my last paragraph does not imply the view that no weight should be given to the perspective (or perception) of medical staff at the clinic (a matter emphasised by Craig Lind in an article criticising the Court of Appeal's decision in (2003) 15 Child and Family Law Quarterly 327, 332-3). The clinic's perception is one element to be taken into account in answering the factual question which the Court of Appeal posed, following the language of section 28 (3). The idea of providing treatment services to two people "together" does involve a "mental element" (the phrase used by Wilson J in *U v W (Attorney General intervening)* [1997] 2 FLR 282, 294) and the perceptions of the medical staff at the clinic are part of that. But they cannot be the decisive element if they are based partly on deception, and if the rest of the evidence shows that at the material time there is no longer any "joint enterprise" between the woman and her ex-partner.

44. Third, in common with the Court of Appeal I do not think that the appellant can get any assistance from Article 8 of the European Convention on Human Rights. The assertion that B has a right to family life with R (when he is neither her social father nor her biological father) really assumes that which has to be established. Miss Macur rightly did not press this point in her oral submissions to the House. Of the Strasbourg authorities referred to in her printed case, only two, *Kroon v Netherlands* (1994) 19 EHRR 263 and *Yousef v Netherlands* [2003] 1 FLR 210 come within hailing distance of the facts of this case. In both of those decisions the European Court of Human Rights recognised that the existence of a family tie with the child in question must be established: see at p283, para 32 and p219, para 52 respectively. They do not support the conclusion that there was such a tie in this case.

45. For these reasons I would dismiss this appeal.