Although many groups and agencies are represented on it, the Criminal Procedure Rule Committee is dominated by the judiciary, and the ''overriding objective'' is their own attempt to reform criminal procedure so that it aligns more closely with the instincts of ordinary citizens as to what is just and fair. And, unlike the loudly-trumpeted attempts of our headline-hungry politicians to ''rebalance justice'', it looks as if this reform might actually achieve its authors' aim.

J. R. SPENCER

WHO OR WHAT IS A PARENT?

EXACTLY what it is which gives someone the claim to be regarded as a parent has perplexed academics for years. This question has now been confronted by the House of Lords in *Re G (Children)* [2006] UKHL 43, [2006] 1 W.L.R. 230.

A lesbian couple, CG and CW, lived together for seven years in the course of which CG gave birth to two girls with the aid of sperm donation. These girls were raised as children of the family. It was not disputed that the children had established an important relationship with CW and with CW's teenage son, also conceived through donor insemination during an earlier lesbian relationship. When the relationship between CG and CW broke down there was an acrimonious dispute over the two girls which led to applications for residence and contact. Both parties had by now acquired new partners and CG announced her intention to leave Leicester for Cornwall, a move thought to be designed to impede contact between CW and the children. CG, in breach of a court order restraining her from doing so, surreptitiously removed the children to Cornwall without informing CW. The court had made a time-sharing order set at 70% to CG and 30% to CW. CW had failed in her attempt to obtain a shared residence order in the lower courts but ultimately succeeded on appeal, the significance of which was that she thereby acquired parental responsibility for the children (Children Act 1989, s 12 (2)). Bracewell J. controversially reversed the court order and gave *primary* care of the children to CW. She regarded CW's relationship with the children as essential and she had no confidence that it would be maintained by CG if she and the children remained in Cornwall. The Court of Appeal dismissed CG's appeal rejecting the contention that there should be cogent reasons for preferring the claims of a person who was not a parent over those of a natural parent.

The House of Lords unanimously allowed CG's appeal, thus restoring CG as the primary carer. The House reasserted the authority

of *J* v. *C* [1970] A.C. 668 that the welfare principle governs disputes between parents and others just as it does between two parents. In that case Lord MacDermott had provided the orthodox interpretation of the welfare principle that the best interests of the child "rules upon or determines the course to be followed". It is this formulation which denies the existence of parental rights and regards any claims which parents or others have as relevant only to the extent that they bear on the determination of the child's welfare. How then can it be said that any premium attaches to natural parenthood? The answer given by the House is that while there is no *presumption* in favour of the natural parent, the fact of natural parenthood is nonetheless an "important and significant factor" and that the welfare test is broad enough to encompass the "special contribution" of natural parents. This factor had been undervalued by both Bracewell J. and the Court of Appeal. Further, while the willingness of CG to co-operate over contact with CW was also an important factor, moving the children from their parent's home could not be justified where, as here, contact between them and the co-parent, CW, was functioning well despite the geographical difficulties.

In the course of her principal speech Baroness Hale of Richmond identified three ways in which a person may become the natural parent of a child – by genetic, gestational and social or psychological contribution. In most cases the mother will combine all three. As Lord Scott of Foscote put it, "[m]others are special". This of course begs the question (though not one falling for decision in *Re G*) whether fathers are "special" too. Baroness Hale recognised the contribution of the natural father as "unique", based on his genetic and social or psychological roles but would evidently exclude him from any credit derived from the processes of gestation, birth and feeding of the infant. This is a view which might be questioned by many fathers who closely support the mother through pregnancy, labour and birth and who are often also involved in feeding the child. Their opportunities to be so involved will potentially be significantly increased by the improved paternity leave provisions of the Work and Families Act 2006.

This is not the first time that the House of Lords has rejected the existence of any presumption in favour of natural parents (see particularly *Brixey* v. *Lynas* [1996] 2 FLR 499 where a presumption in favour of *mothers* was denied). How believable is this? According to Lord Nicholls of Birkenhead, "[a] child should not be removed from the primary care of his or her biological parents without compelling reason". That this is not a legal presumption might be understood by lawyers but to the layperson it looks very much like an automatic preference for parents. According to Baroness Hale, "[there] is no question of a parental right", yet nowhere in any of the speeches is

there so much as a hint of reference to the United Kingdom's international obligations. These are very largely couched in the language of rights. It is, with respect, quite simply unsustainable to deny that parents have rights when the European Court of Human Rights has made it very plain that they do. It might be argued that this is just a question of language. However, the crux of the matter is whether the courts are prepared to recognise that parents have legitimate *independent* interests. This the House of Lords appears to be unwilling to do by reaffirming the traditional interpretation of the paramountcy principle. The truth is that this interpretation is no longer tenable alongside the balancing exercise required by Article 8 of the ECHR (which involves express acknowledgment of the rights of *both* parents and children) and it will sooner or later need to be reformulated.

Notwithstanding these concerns the result in this case, the recognition given to the value of natural parenthood and the significance attached to the beginnings of life are much to be applauded and chime very well with the child's rights under Articles 7 and 8 of the United Nations Convention on the Rights of the Child. The view that the person looking after a child is at least the equivalent of a parent, and may have an even stronger claim to be regarded as *the* parent, is beloved of certain academics. It is unlikely to strike much of a chord with ordinary people who are well able to distinguish between parents and others looking after children.

ANDREW BAINHAM

EQUAL BUT DIFFERENT?

ON 26 August 2003 Susan Wilkinson (the petitioner) and Celia Kitzinger (the first respondent) celebrated their marriage in British Columbia, Canada. The marriage was lawful and valid under the law of British Columbia, which permits and recognises marriages between persons of the same sex. Both parties were then and are now domiciled in England. After the coming into force of the Civil Partnership Act 2004 they sought a declaration that their marriage was also to be considered a marriage under the law of England and Wales. If necessary, they further sought a declaration of incompatibility under section 4 of the Human Rights Act 1998 in relation to section 11(c) of the Matrimonial Causes Act 1973. The latter stipulates that a marriage is void if the parties are not respectively male and female. In *Wilkinson* v. *Kitzinger and others* [2006] EWHC 2022 (Fam) Sir Mark Potter P. dismissed the petitions.