only one no-profit rule, there is really no question about whether some unlawful profits are held in trust and some are not. The interests of the fiduciary's creditors could only be addressed through the introduction of a discretionary constructive trust, because the traditional law decides whether or not there is a trust through analysis of the juridical relationship as between fiduciary and beneficiary; the existence of claims held by others is not material. If there is a trust, it follows that the creditors of the trustee cannot have the trust property.

This helps us to see that it is high time to put to rest the strange observation of Lindley L.J. in *Lister & Co v Stubbs* (1890) 45 Ch.D. 1, 15, that the claim for a trust was unsound "in confounding ownership with obligation". The judgments in *Lister* were criticised in *FHR* by Etherton C. (at [103]), but this particular argument of Lindley L.J. seems entirely misplaced; the whole history of the trust is a history of confounding ownership with obligation, since the law of trusts gives property-like features to beneficial interests, which interests are nothing but the rights that correspond to the obligations of the trustee with respect to the benefit of the trust property.

LIONEL SMITH

AN UNBALANCED SCALE: ANONYMOUS BIRTH AND THE EUROPEAN COURT OF HUMAN RIGHTS

OFFICIAL sanction of anonymous relinquishment of children in Europe dates back to the 12th century, when Pope Innocent II introduced foundling wheels to prevent babies being killed and left in the River Tiber. However, it has only been in the last century that such mechanisms have expanded greatly. Anonymous birth has been sanctioned in France, Luxembourg, Austria and Germany, while the mother is granted the right to keep her identity secret in the Czech Republic, Greece, Italy, Russia and Ukraine. The last century also saw the institution of hundreds of baby-hatches across Austria, Belgium, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia and Switzerland.

In 2003, the European Court of Human Rights (ECtHR) gave judicial approval to the practice of anonymous birth in the *Odièvre v France* ((Application no. 42326/98) [2003] E.C.H.R. 86). In this controversial decision, with seven of the 17 judges dissenting, the court found that the French system of anonymous birth legitimately balanced the rights of the mother and child. It held that since the mother was encouraged to leave non-identifying information for the child, and she was entitled to change her mind at a later date and reveal her

identity, an appropriate balance had been struck between the mother's right to privacy and the right of the child to have information on his or her origins.

This approach was heavily criticised by the judges in dissent. They considered that by allowing the mother's decision to constitute an absolute defence to any request for information, irrespective of the reasons for, or legitimacy of, that decision, the mother was given "a discretionary right to bring a suffering child into the world and to condemn it to lifelong ignorance" (joint dissenting opinion of Judges Wildhaber, Sir Nicholas Bratza, Bonello, Loucaides, Cabral Barreto, Tulkens and Pellonpää, at [7]).

Despite the contentious nature of this decision, and the deeply divided bench, this case has remained unchallenged in Strasbourg for the past decade, a time that has seen anonymous relinquishment spread from a few isolated countries to over a third of European jurisdictions. However, the September 2012 case of *Godelli v Italy* ((Application no. 33783/09) [2012] E.C.H.R. 347, decision only available in Italian and French) gave the court the chance to consider once again how best to balance the two competing rights.

The facts of this case were relatively simple: the applicant was born in 1943 to a mother who requested that she not be named on the birth certificate. The applicant later sought information as to the identity of her mother, but this was refused on the grounds that, at the time of the applicant's birth, her mother expressed a wish not to be identified. The applicant claimed that this was contrary to her right to respect for private and family life. She argued that this at least included the ability to obtain non-identifying information about her biological parents.

In a majority decision, with one judge dissenting, the court found that the interests of the mother and child had not been balanced. Unlike the French system of anonymous birth, the Italian law did not allow the mother to change her mind and identify herself at a later stage if she so wished. Once anonymity was requested, it could not be reversed, and thus there had been a violation of article 8 of the European Convention on Human Rights (ECHR).

On first appearances, this case seems to be a significant step in the direction of greater recognition of the importance of identity for a child, in line with the emotive dissent in *Odièvre*. However, the reasoning upon which it relies serves only to emphasise the weak position of children's rights under the ECHR, and confirm the unbalanced approach to the weighting of rights when considering anonymous relinquishment. Like *Odièvre* before it, the judgment in *Godelli* places a disproportionate emphasis on parental rights, which is a narrow basis for decision. The decision prohibits anonymous birth in only very confined circumstances and on limited grounds, such as

where the mother is not later permitted the opportunity to revoke her original decision to remain anonymous. It is difficult to see how the mother's ability to change her mind at a later stage creates a balance between the mother's and child's rights. Rather, it continues to leave the decision as to whether the child's rights will be respected with the mother herself.

The psychological importance to a child of knowing his or her biological origins has long been recognised, but unfortunately the law has not yet caught up. Although the court in *Godelli* and *Odièvre* referred to this need, it was given scant weight when compared to the mother's rights to privacy. Neither of these judgments referred to the provisions of the United Nations Convention on the Rights of the Child that require the child to be able to know his or her parents as far as possible, nor to the way that the Committee of the Rights of the Child has consistently condemned states that practise systems of anonymous birth or anonymous relinquishment. These omissions highlight the reluctance of the court to engage fully with this issue from the perspective of child rights.

That being said, individual judgments in both *Odièvre* (the concurring opinions of Judge Rozakis, Judge Ress joined by Judge Küris, and Judge Greve) and *Godelli* (the dissenting opinion of Judge Sajó) attempt to redefine the debate as one that is purely child-centred, albeit in a rather skewed manner. In doing so, they conceptualise the issue as a balance between the child's right to identity and his or her right to life. This suggests that the child's primary interest lies in being born in safe conditions, i.e. in not being aborted, or abandoned in an unsafe environment. However, this reasoning creates an unnecessary dichotomy. It sidesteps the true issues at stake, which are the underlying social, economic and cultural circumstances that lead women to feel that they have no option but to demand anonymity.

Unfortunately, these issues have yet to be adequately addressed. There is no doubt that protection should be offered to vulnerable women who may be at risk of physical or psychological harm if they are identified. Nevertheless, empirical evidence shows no drop in abortions or unsafe abandonments after the introduction of anonymous birth, and more nuanced solutions have been adopted in other jurisdictions that allow a better balance between the rights of the mother and the various aspects of the child's rights. These offer a more proportionate response to these delicate issues.

In Austria, for example, a mother can claim the right to anonymity and refuse to provide the hospital with her name, but must leave identifying information with the child welfare authorities for the child to access when he or she reaches 14 years of age. A similar proposal has been made in Germany, where a draft bill has recently been agreed

allowing women to give a false name to the hospital and for the birth certificate, but requiring that their correct personal data be sealed and stored in a central agency for access by the child once he or she turns 16. Such mechanisms provide qualified privacy for the mother, while protecting the right of the child to access information later. Further, several American and Canadian jurisdictions protect the mother's privacy by imposing restrictions on contact if she so wishes, while still allowing the child to know his or her origins.

Regrettably, the court failed to consider such alternative legislative measures for achieving balance between mothers and children. With its narrow approach, it approved all but the most restrictive forms of anonymous birth. It is hoped that when the court addresses the issue of anonymous relinquishment of children in baby-hatches, as it no doubt will in the coming years, the complete discretion given to mothers in this area will be reined in. In the meantime, however, the child's right to identity remains severely compromised.

CLAIRE SIMMONDS

SUSPICIOUS MINDS: PROTECTING CHILDREN IN THE FACE OF UNCERTAINTY

WHEN Parliament reformed the basis for state intervention in the family, it made it explicit that the threshold for such intervention might be crossed where children have not already suffered, but are likely to suffer, significant harm (Children Act 1989, s. 31 (2) (a)). "Likely to suffer harm", it was quickly determined by the Court of Appeal (*Newham L.B.C. v A.-G.* [1993] 1 F.L.R. 281), did not mean more likely than not but rather that there was a "real possibility" of it happening. It took two appeals to the House of Lords (*In Re H. (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563 and *Re B. (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35) for it to be judicially entrenched that this real possibility can only be established by facts proved to the civil standard of balance of probabilities.

Is it sufficient for the local authority to show that an adult, who is now participating in the care of children, was found to be in a "pool of possible perpetrators" regarding harm caused to the child of an earlier relationship? In making the necessary prediction of risk, does it matter that it was not possible to establish who, of more than one candidate, caused that earlier harm? In *Re J. (Children)* [2013] UKSC 9 the Supreme Court has categorically and unanimously held that it does. The single consideration of consignment to a pool of possible perpetrators cannot provide the factual foundation for crossing the