Of further note, the House of Lords reflected briefly on the impermissibility of gap-filling under the *RCN* criteria. Whereas the Alliance noted several places where the text of the Act could not be read satisfactorily if one extended "embryo" to include embryos created by CNR, the Law Lords brushed these off as insignificant "makeweight" arguments. Their view that the HFEA could determine suitable policies to counteract these textual difficulties is surely impermissible gap-filling under the *RCN* criteria, the only difference being that the House delegated the task to a regulatory agency.

In overview, this unanimous decision from the House of Lords is a powerful statement that purposive statutory construction may be used to treat the law's limp in the field of medical technology, even in the event of contradictory statutory language. The manner in which the *RCN* criteria were applied was odd in places, and rested on the House's unconvincing assertion that it could deduce Parliament's purpose without putting its own value judgments in place of Parliament's. More transparency about judicial method would be appreciated. But in several places we can glimpse for ourselves some of the moral reasoning that may influence the court in subsequent medical biotechnology cases.

KATHY LIDDELL

WHOSE SPERM IS IT ANYWAY?

How legally significant is the presence or absence of the genetic connection between a man and a child in the determination of paternity? The common law regarded it as all important and it is still the case that the status of legal father will generally follow proof, or in the case of marriage to the mother the presumption, of this genetic connection. This is the normal rule which will apply unless there is something to displace it (see, for example Bracewell J. in *Re B (Parentage)* [1996] 2 F.L.R. 15). Where assisted reproduction takes place, however, the Human Fertilisation and Embryology Act 1990 openly treats as legal parents some of those who may lack this genetic connection and denies legal parentage, in the case of licensed sperm donation, to those donating sperm despite their obvious genetic link with the child. When the technicality is stripped away, the underlying assumption is that legal parentage in these cases should reflect the intention to be a parent in the course of a joint enterprise between a man and woman, whether married (s. 28(2)) or unmarried (s. 28(3)), to create a child together. But what if the

pregnancy is achieved in circumstances which go beyond what was contemplated by the couple concerned? This is what happened in both *Leeds Teaching Hospitals NHS Trust* v. *A* [2003] EWHC 259 (QB), [2003] 1 F.L.R. 1091 and *Re R (IVF: Paternity of Child)* [2003] EWCA Civ 182, [2003] 1 F.L.R. 1183.

In the *Leeds* case a white couple, Mr. and Mrs. A, and a black couple, Mr. and Mrs. B, sought infertility treatment involving the injection of the respective husbands' sperm into the eggs of their respective wives followed by implantation. Mrs. A became pregnant and in due course gave birth to twins of mixed race. It was clear that Mr. A could not be the genetic father and subsequent DNA tests revealed that, following a mix-up, Mr. B's sperm had been used by the clinic and he was the genetic father. There was no dispute that the twins should remain in the care of Mr. and Mrs. A, who were given a residence order. The central issue which arose for determination was that of their legal paternity.

Dame Elizabeth Butler-Sloss P. held first that the common law presumption of legitimacy (preserved in cases of assisted reproduction by HFEA 1990 s. 28(5)) was displaced by the DNA results. Second, Mr. A was not to be treated as the legal father under s. 28(2) since, although he had consented to the use of *his* sperm in the fertility treatment, he had not consented to the use of any other man's sperm. The mistake which had been made was fundamental, not trivial, and vitiated consent. Nor could Mr. and Mrs. A be properly regarded as a man and woman who had been provided with treatment services together for the purposes of s. 28(3). This provision was intended to apply only to those who were *unmarried* to each other. In any event, the fundamental error which had been made would have vitiated the whole concept of treatment together. The consequence was that Mr. A was not the legal father; this was Mr. B, on the basis of the normal rule that legal paternity follows proof of the genetic connection.

The President then considered in some depth the various claims which all the relevant parties might have under Article 8 of the European Convention on Human Rights. Mrs. B had no genetic or de facto ties to the twins and Article 8 rights were not engaged in her case. Mr. B was recognised as the legal father but was found not to have sufficient connection with the children that "family life" had arisen between him and them for the purposes of Article 8. The President accepted that her decision *did* infringe the rights to respect for family life of Mr. and Mrs. A, who had undoubtedly established this with the children. They were, however, adequately protected by domestic remedies, especially under the Children Act 1989, which in this case included the residence order in their

favour. This ensured that Mr. A, as well as Mrs. A, held parental responsibility for the twins (Children Act 1989, s. 12(2)). It was necessary, in the case of the twins, to have regard to both their *rights* and their *welfare*. The decision to recognise Mr. B's paternity was important to the *rights* of the children and would "not adversely affect their immediate welfare nor their welfare throughout their childhood". The adequacy of domestic remedies meant that no declaration of incompatibility with the European Convention was needed.

In *Re R* an unmarried couple sought IVF treatment involving the use of *donor* sperm, the man acknowledging that he would be the legal father of any resulting child. No pregnancy was achieved by the initial embryo placement. The second placement succeeded and a child was born. Just before the second placement, however, the mother had separated from this man and acquired a new partner, something which she did not reveal to the clinic. The original partner sought parental responsibility for, and contact with this child. Initially he succeeded in obtaining indirect contact and it was conceded in those proceedings that he was the legal father under section 28(3) on the basis that the embryos had been placed "in the course of treatment services provided for [the mother] and a man together". The Court of Appeal, allowing the mother's appeal, held that this was wrong. On the proper construction of the legislation, the relevant time at which to ask the question whether treatment services were being provided for a man and woman together was the time of the successful implantation. It was not sufficient to demonstrate that the man in question had participated *at some stage* in the course of treatment which ultimately resulted in a pregnancy and birth. Hale L.J. emphasised the seriousness of the judgment to be made under section 28(3), which was "an unusual provision, conferring the relationship of parent and child on people who are related neither by blood nor by marriage".

We have here two decisions which turn very much on the correct interpretation of highly technical, some would say ill-drafted, legislation. What are the underlying policy considerations and what are the implications of these decisions for our perceptions of what it takes to become a legal parent?

First, we might view both as support for the theory of intentional parenthood. In so far as the law is prepared to confer legal parentage on those who lack a genetic connection, it is prepared to do so only on the basis that those concerned intend to become parents together. In each of these cases the *common* intention of the relevant couples was frustrated by unforeseen circumstances.

Second, and alternatively, we might see these decisions as a rather robust defence of the genetic link as the basis for legal parentage. It was in the end the *presence* of the genetic connection between the twins and Mr. B in the *Leeds* case which resulted in the conclusion that he was the legal father. It was the *absence* of this connection which produced the opposite conclusion in *Re R*. The original partner was *not* to be fixed with legal parentage in the absence of a clear statutory exception which applied to him. There is, it is submitted, a great deal to be said for the approach of the President in the *Leeds* case which gave legal *parentage* to the genetic father and *parental responsibility* to Mr. A, *the social father* who needed the powers and duties associated with raising children. It is a conclusion which does not confuse the different functions of these two concepts which are, respectively, to establish the child's membership of a family and to confer necessary responsibilities and rights on those looking after children on a stable basis. Hale L.J. neatly highlighted the significance of the family membership issue in *Re R* when she pointed out that the parental relationship involves "not only the relationship between father and child but also between the whole of the father's family and the child".

Third, these decisions raise again the question of when precisely the legal relationship of father and child comes into being, if indeed it does at all. In the case of mothers, and leaving aside the issue of adoption, the legal relationship of mother and child arises automatically at birth, as does "family life" between the mother and child (*Marckx* v. *Belgium* (1979–1980) 2 E.H.R.R. 330). Yet the fact of birth, and the genetic connection if proved, does not lead automatically to a legal relationship between a man and a child and does not establish *per se* family life for the purposes of the Convention. We might view it as a matter of some concern that there is no systematic attempt to establish paternity in every case of childbirth and certainly no universal right on the part of children to derive, from birth, kinship links from a father which are taken for granted on the maternal side. The child in *Re R*, for example, was left "fatherless" and without a paternal family. Whether the correct solution to this problem is to seek out a social, non-genetic father on whom to confer paternity or, alternatively, to break with the anonymity of sperm donation (a matter under review at the present time) is a moot point.

The United Nations Convention on the Rights of the Child (Article 7) has a strongly genetic flavour about its approach to this question since it visualises, as far as possible, the right of the child *from birth* "to know and be cared for by his or her parents", that is to say, surely, the mother and the genetic father. Whether

legislation which can result in fatherless children, or whether judgments of the European Court of Human Rights which require more than proof of a genetic link in order to establish family life, can be squared with this fundamental requirement of the UN Convention is open to doubt. In neither of these cases was there any mention of this difficulty.

ANDREW BAINHAM

PRESUMING EQUALITY OR DOING THE SECTION 25 EXERCISE?

AFTER *White* v. *White* [2001] 1 A.C. 596, to divide assets fairly between divorced spouses the court must consider all the relevant factors set out in section 25 of the Matrimonial Causes Act 1973 and then check the tentative award against the "yardstick of equality", providing good reasons for any inequality (p. 605). The decision of the Court of Appeal in *Foster* v. *Foster* [2003] EWCA Civ 565 is the latest instance in which the court has examined the proper application of the "yardstick".

The district judge considered the duration of the Fosters' marriage (Matrimonial Causes Act 1972 s. 25(2)(*d*)), that they were childless (s. 25(2)(*b*)) and the contributions of each to the welfare of the family (s. 25(2)(*f*)). She awarded a 61% share to the wife because it was possible, the duration of the marriage being sufficiently short at two and a half years, to separate assets owned independently prior to marriage and to return those assets to the individual. Assets acquired during the marriage were treated as the product of joint enterprise and divided equally, notwithstanding the brevity of the marriage. Despite receiving the greater award, the wife appealed, claiming that her financial contribution had been given insufficient weight. The circuit judge agreed, awarding her a 70% share. The husband appealed, seeking equal division of assets.

The Court of Appeal granted permission to appeal in order to address the important question whether it was proper to extend the decision in *White* to short, childless marriages. The courts now routinely consider *White* where spouses' contributions are determined by reference to the lengthy duration of a marriage or the raising of children (*Cowan* v. *Cowan* [2001] EWCA Civ 679; *Lambert* v. *Lambert* [2002] EWCA Civ 1685). *White* has yet to be fully considered in reference to short, childless marriages. The Court of Appeal then asked whether the district judge had been so wrong that the circuit judge had been right to intervene: that is, was it reasonable to apply *White* to a marriage easily