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New Zealand Attorney General v. Family Court at Otahuhu

The judgment which established in New Zealand Law the principle that, for the purposes of marriage, trans people should be legally recognised in their reassigned sex.

November, 1994

Foreword | Judgment

Foreword

Ormrod's 1971 judgment in the case of **Corbett v. Corbett** was somewhat tenuous at the time … but a quarter of a century later, another court took a very different view of the issues addressed by Ormrod.

In this case, the New Zealand Attorney General sought a ruling as to whether a trans person may enter into a valid marriage with a person of the sex opposite to that of their post-transition state.

In this judgment, Ellis J recognised the importance of viewing a marriage as a *social* contract, in which issues of social and psychological identity were of greater significance that the chromosomal test prioritised by Ormrod or the older insistence on the ability to procreate. Ellis also noted the absurdity that if the law did not permit marriages trans people to marry in their post-transition gender, then by corollary it would permit a trans woman to marry a woman who who was not trans … in effect, same sex marriages. This is, of course, the situation still prevailing in the UK, where such legal same-sex marriages *have* been conducted.

For those in the UK, where Ormrod's ruling still applies in many areas of law, a few points are notable:

> In this case, the Registrar in New Zealand did *not* set out to defend the status quo, but rather to seek clarification from the court. The result was a non-adversarial examination of the issues … a sad contrast to the situation in the UK, where the Attorney-General has vigorously opposed efforts to challenge Ormrod.
> In his judgment, Ellis notes the scientific arguments, but turns away from the scientifically determinist view of Ormrod. Instead the issues are examined for their "social advantage" and for any "socially adverse effects" … in which Ellis concludes that "I cannot see any harm to others". This judgment implicitly acknowledges the importance of law as an arbiter of social relations rather than as a mechanism for promulgating the apparent certainties of science or religion … and as a means by which the freedom of the individual can be maintained without harming others. As such it fits well with both the unstated principle underpinning the UN Declaration on Human Rights and the **European Convention of Human Rights**, of liberty constrained only by the need to protect others.
> Less encouragingly, the pragmatic test of sex applied in this case is that from a 1989 Bill, which used "physical conformation of a specified sex" as the determinant. The obvious limitations of such a test for trans men (who rarely undergo phalloplasty) and for the many trans women who are unable to have vaginoplasty is a reminder to those of us in the UK that changes in *our* law will need to use a broader assessment of sex in order to avoid the denial of recognition to significant numbers of trans people.

***Claire McNab**, February 1999*

Judgment

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP787/91

IN THE MATTER	of the Declaratory Judgments Act 1908
AND	
IN THE MATTER	of the Marriage Act 1955
AND	the decision of the Family Court held at Otahuhu in **M v M**, FP No. 048/991/90, 30 May 1991
BETWEEN	**THE ATTORNEY-GENERAL** (on behalf of the Registrar of Births, Deaths and Marriages) **Plaintiff**
AND	**THE FAMILY COURT HELD AT OTAHUHU** **Defendant**

Hearing:	6 October 1994
Counsel:	John Pike for Attorney-General Vivienne Ullrich as friend of the Court
Judgement:	30 Nov 1994

JUDGMENT OF ELLIS J.

The Attorney-General applies on behalf of the Registrar of Marriages for a declaration as to whether two persons of the same sex genetically determined may by the law of New Zealand enter into a valid marriage where one of the parties to the proposed marriage has adopted the sex opposite to that of the proposed marriage partner through sexual reassignment by means of surgery or hormone administration or both or by any other medical means. Mr Pike appeared in support and informed the Court that the Registrar needed the position clarified and preferred not to support any particular proposition. Ms Ullrich appeared as a friend of the Court and presented argument supporting an affirmative answer, and so Mr Pike argued to the contrary. I say immediately that the Court is much indebted to counsel for the way the hearing was conducted and the large amount of controversial material marshalled. Most of Ms Ullrich's written submissions (with some slight amendments) follow and forms part of this judgment, as the information and analysis they contain should not be further condensed. A proper understanding of the problem requires that they be read in full. Further, I have relied on Mr Pike's penetrating submissions in my analysis of what Ms Ullrich has said. The result is that I accept the thrust of her submissions, and this judgment will be much shorter as a result.

It is important to realise at the outset that persons described in the Registrar's question do in fact marry, and some of the leading cases (including *M v M*) are brought about when the marriage partners separate and one, no doubt for financial reasons relating to the division of matrimonial property, seeks to have the marriage declared void.

It is convenient to start with the judgment of Wilde J.O. (later Lord Penzance) in *Hyde v Hyde* (1866) [1861-73] AllER 175. He was there considering whether a marriage by Mormons in Salt Lake City was a marriage that the English Matrimonial Court would recognise for the purposes of the English divorce legislation. He formulated the classic definition of a marriage for those purposes (at page 177):

> **"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."**

Our Marriage Act 1955 does not refer to man and woman or husband and wife except in the Second Schedule which stipulates the forbidden degrees in terms of "A man may not marry his …" and "A woman may not marry her …" and there is incidental reference to "wife" and "husband". It was accepted before me that it is implicit in the Act that marriage is the union of one man and one woman. It was common ground also that in New Zealand there is no requirement that such union be recognised by the Christian or any other faith, and that the union may not necessarily be for life. I agree that this reduces Lord Penzance's definition to a voluntary union, until death or divorce, between one man and one woman, to the exclusion of all others.

This case concerns the definition of "a man" and "a woman" for the purposes of marriage.

Before the relatively recent revelations of science, if there was doubt about the sex of one of the parties it would have been settled by physical inspection. Such has been the case since time immemorial. The obvious manifestations of breasts and genitalia including a woman's vagina would have been considered conclusive. This would not however have classified hermaphrodites combining characteristics of both sexes. Those situations are very rare. No doubt the tendency would have been to ascribe such a person a particular sex if at all possible, but the evidence shows that in some cases that would have been extremely difficult. The evidence was not directed as to how the common law or ecclesiastical law dealt with such cases before chromosomes were first discovered in 1873 (and so named in 1888), from which time our knowledge of reproduction has increased enormously. On the eve of the hearing before me the Evening Post contained a quotation from Dr Geoffrey Fisher, formerly Archbishop of Canterbury, who said:

> **"The only thing that science has done for (us) in the past hundred years is to create … fresh moral problems".**

This case presents just such a problem.

By the 1970s the advance of science enabled a person's sex or gender to be considered in a variety of ways. In ***Corbett v Corbett*** [1971] P83 Ormrod J listed chromosomal factors, gonadal factors (that is the presence of testes or ovaries), genital factors (including internal sex organs), psychological factors, and lastly hormonal factors or secondary sexual characteristics (such as the distribution of hair, breast development, physique and voice). The Judge was determining a petition by a husband to declare the ceremony of marriage to his wife conducted some eight years previously to be null and void on the basis that the wife was male. She had before the marriage adopted the female sex and undergone sexual reassignment by all available medical means. Ormrod J stated his conclusions of fact at page 104:

> **"My conclusions of facts on this part of the case can be summarised therefore, as follows. The**

> **respondent has been shown to have XY chromosomes and, therefore, to be of male chromosomal sex; to have had testicles prior to the operation and, therefore, to be of male gonadal sex; to have had male genital sex; and psychologically to be a transsexual. The evidence does not establish that she is a case of Klinefelter's syndrome or some similar condition of partial testicle failure, although the possibility of some abnormality in androgenisation at puberty cannot be excluded. Socially, by which I mean the manner in which the respondent is living in the community, she is living as, and passing as a woman, more or less successfully. Her outward appearance at first sight was convincingly feminine but on closer and longer examination in the witness box it was much less so. The voice, manner, gestures and attitudes became increasingly reminiscent of the accomplished female impersonator. The evidence of the medical inspectors and of the other doctors who had an opportunity during the trial of examining the respondent clinically is that the body in its post-operative condition looks more like a female than a male as a result of very skilful surgery. Professor Dewhurst, after his examination, put his opinion in these words 'the pastiche of feminity was convincing'. That, in my judgment, is an accurate description of the respondent. It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation."**

He then stated his conclusions on the law at page 106:

> **"The question then becomes, what is meant by the word 'woman' in the context of a marriage, and I am not concerned to determine the 'legal sex' of the respondent at large. Having regard to the essentially hetero-sexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt in the first place, the first three of the doctors' criteria, i.e., the chromosomal, gonadal and genital tests, and if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any opposite intervention. The real difficulties, of course, will occur if these three criteria are not congruent. This question does not arise in the present case and I must not anticipate, but it would seem to me to follow from what I have said that the greater weight would probably be given to the genital criteria than to the other two. This problem and, in particular, the question of the effect of surgical operations in such cases of physical inter-sex, must be left until it comes for decision. My conclusion, therefore, is that the respondent is not a woman for the purposes of marriage but is a biological male and has been so since birth. It follows that the so-called marriage of September 10, 1963, is void."**

The judgment as a whole is a comprehensive analysis of the evidence and the sexual and social significance of the problem. It has been and must be accorded great respect, but as Ms Ullrich's submissions show, it has been the subject of criticisms which are in my view difficult, indeed impossible, to answer satisfactorily. They are directed to the essential role of a man and a woman in marriage. It has to be conceded that the ability to procreate is not essential, nor is the ability to have sexual intercourse. Neither the common law nor ecclesiastical law ever required the first. On the other hand, it used to be the case that a marriage which had not been consummated was voidable. That is no longer the law. In my view the law of New Zealand has changed to recognise a shift away from sexual activity and more emphasis being placed on psychological and social aspects of sex, sometimes referred to as gender issues.

This shift has been recognised by jurisdictions outside England and the approach of Ormrod J in *Corbett's* case has not always been accepted. In our own Family Court in *M v M* (1991)8FRNZ 208 and in the Appellate Division of the Superior Court of New Jersey in MT v JT (1976) 355 A 2d 204 judges have held that post operative transsexual male to female persons have been able to marry, or more precisely that their marriages to a male husband were not void. Added to these is the powerful majority decision of the New South Wales Court of Appeal in *R v Harris and McGuinness* (1988) 17NSWLR 158, a criminal case where the sex of the alleged offender was in issue. These cases and the others that bear on the matter are fully analysed in Ms Ullrich's submissions. I find the reasoning in these three cases to be compelling, and I find myself unable to accept the decision in *Corbett's* case as governing the outcome of the present application.

I think it is important to emphasise (as was emphasised in the cases) that the declaration sought is to resolve the capacity to marry and is not intended to resolve questions that arise in other branches of the law such as the criminal law, and the law of succession. I recognise of course that in such cases the considerations may have much in common.

Some persons have a compelling desire to be recognised and be able to behave as persons of the opposite sex. If society allows such persons to undergo therapy and surgery in order to fulfil that desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry. Where two persons present themselves as having the apparent genitals of a man and a woman, they should not have to establish that each can function sexually.

Once a transsexual has undergone surgery, he or she is no longer able to operate in his or her original sex. A male to female transsexual will have had the penis and testes removed, and have had a vagina-like cavity constructed, and possibly breast implants, and can never appear unclothed as a male, or enter into a sexual relationship as a male, or procreate. A female to male transsexual will have had the uterus and ovaries and breasts removed, have a beard growth, a deeper voice, and possible a constructed penis and can no longer appear unclothed as a woman, or enter into a sexual relationship as a woman, or procreate. There is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. It would merely confirm the factual reality.

If the law insists that genetic sex is the pre-determinant for entry into a valid marriage, then a male to female transsexual can contract a valid marriage with a woman and a female to male transsexual can contract a valid marriage with a man. To all outward appearances, such would be same sex marriages.

As I have said, I find the arguments in Ms Ullrich's submissions compelling, and the receding two paragraphs are adapted from them. I can see no socially adverse effects from allowing such transsexuals to marry in their adopted sex, I cannot see any harm to others, children in particular, that is not properly proscribed and manageable in accordance with the existing framework of the law. I refer for example to my decision on a proposed adoption by two women of the child of one of them: *Re T* (Wellington Registry, AP55/89, unreported 10 April 1992), where the best interests of the child were determinative. In this I find myself of the same persuasion as the Court of Appeal of New Jersey in *MT v JT* (1976) 3SSA 2d 204 and the majority of the Court of Criminal Appeal of New South Wales in *Harris and McGuiness* (1988) 17NSWLR 158. Further, I find myself of the same view as Judge Aubin in *M v M*, the case that prompted this application.

The form of the declaration was the subject of careful submissions also. In the Births, Deaths and Marriages Registration Bill 1989 as originally introduced, provision was made to allow changes to be made to the sex shown on the birth certificates of persons who "had undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex". I consider that this somatic test is an adequate test. It is formulated on the basis of the undisputed evidence that persons who have undertaken such procedures will have already had the social and psychological disposition of the chosen sex.

Declaration.

I therefore make a declaration that for the purposes of s23 of the Marriage Act 1955 where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex.

Submissions were directed to the practical aspects of any declaration, when the Registrar may be in doubt. In such cases a medical examination can be arranged and opinions obtained to enable the Registrar to reach his own conclusion.

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