Reference to CROC Supportive in Validating the Marriage of a Transsexual Parent

By Danny Sandor

DCI-A Secretary Danny Sandor highlights the relevance of the Convention of the Rights of the Child in a recent appeal decision of the Family Court.

Kevin and Jennifer (not their real names) went through a ceremony of marriage in August 1999 and have lived together as a married couple since that time. They appear as an average young Australian couple with two children, who live and work in the same way as others like them in our community.

In October 1999, Kevin and Jennifer applied to the Family Court of Australia seeking a declaration under the *Family Law Act* 1975 that their marriage was valid. The Attorney General intervened in those proceedings on the grounds that a matter of public interest had arisen.

The reason for this interest was that at the time of the marriage, Kevin was a post-operative transsexual person who was registered as a female at the time of his birth. Prior to the marriage Kevin had undergone medical procedures to remove female sexual characteristics and substitute male sexual characteristics. This was a full process of gender re-assignment, involving hormone treatment and irreversible surgery.

Kevin and Jennifer did not assert, either before the trial Judge or on appeal, that Australian law recognises marriage between same sex couples. Their contention was that, at the date of the marriage, Kevin was a man and accordingly their marriage is valid.

The Attorney-General took the position that Kevin is not a man and, therefore, that Kevin and Jennifer's marriage is not valid.

At trial Justice Chisholm heard three days of argument and decided that:

1. For the purpose of ascertaining the validity of the marriage under Australian law, the question whether a person is a man or a woman is to be determined as of the date of the marriage.

2. There is no rule or presumption that the question whether a person is a man or a woman for the purpose of marriage law is to be determined by reference to circumstances at the time of birth. Anything to the contrary in the English decision of *Corbett v Corbett (otherwise Ashley)* [1971] P83 does not represent Australian law. [*Corbett* stands for the legal proposition that a person born with the chromosomes, gonads and genitals of one sex, who then undergoes gender re-assignment treatment and surgery, cannot marry as a person of the re-assigned gender. Any marriage by such a person to the opposite sex of the re-assigned gender is not valid.]

3. Unless the context requires a different interpretation, the words man and woman when used in legislation have their ordinary contemporary meaning according to Australian usage. That meaning includes post-operative transsexual persons as men and/ or women in accordance with their sexual reassignment.
[This is how Australian courts have decided cases on subjects other than marriage, e.g.: *R v Harris & McGuiness* (1988)] 17 NSW LR 158 (liability under the criminal law); *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 (entitlement to social security benefits).]

4. The context of marriage law, and in particular the rule that the parties to a valid marriage must be a man and a woman, does not require any departure from ordinary current meaning according to Australian usage of the word 'man'.

5. There may be circumstances in which a person having female gonads, chromosomes and genitals at birth, may nevertheless be a man at the date of a marriage. In this respect, the decision in *Corbett* does not represent Australian law.

6. Kevin had female chromosomes, gonads and

genitals at birth but was a man for the purpose of the law of marriage at the time of his marriage

The following circumstances were taken into consideration in reaching this conclusion:

> a) He had always perceived himself to be a male;
> b) He was perceived by those who knew him to have had male characteristics since he was a young child;
> c) Prior to the marriage he went through a full process of transsexual re-assignment, involving hormone treatment and irreversible surgery, conducted by appropriately qualified medical practitioners;
> d) At the time of the marriage, in appearance, characteristics and behaviour he was perceived as a man, and accepted as a man, by his family, friends and work colleagues;
> e) He was accepted as a man for a variety of social and legal purposes, including his name, and admission to an artificial insemination program. In relation to such events occurring after the marriage, there was evidence that his characteristics at the relevant times were no different from his characteristics at the time of the marriage;
> f) His marriage as a man was accepted, in full knowledge of his circumstances, by his family, friends and work colleagues.

Justice Chisholm made a declaration that Kevin and Jennifer's marriage is valid [judgment reported as *Re Kevin* (2001) FLC 93-087; (2001) 28 Fam LR 158]. The Attorney-General then appealed Justice Chisholm's decision to the Full Court of the Family Court seeking to overturn the declaration. A successful appeal would have had the effect of rendering Kevin and Jennifer's marriage void.

The Full Court (Chief Justice Nicholson, Justice John Ellis and Justice Sally Brown) received written submissions on behalf of the Attorney-General, the Respondents to the appeal (Kevin and Jennifer), and the Human Rights and Equal Opportunity Commission. The Full Court also heard two days of oral submissions in open court. It then reserved its decision until handing down judgment on 21 February 2002 dismissing the appeal. In essence, the Full Court agreed with the reasoning and findings of Justice Chisholm.

Justice Chisholm's declaration that Kevin and Jennifer's marriage is valid therefore continues to stand. Like any other unsuccessful appellant, the Attorney-General is entitled to seek special leave to appeal to the High Court of Australia within 28 days.

While there are many important legal aspects to the Full Court's decision, most pertinent from a DCI perspective, is its discussion of the relevance of the Convention on the Rights of the Child (at paragraphs 332 – 337 of the judgment):

> " [Ms Wallbank, counsel for Kevin and Jennifer] also pointed out that at the time of the hearing of the appeal, Jennifer was about to give birth to another child. She submitted that a declaration of the validity of the marriage was in the best interests of the children as the status of marriage afforded benefits and protection to the children. She also said that this was a course that would be consistent with the recognition of Australia's obligations under the United Nations Convention on the Rights of the Child ("the Convention").

Mr Basten [counsel for the Human Rights and Equal Opportunity Commission] pointed out that the Convention was a declared instrument pursuant to s. 47(1) of the *Human Rights and Equal Opportunity Act* 1986 (Cth) and said it was a relevant consideration in this case. He referred to the fifth paragraph of the Preamble to the Convention. It recites a conviction by the States Parties to the Convention:

> "… that the family as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."

He pointed to Article 2 which enjoins States Parties to take *"all appropriate measures to ensure that the child is protected from all forms of discrimination or punishment on the basis of the status…of the child's parents, legal guardians or family members"* and to Article 3(1) which requires the best interests of the child to be *"a primary consideration"*. He said of the applicability of the

Convention to the present case (Appeal Transcript, 19 February 2002, page 27):

> "… once one recognises that one has in this case a child who is recognised on his birth certificate as being the child of Kevin and Jennifer then it would be an extraordinary legal imposition on that child and probably not in his best interests to refuse to recognise that he, together with his recognised parents, constituted a family unit. And, in saying that, we are going one step beyond the general proposition that it is in the best interests of the child to be brought up by a stable family unit and that factor is the recognition of Kevin as his father.
> …
> … the child who is a member of a family, both parties of whom are of the same sex, will never be recognised on his birth certificate as having those parties as his parents, so that, again, it is the combination of social and legal circumstances which provides a reason for thinking that the common law would, in this day, put some weight upon the fact that this couple appear to be a family with a child and that the existence of that unit in those circumstances with the recognition of parenthood would be an important factor and which would militate against a suggestion that no such marriage could be recognised under Australian law. So we put it in that way and we do seek to rely upon the convention for that purpose."

Returning to Ms Wallbank's submissions, she also pointed to the fact that legislation exists in every State of Australia recognising that married people do have children and raise children with the assistance of reproductive technology using donated gametes (ie: sperm and eggs) and that the non-biological spouse, who is the parent of those children, is in fact by law, the father or the mother of those children as the case may be.

We think that the trial Judge was therefore correct in paying attention to the evidence as to social and cultural factors.

So far as the Convention on the Rights of the Child is concerned, we agree that there is force in the submissions made as to its relevance. However, we do not need to rely upon it in arriving at our decision. Nevertheless, in this instance, it broadly supports the view that unless the law otherwise provides, it would be contrary to the bests interests of the Respondents' children to refuse to afford recognition to their parents' relationship as a marriage."

The Full Text of the Full Court's judgment *The Attorney-General for the Commonwealth v "Kevin and Jennifer"; Human Rights and Equal Opportunity Commission (Intervener)* is available at the Family Court of Australia website at http://www.familycourt.gov.au/judge/2003/html/attorney.html

Changes to the Law Re the Physical Punishment of Children in Australia

One state (NSW) has recently brought in legislative change in relation the physical punishment of children and another (Tasmania) is considering it.

New South Wales

The *Crimes Amendment (Child Protection - Physical Mistreatment) Act 2001* came into effect in NSW on 5 December 2002.

The amendment sets limits on the force used by parents to physically punish their children and clarifies the legal defence of 'lawful correction' and what is deemed "reasonable chastisement". It aims to reduce the harm caused to children through excessive physical punishment.

Under the amendment, it will be considered unreasonable to:

> Use force on a child above the shoulders
>
> Use force that causes harm that lasts for more than a short time below the shoulders.

Although the Act makes it clear that using excessive force is wrong, it does allow 'reasonable' force so long as it does not cause lasting harm. This obviously raises the question about what constitutes 'harm' that 'lasts for more than a short time'? And how long is 'a short time'? But the aim is to make parents and others dealing with children think about the force they