

# What makes a man a *man*?

*Re Kevin* (2001) 28 Fam LR 158; [2003] Fam CA 94 (Full Court)

## Background

Kevin and Jennifer<sup>1</sup> were married in 1999. In most respects, this should not have been problematic. In New South Wales, Kevin is to the limits of that jurisdiction formally recognised as a man, and for some purposes he is similarly recognised under Commonwealth statutes as a man. He holds a New South Wales birth certificate, which records his sex as male, a fact mirrored by his passport and Medicare card, both Commonwealth legal artefacts.

But for the purposes of marriage, Kevin's legal personality was in issue. Kevin was born female and is a post-operative transsexual. His marriage to Jennifer, therefore, potentially ran foul of conventional wisdom that marriage is, as described by Lord Penzance in *Hyde v Hyde*,<sup>2</sup> 'the voluntary union for life of one man and one woman, to the exclusion of all others'.

The applicants did not contend that the validity of their marriage depended on any underlying alteration of this idea, and it was common ground that the case did not raise issues of same-sex marriage. The applicants argued that their marriage fell within the accepted formulation.

While section 46(3) of the *Marriage Act* 1961 (Cth) and section 43(a) of the *Family Law Act* 1975 (Cth) each make reference to the *Hyde* formulation, neither 'man' nor 'woman' is defined in the legislation. It was argued that as a post-operative transsexual, Kevin was a 'man' for the purpose of the *Marriage Act*. At issue, then, was what constituted a man or a woman within this specific statutory context.

## The conventional view of the meaning of 'man' and 'woman' for the purposes of the *Marriage Act* 1961 (Cth)

The Attorney-General submitted that the test laid down by Lord Justice Ormrod in *Corbett v Corbett*<sup>3</sup> remained good law. According to *Corbett*, the determination of an individual's sex for the purpose of marriage was based on the state at birth of their chromosomes, genitals and gonads.

Where these three physical indicia were congruent at birth, this would determine prescriptively and finally the individual's sex for the purpose of marriage, notwithstanding any subsequent medical or surgical intervention.<sup>4</sup>



This meant that Kevin, who was born with congruent female indicia, was female at birth and remained so for the purposes of marriage, notwithstanding the gender reassignment.

While there had been developments in the ascription of sex as a legal characteristic within the general law – for example, anti-discrimination law, social security law and criminal law had recognised the possibility of an individual's legal sex altering during the course of their life<sup>5</sup> – it was argued that marriage law required special consideration because the rationale for marriage was to contemplate the possibility of procreation. ▶

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## A contemporary view of the meaning of 'man'

It was contended for the applicants that the word 'man' should be given its ordinary contemporary meaning – a question of fact to be determined in accordance with common sense and experience of the world.

In *SRA*,<sup>6</sup> Chief Justice Black had considered that contemporary usage of the terms 'man' and 'woman' comprehended 'not only the significant incidence of sex reassignment surgery, but a growing awareness in the community of the position of transsexuals and... a perception that a male-to-female transsexual who has had a "sex change operation"... may appropriately be described in ordinary English as female'. On that basis, the test in *Corbett* was no longer coincident with current perceptions of sexual identity, whether medically- or community-based.

Of particular significance in the question of determining Kevin's sex was medical evidence of the phenomenon of 'brain sex', which was not available at the time of *Corbett*.

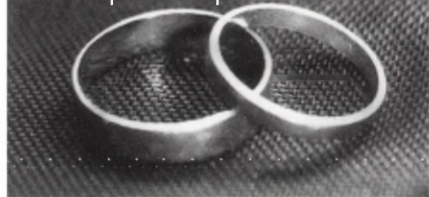
Evidence was presented that the *Corbett* trinity of gonads, genitals and chromosomes did not exhaust the biological indicia of sex. Research, uncontradicted in the evidence, suggested that transsexualism was marked by organic differences in brain development, rather than by mere psychological differences in self-perception.

Although these differences were not observable, except by post-mortem examination, they were manifest in a range of behaviours typically observed in transsexuals.

## Findings at first instance

Justice Chislm held that the appropriate time to ascertain the sex of an individual for the purposes of marriage was the date of the marriage, not the date of the person's birth. Moreover, the meaning to be ascribed to 'man' or 'woman' in the context of matrimonial law should be the ordinary contemporary meaning, thus bringing marriage law into line with the general law.

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Justice Chislm held that in determining the sex of an individual for the purposes of marriage, the inquiry should not be limited to the three biological indicia outlined in *Corbett*, but that 'all relevant matters need[ed] to be considered'.<sup>7</sup>

He declined, however, to give an exhaustive list of the factors that could be considered when establishing a person's sex for the purposes of marriage. But in determining that Kevin was a man and that the marriage in question was valid, he took the following into account.

- Kevin perceived himself to be male.
- He was understood by those who knew him to have had male characteristics since he was a young child.
- He had undergone a process of gender reassignment, involving hormone treatment and irreversible surgery.
- He was, at the time of the marriage, male in appearance, characteristics and behaviour, and accepted as a man by his family, friends and colleagues.
- He was accepted as a man for a range of social and legal purposes.
- His marriage as a man was accepted by his family, friends and colleagues in full knowledge of the circumstances.

## The appeal decision

In February 2003, the Full Court comprising Chief Justice Nicholson and Justices Ellis and Brown, handed down a unanimous judgement affirming the decision of Justice Chislm. They held that the terms 'man' and 'woman' should be given their ordinary and contemporary meaning in the context of marriage as much as they are in the general law.

The issue was whether it was open to Justice Chislm to determine as fact that Kevin was a man. The Full Court endorsed Justice Chislm's finding.

'The recognition of the position of post-operative transsexual persons is at least a step in the direction of the recognition of the plight of such persons, and hopefully a step that will enable them to lead a more normal and fulfilling life.'<sup>8</sup>

## Postscript

On 10 April 2003, the House of Lords, in *Bellinger v Bellinger*,<sup>9</sup> declined to make a similar declaration with respect to the validity of the marriage of a male-to-female transsexual. All five judges reiterated the view of the majority in the Court of Appeal that any change was a matter for the legislature. However, the House of Lords did make a declaration that section 11(c) of the *Matrimonial Causes Act 1973* (UK) is incompatible with articles 8 and 12 of the *European Convention on Human Rights*. **PL**

## Endnotes:

- <sup>1</sup> Pseudonyms used by the Family Court to protect the applicants' identities.
- <sup>2</sup> *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130, p 133.
- <sup>3</sup> [1971] p 83.
- <sup>4</sup> The status of individuals born with non-congruent genitalia, gonads and chromosomes was not relevant for the purposes of *Re Kevin*.
- <sup>5</sup> *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467.
- <sup>6</sup> *ibid*, p 473.
- <sup>7</sup> *Re Kevin* (2001) 28 Fam LR 158, p 229.
- <sup>8</sup> *Re Kevin* [2003] Fam CA 94 (Full Court), p 388.
- <sup>9</sup> [2003] UKHL 21.