

Neutral citation number: [2022] EWFC 111

Case Numbers: MA22C50056

IN THE FAMILY COURT SITTING AT MANCHESTER CIVIL JUSTICE CENTRE

1, Bridge Street West
Manchester
M609DJ

Date: 15 July 2022

Before

HER HONOUR JUDGE CASE

Between

A LOCAL AUTHORITY

Applicant

And

SB

Respondent (1)

And

FM

Respondent (2)

And

RK

Respondent (3)

And

**THE CHILDREN
(via their Children's Guardian)**

Respondent (4) and (5)

Heard on 15th July 2022

Representation:

For the Applicant: Ms Chan of Counsel, instructed by A local authority Solicitors

For the First Respondent: Mr Allen of Counsel, instructed by Bakers Solicitors

For the Second Respondent: Mr Mountain of Counsel instructed by Futter Chapman Family Law Solicitors

For the Third Respondent: Miss Kajue of counsel instructed by Duncan Lewis Solicitors

For the Fourth and Fifth Respondents: Miss Kilvington of counsel instructed by McAlister Family Law Solicitors

APPROVED JUDGMENT

This judgment was handed down remotely on 15 July 2022 and by release to The National Archives.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

HER HONOUR JUDGE CASE:

1. I will at this stage give an extempore judgment to deal with two of the applications listed before me today, the mother's application for a declaration of non-parentage, namely that RK is not the biological father of NMK, and the mother's application for the discharge of RK's parental responsibility in respect of NMK.
2. The application for declaration of non- parentage is made under section 55A of the Family Law Act 1986. The application is supported by DNA test evidence, which demonstrates conclusively that RK is not the biological father of NMK. That evidence is not challenged, and no party today disputes that the declaration of non-parentage should be made.
3. It is fair to say that I do not think RK ever suggested that that declaration would be opposed, but there was an issue about timing, insofar as it might impact on other applications; it is now agreed that the declaration should be made today.
4. Although the declaration is essentially a factual one, it is notable that several of the authorities that Mr Allen produced suggest that there is a residual judicial discretion to decline to make the declaration in an appropriate case, notwithstanding compelling factual evidence. It is also clear that such cases are likely to be very few and far between.

5. I have been referred to the dicta of Munby J in *Re X (A child) 2016 EWHC 1342 (Fam)* where he said at para 18:

I agree with the guardian. X has a right (I put the matter descriptively rather than definitively) to know the truth about his past and about his birth parents. This has long been recognised in our domestic law. In *S v McC (otherwise S) and M (DS Intervener), W v W [1972] AC24, 57* Lord Hodson, in the context of disputed paternity, said that

“The interests of justice in the abstract are best served by the ascertainment of the truth and there must be few cases where the interests of children can be shown to be best served by the suppression of the truth”.

In *In re H (a minor) (Blood Tests: Parental Rights) [1997] Fam 89, 106*, Ward LJ said apropos paternity “every child has a right to know the truth unless his welfare clearly justifies the coverup”

To the same effect in *Re H and A (Paternity: Blood Tests) [2002] EWCA Civ 383 [2002] 1 FLR 1145 para 29*, Thorpe LJ identified one of the principles to be drawn from the authorities as being “That the interests of justice are best served by the ascertainment of the truth”.

6. It has not been suggested that this is one of those unusual cases where I should decline to make the declaration notwithstanding the compelling evidence.
7. Mr Allen also submitted that there is currently an error on the birth certificate, which is an official document of public record, and therefore it is right that it is put right as soon as possible.
8. In relation to that application, which is not opposed, I now make the declaration of non-parentage, namely that RK is not the biological father of NMK.
9. I now move on to the application for discharge of parental responsibility.
10. The issue which has been exercising my mind in respect of this application over the last two or three hearings has been whether discharge of parental responsibility is an automatic consequence of the declaration of non-parentage or whether it is a separate welfare-based decision.
11. This question turns on the construction of section 4 of the Children Act 1989, and in particular subsection (2A), which provides, "A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders".
12. Mr Allen in his original position statement submitted that it was an automatic consequence of the declaration that RK's parental responsibility for NMK would be discharged. That was based on the proposition that the order referred to in subsection (2A) is the declaration; however, in his subsequent skeleton argument he had reflected and moved away from that position.
13. That original position was one which was adopted by the Local Authority. Although the local authority have taken a more neutral position today, in the light of the

different positions of the parties, I considered that it was necessary for me to determine the issue so that the question is dealt with appropriately according to law.

14. Moreover, as I indicated to the parties, in the light of the fact that I am not currently listed to conduct the final hearing, I felt it was important that whoever does so - I believe it will be Recorder Walker - may understand the court's reasoning.
15. There is some case law relating to the operation of section 4 (2A) but this case law largely relates to a very different sort of situation, namely those exceptional cases where a biological father loses his parental responsibility on welfare grounds. I say "largely", because there are also some cases relating to surrogacy which I am not concerned with today. Crucially, however, there are no domestic cases that counsel or I have been able to identify dealing specifically with the situation of the unmarried man who has been named on the birth certificate as a father, but is subsequently found not to be such by DNA testing. On the face of it, this is surprising given how commonly such a situation must arise.
16. At the last hearing I did accept the proposition that I should explore with the Designated Family Judge (in consultation with the Liaison Judge) whether it was possible to reallocate the case, for a discrete hearing on this point, to a High Court Judge or Deputy High Court Judge in the light of the lack of settled authority. Unfortunately, it emerged that that would not be possible without considerable delay, and, in those circumstances, it was accepted that that would not be appropriate, notwithstanding that on the face of it this is a significant and commonly arising question on which there is no authority and, to that extent, appropriate for transfer to a High Court Judge.
17. Accordingly, the matter has remained allocated to me.
18. It seems to me that in these circumstances the appropriate approach is to view the question largely as one of pure statutory construction.
19. However, I have also been helped, to an extent, by the European caselaw identified by Mr Allen, namely the case of *Nazarenko v Russia* (39438/13), 2015 ECHR 686, a case of a negative paternity test against the factual background of a longstanding familial relationship between the child and the man now proved not to be the child's biological father. As a result of that negative paternity test, his paternity was terminated and he was entirely and automatically excluded from the child's life. There was a finding that there was a breach of Article 8 of the European Convention.
20. It is my view, however, that the *Nazarenko* case is not on all fours with the current situation, because, as I explored in argument with counsel, a key matter of criticism by the European Court were the inflexible provisions contained in the Russian Family Code particularly in respect of contact. It appears that the Russian Family Code prescribes an exhaustive list of persons - who are all relatives - who are entitled to maintain contact with the child. There was no flexibility within the domestic law of Russia to allow the court to entertain an application from a person such as Mr Nazarenko, who had previously enjoyed family life with the child, but fell outside those prescribed categories and thus had no standing to apply for contact following the termination of his paternal rights.

21. The position is different in English law, however. In the context of private law, there is provision for any person to make an application for leave to make a substantive application to the court for a child arrangements order, which may proceed upon consideration of the various factors under children Act 1989 section 10 (9) including the nature of the applicant's connection with the child. Essentially, therefore, the removal of parental responsibility would move RK from being in the category of people who are entitled to apply as of right, into the category of people who must cross the leave hurdle. Furthermore, within public law proceedings a non-relative can be assessed to care for or have contact with the child, and indeed RK has made such an application.
22. To that extent, therefore, the law of England and Wales does provide an important element of flexibility which was absent in the *Nazarenko* case.
23. I do however consider that the authority is of some assistance because there is no question that parental responsibility is a very important legal concept in the law of England and Wales. That has been emphasised in case after case. In *Re D (withdrawal of parental responsibility)* Ryder LJ said that:

"It describes an adult's responsibility to secure the welfare of their child, which is to be exercised for the benefit of the child, not the adult. The all-encompassing nature of the responsibility underpins one of the principles of the Act, which is the no order principle within section 1(5) of the Children Act 1989, the expectation that, all other things being equal, parents will exercise their responsibility so as to contribute to the welfare of their child without the need for a court order defining or restricting that exercise."
24. Although the word "parents" was used there, of course people other than parents can properly have parental responsibility for a child, including step-parents, people who hold live-with orders etc.
25. Accordingly, I do consider that the *Nazarenko* case persuasive by analogy, but it is not on all fours with the instant case.
26. In these circumstances, it does seem to me relevant to continue to consider the matter by reference to pure statutory construction.
27. I have raised these points with counsel in discussion.
28. To my mind, one of the most important factors is that a declaration of non-paternity is a declaration of biological fact rather than a declaration as to legal status. Self-evidently an order under the Children Act 1989 section 4(2A) is the latter. The two orders being so different in character, I find it difficult to see how the order being referred to under section 4(2A) could be the declaration of non-paternity.
29. Secondly, there is the use of the word "only" in section 4 (2A),

"A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders".

That seems to suggest that an order under subsection (2A) is the only route by which parental responsibility conferred under section 4(1) can be lost. Again, that appears to preclude the possibility of parental responsibility being lost following an order or a declaration made under a completely different piece of legislation.

30. Thirdly, there is the fact that the whole of section 4 of the Children Act 1989 is subject to the principle that the child's welfare is paramount. That was made clear by Ryder LJ in the case of *Re D*. It concerned a biological father, but nevertheless the point still stands. He said:

"When a court is considering an application relating to the cessation of parental responsibility, the court is considering a question with respect to the upbringing of a child with the consequence that by section 1(1) (b) of the Children Act 1989 the child's welfare will be the court's paramount consideration."

31. Ryder LJ goes on to say that there is no requirement to consider the welfare checklist, although the court may find it a useful analytical framework, not least because welfare has to be considered and reasoned. He also added that the cessation of parental responsibility is an order of the court, "Therefore the court must consider whether making such an order is better for the child than making no order at all".
32. It is clear, then, that the matters which the court will take into account when considering an application for discharge of parental responsibility are much wider than the predominantly factual matters which it will consider when dealing with an application for a declaration under the 1986 Act (notwithstanding the residual discretion referred to earlier).
33. A final point that I explored with counsel is the use of the word "person" rather than "father" in section 4(2A). This would appear to envisage a non-biological father figure, if I can put it that way, being the subject of a specific application under section 4(2A); in other words, section 4 (2A) is not confined to those who are in fact biological fathers but also applies to those who have previously been presumed to be fathers and have acquired parental responsibility by one of the methods set out in section 4 (1). If the contrary were the case it seems to me one would have expected the draftsman to use the word "father" in section 4(2A) in the same way as occurs in section 4 (1). It seems to me that the choice of wording ("person") also disposes of any argument that a man such as RK (named on the birth certificate but proved by DNA testing not to be the biological father) never in fact obtained parental responsibility in the first place.
34. It is right for me to note that although I discussed the latter issue with counsel, it was not a position advanced by anyone within this hearing.
35. So, for all those reasons, I conclude that:
- 1) section (2A) is the only means by which the court can consider removing parental responsibility from a father who has gained it under subsection (1);
 - 2) that it is a welfare-based decision,

- 3) that the fact that the man in question has been found not to be the biological father will feed into that welfare consideration, but that the discharge of parental responsibility is not automatic. The importance of the lack of a biological link is one which will vary from case to case.
36. These then are my reasons for concluding that the application made by mother must be subject to a welfare analysis, and therefore it should be dealt with in the final evidence of all parties particularly the Local Authority and the Guardian, and should be considered at the final hearing.
37. That concludes my consideration of the first two applications.
