Neutral Citation Number: [2022] EWFC 4

Case No: FD21F00053

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2022

Before:

Mr Justice Mostyn

- -

Between:

RUTH AMANDA AYLWARD-DAVIES	**Applicant**
– and –	
CONSTANCE CHARLOTTE CHESTERMAN	**First Respondent**
– and –	
The estate of PATRICK JOSEPH AYLWARD	**Second Respondent**

The Applicant appeared in person
The First Respondent appeared in person
The Second Respondent did not appear and was not represented

Hearing date: 24 January 2022

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published

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Mr Justice Mostyn:

1. This is my judgment on the application by Ruth Amanda Aylward-Davies ("Ruth") in Form C63 issued on 22 September 2021 seeking a declaration of parentage under s55A of the Family Law Act 1986. Specifically she seeks a declaration that Patrick Aylward ("Patrick") was her biological father. I say "was" because Patrick died in August 2008. In her application Ruth named her mother Constance Chesterman ("Constance") as the first respondent and Patrick as the second respondent.

2. Ruth's objective is to get the Registrar-General for Births and Deaths to amend her birth certificate pursuant to Births and Deaths Registration Act 1953, s. 14A so as to replace the person identified as her father, Dennis Hopkins ("Dennis"), with Patrick.

3. At all times Ruth has acted in person on this application.

4. I shall begin this judgment by dealing with two procedural matters. First, I will identify those persons who are required to be, or who might be made, the respondents to this application. Then I will identify the correct procedure for determining the application, and specifically will consider the reportability of the hearing and whether the judgment should be anonymised.

The respondents to this application

5. FPR rule 8.20(1) stipulates who shall be the respondents to this application. They are:

   i) the person whose parentage is in issue except where that person is a child; and

   ii) any person who is or is alleged to be the parent of the person whose parentage is in issue, except where that person is the applicant or is a child.

6. As regards (i) the person whose parentage is in issue is Ruth. Clearly she cannot be both applicant and respondent.

7. As regards (ii) the reference to "a person" is to a person alive or dead. This is clear from the terms of s. 55A(1) which provide:

   > 'Subject to the following provisions of this section, any person may apply to the High Court or the family court for a declaration as to whether or not a person named in the application is or was the parent of another person so named.'

8. The reference to a "person named in the application" in sub-section (1) includes a person who is dead. This is demonstrated by the terms of sub-section (2)(c) which prescribes the jurisdictional requirements where "a person named in the application" is deceased.

9. Therefore, Constance and Patrick were rightly made respondents. To be completely correct, the second respondent should have been a representative of Patrick's estate.

10. FPR rules 8.20(2) – (6) provide:

> '(2) The applicant must include in his application particulars of every person whose interest may be affected by the proceedings and his relationship to the applicant.
>
> (3) The acknowledgment of service filed under rule 19.5 must give details of any other persons the respondent considers should be made a party to the application or be given notice of the application.
>
> (4) Upon receipt of the acknowledgment of service, the court must give directions as to any other persons who should be made a respondent to the application or be given notice of the proceedings.
>
> (5) A person given notice of proceedings under paragraph (4) may, within 21 days beginning with the date on which the notice was served, apply to be joined as a party.
>
> (6) No directions may be given as to the future management of the case under rule 19.9 until the expiry of the notice period in paragraph (5).'

11. The court has not received an acknowledgement of service by Constance or by the representative of Patrick's estate. Neither has filed one because neither has been formally served. Therefore, no other person has been identified under rule 8.20(3).

12. On 25 October 2022 Judd J held a case management hearing. She heard Ruth, Constance and Jane (Patrick's daughter). Her order did not direct that any other person should be made a respondent pursuant to rule 8.20(4). It provided only for the filing of evidence and for the matter to be set down for final hearing, in the following terms:

> '1. The applicant shall, by 4pm on 18th November 2021, file and serve statement(s) setting out (and, if appropriate, annexing) the evidence she relies upon in support of her application for a declaration of parentage with respect to Patrick Aylward, deceased.
>
> 2. The Respondent shall [file] any evidence in response by 4pm on 9.12.21.
>
> 3. The matter shall be listed for further hearing on 24 January 2021; time estimate 2 hours.'

The reference to 'the Respondent' in the singular suggests that Judd J regarded Constance as being the only person who should be a respondent to the application, although, for the reasons given below, I doubt that any consideration was given as to whether Patrick should be a respondent or Dennis given notice of the proceedings.

13. I have seen a copy of Patrick's will. His widow Barbara was his sole Executrix. There is no doubt that the terms of the will have been fully executed.

14. I have received evidence that Barbara is supportive of the application. I was told this by Simon Aylward ("Simon"), and Jane Aylward ("Jane"), the children of Patrick and Barbara. They too are fully supportive of the application. I accept that evidence. Therefore, the failure formally to serve Barbara with the application is of no consequence. I record that at the hearing I made an order waiving the service requirement on Barbara.

15. Ruth named Dennis in her application as a 'person who is acknowledged to be the parent of the person whose parentage is in question.'

16. In my opinion, consideration should have been given at the case management directions hearing to giving a representative of Dennis's estate notice of the application pursuant to rule 8.20(4). Had such notice been given, the representative would then have the right to apply to be made a party to the application. However, it is obvious that Ruth did not draw the attention of the court to rule 8.20(4); I surmise that she was unaware of its existence.

17. I have not seen a copy of Dennis's will; I do not know if he even made one. I have been given no information as to who acted as executors of his will, or, if he died intestate, who were his personal representatives. I have been given no information as to who might be regarded as being a suitable representative of his estate. Neither Ruth or Constance had anything to do with Dennis or his family after the divorce. Ruth stated in a clarifying email to my clerk:

> 'My mother Constance and I have had no contact with Dennis or any of his family/children for over 35 years for reasons I outlined in my testimony to Judge Mostyn. I am aware that Dennis did have other children and I believe they resided in either the Portsmouth or South London area, but I have no other information I can offer the court.'

18. In my judgment identifying and notifying such a representative would be a protracted process and a pointless exercise. There is no reason to think that any such representative would object to this application, or even be slightly interested in it. Dennis was well aware that he was not the true father of Ruth and it is idle to think that anyone on his behalf now would argue otherwise.

19. In my judgment on the specific facts of this case there are good reasons to waive the obligation imposed on the court to consider who should be given formal notice of the proceedings. I do not consider that in so doing I am compromising Dennis's procedural rights in any meaningful way.

The procedure for dealing with the application

20. Section 55A(1) of the Family Law Act 1986 explicitly permits a declaration of parentage application to be issued in either the High Court or the Family Court. Ruth issued the application at the Royal Courts of Justice although the form that she filed did not state in which court she was issuing it. The application was impressed with seal of the High Court. The order dated 25 October 2021 is headed "In the High Court of Justice".

21. However, it would have been wrong to have allowed Ruth to issue this application in the High Court. This is because FPR rule 5.4 provides:

> '(1) Where both the Family Court and the High Court have jurisdiction to deal with a matter, the proceedings relating to that matter must be started in the Family Court.
>
> (2) Paragraph (1) does not apply where –
>
> (a) proceedings relating to the same parties are already being heard in the High Court;
>
> (b) any rule, other enactment or Practice Direction provides otherwise; or
>
> (c) the court otherwise directs'

The President's Guidance - *Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court* dated 24 May 2021 does not require this application for declaratory relief to be issued in the High Court. This is because the application is made under Part III of the Family Law Act 1986 and is therefore excepted from Item No. 3 of the Schedule to the Guidance.

22. Therefore, the application had to be issued in the Family Court. The use of the High Court seal on the issued application, and the heading of the order of 25 October 2021, does not affect that requirement. I heard the case sitting in the Family Court; I give this judgment in the Family Court; and the order giving effect to this judgment shall be made in the Family Court.

23. An application under s55A of the 1986 Act is governed procedurally by FPR Part 8 Chapter 5. FPR rule 8.1 states:

> "Subject to rules 8.13 and 8.24, applications to which this Part applies must be made in accordance with the Part 19 procedure."

24. In *Dunkley v Dunkley & Another* [2018] 2 FLR 258 I somehow overlooked the terms of rule 8.1 but at para 3 surmised that the Part 19 procedure applied by virtue of the reference to aspects of it in rules 8.20(3) and (6).

25. Rules 8.13 and 8.24 are not relevant to this application. Therefore it is made pursuant to, and governed by, the Part 19 procedure.

26. An application under the Part 19 procedure is heard in private under FPR rule 27.10, although members of the press and legal bloggers are entitled to attend under rule 27.11. I duly heard the application in private on Microsoft Teams, and no journalist or legal blogger attended.

27. Had a member of the press or a legal blogger attended I consider that they could have reported everything that they heard during the proceedings. There are no minor children affected even peripherally by the application. It is impossible to see on what basis a reporting restriction order could have been made. In *H v News Group Newspapers Ltd* [2011] 1 WLR 1646 at para 21 the Master of the Rolls stated:

> '(1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.
>
> (5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.'

28. In my judgment there are no aspects of this case whereby the privacy right in Article 8 trumps the principle of open justice in Article 6 and the general Article 10 rights of the public at large.

29. If the case could have been fully reported had journalists attended, then any suggestion that this judgment should be anonymised is untenable. In any event, I cannot discern any good reason to depart from the principle of open justice which is implicit in a full judgment. To anonymise the actors would be to provide a disembodied version with all the disadvantages identified by Lord Steyn in *Re S (A Child)(Identification: Restrictions on Publication)* [2005] 1

AC 593, HL at [34] and Lord Rodger in *re Guardian News and Media Ltd* at para [63].

30. I record that Ruth, Constance, Simon and Jane were all given by me the opportunity to make any submissions in writing opposing the publication of this judgment in full without anonymisation. Ruth, on behalf of all members of the family, sent an email stating that 'we do not wish to make any submissions in writing as to the judge's intentions'.

31. Therefore consistently with the principles I outlined in *BT v CU* [2021] EWFC 87 at [113] and in *A v M* [2021] EWFC 89 at [104] – [106], I shall give this judgment in full without anonymisation.

32. Having dealt with these procedural matters I now turn to the substance of the application.

The background

33. I have received written evidence from Ruth, Constance, Simon and Jane. I also received oral evidence from Ruth and Constance.

34. The evidence has established the following facts to my satisfaction.

35. Ruth was born on 5 November 1960 to Constance. Ruth was born in England and has resided here all her life. She is, and has always been, domiciled in England.

36. Constance was born in 1941 to Orthodox Jewish parents. In 1959, aged just 18, she had begun a passionate, but very risky, relationship with Patrick, an Irish Catholic, then aged 27. She fell pregnant by him, but he did not wish to marry her. They parted and she did not hear from him again for about 29 years.

37. Constance needed to find a husband quickly as a termination of the pregnancy was impossible – abortion was then a criminal offence. The idea of putting the new-born child up for adoption was unthinkable. Equally, to be known as bearing a child out wedlock would cover her in shame in her community. Her life was a maelstrom of painful dilemmas.

38. Constance described to me how she 'disappeared' when she discovered she was pregnant in order to avoid her family finding out the truth. She found and quickly married Dennis (born in 1938) who offered to stand as father to Ruth. To get her parents' consent to the marriage (which was then required as she was under 21) she told everyone that Dennis was Ruth's father, when she knew Patrick to be the father. This deceit was an absolute necessity as Constance's parents would not have supported her in any way had they known that Constance was having an illegitimate child.

39. Therefore on 12 December 1960 Dennis provided the necessary information to register Ruth's birth. By then Dennis and Constance had married. Thus, the certificate states that Dennis and Constance had the same surname and lived at

the same address. It declares Dennis to be the father, even though Dennis knew full well that he was not.

40. Ruth was raised to believe that Dennis was her father and for most of her childhood she believed that this was the truth. Constance told me that unfortunately Dennis was seriously flawed; he was abusive and unfaithful. When Ruth was 15, Dennis told her he was not her true father. This was an overpowering revelation for Ruth.

41. Shortly thereafter, Constance and Dennis divorced and Constance later remarried Edward Chesterman, now also dead. Ruth carried the truth about her parentage as a dark secret until she was in her 40s. It was a source of great shame, and even Edward was not made aware of it. It was never spoken about. This silence was in part due to the societal implications of being an illegitimate child, even in the late 20th century, and in part due to Ruth's personal trauma suffered as a result of the revelation. It was only when in training to become a therapist that Ruth went to therapy herself and was empowered to confront the issue. She spoke to Constance and was able to find Patrick online. She discovered that he was living and running a business in Ireland.

42. Ruth telephoned Patrick for the first time in March 2004, and he immediately acknowledged her as his daughter. He explained to Ruth that he had previously tried to find Constance and the child he suspected they had had together, but had been untruthfully told by Constance's family that she had emigrated to America. Patrick told Simon, his son (born in 1970), about Ruth and how he was certain she was his child. Patrick had by this point also spoken to Constance, who confirmed to him that she had been secretly pregnant, and that Ruth was his child. Soon thereafter, Ruth was introduced to Patrick's children, her half-siblings, Simon and Jane (born in 1965) who embraced her as a sister. The three have shared a close relationship since. Patrick's wife (Jane and Simon's mother) Barbara was slightly slower to come around as she had never been told of the existence of Constance, but she now sees Ruth as family.

43. Patrick died in 2008 following major spinal surgery. I have been told, and I accept, that he was immensely proud to be Ruth's father and saw her as nothing less than his daughter.

The application

44. Ruth's application for a declaration of parentage under the Family Law Act 1986, section 55A was issued on 22 September 2021. As explained above, Ruth wishes to have Patrick recognised in law as her father and for him to replace Dennis on her birth certificate.

45. This application has not been made until now primarily because Constance was only informed last year that Dennis had died. Until that point, she held a well-justified fear that making a parentage application would require him to be notified. That would make him aware of Constance and Ruth's location, which they feared could put them in peril.

46. Ruth's application is supported by Jane and Simon, and by his widow, Barbara, who was the executor of Patrick's estate. Constance also confirms Ruth's version of events. Both Jane and Simon make clear the importance of Ruth being recognised in law as their sibling so future generations can see their true heritage, and because it is something their father would have wanted.

The legal framework and disposal of the application

47. The Family Law Act 1986, section 55A(2) provides:

> 'A court shall have jurisdiction to entertain an application under subsection (1) above if, and only if, either of the persons named in it for the purposes of that subsection -
>
> (a) is domiciled in England and Wales on the date of the application, or
>
> (b) has been habitually resident in England and Wales throughout the period of one year ending with that date, or
>
> (c) died before that date and either –
>
> (i) was at death domiciled in England and Wales, or
>
> (ii) had been habitually resident in England and Wales throughout the period of one year ending with the date of death.'

48. I am satisfied that I have jurisdiction to entertain the application on the basis of Ruth's domicile in England and Wales on 22 September 2021 and/or her habitual residence in England and Wales throughout the period of one year ending with 22 September 2021.

49. I do not need to consider Patrick's circumstances in any detail, but I note that it appears he was habitually resident in England and Wales for the requisite period prior to his death. I am less confident as to whether Patrick was domiciled in England and Wales at the time of his death as he was born in Ireland and there is no evidence before me that he had subsequently acquired, and then retained, a domicile of choice in England and Wales.

50. In any event, nothing turns on Patrick's circumstances in this respect as I am satisfied there is jurisdiction to entertain the application on the basis of Ruth's circumstances alone.

51. Sub-sections (3) and (4) provide:

> (3) Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of

> the application (but this is subject to section 27 of the Child Support Act 1991).
>
> (4) The excepted cases are where the declaration sought is as to whether or not –
> (a) the applicant is the parent of a named person;
> (b) a named person is the parent of the applicant; or
> (c) a named person is the other parent of a named child of the applicant.

52. This is an "excepted case" pursuant to sub-section (4)(b) because Ruth seeks a declaration that Patrick is her father. Ruth does not need therefore to show that she has a sufficient personal interest in the determination of the application, although I am well satisfied that she does

53. Sub-sections (5) and (6) are not relevant to the application.

54. Section 58 of the Family Law Act 1986 contains general provisions as to the making and effect of declarations. Sub-section (1) provides:

> 'Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.'

55. I read that provision to mean that I must be satisfied on the ordinary civil standard (i.e. the balance of probabilities) on the evidence before me that Patrick is Ruth's father. If I am so satisfied, then I am required to make such a declaration to that effect unless to do so would be manifestly contrary to public policy. Once the facts are proved then, subject to the question of public policy, the court has no discretion to withhold the declaration.

56. What evidence is needed to make a declaration of parentage?

57. If Patrick were alive, I could, whether upon an application by a party or indeed of my own motion, direct scientific tests be undertaken to ascertain whether Patrick is or is not the father of Ruth pursuant to the Family Law Reform Act 1969, section 20(1)(a).

58. As Patrick is dead I could order, pursuant to the inherent jurisdiction, scientific tests to the same end if DNA samples could be obtained. Such a direction would not be in breach of the Human Tissue Act 2004: *Anderson v Spencer* [2018] 2 FLR 547, CA.

59. However, as Patrick died more than 13 years ago I have doubts as to whether adequate DNA samples could be obtained.

60. There is no requirement that such scientific testing must be undertaken on an application for a declaration of parentage. I am entitled to determine the application on the basis of the evidence before me. That evidence amply satisfies me that it is far more likely than not that Patrick was Ruth's true father.

61. Finally, I cannot see any reason why it would be manifestly contrary to public policy to make the declaration sought. As I noted during the hearing, I consider, if anything, that it would be manifestly contrary to public policy if I were to refuse to make the declaration sought.

62. I am therefore satisfied that I can and should make the declaration sought, namely that Patrick was Ruth's father.

63. Section 55A(7) of the Family Law Act 1986 provides:

> 'Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.'

64. Ruth has explained that she seeks the amendment of her birth certificate. I do not have the direct power to order that such amendment be made. However, in accordance with the provision stated above, a court officer will send a copy of the order arising from this hearing to the Registrar General for Births and Deaths within 21 days of the date of the order so that he may consider the re-registration of the birth of Ruth under the Births and Deaths Registration Act 1953, section 14A.

65. I do say, however, that it would be most surprising if the Registrar General for Births and Deaths declined to amend Ruth's birth certificate in the light of my declaration.

66. There shall be no order as to costs on the application.

67. That is my judgment.
