Neutral Citation Number: [2019] EWHC 2244 (Fam)

Case No: FD19P00139

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/08/2019

Before :

MR JUSTICE COHEN

Between :

AB	**Applicant**
- and -	
CD	
-and-	
C (a child)	**Respondents**
(No 2)	

Mr E Devereux QC and Mr J Gruder QC and Mr M Edwards (instructed by **Vardags**) for the **Applicant**
Ms S King QC and Ms J Renton (instructed by **Payne Hicks Beach**) for the **Respondent**
Ms S Jaffar, solicitor**,** (instructed by **Cafcass Legal)** for the **child**

Hearing dates: 8 August 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE COHEN

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.

The Honourable Mr Justice Cohen :

1. This judgment is to be read as the sequel to my judgment of 2 July 2019 ("the July judgment").

2. For the purposes of this judgment I shall refer to the child with whom I am concerned as C, the mother as "the mother", C's psychological father as "the husband (H)" and C's biological father as "X".

3. The issues that have arisen at this hearing are as follows:

   i) In the light of the reply from X do I revisit my decision as to whether C should be told anything about his paternity;

   ii) What should C be told of the identity of X and when;

   iii) Do I allow H to take C on holiday to France this month;

   iv) What directions if any should I give in respect of the deceit claim.

4. Since this matter was last before me there have been two developments:

   i) The parties have agreed that Ms Helena Ware should act as independent social worker to help and advise H and the mother through the process of breaking to C the truth of his paternity, albeit it is not agreed when this should happen; and more importantly

   ii) X has responded to the letter sent to him at my direction. To put it shortly, his response has been that he does not recognise the jurisdiction of the courts of England and Wales to deal with this matter and says that the allegations "have no iota of truth whatsoever". He says he is shocked that there are proceedings that involve his identity and reputation and reserves his rights in this regard.

5. This response was one of the possible answers that I predicted at paragraph 40 of my earlier judgment.

6. In determining the issues in relation to the disclosure of paternity I at all times have as my paramount consideration C's best interests.

7. In the light of X's denial of paternity the mother asks me to revisit my decision as to the disclosure that H is not C's father. I decline to do so. All the reasons that I set out in my first judgment still pertain. It is only a matter of time, probably fairly short time, before somebody says to C that H is not his father. Too many people know for the matter to be kept hushed up. There is no prospect of this issue being smoothed over and it remains far better that it is managed so as to minimise the potential damage to C.

8. X's answer has not eased my task. It means that if C was to be told the whole truth he must be told that whilst his mother has named X as his father, X denies it. This brings with it the scope for C to feel abandoned and rejected. Those feelings may or may not be mitigated by the fact that H has, since June, reached the decision that he still wishes to remain in all senses C's psychological father.

9. Mr Devereux QC (the only counsel who is new to this round of the case), says that I have already decided the issue of the disclosure of the identity of X in my previous judgment. That is wrong. I expressly left it open as my judgment makes clear, particularly at paragraph 53.

10. Much of the debate during this hearing has been about the effect and impact of X's answer. Plainly, if he had said that he accepts that he is the biological father and wanted to play a part in C's life, it would have been very easy to decide that C should be told who X was at or about the same time that he was told that H was not his biological father.

11. There are arguments both ways. The father and the guardian argue that C should be told of X's identity as part of the same process and that a two stage process separating the two strands, namely that H is not his biological father and the identification of X, would be harmful to C. It is, they say, inevitable that C would ask at an early stage who X is and that H and the mother must be equipped to introduce X's identity to C.

12. The mother says that I should stop the whole process because, she asks, how would C make sense of being told that X is named by his mother as his biological father but that X denies it. Better by far, she says, to let his childhood continue with two adults as his devoted parents until such time as he fully understands the facts of life and would be able to comprehend the truth.

13. The difficulty of the decision is enhanced by the fact that I can have little confidence that H's use of the information of X's identity when revealed would be in C's best interests. As I set out at paragraph 52 of my earlier judgment his anger and his desire for revenge cause me considerable concern. He gave me little comfort in this hearing when he said that he would undertake not to use the information he gained solely (my emphasis) from these proceedings elsewhere. Having said that he thinks he already knows the identity of X it is predictable that he might argue that identifying X in these proceedings does no more than confirm what he already knows.

14. I do not think it is a foregone conclusion that C would want to know X's identity immediately upon being told that H is not his father. It may be that at least for some time he would be satisfied with the knowledge that he has two adults in his life fulfilling the role of parents and to whom he is deeply attached. Thus, it is said that C should only be told of X's identity when C makes it clear that he wants to know who X is.

15. The problem which then has to be addressed in adopting this approach is:

    i) the deferral may only be for a very short time. One possibility, as H and the guardian surmise, is that C will ask very quickly who X is;

    ii) Who would judge when C wants the news? If left to the parents it might simply lock them into a further disagreement to be resolved by the court;

    iii) Any time that I fix as appropriate for breaking the news would be arbitrary and may very well be the wrong time.

16. I have decided that the best answer is to say that the mother must reveal the identity of X as and when Ms Ware says to the mother that C should now be told the identity of X. At that time, and not before, H must also be told of X's identification. I make it clear to the parties and Ms Ware, who will receive a copy of this judgment, that the time at which C should be told of X's name is one that cannot be predicted. It may be a very short time or it may be years. It will all depend on C's reactions and needs.

17. I share the guardian's view that C must not feel that information is being kept from him and that to do so would be harmful to him. But, what is known now and was not known before, is that X denies paternity and wants nothing to do with C. Matters must be approached at C's pace.

18. Mr Devereux says that I have changed my approach from the time of my July judgment. I disagree and refer to paragraphs 47 and 53 of that judgment. At that time I did not, of course, know how X would respond. Now that response has been received and Ms Ware's appointment agreed, it is appropriate that the person on the ground who will know when C is ready and wants to know X's identity should choose the moment.

19. This is not a rejection of the guardian's advice. It simply ensures that matters are taken at C's pace and that his needs remain paramount and can be overseen by someone who will not bear the emotion that will inevitably weigh heavily on the parents.

20. It is obviously a matter of regret that X's answer does not permit C to be given complete certainty. That is a matter I have taken into account, as I have H's statement that he will not believe the truth of what the mother says without a DNA test of X, which I have no power to order. These are complicating factors, but I am confident that the course that I am taking is the least bad alternative.

21. I make an order that H is barred without permission of the court from using or publicising the identity of X in any way other than in these Children Act proceedings and / or the financial remedy proceedings.

22. <u>H's application to take C abroad</u>

Just the day before this hearing H issued an application for permission to take C overseas to France for a week's holiday at the end of August 2019. His request for such a holiday had been made through solicitors some days before the application. The application was opposed by the mother on two principle grounds. I can dispose of the second quickly: she complained that C would be exposed, if taken to H's holiday home, to a lot of very unpleasant gossip about her. It is true that H had recruited many of the staff to make statements which are highly critical of the mother. Bearing in mind that he is not actively pursuing an application for residence it is hard to see what the purpose of the statements was. But, I have no reason to think that the makers of the statements would vent their criticisms of the mother before C and I have no doubt that if C was to go on holiday to France with his father he would have an enjoyable time as he has in the past, including last in February 2019.

23. I have to say also that H's argument that he should be allowed to take C to France because I had allowed C to go to India with his mother is likewise immaterial. I set

out in my earlier judgment why I was confident that she would return with C after the holiday, as she duly did.

24. The substantial argument is whether or not H can be trusted with sufficient certainty that he would return C at the end of the week's holiday and will not take C to the UAE where he is based.

25. In considering this matter I have regard in particular to the law as summarised in Re A (prohibited steps order) [2014] 1FLR 643 at paragraph 25 which includes the following:

Applications for temporary removal to a non-Convention country will inevitably involve consideration of three related elements:

a) the magnitude of the risk of breach of the order if permission is given;

b) the magnitude of the consequence of breach if it occurs; and

c) the level of security that may be attached by building into the arrangements all of the available safeguards.

26. Assessing the risk of the breach is far from easy. The risk is that H, who feels so strongly about matters in this case, might remove C to where both he and his family have their main base. It is difficult for me to weigh the extent of the risk, in part because this application has been made at such very short notice and unsupported by any evidence.

27. The fact is that H has been very angry about the events disclosed in the last few months. This application by H is made at a time when feelings are running very high. The current timetable presupposes that it will be within the couple of weeks after C's return to England from the proposed holiday that he might be told of the truth of his paternity. I cannot assume that H's emotions might not get the better of him and cause him to behave in a way that he claims now not to intend.

28. It is obvious that the magnitude of the consequence of the breach would be very great. C would be deprived of his primary carer and would be removed to a country far distant from that from where he has lived his life to date. He would be placed in a situation hostile to his mother.

29. In such circumstances I can have no confidence that a return to England would be easily achieved. I have read and re-read the report of Ian Edge. True it is that a non-biological father has no rights under the system of law that operates in the UAE but there is a weighty presumption that a child is legitimate. If H was to claim that he was the father it appears to me from what I have read that there would be a substantial mountain for the mother to climb. As an adulteress she could not take the risk of participating in UAE proceedings and she might well in consequence be regarded as a wholly unsuitable mother.

30. Because of the very late nature of this application no real thought has been given to what safeguards can be put in place to ensure that C goes to France and nowhere else. H's suggestion that he gives the passport upon C's arrival to his agent in France

provides minimal protection. The mother has had very little opportunity to consider what safeguards she might wish to have put in place for this proposed holiday. I am unaware of any safeguard that can be put in place in the UAE.

31. For all these reasons I therefore refuse permission for the holiday.

32. I wish to make it clear that I am making a decision in respect of this one proposed holiday. In future H should give the mother proper notice of his wishes so that proper consideration can be given to the application. I am not saying that such an application would necessarily be granted but at least there would be an opportunity for due consideration.

33. Listing of the strike-out application

This round of proceedings started in early 2019. The matter first came before me in the context of Children Act proceedings in late March 2019. In April Master Cook in the Queen's Bench Division transferred the deceit proceedings to the Family Division indicating to the parties that he considered those proceedings to be "arguably pointless and futile litigation".

34. The wife took out an application to strike-out the deceit proceedings with a two day return date in June 2019. Unwittingly, the dates that she had obtained were exactly those on which the FDR was due to take place albeit that it subsequently became clear that those days would be required for directions and that the FDR would have to be postponed.

35. On 2 May 2019 at a directions hearing before me, I took the view that, rather than the parties spending resources on a strike-out application, it should be heard at the same time as the financial remedy proceedings. It did not then seem to me attractive that the parties should spend two days (the wife's time estimate) or four days (the husband's time estimate) with, as he threatened, inevitable appeal proceedings thereafter on a strike-out application.

36. In preparing my July judgment and as set out at paragraph 68 it became clear to me that the issue of the strike-out would need to be revisited. The factors that led me to this conclusion are as follows:

i) The husband's position has radically changed. He decided at the June hearing that he wanted to continue to play the role of father to C. Inevitably and rightly he has abandoned a substantial element of his deceit claim and no longer seeks reimbursement of the sums that he has expended on C throughout his life.

ii) The parties have each served questionnaires on the other in the deceit claim. They are highly intrusive documents seeking details of each party's private life.

iii) When X's identity is revealed it now seems to me very likely that H would seek to involve him in the deceit proceedings.

37. The wife wishes to argue that the deceit proceedings should have no independent life in the sense that now that the reimbursement claim has been dropped there is no issue that cannot be determined within the very wide powers that I have under section 25 Matrimonial Causes Act 1973 to achieve a fair outcome between the parties in all the circumstances as the court finds them to be.

38. This argument is in my judgement better considered now than later. If I leave the issue until my judgment in the financial remedy proceedings, I run the risk of requiring the parties to give a lot of evidence which will be embarrassing, immaterial and unnecessary.

39. Mr Gruder QC says that I have no power to revisit my case management decision. I reject that submission which seems to me plainly wrong. The Civil Procedure Rules 1998 require me to implement the overriding objective of enabling the court to deal with cases justly and at a proportionate cost. The matters that I must consider are set out at Part 1.1 (2).

40. The court has a general power of management (Part 3) and has an inherent jurisdiction to stay the whole or any part of proceedings as provided at 3.1 (2) (f). The commentary to the Rules provides circumstances in which a stay may be appropriate are many and various. This case like many others is of an evolving nature.

41. I accept of course that I must not exercise my discretion in a capricious or arbitrary way, but it seems to me to be proper that in the circumstances that now arise the strike-out application should be permitted to proceed. I am therefore going to list the strike-out application for 7/8 October and will deal then with the issue of answering the questionnaires in the deceit proceedings if the claim survives.

42. The husband says that he will appeal any decision that the court may make to strike-out the deceit proceedings. I cannot allow myself to be deterred by this threat. It would be more damaging to the parties if I were to spend a significant part of the 20 day hearing proceeding on a basis as to the matters in issue which might subsequently be held by a higher court to be false. The consequence would be the derailing of a long and costly hearing and the need to revisit the award which I would have made. It may be, as the husband says, that the law is "difficult and ground-breaking". I am not sure that that description is justified but it is insufficient reason for me to park the issue.

43. One of the reasons that I have cleared my diary to provide an early hearing date of the application is to permit the parties sufficient time if they wish to challenge my decision, whatever it may be, to make that challenge well before 20 January 2020 when the trial of the financial remedy proceedings will take place.

44. By way of subsidiary directions I add the following:

    i) The parties must lodge position statements limited to a maximum of 15 pages no later than 10am on 4 October 2019 together with an agreed list of authorities with the passages relied upon highlighted;

    ii) The hearing will be listed to start at 12 noon on 7 October;

iii) The parties' oral submissions shall be limited to 2 hours per side.