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No. KH OOP 05334

IN THE HIGH COURT OF JUSTICE
(FAMILY DIVISION)

The Civil Hearing Centre
Coverdale House Leeds
10th May 2001

B e f o r e :

THE HONOURABLE MR. JUSTICE BODEY

Re: "T" APPROVED JUDGMENT

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55 Queen Street Sheffield SI 2DX

MRS. HEATHER SWINDELLS QC and MISS AMANDA HOWARD for the Applicant
MR. RODNEY FERM for the Mother
MRS. ROSANNE MALCOLM for the Amicus Curiae

JUDGMENT

INTRODUCTORY

1. MR JUSTICE BODEY: The Court is concerned for one child, T, who was born on the in 1994, and is, therefore, aged seven.

2. The application by the Applicant who is aged 48 is for an order that blood tests including DNA tests be used to ascertain whether such tests show that he is, or is not, excluded from being the father of T. It is an application made as a preliminary to his actual, or intended, application for parental responsibility and contact. He strongly believes, and claims, that he is the father.

3. T's mother who is aged 45 ("the mother") does not consent to the taking of blood tests, and opposes the application.

4. The mother married her husband ("the husband") in 1977, and they have been together since. They live in a small town with T, the only child of their family. Since T was born during the currency of the marriage, there is a rebuttable presumption of legitimacy.

5. The Applicant has been married three times. He now also lives in the same town as the mother with his third wife, S (whom he married on the 11th December, 1994) and his three children by her, who are aged from 7 to 2, the eldest of whom is a daughter, B. By his second wife he has an adult daughter, M, aged about 20, who lives with her mother.

6. T is, of course, being brought up as a single child. If in fact the Applicant is his natural father, then T would have four half siblings.

THE BACKGROUND UP UNTIL T'S BIRTH

7. After their marriage in 1977, the mother and her husband attempted, for a number of years to have a baby. Unfortunately they were unable to do so, and it was established that the husband has a low sperm count. They, therefore, agreed together that she would, or could, have sexual intercourse with another man if the opportunity presented itself, and that the husband would, as it were, turn a blind eye.

8. In these circumstances, hoping to get pregnant, the mother had sexual relations with the Applicant (then a good friend of the couple, and indeed an Usher at their wedding) on many occasions between July and September, 1983. At the same time, the mother continued to have intercourse with her husband. Unfortunately, however, no pregnancy then resulted.

9. At around about that time, as I am satisfied by the mother's evidence, these acts of sexual intercourse between the Applicant and herself ceased when he moved away from the area.

10. The mother and her husband, after many years of infertility treatment, eventually resigned themselves to being a childless couple, and the mother obtained employment.

11. However, in the early 1990's, the mother was made redundant. Conscious of her "biological clock ticking away" she became depressed at her childless state.

12. At around this time, the Applicant returned to the area, and the parties met again in about April, 1993.

13. Discussions thereafter took place between them along the lines that, as previously, they would have sexual intercourse in the hope that the mother would become pregnant.

14. They, therefore, performed acts of sexual intercourse together on the 1st and 2nd of May, 1993, in a rented caravan; also on one occasion (only) thereafter, being prior to the time when the mother realised she was pregnant with T.

15. Unbeknown to the Applicant, the mother (anxious to create every possible opportunity for conception) also arranged to have sexual intercourse with three other men, who have not been named. Such acts of sexual intercourse occurred on. respectively, the 28th 29th and 30th of April, 1993. The mother had worked out that the end of April and the beginning of May 1993 was her "conception window".

16. The father's case is that the sexual relations which occurred between himself and the mother at the beginning of May, 1993, represented the start of a loving relationship between them, and that T was (as he put it) "conceived in love".

17. I do not doubt that the Applicant believes that now; but 1 have to weigh that belief against his own statement, prepared for a Family Proceedings Court hearing in 1995 (referred to below) in which he said: "... she began to want a child of her own more and more, and it was eventually decided that we should have intercourse *with the view to making her pregnant*.... I maintain that all of these times that we had sexual intercourse were *solely for the purpose of getting [the mother] pregnant*...." (emphasis added).

18. I have to say as regards this very specific wording, that 1 did not find the Applicant's explanation (viz that he had only been asked to prepare a short statement) to be convincing.

19. In addition, I have to bear in mind the mother's evidence as to her state of mind at the time of the 1993 sexual acts, namely that these were for procreative purposes. Although, like the Applicant, she has not been entirely consistent as between her verbal evidence and her written statement (and although, in some respects she has shown herself to be manipulative and capable of deception as regards her various sexual activities) nonetheless I am satisfied that when she had intercourse with the Applicant and the three other men, her motivation was the achievement of pregnancy with a view to continuing to live in a family unit consisting of her husband, the baby, and herself.

20. The mother accepts that the Applicant, following the acts of intercourse in May, 1993, did express his love for her, and did ask her, several times, to marry him; but (for the reason just mentioned) she declined.

21. Although the mother remained predominately friendly with the Applicant until about the end of 1994, going out with him on three or four occasions for coffee and a chat (and even once for a drive to a local town) I am satisfied that in her mind it went no further than that, and that she did not reciprocate his feelings of love and potential commitment. Nor do I accept the husband's suggestion that she planned to leave her husband.

FOLLOWING THE BIRTH OF T

22. Following T's birth, on in January, 1994, the Applicant visited the mother and baby in hospital accompanied by S, who was then his fiancé. Thereafter, about four times a week, and occasionally more, either the Applicant would visit the mother and T at the mother's home, usually accompanied by S; or else the mother, with T, would visit the Applicant and S at S's home. On one occasion the Applicant bought T a teddy bear, and he sometimes held and cuddled him.

23. However, the mother felt that the Applicant was becoming more demanding about T, and, therefore, at about the end of 1994, she decided to cease these reciprocal visits.

24. In the meantime, in or about September, 1994, S had given birth to the Applicant's daughter, B. He and S were then married in December, 1994, and are (as I have said) still together.

25. In January, 1995, the Applicant (or someone) gave M a photograph of T, together with other information casting doubt on the true identity of T's father. M passed this on to the mother's niece and nephew. Thereafter, to the mother's own knowledge, doubts and suspicions about T's paternity went around the local school attended by her niece and nephew.

26. Further, in February 1995 following apparently the husband's public assertion of his own paternity of T, the Applicant responded by proclaiming himself on his citizens-band radio as the true father; and he later attended at a taxi rank where the husband was working, with a placard claiming the same.

27. The Applicant, now, accepts that this conduct of his was childish and unnecessary; likewise, his placing leaflets through letter boxes in about 1998 claiming to be T's father and "challenging" the husband to a DNA test. However, a)l this did have the undoubted effect of putting doubts, and suspicions about T's paternity into the 'public domain'.

28. On 25th April, 1995, the local Family Proceedings Court heard an application by the Applicant for parental responsibility and a contact order. It is not clear from the brief record of those proceedings whether any statement of the Applicant's was read (there being no reference to it).

29. Be that as it may, that Court then concluded that the intrusion of "another" father would confuse T, and would be detrimental to the marriage. The Court said: "... we seek to preserve the present presumption of legitimacy", and concluded "... we do not order DNA tests".

30. There is no specific statement from the Family Proceedings Court that parental responsibility and contact were refused, although, clearly, no such orders were in fact made in the Applicant's favour.

31. This refusal by the Family Proceedings Court to direct blood tests is clearly a factor to be weighed in the balance against doing so now (six years on), and also a factor which the mother and her husband are entitled to take into account and rely on when concluding that they do not want such tests to take place.

32. The Applicant tried to get Legal Aid to appeal the Family Proceeding Court's decision, but without success. The matter then went quiet until he learnt of the imminent introduction into English law of the European Convention on Human Rights. He then, took further advice, and launched these proceedings.

THE DOMESTIC LAW

33. The domestic law applicable to this application is contained in Section 21 of the Family Law Reform Act, 1969, as amended by the Child Support, Pensions, and Social Security Act 2000, with the result that blood samples can now be required:

> (a) if the person who has care and control of [the child] consents; or
> (b) where that person does not consent, if the Court considers that it would be in [the child's] best interests for the sample to be taken.

34. For the purpose of this application for blood tests, the welfare of T is not paramount under Section 1 Children Act, 1989. Instead, one has to apply the test of his best interests, weighing those best interests against the competing interests of the adults who would be affected one way or another, according to whether the application were granted or refused.

35. There is common ground as to the guiding authorities as to blood tests, namely S v. S and W v. Official Solicitor 1972 AC 24. and Re H(Paternity: blood test) 1996 2 FLR 65. I have also borne in mind the three authorities referred to in paragraphs 14 to 17 of Mr Ferm's Skeleton Argument for the mother, but observe that they pre-date the important case of Re H (above), and the Human Rights Act, 1998, and the greater certainty made possible by general scientific advances.

36. In S v. S. and W v. Official Solicitor, Lord Morris of Borth-y-Gest posed the question:

> "... will it be in the interests of the child if relatives and friends of those concerned feel that the big doubt which was raised has been unsatisfactorily left by the law, so that although a conclusion has been expressed, the doubt still remains, so that it will loom over the whole of the child's future life?"

37. Lord Hodson, in the same case said

> "... it must surely be in the best interests of the child, in most cases, that paternity doubts shouid be resolved on the best evidence, and, as in adoption, that the child should be told the truth as soon as possible".

38. In Re H, Ward LJ said

> "... given the real risk, bordering on inevitability, that [the child] will, at some time, question his paternity, then I do not see how this case is not concluded by the unassailable wisdom expressed by Lord Hodson in S v. S and W v. Official Solicitor: '... 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 truth' ...".

39. Ward LJ went on (in Re H) to speak of the inappropriateness, generally, of a child being allowed to believe in a falsehood, or to live a lie. He concluded:

> "... if [the child] grows up knowing the truth, that will not undermine his attachment to his father figure, and he will cope with knowing he has two fathers. Better that than a time bomb ticking away".

40. Those observations seem completely applicable to the facts of this case. The mother accepts that the doubts about T's paternity are in the 'public domain'. As I have said, her niece and nephew and other children at the local school know that these question marks exist, as must many adults in the fairly small town where the parties live only five minutes walk apart.

41. The mother herself said it would be "disastrous" if T were to find out for himself about the doubts over his paternity, perhaps in some unpleasant way. She agrees he must be told, but understandably wishes for herself and her husband to control the circumstances and timing of this, and not to have it forced on them by the Applicant or the Court. She accepts that her relationship with her husband is a stable one, having survived many difficulties, some of which are referred to above.

42. As for T himself, the mother's bond with him is clearly a strong one. She agrees that he could be blood tested without his knowing precisely why it were being done.

43. Indeed, a significant point was made by Mrs Malcolm, Counsel for the Amicus, to the effect that T must be nearing the end of the age at which he could be blood tested without his curiosity being significantly aroused as to the real purpose.

44. The Applicant's application for parental responsibility and contact cannot, simply, be 'wished away'. Those applications are going to have to be heard, whether or not blood tests are ordered. In that event, how much more satisfactory must it be in principle Ibr the evidence to be the best that science can provide (probably certainty) as compared to the unsatisfactory situation of the Court being left with presumptions and inferences.

45. If the Applicant were shown to be the father, then that would then be for ever known, and such certainty would probably be to T's advantage, provided that its ascertainment did not de-stabilise his present home life and security. It would not at all necessarily mean that parental responsibility and/or contact would follow: that would depend on further assessments, further evidence, and careful consideration by the Court.

46. If, on the other hand, the Applicant were excluded as the father, then he would fall out of T's family's life, being irrelevant to T.

47. When it was put to the mother in the witness box that it would be better for T to be told as a result of DNA testing that 'this particular man' is his lather (if testing made this possible) rather than her having to tell him that his father could be any one of four men, she thought long and hard. It seemed to me that she accepted the proposition intellectually, but could not do so emotionally, wishing to cling to the possibility that her husband could be T's father. As she said "... tests would change everything".

48. She accepted in evidence that she did not want to know the answer to the paternity question, although she frankly accepted that her husband realises that he is not the father, and that the highest that she herself can put it, is that she would like to continue to believe that he may be.

49. I am very sympathetic to the mother's feelings in these respects, which are entirely understandable. I realise how stressful alt this must be for her, and appreciate her concern at the possibility of intrusion into her, her husband's, and T's family life. However I do consider that, as a result of these understandably strong feelings, she is not seeing sufficiently clearly and objectively the best long term interests of T in her opposition to this application.

50. As the suspicions regarding paternity are public knowledge, there must be a significant risk of T learning of them sooner rather than later, in some way which would be much more difficult for him to cope with than if the issue were sensitively handled with him by the mother and her husband in an orderly way and if they so wished, with the benefit of professional advice. They may be assured that their's is by no means the first case of its kind.

51. Nor (as I am satisfied having seen and heard the mother) is this one of those cases where the requested tests would create a serious risk of de-stabilising the present arrangements. On the contrary, the mother struck me as a pragmatic, down to earth, sort of person; her husband, too, from what I gather of him.

52. So, given the strength and stability of their relationship, 1 cannot conclude that any risk there might be of "upsetting the apple cart" comes near to out-weighing the arguments I have recorded above in favour of the tests being undertaken. I understand that T is on the Special Needs Register at school; but this is by reason of his being rather behind academically, and not for any emotional reason.

53. As regards the Applicant's inappropriate behaviour in the past (above) which naturally concerns the mother and the husband, it is right to record that he has conducted himself responsibly as regards T since 1995, with just the one lapse, in 1998. Even though he sees T out and about from time to time and could have made trouble, he has not done so and he stressed that he has no wish to threaten, or undermine T's stable life with the mother and the husband. He himself volunteered in the witness box the opinion that T appears happy and well brought up. Added to this, he offers the Undertakings referred to at the end of this judgment.

54. Accordingly, in terms of domestic law, I am entirely satisfied that DNA testing would be in T's interests and, balanced against the interests of the mother and her husband, ought to take place.

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

55. It is unnecessary to recite the wording of Article 8 which, in short, provides for everyone a qualified right to respect for his/her private and family life, the qualification being by Article 8.2.

56. There is no significant dispute that T has a right to respect for his private life (in the sense of having knowledge of his identity, which encompasses his true paternity) and a right to respect for his family life with each of his natural parents, all things being equal.

57. T also has what may (as here) be mutually 'competing' rights to respect for his private and family life, in the other sense that the stability of his present de facto family life should not be put at risk, except as may otherwise be held to be in his interests, and pursuant to Article 8.2.

58. It is further common ground that the mother and her husband have a right to respect fbr their private and family life, comprising a right that the same should not be intruded upon, or interfered with, except as may be necessary to give effect to T's and (if he has them) the Applicant's rights.

59. So far as the Applicant is concerned, he may or may not (depending on the facts and on whether he is in truth the biological father) have a right to respect for a family life encompassing - all things being equal - the society of^ and a relationship with T, and/or a knowledge of T's progress.

60. It is accepted between the parties that if and when these various convention rights pull in opposite directions, then the crucial importance of the rights and best interests of the child fall particularly to be considered. The President said in Re L. V. M and H. 2000 2 FLR 334, at 345 H to 346 C:

> "... Article 8.2 provides the crucial protection for the child, who also has rights and interests under the Convention ... in Hendriks 1982 5 EHRR 223. the Court held that where there was a serious conflict between the child and one of its parents, which could only be resolved to the disadvantage of one of them, the interests of the child had to prevail under Article 8.2. The principle of the crucial importance of the best interests of the child has been upheld in all subsequent decisions of the European Court of Rights ...".

61. For the reasons set out above, under the heading 'Domestic Law' (which are equally apposite here) I am entirely satisfied that in evaluating and balancing the various rights of the adult parties and of T under Article 8, the weightiest emerges clearly as being that of T, namely that he should have the possibility of knowing, perhaps with certainty, his true roots and identity.

62. I find any such interference as would occur to the right to respect for the family/private life of the mother and her husband, to be proportionate to the legitimate aim of providing T with the possibility of certainty as to his real paternity, a knowledge which would accompany him throughout his life.

63. Applying Article 8 in this way (regardless of whether or not the Applicant has established what, if he is the father, would constitute family life with T) confirms my previous view that I should grant the Applicant's application.

64. In these circumstances, I do not consider it necessary or appropriate on this purely preliminary application for blood testing, to rule definitively whether or not (on the

assumption the Applicant turned out to be T's natural father) he has established an Article 8 right to respect for his family life in the sense of encompassing a relationship between himself and T.

65. However, having heard a certain amount of evidence on this point, I do have in mind the way in which T was conceived, viz. with the motivation of trying to get the mother pregnant and without any arrangement for her to leave her husband to set up home with the Applicant.

66. On the evidence I have heard, 1 am inclined to accept her case that there was some discussion along the lines that the Applicant would not assert claims towards any child, and that she would in turn not look to him for financial support: not that any such understanding would undermine the philosophy underlying S v. S (above) and Re H (above) which, in my judgment, would still apply in the particular circumstances of this case.

67. On any view, the acts of intercourse in 1993 were three only and (significantly) stopped once the mother knew she was pregnant. She did not reciprocate the Applicants' expressions of emotion, nor offers of marriage and I have considerable difficulty in accepting that the existence of a necessary commitment can be extrapolated from the subjective feelings of one member only of the "family", if those feelings are not shared by the other member. I further observe that the Applicant must have been having a sexual relationship with S at about the time of T's birth in January 1994 in order for B to have been born in September, 1994,

68. Nor, from what I have heard, do I consider that the various reciprocal visits made between the adults, involving T, during 1994 (above) were in the nature of "contact". They sound to me to have been more in the nature of a number of (then) friends meeting together socially, in which T was naturally involved since he of course accompanied his mother.

69. I accept that a blood tie, if such there be, would create what has been described as a 'strong presumption of family life' (Keegan v. Ireland 1994 18 EHRR 342) and that cohabitation is not essential for family life (Kroon v. Netherlands 1995 2 FCR 28). Nonetheless, under the Convention jurisprudence there must be evidence serving to demonstrate that the relationship concerned had sufficient constancy and commitment to create de facto family ties.

70. In MB v. United Kingdom 22920/93, the head note reads:

> "... family life can extend to the potential relationship between a natural father and his child born out of wedlock. In determining whether family life exists in such a case, relevant factors include co-habitation, the nature of the relationship between the natural parents, and the interest in, and commitment to the child before and after birth on the part of the natural father".

71. In Re H and Re G. 2001 1 FCR 726, the parents had had a relationship over seven years, falling short of co-habitation, but involving their being engaged to be married. Nevertheless, the President held that there were no sufficient exceptional

circumstances to show that the relationship had had "... sufficient constancy to create de facto family ties". Family life had not, therefore, been established.

72. Bearing in mind that the question of family life is one of fact and degree, my view is that the Applicant is unlikely to be held to have made out his case in that respect under Article 8. This likely failure does not however in any way detract from the preliminary decision reached above, as to the appropriateness and need for DNA testing; nor is it to be taken as tying the hands of the Judge who hears the substantive issues of parental responsibility and contact, if he or she considers that this issue (about the existence or not of family life between the applicant, the mother and T) needs to be resolved. He or she will be likely, as I anticipate, to find that the existence (or not) of such family life would at best be only one factor (and one of very small weight) in the resolution of the likely real issues regarding parental responsibility and contact.

CONCLUSION

73. For the above reasons, I accede to the application and make the appropriate order for blood testing.

74. I accept the undertakings offered by the Applicant to the effect that he will not put into the 'public domain' information relating to these proceedings, nor as to T's paternity. This is a serious promise to the Court, breach of which could involve the Applicant being sent to prison.

75. I hope that this will do something to reduce the mother's, and her husband's, understandable concerns as to the way in which they fear the Applicant might behave if the tests should, in fact, turn out to demonstrate that he is, in truth, T's biological father.

76. I am told on behalf of C.A.F.C.A.S.S. that this is the first or one of the first decisions on the amended S21 Family Law Reform Act 1969 and that it may therefore be of benefit for this Judgment to be reported. I will give leave therefore on the usual basis that nothing shall be reported which may identify the parties, or the child, nor where they live.