Neutral Citation Number: [2002] EWCA Civ 383
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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAERNARFON COUNTY COURT
(HIS HONOUR JUDGE ELYSTAN MORGAN)

Royal Courts of Justice
Strand,
London, WC2A 2LL

21 March 2002

B e f o r e :

LADY JUSTICE BUTLER-SLOSS DBE
PRESIDENT OF THE FAMILY DIVISION
LORD JUSTICE THORPE
and
LORD JUSTICE KAY

H & A (Children), Re

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Margaret de Haas QC and Philip O'Neill
(instructed by Messrs Tudor Owen Roberts Glynne & Co of Caernarfon LL55 1AG)
appeared for the appellant
Nicholas Cooke QC and Shan Morris
(instructed by Messrs Elwyn Jones & Co of Bangor LL57 1NT) appeared for the respondent

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HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

THORPE LJ:

1. Mr B appeals, with the permission of this court, Judge Elystan Morgan's refusal of his application for an order that blood samples be taken from the respondent's twins to whose paternity he lays claim. The application took advantage of the amendment of section 21 of the Family Law Act 1969 achieved with effect from 1 April 2001 by the Child Support (Pensions and Social Security) Act 2000. The effect of the amendment was to introduce into section 21(3) an additional clause (b) so that the sub-section provides:

> (3) A blood sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in sub-section (4) of this section –
> (a) if the person who has the care and control of him consents; or
> (b) where that person does not consent, if the court considers that it would be in his best interests for the sample to be taken.

2. This small but significant amendment effectively reversed the effect of the decision of Wall J in *Re O and J (Paternity: Blood Test)* [2000] 1 FLR 418. Judge Elystan Morgan's decision concluded a five day trial that had commenced on 13 September, continued on 20, 21 and 28 September and completed on 8 October. At the final directions hearing on 11 June the time estimate of four hours had been entered. This serious overrun seems to be the result of both incremental growth as each side strove for advantage by the introduction of late evidence and also a tendency to blur the boundaries between Mr B's application for a blood test order and his wider applications for a declaration of parentage under section 55A of the Family Law Act 1986, for parental responsibility, and for contact.

3. On any view this was a difficult case for any trial judge and it has proved no less difficult an appeal. Undoubtedly the case is exceptional on its facts and it is accordingly necessary to record those facts at some length and with some care. Mr and Mrs R are in their mid-forties. They married on 10 May 1975. Mrs R's first born, a son, appeared on 30 July 1975. It was almost 22 years until she gave birth again, this time to twin girls, the subject of the principal application before the judge. They were born by caesarean section one month premature on 30 May 1997. It was common ground that Mrs R met Mr B, who is in his mid sixties, in 1993 and that at some stage in or after 1995 they had sexual intercourse. There was much dispute as to the nature and extent of their relationship until its termination with a bitter quarrel on 4 February 1999. There was also much dispute as to the extent of Mr B's relationship with the twin girls between their birth in May 1997 and the quarrel in February 1999. In resolving these disputes Judge Elystan Morgan rejected the evidence of both, in particular holding that Mrs R's evidence was unacceptable unless independently corroborated. He held that the sexual relationship between them had endured for up to four years from early 1995 to early 1999. He also held that throughout that period there had been a continuing sexual relationship between Mr and Mrs R. Despite their denials he held that there had been both a physical and emotional separation between Mr and Mrs R and held that it pre-dated the commencement of Mrs R's sexual relationship with Mr B. As to the relationship between Mr B and the twins, the judge took a middle path. He accepted that Mrs R had reassured Mr B that he was their father, he accepted that she had sent Christmas cards to Mr B from the twins in 1997 and 1998 and additionally that she had sent him one birthday card and one card for

father's day before the quarrel. He also accepted that she had brought the twins into contact with Mr B both at his home and elsewhere. On the other hand the judge found that Mr R, in ignorance of his wife's adultery had accepted the twins from the day of their birth and had after 1998 become their primary carer whilst Mrs R went out to work. Mr R was, of course, kept in continuing ignorance of the relationship that Mr B maintained with his wife and developed with the twins between May 1997 and February 1999.

4. Mr B's reaction to the quarrel was to issue an application in the county court for contact and parental responsibility. At the first appointment on 31 March 1999 Mrs R challenged his claim to paternity. The result was a consent order for DNA testing, the report to be filed by 30 June 1999 and further directions adjourned to 22 July 1999. Mrs R did not comply with that order, although it is unclear when her change of heart became apparent. The hearing on 22 July was adjourned to 18 August 1999 when the court simply ordered by consent a welfare officer's report on the issues of parental responsibility and contact, no statements without leave and direct contact to Mr B for one hour on alternate Saturdays. Mrs R complied with this last order on 4 September but then refused further compliance. However the court welfare officer observed one period of contact in October and reported in December 1999. Her full and careful report is conspicuous for the absence of any mention of Mr R. Throughout Mrs R is treated as a single mother who had given birth to twins as a result of a three-year relationship with Mr B. A few quotations give the flavour. The opening paragraph reads:

> "The welfare report was ordered to address the issue of contact between the twins and their father."

5. Paragraph 3 gives the background as follows:

> "Mr B and Ms R give differing accounts of their relationship and of Mr B's involvement with the twins. It seems that they had a relationship lasting about three years. The parties did not live together as a couple and since separating early this year, there has been no contact between the children and Mr B."

6. As to Mr B's involvement as a parent, the welfare officer summarised Mrs R's contentions as follows:

> "Ms R does not accept that Mr B was an involved parent. She says that she has always been their primary carer and that he saw the girls when she herself was also present. Ms R says that he only cared for the children for brief periods and that he has never had to attend to their physical needs."

7. Later in December 1999 there was a further consent order, effectively giving effect to the welfare officer's recommendation that there should be a period of indirect contact as a means of helping the twins to establish an awareness of their father. The order was for monthly communication by cards, letters and gifts with a review after six months.

8. One of the extraordinary features of the case is that throughout this year of litigation Mrs R had concealed its existence from her husband. Her deceit was uncovered when

her husband accidentally came across court papers in her bag in early 2000. It is unnecessary to record the interlocutory orders made in the ensuing twelve months. The case came under the control of Judge Elystan Morgan. He intended the trial limited to the issue of paternity to be held in March 2001. However the fixture had to be adjourned, thus allowing Mr B to take advantage of the amendment of the Family Law Act 1969 that came into force in the following month. Equally it is unnecessary to record the interlocutory stages between the loss of the March fixture and the ultimate trial that commenced on 13 September. However it is necessary to record that on 18 January at a directions hearing Judge Elystan Morgan had ordered Mr R to file and serve a statement providing information and details relevant to the issue of paternity. The statement was dated the 3 March 2001. The following extract demonstrates the continuing inability of Mrs R to be candid with her husband. In paragraph 11 he said:

> "I do not doubt that I am the biological father of the twins. I do not know why this application has been made by the applicant. I am aware that, on one occasion only, the applicant had sexual intercourse with my wife. However this was many months before the date of conception of the twins."

9. However Mr R filed a subsequent statement on 13 September, the first day of the trial. In his second statement he forcefully asserts his inability to continue as primary carer for the twins should the court order a test that established Mr B's paternity. In that event he states his intention to forsake Mrs R and the twins. The second statement does not reveal any extension of his understanding of the background. That is not surprising since Mrs R's primary position at the trial was that she had only had sexual intercourse with Mr B once in 1995 and on two occasions in 1996 shortly before the probable period of conception. It may be the pressures of litigation also account for the surprising fact that even by the date of trial their son was ignorant of the litigation and the issues that it raised.

10. I concentrate on the evidence of Mr R since he made a very favourable impression on the judge. The judge not only commended his personality but also accepted his evidence save for his denial of a prior separation from his wife. His oral evidence as to his ability to cope with a scientific investigation was given in chief on 28 September. Over the course of two or three pages of transcript counsel obtained ample support for the written statement that he could not live with the knowledge that Mr B was the father of the twins. He also expressed his assessment of the probabilities, presumably on the basis of the facts then known to him. He said that he was 99% sure that he was the father of the twins. He therefore put the risk of Mr B being the father at 1%. That assessment seems to me to indicate some understandable lack of realism since by then he must have known of his wife's admission of two acts of sexual intercourse with Mr B shortly before the probable period of conception.

11. He was cross-examined and re-examined on these issues on the final day of the trial. I suspect that the extent to which these issues would dominate outcome was not fully appreciated by counsel for Mr B, Mr O'Neill, who was content with the following exchange:

"Q – You see, the reason you are upset is not necessarily the thought of blood tests being ordered, it is because of the deceit that has been perpetrated upon you, isn't it?
A – No. If there was any chance, if there was only a 1% chance that Mr B is the father of these children it would impair everybody's lives, including my own. I couldn't act – if it is true then that Mr B is the father of G and L then I don't – well, I'm almost certain that I couldn't cope with that at all and I would have to let the family unit go because I couldn't look after somebody else's children, if you like."

12. When Miss Morris for Mrs R sought to re-examine Mr O'Neill protested but was overruled. In her re-examination Miss Morris obtained these answers:

"Q – But if the court orders that there be DNA testing of the girls and it is discovered that Mr B was their father ....
A – Yes
Q - ....what would your attitude be then?
A – It would have to change. I don't think I could cope."

13. I turn now to the judgment. I have already recorded the judge's principal findings of fact in a case of substantial conflict. As the judge remarked it was not a case where the conflict could be reconciled by a finding that the parties had different impressions or different recollections of the same events. They could not both be doing their honest best. The judge had to reject the evidence of one or both. In this difficult situation he fixed on Mr R as his best guide to the truth. He accepted Mr R's statements as to what had happened (with the small exception that I have recorded). Significantly he also accepted Mr R's statements as to what he would do if his conviction as to his paternity were destroyed. From there he proceeded to reason his conclusion.

14. The judge turned to consider the essential question set by the application under section 21 of the Family Law Act 1969, namely, would it be in the best interests of the twins for the DNA test to be conducted. He properly referred to the leading case of *S v McC; W v W* [1972] AC 24. He referred to Article 7 of the United Nations Convention. That led him to the general proposition that it was in the best interests of the twins to have the certainty of scientific truth, all other things being equal. He continued by asking himself what would be the effect of the order on the R marriage. His answer was that proof that Mr R was the father would be of little value, since he held that conviction anyway. However if the test demonstrated that Mr B was the father then:

"I believe that .... would have a disastrous effect upon the family and that Mr R is more likely than not to leave the family. I was greatly impressed by what he said, that if that were so he would be looking into the eyes of the children and seeing the eyes of Mr B. He is, I think, that sort of person who would be crushed by such an experience."

15. The judge also considered the risk of local gossip and challenge should the issue be buried without proof. He assessed that risk in these words:

> "I consider in the circumstances that if no test is ordered there is a fundamental unlikelihood of the mater ever becoming a real talking point to the degree that there is a danger that the children themselves will get to know of it. Of course one can never be sure about that."

16. In the final paragraph the judge held the balance. Since this is the crucial paragraph I cite it in full:

> "The balancing exercise therefore that I have to conduct is to weigh the advantage of scientific truth against uncertainty, to consider the interest that the community has in establishing such certitude on the one hand and on the other hand the possible, and I believe, my finding, probably disastrous disintegrative effects of a finding that Mr B in fact is the father. I bear in mind my impressions in relation to all the other matters. This to my mind is a case very different from that of *Re H* and *Re T* that I have mentioned. In *Re H* the mother's husband had undergone a vasectomy, in *Re T* the husband suffered a very low sperm count and there was the near certainty that he was infertile. This is a very, very different case and in all the circumstances, conducting that balancing exercise as carefully as I can, I come to the conclusion that the application for tests should be dismissed."

17. Miss de Haas QC for the appellant criticises the judge's conduct of the balancing exercise. She submits that he underplayed likelihood of Mr B being the father and failed to apply the authorities that were binding on him. She submits that he underplayed the extent to which paternity of the twins was already in the public domain and thus the risk that they would be confronted with the challenge in what could be very damaging circumstances. Above all she criticises the judge for significantly overplaying the risk that DNA testing would lead to the breakdown of the R's marriage.

18. In a spirited defence of the judge Mr Cooke QC emphasises the clear findings as to Mr R's credibility and personality at the end of a five-day trial. The judge twice expressed his conviction that if science proved that Mr B was the father the consequence for the twins would be disastrous. At about five years of age they would lose their psychological father and primary carer. It would not only be contrary to their best interests; it would be a cruel and disastrous blow.

19. The resolution of these competing submissions has not been easy since clearly this court must not presume to know better than so experienced a trial judge who has given much time and care to the trial of an exceptionally difficult case. However in the end I am persuaded that there are substantial flaws in the judge's assessment of the individual factors that must be brought into the essential balancing exercise.

20. First I cannot accept the validity of the judge's assessment that the issue was and would remain a family secret. There was clear evidence that Mr B's possible paternity of the twins had been the subject of gossip at Mrs R's place of work. Second Mr B had obviously made his convictions known amongst his family and friends. Third the issue had been the subject of proceedings in the local county court already on foot for three years and by no means completed. The respondent's skeleton argument informed us:

> "The judge indicated that the matter should be listed for further directions and invited the parties to file witness statements from third parties commenting upon the nature and duration of the parties' relationship. The purpose of such evidence being to assist the court in determining the issue of paternity at a later stage."

21. Accordingly during the course of the hearing we invited the parties to submit a list of those witnesses who might be called on the parentage application. Perhaps not surprisingly the appellant's counsel submitted a long list of names and the respondent's counsel submitted none. That perhaps illustrates the risk that adversariality can lead to excess and then to increasing reverberations that extend knowledge beyond the confines of the case. Thus it is necessary to introduce into the balance the advantages of establishing scientific fact, which allows for planned management, against the risks of perpetuating a state of uncertainty that breeds gossip and rumour, with its risk that at some unpredictable future date the twins might be exposed to a either a malicious taunt or an unintended indiscretion with shocking consequence.

22. Second I am in no doubt that the judge fell into error in his seeming acceptance of the estimation of Mr and Mrs R that the real chance of Mr B having fathered the twins was minimal or 1%. The judge said:

> "The danger here would be if the remote chance of Mr B being shown to be the father were to be the subject matter of a scientific finding."

23. But that assessment was quite inconsistent with his prior finding that Mrs R had been having sexual intercourse with both men not only during the probable period of conception but for many months on either side of it. That finding surely compels the conclusion that Mr B had a 50% chance of paternity, absent other evidence. This factor taints the judge's conclusion that the test offered no advantage to the Rs since it could only confirm what was already a reasonably assumed fact.

24. Third and perhaps of the greatest significance are my misgivings over the judge's strongly expressed assessment that to order the test would be to drive Mr R from the family. Mr Cooke quite rightly laid great emphasis on this factor, which he submitted was an unassailable finding of fact. I am not sure that it holds that status. The judge himself cast a question mark over the status of his findings when he said:

> "I stress that as far as all these matters that I am considering now are concerned, I am not making formal findings of fact but giving the impression which I currently hold, as I must, as a background to the considerations which will apply to the question of whether or not blood tests should be ordered."

25. Beyond that a distinction must be drawn between a finding of fact as to a past happening and a judicial assessment of the probability of a future happening. Such an assessment must rest upon a sound evaluation of the relevant present facts and circumstances. The judge proceeded on the basis that the marriage between Mr and Mrs R was sound at the date of trial. Thus the children's loss of the father and primary carer from such a family would be the greatest deprivation. His assumption is expressed in this passage:

> "The marriage of Mr and Mrs R has lasted 26 years. I have no doubt that it has had its hard knocks, somewhat harder than either Mrs R or Mr R were prepared to acknowledge to this court. But it has survived and I find at the moment that it has all the appearances of being a warm and loving relationship."

26. That does seem to me too simplistic a starting point. Mrs R had grossly deceived her husband both as to her relationship with Mr B and also in concealing from her husband both the proceedings and the contact between the twins and Mr B both before and after the commencement of the proceedings. Her continuing lack of candour is illustrated by Mr R's statement of March 2001. Even at the trial the judge held "There was, and I believe there still is, active concealment of many vital facts on the part of Mrs R as far as Mr R is concerned ....".

27. Thus whatever might have been the appearances, surely the reality was that Mr R was on an uncompleted journey of discovery of the truth. Major adjustments still had to be made. There was much with which he had yet to come to terms, including a more realistic acknowledgement of the chances that Mr B was the father of the twins. Mr and Mrs R had much to reconcile if their marriage was to endure. The complex processes which would have to continue post judgment might equally well be assisted by certainty, which may bring relief or which may alternatively at least excise doubt and suspicion. Unpalatable truth can be easier to live with than uncertainty.

28. In addition to my misgivings as to whether the necessary balancing exercise was correctly performed, I doubt whether the judge gave sufficient weight to the importance of certainty. Over thirty years ago in his speech in *S v McC* Lord Hodson said:

> "The only disadvantage to the child which is put forward as an argument against the use of a blood test, not for therapeutic purposes but to ascertain paternity, is that the child is exposed to the risk that he may lose the protection of the presumption of legitimacy.
> Without seeking to depreciate the value of this presumption it is, I think, fair to say that whatever may have been the position in the past the general attitude towards illegitimacy has changed and the legal incidents of being born a bastard are now almost non-existent. I need not dilate upon this, for I recognise that it is impossible to say that there is no stigma of bastardy even though it be no more than the indirect stigma of the imputation of unchastity to the mother of the child so described. On the other hand, it is difficult to conceive of cases where, assuming illegitimacy in fact, it is to the advantage of the child that this legal status of legitimacy should be preserved only perhaps to be displaced by firm evidence of illegitimacy decided later in his or her life from a blood test.
> The interests of justice in the abstract are best served by the ascertainment of the truth and their must be few cases where the interests of children can be shown to be best served by the suppression of truth. Scientific evidence of blood groups has been available since the early part of this century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity. Why should the risk

be taken of a judicial decision being made which is factually wrong and may later be demonstrated to be wrong?"

29. Those principles have been consistently applied in subsequent cases, including *Re H (A Minor)(Blood Tests: Parental Rights)* [1996] WLR 506 and *Re T (A Child)(DNA Tests: Paternity)* [2001] 3 FCR 577. The judge sought to distinguish those two authorities in his concluding paragraph, which I have cited above. It draws the distinction that in those two cases there were serious doubts as to the husband's procreative capacities. I do not consider that that factual distinction begins to displace the points of principle to be drawn from the cases, first that the interests of justice are best served by the ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences. It seems to me obvious that all that Lord Hodson expressed in the passage that I have cited applies with even greater force and logic in a later era. First there have been huge scientific advances with the arrival of DNA testing. Scientists no longer require blood, thus removing what for some is the unbearable process of its extraction. Of even greater importance is the abandonment of the legal concept of legitimacy achieved by the Family Law Act 1987.

30. The judge made it plain that in the absence of scientific evidence then the issue was to be decided on the application of 'a very important, well established principle .... that is, the presumption of the legitimacy of children born during the currency of the marriage'. He went on to refer to the case of *Serio v Serio* [1983] FLR 756. Twenty years on I question the relevance of the presumption or the justification for its application. In the nineteenth century, when science had nothing to offer and illegitimacy was a social stigma as well as a depriver of rights, the presumption was a necessary tool, the use of which required no justification. That common law presumption, only rebuttable by proof beyond reasonable doubt, was modified by section 26 of the Family Law Reform Act 1969 by enabling the presumption to be rebutted on the balance of probabilities. But as science has hastened on and as more and more children are born out of marriage it seems to me that the paternity of any child is to be established by science and not by legal presumption or inference. Were the judge's order to stand in the present case the consequence would be a long and acrimonious trial of the paternity issue when, in the absence of the only decisive evidence, each side would resort to evidence of marginal or doubtful worth in the determination to prevail. Such a development would be wasteful of both legal costs and judicial time.

31. As I have said my profoundest misgiving stems from the judge's confidant conclusion that to grant the application would be to destroy the twin's family. However I do not consider that the evidence available to this court permits that very serious consequence to be dismissed as fanciful or even sufficiently unlikely as to be excluded as a factor to be brought into the balance. I conclude that the appeal must be allowed but that the application must be remitted for re-trial. That is not so dire an outcome for the parties as usual since it offers the opportunity to transfer not only the remitted application but all outstanding applications to the Family Division for trial by a judge of the Division. It seems to me important that he should at the earliest opportunity take control of the proceedings establishing clear directions and boundaries by orders and directions designed to bring these proceedings to a close as swiftly and economically as possible. It is in my judgment essential that he should

have within the range of orders available to his discretion an order under section 21(3)(b). I would also invite CAFCASS Legal to arrange for the separate representation of the twins in the continuing proceedings.

KAY LJ:

32. I agree.

PRESIDENT:

33. I also agree.

Order: appeal allowed and orders below set aside; applications to be transferred to the High Court for hearing by a judge of the Division; applications to be listed for directions as a matter of priority; children to be joined as parties to the proceedings and an officer of CAFCASS to be invited to represent the children; no order as to costs save detailed public funding assessment of all assisted parties' costs.
(Order does not form part of the approved judgment)