Neutral Citation Number: [2008] EWCA Civ 499
Case No: B4/2008/0491

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MILTON KEYNES COUNTY COURT
(HIS HONOUR ROGER CONNOR DL)
(LOWER COURT No: MK07P01823)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 16th April 2008

Before:

LORD JUSTICE RIX
and
LORD JUSTICE WILSON

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IN THE MATTER OF P (A Child)

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Ms Claudia Lorenzo (instructed by Pictons, Milton Keynes) appeared on behalf of the Applicant "Mother".
Mr Andrei Szerard (instructed by Adams Moore Family Law, Milton Keynes) appeared on behalf of the Respondent "Father".

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Judgment(As Approved by the Court)

Lord Justice Wilson:

1. A mother applies for permission to appeal against a direction made under s.20 of the Family Law Reform Act 1969 by His Honour Roger Connor DL, sitting as a deputy circuit judge, in the Milton Keynes County Court on 5 February 2008. Today's hearing takes place pursuant to a direction made by Lord Justice Wall on 17 March 2008 that the

mother's application be adjourned to be considered at an oral hearing, on notice to the respondent, Mr W, and on the basis that, were permission granted, the substantive appeal should be heard forthwith.

2. The proceedings relate to a girl, namely P, who was born on 31 August 1997 and who is thus now aged ten years and eight months. P resides with the applicant mother and has always done so; nor is there any issue but that she should continue to do so. The mother cohabited with Mr W in 1996 and 1997, i.e. at the time of P's conception; and they continued to live together until 1 January 1998. Since then they have lived separately. Both during the first four months of P's life, when the mother and Mr W continued to cohabit, and subsequently, there was a natural understanding between the mother and Mr W that he was P's father. Following the separation, contact between P and Mr W continued, sporadically, until about 2002; thereafter it ceased until 2007. During those years P was always given to understand that Mr W was her father. No alternative possibility as to her paternity was canvassed.

3. More recently, however, Mr W has raised doubts as to whether he is P's father and has belatedly made allegations that, at around the time of P's conception, the mother may also have been having sexual relationships with other men. Such is the context of the deputy judge's direction under proposed challenge in this court: he directed, pursuant to s.20 of the Act of 1969, that saliva samples be taken from Mr W, from the mother and from P, in order to ascertain whether such showed that Mr W was, or was not, excluded from fatherhood of P.

4. At the hearing before the deputy judge, the mother, who, like Mr W, was represented by counsel, opposed the direction. Although she protested that she had no doubt that Mr W was P's father, and indeed that she had not been having any sexual relationship other than with Mr W at the time of conception, her opposition was founded upon P's alleged feelings in relation to the proposed saliva tests. I am not sure whether the mother went so far as to say that, for the purpose of s.21(3), she, being the person with care and control of P, would not consent to the taking of a saliva sample from P even if such was directed; but she certainly opposed the making of any direction.

5. In July 2007, following the period of about five years from 2002 in which it had been absent, contact between P and Mr W revived. The revival appears to have been at the request of P. But, for reasons which are in dispute, the contact broke down within a month or two. On any view there were tensions between Mr W and the mother. By letter dated 19 September 2007 solicitors for Mr W wrote to her, protesting at the acrimony between them and alleging that she was responsible for it. They also alleged, being an allegation which I believe had never previously been raised, that, although Mr W would like to continue to have contact with P, he had become very concerned that he was not her father; and by the letter the solicitors asked the mother to agree that DNA tests be undertaken in order to establish his paternity.

6. On 3 December 2007, in the absence of any response by the mother to the letter (and it had been unwise of her not to respond to it in one way or another), Mr W issued an application in the county court under the Children Act 1989 for a specific issue order that DNA tests be conducted in order to establish his paternity and, were it to be established, for a defined contact order. Most unfortunately the process-server employed by the solicitors for Mr W to deliver the application and supporting documents personally to the

mother at her home saw fit to put the documents through her letterbox otherwise than in an envelope; and the mother says that it was P who raced to the door, collected the documents and read a substantial part of them prior to the mother's realisation that they were court documents and that P should not read them. The mother says that P had quickly realised that Mr W was raising doubts about his paternity of her and was seeking a direction for DNA testing as well as a contact order in relation to her; and that P had read such material in the documents as was said by Mr W to found the doubts about whether, at the time of conception, the mother's relationship with him had been an exclusive one. The mother alleges, and no one can deny, that P was extremely upset by reading the documents and told the mother that she did not wish under any circumstances to undergo DNA testing or to resume contact with Mr W. Mr W's solicitors assured the deputy judge that they would take all reasonable steps to ensure that no such documents were served so inappropriately on their behalf in future.

7. The basis of the mother's opposition at the hearing before the deputy judge was, therefore, the clear opposition of an intelligent, ten year old girl, to DNA tests, which of course would have to include the taking of a sample of saliva from her, for the purpose of establishing Mr W's paternity of her or otherwise. Furthermore the mother has placed fresh evidence before us, which we have read de bene esse in which she has described P's distress on 5 February 2008, when informed of the deputy judge's direction; in which she has spoken of P's continuing distress on 6 February, when she was unable to attend school; and in which she has spoken of a degree of abnormally quiet, distant behaviour on the part of P to date, symptomatic of worry about the present proceedings and in particular about the deputy judge's direction. Indeed Ms Lorenzo, who has, by her submissions, so well represented the mother in court today, tells us on instructions (following the mother's late arrival in court today, being a lateness which was not her fault) that even this morning P has exhibited clear signs of distress and unsettlement by reason of the continuing proceedings and of the fact, that as things stand, the direction subsists for the testing to take place.

8. In his short judgment, of which there is an approved transcript, the deputy judge recited P's views that she did not want to participate in any such testing as might establish her paternity; and he stated that her opinion was one which he ought not to ignore but that it was far from being determinative of the application.

9. Then the deputy judge addressed a decision of Hedley J, namely *Re D (Paternity)* [2006] EWHC 3545, [2007] 2 FLR 26, upon which Ms Lorenzo had placed much reliance in the argument before him. In *Re D* Hedley J was confronted with an application for DNA testing in order to establish the paternity of a boy, D, of very much the same age as is P. The judge described D as a troubled and angry person who had had a chequered life and, in particular, following exclusion from primary school, was in a specialist unit in secondary school and was subject to statementing procedures. The fact was that his mother had largely disappeared from his life. D had been brought up to consider X as his father and, although his contact with X had been sporadic, a crucial feature, so it seems to me, was that D had been brought up, almost throughout the ten years of his life, by X's mother, thus by a woman whom D understood to be his paternal grandmother. Doubts about his paternity had, as in the present case, been communicated to D in a most unfortunate manner, namely in that case by a visit to him by Y, who was introduced to him by Z as being his father. Y was thus the applicant for DNA testing. The decision of Hedley J was to direct DNA testing in order to establish D's paternity; to direct that Y

should provide his sample forthwith and that it should be stored; but to stay the direction insofar as it related to the taking of a sample from D himself. The basis of the decision was that the boy was strongly opposed to testing and that, while in the long term it was in his interest for the issue of paternity to be resolved, D was presently at a highly emotive stage of his life, at which he should not be further troubled by the imposition of a test to which he was so opposed. Nevertheless Hedley J said, at [22], as follows:

"I immediately acknowledge … that the general approach is that it is best for everyone for the truth about a disputed paternity to be known. The classic statement of that is to be found in the judgment of the Court of Appeal in *Re H and A (Children)* [2002] EWCA Civ 383, [2002] 1 FLR 1145. I acknowledge at once that that should be the guiding principle in all the cases with which the court deals. It has obvious merit, not least the general proposition that truth, at the end of the day, is easier to handle than fiction and also it is designed to avoid information coming to a young person's attention in a haphazard, unorganised and indeed sometimes malicious context and a court should not depart from that approach unless the best interests of the child compel it so to do."

10. In his judgment in the present case the deputy judge distinguished *Re D* on the basis that D had emotional, educational and behavioural problems such that the imposition of a test upon him against his wishes might very well have a significant adverse effect upon him; and that by contrast, P, though opposed to the test and upset by the prospect of it, had no analogous vulnerability. In my view such was a valid basis for the deputy judge's distinction between the two cases. In my opinion, however, and as in the course of the argument today I have sought to suggest to Ms Lorenzo, the fact that in that case D had spent almost his entire life in the care of X's mother conferred upon that proposed enquiry into paternity a complex profundity for D which has no parallel in the present case. For D's life had centred around his established home with the woman whom he understood to be his paternal grandmother, and there was a risk that the enquiry into paternity might expose, as fallacious, that fundamental assumption upon which his life had been constructed.

11. The deputy judge therefore proceeded to hold that, in that questions had arisen about P's paternity and that, as my Lord has stressed in the course of today's argument, P already knew that they had arisen, it was undoubtedly consistent with her welfare and in her interests that the matter should be put beyond doubt by the taking of DNA tests. I have to say that, when the revised grounds of appeal drafted by Ms Lorenzo were brought to our attention this morning, I was surprised to read her assertion that the deputy judge had failed expressly to address whether it would be in P's best interest for a sample to be taken; for analysis of the judgment was that he had indeed expressly addressed that question and had reached an affirmative conclusion.

12. I am not sure that, in addressing the question of P's welfare as he did, the judge addressed it in quite the correct legal way. For he said:

"The statute provides that I can only give such a direction if I am satisfied that doing so would accord with the best interests of the child."

The deputy judge was there referring to s.21(3)(b) of the Act, which seems to me to operate at a stage subsequent to the giving of a direction under s.20, namely the later stage at which the person with care and control of the child may, however ill-advisedly,

withhold her consent to the taking of a sample from the child in accordance with a direction previously given; at that stage the court can proceed to order that a sample be nevertheless taken from a child only if it considers that it would be in the child's best interests. At the stage of considering whether to give a direction under s.20, the child's welfare seems to me to enter the equation on a slightly different basis. In *Re H (Paternity: Blood test)* [1996] 2FLR 65, at 77E-H, Ward LJ, in this court, held that the court ought to permit a blood test of a child unless satisfied that such would be against his interests and that, save to that extent, considerations as to the welfare of the child, albeit relevant, were not paramount. Let me hasten, however, to concede that these are subtle distinctions; and that, were the deputy judge to have been entitled to conclude (as in my view he was) that it was in P's interests that the test should be undertaken, such would be a conclusion which would render his direction in effect impregnable in this court.

13. I cannot help thinking that it would have helped P to have been able to discuss the issues raised by Mr W's application with an independent professional person. In so commenting, I make no aspersion whatsoever on the quality of the care given to P by the mother, about which no doubts have been raised in these proceedings. I make that comment because I am not clear quite how P's mind has been working. I suspect that her starting-point is anger that Mr W has questioned his paternity of her and that her finishing-point is a simple wish to block the course which he asks to be taken in consequence of his recently expressed doubts. It is, for the general reasons eloquently expressed by Hedley J in *Re D*, and endorsed by the deputy judge in the circumstances of this case, in P's interests that, now that, for whatever reason and however belatedly, these questions have been raised, they should be definitively answered by recourse to the best available evidence.

14. In the course of her argument this morning, Ms Lorenzo has prayed in aid the "no order" principle located in s.1(5) of the Children Act 1989. The sub-section provides, of course, that, where a court is considering whether or not to make one or more orders under the Act with respect to a child, it shall not make the order unless it considers that doing so would be better for the child than not to make an order at all. I am certainly not prepared to airbrush s.1(5) out of this case on the basis that the judge's direction was made under the Act of 1969 rather than under the Act of 1989: I would be perfectly prepared to endorse the proposition that a direction for testing under the Act of 1969 should not be made unless the court was persuaded that it would be better for the child to make it than not to make it. Where I part company with Ms Lorenzo is with her suggestion that it would be better for P, in all the circumstances, that this direction should not be made. There is one particular problem about that submission, namely that, if the direction for testing were not made, it is hard to see how Mr W, the mother and in particular P, could get on with their lives on a settled basis. In particular Mr W, as I have said, is seeking a defined order for contact. It seems to me that determination of the issue of paternity is a prerequisite to the satisfactory resolution of the issue of contact. Were tests to establish that he was not P's father, Mr W would withdraw his application for contact. Were they, however, to establish that he is her father, the application for contact could proceed at any rate upon the terra firma of his paternity of her; but the court would then have to wrestle with the difficult issues raised by his unfounded expressions of doubt about his paternity and the understandable anger of the mother and of P that he should belatedly have expressed them.

15. When in argument I put to Mr Lorenzo my concern about the potential stalemate of the application for contact in the absence of testing, her answer was that, in the circumstances, contact could not in any circumstances now take place. That is her client's perception. Those are her instructions. Nevertheless that is only one side of the argument. The father will have another. Indeed as yet, for obvious reasons in the light of the continuing uncertainty as to paternity, there has been no enquiry into the contact issues conducted by a CAFCASS officer.

16. For all those reasons I am of the view that there is no basis for concluding that the mother has a real prospect of persuading us that, in making his direction, the deputy judge exceeded the ambit of the discretion conferred upon him by s.20 of the Act of 1969; and I would refuse her permission to appeal.

Lord Justice Rix:

17. I agree with my Lord's disposal of this application and with the reasons which he has given for it. So this application for permission to appeal is refused.

Order: Application refused