RE D (PATERNITY)
[2006] EWHC 3545 (Fam)

Family Division

Hedley J

20 October 2006

Paternity – Investigation by scientific testing – Child's own opposition – Best interests – Indefinite postponement of testing

The teenage mother had consistently identified a particular man as the father of the child; the man had recognised his paternity of the child, and also of the mother's two other children. Shortly after birth, the child had been placed with the man's mother on the basis that she was the child's paternal grandmother; eventually the grandmother figure had been granted a residence order in her favour. The child had had occasional contact with the man believed to be his father but had had very little contact with the mother, and had always relied on the grandmother figure for parenting. Two other children lived with the paternal grandmother, one child believed to be the child's full sibling, and a cousin. The child had had a troubled childhood; he had a number of educational and behavioural problems and the evidence of the social worker and the guardian was that he was an angry young person struggling to deal with various difficulties of his own. During a visit to the child on his tenth birthday, the applicant, who had undoubtedly known the mother at about the time of conception, was presented by a third party to the child as the child's real father. Shortly afterwards the applicant sought residence and contact orders, and a parental responsibility order. The child's adamant response was that he wanted nothing to do with the applicant, that the applicant was not his father, and that he would not participate in scientific testing. The residence was withdrawn, but the applicant still sought to establish his paternity by scientific testing under s 20 of the Family Law Reform Act 1969 (the 1969 Act).

Held – ordering scientific testing to establish paternity, but staying the order in relation to the child without limit of time but with liberty to restore –

(1) There were reasonable grounds for believing that the applicant might be the child's father, sufficient to warrant investigation by scientific testing (see para [10]).

(2) Although the child was not competent in the *Gillick* sense, he did understand the essence of the issue between the adults, what testing meant and what its conclusions might be; his strong opposition to scientific testing was his own, and the whole issue of paternity was a big issue at a highly emotive stage of his life. The applications had to be understood in the context of the child's life; they had challenged the only emotional security the child had ever known (see paras [15], [16], [26]).

(3) Under s 21 of the 1969 Act the court could exercise its compulsive powers to override a lack of consent to the tests only if it would be in the child's best interests for the sample to be taken. It was in the child's best interests to know the truth about the disputed paternity, and to know sooner rather than later, as this was an issue that he would neither forget, nor be able wholly to repress. However, it was not in his best interest to press the issue now, given the other turbulence in his life and his deep resistance to testing (see paras [21], [28]).

(4) The court directed that the applicant provide samples to be stored, and made the order for a sample be taken from the child, but stayed that order without limit of time but with liberty to restore. As the obtaining of such a sample was strongly in the long-term interests of the child, this approach had the effect of securing fairness to the man whilst protecting the position of the child in terms of removing pressure from him at the present time (see paras [29], [30]).

(5) The guardian was to see the child, and explain that the issue of paternity should not be indefinitely put off, and that, in the end, truth was easier to live with than

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doubt, but that in recognition of the pressures facing the child, the court did not wish to ask the child to do anything in this regard until he felt ready to do so. If at any stage the child agreed to provide a sample and was tested, it would be the obligation of either the social worker or the guardian to inform the applicant of the results (see paras [31], [32], [34]).

Statutory provisions considered

Family Law Reform Act 1969, Part III, ss 20(1), 21(3)(b)
Children Act 1989, Part II, ss 1, 4, 8, 10(9)

Cases referred to in judgment

Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security [1986] AC 112, [1985] 3 WLR 830, [1986] 1 FLR 224, [1985] 3 All ER 402, HL
H and A (Children), Re [2002] EWCA Civ 383, [2002] 1 FLR 1145, [2002] All ER (D) 331 (Mar), CA
Wyatt v Portsmouth NHS Trust [2005] EWCA Civ 1181, [2005] 1 WLR 3995, [2006] 1 FLR 554, CA

Jonathan Cohen QC and *Lucy Cheetham* for the applicant
Joanna Dodson QC for the grandmother
Teertha Gupta (CAFCASS Legal Services) for the guardian ad litem

Cur adv vult

HEDLEY J:

[1] This case concerns the future of a young man, called T, who was born on 2 July 1995, so he is now 11. He lives with Mrs D who believes herself to be, and is believed by the family to be, the paternal grandmother of T. I express it like that for reasons that will become apparent. In Mrs D's household there also live two other boys – J, who is 11 and who is a cousin of T, and M, who is 10 and who is again believed to be a full sibling of T.

[2] The case comes before me because of applications brought by Mr VE who claims to be the father of T. The matter started with applications for orders under s 8 of the Children Act 1989 for residence and contact and an application under s 4 for parental responsibility. It is now common ground that the application for residence should continue no further. Mr E has sought permission to withdraw that application and that permission is granted. If the application is not withdrawn it will be summarily dismissed.

[3] That leaves the application for contact and for parental responsibility. Both those applications in slightly different ways raise the whole issue of paternity, for if Mr E is not established to be the father of T the court has no jurisdiction to grant him an order for parental responsibility and he is not entitled to apply as of right for a contact order, but would require leave to do so under s 10(9) of the Children Act 1989. Given that state of affairs, Mr Jonathan Cohen QC, who has acted on Mr E's behalf, has very properly restricted his application at this stage to one under Part III of the Family Law Reform Act 1969 (the 1969 Act), that is to say for scientific testing of samples with a view to establishing whether or not he is in fact the father of this child.

[4] There was some debate about the correct form of proceedings, but for reasons that will become apparent when I turn to consider the law in a little more detail, I am satisfied that I have the necessary jurisdiction to make

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orders under Part III without requiring any formal application for a declaration of paternity to be made. Whether that is how the case should ultimately proceed can be determined as and when the outcome of any scientific tests are known.

[5] Given that that was the way in which the case developed, and a development with which I have to say I fully agree, the first issue that arose is whether there is a sufficient evidential basis made by the father to justify a serious consideration of an application under Part III of the 1969 Act. I heard that effectively as a preliminary issue with oral evidence from Mr E and Mrs D and the submissions from counsel. At the conclusion of that part of the case I indicated that I was satisfied that such a basis existed and that I would give my reasons for that view in giving judgment on the overall application. Accordingly, I turn to my reasons for that conclusion.

[6] T would have been conceived in the autumn (and probably the October) of 1994. Mr E says that he was at that stage in a relationship with the mother, the mother being a lady called AS. At that time he would have been 16 and she would have been 15. Both were in fact looked after by the local authority. The mother's position appears to be that she acknowledges that she knew Mr E at that stage, but denies that any sexual relationship occurred between them. The mother says that the father of T is AD who is a son of Mrs D. AD has recognised that he is the father of T and, indeed, he had two other children by AS, one of whom, M, lives with Mrs D. It is right to say that neither AS nor AD have given evidence before me nor have they formally participated in these proceedings.

[7] At the outset of the hearing the parties sought and obtained a disclosure order in relation to the care home agency's records for the relevant period of the autumn of 1994. An officer kindly attended and produced the records. They were inspected by the parties and a brief schedule of the material entries was made available to me. That demonstrates that in September there were meetings between Mr E and the mother. There was clearly communication between them in November. There is clear evidence that Mr E was often away from the care home without indicating where he was going and the broad sweep of the records confirms that the parties knew each other, telephone calls and the like; that the parties had met with each other, including spending a night together, and are consistent with the account of Mr E of a relationship existing at the time. They do not help, of course, on the crucial issue of whether or not that relationship included a sexual relationship.

[8] I heard Mr E give evidence. I was disposed to accept what he told me, at least to the extent of making it reasonably arguable that he may have been in a sexual relationship at or about the time of conception. That does not remotely establish by itself that he is the father because it is equally possible that the mother was also in a sexual relationship with AD at the time and the mother's general background and antecedents do not preclude that as a serious possibility.

[9] That was all a long time ago. Mr E says that he knew nothing of T's existence until 2003. He actually did nothing to advance the matter until the summer of 2005. His explanation for that delay is threefold. First, he says that it took quite a long time, as it were, to get his head around the implications of what he had been told. Secondly, he suffered a serious accident in early 2004

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which diverted his attention. Thirdly, he made a trip to the United States to meet with the person whom he had been led to believe was his father, met the person, enjoyed the experience and subsequently discovered from his mother that the man was not his father at all. In those circumstances I do not find it terribly difficult to accept that there would have been a high degree of confusion in his own mind and that the delay does not tell me anything adverse to the case that Mr E wishes to advance before the court. It may have other implications, but it does not impede the basic assertion that he has reasonable grounds for asserting that he may be the father of T.

[10] It was for those reasons that I concluded that there were reasonable grounds for believing that the applicant may be T's father, sufficient to warrant investigation by scientific testing if asked so to do.

[11] That then sets the scene from the adult point of view, but in this case it is also very important to set the scene from T's point of view because many of the matters to which I have referred have no meaning to him and matters which have serious meaning to him will not have been known to Mr E and so it is important to set out the position as he would perceive it.

[12] The stark reality is that T has been cared for during his life neither by a mother nor by a father, but by Mrs D. He has had contact with the man whom he believes to be his father from time to time, but it appears that it does not follow any fixed or consistent pattern. The mother, according to Mrs D, and I have no doubt Mrs D is right about this, has not seen T for a very long time.

[13] The truth of the matter is that he was placed as a baby with Mrs D, his placement having been secured by a residence order in 1996. She has cared for him ever since and she represents for him his rock of emotional security.

[14] But life has not been easy for him or for Mrs D's family. In April of 2005 the children were registered by the local authority social services on the Child Protection Register under the category of neglect. It is unnecessary and invidious for me to seek to explore anything of how that came about. I simply record it as indicating that T will have been for some little time before then in troubled waters.

[15] Shortly after that in May 2005, that is to say when he was still short of his ninth birthday, he was permanently excluded from primary school. He was between then and July 2006 attending part-time at a supported learning unit. In September of this year he went to secondary school, but remains in a specialist unit in that secondary school and is currently subject to the statementing procedures. Once again, it is not necessary for me to inquire in any detail into any of these matters. I recite them as merely evidence that demonstrates that those troubled waters are still running so far as T is concerned and they form a most important context in which to consider the matters that have been brought before me. It is apparent from the evidence of both the social worker and the guardian that T is not a particularly articulate young man, but that he is a troubled and angry person.

[16] His introduction to this controversy occurred rather dramatically on 2 July 2005, which of course was the occasion of his tenth birthday. Mr E and a friend came in effect to see T and did so. The friend – and I accept that the friend was not acting with the authority of Mr E – most unwisely introduced T to Mr E as his father. If that were not bad enough, it was followed up shortly thereafter by what appeared to be a serious residence application challenging

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the only point of emotional security that T had known in his life. The importance of it is not the wisdom or otherwise of the making of that application, but its impact on T from his relatively narrow but fairly intense point of view. And for the purposes of understanding this case and reaching the right result in it, it is very important that as well as looking at this case through the eyes of the adults, the court also looks at it through the eyes of T. The reality is clearly demonstrated by the evidence of the social worker and the guardian that at the moment T is adamant to anyone who will listen to him that as AD is his father, that he wants nothing to do with the idea of the applicant and that he is deeply resistant to scientific testing. None of those matters are decisive, but they remain relevant as will become apparent.

[17] What about Mrs D's position in all this? She has cared for T throughout. It must be the case that for some years now life has presented more than its fair share of difficulties so far as she is concerned. The events of July 2005 were not only a direct threat to her care for this boy, but of course to her familial status as the paternal grandmother. It is quite clear and not altogether surprising that Mrs D finds this whole matter a very painful issue to confront; she would be more than glad not to have to do so and never to have to do so again. I have no doubt that T cannot have failed to have picked up the distress and anxiety that all this has generated in his grandmother who, as I say, is far and away the most important adult in his life. And of course it is the truth that the resistance and antipathy felt by each of them will have fed off each other so as to drive that resistance and antipathy to a deeper level; and the court needs to recognise that whilst I do not believe Mrs D would ever deliberately subvert either an order of the court or indeed the freely expressed wish of T, it is the fact that T is unlikely to receive from that source encouragement to confront the issue of paternity.

[18] Both the social worker and the guardian were clearly of the view that T's anger was genuine, although maybe had multiple causes, and that his resistance to the whole issue of paternity and scientific testing are views of his own and are not simply the parroting of other adult views as one can sometimes find in Children Act 1989 cases. Moreover, both the social worker and the guardian formed the view that T remains in the midst of difficult times in his own life. It seems to me on the evidence that each of those conclusions is manifestly correct and the court should take them into account in deciding how best to proceed in this case.

[19] I turn then briefly to the legal framework. Section 20(1) of the Family Law Reform Act 1969, as amended, reads as follows:

> 'In any civil proceedings in which the parentage of any person falls to be determined the court may, either of its own motion or on an application by any party to the proceedings, give a direction – (a) for the use of scientific tests to ascertain whether such tests show that a party to the proceedings is or is not the father or mother of that person; and (b) for the taking within a period specified in the direction of bodily samples from all or any of the following, namely that person, any party who is alleged to be the father or mother of that person and any other party to the proceedings, and the court may at any time revoke or vary a direction previously given by it under this subsection.'

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I set that out as demonstrating that s 20 may be called to aid any civil proceedings which are before the court and to demonstrate that application for an order under s 8 is sufficient to generate such proceedings. At the moment I have been unable to trace this case, if indeed it has been reported, but certainly I have used this process in determining whether or not someone required leave to make a contact application under Part II of the Children Act 1989 and no criticism of that procedure was made when the matter was subsequently considered by the Court of Appeal.

[20] I pass on then to s 21 of the 1969 Act, which provides so far as is material as follows:

> '(1) Subject to the provision of subsections (3) and (4) of this section the bodily sample which is required to be taken for any purpose from the person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent.
> (2) The consent of a minor who has attained the age of 16 years for the taking of himself of body samples shall be as effective as it would have been were he of full age; and where a minor has by virtue of this subsection given an effective consent to the taking of a bodily sample it shall not be necessary to obtain any consent from any other person.'

I interpolate to say that I set those two out as demonstrating that consent is an integral part of the statutory process.

> '(3) A bodily sample may be taken from a person under the age of 16 years not being such a person as is referred to in subsection (4) of this section [which we do not need to trouble about] (a) if a person who has the care and control of him consents or where that person does not consent if the court considers that it would be in his best interests for the sample to be taken.'

That statutory amendment was incorporated to deal with circumstances where there was no valid consent by or on behalf of a young person under the age of 16 years, but as I say the tenor of s 21 is clear that consent lies at the heart of the process.

[21] I observe that in s 21(3)(b) of the 1969 Act the court may only exercise its compulsive powers 'if it would be in his best interests for the sample to be taken'. The whole concept of best interests has been subject of considerable judicial scrutiny in the last 2 years. In particular, I draw attention to the views of the Court of Appeal in *Wyatt v Portsmouth NHS Trust* [2005] EWCA Civ 1181, [2005] 1 WLR 3995, [2006] 1 FLR 554 where the Court of Appeal specifically upheld the approach of the trial judge in *Wyatt*, subsequently supported by the President in another but similar case, that best interests should not receive any precise definition. It ranged as widely and as deeply as the individual facts of a case required it to do. Of course, integral to best interests is the concept of welfare, but the court were at pains to make it clear that no formal restraints of language should be placed on that concept.

[22] That said, I immediately acknowledge, as Mr Cohen QC has advanced on behalf of the applicant, that the general approach is that it is best for

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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.

[23] This, however, is a rather unusual case because in most paternity cases the child is very much younger than is T at the moment and is usually unaware of the issue that exists between the adults. In this case, however, T knows perfectly well what the nature of the dispute is. He has his own views as to what its implications may be and I certainly accept, as I think do both professional witnesses, that the idea now being in his head, it will not actually go away and those are matters which again the court must bring into consideration in deciding what is the right way ahead.

[24] As I have said, this whole issue is subject to a best interest test and I am satisfied that best interests like welfare in s 1 of the Children Act 1989 must pay particular regard to the views of the child having regard to his age and understanding. As I have indicated, I think that is possibly even more important in a case such as this where the statutory formula is predicated on the issue of consent.

[25] The social worker and the guardian spoke effectively with one voice. What they said was that ideally it is in the interests of T that this matter should be resolved one way or the other. It was in the interests of T that it should be resolved if possible sooner rather than later, but they were also clearly of the view that it would be quite wrong to force this issue upon T at the present time, or, indeed, to impose a timetable on him, however relaxed that timetable might be. On the other hand, they were also clear that he does need to have the issue kept before him so that it can be dealt with as it should be when he feels ready so to do.

[26] Having listened to all the evidence in this case, I am satisfied that, although T could not be described as competent in the *Gillick*[1] sense of that term, he does understand the essence of the issue between the adults; that he does understand what testing means and what its conclusions might be; that his strong opposition to it is essentially a view of his own and that this whole issue of paternity is a big issue for him at a highly emotive stage of his life.

[27] Because there are compelling reasons why this matter should be resolved on the one hand and why it should not be addressed now on the other, I have found this a particularly difficult case. I am satisfied that Mr E is genuine in his application, but it has come at a most unfortunate time from T's point of view and it got off to a most unfortunate start. It is absolutely essential that it is understood how all this would have seemed to T because unless that is understood the basis of his intense present objections is very hard to grasp, but once understood is perfectly obvious.

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1 *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112, [1986] 1 FLR 224.

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[28] I am satisfied that this is an issue which T will not forget, nor will he be able wholly to repress. I am satisfied both that it is in his best interests to know the truth and to do so sooner rather than later. However, I am also satisfied that it is not in his best interests to press it now given the other turbulence in his life and his present deep resistance to it. That will, of course, be a disappointment to Mr E, but the fact is in this jurisdiction that we have to deal with the world as it is and not as the world as it ought to be or as we would like it to be.

[29] In those circumstances what then should the court do? I have decided upon the following approach. I intend to make an order under s 20(1) of the 1969 Act. I propose to direct that Mr E, if he wishes to pursue his application, supplies the requisite bodily samples and that the analysis and results of that shall be delivered to Children and Family Court Advisory and Support Service (CAFCASS) and the local authority, both of whom will be invited to store it perhaps in a sealed envelope with the files relating to T which they hold. Provided that he provides a sample when asked so to do, I see no reason why AD should not be permitted to join in this if he so wishes.

[30] I then propose that the order under s 20 in relation to T shall be stayed without limit of time, but with liberty to restore. I adopt this slightly unusual approach because I accept from Mr Cohen QC that unless an order is made it will be extremely difficult for Mr E to have a sample analysed and its results obtained. As I believe the obtaining of such a sample is strongly in the long-term interests of T, I am willing to incorporate it into an order and believe that this approach has the effect of securing fairness to Mr E in that regard whilst protecting the position of T as I would wish to in terms of removing pressure from him at the present time.

[31] I would invite the guardian, whether in company with the social worker or not is a matter entirely for him, to see T subsequent to this judgment and amongst other things to explain to him that it is the view of the judge as well as the view of the social worker and the guardian that this matter of paternity should be resolved and that in the end truth is easier to live with than doubt or fiction.

[32] Secondly, it is the view of the judge, the social worker and the guardian that this matter should not be indefinitely put off, but that the judge understands all the pressures that are on T at the present time and, therefore, understands why he is resistant to what is going on and does not wish T to be asked to do anything in this regard until he feels ready to do so. I am sure that the guardian will be able to find child-friendly language in which to communicate those matters.

[33] I propose to direct at the request of the parties that this judgment be transcribed and that copies of it, in addition to being supplied to the parties as they should be, will be supplied both to social services and to CAFCASS to be retained with their files in relation to T and for permission for social services to disclose the judgment to any Child and Adolescent Mental Health Service worker who undertakes therapeutic work in due course with T. My hope is that occasionally, as is judged best by the responsible social worker at the time, T will be encouraged to think about this issue and whether or not he is willing to address it. The matter depends on the guardian or the social worker keeping these issues in mind in any ongoing dealings that they have with T.

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[34] If at any stage T agrees to provide a sample and it is tested, I would regard it as an obligation either of the social worker or the guardian to inform Mr E of the results and, accordingly, it will be an obligation on Mr E to ensure that the guardian or social worker know of any change of address or contact that may occur in the future.

[35] I have of course, as fairness requires, left it open to Mr E to seek to restore this matter to apply to vary or set aside the stay that I have made. If any such application is made it is reserved to me and should in the first instance be listed before me ex parte for directions without service on any other party. That is not because I contemplate a summary striking out, but it seems to me it will be sensible to take stock of what Mr E knows at that stage and what inquiries may need to be made before re-opening the process.

Order accordingly.

Solicitors: *White Ryland* for the applicant
Dawson Cornwell for the grandmother
CAFCASS Legal Services for the guardian ad litem

PHILIPPA JOHNSON
Law Reporter

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