



Neutral Citation Number: [2020] EWCA Civ 577

Case No: B4/2020/0419

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
HHJ Marston, sitting as a Deputy High Court Judge
BS19P02142

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2020

Before :

SIR ANDREW McFARLANE
President of the Family Division

LORD JUSTICE PETER JACKSON

and

LADY JUSTICE NICOLA DAVIES

L (Adoption: Identification of Possible Father)

Christopher Naish (instructed by **Powells Law**) for the **Appellant Mother**
Elizabeth Smith (instructed by **North Somerset Council**) for the **Respondent Local**
Authority
Stuart Fuller (instructed by **Henriques Griffiths Solicitors**) for the **Respondent Child**
by their Children's Guardian

Hearing date: 23 April 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Thursday, 30 April 2020.

Lord Justice Peter Jackson:

1. In *A, B and C (Adoption: Notification of Fathers And Relatives)* [2020] EWCA Civ 41 this court considered the approach to be taken where a mother wants a baby to be placed for adoption without notice being given to the child's putative father. This appeal raises two related questions. First, to what extent does the same approach apply where there is uncertainty about the child's paternity? And second, what should the response of the court be to a proposal that paternity should be investigated by carrying out DNA testing on other children of the mother without reference to the possible father? I will call this 'sibling testing' although it begs the question of whether there is shared parentage.
2. The background is that the appellant mother, who is in her mid-20s, has three children. The older two are B, a boy aged nearly 3, and M, a girl aged 1¾. Their father is Mr C, with whom the mother cohabited between 2015 and 2017. He has parental responsibility for B, being named on his birth certificate, but does not have parental responsibility for M. He no longer lives with the mother but has contact with both children, as does his mother.
3. The mother's third child, K, is a baby girl now aged about 9 months. The pregnancy was concealed by the mother but in June 2019 it became known at a late stage to her family. She told them that Mr C was the father, and she said the same to a midwife at an appointment when she was 34 weeks pregnant. She asked for the child to be placed for adoption at birth. The midwife contacted the local authority and the mother informed social workers on 19 June that Mr C was the baby's father, but she was critical of his commitment and said he would not be able to care for the baby. She said that the older children had contact with him once every three weeks and that they stayed with his mother every Friday. She refused to consent to social services contacting him. The mother repeated this account at a meeting with the midwife and social worker two days before K was born.
4. K was born in July 2019. The mother left hospital without seeing her. When K was two days old the mother named her and signed a s.20 agreement to her being in foster care. She remained adamant that she would not give information about Mr C. She was told that the court might direct the local authority to identify the father. Eight days later, during the course of a further meeting, the mother told the social worker for the first time that Mr C was not K's father, but that she had been born as the result of what she described as a drunken one night stand with a man whom she could not identify. She said that she had lied previously because she was embarrassed at her actions and because she had not expected that anyone would want to contact Mr C.
5. Shortly after that, K moved to live with early permanence foster carers, where she remains. At the end of October 2019, the mother signed her consent to K's adoption.
6. On 16 December 2019, the local authority belatedly applied for a declaration that it need not take any further steps to identify or locate K's father or paternal family. At the same time it sought an order for DNA testing of Mr C. It was

explained to us that the inconsistency between these applications was due to a breakdown in communication within the local authority, and that by the time the matter came before the court the local authority's position was that K's paternity needed to be clarified and that if Mr C was the father he should be consulted about her adoption.

7. The matter came before HHJ Marston on 19 December. He directed the mother to provide contact details for Mr C by 16 January 2020.
8. On 15 January 2020, the mother filed a witness statement expressing her fear at Mr C's response if told of K's birth. She described unpleasant behaviour by him towards her and her family, including at Christmas 2019. She said that he had a uncle who had been involved in serious violence and she feared what would happen if K's birth became known locally. She now said that she was certain Mr C was not the father.
9. At a further hearing on 20 January, with the support of K's Children's Guardian, the judge ordered the mother to provide Mr C's address and telephone number by 23 January, directed the local authority to contact him and inform him of K's birth, and gave a direction for DNA paternity testing involving K and Mr C. If Mr C was found to be the father, he was to be given notice of a hearing on 31 March.
10. The mother obtained advice on appeal. She then moved to the position that DNA testing of herself and her other children would be sufficient to establish that Mr C was not K's father. Accordingly an application was made for permission to appeal and for a stay. On 23 January, the judge granted a stay pending a telephone hearing on 5 February with a time estimate of 30 minutes.
11. The decision in *A, B and C* was handed down on 29 January.
12. In preparation for the hearing, full position statements were filed by the mother, the local authority and the Children's Guardian. On behalf of the mother, Mr Naish argued that the court should assume that Mr C may not be the father, that the mother had experienced significant emotional abuse from him and feared further such abuse, and that this would have a significant impact on her mental health. Informing Mr C would be an unnecessary breach of her Article 8 privacy rights when the desired outcome could be achieved by other means; the position may be different if Mr C was revealed to be the father. Obtaining samples from B and M would be unlikely to cause any significant distress. If the existing order was confirmed, it was not certain that Mr C would cooperate with testing. In response, Ms Smith for the local authority argued that it would not be ethical for the older children to be tested. It would not be done in their interests and there would be a risk that it would disturb their paternity. It would be done without the knowledge of Mr C, who has parental responsibility for B and Article 8 rights in respect of both children. It would not be as scientifically conclusive as adult testing. It was accepted that further investigation might not be appropriate where there was a very real risk of harm to K or the mother, but that was not the case here. It was in K's interests that there should be clarity about her parentage without further delay. The Guardian made similar

submissions, laying emphasis on K's need to have information about her identity as she grows up.

13. On 5 February, the judge opened the hearing by informing the advocates that he only had ten minutes to deal with the matter that morning. Mr Naish, counsel for the mother, submitted that this was not likely to be adequate. The judge then heard brief submissions and said that he would consider the matter overnight. He said that he would either give judgment in favour of the mother's position or, if minded to rule against her, would list the matter for a hearing when he could hear full argument.
14. That is not in fact what happened. On 14 February the judge listed the matter for the handing down of judgment and on 17 February, he gave an extempore judgment, rejecting the suggestion of sibling testing and confirming his previous order. The mother was again ordered to provide contact details for Mr C, this time by 13 March. Failing that, the local authority was authorised to locate Mr C itself.
15. In his judgment, the judge recited the history and set out the mother's concerns about the father being a volatile man who would make things difficult for her and her family if he learned about K's birth. He said that he approached matters on the basis that there was some truth in that. In making the earlier orders, he had applied the same approach to a possible father as would apply to a presumed father and had not found there to be any exceptional reasons for not pursuing the question of paternity. He then addressed the advantages of the proposal put by the mother, reading from Mr Naish's written submissions. He summarised:

“Therefore the argument that is being put forward there is that I can, in effect, have my cake and eat it. I can have a genetic test which establishes the parenthood without having to go to Mr [C] and let the cat out of the bag in order to have such a test, if I can be colloquial.”

However, having made reference to each of the submissions of the Guardian and local authority, and reminded himself that paternity in this case was in issue, the judge reached his conclusion:

“I actually found this quite difficult to decide because I can see the advantages in not going to Mr [C] straightaway and possibly having an indicator of whether he is the father or not, which makes it unnecessary for him actually to be approached at all. However, on balance, I take seriously the potential risks. What about if he is not the father of either of the other two children? What about if he is the father of one and not the other? What about the fact that he has parental responsibility for the children and therefore I must treat his rights on the same basis as the mother's and if I am going to order genetic testing of this sort, I must approach both people with parental responsibility?”

However it seems to me that all of those are peripheral to the fact that I took a decision which was that there should be testing. That will establish what finally, without any scope for argument, whether Mr [C] is the father of this little child or not, and the quicker and more definitively that that is done, the better it seems to me. Therefore there is a potential for further argument if I go down this route. There is a potential for lack of precision, and we could be here then arguing about whether Mr [C] should be tested further at a later date.

It is a difficult balance to strike because one is instinctively sympathetic to the mother in these circumstances, however, it seems to me, what I need to do is to be instinctively sympathetic to [K] and her best interests and to establish absolutely, beyond doubt, what her parentage is, because either she then needs to be adopted as quickly as possible or if there is some alternative placement in the family, that needs to be ascertained as soon as possible.

Therefore although the argument is attractive, I am not going to find in its favour, and I am going to remake my previous order and I am going to discharge the stay on that. The other order I make is there should be a transcript of this short judgment.”

16. After the judgment, counsel appearing for the mother reminded the judge that he had intended to hear further submissions before such a decision. On 24 February, the appellant’s notice was filed. I granted a stay on 27 February and permission to appeal on 31 March, the delay arising from difficulty in obtaining a record of the judgment.
17. The grounds of appeal as lodged were to this effect:
 - (1) The failure to give the mother’s counsel the promised opportunity to make further submissions was a serious procedural irregularity that rendered the decision unjust and was in breach of the mother’s rights under Article 6.
 - (2) The decision was wrong as being an unnecessary breach of the mother’s Article 8 rights in circumstances where the other children could be tested.
 - (3) If a balancing exercise was called for, the judge failed (as a result of not hearing more extended submissions) to take adequate account of the mother’s allegations of abuse and the effect of disclosure on her, the fact that *A, B and C* concerned children whose paternity was not in issue, and the fact that Mrs C does not have parental responsibility for K or family life with her.
18. On this appeal the mother has sought leave to file additional evidence in the form of a GP report and a statement from her mother. We have considered these although they do not satisfy the test for admission of further evidence. The GP report describes the mother as having suffered from post natal depression following the birth of both her older children. Since then she has been on a

prescription of antidepressants. Her second pregnancy were concealed until a late stage. She has not attended the GP since December 2018. The grandmother's statement expresses her concern for her daughter's mental health arising from the decision for K to be adopted and anxiety about the consequences of Mr C being informed. In my view this material reflects the information that was before the judge and does not significantly add to it.

19. At the appeal hearing, which took place by video-link, the parties' submissions became more focused:

(1) Mr Naish realistically accepted that any concerns about the fairness of the process were remedied by the hearing in this court. He also acknowledged that in the light of authority an appeal from the judge's original decision to order that a putative father in Mr C's position should be approached could not succeed. The weight of his argument rested on two propositions. First, as sibling testing represented a viable alternative to approaching Mr C, the undoubted breach of the mother's Article 8 rights was not necessary; accordingly it would be impermissible to take account of any competing rights. In the alternative, if a balancing exercise was to be conducted between the competing interests, the arguments against sibling testing were overstated. The suggestion that Mr C may not be the father of B and M is speculative and unfounded when on the balance of probability he is likely to be their father. It is said that sibling testing is less definitive, but no scientific evidence was put before the court about that. In one of the cases in *A, B and C*, as the judge noted, sibling testing had in fact occurred. The proposal for sibling testing would meet the rights of K and the mother and not prejudice Mr C or the other children. The decisions in *A, B and C* concerned fundamentally different situations of established paternity, but the judge did not sufficiently take account of this. Different considerations arise where the father has not been identified and the mother's wish to keep the birth confidential from a man who may not be the father deserves particular respect. The judge should have proceeded with greater caution in the light of the allegations of abuse. In response to questions about the propriety of testing children for whom Mr C has Article 8 rights and in one case parental responsibility, Mr Naish said that if parental responsibility was an obstacle to testing B, the test should be carried out on M alone.

(2) Ms Smith, for the local authority, contended that the judge correctly conducted a balancing exercise before reaching his conclusion. The inconsistencies in the mother's accounts are relevant when considering the weight that should be attached to her wishes and the judge was right to critically examine her contentions rather than taking them at face value. No allegations of abuse had been made by the mother before she had changed her account of K's paternity, and there is no evidence of the mother having a significant mental health disorder. K needs to know her origins and the court will require this information when considering her adoption. As her birth is known to the maternal family, who live near the paternal family, it is unrealistic to suppose that the paternal family will not ultimately become aware of K's existence. The arguments concerning the ethics and efficacy of sibling testing are repeated.

- (3) Mr Fuller, for the Guardian, notes that it now appears to be accepted by the mother that it is in K's best interests to establish, if possible, whether Mr C is or is not her father. As Cobb J said in *Re M and N (Twins: Relinquished Babies: Parentage)* [2017] EWFC 31 at [20]: "There can be few things more important to a person than to know of their parentage..." Sibling testing raises potentially serious issues for those unrepresented children, depending upon the outcome, and it is not clear that parental responsibility could properly be exercised in this way without informing Mr C. A failure to seek to test Mr C would be an unacceptable interference with K's Article 8 rights, as she needs in due course to know the identity of her father, and to have the local authority and the court know it as soon as possible and on the best possible scientific evidence. The judge took careful account of the mother's position, but the feared consequences of disclosure to Mr C are the same whether he is or is not the baby's father. The judge applied the approach endorsed in *A, B and C* at [89]. He struck the right balance and correctly concluded that the situation described by M was not so serious as to justify her plea for confidentiality. The dominant right in this case is K's right to have her paternity swiftly and accurately established, not her mother's right to privacy.
20. I firstly address briefly the original ground of appeal that the mother was deprived of a fair hearing, which was rightly not pursued. The judge overlooked the fact that he had promised the mother a further opportunity before making an adverse decision – in fairness, he refers in the transcript to the enormous workload facing the court at the time – but that missed opportunity did not make the process unfair, even without the opportunity supplied by this appeal. He was very familiar with the case, had a full statement from the mother and focused submissions from Mr Naish, all of which he explicitly took into account. It was not in my view necessary for him to have promised a further hearing and any procedural error that arose from his proceeding without such a hearing was not in the circumstances of this case a serious procedural error that caused any injustice. The essential ingredients of the mother's case were all urged upon the court and understood. I therefore turn to the substance of the appeal.
21. In a case where a mother wishes a child to be placed for adoption without notifying the father, but where there is uncertainty about the identity of the father, the issues of notification of the birth of the child and paternity testing are interlinked. The approach identified in *A, B and C* at paragraph 89 contemplates an individual being a putative father, although in one of the two cases where the issue concerned notification of a father, paternity had not been confirmed. A putative father is a person thought to be the father, although paternity has not been formally confirmed. The present case concerns a possible father, someone who may or may not be the father. Such uncertainty about paternity is to be regarded as one of the other relevant matters referred to at sub-paragraph 6(9) of the summary at paragraph 89 in *A, B and C*. If the court, on all the available information, considers that there is a substantial possibility that a person may be the child's father, that will be a factor to be taken into account alongside other factors bearing on the decision concerning notification. The weaker the possibility, the less likely the court will be to direct an investigation of paternity that compromises the mother's wish for privacy.

22. This is not the occasion for a full review of the ethical issues surrounding sibling testing, and the following observations are directed at the situation that may arise when sibling testing is proposed as a means of clarifying the parentage of a child whose mother seeks adoption.
23. The power under the Family Law Reform Act 1969 to make an order for scientific testing to establish parentage applies only to parties to the proceedings. The Human Tissue Act 2004 (Sections 5 and 45 and Schedule 4) makes it an offence to take DNA from a child who is not competent to provide consent without the consent of a person with parental responsibility. Individual parental consent is therefore sufficient as a matter of the criminal law. However, concern has been widely expressed about the appropriateness of paternity testing on demand, particularly where it is based on the consent of one parent alone. For example, the British Medical Association guidance to doctors, *Consent in paternity testing*, updated December 2019, says this under the heading ‘Ethical obligations’:

“Although, legally, paternity testing may be undertaken without further investigation where the necessary consents have been obtained, from an ethical perspective, the BMA considers that health professionals should agree to provide assistance with testing only where this is considered to be in the best interests of the child or young person.”

In relation to ‘motherless testing’ the guidance advises doctors to advise against it and not to participate in it.

“Legally, where the putative father has parental responsibility for the child, motherless testing (tests which do not involve testing the mother’s DNA) could be undertaken without the knowledge of the mother.

The BMA believes that this could be very harmful to the child, as well as to the family unit as a whole, and would prefer to see a situation in which the consent of all parties is required for paternity testing.”

The Department of Health publication *Good Practice Guide on Paternity Testing Services* (May 2008) similarly expressed the view that motherless testing should not be undertaken by paternity testing companies unless such a test has been directed by a court.

24. In my view, concerns about the harm that ‘motherless’ testing may cause are also potentially relevant to ‘fatherless’ testing: testing without notice to a father. Such covert testing of another child may amount to an unlawful breach of the Article 8 rights of that child’s father and of the child. Social workers will need to take account of these legal and ethical issues when making a judgement about the appropriateness of such testing. For its part, a court should in my view be extremely cautious before approving the testing of possible siblings as a means of clarifying the parentage of a child whose mother seeks adoption. It should reflect on the fact that in the presence of one secret (the birth of the child) it is, as a public body, being asked to endorse another secret (covert testing). It should think beyond the testing to the possible

consequences. The inherent ethical objections to sibling testing are therefore only likely to be overcome in compelling circumstances where the clarification of parentage is necessary and where standard paternity testing is for some reason not an acceptable option. In any case, such a course should only be contemplated after a thorough analysis that takes full account of the interests of the possible siblings.

25. Applying all these considerations to the present case, I reach these conclusions:
- (1) The judge was right to resist the proposal for sibling testing. Even if the testing did not produce unexpected results, it would in the circumstances of this case be a disproportionate interference with the rights of the other children and their father. Those other children would unwittingly become involved in the secrecy requested by the mother. The factors speaking against informing Mr C of K's birth are not by any means strong enough to justify taking that course.
 - (2) As sibling testing is not an appropriate alternative means of establishing paternity in this case, the mother's argument that it is unnecessary to seek standard paternity testing falls away. The rights and interests of all parties must be considered and balanced.
 - (3) When making the central decision to refuse to endorse adoption without clarification of K's paternity, the judge had all relevant factors in mind and he cannot be said to have given inadequate weight to factors relied on by the mother or excessive weight to factors relied on by the other parties. He took a balanced view of the evidence and made appropriate allowances for the mother's position. He reminded himself that there was an issue about paternity but he clearly found that there was a substantial possibility that Mr C is K's father, as the mother had repeatedly said, not only to professionals but to members of her own family, who were in a better position to know whether that was plausible. In the end he found that the overriding factor was that K, whatever her future may hold, should be provided with as much knowledge of her parentage as possible, so that she can know throughout her life whether she has siblings and whether their father is her father. The judge's decision was a proper one in the circumstances of the case.
26. Lastly, we regret that it has taken so long for this issue to be resolved. In our earlier decision, under the heading 'Urgency and thoroughness of procedure' we emphasised that:

“A local authority, faced with a baby that may require adoption, either because a mother wishes to relinquish the baby for adoption or because there are proceedings with a plan for adoption, will be acutely aware of the need for a speedy decision. Where the mother requests confidentiality, it will need to decide at a very early stage whether an application to court should be made to determine whether or not the putative father or relatives should be informed and consulted.”

The events in this case predate that decision, but we hope that where applications to court are required local authorities will from now on ensure that they are made during a child's earliest months so that swift and appropriate decisions can be taken in these difficult cases.

27. For these reasons, I would dismiss the appeal.

Lady Justice Nicola Davies

28. I agree.

Sir Andrew McFarlane P

29. I also agree.
