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Case No: FD19P00139

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2019

Before :

MR JUSTICE COHEN

Between :

AB
- and -
CD
-and-
C

Applicant

Respondents

Mr A Verdán QC and Mr M Edwards (instructed by **Vardags**) for the **Applicant**
Miss S King QC and Miss J Renton (instructed by **Payne Hicks Beach**) for the **1st**
Respondent
Miss S Jaffar (instructed by **CAFCASS**) for the **2nd** **Respondent**

Hearing dates: 26-28 June, 2 July 2019

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE COHEN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Honourable Mr Justice Cohen :

1. In this case I am concerned with a boy whom I shall call C. He is the only child of the family. I shall call his mother CD. The identity of his biological father is unknown to the court and I shall call him X. At all times he has believed the mother's husband AB to be his father.
2. The principle application before me is that of AB that I should order the mother to disclose X's identity so that C can be told. The mother resists both the proposal that C should be told that AB is not his father at this stage and that she should be required to disclose X's identity.
3. AB and CD were married in 2003. Some years later C was conceived. The mother says that at the time she was having an affair with X. The circumstances which led to the affair are irrelevant to my determination. She says that she was at the time still in a sexual relationship with AB, her husband, and she convinced herself that she was carrying his child.
4. Throughout the remainder of the marriage C was treated as the much-loved child of the two spouses. Unfortunately, the marriage ran into difficulties unconnected to the matters I have described and in early 2017 the parties separated.
5. AB says that in 2018 he heard rumours that the mother had been having an affair around the time of C's conception and he asked the mother to agree to a DNA test. That was carried out in December 2018 and both that test and another test carried out the next month confirmed that AB was not the biological father of C.
6. C is by all accounts a delightful, intelligent, thoughtful boy who has made good progress at school. He was deeply saddened by the breakdown of his parents' marriage and separation and it is very likely that he will be further upset to hear that his paternity is not as he has always believed.
7. AB was devastated by the news that he was not the biological father of C. It was a huge blow to him personally as well as to his pride and status. Following the revelation, relations between AB and CD have been at rock bottom. AB has issued a raft of proceedings against CD including:
 - i) Proceedings in the Chancery Division for breach of confidence;
 - ii) Proceedings in the Queen's Bench Division, claiming back from CD all the money that he has spent on C in the mistaken belief that C was his child and seeking also damages for his distress and for the difference between the sum that CD will receive at the determination of her claims for financial remedy orders and what she would have received if her claims were determined in 2011 as he says they would have been if she had admitted her adultery;
 - iii) Proceedings under Children Act 1989 for residence and these proceedings;
 - iv) Financial Remedy proceedings.

The scale of the litigation is immense, with huge teams of lawyers. The Queen's Bench and financial remedy applications are listed before me for 20 days early next year.

8. This deluge of proceedings obviously gives me concern as to how AB might intend to use the information of X's identity and that was confirmed by his evidence that he might use it to take proceedings against X.
9. After a prolonged period of uncertainty and mixed emotions AB has finally, that is within about the last week, decided that he wants to remain a central figure in C's life. C knows no other father. It is common ground that AB and C are very close (as are CD and C) and their relationship is of huge importance to C. I treat AB's threat of withdrawal from C's life as now parked firmly in history. AB lives abroad and comes to England for about a week a month to see C and spends approaching half the school holidays with C.
10. CD is greatly relieved that AB has taken the decision to remain in the centre of C's life. She agrees that this course is very much in C's best interests.
11. So far as X is concerned, CD says that he knows nothing of these proceedings and she has no reason to think that he has any knowledge of his paternity of C. She has never discussed it with him and as far as she is aware X has never met C on any occasion.
12. At an early stage of these proceedings the parties rightly agreed that C needed to be separately represented and I appointed a guardian pursuant to rule 16.4 Family Proceedings Rules 2010. I am grateful for the guardian's assistance.
13. The arguments of the parties

AB says that C needs to know who his father is as soon as possible. That means telling him not only that he, AB, is not the father, but that he also needs to know the identity of X. He says that only when he, AB, knows the identity of X can he sit down with X and ascertain exactly what role X is to play in C's life.
14. Bearing in mind the strength of AB's feelings, it seems to me highly unlikely that he would be able to sit down with X and have the sort of calm and rational discussion that he envisages. But, whether or not a discussion takes place, it is understandable that he wants to know what role, if any, X would wish to play in C's life.
15. AB adopts the guardian's proposal that he and the mother should with professional assistance agree a script and present to C the reality of his paternity. He is not willing to accept the mother's word as to the identity of X, even if X admits it, and he would want X to undergo a DNA test.
16. He says that C is bound to ask who his real father is when told that AB is not his biological father and that information should not be kept from him or delayed.

17. He says further that C has a right to know the identity of his birth father. It is fundamental to his sense of identity and belonging and Articles 7 and 8 of the United Nations Convention on the Rights of the Child underline this point.
18. AB makes the further point that the lack of knowledge of the identity of X sours his social life in the sense that he thinks it is likely, and I tend to agree, that X is someone who is known to AB and AB does not want to spend his time wondering which of his social circle is to blame and possibly pointing the finger at those who are blameless.
19. He says that it is important for C to know the identity of X in case there are any hereditary medical problems. I give little weight to that. C is in good health. No problems have yet emerged and on any basis sooner or later C is likely to have to be told the identity of X.
20. Mr Verdan QC on behalf of AB has sought to argue that since I will be bound (as he puts it) to order disclosure of X's identity in the Queen's Bench proceedings, I should not close my eyes to that fact in considering disclosure within the Children Act proceedings. I do not consider that this is an appropriate matter for me to take into account in the children proceedings which are governed by what is in C's best interests.
21. But, in any event, it is not a given that X's identity will be ordered to be disclosed in the Queen's Bench proceedings against CD or that I shall regard it as appropriate that any claim against X within such proceedings should be determined at the same time as the claim against the mother. I remind myself that there is an outstanding strike out application made by the mother in respect of this claim against her which I may need to consider and determine sooner than envisaged by the existing case management directions.
22. The mother's case is that C's state of biological knowledge is that he simply will not understand what is meant by the concept of him having two fathers in his life. Far better, she says to wait for about two years by when he will understand the genetic process. In the meantime, C can get on and enjoy a full relationship with AB.
23. She says that when C is told that AB is his psychological but not his biological father it is unlikely that C will, at least in the short term, question who X might be. If he did, she would seek to deflect the issue by saying that it is someone whom C has never met and who plays no part in his life. Only if C became insistent would she tell him. In an ideal world she would hope that the secret of X's identity might remain in the background until C approaches adulthood.
24. In particular, she stresses that now is not the right time to tell C anything. The parties are in the midst of an enormous amount of litigation and tensions are high. She would at least want to get past February by when it is hoped I will have determined the body of litigation that is listed before me then.
25. If C is told who X is, it may lead to C being divided 3 ways. How, she asks, is C expected to cope with that. She has no desire to have X involved in C's life or run the risk of his undermining the relationship that AB has with C.

26. The parties live in a culturally conservative society. If the identity of X was revealed that would have a damaging impact on both her and X within their society but also would inevitably have a knock-on effect on C.
27. She says that at the moment the only person who knows X's identity other than her is her brother, who has kept the information to himself although in a pleading in the Queen's Bench action she said that she has also told her parents.
28. The guardian has provided a helpful report. Her evidence, which the mother and AB accept in this respect, is that the news that AB is not C's biological father is widely known to family members, the staff in their various residences, and to those in their immediate social circle.
29. In an ideal world, she says, C would be told by AB and CD together that AB was not C's biological father. They would do so from a prepared script with which they would have had professional assistance. By then AB and CD would know what X's views were and whether he wanted to play any part in C's life, so that if C asks questions about him they would be in a position to answer them. As to when C should be told, she said this in her report:

26. It is my view that C should be informed of his paternity and that he has a right to this information, which constitutes a crucial tenet of his biological heritage and his identity. Drawing upon the research within adoption literature, there is increasing recognition of the unhealthy and damaging impact of keeping secrets within a family about such fundamental issues and the detrimental impact of children finding out inadvertently, or at a later stage, that such significant information was kept from them.

27. That the information about C's paternity is so widely known, amongst his extended family, the family and extended family's staff members and reportedly, within wider society renders it impossible that C would not at some stage, come to learn the truth. It also increases the risk of him inadvertently finding out, or hearing the information from a third party, which would be hugely damaging to him. Further, there is also the potential that C could be told in a moment of anger or hurt, rather than in a way that is managed to be as safe and least harmful way as possible.

28. It is partly for this reason that I consider that ideally, it would be better for C to be told about his paternity now, rather than waiting until he is older and thus increasing the risks of him finding out via alternate means.

29. However, it is C's current age and stage of development that leads me to consider that he is best told now, rather than as he enters the pre-teen phase and puberty. At this age, C is still a young child, and whilst he is developing an increased understanding of the world and is more able to understand more complex information, his thinking remains relatively uncomplicated. Children are better at dealing with life events at this age, because they have a lesser sense of permanency as they tend to live in the moment. From a cognitive standpoint, the information shared is likely to have less of a devastating impact that if C were older. He is more likely to overcome initial feelings of shock and distress than if he were entering the pre-teen or teenage stage of development, where the

advance of puberty can bring about real emotional turbulence, that would compound any initial emotional response. Further, an older child is increasingly likely to experience a sense of loss of trust in a parent at not having been told sooner.

30. She says that the idea of telling C soon, as she recommends, that AB is not his genetic father but leaving it until later to tell him who X is, runs two particular risks:
- i) The risk of C feeling that information is being kept from him;
 - ii) Doubling the pain by having to tackle two related issues at times that are chronologically apart.

Much better, she says, to tell him it all in one go and combine it with the reassurance that nothing will change in his life and that AB is still his psychological and social father.

31. She says that the parties have done well in limiting C's awareness of the animosity between them and the extent of the legal proceedings. She says that mitigates the danger of him being damaged by the continuation of proceedings if C's paternity and X's identity are revealed sooner rather than later.

32. The guardian accepts that it may be that C will not want to know the identity of X. In that case she says, he should not be told until he wants to know.

33. The law

Perhaps surprisingly, there appears to be no reported case where these particular issues have arisen before. There are, however, a number of cases which have clearly established that it is in a child's interest to know the truth of his paternity. As Hedley J said in *Re D (paternity)* [2007] 2FLR 26 at paragraph 22

*The general approach is that it is best for everyone for the truth about a disputed paternity to be known. The classic statement that is to be found in the judgment in the Court of Appeal in *Re H and A (children)* [2002] 1FLR 1145. I acknowledge once that that should be the guiding principle in all 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.*

34. I apply the provisions of s.1 Children Act 1989 and C's welfare is my paramount consideration.

35. The parties

I need say little about AB and CD. They are both plainly highly intelligent. Each accepts that the other is a devoted and committed parent to C. The mother says that she is devastated and full of remorse for the situation that she has brought about and I accept that her remorse is genuine.

36. AB has been put in a dreadful position. He is beginning to reconcile himself to his position but in my judgement he remains full of controlled anger.
37. The guardian gave thoughtful and helpful evidence. It is no criticism of her to say that I think she had not foreseen the range of difficulties that this case presents and that to some extent her evidence was given on the hoof as she was made to confront problems in the witness box which she had not previously thought through. The same can be said of the other parties whose positions evolved throughout the case.
38. My approach
- This is an acutely difficult matter and I approach it with humility, aware that different tribunals might reach different decisions on this matter of such importance to the parties.
39. The starting point is that C must be told sooner rather than later that AB is not his biological father. I agree with the guardian that he is at an age when it will be easier for him to accept than it will be when he is older. I agree also that the risk of him hearing rumours from others is a real risk which needs to be avoided if possible.
40. The much harder issue is that relating to the disclosure of X's identity. The guardian says that in an ideal world the two issues would be dealt with in one go and I entirely see the logic of that. The difficulty is that X is completely unaware of these proceedings and what is going on in them. It is not possible to know how X will react and thus no one can tell C whether X will want to play any role in his life or even meet him. There are all sorts of possibilities; to name a few obvious ones:
- i) He might deny paternity;
 - ii) He might decline a DNA test. The court has no power to compel him to have one;
 - iii) He may want nothing whatsoever to do with these proceedings. Indeed, he may not even reply to any communication that is sent to him;
 - iv) He might on the other hand wish to play a role in C's life;
 - v) He may have very strong feelings himself as to whether his identity should be disclosed.

His reaction will impact on what is told to C.

41. By the end of the case AB and the guardian both argued that the two issues of disclosure of AB's non-paternity and the identification of X should not be split. If that meant a delay before C was told anything so that X's stance could be ascertained, then so be it, although the delay should not be excessive. Only with a knowledge of X's stance could a full picture be given to C. The mother remained of the view that the two issues could and should be split.

42. It seems to me that it must be wrong to disclose X's identity until answers to the questions that I have mentioned above are known. I have therefore drafted a letter to X which will be sent to X seeking answers. The contents of the letter have been provided to counsel for their comments and will be the subject of amendment.
43. CD and the guardian both say that X must be told of the existence of the Queen's Bench proceedings. It would be wrong to hide from him that he may be catapulted into such proceedings. I regard it as unfortunate for C that X's attitude to C might be influenced by this threat and I hope that AB will give further thought to the value of those proceedings in the context of their effect on C.
44. The consequence of the delay in imparting information to C is that the parties may lose the advantage of the imminent approach of the summer school holidays which would permit C to be told but then be able to experience for himself that nothing had changed in his relationship with AB with whom he would be spending three periods of about one week each during the holidays. It would give an opportunity for C to realise that AB will not suddenly disappear from his life or his role be diminished. In term-time AB will be less available.
45. AB suggests that I should require X to reply to the letter sent to him by the end of this week. That is completely unrealistic, especially as the terms of the letter have not even been finalised. X must have the chance to assimilate what he is being told which may come as a total shock to him. He is entitled to give a considered view and to take advice.
46. I therefore propose to list the matter before me in about 5-6 weeks' time by when I expect X to have responded. AB accepts that a further delay may be needed, depending on X's reply. The delay is the inevitable consequence of dealing with matters holistically, rather than decoupling the two issues.
47. I have at times been attracted to the mother's proposal that the two issues should be separated but I am persuaded that it is more in C's interest for the parties to be better equipped to answer such questions as he might ask.
48. How the news is broken to C must be very sensitively handled. The parents think that they might be able to do it together. The guardian is less optimistic. Her proposal is that CD should tell C the news by reference to the agreed script and that later the same day AB should reinforce it. I think that is probably right but further guidance should be taken from the expert who will be assisting them through this process and who will be able to gauge their reaction to it.
49. Each party has made suggestions as to what C's wishes might be. The only certainty is that the news will be unwelcome. It is not possible to surmise beyond that.
50. It is essential that the orders that I make are buttressed in a number of ways. First, AB's position is to be strengthened by the grant of parental responsibility to him and a "spend time" order. I am pleased that this is agreed.

51. Steps need to be taken to mitigate the lack of communication which exists between the wider family. It is very bad for C that arrangements for him to see his paternal cousins who live just a few doors away are made through staff rather than directly between family members. Likewise, steps should be taken to try to obtain some form of working relationship between the parents as to the arrangements for C. They have agreed to use an app and to accept mediation.
52. I have little doubt that in so far as the fact that C is not the genetic child of AB has reached the public arena that has happened through disclosure from AB or those he has told. Both his sense of anger and the mother's sense of shame make it far more likely that he or his side is the source.
53. If the time comes that I direct that X's identity should be disclosed I will have to consider carefully how the information is to be used and to whom it will be given. I will wish to restrict its circulation as far as possible. I am anxious that the information is used for C's benefit and not for any gratification of a desire for revenge.
54. I therefore order as follows
- a) CD shall forthwith disclose to her solicitors the name and contact details of X.
 - b) The solicitors shall by 5 July write to X a letter in agreed terms which shall require a reply by 2 August 2019.
 - c) The matter shall be listed for a 2 hour hearing before me no later than 16 August 2019.
 - d) In the event that the parties agree that the hearing cannot be effective it shall be vacated and relisted.
 - e) At the next hearing or on paper in the event that the hearing in August is vacated consideration will be given to giving directions for the hearing of the mother's strike-out claim in the Queen's Bench proceedings.

55. Subsidiary Issues

I turn now to some of the other issues between the parties, the most troublesome issue being that of overseas travel during the course of this summer school holiday.

56. Each party had set out their original position, AB seeking to take C to the UAE where he is based and the mother seeking to take the child to India where she has family.
57. AB's position has now changed, and he says that neither parent should be permitted to remove C from England and Wales during the course of the summer holidays. His argument has two limbs, namely the desirability of the parents being able to look after C week and week about during the period that he is being told the facts of his paternity and secondly his particular objection to India.

58. It is not easy to predict at this stage when C will be told of the fact that the man he has believed to be his father is not his biological father let alone as to the identity of his true biological father.
59. In considering the matter I have particular regard to the test set out by Patten LJ in *Re A (a child)* [2013] EWCA 1115. The matters I must particularly consider are:
- i) The magnitude of the risk of breach of the order if permission is given;
 - ii) The magnitude of the consequence of the breach if it occurs;
 - iii) The level of security that may be achieved by building into the arrangements all of the available safeguards.
60. I am of the clear view that the risk of the mother retaining C in India is very small. She and C have lived in England throughout their lives. They are completely settled in England. Their social status in India is undermined by the fact that her adultery is, within their circle, a known fact.
61. Further, at this particular time the financial consequences of the mother not returning with C to England would be very large. She has a claim for financial remedy orders to be determined by me early next year and if she was in breach of an order to return C that claim would be extremely adversely affected. The incentive for her to return is higher now than it has ever been, including the three occasions on which she went to India with C last year, namely August, October and December 2018, the last occasion being after the first DNA test results.
62. I understand AB's anxiety that the mother might introduce C to X. In her evidence she did little to remove the suspicion that X may be living in India. She says very clearly that she will ensure that C and X never meet. I shall require her to undertake that in no circumstances will C come into contact with X.
63. What would the magnitude of risk be if the mother did not return on time with C? AB points to two particular matters. First, if X is indeed in India and if he accepts that he is the biological father, both of which are unknown, he could as C's father apply for orders in respect of C in the courts of India. I recognise that that is a risk but at no stage during C's life has he ever expressed any interest in C and I have no reason to think that this might now be the case. True it is that Indian proceedings may take what might seem an extraordinarily long time to resolve, as the single joint expert points out. But there is, so far as I know, no bar to AB visiting India and exercising all his rights to spend time with C. He is now a holder of parental responsibility for C.
64. I intend to buttress the permission that I am granting by requiring the mother to pledge as security for C's prompt return the London flat of which she is the legal owner. She says that her parents are the beneficial owners of the property and they have agreed to subrogate their interest in the property to any right or claim that AB might have in the event of a retention of C in India. With these precautions in place I am as confident as I can be that the mother will return with C on time.

65. She asks permission to travel for 20 days. I am not at this stage willing to grant a period of that time. The holiday must take second fiddle to any steps that are necessary to deal with the paternity issue. I therefore, at the moment, limit the duration of the trip to 14 days.

66. I should add that it is not challenged that C is greatly looking forward to the trip.

67. The letter to X

The terms of the letter as dictated by me have largely been accepted by the parties, subject to various helpful suggestions they have made. The question, however, has arisen, as to who the sender should be. I rule that the letter should be sent by the mother's solicitors, but in a form agreed between the parties, including the guardian. The body of the letter must make clear that it is a letter that is sent on behalf of all three parties and which has been approved by the judge. Any and every reply must be copied to the other parties subject only to the redaction of name and address.

68. Financial proceedings

During the course of his evidence I pointed out to the father the apparent inconsistency between his case on the one hand that he loved and wanted to play a very full part in C's life going forward and on the other hand saying that he should be reimbursed for all the money that he had spent upon C. He saw the inconsistency and said that he would abandon his claim against the mother for reimbursement.

69. Amendments to pleadings should be done in a proper and focussed way. I direct that he amends his claim form to reflect this change by no later than 25 July 2019.