Neutral Citation Number: [2024] EWHC 305 (Fam)

Case No: SE23C50265

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SHEFFIELD DISTRICT REGISTRY

Date: 15 February 2024

Before:

MR JUSTICE POOLE

- -

Re D (Parentage: Local Authority Application)

Between:

BARNSLEY METROPOLITAN BOROUGH COUNCIL

Applicant

- and –

(1) JK
(2) LM
(3) PQ
(4) And (5) D and E (by their Children's Guardian)

Click here to enter text. **Respondents**

- -

Shaun Spencer KC and Simon Pallo (instructed by Barnsley Metropolitan Council) for **the Applicant**

Charlotte Worsley KC and Dan Foster (instructed by A&N Care) for the **First Respondent**
The Second Respondent not appearing

Joseph O'Brien KC and Lance Dodgson (instructed by Foys Solicitors) for the **Third Respondent**
Alex Taylor (instructed by MKB Solicitors) for the **Children's Guardian**

Hearing date: 31 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Poole:

Introduction

1. When the First and Third Respondents to this application, JK and PQ, were in a relationship, they were upset to find that JK struggled to conceive. They investigated the possibility of IVF treatment through the NHS but that was not available to them, and of private IVH treatment but that was unaffordable. Doubtless in desperation, they agreed upon and carried out a procedure whereby PQ's father, RS, provided a sample of his sperm, PQ mixed it with his own sperm, and the mixture was injected into JK's vagina. All the adults involved consented to this procedure on the basis that if JK became pregnant and gave birth, PQ would be treated as the baby's father, and RS as its grandfather. JK did become pregnant and D was born. PQ was named on his birth certificate as his father. He is now five years old. He has two half-siblings, children of JK, who are E and F. F is an adult but E is a child and, with D, is the subject of public law proceedings brought by the Applicant Local Authority. JK and PQ separated and initially JK cared for D and E, but the Local Authority brought these proceedings because of concerns about serious harm to D and E attributable to her actions and neglect. Now, D and E live with PQ under an interim child arrangements order with an interim supervision order in favour of the Applicant Local Authority. F lives with them. JK lives separately but has contact with her children.

2. I cannot believe that JK, PQ and RS properly thought through the ramifications of their scheme for JK to become pregnant, otherwise it is unlikely that they would have embarked upon it. They maintain that they thought it best not to know who was the child's biological father, hence the mixing of sperm, but given that JK has had other children, and that she and PQ had tried for several months to produce a pregnancy, it is not against the odds that the biological father of D is RS, in which case PQ, whom he treats as his father, is his biological half-brother, and RS, whom he treats as his grandfather, is his father. They created a welfare minefield through which it will be very difficult to navigate. So far as I am aware, only JK, PQ, and RS knew about the circumstances of D's conception until, during these proceedings, JK revealed them to the Local Authority.

3. For the purposes of the applications addressed in this judgment I do not need to set out the detailed history behind the Local Authority's application for public law orders under Children Act 1989 (CA 1989) Part IV. D and E are doing relatively well in PQ's care and wish to remain living with him. The circumstances of D's conception form no part of the Local Authority's threshold and all parties agree that it is highly likely, subject to some presently unforeseen event, that the public law proceedings will conclude with final supervision and child arrangements orders to secure the children's placement with PQ.

4. The Local Authority's applications which are for me now to decide are for:

    a. A direction under the Family Law Reform Act 1969 (FLRA 1969) s20 for the use of scientific (DNA) tests to ascertain whether such tests show that a party to the public law proceedings, namely PQ, is or is not the father of D, and for the taking of bodily samples from JK, PQ and RS. This application was made on 7 September 2023.
    b. A declaration as to D's parentage made under the Family Law Act 1986 (FLA 1986) s55A. This application was made on 16 January 2024.

5. The applications are opposed by JK, PQ, and also by the Children's Guardian who seeks to represent D's best interests. RS is not a party to the public law proceedings but he attended the hearing before me remotely and he too opposes the applications. LM, who is E's father, is a party to the public law proceedings and has engaged in them, but he chose not to participate in the hearing of these applications which do not affect him.

6. I have been greatly helped by thoughtful and targeted written and oral submissions by Counsel. I heard no oral evidence but received written evidence including statements from JK, PQ, and RS, statements from social workers, and a report from Dr Willemsen, Clinical Psychologist, dated 26 January 2024 which addresses the family dynamics and the impact on D of being subject to DNA testing, and of being informed of the results and their implications. He also addresses the risks to and impact on D of not being told of the results of testing if such testing established that RS, not PQ, is his biological father.

Statutory Provisions

7. FLRA1969 s 20 provides:

> **"20. Power of court to require use of blood tests.**
> (1) 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;
> **21 Consents, etc., required for taking of bodily sample.**
> (1) Subject to the provisions of subsections (3) and (4) of this section, a bodily sample which is required to be taken from any 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.
> …
> (3) A bodily sample may be taken from a person under the age of sixteen years, not being such a person as is referred to in subsection (4) of this section,
> (a) if the person who has the care and control of him consents; or
> (b) where that person does not consent, if the court considers that it would be in his best interests for the sample to be taken."

8. FLA 1986 s55A provides:

> "**55A Declarations of parentage.**
> (1) Subject to the following provisions of this section, any person may apply to the High Court or the family court for a

declaration as to whether or not a person named in the application is or was the parent of another person so named.
…
(3) Except in a case falling within subsection (4) below, the court shall refuse to hear an application under subsection (1) above unless it considers that the applicant has a sufficient personal interest in the determination of the application (but this is subject to section 27 of the Child Support Act 1991).
(4) The excepted cases are where the declaration sought is as to whether or not—
(a) the applicant is the parent of a named person;
(b) a named person is the parent of the applicant; or
(c) a named person is the other parent of a named child of the applicant.
(5) Where an application under subsection (1) above is made and one of the persons named in it for the purposes of that subsection is a child, the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.
(6) Where a court refuses to hear an application under subsection (1) above it may order that the applicant may not apply again for the same declaration without leave of the court.
(7) Where a declaration is made by a court on an application under subsection (1) above, the prescribed officer of the court shall notify the Registrar General, in such a manner and within such period as may be prescribed, of the making of that declaration.

s58 General provisions as to the making and effect of declarations.
(1) Where on an application to a court for a declaration under this Part the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy.
(2) Any declaration made under this Part shall be binding on Her Majesty and all other persons."

9. There is no dispute that both the public law proceedings and the s55A proceedings are "civil proceedings" within the meaning of FLRA 1969 s20 but that, in the present case, the court may only make a s20 direction if D's parentage "falls to be determined" within those proceedings. If so, then in *Re L (Paternity Testing)* [2009] EWCA Civ 1239, applying the House of Lords decision in *S v S; W v Official Solicitor*[1970] 3 All ER 107, the Court of Appeal confirmed that the court has a discretion whether to make a s20 direction but ought to permit testing of a child unless satisfied that it would be against their best interests.

10. In dealing with the Local Authority's s55A application, the court shall refuse to hear it unless it considers that the Local Authority has "sufficient personal interest" in the determination of the application (s55A(3)). The Local Authority does not come within the exception provided by s27 of the Child Support Act, 1991 which, so far as is relevant, disapplies s55A(3) when an application for a maintenance calculation has been made or a maintenance calculation is in force with respect to a person who

denies that he is a parent of the relevant child, and a s55A application for a declaration of parentage is made by the Secretary of State or a person with care of the child.

Procedural Deficiency

11. At the outset of the hearing before me, Mr Spencer KC very properly accepted a number of material deficiencies in the Local Authority's application under FLA 1986 s55A:

    a. On 1 November 2023 I listed this hearing and directed that any application under s55A shall be made by15 December 2023. In fact, the application was made over a month later.
    b. The Family Procedure Rules (FPR) r8.20 provides that the respondents to applications for declarations of parentage shall be "any person who is or is alleged to be D's parent …" but RS, who is alleged to be the parent, was not named as a respondent.
    c. After acknowledgement of service, the respondents named in an application (here including PQ) can give details of other persons they consider should be made a party to the proceedings and the court can then join those other persons or give them notice of the proceedings. Those persons then have 21 days to apply to be joined as a party and no directions may be given as to the future management of the case until that period has expired – FPR r8.20 (3) to (6). Even if the Local Authority's s55A application is viewed as an application for a declaration of non-parentage in respect of PQ, RS would or should have been joined or given notice under these procedures. But, as it is, RS had not been named as a respondent, he had not been made a respondent, he had not been served with the application, and he had received no notice of the s55A application before the hearing.

12. RS was present, remotely, at the hearing because I had invited him to attend, as a non-party, for the application under FLRA 1969 s20. I asked for his view about the procedural deficiencies in relation to the application under FLA 1986 s55A and he said that he wished to obtain legal advice. When, prompted helpfully by Counsel, I explained some of the ramifications of the s55A application, he asked me to adjourn the hearing so that he could obtain advice. The ruling I gave at the outset of the hearing was that I should proceed to determine preliminary issues which were as follows:

    a. Whether the court should refuse to hear the Local Authority's application under FLA 1986 s55A(1) because The Local Authority does not have "a sufficient personal interest in the determination of the application" (s55A(3)).
    b. Whether D's parentage "falls to be determined" in the CA 1989 Part IV public law proceedings.
    c. Whether, even if D's parentage does fall to be determined, it is contrary to D's best interests to direct the use of scientific test under FLRA 1969 s20.

    I indicated that it might be possible also to give at least an indication of whether the court should refuse to hear the application under FLA 1986 s55A on the grounds that "the determination of the application would not be in the best interests of the child" but that if I considered that RS should be heard, through Counsel or solicitor, I would not conclude my determination of that issue but would adjourn to allow RS the opportunity to obtain legal advice representation. This was a pragmatic ruling applying the overriding objective and my case

management powers to seek to avoid delay in the proceedings, and wasted costs, whilst balancing the need to ensure procedural fairness.

The Issues

13. For the Local Authority, Mr Spencer KC conceded that he did not seek to rely on the s55A application merely as a device to create proceedings in which D's parentage falls to be determined. Considering the issues I have to determine, it seems to me sensible to consider, first, whether the s55A application must be refused on the s55A(3) ground that the Local Authority does not have sufficient personal interest. If I rule against the Local Authority on that ground then the only extant civil proceedings would be the CA 1989 Part IV public law proceedings. The two preliminary issues to determine under FLRA 1969 s20 would then be whether D's parentage falls to be determined within those CA 1989 proceedings and, if so, whether nevertheless the court should refuse to exercise its discretion to direct testing under s20 because it would be contrary to D's best interests to do so. It should be noted that, here, the context in which best interests is considered is the direction for testing, not the imparting to D of the results of those tests. However, as was not disputed by Counsel, it is difficult to divorce the testing from the communication of the results or of their implications, in an appropriate manner to D as well as to the other parties.

14. The context for considering D's best interests under FLA 1986 s55A(5) is somewhat different because the court is enjoined to consider whether the determination of the application for a *declaration of parentage* would not be in the best interests of the child. Nevertheless there is some overlap with the consideration of whether testing would be contrary to D's best interests.

15. Hence, the issues I shall address are:

    a. Does the Local Authority have "sufficient personal interest" in the determination of the FLA 1986 s55A application? If not, then in accordance with s55A(3), I must refuse to hear that application.
    b. Is D's parentage a matter that "falls to be determined" in the CA 1989 Part IV public law proceedings regarding D and E?
    c. If so, would it be contrary to D's best interests to make a direction for DNA testing under FLRA 1969 s20?

Evidence

16. In their written evidence, JK, PQ, and RS give broadly consistent accounts of the circumstances of D's conception. I described those circumstances at the outset of this judgment. They are very clear in their evidence that it was agreed that RS would be treated as D's grandfather. He does not have much contact with D but their relationship is established as one of grandfather and grandchild. Likewise, since D's birth, PQ has been treated as his father. Since August 2023, D, E, and F have lived with PQ. E's father, LM, has no relationship with E. F, also JK's child, is aged 19. Local Authority assessments of PQ as a carer for D and E have been positive.

17. JK, PQ, and RS strongly believe that it would be contrary to D's best interests for him to be told that it is possible that RS, and not PQ, is his biological father. It was always intended that the arrangement that led to his conception would be kept secret. It is naturally a matter of regret to PQ and RS, and no doubt to JK herself, that JK has revealed the secret to the Local Authority. If D were told of the uncertainty of his

paternity, or of any DNA test results that established that PQ was not his biological father, they fear that it would be damaging to his relationships with JK, PQ, and RS. Their own emotional stability, and therefore their ability to provide care to D and E, would be jeopardised. Extremely difficult questions would arise about what exactly to tell D. As a young child he would have great difficulty understanding the mechanics of, the reasons for, and the emotional implications of the circumstances of his conception. Difficult decisions would have to be taken about what to tell him, by whom, and when. There is evidence from the Local Authority that D is a ”resilient boy” but JK and PQ advise the court that they would be very concerned about the impact on him were either of the applications to be allowed.

18. JK, PQ, and RS have all indicated that whilst they are opposed to the applications, were the court to direct DNA testing they would comply and provide samples. JK and PQ would consent on behalf of D for samples to be taken from him.

19. Dr Willemsen was jointly instructed to address various matters arising. He has carried out a psychological assessment of D, of his relationships with PQ, JK, and RS, and the likely impact on D of a direction for DNA testing. He has advised on whether, and if so how, information arising from the testing should be imparted to D and the impact on D and his relationships within the family of imparting the information to him (which depends on what any testing reveals). I indicated to the parties that I did not need to hear oral evidence from Dr Willemsen, and none of the parties wished to question him. For the purposes of the applications before me now, I accept his written evidence. He advises the court that PQ’s fear is that his relationship with D will be weakened by D knowing that he is not his father, but that, in Dr Willemsen’s view, D has a strong bond with PQ which may in fact be strengthened by sharing the truth with D. Therapeutic work after DNA testing “will help D integrate a sense of reality reflective of his biological roots, while maintaining the relationship with his primary carer, his father.” In Dr Willemsen’s view, the most significant threat to the stability of the current placement lies with JK who “might attack D’s relationship with the father, should he not be D’s biological father.”

20. Dr Willemsen advises that “each and every time, when I come across families where there is a disclosure, for example from an extra-maritally conceived child, there is considerable trauma.” He says that identity is “not just formed psychologically, identity has biological roots too.” He indicates that it could be even more difficult for D to deal with the knowledge of his biological paternity were he to learn of it in adolescence rather than now, and warns that “decisions made now (including not making an intervention, which is a decision too) has [sic.] consequences for the child.” If the decision was made to test now, and biological identity is determined,

> “…the road is open to an intervention with the child, which will be therapeutic in nature, in which the child will be invited to share its experience of family life, his parents and the parental couple, and where slowly the narrative of reality (truth, the local authority called it) is fed to the child. The child is observed in the therapeutic work and responses from the child are worked through.”

Submissions - “Sufficient Personal Interest”

<u>The Local Authority</u>

21. Mr Spencer KC and Mr Pallo emphasised the importance of truth as to parentage both in relation to the best interests of a child and the public interest more generally. They referred me to paragraph [24] of the judgment of Black LJ in *Re S (A Child) (Declaration of Parentage)* [2012] EWCA Civ 1160,

> "Issues of status, such as parentage, can be expected to be approached with some formality. They concern not only the individual but also the public generally which has an interest in the status of an individual being spelled out accurately and in clear terms and recorded in properly maintained records."

In *S v S* (above) Lord Morris discussed "the general desirability of arriving at the truth" which "points to the further desirability of having the best evidence available." [55].

22. The United Nations Convention on the Rights of the Child (UNCRC) provides that a child has "as far as possible, the right to know and be cared for by his or her parents. Article 8 of the European Convention on Human Rights includes protection of a person's "physical and psychological integrity" and, as submitted to me, people have "a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity." *Milkulic v Croatia* (App no. 53176/99) [2002] 1 FCR 720.

23. Mr Spencer KC noted that there was no statutory definition of "sufficient personal interest", nor was I taken by any Counsel to any authority on the interpretation of that phrase. He maintained that s55A(3) was intended to safeguard respondents from applications that were frivolous, vexations, or untenable, or which were an abuse of process. The Local Authority's application is not in any of those categories. He suggested three grounds on which it can be found that the Local Authority has a sufficient personal interest:

    a. The Local Authority, as is the court, is required to assess and evaluate the child's bests interests within the CA 1989 Part IV public law proceedings, having regard to the welfare checklist at CA 1989 s1. The existence of the family secret, or fiction, concerning D's conception, is relevant to D's emotional needs, his background and characteristics, and any harm he has suffered or is at risk of suffering, all of which are matters to which the court must have regard.
    b. The Local Authority has a duty to seek to obtain the best evidence to enable the court to resolve proceedings.
    c. The Local Authority is the sole party in the proceedings supporting testing to determine parentage and if it were prevented from doing so then the public interest in maintaining and correcting public records and in establishing the truth of parentage, would be thwarted.

24. Mr Spencer said that the Interpretation Act 1978 provides that the word person "includes a body of persons corporate or unincorporated". He submitted that "personal" did not require that the applicant should be a natural person as opposed to a legal person, such as corporate body. He cited three cases in which local authorities had made applications under s55A - *Newcastle City Council v WM and Others* [2016] 2 FLR 184, a decision of Mr Justice Cobb; *Re KS* [2008] 2 FLR 720, a decision of Mr Justice Roderick Wood in proceedings relating to the Mental Capacity Act 2005; and *Re M & N (Twins: Relinquished Babies: Parentage)* [2017] EWFC 31, another

decision of Cobb J. In the two cases before Cobb J, the Local Authorities in question had parental responsibility by virtue of care orders and no parties opposed the declaration of parentage. In *Re M & N*, Cobb J held,

> "Given that the Local Authority has parental responsibility for these twins under section 38 CA 1989, I am satisfied (per section 55A(3)) that they have "a sufficient personal interest in the determination of the application".

Although he did not record any detailed argument on the point, Cobb J clearly regarded as significant, indeed determinative of the fact that the Local Authority had parental responsibility. The case of *KS* concerned best interests decisions affecting a protected party.

25. Whereas the Local Authorities in the cases before Cobb J referred to above did have parental responsibility, the interim orders in place in the present case do not confer parental responsibility on the Local Authority. Mr Spencer submitted that the distinction was irrelevant: parental responsibility was obviously not a pre-requisite for having a sufficient personal interest otherwise many putative fathers without parental responsibility would be deprived of the opportunity to seek a declaration of parentage. As for the significance of the word "personal", Mr Spencer submitted that it added nothing but was merely a reference to the "person" - whether a natural person or legal person - making the application.

<u>JK, PQ, and Guardian</u>

26. Ms Worsley KC leading Mr Foster, Mr O'Brien KC leading Mr Dodgson, and Mr Taylor did not rule out that a Local Authority could, in different circumstances, have a sufficient personal interest in the determination of an application for a declaration of parentage, but submitted that in the present case the Local Authority does not meet that requirement. The word "personal" is important because it signifies an interest that is different from that which the Local Authority maintains it has. The statute could have referred to "sufficient interest" but the word "personal" was added, so it is reasonable to infer that it adds a requirement that the interest must be "personal". It was submitted that it adds a requirement that the interest which the applicant must have is personal to them. Mr Taylor set out the reasons why the Local Authority's interest is not personal as follows:

    a. The Local Authority does not have parental responsibility for D.
    b. It would itself be unaffected by any determination on the application.
    c. Absent the s55A application, D's parentage would not fall to be determined within the care proceedings (a point that is disputed by the Local Authority and that requires my determination).
    d. The Local Authority has no special status as an applicant. If it, without parental responsibility, has "sufficient personal interest" then so might other public bodies anxious to maintain an accurate public record.
    e. A "personal" interest is to be contrasted with the wider public interest that Mr Spencer has prayed in aid.

27. Mr O'Brien KC submitted that the Local Authority is not applying in a personal capacity but as a public body without any personal interest in the outcome of the application, and that it has elevated its role to one of being a guardian of the public interest, for example seeking to ensure that public records are maintained and

corrected in accordance with the best available evidence. In fact FLA s59 provides for the intervention of the Attorney-General in applications for a declaration of parentage, thereby affording an opportunity for the public interest to be protected. The public interest is also engaged in relation to child support payments in which context the Secretary of State (for the Department of Work and Pensions) is given exemption from s55A(3). There would be no need for the exemption if the Secretary of State, seeking to uphold the public interest in relation to child support payment arrangements, would be considered to have a "sufficient personal interest". The Local Authority, like the Secretary of State has no personal interest in the determination of the application for a declaration of parentage. There is generally no role for a public body to make such applications and certainly not for a public body that does not parental responsibility or any other connection which might be thought to give it a personal interest in the outcome of the application.

Submissions - "Falls to be Determined"

The Local Authority

28. Mr Spencer KC and Mr Pallo submitted that FLRA s20 testing is about obtaining the best evidence to help the court to resolve matters that fall to be determined in the relevant proceedings and that, "D's parentage is a matter requiring determination so as to permit a comprehensive and accurate welfare evaluation to be undertaken at the conclusion of the case." I have already referred to Mr Spencer's submission that D's parentage is relevant to D's welfare and elements of the welfare checklist. It is submitted that, "the parentage issue clearly arises within the context of the welfare evaluation." Mr Spencer accepted that a determination of D's parentage was not required for decisions at the threshold stage of the CA 1989 Part IV proceedings. The circumstances of conception are not relied upon and there was no other issue in relation to the threshold that required DNA testing and sampling to obtain evidence of parentage. However, it was submitted that the court would need to know D's parentage in order properly to consider supervision and support planning. How could the court consider D's welfare in a vacuum, not knowing his parentage?

29. In response to the submissions of the other parties, referred to below, Mr Spencer submitted that "falls to be considered" did not create a test of necessity: a matter may fall to be determined within proceedings even if it was not necessary for it to be determined. He referred to the judgment of Balcombe LJ in *Re E (Parental Responsibility: Blood Tests)* [1995] 1 FLR 392 at 400 where he said,

> "The order directing a blood test to be taken can only be made in proceedings to which an ancillary matter, namely paternity, arises; for example if the father had applied for contact with H, or if the mother had (which she has not) applied for financial provision from the father in respect of H, then those would be proceedings in which the question of H's paternity would arise. But it seems to me clear from the decision of the court in Re F [Re F (A Minor) (Blood Tests: Parental Rights) [1993] Fam 314] that there is no jurisdiction to make a free-standing order for directing blood tests to be taken to determine paternity."

JK, PQ, and Guardian

30. Again, Counsel for all other parties adopted similar submissions in opposition to the Local Authority's position. Ms Worsley KC submitted that the court did not need to resolve D's uncertain parentage in order to conclude the CA 1989 Part IV proceedings. Future planning can be undertaken just as well not knowing for sure who is D's biological father. There is uncertainty, however it is not the function of the public law proceedings to resolve that uncertainty but rather to determine (i) if the threshold under CA 1989 s31 is met and if so (ii) what orders, if any, should be made. DNA testing is not required to determine any of those matters in this case. It may be considered desirable by the Local Authority to do DNA testing in order to determine biological paternity but it is not considered desirable by the family members and, most importantly for the issue under consideration, it is not necessary. Hence the question of D's paternity is not a matter that falls to be considered in the CA 1989 public law proceedings.

31. No adult individual seeks to determine parentage by scientific testing to establish parentage or non-parentage. In many other cases that would be catalyst for testing because parentage would fall to be determined. The determination of parentage is not relevant to any decisions about joinder of parties, kinship carers, or contact. The making of a supervision order will not depend on D's biological parentage and neither will the making of a child arrangements order.

32. Ms Worsley KC, Mr O'Brien KC, and Mr Taylor contended in oral submissions that the court should apply a narrow interpretation of "falls to be considered" such that the requirement was that it had to be necessary for the issue of parentage to be determined in the proceedings relevant. The family's Article 8 rights were engaged and the adults in this case, as well as D through the Children's Guardian, oppose the application for testing. Interference with their Art 8 rights could only be justified if it were necessary and proportionate. A loose interpretation of "falls to be considered" would allow interference with their Art 8 rights when it was neither necessary nor proportionate. Mr O'Brien KC added that testing is a form of expert evidence which the court must not permit unless the test of "necessity" is met under FPR Part 25.

33. Mr Taylor reminded the court of the judgment of Baroness Hale in *Re G* [2006] 2 FLR 629 at [33] to [37]:

> "[33] There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case. The first is genetic parenthood: the provision of the gametes which produce the child. This can be of deep significance on many levels. For the parent, perhaps particularly for a father, the knowledge that this is "his" child can bring a very special sense of love for and commitment to that child which will be of great benefit to the child (see, for example, the psychiatric evidence in Re C (MA) (An Infant) [1966] 1 WLR 646). For the child, he reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up. The knowledge of that genetic link may also be an important (although certainly not an essential) component in the love and commitment felt by the wider family, perhaps especially grandparents, from which the child has so much to gain.

> [34] The second is gestational parenthood: the conceiving and bearing of the child. The mother who bears the child is legally the child's mother, whereas the mother who provided the egg is not: 1990 Act, s 27. While this may be partly for reasons of certainty and convenience, it also recognises a deeper truth: that the process of carrying a child and giving him birth (which may well be followed by breast-feeding for some months) brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other.
>
> [35] The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting.
>
> …
>
> [36] Of course, in the great majority of cases, the natural mother combines all three. She is the genetic, gestational and psychological parent. Her contribution to the welfare of the child is unique. The natural father combines genetic and psychological parenthood. His contribution is also unique. In these days when more parents share the tasks of child rearing and breadwinning, his contribution is often much closer to that of the mother than it used to be; but there are still families which divide their tasks on more traditional lines, in which case his contribution will be different and its importance will often increase with the age of the child.
>
> [37] But there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare. Adoptive parents are the most obvious example, but there are many others."

34. In the present case, Mr Taylor submits, D has a father, namely PQ. He is clearly D's social or psychological father. Accordingly, welfare decisions will be grounded on PQ being D's father whether or not he is his genetic father. Likewise, RS's status as a slightly distant grandfather will be relevant to welfare decisions, not his potentially much closer biological relationship with D. As Mr Taylor put it, there is nothing in the welfare checklist that requires the court to determine what kind of father PQ is, i.e. whether he is D's genetic father.

Submissions - Exercise of Discretion under FLA 1969 s20

<u>The Local Authority</u>

35. If the court accepts that D's parentage "falls to be decided" in the CA 1989 public law proceedings, then it is clearly established by *S v S; W v Official Solicitor*, and *Re L* (both above) that the court ought to permit the testing unless satisfied that that would be against the child's interests. The court does not need to be satisfied that testing would be in the best interests of D before ordering testing. Counsel for JK and PQ

accepted that the court should consider itself bound by those authorities. Mr Taylor, for the Guardian, did not.

36. Mr Spencer KC and Mr Pallo submit that the importance of ascertaining the truth is not only in the interests of justice but also in the best interests of D. As Lord Hodson said at [47-48] in *S v S; W v Official Solicitor*, "there must be few cases where the interests of children can be best served by the suppression of the truth." In *Re H (a minor) (Blood tests: parental rights)* [1996] 4 All ER 28, Ward LJ said,

> "[page 42 j] In my judgment every child has a right to know the truth unless his welfare clearly justifies the cover up. The right to know is acknowledged in the UN Convention on the Rights of the Child (New York, 20 November 1989; TS 44 (1992); Cm 1976), which has been ratified by the United Kingdom, and in particular art 7…
> …
> [page 44e] If the child has the right to know, then the sooner it is told the better. The issue of biological parentage should be divorced from psychological parentage. Acknowledging Mr B's parental responsibility should not dent Mr H's social responsibility for a child whom he is so admirably prepared to care for and love irrespective of whether or not he is the father. If the cracks in the H marriage are so wide that they will be rent asunder by the truth, then the piece of paper which dismisses the application hardly seems adhesive enough to bind them together.
> … If H grows up knowing the truth, that will not undermine his attachment to his father figure and he will cope with knowing he has two fathers. Better that than a time-bomb ticking away."

37. In *Re D (Paternity)* [2006] 2 FLR 26, Hedley J observed that "truth … 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." That chimes with Dr Willemsen's evidence to the court. However, in their written submissions to the court, Counsel for the Local Authority referred also to *J v C* [2006] EWHC 2837, a short judgment in which Sumner J declined to direct a mother of a ten year old child to inform the child of the truth of his parentage. The Judge declined to do so because he accepted it was in the best interests of the child to be told, as the mother intended, when he was aged 16.
38. In the present case, Mr Spencer KC and Mr Pallo submit, "the risk of harm is so great that determination of parentage is demanded by his welfare … such is the consequence of the circumstances of the conception."

<u>JK, PQ, and Guardian</u>

39. No adult in this family supports DNA testing, informing D of the circumstances of conception and the results of any testing, or the need for a declaration of parentage. Those who know D best consider that it would be damaging to D's welfare to allow DNA testing with a view to informing him of the results of that testing. It would also be damaging to their own emotional and mental stability which would, in turn, have a detrimental effect on D. Ms Worsley KC and Mr Foster have included a welfare checklist summary in their written submissions which emphasises the enormity of the potential consequences for him of testing and then informing him of the test results.

40. Mr O'Brien KC and Mr Dodgson refer the court not only to the judgment of Sumner J in *J v C* (above), but also to the orders made by Hedley J in *Re D* (above) which directed samples to be taken, but stayed the order with liberty to restore so that sampling could take place at the right time for the child, which was not at the time of the hearing. Similarly MacDonald J in *MS v RS and BT Paternity* [2020] EWFC 30 determined that it was not currently in the children's best interests to determine the application. They submit that this case is exceptional on its facts and that whilst the court must apply the general test articulated in *S v S; W v Official Solicitor*, no previous case provides a clear answer as to how the discretion should be exercised in the present case. Those with parental responsibility for D consider that it would be contrary to his best interests to proceed to testing because to disrupt the bond he has with PQ would be "catastrophic and devastating to a healthy 5 year old boy who has already suffered adverse childhood experiences."

41. In written submissions Mr Taylor submits that the court must proceed in a way that is compatible with the rights of the child and other family members under the European Convention on Human Rights. There should be no interference by a public authority with the exercise of the right to respect for private and family life except as is in accordance with the law and is "necessary" for one or more of the reasons set out in Art8(2). He submits that the court should follow the statutory framework provided by CA 1989 s1 when deciding whether to give directions under FLRA s20 "even in preference to the authority of the Court of Appeal" and that the court should decide the question from a non-presumptive starting point holding the child's welfare as paramount and not consider itself bound by *S v S; W v Official Solicitor* or *Re L* (above).

Analysis and Conclusions

42. D is a unique child who would not exist but for the unusual arrangements made for his conception, but those arrangements have also created the potential for him to suffer emotional harm were he to learn of them or that his biological father is not PQ, but is RS. However, the Local Authority do not rely on the parents' decisions about D's conception as part of the threshold under CA 1989 s31 for the making of a care order or supervision order. Neither their scheme for JK to become pregnant, nor their decisions to keep that a secret, are put forward as grounds for making CA 1989 Part IV orders. There is no dispute that the threshold is met for other reasons which are set out in the Local Authority's threshold document. The circumstances of D's conception are therefore irrelevant to the issue of whether the court has the power to make public law orders under CA 1989 Part IV.

43. If a court is considering making CA 1989 Part IV orders, then CA 1989 s1(3) provides that it shall have regard to,

> "(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
> (b) his physical, emotional and educational needs;
> (c) the likely effect on him of any change in his circumstances;
> (d) his age, sex, background and any characteristics of his which the court considers relevant;
> (e) any harm which he has suffered or is at risk of suffering;
> (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the range of powers available to the court under this Act in the proceedings in question."

Does D's parentage "fall to be decided" because the court must consider this welfare checklist and hold D's welfare as its paramount consideration? In my judgment it does not.

44. It is not currently known with any certainty that RS, and not PQ, is D's biological father, but it is known with certainty that PQ, and not RS, is D's psychological father. Furthermore, there is a child arrangements order for D to reside with PQ, that is very likely to be continued as a final order in the public law proceedings, he has parental responsibility for D, he has been treated by D as his father all D's life, and he is D's day to day carer. The relationship between D and PQ is established. I cannot discern any need to determine D's biological parentage in order to address all or any of the elements of the welfare checklist. That does not mean that there will be no risks of harm to D arising out of the uncertainty of his biological parentage, the fact that he is unaware of that, and the effects of the circumstances of his conception on the family dynamics. But those risks are now known to the court and will be taken into account in any welfare analysis. The court will be capable of having regard to each of the elements of the welfare checklist without DNA testing having been carried out. DNA testing might change the factual context in which welfare would be considered – and it is arguable whether such a change would improve or diminish D's welfare – but it is not necessary to change the factual context in order to carry out the welfare analysis.

45. It must be acknowledged that the circumstances of D's conception cannot now be undone. Without testing, his biological paternity remains uncertain but there is a strong chance, to say the least, that the person he thinks is his grandfather is his biological father, and that the person he thinks is his father is his biological half-brother. At present the circumstances of D's conception are being kept as a family secret and, so far as five year olds understand biological parentage, a fiction that PQ is his biological father is being maintained. But were D to discover the possibility that RS is his biological father, and the reasons why that is possible, his welfare would be jeopardised. That is so even if he were deliberately told in a planned manner with ample support. If he were to learn of these matters in an unmanaged way, the harm to him could be greater. Furthermore, his future awareness that those he loves and relies on most had kept this secret from him could also cause him emotional harm. Anyone concerned with D's welfare must now seek to manage the latent risks to his welfare that arise from the hidden circumstances of his conception. At present that responsibility lies with PQ and JK. It does not lie with the Local Authority. No party has suggested that there are likely to be any changes of parental responsibility even if biological parentage was established by testing.

46. In the present case, D is living with PQ under a child arrangements order. The interim supervision order, as would any final supervision order, merely imposes a duty on the Local Authority to 'advise, assist and befriend' the supervised child, CA 1989 s35. A supervision order does not give the Local Authority parental responsibility and does not give a Local Authority licence to intervene in parental welfare decision-making about the child. What the Local Authority is seeking to do here is to intervene as if it did have parental responsibility. It wishes to take the decision about how to manage the difficult welfare issue concerning D's conception away from the parents and to force the issue by requiring DNA testing or by seeking a declaration of parentage.

47. Suppose that this was a private law case rather than public law proceedings and that D was living with PQ as he is now and that JK applied for a 'lives with order' in her

favour, but neither of them wanted DNA testing to determine D's biological parentage. It would, I hope, be obvious that the Local Authority and any other public body that became aware of a doubt as to the public record of D's parentage would not consider applying for a declaration of parentage or intervening in the private law proceedings in order to seek DNA testing. D's welfare would be the court's paramount consideration and the welfare checklist would be applicable, as it is in public law proceedings. But the court would not need to carry out testing to determine if PQ was D's biological father in order to make decisions about child arrangements. The court would have to consider the ability of PQ and/or JK to deal with the issue of D's uncertain genetic parentage and to meet his needs in that and other respects. An important element of the promotion of D's welfare would involve the management of the very difficult and delicate situation created by the circumstances of D's conception but the court would not consider it necessary to dictate the management of D's welfare in that regard by compelling DNA testing, either of its own motion or on application from a non-party in the private law proceedings, such as the Local Authority.

48. These introductory observations provide some context to the specific determinations that now follow.

Issue – "sufficient personal interest"

49. FLA 1986 s55A(3) provides that unless the court considers that the applicant has a sufficient personal interest in the *determination of the application*, it *shall* refuse to hear the application. I have added emphasis to show that the interest must be in the determination of the application, which is for a declaration of parentage, and that the court is not given a discretion.

50. In interpreting FLA 1986 s55A(3) I seek to give the words their plain, literal and ordinary sense. I have not been referred to any authority to guide me. Clearly, "interest" is used, not in the sense of having a desire to know, but in the sense of having a stake in the determination. The adjective "personal" qualifies "interest". In my judgement the interest of a public body wishing to ensure the maintenance of correct public records, is not "personal", but rather that public body is seeking to uphold a "public interest". If the Secretary of State for the DWP applies for a declaration of parentage he does not have a personal interest in the determination of that application, but to allow such applications to be made, he is exempted from the requirement to demonstrate a personal interest by the Child Support Act 1991 (CSA 1991) s27. Other public bodies have to establish a personal interest. The provision should not be interpreted as requiring only that a "person" should have an interest. I accept that as a "legal person" a Local Authority may bring an application for a declaration of parentage. So can any other person, but s55(3) does not prevent the making of the application but the hearing of it. The requirement for the applicant's interest in the determination to be "personal" would be meaningless if all it required was that the applicant was a legal person. Rather, the provision for the interest to be "personal" requires that the applicant should, personally, have a stake or interest in the determination of their application. The court must refuse to hear applications by the officious bystander or the nosey neighbour and, in my judgement, by a person whose only interest is to uphold the public interest (unless the exemption under the CSA 1991 s27 applies). The word "sufficient" requires the court to consider whether, even if there is some level of personal interest, it is of so little substance that the hearing of the application should be refused.

51. The interpretation set out above would serve the purpose of excluding frivolous, vexations, and malicious applications, and those which were an abuse of the process of the court. They would exclude the officious bystander who wishes to know the parentage of someone but has no personal stake in that determination. This interpretation appears to me to be rational and consistent with other provisions within the relevant parts of the FLA 1986. It is consistent with serving the purposes of this part of the statute.

52. Applying that interpretation to the present case, I am satisfied that the Local Authority has no personal interest in the determination of its application under FLA 1986 s55A(1). It may wish to know who is D's biological father, but it has no stake in the outcome of its application. A wish to uphold the public interest in maintaining accurate records of births does not confer a personal interest in the determination of such an application. It would create a significant interference with individuals' Article 8 rights to allow persons, whether individuals or public bodies, to apply for and continue applications for declarations for parentage when their only motive was to uphold a public interest. Hence, I have to consider whether, in the present case, the Local Authority has some other stake in, or connection with, the determination of the application to give it a personal interest.

53. The court has made a child arrangements order for D to live with PQ. Similar orders are made in countless private law cases which do not involve a Local Authority. The interim child arrangements order in this case may have been made after the Local Authority began public law proceedings, but the order itself does not confer on the Local Authority any personal interest in establishing D's parentage.

54. The interim Supervision Order requires the Local Authority as supervisor to advise, assist and befriend the supervised child. CA 1989 Schedule 3 sets out more details as to the exercise of that duty. It gives certain powers to the supervisor and imposes certain obligations on someone in PQ's position. However, in my judgement, none of those duties, powers, or obligations depend on the biological relationship between D and PQ. And the interim Supervision Order does not affect RS at all. Importantly the interim Supervision Order does not confer corporate parental responsibility on the Local Authority in the way that an interim Care Order would have done. Without parental responsibility, the Local Authority is not engaged with the welfare of the child in the same way as those with parental responsibility.

55. I acknowledge that the current orders are interim orders only and that final orders will follow. However, with frankness, the Local Authority have not suggested that the final orders will be other than those which the parents suggest – a child arrangements order and possibly a final Supervision Order. There is no real prospect of the Local Authority assuming parental responsibility for D. Unless or until it does, I have to deal with the present issue in the context of the current circumstances and knowing that there are unlikely to be any changes in the legal positions and relationships of the parties before me and D.

56. I shall discuss LFRA 1969 s20(1) below but note now that the Local Authority does not need to know D's parentage in order to meet its obligations of notification or service of documents or information in relation to the public law proceedings.

57. In my judgement, in this case the making of a Supervision Order, whether interim or final, does not give a Local Authority a personal interest in the determination of an application for a declaration of parentage. If I am wrong about that, then I would add that any personal interest is not "sufficient" because there is no link between the

interest of the Local Authority and the determination of the application that could reasonably be regarded as of any substance. FLA 1986 s55A(1) allows for applications for declarations as to whether or not a person named in the application is or was the parent of another person so named. The provisions in relation to jurisdiction as well as ss55A(3), 55A(5), and 58 are designed to ensure that the opportunity to make such applications is not misused. It would be a misuse of the right to apply, for a person to apply out of prurient interest or to seek to uphold some perceived public interest. The officious bystander does not have a "sufficient personal interest" in the determination of the application and so is refused a hearing. Nor would a person who, without any personal interest in the determination, wishes to correct the public record. Here, D's birth certificate may be inaccurate and I understand that the Local Authority may not want to stand by and allow that record to stand. However, although the Applicant Local Authority in the present case is, I accept, acting from the best of motives, I do not regard it as having a sufficient personal interest. It does not have parental responsibility, it does not require a determination of its s55A application in order to know whether, or how, to exercise its obligations and powers in relation to D, and it does not need to know who is D's biological father in order to ensure fairness in the public law proceedings.

58. Accordingly, I find that the Local Authority does not have sufficient personal interest in the determination of its application for a declaration of D's parentage and that, under FLA 1986 s55A(3) the court must refuse to hear its application.

Issue – FLRA 1969 s20 : "falls to be determined"

59. The gateway for ordering testing under FLA 1969 s20 is not that the issue of parentage might be considered, or that the parentage in question could be relevant in the civil proceedings. The direction may only be made if the parentage of a person falls to be determined. The Respondents at the hearing submit that parentage only falls to be determined if it is *necessary* to be determined in the civil proceedings. That interpretation reflects the Art 8 rights of the family members and child in respect of which only necessary and proportionate interference can be justifiable. The Local Authority has challenged that interpretation but nevertheless submits that determination of the parentage of D is necessary within the CA 1989 public law proceedings. In my judgement, the issue of parentage "falls to be decided" in the civil proceedings if either (i) the court hearing the civil proceedings has decided that the issue of parentage should be determined, or (ii) if the court conducting the civil proceedings is the same court as is hearing the s20 application, it decides that the parentage of the person should be determined. Unless or until a decision is made that the determination of parentage is required in the relevant civil proceedings, the issue does not "fall to be determined". In the present proceedings the court has not decided that D's parentage should be determined, therefore I must now decide whether D's parentage requires to be determined within the CA 1989 Part IV public law proceedings.

60. When considering the CA 1989 Part IV public law proceedings, I have to identify what issues remain to be resolved and ask whether the determination of D's parentage is needed in order to resolve those issues. I should not consider at this stage whether or not it would be in D's best interests for his parentage to be determined. That is a question that arises only if the issue of parentage falls to be determined. Furthermore, the court does not choose which issues fall to be determined by reference to whether it would be in a child's best interests for them to be determined. Instead, the court identifies what needs to be resolved in order to make the decisions that have to be made under CA 1989 Part IV. As conceded, parentage is not relevant to the question

of threshold in this case. The question therefore is whether the remaining issues for the court to decide require determination of D's parentage: is that determination necessary within the CA 1989 Part IV proceedings in this case?

61. I find that the question for the court is whether determination of parentage is *necessary* to resolve the outstanding issues, because determination of parentage is an interference with the Article 8 rights of D and members of his family, and Article 8 requires any such interference to be necessary (Art 8(2)) and proportionate. Also, as a matter of case management, the court should not allow resources and time to be spent on resolving issues that do not need to be resolved in order to conclude the proceedings. The fact that within proceedings, issues arise that require consideration of a child's welfare, does not mean that every aspect of the child's welfare must be considered within those proceedings.

62. Balcombe LJ's judgment in *Re E (*above) does not help the Local Authority because in that case there were no ongoing civil proceedings – only the father's application for blood tests. Balcombe LJ was merely saying that there have to be civil proceedings in which the issue of parentage arises. He referred to it as an "ancillary matter" meaning that the central matter would be something else, such as contact: the issue of paternity could not be sole matter within the civil proceedings. The application for testing has to arise in relation to proceedings in which parentage is an ancillary matter. Balcombe LJ was addressing the meaning of "in any civil proceedings" not "falls to be decided." Here, the public law proceedings are ongoing and the question is whether D's parentage arises as a matter ancillary to the determination of those proceedings, but as a matter which falls to be determined within those proceedings.

63. As the President of the Family Division emphasised in his View in January 2023 when re-launching the Public Law Outline, once the threshold has been met, the remaining issues for the court to consider are: (i) the permanency provisions (within the s31A care plan), (ii) contact arrangements, and (iii) what final orders should be made. No care order has been sought or is likely to be sought in this case and so consideration of the permanence provisions of a s31A care plan is not required (s31(3A)). A decision about making a final supervision order and/or child arrangements order is a determination of a question with respect to the upbringing of the child and so the child's welfare shall be the court's paramount consideration. Further, by operation of CA 199 s1(3) and (4) the court shall have regard in particular to the welfare checklist. However, the paramountcy principle and the checklist are engaged when the court is determining questions with respect to a child's upbringing. The prior question is what are the questions with respect to the child's upbringing that need to be determined. Focusing on what issues require determination, and the questions of contact and what final orders should be made, I cannot see that the determination of D's biological parentage is needed in order to resolve those questions. They can and will be resolved without knowing D's biological paternity. I accept the Respondents' submissions that it is not necessary to determine D's parentage in the public law proceedings.

64. It is relevant to considerations of D's welfare within the public law proceedings that there is uncertainty about his biological parentage, that the circumstances of his conception were out of the ordinary and involved RS, and that the family intended to hide, and have hidden those circumstances from him. In considering D's welfare, the court will not shut its eyes to those matters. But it is quite another thing to seek to force a resolution to the uncertainty as to his parentage. However strongly the Local Authority consider resolution of D's parentage to be in his best interests, it is not something that the court needs to resolve in order to conclude the public law

proceedings. All outstanding issues in the proceedings can be resolved without determining D's parentage. Particular regard can be had to the welfare checklist without having certainty as to D's biological paternity. His needs, his background, and any harm he is at risk of suffering can all be considered on what is presently known. It is one thing to assess welfare on the basis of uncertainties and risks, which is the normal process of assessment, and quite another deliberately to change the circumstances by compelling testing and determination of the issue of biological paternity. I do not consider it necessary to determine D's parentage for the purpose of the CA 1989 Part IV proceedings and I will not direct that it is an issue that should be decided. Hence, D's parentage does not "fall to be determined" within those proceedings, and a s20 order for testing cannot be made.

65. I have ruled that the court shall refuse to hear the Local Authority's s55A application and therefore there are no other civil proceedings in which the issue of parentage falls to be determined. Accordingly, since D's parentage does not fall to be determined in the extant civil proceedings, the Local Authority's application under FLRA 1969 s20 is refused.

Issue – The Discretion Whether to Direct Testing Under FLRA s20

66. Given my determinations above, consideration of whether it would be contrary to D's best interests to make a direction for testing under FLRA 1969 s20 does not arise. Nevertheless, I shall address that issue given the detailed submissions I have received about it, and in case I am wrong in my earlier rulings.

67. Great weight must be given to the dicta in *S v S; W v Official Solicitor*, *Re H*, and *Re D* (all above) as to the importance of truth and identity to the issue of a child's best interests. Nevertheless, other factors may cause the court to conclude that it is in the best interests of the child not to know the truth about their parentage. The circumstances of this case are exceptional. Firstly, none of the adults in the family wish to challenge the status quo. They all believe it would be contrary to D's best interests for testing to be done. Secondly, this is not a case where D would potentially discover only that the man he thinks of as his father is not his biological father. He would potentially discover much more than that, namely that the man he considers to be his grandfather is his father, and the man he considers to be his father is his half-brother. There is considerable potential for testing to lead to disclosure to D that will be harmful to him. D is only five years old and the provision to him of information of that kind would have to be carefully managed in order to mitigate the harm to him and his relationships within the family, as well as the relationships between the adults. Dr Willemsen has advised that it could be done, that it might actually strengthen the bond between D and PQ, and that it is probably better to grasp the nettle now, than leave it until later in D's development. Thirdly, the secret or fiction about D's parentage is being maintained by everyone in the family. JK, PQ, and RS appear to believe that this "secret" can be kept forever and that it should be left as a secret. The difficulty with that is that JK has already told other people, i.e. employees of the Local Authority, which is what has led to this hearing before me. It is quite possible that D might learn something of the circumstances of his conception, or that PQ might not be his father, in uncontrolled circumstances. If he is likely to find out, then the longer it is left before he is told, the more he will feel that he has been lied to or at least misled by the adults he most trusts.

68. Dr Willemsen has advised that a sample could be taken from D without causing him any psychological harm or emotional distress. He would have to be told that the

sample was required for some other purpose but, at the age of 5, he would not suspect that it was for DNA testing. This small deceit would be justified.

69. I am conscious that I have conflated the decision to direct testing with the imparting to D of the results of testing but it is difficult to divorce them. There would be little point in obtaining test results and then not communicating them to anyone. The adults must have a very good idea of what the test results would reveal. If the point of the testing is to provide certainty as to who is D's genetic father, and such testing was not against his best interests, then it would seem irrational to find out the results and not inform him in some way and at some time about the results or the implications of the results. Nevertheless, the questions of what information should be given to D following testing, and where, when, by whom, and in what circumstances any information should be given to him, will remain in issue even if testing is ordered. In *MS v RS and BT* (above) MacDonald J considered an application under FLA 1986 s55A by an individual for a declaration of non-parentage. He was faced, as I am, with a "minefield" in which there were potential harms to the children whatever decisions were taken. He decided that,

> "The proper way forward in this case is to direct, pursuant to the Family Law Reform Act 1969 s 20 that the father, the mother and the putative father shall provide DNA samples for testing, the results of that testing to be delivered to Cafcass and held in a sealed envelope on the children's Cafcass file. In addition, I shall direct, that the children shall provide samples for DNA testing, but I will stay that order without limit of time and with liberty to restore to the court on not less than seven days' notice to the parties. Finally, I will adjourn the father's application generally with liberty to restore."

70. The children in that case were aged 13 and 15 and were aware of, and distressed by, their father, the applicant, having obtained DNA from them by subterfuge. Further testing was nevertheless required should any declaration of parentage to be made. Here, D is only aged 5 and is and would be wholly unaware that DNA testing was happening. If the s20 application was validly made, then I would have to consider whether it was contrary to D's best interests for DNA testing to be done, even if further consideration was then given to when and how he would be informed, but I cannot see any benefit obtaining to D of adopting the same solution as MacDonald J which was well suited to the particular circumstances of the family with whom he was concerned.

71. The exercise of the discretion in this case is finely balanced. The intellectual exercise I have to undertake is to ignore the ruling I have made that the issue of D's parentage does not fall to be determined in the public law proceedings. Consideration of the discretion only arises if his parentage does fall to be determined. However, in that event, the fact that parentage was an issue that fell to be determined in the case would itself be a matter to add to the consideration of whether testing would be contrary to D's best interests. If his biological parentage *needed* to be determined in order for decisions about a final CA 1989 Part IV order to be resolved, then that would be a factor in favour of proceeding with testing. In the authorities to which I have been referred on the issue of the discretion, there was no question but that parentage was an issue that fell to be decided. It has been repeatedly emphasised in previous cases that the truth is of crucial importance in relation to children's best interests in these sorts of circumstances. When considering whether testing were contrary to D's best

interests, I would give weight to the fact that (i) testing is directed to an issue of parentage that falls to be decided in public law proceedings affecting that child, (ii) the truth of their parentage would otherwise be hidden from the child; and (iii) concealing the truth from the child could jeopardise their relationships with their main carer(s). I do not accept Mr Taylor's submissions that I should not follow the decisions of *S v S; W v Official Solicitor* and *Re L* (above). I consider myself bound by them. Having weighed all the evidence, including Dr Willemsen's report, I conclude that in the event that D's parentage fell to be determined, it would not be contrary to his best interests to direct DNA testing. However, were I to have made a direction for testing, I would have directed that a plan should be prepared for the communication of the results of testing, or the implications of those results, to D, and that evidence be filed and served in relation to that plan. The plan and evidence would have needed to address what D should be told, by whom, when and in what circumstances. I would have listed the case for a further hearing at which the court would have considered the communication plan and have given directions accordingly.

Analysis – Best Interests: FLA s55A(5)

72. As indicated earlier in this judgment, due to procedural deficiencies in the making and service of the s55A application, I ruled that I would not give a concluded decision in relation to this issue until RS had had an opportunity to obtain legal advice and secure representation. Again, this issue only arises if I am wrong to have decided to refuse to hear the application on the grounds that the Local Authority does not have sufficient personal interest in its determination. Although s55A(5) concerns a best interests analysis, the outcome of it is not necessarily the same as that relevant to the discretion to order testing under FLRA 1969 s20. A similarity is that the court's focus is on whether the proposed action is "not in the best interest of the child" rather than on whether it *is* in their best interests. But the issue is not solely directed to testing but to whether the determination of the application for a declaration of parentage would not be in their best interests. Nevertheless, the previous section of this judgment relating to the best interests issue under FLRA 1969 s20 is clearly pertinent to the considerations relevant to the decision whether the determination of the s55A application would not be in the best interest of the child.

73. I shall not make a decision on s55A(5) but when doing so I would take into account most if not all of the matters I have discussed in the previous section. I do keep an open mind, however, because I have not heard submissions on behalf of RS on this issue.

Final Conclusions

JK and PQ, having parental responsibility for D, and RS who is closely involved, may wish to reflect on the evidence of Dr Willemsen, and perhaps this judgment, and may decide to find out for certain who is D's biological father so that they can inform him at a time that they consider is in his best interests. But that is a matter for them. The fact that a Local Authority has brought CA 1989 Part IV proceedings does not, by itself, give them or the court licence to intervene in every aspect of a child's life. The court must be astute to identify the issues that require determination, and to limit evidence to that which is needed to resolve those issues. Absent that discipline, not only would the Family Court's caseload become unmanageable, but there would be significant danger of overreach by the state. In relation to the issues which have arisen in this case, there are many families in which a child's paternity is uncertain. Welfare

decisions are made about the child without knowing who is the biological father. By statute, the circumstances in which anyone, including a public body, may make or continue an application directed at finding out the biological parentage of a child, are carefully circumscribed. Without such statutory gatekeeping, FLRA 1969 and FLA 1986 would allow unnecessary and disproportionate interference with rights to respect for people's family and private life. It was rather robustly put to me in submissions that D's parentage was none of the Local Authority's business. I would not express it quite like that, but the submission does speak to a truth that when a Local Authority is an applicant under FLRA 1969 s20 or FLA 1986 s55A, the court has to be satisfied, respectively, that a child's biological parentage *is* their business: it falls to be determined in the relevant civil proceedings or the Local Authority has a sufficient personal interest in the determination and declaration of parentage. For the reasons given, the gates to the Local Authority's applications in this case are closed and I dismiss their applications both under FLRA 1969 s20 and FLA 1986 s55A.