Neutral Citation Number: [2025] EWHC 102 (Fam)

Case No: FD24P00366

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 January 2025

Before :

MS DEBRA POWELL KC,
sitting as a Deputy High Court Judge (In Private)

- -

Between :

KL	**Applicant**
- and -	
BA	**Respondent**

- -
- -

Ms L Andrews (instructed by **International Family Law Group LLP**) for the **Applicant**
Mr T Wilson (instructed by **RWK Goodman**) for the **Respondent**

Hearing dates: 04 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MS DEBRA POWELL KC

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.

Ms Powell KC:

Introduction

1. This case concerns applications under the Children Act 1989 for child arrangements and other orders in respect of a child, MA, who was born on 24 May 2020 and is now aged four.

2. The particular issue that currently falls for determination is whether the effect of a declaration of non-parentage in respect of a man who is not married to a child's mother and is named on the child's birth certificate as the father, but whom subsequent genetic testing shows is not the child's biological father, is to render his putative acquisition of parental responsibility under s.4(1)(a) of the Children Act void *ab initio*, or whether he has and retains parental responsibility that can only be removed by order of the court. If it is the latter, the question also arises whether such an order is to be made automatically or whether it requires a welfare analysis.

3. It was common ground at the hearing that, if an order of the court is required to remove parental responsibility, and if such an order would require a welfare analysis, that determination would need to be adjourned to a further hearing.

Relevant background

4. The parties began a relationship some time in 2019 and in September that year MA's mother, BA, informed the applicant, KL, that she was pregnant. From the time MA was born, KL and BA shared her care, although the extent to which they lived together during this time appears to be disputed. KL believed that he was MA's biological father and on 6 July 2020 he and BA registered MA's birth together, with KL being named on the birth certificate as the father.

5. In around December 2022, the relationship having come to an end, BA informed KL that he might not be MA's biological father, and subsequent genetic testing in October 2023 showed that the biological father was, indeed, another man, ST. ST does not seek to play any active part in MA's life at present, preferring to wait until MA is old enough to make up her own mind about what relationship she would like to have with him, if any.

6. KL considers MA to be his daughter. He describes a close bond with her and has always wished to continue to be a father to her, notwithstanding that he accepts he is not her biological father.

7. After the parties' separation, MA lived with her mother and initially continued to spend time with KL, including having regular overnight and weekend stays. From May 2023, however, the arrangements broke down, with the mother refusing to allow unsupervised contact to take place, and the following month KL issued proceedings in the Family Court seeking child arrangements orders in respect of MA. Those proceedings are ongoing.

8. On 9 November 2023 KL made an application for a parental responsibility order, which was said to be a pre-emptive application in case the issue of removal of his (putative) parental responsibility was raised by the respondent consequent upon the results of the genetic testing. At a Dispute Resolution Appointment before lay magistrates on 9 February 2024, at which KL was represented and BA was neither present nor represented, it was asserted on behalf of KL that he had parental responsibility at that time because he was still named on the birth certificate, and an order was sought "for the continuation of this Parental Responsibility in the interim for the matter to be addressed at a contested hearing if necessary." BA sought, in a position statement filed for the hearing, to have KL's parental responsibility removed.

9. The lay magistrates recorded the following:

> "Upon it being confirmed that the Applicant's Parental Responsibility remains for the child and the Applicant's application for a Parental Responsibility (*sic*) being consolidated. The Respondent's position being that the Applicant's Parental Responsibility for the child should be removed and the Court noting that this issue shall be determined at a future hearing."

10. The order followed, and stated:

> "For the avoidance of doubt, the Applicant has Parental Responsibility, and this shall be continued until further order of the Court."

11. Although this was described in the skeleton argument filed by Ms Andrews on behalf of the applicant for this hearing as the magistrates having 'granted' a parental responsibility order, I was told at the hearing that it was agreed between the parties that this was legally incorrect and that it was, in reality, merely a recital setting out what the magistrates believed to be the legal position at that time, which must follow from the wording used in the two separate paragraphs.

12. Shortly after this DRA the respondent took MA abroad and did not return her to this jurisdiction until around August 2024, whereupon KL sought, and on 16 August 2024 obtained, a location order at a hearing before Theis J.

13. In November 2024 BA made an application for a declaration of non-parentage in respect of KL.

14. The matter was listed for a hearing in this Court on 4 December 2024 to determine the legal issues regarding the applicant's parental responsibility, and other issues concerning interim contact, consolidation of outstanding applications in respect of MA, and continuation of the Tipstaff orders. The application for a declaration of non-parentage was not opposed by KL, indeed, it was agreed by him that it should be made, and I indicated at the hearing on 4 December 2024 that I would make the declaration sought. I made orders in respect of the other issues, and I reserved judgment on the legal issues regarding parental responsibility. This is that judgment.

Legal framework

15. Section 2 of the Children Act 1989 provides as follows:

> **2 Parental responsibility for children**
> *(1) Where a child's father and mother were married to, or civil partners of, each other at the time of his birth, they shall each have parental responsibility for the child.*
>
> *(1A) Where a child– (a) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008; or (b) has a parent by virtue of section 43 of that Act and is a person to whom section 1(3) of the Family Law Reform Act 1987 applies, the child's mother and the other parent shall each have parental responsibility for the child.*
>
> *(2) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth –*
> *(a) the mother shall have parental responsibility for the child;*
> *(b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.*
>
> *(2A) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies– (a) the mother shall have parental responsibility for the child; (b) the other parent shall have parental responsibility for the child if she has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.*
>
> *(3) References in this Act to a child whose father and mother were, or (as the case may be) were not, married to, or civil partners of, each other at the time of his birth must be read with section 1 of the Family Reform Act 1987 (which extends their meaning).*

16. Section 3 of the Children Act, which defines 'parental responsibility', provides at subsection (5) for the situation where a person without parental responsibility has care of a child:

> *3(5) A person who –*
> *(a) does not have parental responsibility for a particular child; but*
> *(b) has care of the child,*
> *may (subject to the provisions of this Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.*

17. A father who is not married to the child's mother can acquire parental responsibility under section 4, which provides, so far as material:

4 Acquisition of parental responsibility by father

(1) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(a) he becomes registered as the child's father under any of the enactments specified in subsection (1A);

(b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

(1A) The enactments referred to in subsection (1)(a) are—

(a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;

...

...

(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(3) The court may make an order under subsection (2A) on the application—

(a) of any person who has parental responsibility for the child;

...

18. The Births and Deaths Registration Act 1953 section 10(1)(a) to (c) provides as follows:

10 Registration of father or of second female parent where parents not married or civil partners

(1) Notwithstanding anything in the foregoing provisions of this Act and subject to section 10ZA of this Act, in the case of a child whose father and mother were not married to, or civil partners of, each other at the time of his birth, no person shall as father of the child be required to give information concerning the birth of the child, and the registrar shall not enter in the register the name of any person as father of the child except—

(a) at the joint request of the mother and the person stating himself to be the father of the child (in which case that person shall sign the register together with the mother); or

(b) at the request of the mother on production of—

(i) a declaration in the prescribed form made by the mother stating that that person is the father of the child; and

(ii) a statutory declaration made by that person stating himself to be the father of the child; or

(c) at the request of that person on production of—

(i) a declaration in the prescribed form by that person stating himself to be the father of the child; and

(ii) a statutory declaration made by the mother stating that that person is the father of the child; ...

19. Section 10A(1) refers to re-registration and is not directly relevant to the point in issue.

Previous decisions

20. The issues falling for determination in this case are the subject of differing judicial opinion and conflicting published decisions at High Court and Circuit Judge level.

21. In *RQ v PA and another* [2018] 4 WLR 169, [2018] EWFC 68, Theis J was considering an application for a declaration of non-parentage in respect of a man who was not the biological father of a child conceived by means of fertility treatment provided in Spain, and was not married to the woman who had carried and delivered the child and who was therefore her mother. At paragraph 34, after setting out s.4(1)(a) CA 1989, the learned judge made these *obiter* observations:

> "There is no definition of '*father'* in the CA 1989. Mr Kingerley and Ms Carew jointly submit that the father must *in fact* and *in law* be the father to be able to take advantage of this route to obtaining parental responsibility. In this case, it is established pursuant to the relevant provisions of the HFEA 2008, outlined above, that PA is not the legal father therefore the inclusion of his name on the birth certificate as the father cannot be correct in the light of the court's declaration. It follows, therefore, if he is not the father he does not have parental responsibility because section 4 CA 1989 does not apply (to an individual who is not the father). Although not directly relevant to the application this court is being asked to determine, those submissions make logical sense and I accept their analysis."

22. In another High Court decision, *Re G (Declaration of Parentage: Removal of Person Identified as Mother from Birth Certificate (No.1))* [2018] EWHC 3360 (Fam) (also known as *NG v AV*), Williams J was invited to make a declaration of non-parentage in respect of a woman, AV, who had been registered as a child's mother but who he had found as a matter of fact had no genetic or gestational connection with her, the child having been born to a surrogate using the surrogate woman's own eggs and then cared for by AV as her own. AV had subsequently taken the child abroad and their whereabouts at the time of the hearing were unknown.

23. Williams J initially declined to make the declaration because of a concern about the consequences for the child of AV being removed from the birth certificate "and thus not holding parental responsibility", in circumstances where a foreign state might, as a result, separate the child from AV in a sudden and distressing way. At a subsequent hearing, he made the declaration sought without further reference to the issue of parental responsibility ([2018] EWHC 3361 (Fam)). The issues of when and how parental responsibility ceases consequent upon a declaration of non-parentage did not

arise for determination, and the observation about the woman not holding parental responsibility consequent on her removal from the birth certificate was *obiter*.

24. There have been two recent cases, however, in which the effect on the putative parental responsibility of an unmarried man who had been proved not to be the biological father of a child fell to be determined, and on which the applicant relies, in whole or in part. It is therefore necessary to consider them in some detail.

25. In the first, *re SB* [2022] EWFC 111, HHJ Case gave an *ex tempore* judgment in an application by a mother for a declaration of non-parentage under s.55A Family Law Act 1986 in respect of a man who was not the biological father of her child, and a further application by her for the discharge of that man's parental responsibility in respect of the child. As in the instant case, there was no dispute that the declaration of non-parentage should be made, and it was.

26. HHJ Case considered that this raised an issue of whether the discharge of the man's parental responsibility was an automatic consequence of the declaration of non-parentage or whether it required a separate welfare-based decision, which, in turn, she considered turned on the construction of s.4 CA 1989 and, in particular, subsection (2A).

27. The following were identified as being of particular importance to her decision:
    a. a declaration of non-paternity is a declaration of biological fact, not a declaration as to legal status, whereas an order under s.4(2A) CA 1989 concerns legal status, hence a declaration of non-paternity cannot be the order being referred to under section 4(2A);
    b. the use of the word "only" in s.4(2A) shows that a court order is required;
    c. the whole of s.4 CA 1989 is subject to the principle that the child's welfare is paramount, as was made clear by Ryder LJ in *Re D (A Child)* [2014] EWCA, in which he said:

> "12. When a court is considering an application relating to the cessation of parental responsibility, the court is considering a question with respect to the upbringing of a child with the consequence that by section 1(1)(b) of the Children Act 1989 the child's welfare will be the court's paramount consideration.*"*

28. HHJ Case also highlighted the use of the word 'person' rather than 'father' in s.4(2A), concluding that this appeared to envisage a 'non-biological father figure' being the subject of a specific application under that provision, and s.4(2A) therefore not being confined to those who are in fact biological fathers but applying also to those who have previously been presumed to be fathers and have acquired parental responsibility by one of the methods set out in section 4(1). She considered that the choice of the word 'person' disposed of any argument that a man named on the birth certificate but proved by DNA testing not to be the biological father never in fact obtained parental responsibility in the first place.

29. The observations of Theis J in *RQ v PA* and of Williams J in *re G* were not drawn to the judge's attention.

30. The conclusion in *re SB*, set out at paragraph 35, was that:
    a. subsection (2A) is the only means by which a court can consider removing parental responsibility from a father who has gained it under subsection (1);
    b. it is a welfare based decision;
    c. the discharge of parental responsibility is not automatic on the making of a declaration of non-parentage and requires a welfare analysis.

31. HHJ Case subsequently gave a second judgment in *re SB*, having carried out the welfare analysis she had determined was required under s.4(2A), but that came after the second case, *re C* [2023] 3 WLR 1, which I consider next.

32. *Re C* was a decision of HHJ Moradifar, sitting as a High Court Judge, and also concerned an application by a mother for a declaration of non-parentage under s.55A Family Law Act 1986 in respect of a man who had been registered as the child's father but was subsequently established by genetic testing not to be so.

33. The decisions of Theis J in *RQ v PA* and Williams J in *re G* were referred to. HHJ Moradifar observed that Williams J had taken a similar view to that of Theis J on the issue of acquisition of parental responsibility, by assuming that removal of the psychological, but non-biological, non-gestational, mother's name from the birth certificate would result in the loss of parental responsibility. He noted that both cases concerned the provisions of the Human Fertilisation and Embryology Act 2008.

34. The learned judge concluded that where a man has gained parental responsibility for a child by being registered as the father, the registration and consequent grant of parental responsibility by operation of s.4(1)(a) are based on a rebuttable presumption that he is the biological father of the child. If that presumption is rebutted the status of the man as the 'father' cannot persist and the foundation for the acquired parental responsibility is displaced. Parental responsibility is lost by means of an order of the court, as required by s.4(2A), that simply reflects the true status of the individual adult and does not require a welfare analysis.

35. Consideration was given to whether in these circumstances the man's parental responsibility ceases *ab initio*, but HHJ Moradifar decided that would be contrary to public policy and the intentions of Parliament, because where a man, having been named as the father on the birth certificate, has exercised his parental responsibility in good faith, there might be many possible difficulties if the legality of his decisions and actions were threatened.

36. By the time HHJ Case came to give her second judgment, in *re SB (No.2)* [2023] EWFC 58 B, the decision of HHJ Moradifar in *re C* had been published. HHJ Case agreed with HHJ Moradifar's conclusion that it would be contrary to public policy and the intentions of Parliament for a man's parental responsibility to cease *ab initio* on a declaration of non-parentage, as, she said, this would lead to the presumed father's parental responsibility being thrown into doubt as soon as a mother made a

statement casting doubt on his paternity, with the potential to cause widespread uncertainty as to the parental responsibility of unmarried fathers. Further, she said, it would open up the spectre of litigation challenging *post facto* the actions and decisions of a man who had taken decisions in good faith believing himself to have parental responsibility.

37. She differed from HHJ Moradifar in her interpretation of the *obiter dicta* of Williams J in *re G,* deciding that Williams J had proceeded on the basis that the declaration of non-parentage and subsequent removal of a wrongly registered mother from the birth certificate would have the effect of removing her parental responsibility, and that the woman's parental responsibility was therefore voidable rather than void *ab initio.*

38. HHJ Case reiterated the point from her first judgment, as to the significance of the use of the word 'person' rather than 'father' in subsection (2A), and for all these reasons rejected the 'void *ab initio'* approach, concluding that a man incorrectly named as a father on the birth certificate did acquire parental responsibility under s.4(1)(a) CA 1989.

39. The judge also agreed with HHJ Moradifar's reasoning and conclusion that a separate specific order was required under s.4(2A) CA 1989 terminating parental responsibility, and reiterated the reasoning and conclusion on this issue from her first judgment.

40. She considered, though, that the conclusion in *re C* that no welfare analysis was required before making such an order was wrong because it failed to take account of the binding decision of the Court of Appeal, in *re D*, referred to above at paragraph 27.

41. At paragraphs 63 to 73 she said this:

> "63. Several of the written submissions have touched upon the issue of parliamentary intention, such being that section 4(1) was intended as a mechanism to confer parental responsibility solely upon a child's biological father. It is those principles which HHJ Moradifar clearly had in mind when he said, "The biological link is the foundation that identifies a man as the father of the child, under the statutory regime. When that foundation is displaced, the status of that man as the father cannot persist", and later, "Registration and the consequential award of parental responsibility by operation of law is based on the rebuttable presumption that he is the biological father of the said child. If that presumption is rebutted, the foundation for the acquired parental responsibility is displaced. Subsequently, parental possibility [sic, 'responsibility' clearly intended] will be lost by the order of the court that reflects the status of the individual adult".
>
> 64. Of course, I accept that the clear intention of parliament was to convey parental responsibility only on biological fathers pursuant to section 4(1) of the Children Act 1989. The fact that that was the intention does not preclude the possibility that parliament, through the parliamentary draughtsmen, had

foresight about the likelihood of errors occurring, and how they should be corrected.

65. It is worth remembering that a father acquiring parental responsibility by being registered on the birth certificate was not part of the original Children Act 1989, it was added as one of the amendments made under the Adoption and Children Act 2002. At the same time section 4(2A) was inserted. Prior to these amendments, there had been no express provision for the removal of parental responsibility from an unmarried father.

66. Parliament decided to add to the previous methods by which an unmarried father could acquire parental responsibility, the third route of birth registration. That was to be acquired by the simple act of a joint signing of the Register by the mother and putative father, without proof of paternity. Whilst there were some inherent safeguards within this process, such as the penalties for perjury, against deliberate misstatements on a birth certificate, there are no safeguards against honest mistake. Accordingly, when considering the entirety of the general population, it was entirely foreseeable that there would continue to be, as realistically there always have been, errors as to paternity on the birth register arising from mistakes made in good faith, as well as some errors made from misstatements not made in good faith.

67. An important change made by the amendments, therefore, was that the registration of the unmarried father now carried legal consequences for the child who was registered, in that the father acquired parental responsibility by the simple act of joint registration at birth.

68. It would therefore be logical, in my judgment, to conclude that parliament intended to provide within section 4 Children Act 1989, as amended, a complete scheme for the gaining and discharging of parental responsibility when acquired by one of the three methods referred to within section 4(1) including where the parental responsibility was gained on a false premise. In my view this is what they did.

69. I reiterate the significance of the language used by again quoting from my previous judgment:

> "A final point that I explored with counsel is the use of the word "person" rather than "father" in section 4(2A). This would appear to envisage a non-biological father figure, if I can put it that way, being the subject of a specific application under section 4(2A). In other words section 4(2A) is not confined to those who are in fact biological fathers, but also applies to those who had previously been presumed to be fathers and had acquired parental responsibility by one of the methods set out in section 4(1). If the contrary were the case, it seems to me one would have expected the draughtsman to use the word "father" in section 4(2A) in the same way as occurs in section 4(1)."

> 70. None of the written submissions engaged with this part of my earlier judgment as to why the word "person" was chosen, if it were not to deal with a situation such as that in which Mr K finds himself.
>
> 71. Of course, the possibility of mistake as to paternity could apply to any of the three methods set out in section 4(1) Children Act 1989. There is no formal requirement for proof of paternity where paternity is not in dispute.
>
> 72. It would have been open to parliament to distinguish between the method and criteria to be applied to applications to dismiss parental responsibility based on proof of non-paternity and applications based on welfare grounds in respect of biological fathers. No such distinction is provided.
>
> 73. In those circumstances, the natural construction of section 4(2A) Children Act 1989, bearing in mind the consequences with respect to the upbringing of a child to which I have alluded earlier, must be that an application under section 4(2A) is to be construed in accordance with the principles of the Children Act as set out in section 1. To my mind this brings us back to the ratio of Ryder LJ in *Re D*."

42. *Re D* concerned an application by a mother for an order removing parental responsibility from her child's biological father, to whom she was not married and who had been convicted of serious sexual offences against her two other children. Ryder LJ, with whom the other members of the Court agreed, concluded that the welfare of the child was the paramount consideration, and said at paragraph 14:

> "14. An unmarried father does not benefit from a 'presumption' as to the existence or continuance of parental responsibility. He obtains it in accordance with the statutory scheme and may lose it in the same way. In both circumstances it is the welfare of the child that creates the presumption, not the parenthood of the unmarried father. ..."

43. Finally, the Court of Appeal in *P v Q and F (Child: Legal Parentage)* [2024] EWCA Civ 878 said this about legal parentage and the significance of birth registration:

> "*Legal parentage*
>
> 16. The baseline position is the common law principle that a child's legal parents are the gestational mother and the genetic (also known as biological) father. This is a principle of law and not a rule of evidence or a presumption. ...
>
> ...
>
> *Birth Registration*
>
> 19. The registration of a birth under the Births and Deaths Registration Act 1953 will, for important practical purposes, identify a child's legal parents. A birth certificate is perhaps the most fundamental of all documents concerning personal status. However, the registration process depends on the accuracy and completeness of what the registrar is told by the informant(s), and many

> genetic parents do not appear on birth certificates. Registration is therefore practical evidence of legal parentage, but the legal status of parentage does not spring from registration. In a case where the child's parentage is called into question, the court may make declarations under the FLA 1986, which may or may not confirm the details that appear in the register. It is for that reason that section 14A of the 1953 Act provides for re-registration after a declaration of parentage and notification by the court to the Registrar General under section 55A(7) FLA 1986.
>
> 20. Registration has been said to constitute prima facie evidence of parentage, but it is not conclusive: *Brierley v Brierley* [1918] P 257, relying on the forerunner to section 34(2) of the 1953 Act. Registration of birth is certainly evidence of parentage upon which the outside world, including a court, is entitled to rely, but where there is an issue about parentage it does not create a legal presumption."

Parties' submissions

Applicant

44. On behalf of the applicant, Ms Andrews submits that KL acquired parental responsibility under s.4(1)(a) of the Children Act 1989 when, together with BA, he registered MA's birth and was named on her birth certificate, and that it is not void *ab initio* as a result of the discovery that he is not MA's biological father, but can be removed only by an order of the court.

45. In doing so, she relies on the legal analyses of HHJ Case in both judgments in *re SB,* and of HHJ Moradifar in *re C*.

46. She seeks to distinguish *RQ v PA* and *re G,* on several grounds, albeit that the relevant observations in both cases were *obiter*:
    a. both cases concern applications made under the HFEA 2008;
    b. *Re G* does not relate to s.4 CA 1989 at all;
    c. *Re G* concerns informal surrogacy arrangements and a woman wrongfully registering herself as the child's mother.

47. Ms Andrews submits that the applicant has exercised his parental responsibility in good faith since registering MA's birth. To deem that he had never had parental responsibility would, it is said, cast legal uncertainty on the status of decisions made by him in relation to MA's upbringing. The consequences of this in a case where the person deemed to have lost parental responsibility *ab initio* had been the sole decision maker for the child could, it is submitted, be even more drastic, and must be contrary to public policy.

48. Ms Andrews further submits that, before making an order removing parental responsibility under s.4(2A) of the Act, the court is required to undertake a welfare analysis. Reliance is placed on *SB (No.2),* and upon the judgment of Ryder LJ in *Re D (A Child)* [2014] EWCA, paragraphs 11-12, 14, 17, 20 and 29.

49. Although Ms Andrews relies on *Re D* primarily in support of her contention that there must be a welfare analysis before the court makes an order terminating parental responsibility, she also submitted in oral argument that paragraph 14 of the judgment, referred to above at paragraph 42, provides some support for what she described as "the more flexible approach in terms of s.4(1)(a) and the circumstances in which it can be complied with", rather than just a strict reading of the statute.

50. She highlights that there are many circumstances in which an issue of mistaken paternity may occur and submits that, given the draconian nature of the termination of parental responsibility and what is said to be the direct impact on a child's welfare, a purely technical and blanket approach to making decisions under s.4(2A) would be contrary to public policy. Further, it is said that it must be contrary to the no order principle and to public policy for a court to be required to make an order under s.4(2A) discharging parental responsibility and then, potentially, to make a further order under s.8 CA 1989 granting parental responsibility.

Respondent

51. On behalf of the respondent, Mr Wilson submits that KL never, in fact, acquired parental responsibility under s.4(1)(a) CA 1989 because he was not MA's biological or legal father and he did not, therefore, satisfy the requisite statutory criteria. Where a man who is registered as a child's father is subsequently proven not to be that child's father, the effect is to render the putative acquisition of parental responsibility void *ab initio*, *per* the approach of Theis J in *RQ v PA*. He argues that Williams J in *re G* adopted a similar approach.

52. Mr Wilson relies on the ordinary meaning of the words of s.4(1)(a), and points out that it is well established that the acquisition of parental responsibility represents the conferring of an important status *vis-à-vis* the child, see, e.g. Butler-Sloss LJ in *re H (Parental Responsibility)* [1999] 1 FLR 855, at 858. He submits that the plain wording of s.4(1)(a) reflects Parliament's intention that only a parent is able to obtain parental responsibility by virtue of being named on a birth certificate.

53. Legal parenthood is determined under common law rules, which provide that a woman who carries and gives birth to a child is the mother, and the man whose genetic material was used to create the child is the father, unless the statutory scheme provides for a different outcome, which does not apply here. Mr Wilson relies on the Court of Appeal in *P v Q and F (Child: Legal Parentage)*, and on the decision of Moylan J (as he then was) in *R v B (Parental Responsibility: Financial Provision)* [2010] 2 FLR 1966, [2010] EWHC 1444 (Fam).

54. He refers to the legislative history of s.4 CA 1989 and to the fact that, prior to its amendment by s.111 Adoption and Children Act 2002, s.4(3) provided that a court order under s.4(1) or a parental responsibility agreement with the mother could only be brought to an end by order of the court (contrary to what was said in *re SB* at paragraph 65, above). There is no equivalent use of the word 'person' in place of 'father' in the original, which provided as follows:

4 Acquisition of parental responsibility by father

(1) Where a child's father and mother were not married to each other at the time of his birth—
(a) the court may, on the application of the father, order that he shall have parental responsibility for the child; or
(b) the father and mother may by agreement ("a parental responsibility agreement") provide for the father to have parental responsibility for the child.

(2) No parental responsibility agreement shall have effect for the purposes of this Act unless—
(a) it is made in the form prescribed by regulations made by the Lord Chancellor; and
(b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

(3) Subject to section 12(4), an order under subsection (1)(a), or a parental responsibility agreement, may only be brought to an end by an order of the court made on the application—
(a) of any person who has parental responsibility for the child;
…

55. Mr Wilson submits that the Explanatory Notes to s.111 of the Adoption and Children Act 2002 show that the use of the word 'person' in s.4(2A) was not intended to extend the meaning of s.4(1) to include a person who was mistakenly named as the father on a birth certificate, because they refer to termination of parental responsibility that has been granted to 'an unmarried father' and not to 'a person'. The Notes state:

> *"Section 111 amends section 4 of the Children Act 1989 to provide that a father who is not married to the mother at the time of the child's birth is to have parental responsibility if registration or re-registration of the birth takes place according to the provisions of the Births and Deaths Registration Act 1953 and equivalent provisions for Scotland and Northern Ireland. Parental responsibility granted to an unmarried father under these provisions may only be terminated by the order of a court. Applications for the termination may be made by any person who has parental responsibility for the child or, with leave, the child."*

56. Mr Wilson argues that the applicant's contentions, and the reasoning of HHJ Moradifar and HHJ Case, place an unsustainable weight on the use of the word 'person' rather than 'father'.

57. He further submits that the reasoning in *re C* is open to doubt because (i) it does not appear that the 'plain reading' approach to statutory interpretation was argued and (ii) it proceeds on the basis that the birth registration creates a rebuttable legal presumption that the man is in fact and in law the father. This, he contends, is not supported by reference to any authority, and is contradicted by the (later) decision of the Court of Appeal in *P v Q (Child: Legal Parentage)*.

58. Mr Wilson submits that the effect of applying the approach in *re C* would be to broaden significantly the scope of individuals who are able to acquire parental responsibility for a child, despite Parliament's clear intention to the contrary, and that any person who so acquired it would continue to hold it until it was removed by the court. He submits that HHJ Case's analysis in *re SB* is even more expansive, and could lead to such a person retaining parental responsibility despite never having met the statutory criteria to acquire it.

59. Mr Wilson argues that the apparent public policy concerns relied on in both *re SB* and *re C*, concerning suggested implications for a person who has acted in good faith believing himself to hold parental responsibility, cannot justify this more expansive interpretation of s.4(1)(a) CA 1989.

60. Further, Mr Wilson points to s.3(5) CA 1989, which he says provides an answer to these concerns, because it provides legal authority for a person without parental responsibility to make decisions that are reasonable in all the circumstances for the purpose of promoting or safeguarding a child's welfare. He makes the point that s.3(5) CA 1989 does not appear to have been cited or considered in any of the previous cases on this issue.

61. In the alternative, Mr Wilson submits that, if the applicant's putative parental responsibility is not void *ab initio*, then this court should follow the decision of HHJ Moradifar in *re C*, that an order of the court is required to deprive the applicant of parental responsibility, but that such an order does not entail any welfare analysis.

Discussion

62. In my judgment, the starting point in this case must be s.4(1)(a) CA 1989 and a consideration, applying ordinary principles of statutory interpretation, of whether KL ever acquired parental responsibility in accordance with that provision. That entails, in the first instance, looking at the natural and ordinary meaning of the words used.

63. Before the birth was registered, there can be no dispute that ST, being MA's biological father, and therefore her legal father under the common law, would have been eligible to register MA's birth with BA under s.4(1)(a): he was (and is) MA's father, and he was not married to MA's mother, BA, at the time of the birth.

64. Looking at the natural and ordinary meaning of the words used in s.4(1)(a), can it also be said that KL was, before the birth was registered, eligible to register MA's birth with BA under that provision and thereby to acquire parental responsibility? The only possible answer to that question, in my judgment, is, as Mr Wilson submits, 'no': there is no ambiguity in the words used in the subsection, and KL was not MA's 'father' under the common law, whether biological or legal, even though he believed that he was.

65. I draw support for this conclusion from the *obiter* observations of Theis J on this point in *RQ v PA*, which, although not binding, are, of course, persuasive.

66. I respectfully agree with the statement of HHJ Case in paragraph 64 of *re SB (No.2)* that "the clear intention of Parliament was to convey parental responsibility only on biological fathers pursuant to section 4(1) of the Children Act 1989 ...", and observe that that is the result that is achieved by applying the natural and ordinary meaning of the words in s.4(1)(a).

67. I also respectfully agree with HHJ Moradifar's observation, at paragraph 13 of *Re C*, that:

> "... the Act itself does not define the term "father". In my judgment, the biological link is the foundation that identifies a man as the father of the child under the aforementioned statutory regime. When that foundation is displaced, the status of that man as the 'father' cannot persist."

68. It has not been contended on behalf of the applicant that the word 'father' in s.4(1) has a meaning other than that under the common law, rather, it is said simply that KL obtained parental responsibility by virtue of his name being placed on the birth certificate at the joint request of he and BA, both parties believing at that time that he was the biological father of MA. What is being suggested is, effectively, that a man who is not the biological or legal father of a child can nonetheless acquire parental responsibility under s.4(1)(a) by virtue of a mistake (or, implicitly, a misrepresentation) by the mother or the man himself as to him being the biological father, notwithstanding that he does not meet the statutory criteria under that section.

69. Ms Andrews relies on the judgment of HHJ Moradifar in *Re C*, in which he concluded that the naming of a man as the father on a birth certificate created a rebuttable presumption that he was the biological father. However, in the subsequent Court of Appeal case of *P v Q and F (Child: Legal Parentage)* it was stated expressly that there is no such legal presumption, rather, the registration of the birth is simply evidence of parentage and, where an issue arises about that parentage, that must be resolved by the court. The effect of this is to remove the central plank of HHJ Moradifar's reasoning for concluding that a man in KL's position does acquire parental responsibility under s.4(1)(a).

70. As Mr Wilson submitted, if it were right that a man in KL's position did acquire parental responsibility under s.4(1)(a), it would lead to a substantial broadening of the scope of individuals who are able to acquire parental responsibility for a child, which would be contrary to the intention of Parliament and to the Act's careful scheme concerning the grant of parental responsibility. There are several different factual circumstances that might give rise to this situation: the mother and the man may each be mistaken as to the child's paternity, or unsure, or one or both of them may be dishonest in representing that the man is the father. The man in question may want to be involved in the child's life as if he were the father even once the truth is known, or he may not. It would be a strange result, in my judgment, if in all of these circumstances the man in question were to acquire parental responsibility under s.4(1)(a) notwithstanding his ineligibility to do so.

71. The question, then, is whether there is any reason not to apply the natural and ordinary meaning of the words used in s.4(1)(a) CA 1989, which give effect to the clear intention of Parliament.

72. Ms Andrews, relying on HHJ Case's analysis in *re SB*, says that the wording of s.4(2A) CA 1989, with the use of the word 'person' rather than 'father', shows that Parliament's intention was to make provision for situations where a man was wrongly named as the father, specifying that the parental responsibility of such a 'person' could only be removed by order of the court, and thereby requiring that s.4(1)(a) be interpreted as granting parental responsibility to a man wrongly named as father on the birth certificate. She contends that that is the only reason why the word 'person' would have been used instead of 'father' in s.4(2A).

73. I disagree. Although it may be arguable that the use of the word 'person' instead of 'father' was a deliberate choice, intended to convey that persons other than biological or legal fathers might acquire parental responsibility under s.4(1), that is not, in my judgment, the only possible interpretation of s.4(2A).

74. Looking at the natural and ordinary meaning of the words of s.4(2A), the wording is, in my judgment, entirely consistent with the natural and ordinary meaning of the words used in s.4(1)(a), and does not require that s.4(1)(a) be interpreted as granting men in KL's position parental responsibility. A 'person' under s.4(2A) can, logically and grammatically, be simply a 'father' under s.4(1).

75. Further, it would have been possible to make explicit and clear provision in s.4(2A) for the situation where a man has been wrongly named as the father if Parliament had wished to do so, but the use of the word 'person' instead of 'father' does not do that. It might have been expected that Parliament would have chosen to be explicit, and not ambiguous, about a matter of such importance.

76. I accept Mr Wilson's submission that the Explanatory Notes to s.111 Adoption and Children Act 2002, which inserted s.4(2A) into the Children Act 1989, suggest that the use of the word 'person' in s.4(2A) was not intended to extend the meaning of s.4(1) to include a person who was mistakenly named as the father on a birth certificate, because they refer to termination of parental responsibility granted to 'an unmarried father' under the relevant provisions requiring a court order, and do not use the word 'person' as the section itself does.

77. I note also that Ryder LJ, in *re D*, said at paragraph 5:

> "Section 111 of the Adoption and Children Act 2002 [ACA 2002] amended the CA 1989 to introduce the automatic conferment of parental responsibility where an unmarried father is named on a birth certificate after 1 December 2003. It did not alter the statutory provision in section 4 CA 1989 relating to the cessation of parental responsibility. …"

78. Indeed, there is no obvious reason why the provision relating to the cessation of responsibility would have been changed when adding registration of the birth as a

means by which an unmarried father could acquire parental responsibility under s.4(1).

79. I am, therefore, unable to agree with HHJ Case's conclusion at paragraph 68 (as set out above), that, in making the changes under s.111 Adoption and Children Act 2002, and, in particular, in using the word 'person' instead of 'father' in s.4(2A), Parliament intended to provide for the situation in which parental responsibility was gained on a false premise. I accept the submission of Mr Wilson that that places an unsustainable weight on the use of the word 'person' and that the simple use of that word instead of the word 'father' is insufficient to justify departing from the natural and ordinary meaning of the words used in s.4(1)(a).

80. It is not contended on behalf of the applicant that applying the natural and ordinary meaning of s.4(1)(a) would lead to inconsistency with any other provisions in the Act, and I accept the submission of Mr Wilson that it is entirely consistent with the Act as a whole that only a biological and legal father will be eligible to register a birth and thereby acquire parental responsibility under s.4(1)(a).

81. Ms Andrews also relies on what was said to be the public policy argument against parental responsibility being void *ab initio* when a man is shown not to be the biological father of a child whose birth he has registered with the mother. It was accepted in both *re SB* and *re C* that, where a man had purported to exercise parental responsibility in respect of a child, a subsequent ruling with the effect that he had never, in fact, held parental responsibility would be capable of giving rise to many legal problems, which would, it is said, be contrary to public policy. Unfortunately, though, no specific legal problem that would arise was identified in the judgments in either of those cases.

82. In oral submissions, Ms Andrews suggested that if parental responsibility was void *ab initio* there could be legal difficulties in respect of past decisions relating to matters such as schooling, religious observance, medical treatment and many other matters, but, when pressed, was unable to identify exactly what the legal difficulty might be in any particular situation. Of course, it is the case that a person who has purported to exercise parental responsibility in respect of a child may have made many decisions having significant implications for the upbringing and welfare of that child, but what is not clear is what actual legal difficulties could arise if it subsequently transpired that the parent had never acquired parental responsibility.

83. Mr Wilson, when asked, was also unable to identify any specific legal difficulty that would arise in these circumstances. He pointed to s.3(5) CA 1989 as providing legal authority for any reasonable act that a person believing himself to have parental responsibility might have done for the purpose of safeguarding or promoting the child's welfare, which would, he said, provide a safeguard for a man who believed himself to have, but did not in fact have, parental responsibility. It is notable that s.3(5) CA 1989 was not referred to in either *re SB* or *re C.*

84. Although Ms Andrews did not accept that s.3(5) CA 1989 could fill what she described as the 'void' that could exist if parental responsibility was void *ab initio* on

proof that a man was not the biological father of the child, she did not identify any specific situation in which s.3(5) would not apply.

85. If, as Mr Wilson submits, there are not multiple legal difficulties that would be created if a man's putative parental responsibility were to be void *ab initio,* whether because of the operation of s.3(5) CA 1989 or otherwise, then it cannot be contrary to public policy for that to be the case. Given that no such legal difficulty has been identified in the course of submissions, or in the previously decided cases, I am unconvinced that there is any such public policy, and certainly none that would justify departing from the natural and ordinary meaning of the words used in s.4(1)(a).

86. The decision of the Court of Appeal in *re D* is, of course, binding on me, however, it says nothing about whether or not the putative parental responsibility of a man in KL's position is void *ab initio*. It speaks to how s.4(2A) is to be applied when considering removal of parental responsibility from a biological father who *has* acquired parental responsibility under s.4(1)(a), and does not concern the *granting* of parental responsibility under that provision at all. In my judgment, contrary to Ms Andrews' submissions, the case provides no support for the interpretation of s.4(1)(a) for which she contends.

87. I have also not found the decision in *re G* to be of assistance, because it is not clear from the passage referred to that Williams J was intending to make any observation on whether parental responsibility following a declaration of non-parentage was void *ab initio* (per HHJ Moradifar) or voidable (per HHJ Case), in circumstances where that issue did not arise and what was being considered was how a foreign state would respond in practice to the removal of a woman from the child's birth certificate when the child was in that woman's physical care.

Conclusion

88. For all these reasons, I conclude that KL did not acquire parental responsibility under s.4(1)(a) CA 1989 when he was mistakenly registered as MA's father on her birth certificate, and so he has never held parental responsibility.

89. Accordingly, no order is required under s.4(2A) CA 1989 to remove parental responsibility from him, and it is unnecessary for me to consider whether, before making any such order, a welfare analysis would have been required.

90. KL's applications for child arrangements and other orders in respect of MA will now fall to be considered by the local family court in accordance with ordinary principles under the Act.