



Neutral Citation Number: [2023] EWHC 516 (Fam)

Case No: RG21C01154

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

In the matter of;

Re C & A

(Children: Acquisition and Discharge of Parental Responsibility by an Unmarried Father)

9 March 2023

Mr Edward Kirkwood (instructed by the Joint Legal Team) for the applicant local authority
Miss Amanda Meusz (instructed by Sweetman Burke & Sinker) on behalf for the 1st Respondent mother

Miss Corrin Carey of Careys Law for the 2nd Respondent father

Mr David Merrigan (instructed by Simpson Millar Solicitors) for the 3rd Respondent father

Miss Jacqui Gilliatt (instructed by THP Solicitors) for the 4th and 5th Respondent children through their guardian Miss Natalie Irwin

Approved judgment

Introduction

1. The local authority applies for public law orders for two children. They are C and A who are respectively twelve and six years old. The children share the same mother but have different fathers. The matter has thus far been allocated to the District Bench and comes before me to hear the mother's application for a declaration of 'non parentage' and consequential directions that lead to the discharge of the parental responsibility that C's 'father' ('N') acquired by being named on C's birth certificate. During the private law proceedings some time ago and in a more recent paternity test it has been established that N is not C's biological father. In the course of submissions, the parties' positions have crystallised further and may be summarised as follows:
 - a. The mother argues that in light of the undisputed paternity test, N cannot properly hold parental responsibility for C. A declaration by the court as sought would rebut the presumption of paternity which by operation of law has granted N parental responsibility. There will then follow a re-registration process that would remove N's names from C's birth certificate and discharge his parental responsibility. This position is supported by the local authority and C's guardian. They each invite me to address this issue now and not wait until the conclusion of the proceedings.
 - b. N accepts that he is not C's biological father. He argues that the mother's application should be adjourned and considered at the conclusion of the proceedings. Otherwise, he states that by reasons of the cases that are considered below, the court must undertake a welfare analysis thus suggesting that parental responsibility is not automatically lost on the declaration as sought by the mother. Given his established involvement with C, such an analysis should be undertaken at a final hearing.
 - c. Although represented at this hearing, understandably, A's father does not advance a position.

The law

2. I am grateful to the advocates for their written submissions that they have prepared under some time pressure as supplemented by their additional submissions thereafter. Notwithstanding the resources that have been deployed to research the

applicable law, only three cases have been identified that may assist in addressing the issues in this case which on any view are not novel in our modern society. I will set out the applicable law by reference to two broad areas, first the statutory framework and second the aforementioned cases.

3. S. 2 of the Children Act (1989) ('the Act') provides that:

“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 Law Reform Act 1987 (which extends their meaning).

...”

4. S.3 of the Act sets out the provisions concerning the meaning of parental responsibility before setting out the means of acquisition of it under S.4 of the Act which provides that:

“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;

(b)paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c)sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(1B)The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.

...

(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; or

(b) with the leave of the court, of the child himself,

subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

The remainder of S.4 addresses the acquisition of parental responsibility by a ‘second female parent’ and by a step parent. I have not detailed these provisions as they fall outside the remit of this judgment.

5. S.10 of the Births and Deaths Registration Act (1953) as referred to in the above provisions, provides that:

“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; or

(d) at the request of the mother or that person on production of—

(i) a copy of any agreement made between them under section 4(1)(b) of the Children Act 1989 in relation to the child; and

(ii) a declaration in the prescribed form by the person making the request stating that the agreement was made in compliance with section 4 of that Act and has not been brought to an end by an order of a court; or

(e) at the request of the mother or that person on production of—

(i) a certified copy of an order under section 4 of the Children Act 1989 giving that person parental responsibility for the child; and

(ii) a declaration in the prescribed form by the person making the request stating that the order has not been brought to an end by an order of a court; or

(f) at the request of the mother or that person on production of—

(i) a certified copy of an order under paragraph 1 of Schedule 1 to the Children Act 1989 which requires that person to make any financial provision for the child and which is not an order falling within paragraph 4(3) of that Schedule; and

(ii) a declaration in the prescribed form by the person making the request stating that the order has not been discharged by an order of a court; or

(g) at the request of the mother or that person on production of—(i) a certified copy of any of the orders which are mentioned in subsection (1A) of this section which has been made in relation to the child; and

(ii) a declaration in the prescribed form by the person making the request stating that the order has not been brought to an end or discharged by an order of a court.

(1A)The orders are—

(a)an order under section 4 of the Family Law Reform Act 1987 that that person shall have all the parental rights and duties with respect to the child;

(b)an order that that person shall have custody or care and control or legal custody of the child made under section 9 of the Guardianship of Minors Act 1971 at a time when such an order could only be made in favour of a parent;

(c)an order under section 9 or 11B of that Act which requires that person to make any financial provision in relation to the child;

(d)an order under section 4 of the Affiliation Proceedings Act 1957 naming that person as putative father of the child.

...

(2)Where, 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, a person stating himself to be the father of the child makes a request to the registrar in accordance with paragraph (c) to (g) of subsection (1) of this section—

(a)he shall be treated as a qualified informant concerning the birth of the child for the purposes of this Act; and

(b)the giving of information concerning the birth of the child by that person and the signing of the register by him in the presence of the registrar shall act as a discharge of any duty of any other qualified informant under section 2 of this Act.

...

(3)In this section and section 10A of this Act references to a child whose father and mother were not married to or civil partners of, each other at the time of his birth shall be construed in accordance with section 1 of the Family Law Reform Act 1987

10ZARegistration of father or second female parent by virtue of certain provisions of Human Fertilisation and Embryology Act 2008

(1)Notwithstanding anything in the foregoing provisions of this Act, the registrar shall not enter in the register—

(a) as the father of a child, the name of a man who is to be treated for that purpose as the father of the child by virtue of section 39(1) or 40(1) or (2) of the Human Fertilisation and Embryology Act 2008 (circumstances in which man to be treated as father of child for purposes of registration of birth where fertility treatment undertaken after his death); or

(b) as a parent of the child, the name of a woman who is to be treated for that purpose as a parent of the child by virtue of section 46(1) or (2) of that Act (circumstances in which woman to be treated as parent of child for purposes of registration of birth where fertility treatment undertaken after her death), unless the condition in subsection (2) below is satisfied.

...

“10A Re-registration where parents neither married nor civil partners

(1) Where there has been registered under this Act the birth of a child whose father and mother were not married to, or civil partners of each other at the time of the birth, but no person has been registered as the father of the child (or as a parent of the child by virtue of section 42, 43 or 46(1) or (2) of the Human Fertilisation and Embryology Act 2008, the registrar shall re-register the birth so as to show a person as the father—

(a) at the joint request of the mother and that person; 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; or

(d) at the request of the mother or that person on production of—

(i) a copy of any agreement made between them under section 4(1)(b) of the Children Act 1989 in relation to the child; and

(ii) a declaration in the prescribed form by the person making the request stating that the agreement was made in compliance with section 4 of that Act and has not been brought to an end by an order of a court; or

(e) at the request of the mother or that person on production of—

(i) a certified copy of an order under section 4 of the Children Act 1989 giving that person parental responsibility for the child; and

(ii) a declaration in the prescribed form by the person making the request stating that the order has not been brought to an end by an order of a court; or

...”

6. Finally Part 1, s1 of the Family Law Reform Act (1987) provides:

“1. General principle.

(1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.

(2) In this Act and enactments passed after the coming into force of this section, unless the contrary intention appears—

(a) references to a person whose father and mother were married to, or civil partners of, each other at the time of his birth include; and

(b) references to a person whose father and mother were not married to, or civil partners of, each other at the time of his birth do not include,

references to any person to whom subsection (3) below applies, and cognate references shall be construed accordingly.

(3) This subsection applies to any person who—

(a) is treated as legitimate by virtue of section 1 of the Legitimacy Act 1976;

(b) is a legitimated person within the meaning of section 10 of that Act;

...”

7. Turning to the three mentioned case, in *RQ v PA and another* [2018] 4 WLR 169, Theis J addressed the issue of acquisition of parental responsibility by reference to the status of an individual as the father of the relevant child. In her obiter observations she stated:

“33 One matter that is not specifically addressed in either of the written submissions is the position in relation to whether PA had parental responsibility, by virtue of being named on the birth certificate.

34 Section 4(1) of the Children Act 1989 (“CA 1989”) provides as follows:

“Where a child’s mother and father are not married to each other at the time of his birth the father can acquire parental responsibility for the child if (a)he becomes registered as the child’s father under any of the enactments specified.

The specified enactments include Births and Deaths Registration Act 1953, in practice the unmarried father of the child acquires parental responsibility if the birth is registered naming him as the father. 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.”

Williams J took a similar view on the issue of acquisition of parental responsibility by approaching the issue on the assumption that removal of the mother’s name from the birth certificate would result in the loss of parental responsibility, *Re G (Declaration of Parentage: Removal of Person Identified as Mother from Birth*

Certificate) (No 1) [2018] EWHC 3379 (Fam). I note that both of these cases concerned the provisions of the Human Fertilisation and Embryology Act (2008).

8. By contrast, in *A Local Authority v SB & Ors [2022] EWFC 111*, HHJ Case sitting in the Manchester Family Court tackled this issue from a different angle and came to a different view. Although this decision is not a binding decision on this court, it is important to note the approach of the court. In the judge's analysis;

"28. ... one of the most important factors is that a declaration of non-paternity is a declaration of biological fact rather than a declaration as to legal status. Self-evidently an order under the Children Act 1989 section 4(2A) is the latter. The two orders being so different in character, I find it difficult to see how the order being referred to under section 4(2A) could be the declaration of non-paternity.

29. Secondly, there is the use of the word "only" in section 4 (2A),

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

That seems to suggest that an order under subsection (2A) is the only route by which parental responsibility conferred under section 4(1) can be lost. Again, that appears to preclude the possibility of parental responsibility being lost following an order or a declaration made under a completely different piece of legislation.

30. Thirdly, there is the fact that the whole of section 4 of the Children Act 1989 is subject to the principle that the child's welfare is paramount ...

32. It is clear, then, that the matters which the court will take into account when considering an application for discharge of parental responsibility are much wider than the predominantly factual matters which it will consider when dealing with an application for a declaration under the 1986 Act (notwithstanding the residual discretion referred to earlier).

33. 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 have previously been presumed to be fathers and have 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 draftsman to use the word "father" in section 4(2A) in the

same way as occurs in section 4 (1). It seems to me that the choice of wording (“person”) also disposes of any argument that a man such as RK (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.....

35. So, for all those reasons, I conclude that:

1) section (2A) is the only means by which the court can consider removing parental responsibility from a father who has gained it under subsection (1);

2) that it is a welfare-based decision,

3) that the fact that the man in question has been found not to be the biological father will feed into that welfare consideration, but that the discharge of parental responsibility is not automatic. The importance of the lack of a biological link is one which will vary from case to case.”

Analysis and conclusion

9. Ordinarily, an application for an adjournment will be considered before the substantive issues. In this instance N’s application for an adjournment is intrinsically connected to the legal issues that include the need for a welfare analysis before his parental responsibility is discharged. Therefore, I will consider his application in the overall analysis of the law. I have quoted extensively from the statutory provisions as there are several relevant threads joining these different statutes. The Act is the primary source for matters concerning parental responsibility. S.2 of the said Act addresses who may acquire parental responsibility for a child and what this entails for the holder of it. Importantly, in this section there is a clear and important distinction in the terms used to describe who may hold parental responsibility. S.2(1) and (2) refer to “*father and mother*”. However, the provisions of s. 2(1A) and (2A) refer to a “*parent*” which reflects the terminology of the Human Fertilisation and Embryology Act (2008) (‘HFEA 08’). Part 2 of the HFEA 08 sets out the definitions and who shall be treated as the mother, father and a parent. Further detailed consideration of these provisions fall outside of the scope of the submissions that I have received and this judgment.
10. S.4 of the Act addresses the “*Acquisition of parental responsibility by father*”. Where the father is not married to the mother or in a civil partnership, he may acquire parental responsibility by three routes, registration as the father, parental responsibility agreement or an order of the court. S. 4(2A) provides that where a father has acquired parental responsibility under the provisions of s. 4(1) of the Act, he may only cease to have it by an order of the court. The registration of an individual as the father is governed by the provisions of the Births and Deaths Registration Act

(1953) ('the BDRA 53'). S. 10 of this Act sets out the different routes through which an unmarried father may be formally registered as the child's father. The terminology used in this provision is clear when referring to the father and the mother. S. 10ZA of the Act refers to 'father' and 'second female parent', when setting out the registration requirements relating to the HFEA 08.

11. The submissions by the mother, the local authority and the guardian are founded on the clear references to the term 'father' in the above mentioned enactments. It is argued that the legal framework around the acquisition of parental responsibility by an unmarried father is based on a rebuttable presumption that the 'father' is the biological father of the child. If that presumption is rebutted, the very foundation for the acquisition of parental responsibility is displaced. This in turn gives rise to consideration as to whether the parental responsibility will be void *ad initio* or whether it ceases on declaration of 'non-parentage' or reregistration. It is submitted that it would be contrary to the intention of parliament and more generally, public policy that the parental responsibility should be void *ab initio*. Mr Kirkwood, having taken the lead on this issue, argues that in circumstances such as this case, where a person such as N, has exercised his parental responsibility in good faith, there may be enumerated possible difficulties if the legality of his decisions and actions are threatened.
12. N agrees with the analysis of the other parties in respect of the presumption that informs the acquisition of parental responsibility by an unmarried father. However, Mr Merrigan argues that there is no 'automatic discharge' of the parental responsibility. The Act is explicit by providing [S.4(2A)] that N will only cease to hold parental responsibility if the court orders it so. Thus, the court is tasked with a welfare analysis when faced with what is effectively an application for the discharge of N's parental responsibility. Furthermore, such an analysis is better undertaken at the final hearing where the court will be tasked with analysing the overall welfare of each of the children. So it is that he invites the court to adjourn this application to the Issues Resolutions Hearing which is listed some weeks away. He relies on the analysis in *A local Authority v SB & Ors* as detailed earlier in this judgment.
13. The relevant term of the statutory provisions clearly refer to a 'father' and when there is a requirement to state otherwise, for example reference to a 'parent', the said provisions meet that requirement. This clearly illustrates the clear intention behind the statutory scheme that has catered for the means by which different individuals with different relationships to the child can acquire parental responsibility which is commensurate with the values of the progressive and modern society we live in. As observed by Theis J, 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.

14. There is a greater divergence in the parties’ positions as to the impact of a declaration of ‘non-parentage’ that recognises and gives effect to the rebutted presumption of a biological link between N and C. S.4(2A) is clear in its terms that provide where a father who has acquired parental responsibility via the three routes that are identified in s.4(1), may only cease to have it if the court orders it. In this section there is no requirement for a welfare analysis for a father to acquire parental responsibility through registration. The Act provides for additional routes through which individuals, whether the father or not, with or without a parental biological link, may acquire parental responsibility (see s.8 of the Act). There is no doubt that such an application will be determined by the court by considering the child’s welfare as paramount and undertaking an analysis of the child’s welfare.
15. However, in my judgment this does not support an argument that an order under s. 4(2A) enquires a welfare analysis. It lends support to the argument that it does not. The statutory regime is distinct in its approach to the different routes by which parental responsibility is acquired. Where the very legal presumption for the acquisition of parental responsibility by operation of law under s. 4(1) does not exist, any welfare analysis is superfluous and would serve no purpose at all. I agree with Mr Kirkwood’s sagacious submissions that it would be contrary to public policy and the intentions of parliament to conclude that in such circumstances parental responsibility ceases ab initio. Therefore, this raises the argument that a declaration of ‘non-parentage’ and a subsequent re-registration is all that is required for N to cease to have parental responsibility for C. There is an inherent attraction and neatness to this argument. However, in my judgment, this cannot survive the provision of s.4(2A) of the Act. Its terms are clear by stating that a court order is required. In my judgment it would also be good practice to be clear that parental responsibility has ceased by reference to a particular date especially given the public policy arguments that I have summarised above.
16. Finally, I turn to the issue of the proposed adjournment. As I have set out earlier in this judgment, the argument for an adjournment is routed in the requirement of a welfare analysis. Such an argument cannot persist in the face of my judgment that in these circumstances there is no room for a welfare analysis. Although C may well be aware of N’s position, it is important that these proceedings and the space that the parties occupy within it continue in the correct legal premise. N was made a party to these proceedings and there is no suggestion that his party status should change. It

would be important that he should continue to have the benefit of legal advice and representation within these proceedings. However, it would be entirely inappropriate for me to involve myself in the assessments that the Legal Aid Agency must undertake in accordance with its own regulations.

17. In summary, where a man has gained parental responsibility for a child by being registered as the father of the child, such a registration and the consequential award of parental responsibility by operation of the 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 responsibility will be lost by the order of the court that reflects the status of the individual adult and does not require a welfare analysis. By contrast, where there is an application for a parental responsibility order or other orders that would grant parental responsibility to the applicant, the court will be tasked with undertaking a welfare analysis. This is a separate and different route through which parental responsibility may be awarded to the instance case. Therefore, I grant the mother's application, order that N shall cease to have parental responsibility for C from the date that this judgment is handed down and invite the Registrar to reflect this on the register.
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