

Articles

DNA, PATERNITY DECEIT AND RELIABILITY OF THE BIRTH CERTIFICATE AS A HISTORICAL DOCUMENT

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The term 'paternity deceit' is used to refer to when a mother is untruthful about who the father of the child is. Perhaps the oldest known such deceit was actually a 'maternity deceit' when King Solomon had to decide who the mother of a child was. In that situation, the real mother was prepared for her child to be given to the other woman rather than her child being harmed and that heroic gesture determined that she was the child's true mother. In family law, we see 'paternity deceit' operating in a range of different ways. In the aftermath of the second world war, fathers came home and found their wives had given birth to a child who could not possibly have been their husband's yet the child was nurtured and brought up as a child of the family. Nowadays a variety of possible scenarios can occur such as:

- (1) A man, who is in fact the biological father, appears as the father on the birth certificate but the mother has formed a newer and more meaningful relationship and therefore brings up the child to call another man 'daddy', so that mention of the biological father is removed from the child's life. If further children are born to the mother they believe that they are the full siblings of the older children. The mother may be resistant to her child ever being told the truth about his or her paternity.
- (2) The mother who knows who the father of her child is but chooses not to record his name on the birth certificate.
- (3) The mother has 'moved on' to be with another partner at the time of the

child's birth and chooses to put that preferred partner's name on the birth certificate rather than the name of the biological father.

The birth certificate is an important document: yet we can see that it is by no means a reliable historical document. If any untruths remained a family secret in times gone by then with the advent of DNA and paternity testing the true situation can now be easily ascertained. However, this is certainly a 'Pandora's Box' as the repercussions of the truth being revealed can be far reaching and with devastating consequences.

Section 1 of the Children Act 1989 reminds us that the child's welfare is the court's 'paramount consideration' yet does this sit happily with the need for a child to know the truth about his or her paternity? Perhaps the core need is for any child to be stable in his or her upbringing and for the integrity and stability of the primary care giver to be protected. However, that is a deeper philosophical issue and the starting point should be to examine the law surrounding the registration of a child at birth.

REGISTRATION OF A CHILD'S NAME

A child's birth must be registered within 42 days of birth (see the Births and Deaths Registration Act 1953 (as amended by Registration of Births and Deaths (Amendment) Regs 1994)). This is done by

making an appointment to register the birth which is done in order to obtain a birth certificate.

What is the function of a birth certificate?

It shows who you are and where you were born and is a form of identification.

Who can register a birth?

'If parents are married, they both have the power and the duty to register their child's names. If they are not married the mother has the sole duty and power to do so.' See Butler-Sloss LJ in *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930, at p 933. If the parents are not married, the father's details can only be entered in the register if both parents go together to register the birth. The unmarried mother does not have to put the father's details on the register when she registers the birth.

Unmarried father acquires parental responsibility upon registration

Section 111 of the Adoption and Children Act 2002 came into force on 1 December 2003 and has amended s 4 of the Children Act 1989 so that a father who was not married to the mother at the time of the child's birth acquires parental responsibility if his name is put on the child's birth certificate at registration or re-registration of the birth pursuant to the Births and Deaths Registration Act 1953.

Birth during marriage and presumption of legitimacy

At common law it is presumed that a child who is born to a married woman is the child of her husband and that the child is legitimate: *Re G (No 2) (A Minor) (Child Abuse: Evidence)* (1988) 1 FLR 314, at p 319. However, the presumption of legitimacy or illegitimacy is rebuttable: s 26 of the Family Law Reform Act 1969 provides that:

'... any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that that

person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption.'

The certainty of science is now to be preferred to 'presumptions'. In *Re H and A (Paternity: Blood Tests)* [2002] 1 FLR 1145, at para [30] Thorpe LJ said:

'Twenty years on I question the relevance of the presumption or the justification for its application. In the nineteenth century, when science had nothing to offer and illegitimacy was a social stigma as well as a depriver of rights, the presumption was a necessary tool, the use of which required no justification. That common law presumption, only rebuttable by proof beyond reasonable doubt was modified by s 26 of the Family Law Reform Act 1969 by enabling the presumption to be rebutted on the balance of probabilities. But as science has hastened on and as more and more children are born out of marriage it seems to me that the paternity of any child is to be established by science and not by legal presumption or inference.'

'Paternity Fraud' or the 'Duped Dad'

'Paternity fraud' is 'the act of falsely naming a man to be the biological father of a child, particularly for the purpose of collecting child support (also referred to as child maintenance), by the mother when she knows or suspects that he is not the biological father. The term entered into common use in the late 1990s (according to Wikipedia).

Statistics for ex-paternity?

It is difficult to know for sure the statistics for ex-paternity but the Child Support Agency (CSA) has provided some information regarding the number of DNA paternity tests performed each year for CSA cases between 1 April 1998 (when the CSA's paternity testing system began) and 31 March 2005. For each year the percentage of the DNA tests that proved paternity were as follows:

| Year | No of tests | % results positive |
|-----------|-------------|--------------------------|
| 1998/1999 | 4,173 tests | positive result of 84.8% |
| 1999/2000 | 3,317 tests | positive result of 80.2% |
| 2000/2001 | 2,938 tests | positive result of 85.1% |
| 2001/2002 | 2,346 tests | positive result of 85.8% |
| 2002/2003 | 2,773 tests | positive result of 83.4% |
| 2003/2004 | 1,314 tests | positive result of 84.6% |
| 2004/2005 | 1,982 tests | positive result of 84.6% |

(http://www.childsupportanalysis.co.uk/guest_contributions/csa_paternity_1.htm)

This suggests that about 15% of children have a father who is not the putative or presumed father.

We live in a technologically sophisticated age in which women have given birth to babies with scientific assistance over the age of 60; when embryos can be frozen then defrosted and fertilised when desired; when women can carry fertilised donor eggs. Has the time come for there to be scientific clarity before a father's name can be entered on the birth certificate? For that matter, where there has been a donor egg in a host mother who will be bringing up the child, should the birth certificate reflect the 'truth'; and disclose the identity of the egg donor and also the birth mother?

Would it be socially acceptable for there to be a DNA test before a father's name could be placed on the birth certificate? And who would pay for this testing? The result of scientific testing would highlight ex-paternity which is potentially destabilising to a relationship. However, to leave matters as they stand at the moment means that the birth certificate is an unreliable historical document. As a logical progression, we could reach a stage in future when the certificate records:

- (1) the name(s) of the 'DNA' father and/or mother;
- (2) the mother who carried the infant in pregnancy;
- (3) the father who rears the child in childhood.

In those circumstances the 'birth' certificate would move on to become a 'DNA'

certificate. However, it could be argued that this is simply 'too much' information.

THE TORT OF DECEIT

What if the man who has reared the child finds out that the child is not his own, is unhappy and seeks financial compensation for having spent money on another man's child? The tort of deceit was made out in the case of *A v B (Damages: Paternity)* [2007] 2 FLR 1051, a decision of Blofeld J in the Queen's Bench Division. The facts were that a man and a woman were involved in a relationship for 7 years during which time they retained separate homes but also spent a great deal of time cohabiting. Some months into the relationship the woman became pregnant. The man was misled by the woman into believing the child was his.

From the time of the pregnancy until the breakdown of the relationship some 5 years later the man made various payments in connection with his relationship with the woman, both to the woman directly and to third parties to cover costs associated with the welfare and education of the child. Only after the breakdown of the relationship did the woman dispute the paternity of the child. A DNA test subsequently confirmed that the man was not the child's father. The man made a final payment in respect of the child's school fees pending receipt of the DNA test results and no further payments thereafter. The man issued contact proceedings in the Family Division. The court refused to make a contact order, because of the mother's opposition to contact but urged the woman to allow the man to be a positive male figure in the child's life; however, the

woman had continued to veto contact between the man and the child.

The man brought proceedings seeking both general and special damages for loss suffered as a result of the woman's false representations as to paternity. There was no claim for special damages for expenditure by the man on the woman for her sole benefit; there were claims for special damages for holidays and restaurant meals, and for the costs of private nursery and school fees, and for equipment for the child. It was held, ordering the defendant woman to pay the man general damages in the sum of £7,500 and special damages in the sum of £14,900 that the court was satisfied to a degree of probability commensurate with the seriousness of the allegation that the woman had intended that the man should place reliance upon her false representations as to the child's paternity and that as a result of those fraudulent representations the man had suffered damage. All the ingredients of the tort of deceit had been made out. It was held that the man's claim was not a 'novel claim unknown to English law': 'Liability in deceit could be found to occur in a domestic context as between a cohabiting couple and was not an undesirable interference by law in domestic relations' applying *P v B (Paternity: Damages for Deceit)* [2001] 1 FLR 1041. The judgment of Burnton J at p 26 is referred to by Blofeld J:

'I see no reason why a confidence trickster who obtains money or other property from a woman by lying to her and living with her, possibly for a short period, should be outside the scope of liability in tort; and the same must apply to a woman who fraudulently deceives a man in order to obtain his money or property' (para [46]).

The facts of *P v B (Paternity: Damages for Deceit)* were that by a consent order it had been determined that the man was not the father of the child. The man alleged that he had been fraudulently deceived by the mother, with whom he had been living for many years, into believing that he was the father of the child. The mother denied making any representations as to paternity, and contended that if any such representation had been made, she had honestly believed it to be true. She claimed

that the man had not relied on any such representation and denied that he had suffered any damage.

The mother then raised the question whether the tort of deceit applied in the context of domestic relations. This question was tried as a preliminary issue. It was held, deciding the preliminary issue in the man's favour, that the tort of deceit applied as between a cohabiting couple; that the law would be deficient if there were no liability in tort in this context; and that the law should encourage honesty between cohabiting couples, rather than condone dishonesty. Liability for deceit was not an undesirable interference by the law in the domestic relations of a man and a woman; actions for deceit between couples would, in practice, be commenced only when their relationship had already broken down and would not cause the breakdown of relationships. The claim for damages could proceed to trial, although the court cautioned that it did not follow that any of the special damages claimed were recoverable, even if liability were established.

DECLARATION OF PATERNITY AND S 55A FAMILY LAW ACT 1986

By s 55A of the Family Law Act 1986 a person can seek a declaration as to the status of a child. An application can be made to the High Court, county court or to the family proceedings court. Section 55A allows any court to make a declaration that a person named in the application is or was the parent of another person so named. The procedural rules for the High Court and county court are FPR 1991, rr 3, 13 and 3.21, and for the family proceedings court FPC (MP, etc) R 1991, r 3B. In the magistrates' court the application is made on Form FL 423 and the order on Form FL 424. In the High Court or county court the order is in Form M30.

A court will only have jurisdiction to hear an application for a declaration as to parentage if either of the persons named in the application is habitually resident in England and Wales on the date of the application or has been habitually resident for 1 year up to that date, or has died but satisfied either of the above grounds at the date of death. When a declaration of parentage is made, the court notifies the

Registrar General of the declaration. Under s 14A of the Births and Deaths Registration Act 1953, the Registrar General has discretion to authorise the re-registration of the birth on the basis of the declaration; neither parent signs the new registration.

IMPORTANCE OF THE BIRTH CERTIFICATE REFLECTING THE TRUTH

In *M v W (Declaration of Parentage)* [2007] 2 FLR 270 a man born in England on 20 November 1964 petitioned for a declaration of natural parentage and sought a declaration from the High Court that a particular woman was his mother and a particular man was his natural father. His mother had not married and soon after his birth placed her son for adoption: he was adopted with her consent on 21 May 1965. His original birth certificate bore only his mother's maiden name and not his natural father's name. However, his father's name, brief physical description and likes appeared in the adoption file. His adoptive parents, whose name he carried, were well aware of his natural father's name and the petitioner had grown up knowing his name. Apparently, his natural parents had had a brief relationship and separated, leaving the natural mother pregnant. It was not clear if the father knew she was pregnant but there seems to be a suggestion that he did. However, he never knew that the mother had given birth to his son because before the petitioner's birth he returned to his native Australia where he married and then divorced. He died on 9 January 2009 in Australia.

The petitioner sought a declaration as to his parentage, seeking an amendment to his original birth certificate to include his natural father's name. There were seven respondents to the petition. The first respondent was the petitioner's own mother. The second and third respondents were the petitioner's adoptive parents. The fourth respondent was the Australian man's divorced wife. The fifth and sixth respondents were the two children of the Australian natural father and his wife.

The petitioner was a citizen of the UK and had remained living in the UK. On 10 March 2003 when he was 39 the petitioner's natural mother signed a declaration of acknowledgment of

parentage in which she named the natural father. On 23 December 2004 the petitioner had been granted Australian citizenship because he was able to satisfy the Australian authorities as to his parentage by the named natural father. The petitioner had been in friendly correspondence with the man's children in Australia. The petitioner sought a declaration of natural parentage as a matter of great importance to his self-perception and sense of identity. He felt that his natural father had officially been labelled as unknown and that some stigma attached to that. He also wished to pass on to his children and grandchildren an accurate and recognised account of his ancestry. The petitioner's adoptive parents, the natural mother, the Australian children and the Australian's divorced wife were all aware of the petition and none of them wished to defend it. The Attorney-General was supportive of the petition given that it had been served on the Australian divorced wife and children. The court made the declaration of parentage as it was satisfied as to the truth of the petitioner's parentage. As Mrs Justice Hogg said:

'I am of the view that it could be of assistance to the petitioner and his own children to know who the natural father was, because questions are often asked now as to a person's possible vulnerability to medical conditions or genetic make-up. It may be of value for the petitioner and his family to know that the state has recognised the named father. It would, of course, also satisfy the petitioner's personal wishes and emotions' (para [17]).

'I look at the situation as of today, and applying the current day attitude and philosophy about adoption, I see that it is of great value for everyone who is adopted to know about their background. Historically this may not have been the case, or so widely held' (para [21]).

PRIVATE LAW CONTACT PROCEEDINGS: KNOWLEDGE BY CHILD OF BIRTH FATHER'S IDENTITY

In *Re L (Identity of Birth Father)* [2008] EWCA Civ 1388, [2009] 1 FLR 1152 the biological father in 2006 sought contact

with his son who was then aged 13 and whom he had not seen since infancy. The boy's mother had married and believed his stepfather to be his biological father. The question of contact could not be addressed without first dealing with the issue of paternity, ie if, how and when the teenage boy would be informed of the truth that the man he thought was his father was in fact his step father and that another man was in fact his true father. The boy had considerable mental health problems and had been under the care of the local child and mental health services for over ten years. In 2006 his consultant psychiatrist wrote that the news of his true paternity would 'have a massive impact on the (the boy) and would certainly result in a deterioration in his behaviour and also his performance at school'. However, the mother did not want the psychiatrist involved in the proceedings and a psychologist was jointly instructed and carried out a 'paper exercise'.

In 2008, at the outset of the trial, the mother agreed to inform the boy of his true identity at the end of the current academic year. The trial judge did not consider the psychiatrist's 2006 letter or her potential to give evidence but after hearing from the psychologist, considered only the narrow question of whether the boy should be told at the beginning or end of the academic year. The mother successfully appealed and the case was sent back to the county court because:

- (1) The agreement between the parties to exclude the evidence of the psychiatrist denied the court a contribution which was at minimum highly relevant and potentially decisive. Consequently, there was a sense that a welfare decision had been taken on incomplete evidence. The court's concerns were sufficiently profound to conclude that the trial judge needed to look at the matter again.
- (2) There had to be an evaluation by the psychiatrist – she had a great deal of past experience of the boy and the responsibility of sustaining him through the trauma that lay ahead – and if the psychologist were to remain involved it was very important that there should be collaboration between the two.

Thorpe LJ said

'My fundamental misgiving is that the agreement reached between the parties to exclude the evidence of the consultant psychiatrist denied the court a contribution which was at minimum highly relevant and potentially decisive. I do not criticise HHJ Cliffe in any way. I think it is thoroughly unfortunate that unexplained misgivings on the part of the mother resulted in a preparation that excluded the consultant altogether from the exercise.

Again, without the smallest criticism of HHJ Cliffe, coming to the case fresh, I have an anxiety which I cannot dispel that a welfare decision has been taken on incomplete evidence, not just something that might have been of some value. What appears to be the most crucial source of evidence has gone untapped and that is no fault of HHJ Cliffe. It is the direct result of the extent to which the mother's wishes and feelings diverted the professionals from visiting that source. I cannot stifle my sense of misgiving and simply dismiss the appeal on the basis that Ms Shaikh has not made good any of her grounds. My concerns are sufficiently profound to persuade me that HHJ Cliffe needs to look at this again. There must be an evaluation by Dr Ellis, who has not only a great deal of past experience of this patient but who has also the responsibility of sustaining him through the trauma that lies ahead.'

In *Webb v Chapman* [2009] EWCA Civ 55 a father tried to sue his ex wife for deceiving him over the paternity of her daughter. Mr Webb brought up the child as his own having no reason to believe the child was not his and the child was registered as Mr and Mrs Webb's child. Mr Webb provided for the child's care. When she became 18 years of age, DNA tests proved that Mr Webb was not in fact the child's father. The couple divorced. Mr Webb unsuccessfully claimed damages against his ex wife and her lover at Bournemouth County Court and applied, unsuccessfully, to the Court of Appeal for permission to appeal against the ruling of the court below. Mr Webb alleged that his wife had deliberately set out to make Mr Webb believe the girl was his

daughter and had deceived him for years, giving Mr Webb birthday and Christmas cards from his 'daughter' and referring to him as her 'daddy'. Thorpe LJ stated:

'So, standing back and asking the proper question of proportionality, I reach these conclusions. First, that were we to allow Mr Mostyn QC to proceed in this court with limited prospects of success, only to enable him to carry the socio-legal argument to the House of Lords, we would be visiting on the litigants huge burdens, both financial and emotional, which are in my judgment disproportionate to any prospects of success. This whole litigation could be categorised as a misfortune to all those engaged in it, and, looking at the situation dispassionately, I would not wish to be the one who extended the misfortunes further. So for those reasons I would refuse the application.'

CONCLUSION

The court encourages honesty in a relationship and it follows that the birth certificate should reflect the truth. Practitioners will be aware of a variety of cases in which the birth certificate does not reflect the truth and the trend now is to recommend 'transparency' in family law dealings. There is a risk of half siblings, who have a parent in common, in ignorance, forming a union that is illegal in civil and religious law, due to clouding of information about parentage on the birth certificate. It is submitted that consideration should be given to transparency of information about egg and sperm donation on the birth certificate to avoid the risk of incest. If there is secrecy about who the biological parents are there is the risk of

incestuous unions being formed later in life. In the case of donor eggs by a stranger, it is assumed that the name on the birth certificate is that of the birth mother but not the biological mother which leads to lack of transparency for the child. In the case of a childless married couple where the man is infertile and there is a sperm donor, the information recorded on the birth certificate may be misleading.

Is the birth certificate a type of cosmetic document which shows the identity of the woman who has carried the child to delivery and may show the identity of the man who is believed to have fathered the child? Naturally anonymity is sought by those involved in assisted conception but there is an argument for disclosure of the true biological parent on the birth certificate. In the case of *M v W* above, a man sought to amend his original birth certificate so that it included his natural father's name. It was relevant to him because he felt demeaned at his father's name being left off his birth certificate when his father's identity was known and one can understand that his self-esteem would be boosted when he gained an identity.

In today's society, where information is available at the touch of a button and there are popular TV programmes researching family trees and a massive interest in discovering one's roots, the reliability of the birth certificate continues to be a big issue. The question is whether the time has come to review the rules surrounding registration of a child's birth so that the birth certificate can once again become a reliable document. After all the new biometric passports (the 'e-passport') have to contain correct personal details. Is the birth certificate obsolete or should the rules surrounding registration of a child's birth be tightened?