Neutral Citation Number: [2020] EWFC 30

Case No: ZC19P00940

IN THE FAMILY COURT
SITTING AT MANCHESTER

Manchester Civil Justice Centre

Date: 22/04/2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

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Between:

MS	**Applicant**
- and –	
RS	**First Respondent**
- and -	
BT	**Second Respondent**
- and -	
AS and BS	**Third and Fourth Respondents**

Ms Daisy Hughes (instructed by **Vaitlingham Kay**) for the **Applicant**
The First Respondent appeared in person
Ms Margaret Parr (instructed by **Brown Turner Ross**) for the **Second Respondent**
Ms Joanna Moody (instructed by **Gaynam King & Mellor**) for the **Third and Fourth Respondents**

Hearing dates: 11 and 12 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 22 April 2020.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. The court has before it an application for a declaration of non-paternity in respect of two children, A, who was born in 2005 and now aged 15, and B, who was born in 2006 and is now aged 13. This matter was rightly described by the Children's Guardian in evidence as a "minefield". Responsibility for this lies *entirely* with the adult parties in this case.

2. The applicant is MS (hereafter 'the father'), represented by Ms Daisy Hughes of counsel. The father seeks a declaration pursuant to s 55A of the Family Law Act 1986 that he is *not* in fact the father of the children. The father invites the court to make the declaration he seeks based on the totality of the evidence before the court, which evidence includes the results of a commercial 'off the shelf' DNA test he administered to both children without their knowledge. Whilst in his statement of 4 November 2019 the father states that he is *not* seeking a declaration that the second respondent, BT (hereafter 'the putative father'), is the children's father, it became clear during Ms Hughes' oral and written closing submissions that, in effect, the father does seek a finding to that effect in circumstances where he invites the court to draw an adverse inference against the putative father by reason of his refusal to submit voluntarily to forensic DNA testing. The father presented as a rather egocentric and self-centred witness, lacking in empathy, quick to emphasise to the court how hard this matter has been for *him* and exhibiting little apparent appreciation of the impact of his unilateral and clandestine actions on A and B.

3. The mother of the children is the first respondent, RS (hereafter 'the mother'). She represented herself before the court. The mother contends that the children should not be subject to further forensic DNA testing and the father's application should be dismissed. Her case as to the children's paternity appeared to evolve over the course of the hearing to the point where she asserts that she now has "no reason to believe" that the father is not the biological father of the children. She however, also conceded certain behaviour at the time of the conception of each child that leaves that assertion open to question. The mother remains willing to undergo a forensic DNA test. I found the mother to be an evasive witness who was prone to clothe her answers in caveats with a view to avoiding a concrete position with respect to the question of paternity and to leave open the possibility that the putative father is indeed the biological father of the children. Within this context, her final position in oral evidence, in so far as it was possible to identify one, was that as far as she is aware the father is the biological father of the children, that she still believes that he is "most likely their father", that it is "not likely" that the putative father is the biological father. The mother also stated that if the father is not the children's biological father she has no idea who is.

4. The putative father is the second respondent in these proceedings and is represented by Ms Margaret Parr of counsel. The putative father submits that the question of a declaration on the father's application is a matter for the court but argues strenuously that the court should not make any finding that he is the father of the children. Again, the putative father's case appeared to evolve over the course of the hearing to the point where, whilst he asserts it is highly unlikely that he is the father of the children, he too conceded certain behaviour at the time of the conception of each child that may call into question the validity of that assertion. As I have alluded to, the putative father has

during the case management stage of these proceedings refused to submit voluntarily to a DNA test in order to settle the question of whether he is the father of the children. He reconfirmed this objection in oral evidence, notwithstanding the ability of the court to draw an adverse inference from that stance. By way of explanation for his refusal, the putative father relied on concerns about data privacy and the security of his DNA samples in the context of his job in information technology, vague and non-specific criticisms of the family court, borne of previous litigation with respect to his daughters, and concerns regarding the impact of the results on his mental health. Like the mother, I found the putative father to be an evasive witness who was also prone to dress his answers in caveats, again in an apparent effort to avoid a firm position with respect to the question of paternity and to leave open the possibility that the subject children are his.

5. The children are represented through their Children's Guardian, Ms Huber, by Ms Joanna Moody of counsel. Both children are described as feeling distressed, deeply angry and betrayed by the surreptitious DNA test carried out on them by the father. There is evidence that each of the children has suffered considerable emotional anguish and instability in this context, with A in particular being said to have exhibited both threatened and actual self-harm. The Children's Guardian considers that both children are *Gillick* competent with respect to the question of further, forensic, DNA testing. Within this context, the current firm position of both children is that they will refuse to undergo further, forensic DNA testing, that they do not wish to know who their father is and that they wish to be left alone. On balance, that position is supported by the Children's Guardian with respect to both of the children. In the circumstances, the Children's Guardian submits that, pursuant to s 55A(5) of the Family Law Act 1986, it is not in the children's best interests for the father's application to be determined. In the alternative, the Children's Guardian submits that there is insufficient evidence to determine that application or to make any finding in respect of the putative father.

6. In circumstances where the Children's Guardian argued that the court should decline to hear the application pursuant to s 55A(5) of the 1986 Act on the grounds that the determination of the application would not be in the best interests of the child, where the father pressed strenuously for a determination of his application and where the parties contended that the question of whether the determination of the application was in the best interests of the children required the court to consider the evidence before it, it was agreed that the court would hear the evidence in this matter before deciding between those competing positions. Within this context, in determining the issues before the court I heard evidence from the father, the mother, the putative father and from the Children's Guardian. I have also had the benefit of reading the documentary evidence that has been filed with the court and the helpful Skeleton Arguments provided by counsel. Following the conclusion of oral closing submissions, Ms Hughes requested the opportunity to make further submissions in writing. I gave permission and have received further written submissions from all counsel and the mother. The final set of written submissions was received by the court on 3 March 2020.

BACKGROUND

7. The mother and the father met in August 1998 and married in June 2001. In October 2001 the mother commenced work at [company Y], a division of [company X]. Whilst in that employment, the mother met the putative father, who was himself at that time married. The mother and the putative father led a large project together. Within this context, the father asserts that between 2001 and 2003 the mother and the putative father were required in their respective roles to travel together to [location given] on a frequent basis for many days at a time and staying at the same hotel. This is denied by both the mother and the putative father. The putative father contends that he never travelled to [location given] with the mother, who he contends instead travelled with a young, male manager. In her first statement, the mother states that she and the putative father had a *solely* professional relationship and only occasionally socialised at work functions in the company of others.

8. Between 2001 and 2003 the mother and the father lived in [location given] and the putative father and his then wife lived in [location given]. The putative father and his wife had two daughters. C now aged 16, and D, now aged 11. There are photos of both children in the bundle, including photos of those two girls with A and B. It is the father's case that there is a considerable family resemblance between the putative father's children by his ex-wife and B and A. On the morning of the second day of this hearing, and having never raised the issue before, the putative father filed and served a handwritten statement asserting that he and his ex-wife had endured considerable fertility issues when trying to conceive their daughters. With respect to the aspects of fertility treatment that related to him, the putative father asserted that he had been diagnosed with 'slow swimmers', a reference to the effectiveness of his sperm. Asked to explain why he had not raised this issue before, the putative father stated, surprisingly, that it had not "struck me as of any relevance". The putative father filed no medical evidence to support the assertions regarding his fertility made in his late statement.

9. The putative father left company X in May 2003. In their original accounts, both the mother and the putative father contend that thereafter they were rarely, if ever in contact with each other, the putative father asserting in his statement that they interacted much less after he left company X, save at rare social events with former colleagues from company X. In oral evidence the mother likewise asserted that she interacted with the putative father "much less" as a consequence of him leaving company X, later also stating that she only saw him outside work at work events or social events. Within this context the mother further asserted that, after this point, she and the putative father spent *no* time *alone* together and saw each other only in the company of other adults.

10. A was conceived in mid-2004 and was born in February 2005. In her second statement dated 22 August 2019 the mother states that she has always believed the biological father of both children to be the father, that she has no recall of being intimate with any other person, that she felt it was unlikely that the putative father is the biological father and that she could not identify any other potential fathers. When cross examined by Ms Moody, the mother stated that at the time of A's conception she and the father had been actively trying for a baby and had undergone fertility and sperm testing to that end. In oral evidence, the father confirmed that he and the mother's relationship was sexual at the time of A's conception. B was conceived in mid-December 2005. In evidence the father contended that he and the mother had not often been intimate during

this latter period but had had sexual relations once or twice when on holiday at this time. The mother confirmed that position in her evidence.

11. With respect to opportunities for conception by men other than the father, the mother asserted that the *only* social event she attended during the period of A's conception was a barbeque in [location given], conceding to Ms Moody that "drank more than she normally did" at that event. The mother asserted in her second statement that the putative father "would not have been in attendance" at that event. However, in oral evidence the mother retreated from this certainty, telling the court that "I do not believe he was there" and then that "I do not recall him being there". As I have noted the putative father confirmed in his late, handwritten statement that there *were* occasions he socialised with former colleagues. He contended he was not present at the barbeque but did not discount the possibility of being at an event in that period. With respect to the period in which B was conceived, the mother asserted that the only social events she attended during that period were a work Christmas party and an [event given] Christmas party. Again, the mother stated in second statement that the putative father "would not have been in attendance". Again in oral evidence she retreated somewhat from this certainty, telling the court that at the work Christmas Party she was drunk and claimed simply "not to recall" the putative father being at that party.

12. When pressed, both the mother and the putative father also hedged around the possibility of them having had sexual intercourse at the time of each child's conception, in contrast to the bare denials contained in their respective statements. The mother stated she did not "recollect" having sexual intercourse with the putative father but that she was "pretty drunk" on occasion, speculating that if she had had sex with putative father during the period in which the children were conceived it would have been because she was "extremely drunk". Latterly she told Ms Moody that she did not recall having sex at the summer barbeque during the period of A's conception and had not stayed out. With respect to the conception of B, when cross examined by Ms Hughes the mother ultimately stated that "I just don't know in terms of the conception of B, I can't recall that happening, I can't recall a lot".

13. Within the foregoing context, in the further handwritten statement produced by him on the morning of the second day of the hearing covering the period during which A and B were conceived, the putative father states as follows with respect to that period:

> "[3] Between mid-2003 and late 2005, the stress of fertility treatment took a toll on my mental health. I would describe that period as a time when I went 'off the rails' a bit. I was socialising and drinking and quite unashamedly flirting with other women as a reaction to a lack of manliness.
>
> [4] I do not have anywhere near a total or full recall of exactly what I was getting up to at that time. I had drunken fumbles with other people. I find this whole thing embarrassing and embarrassing to admit.
>
> [5] I had a flirtatious conversations (*sic*) with other women (other than my wife) via social media. This included with [the mother]. [The mother] would not be at the social events I am describing as these took place in [location given] where I was then working, having left company X in May 2003.

> [6] Company X was based in [location given] where most drive to work whereas in [location given] pretty much everyone commutes by public transport and there is more of a social drinking culture.
>
> [7] Between 2003 and 2005 I cannot say with absolute certainty that these drunken fumbles didn't include [the mother]. I cannot remember any specific instance of being with [the mother] but due to us flirting at times it is a slim possibility. I was not in a relationship or an affair with [the mother].
>
> [8] If I had relations with [the mother] during this hazy period, then at most it could or would have been a very few number of times. I cannot remember when these times might have been and cannot say for certain whether they are in line with the conception of A and B. The time of the conception of B was when my ex-wife and I were fully engaged in fertility treatment."

14. Within the foregoing context, and in circumstances where he had previously asserted a strictly professional relationship with the mother at company X, followed by virtually no contact at all from May 2003, and in addition to conceding that in fact flirtatious texting had taken place between them after that date, when cross-examined by Ms Hughes the putative father said it would "not be beyond the realms of possibility" that he had met and had sexual intercourse with the mother between 2003 and 2006. He however, continued to assert that the mother would not have been in [location given] during this period. The putative father further reiterated that he had been very drunk at social events during this period and so drunk that if he had had sex he could not recall. It was within this context that the putative father ultimately admitted to "a slim possibility" that he had had sex with the mother at the time A was conceived. With respect to the period covering B's conception, the putative father told Ms Moody that he did not "recall having sex" with the mother but that he was "pretty off the rails dealing with stress". Ultimately, the putative father conceded that "There is yes, a possibility that I could be the father of A and B."

15. The father contends that very shortly after A was born, and again notwithstanding the assertion by the mother and the putative father that they had a strictly professional relationship at company X, followed by virtually no contact at all from May 2003, the putative father visited A and was photographed holding her both at the mother and father's home and at the putative father's home, without the knowledge of the father. The father produces before the court photographs that he contends evidence these encounters of which he was not made aware. In cross examination the mother conceded that the putative father had visited A at this time and that she had failed to mention this visit in her statement. She contended that the father had been present. The mother likewise conceded that she visited the putative father on three occasions at around this time. In cross examination she stated that she was only sure that the father was present for the first of these visits. Whilst the putative father initially denied the photographs evidenced him holding the infant A at his own property, he was forced to concede in cross-examination that the photographs do indeed show this. The putative father further conceded that he had visited A when she was only days old.

16. The father also produced further photographs that he contends evidence the putative father visiting MS and RS's home in mid-2005 in his absence. Once again, both the mother and the putative father contend that the father was present on this occasion. At this time, the father alleges that the mother joined a gym on the outskirts of a village to

which the putative father and his then wife had recently moved. The father further alleges that the mother discouraged him from joining the same gym, in respect of which it transpired that the putative father was also a member. In January 2006 the father contends that the mother became keen on purchasing a property in the same village in which the putative father and his then wife lived. B was born in September 2006. Father asserts that he wished to name the child 'R', after his father who had died the year before, but that the mother insisted on the name 'B', the same forename as the putative father.

17. Subsequent to 2006, the two families became increasingly friendly. The mother became a regular child minder for the putative father's two daughters and the two families shared a holiday in the summer of 2008. The father produced further photographs that he contends show the putative father in the company of both A and B at various points between 2007 and 2009 when he, the father, was not present. The father further points to the absence of any photographs of the putative father's then wife in the company of A and B or holding them. The father contends that the court should attach forensic significance to the fact that there is a paucity of such photographs. In answer to this assertion, mother said she had and could produce multiple such photographs but did not do so, or attempt to do so, at any point during the hearing, notwithstanding that assertion being made on the first day of the hearing. The putative father suggested that the reason there were not such photographs was because his ex-wife "did not like children".

18. In 2009 the putative father and his then wife separated. Their divorce was finalised in 2011. During this time the father alleges that the mother would go on holiday with the putative father and the children of both families, stating she felt sorry for him as a single father with two young children. The father further asserts that in early 2014 A told him that the mother and the putative father shared a bed during these holidays. When he challenged her, the father states that the mother told him that this was "to ensure the children had a room each".

19. In 2011 the mother asked the father for a divorce. The father said that this request came as something of a shock to him. The father further alleges that on the day the mother told him she wanted a divorce she removed *all* of the photographs of the children from the family home, including CDs on which the photographs were stored, contending that the mother did so in order to disguise the increasing similarities between the children and the putative father. The father considers that these photographs show that the children are the "spitting image" of the putative father.

20. I pause to note that at *no* point during the period which I have recounted did the father entertain suspicions that the children were not his. Indeed, in oral evidence the father stated that at the point the mother asked for a divorce he had no suspicions regarding the children's paternity. When cross-examined by Ms Moody he stated that for seven years following the birth of the children he had "no doubt whatsoever that I was the father". Rather, the father went on to state that the doubts came when he and the mother were arguing about financial provision. The father told the court that a question was raised in his mind at this point by his reflecting on the history and that the mother and the putative father had become closer. In 2013, the father asked the mother whether in terms whether the putative father was the biological father of the children. In response, the mother stated, emphatically, that the putative father was not the biological father and father stated that he believed her.

21. On 21 October 2013 a financial remedy order was finalised between the mother and the father. Pursuant to that order, the father currently pays £1,160 per month to the mother by way of child maintenance. When it was put to him, the father denied that his application for a declaration that he is not the father of the children is financially motivated.

22. The mother and the father finally divorced in 2014. The mother contends she commenced a relationship with the putative father *after* she had separated from that father and to that point, including during the holidays the mother took with the putative father and their respective children, their relationship was non-sexual in nature. The father contends that the mother asked him for a divorce in October 2011 the day before a holiday she had booked with the putative father and all four children was due to commence and thereafter pursued an open relationship with the putative father *prior* to the divorce. The mother and the father finally ceased co-habitation on the sale of the former matrimonial home in August 2014. The relationship between the mother and the putative father ended in July 2016. In March 2016 father had a child with his new partner.

23. The father alleges that between the Summer of 2017 and the Summer of 2018 A made a number of comments that he considered related to her paternity. In particular, he asserts that in the Summer of 2017 A asked him a number of times when the mother and the putative father met and when they started to be a couple. The father further asserts that in 2018 A stated that she looked like the putative father rather than the father or the father's new son. The father also asserts that A said there was a likeness between herself and the putative father's sister. In the Summer of 2018, the father states that A made a comment, during an argument with him, about not being genetically related to him and commented to B, in front of the father, that it is irrelevant to them whether the father could roll his tongue or not, the father contending that this indicated a further doubt on the part of A that the father was her biological father.

24. As I have already noted, the father used a commercial Alpha Biolabs 'Peace of Mind' DNA test on both children without their knowledge. The father contends that in October 2018 he spent time sitting opposite the putative father on a train and was perturbed by what he considered to be the likeness between the putative father and A and B, also noting what he considered to be similar facial expressions and mannerisms. The father states that he tried to convince himself that this was a coincidence based on the time the putative father had spent with the children. However, in December 2018 the father determined to undertake the 'Peace of Mind' DNA test. He took a cheek swab from each child, telling them that the swabs were to check their dental hygiene. The father asserts he did not reveal to the children the true nature of the test in order to hide from them his doubts as to paternity, in case it confirmed he was their father. He contends that he undertook this exercise in accordance with the guidance given in the testing kit he obtained from Alpha Biolabs, which guidance states as follows:

> "There are three easy steps:
>
> 1. Using one of the swabs provided in the testing kit, firmly rub on the inside of the left cheek for at least 20 seconds; then place the swab in the envelope provided. The second swab is used in exactly the same way on the inside of the right cheek. It is advisable not to eat or dinking immediately prior to collecting your samples.

> 2. Complete the details on the front of the swab envelope and seal it.
>
> 3. Place all the swab envelopes and the complete form in the self-addressed return envelope and sent it back to our testing laboratory."

25. The results of the DNA test, stating that the father is not the biological father of either of the children, became available on 11 December 2018. I pause to note that in relation to each of the children, the DNA Profiling Test Report states as follows (the wording of each being identical save for the name of the child):

> "**Statement**
>
> A comparison of the DNA profile of MS and [name of child] does not support the hypothesis that MS is the biological father of [name of child] as 3 or more mismatches were observed between the alleged father and child.
>
> As this is a Peace of Mind test all testing has been performed based on information provided by the client. The identity of the sample donor and the chain of custody of the samples cannot be guaranteed; therefore these results are not court admissible.
>
> **DNA Profile Data**
>
> A technical data table, showing the comparison of the DNA markers between the tested individuals can be ordered for an additional £30.
>
> **Conclusion**
>
> The result excludes MS as the biological father of [name of child]."

26. The mother made clear during her evidence that she doubts the integrity of the DNA tests performed by the father, at times even implying that he may have sent misleading samples to Alpha Biolabs. In this context, at the pre-hearing review the court directed that Alpha Biolabs provide answers to a series of questions regarding the tests, including how they compare to a forensic DNA test for use in legal proceedings. In summary Alpha Biolabs state that:

    i) A Peace of Mind DNA test is a paternity test that is solely reliant on the information provided by the customer. It is not a witnessed test, the identification of the named donors or the chain of custody cannot be verified.

    ii) The collection form requires the that consent for testing each child under 16 must be provided by an adult with parental responsibility.

    iii) A legal test is a witnessed test with a full chain of custody and the entire process is overseen by sample collectors from Alpha Biolabs, who take the DNA samples and verify the individuals by checking photographic identification. There is a full chain of custody and such tests can be used for legal purposes.

    iv) Peace of Mind tests are for information only. There is a difference between the reliability of a Peace of Mind test and a legal test as Alpha Biolabs cannot

guarantee that the individuals named on the test form and the DNA samples provided are correct.

27. The father elected not to communicate the results of the DNA test to the mother until after Christmas 2018. On 20 December 2018 the mother relocated to [location given] with the children, a move that had been the subject of tension between the father and the mother since February 2018. According to the mother, at some point after Christmas 2018 A informed her that the father was "planning something really bad".

28. On 30 January 2019 the father's solicitors wrote to the mother to inform her of the results of the DNA test. Following receipt of the letter containing the results, the mother states that she checked A's Internet search history and discovered she had been googling 'mouth swabs' and 'DNA testing'. It is also said that A had made mention of the subject at school. On 20 February 2019 the mother agreed to 'forensic DNA testing', meaning testing with forensic safeguards. By reply, on 26 February 2019 the father suggested the same ruse he had deployed on the children for the 'Peace of Mind' test be used for the forensic testing. The mother maintained that the children should be told the reason for the testing. In the letter of 26 February 2019 the father also asserted that the terms of the financial remedy order would have to be revisited in respect of child maintenance.

29. The applicant's application for a declaration of non-paternity was issued on 11 April 2019. On 1 May 2019 Recorder Samuels QC considered the jurisdictional requirements of s 55A(2) of the Family Law Act 1986 satisfied and determined that it was not necessary to invite the Attorney General to intervene pursuant to s 59 of the 1986 Act. On 29 April 2019 and 28 May 2019 the putative father indicated in writing his intention not to engage with the proceedings. On 16 July 2017, HHJ Forrester directed the solicitor for the children to write to the putative father advising him that the court may make orders declaring him to be the father of one or both of the subject children even if he continued to decline to engage in the proceedings. At a hearing on 10 October 2019 before HHJ Forrester the putative father stated that he was not willing to undergo DNA testing and made a direction that the father indicate whether he sought an order requiring the putative father to provide DNA samples and an order that such sample be tested against those taken from the children by the father. No such orders were sought by the father.

30. The matter came before me for directions on 20 January 2020. At that hearing, the father raised for consideration the question of whether further forensic scientific testing should be undertaken to establish the children's paternity, to include forensic samples being taken from the children. The mother indicated to the court that she would be amenable to such testing but that the children were fiercely opposed to it, as confirmed by the Children's Guardian. The putative father indicated that he would be opposed to forensic testing. Within this context, I indicated that I was not minded to direct further forensic testing and the father did not press, then or subsequently, any formal application for such a direction. It is important to note that at all points up to and including 20 January 2020, whilst the father had stated his belief that the putative father was the biological father of the children, he was not seeking a finding or declaration to that effect.

CHILDREN'S WISHES AND FEELINGS

31. On 8 July 2019 the Children's Guardian and the solicitor for the children spoke to each of the children, initially at home together and then individually at school. A stated that she was angry that her DNA had been taken in a way that she considered to be dishonest and stated that if the father had simply asked her she was likely to have consented. A declined to agree to undergo further forensic DNA testing. She considered that it made no difference to her whether she is biologically related to the father as she does not regard him as her father and does not wish to have a relationship with him. She was clear in her view that her paternity is a matter for her parents to resolve and she does not wish to be involved. A was alive to the fact that further testing could also determine whether she is a full or half sibling to B. She stated she would like to meet the judge determining the application but not before judgment.

32. On 8 July 2019 B's position was distinct from that articulated by his sister. He presented as betrayed and confused by both the father's application to the court and by his lack of contact. B was plainly distressed by the loss of his relationship with the father and his younger paternal sibling. B stated that he *was* willing to undergo further DNA testing. If such testing established that he is biologically related to the father then B would wish to have contact with him. B did not wish to meet the judge determining the application.

33. As a result of the meeting on 8 July 2019, the Children's Guardian considered that both children were *Gillick* competent on the question of whether to agree or oppose further forensic DNA testing, in that they each understood how the DNA sample would be taken and the possible results, outcomes and implications of such testing. Both children understood that a refusal on their part to undergo further DNA testing would not mean an end to the proceedings.

34. A further meeting took place between the children's solicitor and the children at school on 6 September 2019, initially together and then with A by herself. B indicated that he had now decided he did not want to participate in further DNA testing because he did not want to find out if the father was his biological father (stating he had only previously agreed to this course in order to recover certain items from the father's home). B indicated that he wanted to be left alone and "for all this to go away". A reiterated her objection to further forensic DNA testing, stated she would refuse any attempts to test and remained angry. Indeed, A stated that she wanted the father to "pay for what he has done" and was willing to speak to the Police. She also wanted an apology from the father. She reiterated that she was not interested in finding out who her father is. Finally, A expressed her view that the father's motivation for disputing paternity was financial and that he would "sue Mam for all the expense he has incurred in bringing us up".

35. On 8 November 2019 A was referred to CAMHS / Barnardo's My Time following reports by the mother that she had seen signs of self-harm on A. On 21 November 2019 A denied to the Children's Guardian that she had been self-harming but admitted struggling emotionally and wished to talk to a professional. B was also referred to CAMHS at this time following his exclusion from class for behavioural issues. In a statement filed four days later the mother reported that B had expressed suicidal thoughts and A had again self-harmed by cutting her wrists with a kitchen knife. In her written closing submissions, filed following the request of Ms Hughes to file further submissions in writing, the mother stated that B had recently thrown himself into a river.

36. On 6 December 2019 the Children's Guardian confirmed that the children had made clear to her that, in addition to refusing to undergo further and forensic DNA testing, they would *not* agree to the existing DNA samples taken surreptitiously by the father being used for comparison against the DNA of the adults. A wanted the samples destroyed. Both children considered that the samples had been taken from them illegally and considered that the results should not be used in court. Both again reiterated they were not prepared to provide further DNA samples for the purpose of proceedings.

37. Within this context, when giving her evidence Ms Huber, who is a highly experienced Children's Guardian (and who reminded me that she *pre-dates* CAFCASS) conceded that the general view is that children need to know their paternity as a fundamental aspect of their identity. However, Ms Huber was clear that it is significant that the court in this case is dealing with older children, and indeed children *much* older than those in respect of whom the issue of paternity ordinarily arises for determination. Within this context, Ms Huber reiterated her view that both children are *Gillick* competent on the question of further testing, that both object to further testing and that in determining the correct course, the court must acknowledge the level of anger and violation felt by A and the level of confusion felt by B caused by the actions of the father in this case and the evident distress being exhibited by both children. Within this context, Ms Huber rejected the notion that further, forensic DNA testing would provide any sense of "certainty" or "finality" for the children, given the emotional damage caused by the current situation, with which damage they will continue to wrestle.

38. Ms Huber was concerned in particular that any order the court made for further forensic DNA testing will be seen by the children as simply more pressure being placed upon them in relation to an issue they consider to be between the adults and in which they want no part. Ms Huber was slightly more attracted to the idea of testing being undertaken and then the results being embargoed until the *children* chose to know the result. She considered that if they knew that each of the adults had provided further DNA samples they *may* be more willing to have samples taken themselves. Ms Huber pointed out to the court however, that ordering teenagers to do things is almost always less successful than persuading them to do something.

39. On balance, having regard to the children's current emotional state and high levels of anger on the part of A and confusion on the part of B, Ms Huber maintained her view that, in circumstances where the children are *Gillick* competent on the issue of further DNA testing, their stated wishes and feelings with respect to further forensic testing should be respected notwithstanding that such testing is the most reliable and efficacious manner of resolving the current dispute and that, on Ms Huber's case that the evidence currently before the court is insufficient to make good the father's application.

THE LAW

Application for Declaration Concerning Parentage

40. The identification of the child's parentage is a fundamental aspect of the child's identity and will engage the child's right to identity under the UNCRC Arts 7 and 8 and the ECHR Art 8 (*Gaskin v United Kingdom* (9189) EHRR 36). In *Re H (A Minor) (Blood Tests: Parental Rights)* [1997] Fam 89 the Court of Appeal referred to Art 7 of the UN

Convention on the Rights of the Child in concluding that every child has the right to know the truth of his identity unless disclosure is clearly contrary to his best interests. There must be cogent reasons for denying the child that knowledge. The child's long-term interests may also be better served not just by his knowing the truth about parentage but also by the fact that the adults involved will be able to plan their future lives in light of the true situation (see *Re E (A Minor) (Child Support: Blood Tests)* [1994] 2 FLR 548). Within this context, it has been held that in most cases it is in the interests of the child that paternity doubts should be resolved on the best evidence and that the child should be told the truth as soon as possible and that there are few cases where the best interests of the children can be shown to be served by suppression of truth (*Re T (A Child) (DNA Tests: Paternity)* [2001] 2 FLR 1190). Accordingly, where parentage is in doubt the courts have taken the view that it is normally wrong to leave the matter unresolved (see *Re P (Identity of Mother)* [2012] 1 FLR 351) and that the interests of justice are best served by the ascertainment of the truth (*H and A (Paternity: Blood Test)* [2002] 1 FLR 1145).

41. However, and of relevance in this case, it is also important not to allow these cardinal principles, born of adult views of the importance of a child knowing his or her paternity, to obscure the fact that the *child* may also have strong views over the value of the right to know the identity of his or her father. What has been referred to as a judicial expectation that all children must accept the importance of knowing their origins (see Fortin, J *Children's right to know their origins – too far, too fast?* [2009] CFLQ 336).

42. It is also important to bear in mind from the outset, as Black LJ (as she then was) noted in *Re S (A Child)(Declaration of Parentage)* [2012] All ER (D) 140 (Aug) at [24], that the question of parentage is a question that concerns more than just the child or children whose parentage is in doubt and, accordingly, that:

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

And at [37]:

> "[37] I think there was also a failure on the part of the Recorder to give full weight to the public interest aspect of a status issue such as this. This is seen in the conflation in the judgment of the considerations under section 55A(5) and section 58 and also in his concentration upon the desirability of J making an informed choice as to whether his father was named on his birth certificate ... I am not suggesting that the desirability of a child being involved in the decision is necessarily a completely irrelevant consideration but it must be borne in mind that it is not given to most to choose who is named on their birth certificate and the system of public records would be seriously undermined if it were."

43. Within this context, an application for a declaration concerning parentage is governed by s 55A of the Family Law Act 1986. Section 55A(1) provides for any person to apply to the High Court for a declaration as to whether or not that person is the parent of another person. Where one of the persons named in the application is a child then

pursuant to s 55A(5) of the 1986 Act the court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child. Pursuant to s 55A(6), if the court decides to refuse to hear the application on the grounds that its determination would not be in the child's best interests, it may order that the applicant may not apply again for the same declaration without the permission of the court.

44. With respect to the question of best interests in the context of the court's discretion pursuant to Section 55A(5) to refuse to hear such an application if it is not in the children's best interests to do so, in *Re S (Declaration of Parentage)* Black LJ observed as follows at:

> "[31] Returning to the sphere of declarations of parentage, it may be helpful, in order to examine how section 55A and section 58 interrelate, to take the example of a teenage child who is aware of the application for a declaration of parentage by a man who claims to be his or her father and who threatens that he or she will commit suicide if the man's application is permitted to proceed. A psychiatrist gives evidence that he considers the threat to be genuine and that, should the proceedings continue, the child is at serious risk of emotional harm at the very least. Section 55A(5) would enable the court to refuse to entertain the father's claim for a declaration on the basis that the determination of the application would not be in the best interests of the child.
>
> [32] I have deliberately chosen an example in which the application of section 55A(5) is obvious but there may well be cases in which the facts were less radical but the court would still exercise its power under section 55A(5). I would have thought that the examples in Professor Cretney's book of the child conceived in a rape or the child who is settled with adopters would potentially give rise to a power under section 55A(5) to refuse to hear the application. I question whether it is likely that a case would avoid being derailed at the section 55A(5) stage, proceed to a determination of the fact of parentage, and then throw up welfare considerations which would make it manifestly contrary to public policy to grant a declaration."

45. In considering whether it can be said that to hear the application is not in the children's best interests (and further highlighting why facts justifying such a conclusion will generally, but not always be radical in nature) the right of the child to know, and the importance of the child knowing his or her paternity is a factor that must also be weighed in the balance, subject to the matters set out above.

46. It is also important to note in the context of the question of whether determining the father's application is in the best interests of the children that proceedings concerning the establishment of, or challenge against paternity concern father's private life under Art 8. Any decision by the court to reject the father's request to legally determine whether he is the father of the children would thus constitute an interference with his right to respect for family life unless it is in accordance with the law, pursues an aim or aims that are legitimate and can be regarded as necessary in a democratic society (see *Ahreus v Germany* [2012] 2 FLR 483 at [60-[62]). These requirements would in all likelihood be met by a conclusion that determining the application would not be in the child's best interests pursuant to s 55A(5) of the 1986 Act in circumstances where, in

balancing the competing rights of the child and the parent, the child's best interests are paramount.

47. Where the court determines that it *will* deal with the application then, pursuant to s 58(1) of the Family Law Act 1986, where the applicant for a declaration proves the truth of the proposition to be decided to the satisfaction of the court, the court shall make the declaration unless to do so would be manifestly contrary to public policy. Pursuant to s 58 in deciding whether the truth of the proposition has been proved the court is deciding whether a fact is established, in this case whether a man is the father of a child. It is not taking a discretionary welfare decision or making a value judgment (see *Re S (A Child)(Declaration of Parentage)* at [23]).

48. In this case, the subject children were born to the mother at a time that she was married to the father. In the circumstances, answering the question of whether the father has, for the purpose of s 58(1) of the 1986 Act, proved to the satisfaction of the court that he is not the father of the children involves consideration of the effect of the presumption of legitimacy and the circumstances in which that presumption can be rebutted (whilst the Family Law Reform Act 1987 removed the terms "legitimate" and "illegitimate" from the legal lexicon, the Act does *not* abolish the concept and status of legitimacy and illegitimacy and the presumption of legitimacy remains part of English law (see *In re Moynihan* [2000] 1 FLR 113).

Presumption of Legitimacy

49. At common law, when a child is born to a married woman there is a presumption in law that her husband is the father of the child (based on the Roman law maxim *pater est quem nuptiae demonstrant* or, literally, the father is he whom the marriage points out). This legal presumption applies where the child could have been conceived during the subsistence of the marriage. The presumption of legitimacy is rebuttable by evidence of circumstances proving to the contrary (*Banbury Peerage Case* (1811) 1 Sim & St 153). Where there is a dispute regarding paternity, the presumption merely determines the burden of proof (*S v S, W v Official Solicitor* [1970] 3 All ER 107). That burden of proof lies on the person seeking to rebut the presumption, in this case the father. It is of note in this context, that it has been held that if a legal presumption is allowed to prevail over biological and social reality this may amount to a breach of Art 8 (see *Znamenskaya v Russia* (Application No 77785/01) [2005] 2 FCR 406).

Standard of Proof for Rebuttal of Presumption

50. With respect to the standard of proof required to be met to rebut the presumption of legitimacy, s 26 of the Family Law Reform Act 1969 provides as follows:

> "**26 Rebuttal of presumption as to legitimacy and illegitimacy**
>
> 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."

51. Older authorities have suggested that the standard of proof under s.26 of the 1969 Act is related to the gravity of the issue being determined. In *Re JS (A Minor)* [1980] 1 All ER 1061, a case where s 26 of the 1969 Act was not in issue, Ormrod LJ held that the in determining the standard of proof in relation to questions of paternity the court must take into account the gravity of the decision and determine the degree of probability which is proportionate to the subject matter. In *Serio v Serio* [1983] 4 FLR 746 the Court of Appeal, relying on the decisions of Lord Denning in *Bater v Bater* [1951] P 35 and *Blyth v Blyth* [1966] AC 643, held that in a case of disputed paternity the standard of proof required to rebut the presumption is a standard commensurate with the seriousness of the issue involved, which standard is a higher degree of probability than in other civil matters as it is difficult to imagine an issue in civil proceedings of greater gravity. This analysis was accepted by Lord Jauncey and Lord Slynn in *Re Moynihan* [2000] 1 FLR 113 at [119] and [123] respectively.

52. The cases of *Re JS (A Minor)* and *Serio v Serio* were however, decided prior to the decisions of the House of Lords in *Re H and others (minors) (sexual abuse: standard of proof)* [1996] AC 563 and *Re B (Care Proceedings: Standard of Proof)* [2009] 1 AC 11, which also post-dated *Re Moynihan*. Whilst the presumption of legitimacy is a presumption of law, the question of whether that presumption can be rebutted for the purposes of s 26 of the Family Law Reform Act 1969, i.e. the question of whether a man is the father of a child, is a question of fact (see *Re S (A Child)(Declaration of Parentage)* [2012] All ER (D) 140 (Aug)). In this context, in *Re H and others (minors) (sexual abuse: standard of proof)* Lord Lloyd of Berwick concluded as follows with respect to the standard of proof in s 26 of the Family Law Reform Act 1969:

> "Another indirect pointer may be found in section 26 of the Family Law Reform Act 1969. At common law the presumption of legitimacy could only be rebutted by proof beyond reasonable doubt. This was one of the considerations which led the House to its conclusion in *Preston-Jones v Preston-Jones* [1951] A.C. 391. By section 26 of the Act of 1969 the presumption can now be rebutted on a simple balance of probabilities. Although in *Serio v. Serio* (1983) 4 F.L.R. 756, 763 the Court of Appeal held that the standard of proof should be "commensurate with the seriousness of the issue involved" (in other words, that it might require more than a mere balance of probabilities), this seems to read words into the statute which are not there. If the legislature has ordained that the presumption of legitimacy can be rebutted on a simple balance of probabilities, I have no great difficulty in concluding that section 31(2) requires a simple balance of probabilities, and no more, even when there is a serious allegation of sexual abuse."

53. Within this context, and again in relation to the burden of proof applicable to the threshold and welfare stages in proceedings under Part IV of the Children Act 1989, in *Re B* Lord Hoffman confirmed at [2] that:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having

happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

54. As to the nature of the standard of proof where the law requires the relevant fact to be proved on the balance of probabilities, in *Re B* Lord Hoffman made clear at [13] that:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

And at [15] that:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

And Baroness Hale at [69] and [70]:

> "[69] There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial "offence" may have been another example: see *Bater v Bater* [1951] P 35 . But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.
>
> [70] My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

55. It is of note that in both *Re H and others (minors) (sexual abuse: standard of proof)* and *Re B (Care Proceedings: Standard of Proof)* the House of Lords reached these conclusions in the context of decisions which are, like decisions as to paternity, of great consequence, namely the potential removal of children from the care of their parents. Further, it is of note that in reaching its decision the House of Lords was referred to, and considered *Bater v Bater* [1951] P 35, Blyth v Blyth [1966] AC 643 and *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 in this context, which authorities had formed the basis of the view of the Court of Appeal in *Re JS* and *Serio v Serio* that the standard of proof in s 26 of the Family Law Reform Act 1969 was enhanced by the gravity of the decision being determined. Finally, as noted by Lord Lloyd in *Re H and others (minors) (sexual abuse: standard of proof)* there is no suggestion on the face of s 26 of the 1969 Act that the applicable civil standard of proof is somehow enhanced.

56. In these circumstances, whilst conscious of the older Court of Appeal authority in *Re JS* and *Serio v Serio*, that the approach in the latter was approved by the House of Lords in *Re Moynihan*, that the observations made by the House of Lords in *Re H and others (minors) (sexual abuse: standard of proof)* were obiter and that in *Re B (Care Proceedings: Standard of Proof)* the House of Lords concerned a different statutory provision, in determining the issues of paternity before the court I am confident that I should proceed on the basis of the decision of the House of Lords in *Re B* and apply as the standard of proof the simple balance of probabilities without any amendment to that standard of proof to reflect the gravity of the questions posed (see also *Re M and N (Twins: Relinquished Babies: Parentage)* [2018] 1 FLR 293 at [19]).

Evidence to Rebut the Presumption

57. The fact that the court is proceeding on the basis of the simple balance of probabilities does not alter the fact that, as made clear by Cobb J in *M and T (Twins: Relinquished Babies: Parentage)* [2018] 1 FLR 293, a declaration of parentage is significant and should not be based on potentially unreliable evidence.

58. As Thorpe LJ made clear in *Re H (Paternity: Blood Tests)*, in the modern era the court should, ideally, be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences when determining the question of paternity. Pursuant to the Family Law Reform Act 1969 s 20(1) in any civil proceedings in which the parentage of any person falls to be determined, the court has a discretion, either of its own motion or on an application by a party to the proceedings, to give a direction (a) for the use of scientific tests to ascertain whether they show that a party to the proceedings is or is not the father or mother of that person, and (b) for the taking, within a period specified in the direction, of bodily samples from all or any of the following, namely that person, any party alleged to be the father or mother of that person and any other party to the proceedings. In deciding whether to make a direction for testing, the proper approach is that the court should permit a scientific test unless it is satisfied that to do so would be against the child's interests, having weighed those interests against the competing interests of the adults who will be affected one way or another, according to whether the application to test is granted or refused (see *S v S, W v Official Solicitor* [1972] AC 24). The taking of samples from children should only be undertaken pursuant to the express order of the court (see *Re F (children) (DNA evidence)* [2008] 1 FLR 348.

59. With respect to compelling participation in tests, the Family Law Reform Act 1969 s 20(1) as amended provides that a person cannot be compelled to provide a sample and a sample cannot be taken without their consent. A sample may be taken from child notwithstanding the carers refusal to consent pursuant to the Family Law Reform Act 1969 s 21(3). With respect to children under 16 who are considered *Gillick* competent, if a child is of sufficient understanding he or she may refuse to submit to medical examination or other assessment (see *L v P (Paternity Test: Child's Objections)* [2013] 1 FLR 578). It is generally unwise to subject a child who is able to understand the purpose and implications of testing to testing against that child's will (see *S v S, W v Official Solicitor* [1972] AC 24 at [47]-[48] and *Re JS (A Minor)* [1981] Fam 22 at 30).

60. Whatever the position in respect of *Gillick* competence, a refusal to consent on the part of the child will always raise the issue of the child's welfare (*L v P (paternity test: child's objection)* [2013] 1 FLR 578 at [17]). In *Re D (paternity)* [2007] 2 FLR Hedley J did

not find the child to be *Gillick* competent on the question of DNA testing but was satisfied that the child was a troubled and angry young person who was strongly opposed to the application for testing and that he understood the issues involved. Within this context, Hedley J decided it was not in the child's best interests at that stage in his life to press the question of testing. Instead, Hedley J ordered that the adults supply DNA samples and that they be stored so that if the child later wanted testing to be completed, it could be performed quickly. However, where the court is satisfied that a child should not be compelled to submit to testing, this does not in *all* cases preclude the court from finally determining the issue of paternity (*Re P (Identity of the Mother)* [2012] 1 FLR 351).

61. Where the court orders DNA testing, the procedure to be applied is set out in the Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1971/1861). The 1971 Regulations have been amended with The Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) which came into force on 23 November 2015. The regulations emphasise the need to ensure the forensic integrity of such testing by stipulating the manner in which samples that will be used for paternity testing should be taken, handled and processed.

62. Reports obtained by parties themselves prior to commencement of proceedings can be admitted at the court's discretion. However, having emphasised that continuity of handling of samples from testing to recording of results are every bit as crucial as the quality of the science and intrinsic to the reliability of the conclusions, that without rigorous procedural safeguards the science is worthless and that this is the reason for the relevant regulations having been promulgated, in *Re F (children) (DNA evidence)* [2008] 1 FLR 348 Anthony Hayden QC (as he then was) held that it is likely that any procedural or professional deficiencies that are identified in the testing will make it impossible for the court to rely on its conclusions. In *Re F (children) (DNA evidence)* the difficulty was that the link between donor and sample could not be assured.

63. Pursuant to the Family Law Reform Act 1969 s 23(1), if a person refuses to give a sample for testing, the court is entitled to draw any inference as appears proper, and, in the absence of a reasonable explanation for the refusal (see *McVeigh v Beattie* [1988] Fam 69). The court may find proven forensically what the person, by his refusal, has prevented from being established scientifically (see *Re G (Parentage: Blood Sample)* [1997] 1 FLR 360). The court's power to draw an adverse inference based on a refusal by an adult to undergo testing is wholly at large, is unconfined and is wide enough to extend to an inference of the child's *actual* paternity (see *Re A (A Minor)(Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 at 473). Indeed, the court is entitled to draw the inference that a putative father is the father of a child by his refusal to submit to tests even where there exists a presumption that the child is the legitimate child of another man, Scott-Baker J holding in *F v Child Support Agency* [1999] 2 FLR 244 that "it seems to me plain that, even where there is a presumption of legitimacy, a putative father still declines to give a blood test at his peril when ordered to do so by the court". The drawing of an adverse inference, based on a refusal to provide a sample, is for the trial judge on the facts of the particular case and does not require a separate fact finding hearing (*Re P (Identity of Mother)* [2012] 1 FLR 351).

64. In order to avoid the adverse inference being drawn, the person who refuses testing must advance very clear reasons, which it would be just and reasonable to maintain, for refusing to undergo tests. In this respect, the father in this case relies on the following

observations of Waite LJ in *Re A (A Minor)(Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 at 473).

> "The starting-point must be that the old uncertainties which formerly surrounded issues of disputed paternity when a mother had been sexually involved with two or more men at the time of conception are now banished altogether. Genetic testing, already advanced to a high degree of probability through the negative techniques of exclusion, has now moved on to the point where it has become possible to achieved positive certainty. That has had a profound effect on cases like the present, where a mother has been having relations with different men at the time of conception. Any man who is unsure of his own paternity and harbours the least doubt as to whether the child he is alleged to have fathered may be that of another man now has it within his power to set all doubt at test by submitting to a test. It has ceased, therefore, to be possible for any man in such circumstances to be forced against his will to accept paternity of a child whom he does not believe to be his. Against that background of law and scientific advance, it seems to me to follow, both in justice and in common sense, that if a mother makes a claim against one of the possible fathers, and he chooses to exercise his right not to submit to be tested, the inference that he is the father of the child should be virtually inescapable. He would certainly have to advance very clear and cogent reasons for this refusal to be tested – reasons which it would be just and fair and reasonable for him to be allowed to maintain."

In *Re G (Parentage: Blood Sample)* [1997] 1 FLR 360 Thorpe LJ put the matter as follows at 367D:

> "The court must be astute to discern what are the real motivations behind the refusal. It should look critically at any proffered explanation or justification. It should only uphold an explanation that is objectively valid, demonstrating rationality, logicality, and consistency. Anything else will usually lead to an adverse inference."

65. Where no scientific samples, or acceptable scientific samples are available, other evidence may still permit the court to determine the application (see *W v K (Proof of Paternity)* [1988] 1 FLR 86. The evidence of a husband and wife is admissible in any proceedings to provide that marital intercourse did or did not take place (see Matrimonial Causes Act 1973 s 48(1)). The court may rely on evidence proving to the requisite standard that the husband did not have intercourse with his wife at the relevant time. Evidence that sexual intercourse did not take place is capable of rebutting the presumption (see *Whitton v Garner* [1965] 1 WLR 313). It is not sufficient to show only that opportunities for sexual intercourse existed as this is not conclusive that it took place (see *Morris v Davies* (1837) 5 CL & Fin 163 at 252).

66. If the mother gives evidence that sexual intercourse took place at the relevant time it is for the putative father to rebut that evidence (see *L v K* [1985] 1 All ER 961). Once it is established that the spouses had intercourse at the relevant time, the husband must show that the child is not the issue of that intercourse to rebut the presumption. The presumption is *not* rebutted merely by proving that someone else had sexual intercourse with the wife (see *Gardner v Gardner* (1877) 2 App Cas 723 at 737 to 738 per Lord Blackburn). The fact that the wife has committed adultery does not *per se* rebut the

presumption, because this merely shows that the husband *or* the adulterer could be the father (*Francis v Francis* [1960] P 17, [1959] 3 All ER 206 and *Gardner v Gardner* (1877) 2 App Cas 723, HL). Other facts in conjunction with evidence that the wife committed adultery may rebut the presumption (see *Watson v Watson* [1954] P 48 and *Francis v Francis* [1960] P 17, both cases decided before the standard of proof for rebutting the presumption was lowered to the balance of probabilities).

67. The court may also admit photographic evidence of a suggested facial resemblance as being relevant to the question of paternity (*C v C (Legitimacy: Photographic Evidence)* [1972] 2 All ER 577). However, in *Russell v Russell* (1923) 129 LT 151 Hill J admitted photographic evidence but described it as very unsafe and conjectural. Within this context, in *C v C*, Latey J observed as follows with respect to photographic evidence of facial resemblance:

> "As I have said, although, in my opinion, there is no authority which binds me one way or the other, it is quite plain that in a number of reported cases (some of which I have mentioned) at first instance such evidence has been admitted and notably it was admitted by so wise and eminent a judge as Hill J. I think that the right view for me to take is that I should not depart from that body of jurisprudence, and rule that the evidence is inadmissible, though, as I have no doubt I shall be reminded again later in the case, of course I must keep in the forefront of my mind, in deciding when I have seen and heard such evidence what weight to attach to it, the perils which have been pointed out in more than one case".

68. With respect to factors that are relevant to the question of paternity beyond the results of scientific testing, it is important to note that the presumption of legitimacy itself carries no weight in deciding the question of legitimacy *unless* the court is unable to decide the issue on the evidence available to it (see *S v S, W v Official Solicitor* [1972] AC 24 at 41). Registration in the register of births is prima facie evidence of all the facts required by statute to be entered into the register (see Births, Deaths and Registration Act 1953 s.34). However, again where there is other evidence available to the court, this statutory principle will not be definitive where the question of paternity is disputed before the court.

DISCUSSION

69. I have found this a very difficult case to decide. There are problems with every aspect of the evidence before the court. In these circumstances the court's analytical task is akin to attempting the construction of a complex mechanism containing many cogs, none of which mesh entirely satisfactorily. Nonetheless, the duty of the court is to come to a reasoned decision. Having considered carefully the evidence and the submissions in this case, and on a fine balance, I have decided that, as submitted by the Children's Guardian and pursuant to s 55A(5) of the Family Law Act 1986, it is not in the children's best interests to determine the father's application at this time. My reasons for so deciding are as follows.

70. In *Re S (A Child)(Declaration of Parentage)* Black LJ, as she then was, recognised that the impact on a teenage child of making a declaration may mean that to do so is not in that child's best interests, particularly where proceeding to determine the application would have adverse consequences for the child's mental health. In that case, Black LJ

contemplated not only the extreme situation of threatened suicide coupled with expert evidence demonstrating a serious risk of emotional harm, but also cases with "less radical" facts where the court may still reach the conclusion that to determine the application is not in the child's best interests. Whilst once again the examples given by Black LJ of less radical facts centred on the emotional consequences of determining the application, Black LJ did not seek to exclude other grounds on which the court might find that to determine the application is not in a child's best interests, nor to limit those grounds to purely emotional factors.

71. Within this context, and whilst I accept that the ascertainment of the truth regarding paternity is almost always in a child's best interests, given the gravity and lifelong consequences of the decision it is plainly in a child's best interests for the question of paternity to be answered based on evidence that is sufficiently cogent. It cannot serve a child's best interests to provide that child with purported resolution of the question of paternity now on the basis of evidence that may result in that resolution being undermined or further disputed later. In this case, I am satisfied that there are *manifest* problems with each of the strands of evidence on which the father seeks to rely to advance his application for a declaration that he is not the father of the children such that, in the absence of further and forensic DNA testing at this time not being possible for the reasons I will come to, it is not in the children's best interests to determine the father's application at this time and on the basis of the current evidence. I deal with each strand of evidence in turn.

72. The evidence of the parties regarding the history of the children's conception, and in particular the evidence of the mother and the putative father, was unsatisfactory in many respects and presented a confusing and confused picture. With respect to the evidence of the mother and the putative father, I am satisfied that each were withholding matters from the court. In particular, I consider the following matters significant:

i) Whilst the mother originally contended that her relationship with the putative father at company X was merely that of colleagues and there was thereafter no or minimal contact between them from 2003 to the end of 2005, the photographic evidence of meetings with the putative father "as a friend" immediately after A's birth and shortly thereafter is inconsistent with that assertion, particularly in circumstances where the mother fails to mention them in her statement.

ii) Whilst the putative father also originally contended that his relationship with the mother at company X was merely that of colleagues and there was thereafter no or minimal contact between them from 2003 to the end of 2005, his late admission that he had flirtatious exchanges with the mother via social media and had been "flirting at times" with her during this period is also inconsistent with that assertion, again particularly as he failed to mention this in his original account.

iii) Within this context, the mother moved from a firm assertion that her relationship with the putative father at company X was merely that of colleagues, that there was thereafter no or minimal contact between them from 2003 to the end of 2005, that she had always believed the biological father of both children to be the father and that she had no recall of being intimate with any other person, to a concession that she had attended social events both during the period of A's

conception and B's conception at which she had been extremely drunk and with respect to which she could not "recall" whether the putative father had been present or whether she had sex with him.

iv) Likewise, within this context the putative father moved from an assertion that his relationship with the mother at company X was merely that of colleagues, that there was thereafter no or minimal contact between them from 2003 to the end of 2005 and that he was certainly not the father of the children to a concession that he could have had sex with the mother, although a "very few number of times", that he could not say for certain whether these occasions were in line with A and B's dates of conception and that there is a possibility he could be the father of both children.

v) Within the foregoing context, both the mother and the putative father now accept that there is a possibility, albeit they contend it is remote or theoretical, that the putative father is the biological father of the children.

73. I have borne in mind, as I must, that both the mother and the putative father may have sought to disguise a closer, and indeed sexual relationship at the time of the children's conception out of embarrassment as that conduct was illicit and, on their evidence, the result of extreme inebriation rather than in an attempt to disguise from the court the paternity of the children. In particular, with respect to the putative father I have taken account of Ms Parr's submission that the evidence concerned intensely personal matters dating from a very difficult period in the putative father's life of which he was clearly not proud. However, there is a more fundamental difficulty with this evidence and with the father's contention that it demonstrates that the mother and the putative father were having sexual intercourse at the time of each child's conception.

74. Even were the court to accept that the proper inference to be drawn from the change of account on the part of the mother and the putative father is that they were engaging in sexual intercourse at the relevant times, both the mother and the *father* are likewise clear in their evidence that they too were having sexual intercourse at this time. As the authorities make clear, the presumption that the father is the biological father is not rebutted merely by proving that someone else had sexual intercourse with the mother at the relevant time. In circumstances where the father's case at its highest on this evidence can be only that both he and the putative father were having sexual intercourse with the mother at the time each child was conceived, the fact that the mother committed adultery does not *per se* rebut the presumption, because this merely shows that the husband or the adulterer could be the father. This point is, sensibly, conceded by Ms Hughes.

75. Of course, other evidence in conjunction with evidence that the mother committed adultery can rebut the presumption. However, in my judgment there are also significant difficulties with the other strands of evidence on which the father seeks to rely.

76. I have considered carefully the photographs contained in the bundle, and provided to me in electronic form at a much higher resolution, that are said by the father to demonstrate (a) a clear facial likeness between the putative father and both of the children, (b) the absence of a facial likeness between the children and the father, (c) by contrast, the clear facial likeness between the father and his third child from his current relationship, (d) a marked similarity in facial features between A and B and the putative

father's daughters and (e) a marked absence of similarity in facial features between A and B and the father's third child from his current relationship. However, whilst it is clear that there is a degree of likeness between the putative father and both of the children and between A and B and the putative father's daughters, I am satisfied that this evidence must be approached with *considerable* caution on a question as fundamental as paternity. Such evidence is necessarily subjective and, in this context, is subject to significant risk of unconscious bias on the part of the person viewing the pictures, including the judge. Within this context, I am satisfied that the view expressed by Hill J in *Russell v Russell* that such evidence is "very unsafe and conjectural" is correct and, accordingly, that the caution articulated by Latey J in *C v C (Legitimacy: Photographic Evidence)* should be exercised by this court with respect to the photographic evidence provided by the father. Given the gravity and consequences of the decision before the court, the need for care with such evidence is even further enhanced.

77. I have also considered very carefully the extent to which the court is able to place weight on the 'Peace of Mind' DNA tests. Ms Hughes submits that the 'Peace of Mind' DNA paternity test is reliable evidence demonstrating that the father is not the biological father of the children. Ms Hughes concedes that the 'Peace of Mind' test does not, on its face, provide the certainty of a 'legal' DNA test in circumstances where the identity of the sample donors cannot be confirmed by the testing company and the chain of custody cannot be confirmed by the testing company. However, Ms Hughes submits that, in circumstances where the surreptitious nature of the testing has formed a central theme in this case, it cannot seriously be suggested that the father then sent different samples to Alpha Biolabs. Further, Ms Hughes submits that there is no evidence that Alpha Biolabs considered the samples to have been compromised during transportation but rather tested those samples and provided a result. Within this context, Ms Hughes submits that the 'Peace of Mind' DNA test is highly cogent evidence of the truth of the first proposition, namely that the father is not the biological father of the children. I cannot accept that submission.

78. As Anthony Hayden QC (as he then was) made clear in in *Re F (children) (DNA evidence)*, it is likely that any procedural or professional deficiencies that are identified in the testing will make it impossible for the court to rely on the conclusions of such testing. As I have noted, in *Re F*, as in this case, the difficulty was that the link between donor and sample could not be assured. Within this context, it is important to note the strict requirements imposed by the Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1971/1861) as amended by the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) with respect to DNA testing to be used in the context of legal proceedings. In particular:

    i) The relevant sample must only be taken by a sampler who is a registered medical practitioner or other person defined in Regulation 2 of the 1971 Regulations as amended.

    ii) The sampler is required to determine whether there is any factor that might affect the outcome of the testing pursuant to Regulation 5 of the 1971 Regulations as amended.

    iii) The sampler is required to check and confirm the identity of the subject to be tested. In respect of a child under the age of sixteen, they must be accompanied

by a person of full age who must identify the child to the sampler pursuant to Regulation 4 of the 1971 Regulations as amended. In respect of any subject who has attained the age of 12 months by the date of the direction for testing, the sampler must ensure that a photograph of that subject is affixed to the direction form relating to that subject before the sample is taken.

iv) The sampler is required to handle the sample in the manner specified by the regulations. Pursuant to Regulation 6 of the 1971 Regulations as amended, once the sampler has taken a sample he must place it in a suitable container and must affix to the container a label giving the full name, age and sex of the subject from whom it was taken. The label must be signed by the sampler and the sampler must confirm he has taken sample and date on which it was taken.

v) The sampler is required to despatch the samples forthwith to the tester by post by special delivery service or deliver them or cause them to be delivered to the tester by some person other than a subject or a person who has accompanied a subject to the sampler.

vi) Testing is likewise strictly controlled by regulation, it being a requirement that samples taken (so far as practicable) all be tested by the same tester.

79. Within this context, the court cannot ignore the fact that in this case the person who seeks to rely on the DNA test results to make good his application, namely the father, is the very same person who undertook the sampling for those tests in circumstances that were not the subject of any of the detailed regulatory safeguards that Parliament has decided should apply to DNA tests used in legal proceedings. That regulatory framework for forensic DNA testing is in place precisely to avoid this situation and to ensure that the court has available to it independent testing undertaken by a qualified person in forensically rigorous circumstances. Within this context, I agree with Hayden J (as he now is) that it is likely that any procedural or professional deficiencies that are identified in the testing will make it impossible for the court to rely on the conclusions of that testing. In this case the samples were not taken by an approved sampler but by the party that now seeks to rely on them, the court has only the father's account of how the testing was undertaken, the father was not in a position to determine whether there was any reason that the samples should not have been taken at that point, there was no independent witness to the samples being taken, there is no confirmation beyond the father's account that the samples sent were the samples taken from the children and there is no demonstrable chain of custody with respect to the samples. This is very far from the reliable forensic context for testing required by the statutory regulations.

80. I am also persuaded that there is force in the argument that the court would set an unfortunate and undesirable precedent if it relied, either wholly or in part, on DNA tests that had not been carried out with the rigor required by the statutory regulations to determine the question of paternity in this case. As I have noted, the Blood Tests (Evidence of Paternity) Regulations 1971 (SI 1971/1861) as amended by the Blood Tests (Evidence of Paternity) (Amendment) Regulations 2015 (SI 2015/1834) were promulgated for a reason. Namely to ensure that the courts have available to them forensically reliable scientific test results in circumstances where those results are now generally determinative of the question of disputed paternity. Within this context, it is difficult for the court to accept as evidence establishing paternity results that Alpha Biolabs itself points out are not designed for use in legal proceedings. For the court to

rely on the 'Peace of Mind' test in these circumstances would be to allow a party to litigation to circumvent entirely the statutory safeguards put in place to ensure the integrity of DNA evidence used in legal proceedings and to cut across the statutory safeguards put in place by Parliament with respect to testing that can be relied on evidentially in court.

81. In circumstances, and where the procedural rigor, sample collection by a trained medical professional and continuity of handling mandated by the regulations is vital to integrity of DNA testing results and is mandated for results that are to be relied on in court, I am satisfied that it would not be appropriate to attach weight to the results of the 'Peace of Mind' test, both by reason of the deficiencies with respect to the particular testing undertaken in this case and in principle. Whilst it might be argued that the results should form part of the wider evidential canvass to which the court must have regard, this would not be consistent with the conclusion that to rely on the test results would be to allow a party to litigation to circumvent entirely the statutory safeguards put in place to ensure the integrity of DNA evidence used in legal proceedings and cut across the statutory safeguards put in place by Parliament with respect to testing that can be relied on evidentially in court. Either that regulatory framework is adhered to or it is not and in cases of disputed paternity is it *vital* that it *is* adhered to.

82. Ms Hughes further invites the court to draw an inference against the putative father based on his indication, at the hearings in October 2019 and January 2020 and at this final hearing, that he is not willing to provide voluntarily a DNA sample for forensic DNA paternity testing. Within this context, I have borne carefully in mind that the authorities make clear that the court's power to draw an adverse inference based on a refusal by an adult to undergo testing is wholly at large, is unconfined, is wide enough to extend to an inference of the child's actual paternity and that, in this context, the court is entitled to draw the inference that a putative father is the father of a child by his refusal to submit to tests even where there exists a presumption that the child is the legitimate child of another man. I am also mindful that there is some authority for the proposition that where there is a refusal to undertake a DNA test the inference that the unwilling party is the father of the child should be virtually inescapable. However, in evaluating the weight, if any to attach to a refusal by a putative father to undergo testing, and in examining whether any explanation is objectively valid and demonstrates rationality, logicality, and consistency leading to reasons which it would be just and fair and reasonable to allow him to maintain, the court must necessarily have proper regard to the context of the refusal. In the particular circumstances of this case, there are significant difficulties with an approach that seeks to draw from the putative father's refusal to voluntarily undergo DNA a virtually inescapable inference that he is the children's father.

83. There has been no direction by the court that the putative father submit to DNA testing. Whilst HHJ Forrester directed the father to indicate whether he sought an order that further forensic samples be obtained from the putative father and an order that that sample be compared against the samples obtained by the surreptitious DNA testing of the children, the father has never so indicated. It is correct that the father raised the issue of forensic testing before the court on 20 January 2020, although he did not press a formal application. I also acknowledge that in *Re H* it was held that there is little material difference between a refusal to provide a sample after the court directing such a sample and a refusal where no such direction has been given. However, whatever the

position in respect to directions or requests regarding testing, in my judgment there is in any event a far more fundamental difficulty with drawing and adverse inference against the putative father in this case.

84. Until the closing submissions advanced in this case on behalf of the father, the putative father had been given a clear message that no declaration that he is the biological father of the children was being sought against him by the father. No such declaration has ever been sought by the mother. The Children's Guardian has at all points contended that a finding to that effect is not necessary. In the circumstances, the position of the putative father that he declined to participate in DNA testing because he was not persuaded of the necessity for voluntary DNA testing and sought to preserve the confidentiality of his DNA must be seen in this context. In the circumstances, whilst the putative father is not in breach of a direction of the court that he undergo DNA testing, much more importantly his decision not to submit to voluntarily DNA testing must be seen in the context that until this hearing no one, including the mother, was seeking a declaration or a finding that he is the biological father of the children.

85. As Baroness Hale observed in *R (S) v Chief Constable of The South Yorkshire Police* [2004] 1 WLR 2196 at [71], "there can be little if anything more private to the individual than the knowledge of his genetic makeup". Within this context, whilst I agree that in light of the putative father having undergone fertility testing, which would have required the production of a sample, the rationale he provides for objecting to the provision of a DNA sample may be said to be surprising on its face, the putative father's justification for refusing testing, namely that he did not see the need for it and sought to protect the privacy of his DNA, falls to be considered in the context of the fact that at the time it was advanced no party sought a declaration or finding of paternity against him. In these circumstances, and seen in their proper context, whilst I retain some reservations regarding the reasons advanced by the putative father, on balance I am satisfied that those reasons are sufficient, again when seen in their proper context, for the court to conclude that it would not be appropriate in the circumstances of this case to draw an adverse inference from the putative father's refusal to volunteer himself for DNA testing and I decline to do so.

86. Ms Hughes also seeks to persuade the court that the court should draw inferences from the children's refusal to submit to further forensic DNA testing. I am not prepared to do so. On the evidence before the court the children plainly have an objection to further DNA testing that is objectively valid, rational, logical and consistent in light of the circumstances in which samples were covertly taken from them by their father without their consent. Within this context, which caused A to feel violated and B to feel confused, I am satisfied that for two *Gillick* competent children to object to further DNA testing at the request of an adult who they consider has fundamentally betrayed their trust is plainly an objectively valid, rational, logical and consistent position. Accordingly, it would not be appropriate for the court to draw any adverse inference from their position on further testing.

87. I have also borne carefully in mind the additional items of circumstantial evidence relied on by the father, namely the visits by the putative father to the infant A shortly after her birth and notwithstanding the assertions of the putative father and the mother that at that time they had no close relationship, the subsequent appearance of the putative father alone in photographs with A and B and the mother's desire to be at the gym at which the putative father was a member and to live in the village in which the

putative father lived. Once again, there are difficulties with this evidence. First, these matters were assembled by the father as relevant to the question of paternity only after he had developed suspicions that the putative father was the biological father. As the father himself conceded, at the time these matters did not cause him any suspicion (albeit I am satisfied he did not know about at least some of the visits by the putative father). Within this context, and as conceded in part by the father, there is a danger that the father's evidence with respect to these matters is significantly contaminated by confirmation bias in circumstances where they derive from the father's much later efforts to prove a proposition he had come firmly to believe was true. Second, within this context and more fundamentally, I am not satisfied that these circumstantial matters, admitting as they do of a range of possible explanations, are capable of remedying the fundamental difficulties with the primary evidence which I have set out above.

88. The obvious solution to the manifest evidential difficulties that I have related, which I am satisfied mean it would not be in the children's best interests to determine the father's application based on the same, would be for the court now to direct *forensic* DNA testing be carried out on the children and adults in a manner that accords with the procedure laid down in the statutory regulations. The courts have observed repeatedly that, in the modern era the court should, ideally, be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences when determining the question of paternity. However, I am likewise satisfied that to press such testing on the children would not be their best interests at this point in time.

89. In this case, there is clear evidence from the Children's Guardian and the mother that the children are struggling emotionally to a very significant degree, which evidence was not undermined in cross-examination. As I have recorded, on 8 November 2019 A was referred to CAMHS / Barnardo's My Time following reports by the mother that she had seen signs of self-harm on A. On 21 November 2019 A denied to the Children's Guardian that she had been self-harming but admitted struggling emotionally and wished to talk to a professional. B was also referred to CAMHS at this time following his exclusion from class for behavioural issues and a diagnosis of depression. In a statement filed four days later the mother reported that B had expressed suicidal thoughts and A had again self-harmed by cutting her wrists with a kitchen knife. In her written closing submissions, filed following the request of Ms Hughes to file further submissions in writing, the mother stated that B had recently thrown himself into a river. In my judgment it is not at all hard to see why A should feel grossly violated by the clandestine taking of samples from her, nor why B is so confused by the consequences of this surreptitious activity on the part of a man he understood to be his father.

90. I must and do bear in mind evidence of the Children's Guardian that it would not be safe to draw specific conclusions on the emotional impact on the children of determining or not determining the question of paternity based solely on the children's current behaviour and emotional distress, the same being capable of attribution to a number of factors or a combination thereof. However, I am satisfied that much of the emotional turmoil being experienced by both children stems from the issue of paternity, and in particular the manner in which their DNA was obtained from them. This much is entirely plain from what the children themselves have said. Further, the court cannot

simply ignore current emotional distress, behaviour and evidence the self-harm exhibited by the children and the statements they have made regarding the emotional pain caused to them by the father's concealed actions. Within this context, I must place weight on the evidence of the Children's Guardian's that any order the court made for further forensic DNA testing will be seen by the children as simply more emotional pressure being placed upon them at a time when they are highly emotionally vulnerable and in relation to an issue they consider to be between the adults of which they want no part.

91. Further, both children have also expressed clearly that they do not wish to provide further, forensic DNA samples. A is 15 years of age and B is 13 years of age. There is no cogent evidence before the court that their views on testing are being influenced by their mother nor did any party seek to challenge the conclusion of the Children's Guardian that the children are *Gillick* competent on the issue of providing further samples. Unlike the cases of very young children, where unresolved questions of paternity may be a 'ticking time bomb (to use Ward LJ's phrase in *Re H (Paternity: Blood Test)* [1996] 2 FLR 65), in this case A and B are teenage children who have become aware that paternity is in issue and who have made clear that they do not wish to know their paternity and will not submit to testing to establish the same, they being competent to so refuse. Within the foregoing context, the Children's Guardian submits that as children aged 15 and 13 years old respectively with strong and clearly expressed views, A and B have a right not to know (or more accurately to choose if and when to know) their paternity and that to conclude otherwise at this time would be to place further and damaging emotional pressure on them. I accept that submission.

92. The authorities are clear that, with respect to children under 16 who are considered *Gillick* competent, if a child is of sufficient understanding he or she may refuse to submit to medical examination or other assessment and that it is therefore generally unwise to subject a child who is able to understand the purpose and implications of testing to testing against that child's will. In the circumstances, I am satisfied that to press further forensic DNA testing of the children at this time would not only heap further and damaging emotional pressure onto the children and be antithetic to their clearly expressed wishes and feelings, it would also be wrong in principle in my judgment to impose such forensic DNA testing on *Gillick* competent children who clearly object to it. In this context I am satisfied that to do so at this time would be against the child's interests, having weighed those interests against the competing interests of the father, the mother and the putative father, who will be affected, one way or another, by my decision.

93. In reaching my decision, I have also borne in mind that, as Black LJ (as she then was) highlighted in *Re S (A Child)(Declaration of Parentage)*, issues of status, such as parentage, can be expected to be approached with some formality in circumstances where they concern not only the individual, but also the public generally which has an interest in the status of an individual being spelled out accurately and in clear terms and recorded in properly maintained records. However, as also made clear in *Re S*, such factors are more appropriately dealt with under s 58 of the 1986 Act if and when the court reaches the stage of whether, having decided to determine the application, a declaration should be made. Further, and in any event, a declaration based on evidence that is, as in this case, deficient is obviously antithetic to the need for the status of an

individual to spelled out accurately and in clear terms and recorded in properly maintained records.

94. In the premises, I am not satisfied that it is in the children's best interests to determine the father's application on the current deficient evidence before the court. Further, in circumstances where the *Gillick* competent subject children in this case object to forensic DNA testing and where I am satisfied that to press further testing at this time to remedy that issue would be emotionally damaging to the children, I am equally satisfied that it is not in the children's best interests to compel them to undergo the testing that would remedy these evidential difficulties at this point in time, having weighed those interests against the competing interests of the adults in this case.

95. However, whilst I am satisfied, for all the reasons that I have given, that it is not currently in the children's best interests to determine the father's application, it must be acknowledged that the decision of the court leaves the father in the position of being the legal father of the children for a further period, with all the legal consequences that flow from that status, including a not insignificant financial obligation under the current child maintenance order. Further, any decision by the court not to accede to the father's request to legally determine whether he is the father of the children constitutes an interference with his right to respect for family life unless it is in accordance with the law, pursues an aim or aims that are legitimate and can be regarded as necessary in a democratic society. In addition, it would be unfair on the father, and arguably a further breach of his Art 8 rights, to remain indefinitely as the children's legal father by virtue of a presumption if that is not the biological reality. Beyond these factors, there is a wider public interest in the children's status being, eventually, formally settled and recorded in properly maintained records, not least to address potential future questions with respect to, for example, consanguinity. With respect to the children, whilst the court must be careful not to simply assume that the children will eventually want and need certainty regarding their paternity and that such certainty will inevitably be good for them, in the medium to long term I am satisfied that it is likely to be in the children's best interests to know the identity of their biological father, that conclusion being one that, as observed by Hedley J in *Re D (Paternity)* [2007] 2 FLR 26, is generally consistent with the proposition that:

> "...truth, at the end of the day, is easier to handle than fiction and also it is designed to avoid information coming to a young person's attention in a haphazard, unorganised and indeed sometimes malicious context."

Further, the children themselves may change their minds. In these circumstances, whilst not currently in the children's best interests for the father's application to be determined, the question of their paternity cannot remain undecided indefinitely.

96. How then does the court, within this context, balance the need to ensure the best interests of the children and the need to act fairly to the father, with whose application for a declaration of non-paternity the court is seised? In answering this difficult question, I am attracted by the submission of the Children's Guardian that I should consider the approach adopted in circumstances not dissimilar to those in this case by Hedley J in *Re D*, a case concerning, as I have noted, a teenage child who was struggling with emotional issues and refusing to agree to participate in scientific testing to determine his paternity. In that case, having heard evidence from each of the parties, the social worker and the Children's Guardian, Hedley J determined that the appropriate

means of relieving pressure on the child to submit to testing whilst also treating the father fairly by ensuring a mechanism for the eventual determination of his application was to order scientific testing of the adults and to order scientific testing of the child but to stay the order in relation to the child without limit of time, with an invitation to the Cafcass officer to explain to the child the rationale for the judge's decision. Namely, that the court understood the pressure on the child and did not wish to force the question of testing, but that the issue of paternity could not remain unresolved forever.

97. This approach commends itself to the court in this case. I am clear, based on the evidence of the Children's Guardian and the mother, that it would be entirely antithetic to the children's best interests to force the question of testing at this point within the context of their wishes and feelings as set out above. As I have noted, it is readily apparent to the court why A would feel so grossly violated by the surreptitious taking of her DNA by the father and why B would feel necessarily confused by the consequences of that action. Within this context, I am satisfied that their fierce objection at this time to further testing is both deeply held and genuine. Against this, the children are each articulate and have engaged with the Children's Guardian. The Children's Guardian did not rule out the possibility that the children *might* ultimately change their mind in respect of testing if they knew that each of the adults had already provided samples. In this context, whilst satisfied it would be wrong to press the question of testing with an order taking effect immediately, I am satisfied that an order stayed without limit of time coupled with the children being told that the court understands and sympathises with their position, believes that it would be best to determine the question of paternity scientifically as soon as possible but that it will not *force* the children to do so, has the best chance of bringing a final resolution to this sad case. Equally, whilst satisfied that it would not be in the children's best interests to determine the father's application on the basis of the current deficient evidence before the court, the father's application should not be dismissed in circumstances where the court is leaving the door open to the provision of evidence of sufficient cogency to determine that application.

98. As I have acknowledged the decision of the court leaves the applicant in the position of being the legal father of the children for a further period, with all the legal consequences that flow from that status. Within this context, as I have also noted above, any decision by the court note to accede to the father's request to legally determine whether he is the father of the children, and to allow a legal presumption to prevail over what may be a different biological reality, constitutes an interference with his right to respect for family life unless it is in accordance with the law, pursues an aim or aims that are legitimate and can be regarded as necessary in a democratic society. However, two points fall to be made in this respect. First, in balancing the competing rights of the parties, including those of the children, the children's best interests are paramount. Within this context, the interference in the father's Art 8 rights constituted by a further delay in the determination of his application are necessary and proportionate to the aim of ensuring the best interests of the children are protected for the reasons I have set out. Second, it cannot be ignored that the father is the author of his own predicament, having chosen, at best unwisely, to take matters into his own hands by deploying clandestine DNA testing upon which the court cannot rely for the reasons I have given.

CONCLUSION

99. To paraphrase Hedley J in *Re D*, there are sound reasons why it would not be in the children's best interests for this case to be determined now on the one hand and sound reasons why the question of paternity should now be determined on the other. In resolving the contradiction thereby created I am satisfied, for the reasons I have given, that the proper way forward in this case is to direct, pursuant to the Family Law Reform Act 1969 s 20 that the father, the mother and the putative father shall provide DNA samples for testing, the results of that testing to be delivered to Cafcass and held in a sealed envelope on the children's Cafcass file. In addition, I shall direct, that the children shall provide samples for DNA testing, but I will stay that order without limit of time and with liberty to restore to the court on not less than seven days notice to the parties. Finally, I will adjourn the father's application generally with liberty to restore.

100. In addition to these orders, I will invite the Children's Guardian, when informing the children of the outcome of this hearing, to explain to them in age appropriate language that the judge understands their feelings of violation and confusion, that the judge therefore understands why they have said they do not want to participate in scientific testing and that the judge does not intend to ask them to do anything in this regard until they feel ready to do so. The Children's Guardian can also explain the view of the judge that the question of paternity, now it is out there, cannot be put off forever and that the judge considers that, ultimately, it would be better for the children to know the answer than not to know. Finally, in line with the evidence of the Children's Guardian, she can explain to the children that the adults will have provided their samples by order of the court before the children decide whether they are ready to do so.

101. It is my hope that, notwithstanding his inevitable disappointment at this outcome, the father, who went to great pains to express to me his desire to protect the emotional wellbeing of the children within the context of determining the question of paternity, will see the sense in this approach and the benefits that will, ultimately, flow from it.

102. That is my judgment.