THE COURT'S POWER TO COMPEL DNA TESTING IN PATERNITY DISPUTES – LB v YD 2009 5 SA 463 (T)

1 Introduction

A fundamental scientific breakthrough was made in 1900 by Landsteiner, who demonstrated that the red blood cells of some individuals contained different chemical substances from the blood cells of others; and that all blood could be classified into a small number of groups (see Cretney *Family Law in the Twentieth Century – A History* (2003) 536). In accordance with recognized principles of genetics these characteristics are transmitted from one generation to another, and thus

> "[A] comparison of the characteristics of a child's blood with that of his mother and a particular man may show that the man *cannot* be the father … [and] if it is known that at the material times the mother had had intercourse only with H (her husband) and X and the blood test excludes H but not X, then X must be the father" (Law Commission Report on *Illegitimacy* (Law Commission 118 par 5.2), cited *ibid*).

Whilst English courts began to accept such evidence in paternity cases (the first reported case seems to be *Wilson v Wilson otherwise Jennings* (1942) LJ 129, 226), Heaton points out that until a few decades ago the unreliability of blood tests meant that they were seldom employed in such cases in South Africa (Heaton *Cronjé & Heaton's The South African Law of Persons* 3ed (2008) 60). A further complication in the use of these tests as a means of determining parentage, however, related to the fact that in order for an acceptable result to ensue it was necessary to have samples not only from a child but also from the adults involved. What if an adult refused to be tested, or a parent refused to allow the child to undergo a test?

The South African courts initially held that they could not compel any person to undergo blood tests (*E v E* 1940 TPD 333), although they were prepared to accept evidence obtained through voluntary testing (*Ranjith v Sheela* 1965 3 SA 103 (D); *Van der Harst v Viljoen* 1977 1 SA 795 (C); and see Heaton 60). The potential consequences of the courts refusing to compel testing are that a non-biological "father" will be compelled to maintain the child. More recently the South African courts have seen fit to order blood tests in paternity disputes, although whether such orders should be made remains controversial. The latest case dealing with this issue is that of *LB v YD* (2009 5 SA 463 (T)). (Leave to appeal the decision in this matter was dismissed in *YD v LB (A)* 2009 5 SA 479 (GNP)).

2 Facts

Since there were factual disputes between the parties, the court adopted the approach set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (1984 3 SA 623 (A) 634H-I), such that the facts averred in the applicant's affidavits which have been admitted by the respondent would be accepted for the purposes of the judgment, unless any denials of the respondent are "untenable or uncreditworthy to the extent that such may be disregarded and the applicant's contrary averments be accepted" (par [2]). Applicant and respondent were involved in an intimate relationship for the period February 2006 to April 2007 (par [2]). As a result of the respondent becoming disillusioned with the relationship it was terminated. The respondent discovered that she was pregnant with Y on 23 March 2007. At this point she had no doubt that the applicant was the father (par [4]). The court accepted that shortly thereafter the applicant had denied that he was the father of Y. Some seven months after the termination of the relationship, on 8 November 2007, the child ("Y") was born. In the meantime the respondent had married an old boyfriend in July 2007 (par [5]). The nature and frequency of the contact between the parties in the period between April 2007 and November 2007 were disputed (par [6]). The applicant was informed of the birth three days after it had taken place, whereupon he immediately wanted to see the baby. The respondent informed him that she would get in touch with him later in this regard (par [7]).

The applicant, feeling excluded whilst maintaining doubts about his paternity, instructed his attorney to send a letter to respondent in which he once again denied paternity in the strongest terms, but offered to pay for the costs of the confinement should DNA tests prove otherwise (as well as offering to pay for the costs of such tests) (par [8]). The respondent was shocked and aggrieved by the applicant's denial of paternity, in that she contended that she had always been willing to make the applicant a part of Y's life. She therefore responded in turn with a letter from her attorneys, in which she accepted the applicant's denial of paternity and further stated that applicant consequently had no rights nor obligations in respect of Y (par [9]-[10]).

In the face of losing parental rights in respect of Y, the applicant responded with an acknowledgement that he was indeed her father, and a request for blood tests from the respondent and Y to confirm this state of affairs (par [11]). The applicant requested that respondent voluntarily consent to such tests, failing which an application would be launched to compel her to do so. The respondent was not prepared to allow such tests, and consequently the application was made, in respect of which the applicant asserted that should the DNA tests confirm his paternity of Y, he wished to exercise his parental rights and duties towards her, including financial and maintenance obligations, which apart from three payments made to the respondent during the pregnancy, had not transpired. He argued that it would be in the best interests of the child for her to know with certainty who her biological father is and for him to be a part of her life (par [14]).

Furthermore, he contended that because of the dispute between them, the fact that he and the respondent were often apart during the relevant stage of the relationship and her subsequent intimacy with her husband, it would be appropriate for the court to order the applicant to subject herself to a DNA test (par [13]-[14]). The respondent denied the necessity for a DNA test, stating that apart from the attorney's letter in which she denied the applicant's paternity, she had always maintained that the applicant was Y's father, and that in the light of applicant's subsequent acceptance of this state of affairs and admissions in this regard the test would constitute an unnecessary invasion of her rights to privacy and dignity and would further not be in Y's best interests (par [16]).

3 Judgment

Murphy J noted that it would first be considered whether it was necessary to appoint a *curator ad litem* to protect the interests of the minor child. Despite the respondent (initially) arguing that this was a necessity, it was held that "given the age of the child and her inability to contribute anything meaningful to the proceedings", along with the limited purposes of the litigation, a curator was not required as Y's interests were adequately protected by the respondent (par [16]). The court then proceeded to summarize the applicant's arguments as follows (par [17]):

> "The applicant argues that he has a right to know whether or not he is the father of Y. The respondent has both conceded and denied that he is the father, and despite her concession has denied him access to the child. He submitted further that it will be less prejudicial for Y to be tested at this early stage of her life than for her later in life to discover that the applicant is not her father, which would be considerably more traumatic than the minor invasion occasioned by a DNA test. The applicant's right to know whether he is the father with certainty before assuming the rights and responsibilities of parenthood, he argues, outweighs any inconvenience that might be suffered by Y and the respondent."

Murphy J noted the deficiencies in the law relating to compulsory blood or DNA testing in parental disputes, there being no legislation to specifically regulate the position in civil cases and varying judicial pronouncements on the topic, differing on the proper legal basis for ordering tests (par [18]):

> "In relation to the child the courts have relied on their inherent jurisdiction as upper guardian, while in relation to the non-consenting adult some judges have invoked the inherent jurisdiction of a court to regulate its own procedures while others have refused to do so. In all cases the courts have been mindful of the need on the one hand to protect the privacy and bodily integrity of those to be subjected to tests, but on the other hand have asserted the court's role to discover the truth whenever possible and to make use of scientific methods for that purpose."

Having considered the relevant case law, as well as the provisions of the Children's Act 2005, Murphy J held that the present case required "a clearing of the air", given the various admissions and denials of the applicant's paternity by both parties, and the fact that the respondent had been intimate with her husband within the period of possible conception (par [47]). Furthermore, it was in the best interests of the child that paternity be scientifically determined and resolved at an early stage (par [47]):

> "The child is barely one year old and thus there is no established relationship that might be unduly disturbed or harmed by a determination of non-paternity. If the applicant is established to be the father, the child will benefit in time from knowing the truth and from the applicant's commitment to her financial well-being. The possible stigma of a disputed paternity will also be removed. And furthermore legislative safeguards exist for the assignment and monitoring of appropriate parental rights and responsibilities to the applicant should that prove permissible."

The order sought by the applicant was accordingly granted (par [48]).

4 Discussion

4 1 South African law

Since the inception of the Children's Act 38 of 2005, children in SA are no longer labelled as "legitimate" as was previously the case where the parents were married or "illegitimate" if the parents were unmarried. The Act has shifted the emphasis to labelling the parents (Heaton 49). As a result, where the parents are married, the child is referred to as a child born of married parents and if the parents are unmarried the child is referred to as a child born of unmarried parents (Heaton 49; and Children's Act ss 19-21; 38; 40 and 233).

In most instances paternity, as opposed to maternity, is in dispute, and as a result the law has created two presumptions (Heaton 55). The first is *pater est quem nuptiae demonstrant* (the husband of the mother is the father of the child) in the case of a woman who is married or party to a civil union (Van Heerden "Legitimacy, Illegitimacy and the Proof of Parentage" in Van Heerden *et al* (eds) *Boberg's Law of Persons and the Family* 2ed (1999) 327 353ff). In the case of a woman who is not married or party to a civil union, a man is presumed to be the father of a child if it is proved that he had sex with the mother at the time when the child could have been conceived (Heaton 57; and Children's Act s 36).

Both presumptions are rebuttable (see Heaton 55-6). In the case of parties who are married, the man presumed to be the father must show on a balance of probabilities that he is not the father. However, in the case of a child born to an unmarried woman, and in terms of section 36 of the Children's Act, the man must provide evidence to the contrary which "raises a reasonable doubt".

Various factors can be raised to rebut both the presumptions. These include the absence of sexual intercourse at the time that the child could have been conceived, sterility and impotence. In addition, the party who seeks to rebut the presumption may also use the period of gestation as another factor, that is, he could prove that due to the length of the period it is not possible that he could have fathered the child (Heaton 58).

DNA tests remain the most accurate method of determining, with almost 100% accuracy, whether a particular man is the father of a child. In *M v R* (1989 1 SA 416 (O) 425) an expert witness stated that the statistical probability of a particular man being the father could be as high as 99.9%. Whilst, as noted above, in the past blood tests were seldom used as a result

of their unreliability, the accuracy of the tests has improved with advances in medical science. The position of the courts in respect of whether they have the power to compel tests in cases where parties do not consent, however, still remains unsettled.

In the discussion which follows, we shall highlight the manner in which the courts have dealt with applications relating to the testing of a child in a paternity matter, as opposed to the way in which courts have dealt with applications relating to adults in the same context.

In *Seetal v Pravitha* (1983 3 SA 827 (D); and for a critical analysis of this case see Singh "The Power of the Court to Compel any Person to Submit to Identification Tests in Paternity Disputes: The Unquestionable Need for a Rule" 1993 *De Jure* 115) the applicant had sued the first respondent for divorce on the grounds of her alleged adultery. He also applied for an order declaring the four-year-old child born to the respondent whilst married to him illegitimate. The applicant contended that the child was conceived as a result of the alleged adultery. The first respondent refused to submit herself or her minor son to undergo the blood tests required by the applicant. The applicant thereafter made an application to the court asking the court for an order directing her to comply. The application was opposed by the first respondent and a curator *ad litem* on behalf of the second respondent.

The court ruled that the Supreme Court (the erstwhile appellation of the High Court) did have the capacity to order parties to submit themselves to blood tests (832D). The court did not, however, answer the question on what circumstances would permit it to exercise such power. The court ruled further that as far as minors were concerned, it did have the power to consent to blood tests on the minor's behalf. The court was able to do so based upon its position as the upper guardian of all minors (862D-863A). In agreeing that it possessed this power, the court did point out that this would only be done where it was shown to be in the child's best interests (864G-H). In the instant case, the court found that it would not be in the best interests of the child (865G). It was held that the identity of the father was not in much doubt and it would be a disadvantage to the child to be without a father (865G-H). The court declined to order the blood tests, without expressing a view on whether an adult could be compelled to submit to blood tests.

In *M v R* (*supra*) the court took the same view as the court in *Seetal*, namely that it could order tests on the minor child in circumstances where guardians objected (420E). Again, consistent with the view of the court in *Seetal*, the court found that it would only do so in circumstances where it was shown to be in the best interests of the child (420E). In contrast to the decision in the *Seetal* case, the court found that the child's immediate circumstances should not be the only consideration. The court found that the demands of reality and the interdependence and interaction which exists between the child and his family and blood relations, as well as other objective considerations such as the search for truth and the right to privacy of individuals should also be considered (421B-E).

The court found that on the facts of the case it could intervene in circumstances where a parent objected to the child undergoing blood tests. The applicant, who had had no contact with the child that he allegedly fathered, had paid maintenance to the respondent for a period of eight

years. When the respondent applied for an increase in the amount of maintenance, the applicant, wishing to obtain certainty regarding his alleged paternity, brought the application for the child and the respondent to subject themselves to blood tests (418J-419A). The respondent had married her present husband, whom the child accepted as his father, three years after the birth of the child. After seeking advice, the respondent and her husband had decided to tell the child the truth about his paternity (419I).

Based on this fact, the court found that it was crucial to the child's sense of security that he know with certainty who his real father was and it should therefore be determined with as much certainty as possible (423D). The court thereafter turned to consider whether it could compel an unwilling adult to undergo blood testing and found that two conflicting interests presented themselves: pursuit of truth and right to privacy of the person who did not want to submit to the tests (423E-F).

The court found that it had the inherent power to regulate procedure, including the search for and collection of evidence and concluded that it could order the mother to undergo blood tests (425F). The court found that "it is simply a source of evidence which assists the court in its search for the truth and is in that sense a procedural matter" (translated, 428D). Further, the court stressed the reliability of such tests (425H-J). Although mother's right to privacy was infringed, as child's guardian the court felt she should act in the child's best interests, and the blood tests of the mother and the child were thus ordered by the court (429B).

In *Nell v Nell* (1990 3 SA 889 (T)) an application was made by the applicant for specific performance of a settlement agreement that had been entered into between the parties. A clause in the agreement provided for the fact that the respondent and minor child would subject themselves to tissue tests to confirm the paternity of the applicant. The applicant also appealed to the inherent capacity of the court to issue orders of a procedural nature (894C). The court accepted that the settlement agreement existed between the parties, but found that it was within its discretion to order specific performance thereof (894E). The court was disinclined to order the tests based on the fact that the parties had failed to provide details of the tests and what they entailed (894F). Further to this the court also found that it was not in the best interests of the child to do so.

The view of the court was that the ordering of the tests was not simply a matter of procedure (895H). The court disagreed with both *Seetal* and *M v R*, where both courts had held that it was within the inherent jurisdiction of the High Court to order blood tests. In the judgment the court also highlighted the fact that the right to privacy of parties may be outweighed by other fundamental interests, but that this was normally regulated by statute (896H). The Children's Status Act (82 of 1987, applicable at the time) simply created a presumption that where a party was unwilling to subject themselves to blood tests the party in question was concealing the truth regarding paternity. The parties could not be statutorily compelled to undergo blood tests (896H-I). The court also pointed out that if the ordering of blood tests was a matter of procedure, it would still not order the tests as it was not in the interests of the child to do so (896C-E).

In *S v L* (1992 3 SA 713 (E); and for a critical analysis of this case, see Taitz and Singh "Does the Supreme Court Enjoy the Inherent Power to Order Relevant Parties to Submit to Blood Tests to Establish Paternity?" 1995 58 *THRHR* 91), the Eastern Cape High Court (per Mullins J) was faced with the decision as to whether it could override the decision of a parent who did not consent to a minor child undergoing blood tests. The court also had to decide whether it could compel an unwilling adult to submit to blood tests. The court made reference to section 2 of the Children's Status Act and concluded that "the Legislator was not satisfied that there were any legal means available to compel a party to submit to a blood test" but went on to state that "it does not necessarily follow therefrom that the court does not have the power to compel the taking of blood tests" (719C-D).

After consideration of all the relevant authorities the court found that compelling a party to submit to a blood test was not a matter of procedure and further that the court did not have the power to make the order (719I). With regards to the minor child the court found that the court did not have the power to interfere with the decision of a guardian where the guardian had refused permission for the child to undergo blood tests (721I-J). This was despite the fact that the court might have come to a different decision. It was also the view of the court that the ordering of blood tests would not be in the best interests of the child even if it had the power to make such an order (722C).

In the case of *O v O* (1992 4 SA 137 (C)) the court held that it had the power to override the objections of a guardian and could order blood tests in its capacity as upper guardian of all minors (139H-I). It was thus held that the court may authorise tests on a minor despite the objections of his/her parents. The court also found that there was no statutory or common-law power enabling a court to order an adult to undergo blood tests (139I-J). In this matter the court, however, declined to authorise the tests on the child based on the "best interests of the child" principle.

In *D v K* (1997 2 BCLR 209 (N)) the applicant requested that the court compel the respondent to undergo blood tests in order to prove that he was the father of a child born to her as a result of an intimate relationship with him. The respondent, although paying maintenance to her for the upkeep of the child, had at no time acknowledged paternity. During her relationship with the respondent and when the child was born the applicant was married. Her husband was excluded as the father of the child by DNA tests carried out on him. It was only when the child expressed the intention of pursuing a tertiary education did the respondent indicate that he was unwilling to pay for the studies. The applicant was advised to have blood tests done on him and the child.

In his judgment, Moodley AJ pointed out that there was no rule of law that authorized a court to compel blood testing (212I-J). Whilst the court acknowledged that the Supreme Court had the inherent jurisdiction to regulate its own procedures in the absence of any provisions in the Rules and where justice dictated that it do so (213B-C), it had to decide whether or not this power extended to the compulsory taking of blood samples from unwilling adults.

It was the view of the court that the search for the truth and respect for privacy were ideals which should at all times be sought to be upheld. One should not lightly be sacrificed for another and a court should not become a party to the sacrifice (217D-E). It was held by the court that the taking of blood samples was not simply a matter of procedure but amounted to a creation of evidence (217J-218A). The taking of a blood sample also amounted to a violation of the personal integrity of the person as well as a minor assault (218B). In the light of these factors the court found that the taking of a blood sample therefore went far beyond being just a simple procedural and entered into the realm of substantive law (218B).

Moodley AJ proceeded to point out that if the legislature intended to compel a person to submit to blood tests it would have made provision for this in the Children's Status Act. The judge concluded therefore that the legislature, by implication did not approve of compelling unwilling adults to submit to blood tests. The legislature was satisfied with the presumptions contained in the Children's Status Act (see 218C-219B; this Act, which has been repealed in favour of the Children's Act, has substantially similar provisions in this regard).

The court thus found that although it had inherent right to regulate its own procedures it did not extend to cover compulsory blood testing. As the only post-constitution case that dealt with the power of the High Court to compel blood tests in paternity disputes, the court's treatment of the constitutional arguments is significant. Moodley AJ accepted applicant's argument that the taking of a blood sample is "relatively painless" in nature and can thus "hardly be described as cruel, inhuman or degrading treatment or punishment" (220I-J), and consequently not an infringement of the right to freedom and security of the person. However, it was held that although the infringement of the right to privacy might "appear to be minor, the consequences of such intrusion could in some instances be devastating" (221A-B), and therefore, in the light of the less intrusive means of dealing with the matter provided by the presumptions in the Children's Status Act, such infringement could not be regarded as justifiable.

The judgment in the *LB* case constitutes an important development in South African law, in seeking to clarify the controverted position regarding blood testing for the purposes of paternity. In particular, the following conclusions are very significant.

First, regarding the question whether the High Court had the inherent power to compel a custodial parent to make the child and him- or herself available for blood or DNA testing, the court, noting the lack of legislative regulation and the lack of agreement in judicial pronouncements in this regard, reaffirmed the proposition that, acting in its estimation of the best interests of a child, a court "in the exercise of its power as an upper guardian of all minors is entitled to authorise a blood test on a minor, despite objections by a custodian parent" (par [19]). Thus the court disagreed with the findings in *S v L*, where the court found that blood tests should not be ordered purely to ascertain the truth and to provide certainty in respect of the child's paternity. Murphy J found that it was in the best interest of the child to determine the truth about paternity and to provide certainty for the child concerning his parentage and identity. It was held further that ordering a

parent to undergo a blood test was a minor infringement of the parent's right to privacy had to be limited to protect the best interests of the child (par [21]) ("the more correct approach is that the discovery of truth should prevail over the idea that rights of privacy and bodily integrity should be respected" (par [23])). This would have to be done within reasonable limits and would depend on the circumstances of the case (par [24]):

> "That is not to say that the rights of an adult or a child to privacy and dignity should invariably be sacrificed to the needs of the administration of justice. Rather it reiterates the by now well-established principle that such rights must yield to the needs of the proper administration of justice when it is reasonable and justifiable for them to do so, taking into account the importance of the purpose and necessity of getting to the truth."

Murphy J proceeded to point out the "fine, if not artificial" nature of the distinction between overruling a dissenting guardian and the compulsion of an adult to submit to a blood test, adopting the approach set out in *M v R* as more constitutionally sensitive (par [35]), concluded that the court could compel a parent to undergo a blood or DNA test if it is in the best interests of the child (par [30]). This approach, as the court proceeds to point out, resonates with the change in policy towards the rights and responsibilities of unmarried fathers as reflected in the Children's Act of 2005 (par [39]):

> "[O]nce paternity is established the rights and responsibilities are automatic with the precise nature and content being subject to mediation, review and ultimately a parenting plan. Once paternity is established the parties become co-holders of parental responsibilities and rights on an equal footing."

Thus, in the view of the court in *LB*, the court may compel either an adult or a child to submit to testing for the purposes of establishing paternity.

4 2 Other jurisdictions

The New Zealand law in respect of paternity testing is to be found in sections 54-59 of the Family Proceedings Act of 1980. In any civil proceedings in which a child's parentage is in issue, "the court may of its own motion or on the application of a party to the proceeding recommend the carrying out of parentage tests" (Webb *et al Family Law in New Zealand Vol 1* 13ed (2007) 903). The court is not authorized by any legislative provision to compel a party to undergo testing in respect of either adults or children. The courts have in certain instances compelled unwilling parties to subject themselves to testing. The factor most frequently it considered when such orders are granted is whether it would serve the best interests of the child. A further factor is that where what is being sought involves a buccal swab, which is deemed to be less invasive than a blood test, the court is more likely to grant an order in favour of the party seeking the test (*eg*, *S v T* [2003] NZFLR 223).

In Canada, in terms of s 10 of the Children's Law Reform Act of 1990 (C.12), a party is permitted to apply for leave to obtain blood tests from relevant persons. No person may be compelled to submit to a blood test – either adult or child – although where a person named in an order refuses to submit to such a test "the court may draw such inferences as it thinks appropriate" (s 10(3); and see Fodden *Family Law* (1999) 78). The basis

upon which the discretion of the court may be exercised in terms of s 10 is not clear from the Act. The factors considered by the courts have been: the interests of justice; possible inconvenience or physical harm to the resisting parties and lastly the best interests of the minor child (Fodden 78). Various decisions have favoured the pursuit of truth in the interests of justice and consequently that leave to carry out the tests should be granted unless these interests were outweighed by other factors (see, *eg*, *G.R. v L.H.* [1995] O.J. No. 1997. (Prov. Div.); *D.H. v D.W.* [1992] O.J. No 1737 (Gen. Div.); *McCartney v Amell* (1982) 35 O.R. (2d) 651 (Prov. Ct.); and *H v H* (1979) 25 O.R. (2d) 219 (H.C.)).

In England section 20 of the Family Law Reform Act 1969 governs the position where one of the parties to a paternity dispute refuses to submit to DNA testing. This section simply requires a court to give a direction for the use of blood tests to determine paternity. The court is not empowered to order an unwilling adult to a test. The reason for this is the great emphasis placed by English law on the protection of the personal liberty of the individual (*S v McC: W v W* [1972] AC 24 43E). The court may, however, derive a negative inference from an adult's refusal to undergo a test (in terms of s 23(1) of the Act; see Barton and Douglas *Law and Parenthood* (1995) 60; in *Re A (a minor) (Paternity: Refusal of Blood Test)* [1994] 2 FLR 463 the Court of Appeal inferred that the recalcitrant testee was the father of the child, reasoning that the test is so reliable that it can allay all doubt as to paternity). Although the Court of Appeal in *In re F (a minor) (Blood Tests: Parental Rights)* [1993] Fam 314 (CA) departed from the view of the House of Lords in *S v McC: W v W supra* that a direction for blood tests should ordinarily be made, reasoning that the child's interests lay in providing support and protection to the existing family unit in preference to ascertaining the "abstract" truth as to her genetic parentage (see Harris-Short and Miles *Family Law: Text, Cases, and Materials* (2007) 683), this approach has been criticized for not giving sufficient weight to the psychological value of the child knowing her true origins, and for failing to separate the issue of genetic parentage from the putative father's prospects of establishing a meaningful social relationship with the child (Fortin "*Re F*: The Gooseberry Bush Approach" 1994 57 *Modern Law Review* 296 298).

In *In re H (a minor) (Blood Tests: Parental Rights)* [1997] Fam 89 the Court of Appeal reverted back to the *S v McC: W v W* approach, and in so doing drawing a clear distinction between genetic and social parents, and emphasizing that "it is possible for a child to have two 'fathers': one genetic and one social", who may serve very different functions in respect of the child (Harris-Short and Miles 686). Thus the right to knowledge of one's genetic parentage does not presuppose that a social relationship will follow upon such knowledge, and therefore the right to know does not threaten the parenting role of the social parent. In the light of the Human Rights Act of 1998 it was held in *Re T (a child) (DNA tests: paternity)* [2001] 3 FCR 577 (Fam Div) that the rights to knowledge of true paternity should be weighed heavier than the right to family life, and that any infringement on the right to family life would be proportionate to the legitimate aim of providing the child with invaluable knowledge of his paternity.

Thus it seems that the English courts are strongly in favour of establishing paternity, although the order remains a direction as opposed to a more peremptory action for both adult and child.

5 Concluding remarks

The decision in the *LB* case may be welcomed as bringing further certainty to this area of the law, although it seems that the issues which arise out of paternity testing will remain controversial until authoritatively dealt with by either the SCA or the Constitutional Court.

Whilst policy concerns regarding the stigma of illegitimacy (see *Seetal v Pravitha supra* 865G-H) and the disruption of the stability of an intact family (Fodden 80 refers to doubt about the wisdom of pursuing genetic truth: "a child does not know about genetic paternity, and, until taught by society, does not care about such things") have weighed heavily with the courts in the past, it seems that the courts are required to consider a number of factors which have not consistently featured as strongly in their consideration in the past. First, the rights of the child to know the truth about his or her parentage as enshrined in articles 7 and 8 of the United Nations Convention on the Rights of the Child, 1989. Article 7 provides that a child "shall have the right from birth to a name … and, as far as possible, the right to know and be cared for by his or her parents ..." Harris-Short and Miles (677) argue (referring to Bainham "Parentage, Parenthood and Parental Responsibility" in Bainham, Day Sclater and Richards (eds) *What is a Parent? A Socio-Legal Analysis* (1999) 37-8) that the word "parent" refers to *genetic* parent, and thus that the article should be interpreted to refer to the right of children to know their genetic (as opposed to their social) heritage. (Further support for this view may be found in article 8 of the European Convention on Human Rights, as interpreted in *Mikul v Croatia* (App No 53176/99) [2002] 1 FCR 720 to include within the protection of "private life" the interest in ascertaining, through paternity proceedings, the identity of one's genetic parents (see Harris-Short and Miles 678)). In this regard Murphy J in the *Botha* case approved (par [46]) of the remarks in the Australian case *Lamb v Lamb* ((1977) FLC 90-225):

> "Although … it might not always be conducive to the welfare of a child for such tests to be carried out, there must be many cases where the determination of paternity (or, more correctly, non-paternity) by blood tests would set at rest nagging doubts and festering resentments by one party which must be detrimental to a child's welfare. Even when doubts proved justified, many children would be at least in no worse position than before, and a clearing of the air might be for their ultimate welfare."

A second factor to be considered is the rights of the putative father. Allied to the new policy adopted in the Children's Act 2005, mentioned above, there is (as Murphy J states in *LB v YD* (par [46]) "an inherent and inescapable injustice in compelling a person to assume obligations not rightfully his or hers". Third, while the best interests of the child is hardly a new consideration, declining social stigma in respect of illegitimacy and the abolition of any legal distinction between a legitimate and illegitimate child means that the welfare of the child may now be assessed on the basis of different criteria, such as those identified by Harris-Short and Miles (680):

> "whether determining the truth as to the child's parentage risks destabilizing the child's existing family unit; how likely it is that the mother's partner is the father; the stability of the mother's existing relationship; the likelihood of the child being able to develop a meaningful relationship with the putative father; and whether or not doubts concerning the child's parentage have already entered the public arena".

A final factor identified by Harris-Short and Miles (680) bears mentioning: the public interest in the smooth administration of justice. In this regard it is argued that

> "once court proceedings have been initiated there is a legitimate public interest in getting to the truth of the matter. Consequently, in order to ensure the fair and just administration of justice, the best available evidence should be brought before the court, even if it prejudices the particular rights and interests of the individuals concerned".

In conclusion, the approach adopted in the *LB* case may be applauded, such that the pursuit of truth in the interests of justice will dictate that testing should be compelled unless those interests are outweighed by other factors. The test suggested in the Canadian case of *D.H. v D.W.* (*supra*) may be helpful: whether the applicant alleged facts such that there was "a real issue to be tried on the question of paternity" (where the application should "not simply [be] based on bare allegations or speculation but on alleged facts which, if proven, could substantiate his claim that he is the father"; and see Fodden 81).

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