

Protective steps

Jo Sanders and Linzi Bull set out the courts' approach to issues of privacy relating to paternity



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'The court has held that paternity may be capable of being protected as private information, but in practice the ability to do so is likely to be as varied as family arrangements themselves may be.'

The increasingly complex parenting arrangements seen by family lawyers mean that different interests may arise between the parties, whether they are biological parents, others playing a parenting role, or the children. At the heart of that family network lies sensitive private information, including the identity of the biological parents (typically the father). The extent to which any of those parties, or third parties that may learn of that information, including the media, can control the use and disclosure of information about paternity is of growing significance.

In November the circumstances of the birth of two children became headline news (see www.guardian.co.uk/money/2012/oct/26/gay-sperm-donor-pay-child-support-maintenance) when the biological father spoke publicly about his objection to a financial claim for support of the children being made against him. He had donated sperm to enable the child's mother to have a child. The extent to which he intended to play a parenting role is disputed between the parties. In that instance both chose to speak to the press about the dispute, the children, the fact of paternity and the circumstances of conception. However, if one party had wished for that information to remain private, how would that have affected matters? Could either of them have successfully prevented the wider disclosure of those facts by legal means?

In two recent cases the High Court has grappled with the issue of privacy and paternity. These cases may be informative as to how to approach the issue. The headline point is that the court has held that

paternity may be capable of being protected as private information, but in practice the ability to do so is likely to be as varied as family arrangements themselves may be.

AAA v Associated Newspapers [2012]

The case of *AAA v Associated Newspapers* [2012], which was brought by a young child against the publisher of the *Daily Mail*, considered whether there was a basis on which an individual child could prevent disclosure of information about the identity of their father.

Davies J said:

Of itself, I accept that this issue is one in respect of which this young claimant [the child] would have a reasonable expectation of privacy such as would allow her mother the time to decide when it would be appropriate to tell her who her father is.

This ruling is of considerable significance in cases where, as here, the parents were unmarried and, in fact, the child was the result of an extra-marital relationship by the father. The father of the child is a politician who was said to have achieved a degree of notoriety as a result of extra-marital liaisons.

The court gave no weight to an argument by the defendant that intended legislative amendments as a result of s56 of the Welfare Reform Act 2009 meant that paternity was not information that ought to be capable of protection as private. The relevant provision, at paragraph 4 Schedule 6 of the Act, which is not in force, amends the

Births and Deaths Registration Act 1953 and relates to the provision of information to a registrar by an unmarried mother.

However, the facts of the case and its outcome (which could only be described as a partial success for the claimant, who obtained damages in respect of the publication of photographs but failed to obtain either damages or an injunction in respect of the paternity information) illustrate the difficulties that a claimant wishing to protect paternity will need to overcome.

The claimant's mother accepted in evidence that no one could stop her

If one partner wishes to disclose the private information, but the other does not, then if that dispute is referred to the court, the court will first establish whether the claimant's Article 8 right (the right to respect for private and family life) pursuant to the European Convention on Human Rights (ECHR) is engaged in the type of information in question, and if so, then it will conduct a balancing exercise with the defendant's competing Article 10 ECHR rights (the right to freedom of expression). It is not therefore inevitable that 'no one can stop the ex-boyfriend from speaking to the press',

and also in a magazine interview. The judge found that the mother was 'not averse to hinting at or permitting speculation as to the identity of the father of her child'. This conclusion was said to have compromised what would otherwise have been the child's expectation of privacy in her paternity.

This case was not conducted as a 'best interests of the child' hearing and no expert evidence was adduced. The child's rights were of considerable weight, but were not such as to override all other interests here. Clearly, a claimant who wishes to prevent disclosure of information about the identity of a child's father must be able to demonstrate that the information has been protected as much as possible and its disclosure restricted, presumably not beyond a very tight circle of immediate family and friends.

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SKA, PLM v CRH & ors [2012]

A starkly different case this year also touched upon issues of paternity and privacy. Here, however, it was in circumstances of harassment and alleged blackmail that the court had to decide what information should be protected. The interim judgment of Tugendhat J in *SKA, PLM v CRH & ors* [2012] was followed by the full decision of Davies J.

former partner, who was not the father of the child, speaking to the press to say he was not the father and to speculate as to the identity of who was. The judge adopted this position and used it as part of their reasoning in refusing an injunction. This part of the judgment (para 93) is contentious. While it is unarguable that the ex-partner is entitled to disclose information about his own private life to whomsoever they choose, the position is much less straightforward where the private information is essentially shared between two people. This is the case with all information that arises from an intimate relationship, such as a long-term partnership, civil partnership or marriage. Here, we assume that, although it was not made clear in the judgment, the former partner was only aware of the fact of the claimant's mother's relationship with the child's father because he had previously been in a relationship with her.

although whether he could have been successfully restrained is fact-specific. In other privacy cases, the courts have looked at the extent to which the information is truly about a person's own life or whether its focus is really primarily rooted in the life and biography of the other party (the well-known individual of media interest) who is opposing the disclosure.

The judge's main reason for refusing both damages and an injunction in respect of the information about paternity was the extent to which she found that the child's mother had herself referred to the topic. The court heard that as well as discussing the paternity of her child with close friends, she had also spoken about her daughter to someone she had never met before at a country house party (although the public judgment did not make clear precisely what information had been disclosed)

The two claimants sought to protect the information that the second claimant was shortly due to give birth to twins and that the first claimant was the biological father. The defendants had threatened to reveal that information not only to the first claimant's former wife and grown-up children, but also to his second and current wife with whom he was living (collectively described as the 'first family'), unless they were paid £1.5m. None of the first claimant's friends, his first family or business associates knew about the relationship and he told the court that '... [his] world and that of his wife and children would be shattered if they knew, and my relationships with them would be destroyed'.

Unlike the mother in *AAA*, the second claimant discussed her

private life with only a limited group. Her evidence was that she only spoke to the first claimant and her close friends about their relationship.

The interim decision in this case is not easily squared with the bold statement of principle of Davies J above in *AAA* (made subsequent to *SKA*). While granting an injunction in respect of the disclosure of a substantial amount of information, Tugendhat J declined to grant an injunction prohibiting the disclosure of the 'bare fact' that the first claimant was the father of the twins to whom the second claimant was about to give birth. The judge emphasised that he had not been addressed on behalf of the first family or the yet-to-be-born twins as to their rights, but he was not convinced that the claimants would show at full trial that telling the first family of the relationship and resulting children should not be allowed. It may be relevant to note that the court must also consider the privacy rights of non-parties and the best interests of any child whose rights are engaged (*ETK v News Group Newspapers Limited* [2011]). Such parties should speak for themselves, and use the means of their next friend or guardian *ad litem* where they lack the necessary capacity. Of course, at the interim stage in *SKA*, *PLM v CRH & ors* the twins were unborn and so had no right of action.

The judge expressed a view that he thought it unlikely that the grown-up children would remain indefinitely in ignorance of the birth of the twins, their half-siblings. It is not clear why the judge formed that view. The claimants' evidence was that they had agreed that the first claimant would not be registered as the father on the birth certificate, so there would be no public record of his identity, and that that information was intended to be limited to a very small group of trusted friends and the claimants believed it would not come into the public domain.

Nonetheless, the judge relied upon *Hutcheson v News Group Newspapers Ltd* [2011] to draw

a distinction between the details of any sexual relationship and the bare fact of its existence. In *Hutcheson* Gross LJ said it was at most a borderline case whether the male claimant had a reasonable expectation of privacy in the bare facts that he had a second family, and the identity of the mother and children.

Davies J subsequently granted a permanent injunction, but the claimants had by then accepted Tugendhat J's earlier decision that the 'bare fact' of the relationship and the pregnancy could not be protected. In this case, the privacy

a sperm donor could succeed in preventing disclosure to third parties of any of the additional private details surrounding the circumstances of conception and any later role in the family. Where a parent wishes to prevent disclosure of the 'bare fact' of paternity by others to protect the child's ability to learn that information at an appropriate time, the judgment in *AAA* suggests this is also possible.

In pursuing any such case, one factor likely to influence the court heavily seems to be the identity of

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of the paternity itself had been lost even before the children themselves could be heard on the subject.

Conclusion

Issues of privacy and paternity are likely to become more significant where the circumstances of a child's conception are less straightforward. For those who have children through surrogacy or artificial insemination arrangements for example, preventing the circumstances of conception and/or identity of a biological parent from becoming public knowledge is also often a significant and particularly sensitive issue.

Whether the 'bare fact' of the identity of a father can be protected as private is a point of huge significance and, as illustrated above, somewhat unsatisfactory law. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 removed the anonymity of sperm donors. The fact that parliament removed a right to anonymity indicates that, as against the resulting child, a man could not succeed in preventing disclosure of his identity. However, it is highly likely that such

the claimant – whether it is the child itself, or one, or indeed both, of the parents. An infant claimant who can show that it is in its best interests to choose the time at which its paternity is made known seems likely to have a starting advantage because of the court's recognition that the child's rights carry additional weight.

The potential consequences of undesirable disclosures and the fluctuating state of the case law suggests that these are cases which must be dealt with carefully, ideally by those with specialist knowledge in each pertinent area of law, to protect not only the child but the parents and the wider family unit. ■

AAA v Associated Newspapers
[2012] EWHC 2103 (QB)
ETK v News Group Newspapers Ltd
[2011] EWCA Civ 439
Hutcheson v News Group Newspapers Ltd
[2011] EWCA Civ 808
SKA & anor v CRH & ors
[2012] EWHC 766 (QB)
SKA & anor v CRH & ors
[2012] EWHC 2236 (QB)