RE P (DISCLOSURE: CRIMINAL PROCEEDINGS) [2003] EWHC 1713 (Fam)

[2004] 1 FLR 407

Family Division

Wall J

14 July 2003

Disclosure — Criminal proceedings — Criminal practice — Risk of compromising criminal process

A child was conceived through artificial insemination at home. The applicant sperm donor was the brother of the mother's former female lover. He delivered donated sperm to the mother and she in turn inseminated herself with a syringe. The mother said that it was never intended that the applicant would play any part in the child's life. The applicant wanted contact with the child. The mother made allegations of harassment and common assault against the applicant and there were concurrent criminal proceedings. Fearing the mother would disappear with the child, the applicant made the child a ward of court and passport orders were made. The mother surrendered her UK passport, but removed the child from the jurisdiction using a US passport. After a number of applications the mother and child returned to the UK. The applicant applied for contact orders and a guardian was appointed for the child. The matter was listed for hearing and procedural directions were agreed, which included a direction, without reference to the Criminal Prosecution Service or criminal solicitors, that the applicant was to ‘serve all evidence in the criminal proceedings that (his solicitors) have in 7 days'. The applicant's solicitors subsequently applied to the court for further directions as to whether the disclosure was appropriate.

Held — there should be no disclosure of the prosecution statements into the wardship proceedings at this stage —

(1) There was nothing in the existence of the criminal process which prevented or inhibited the mother setting out her case fully (see para [24]).

(2) Disclosure of the prosecution statements into the wardship proceedings at this stage (prior to the conclusion of the criminal proceedings), would be a breach of long-standing criminal practice and would run the risk of compromising the criminal process (see para [25]).

(3) There did not need to be disclosure of the criminal statements to the guardian only. Issues of fact would be for the court to resolve and disclosure ran the risk, at the lowest, of giving the appearance of unfairness and was unnecessary for the proper performance of the guardian's duties (see para [26]).

(4) The court in the wardship proceedings, as well as the applicant, needed to know the entire case advanced by the mother on the contact issue and all her objections to contact. Her statement should set out the objections in full and not by reference to her criminal statement (see para [33]).

Statutory provisions considered top

Human Fertilisation and Embryology Act 1990

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 6

Cases referred to in judgment top

D (Minors) (Wardship: Disclosure), Re [1994] 1 FLR 346, CA

L (A Minor) (Police Investigation: Privilege), Re [1997] AC 16, [1996] 2 WLR 395, sub nom *Re L (Police Investigation: Privilege)* [1996] 1 FLR 731, [1996] 2 All ER 78, HL

L (Police Investigation: Privilege), Re [1995] 1 FLR 999, FD and CA

R v Richardson [1971] 2 QB 484, [1971] 2 WLR 1308, [1971] 2 ALL ER 773, CA

Lionel Swift QC and *Michael Sternberg* for the applicant
Henry Setright QC and *Dermot Main Thompson* for the first respondent
Monica Ford for the guardian, second respondent
Janine Sheff for the Crown Prosecution Service

Cur adv vult

WALL J:

Introduction

[1] It is a commonplace of both private and public law proceedings relating to children for there to be concurrent criminal proceedings involving one or both of the parents. Sometimes the criminal proceedings involve allegations of physical or sexual abuse by one or both of the parents of the child concerned; sometimes the allegation is that one parent has assaulted or harassed the other. Sometimes the parents, or one of them, are facing criminal proceedings unrelated to the child.

[2] The interface between criminal and family proceedings in these circumstances can give rise to difficult questions of disclosure. Many such cases are to be found in the books. Some propositions have become well established. Thus where, for example, confidential family proceedings documents are necessary for the defence of a parent charged with a criminal offence, the family court normally allows that parent to use the documents in the criminal proceedings — see, for example, *Re D (Minors) (Wardship: Disclosure)* [1994] 1 FLR 346 and the extensive review of the authorities by Sir Thomas Bingham MR (as he then was) in *Re L (Police Investigation: Privilege)* [1995] 1 FLR 999, expressly approved by the majority of the House of Lords on appeal — see *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16, sub nom *Re L (Police Investigation: Privilege)* [1996] 1 FLR 731 at 30 and 741 respectively.

[3] The disclosure of documents from criminal proceedings into family proceedings is more complex, and a distinction can usually be drawn between disclosure prior to the conclusion of the criminal proceedings, and disclosure once the jury has delivered a verdict, or the criminal proceedings are otherwise concluded. In the latter case, there is rarely a difficulty. In the former, however, the police and the Crown Prosecution Service (CPS) are properly concerned to preserve the integrity of the criminal process. The fear, in particular, is that disclosure of documents into the family proceedings will give actual and potential witnesses in the criminal proceedings access to material which they would not otherwise be entitled or expect to see, and that, as a consequence, the prospect of the defendant having a fair trial may be compromised. That is the argument which is at the centre of the current application.

The facts of the instant case

[4] The child in this case is P, born on 13 May 2002. The case is unusual, not only in that the child was conceived through artificial insemination, but because the applicant, the donor of the sperm (who has yet to be confirmed by

DNA testing as the child's father), is the brother of the mother's female former lover. The applicant describes himself as homosexual. The insemination process was not undertaken under the Human Fertilisation and Embryology Act 1990 at a licensed clinic: it was done at home, with the applicant attending the mother's accommodation on a regular basis to donate sperm, and the mother then inseminating herself with a syringe.

[5] Since the birth of the child on 13 May 2002, the three adults appear to have fallen out with each other to the point where, in the wardship proceedings, the applicant states that the mother has accused him of seeking sexual gratification by bouncing the child up and down on his erect penis. He, in the process of denying that allegation, also asserts that the mother has told him that if he does not stay away from the child she will unfreeze some of his unused sperm, which she has retained, and spread it on the child's clothes as evidence of indecent assault by him on the child. The mother also accuses the applicant of harassment (allegations made later but dating back to before the birth of the child) and of common assault.

[6] The applicant issued wardship proceedings on 5 March 2003 fearing, with some justification as it turned out, that the mother would disappear with the child to the US. He made a without notice application to Munby J on the same day and passport orders were made designed to prevent the child being removed from the jurisdiction. However, the mother, whilst surrendering her and the child's UK passports, used US passports to take the child out of the jurisdiction in clear disobedience of Munby J's order. After a flurry of activity, and a number of applications to the court, the mother and child have now returned to the UK.

[7] The principal issue in the wardship proceedings is contact between the applicant and the child. There may be a second issue since, on 5 March 2003, the applicant was awarded parental responsibility by Munby J on the first, without notice, application in the proceedings. Mr Henry Setright QC, for the mother, told me that this is a matter which she may seek to reopen in due course.

[8] In any event, the applicant's case is that he wishes to play a full part in the child's life, and as a means to that end seeks regular contact with him. The mother is opposed to contact. The full extent of her opposition is not clear from her statement (a matter to which I will return). From her perspective, however, the applicant (if he is the biological father — she says she was inseminating herself with the sperm from at least two other men at the time) was never intended to play any part in the life of the child, and agreed not to do so. He was the convenient means whereby she became pregnant. That done, he has no further function.

[9] The question of P's paternity is the subject of an order for DNA testing, which has been delayed by wrangles over the identity of the tester and who should pay for it. It is essential, however, that this issue is resolved as quickly as possible, and in any event by 19 August 2003 when there is a day set aside for the hearing of the father's application for interim contact.

[10] The contact proceedings have been timetabled to a full hearing before a High Court judge on 17 November 2003. The child is separately represented by a CAFCASS guardian. The dates of the interim and final hearings were fixed before she was appointed, and I was told she is unable to attend the hearing on 19 August. She also doubts its utility, and asks me to vacate it. I decline to do so, although I excuse her attendance. In my judgment, the

applicant is entitled to invite the court to look at the question of interim contact on 19 August, even if — as is almost certain — the criminal proceedings are not by then concluded.

[11] Whilst on procedural matters, I note that the case is reserved to Bracewell J, if available. I have checked with the Clerk of the Rules. Bracewell J is unavailable on both 19 August and 17 November 2003. The only judge who can take both those hearings is Sumner J, and unless submissions are made to me to the contrary, I propose to direct that both the hearing in August and the hearing in November are heard by Sumner J, to whom the case is henceforth allocated. It has already been through far too many judicial hands.

The criminal proceedings

[12] The applicant is currently facing two charges of common assault and two of harassment. One of the charges of common assault relates to the mother and is alleged to have occurred on

13 September 2002. The two counts of harassment span the period between 1 November 2001 and 22 May 2003. One relates to the mother; the other relates to the applicant's sister. They thus encompass the period of the child's birth. There are, I was told, altogether eight statements in the criminal proceedings. The mother and the applicant's sister are the two chief prosecution witnesses. In addition, I was advised by counsel on behalf of the CPS, Ms Sheff, that there is an ongoing investigation into the mother's allegation that the applicant has indecently assaulted the child. The applicant is due shortly to be interviewed by the police in relation to that allegation, but whether or not charges will be preferred is, currently, wholly unknown.

[13] On practical matters, Ms Sheff informed me that the committal hearing in relation to the two counts of harassment would take place in a fortnight's time. The court of trial will be Snaresbrook, and the usual timing was 4 weeks from committal to a plea and directions hearing; in the absence of other complications, the case would be placed in the warned list 4 weeks after that. On this basis, the earliest date for trial would be late September or early October. However, there was the complicating factor of the ongoing investigation into the allegation of indecent assault on P, which, in Ms Sheff's analysis, was likely, if it resulted in charges, to delay the criminal proceedings.

The application for disclosure

[14] The application for disclosure into the family proceedings of the statements made (and in particular any statements made by the mother) in the criminal proceedings comes about in a somewhat curious way. On 16 June 2003, Hogg J, by consent, made an order containing a number of procedural directions, one of which was that the applicant was to ‘serve all evidence in the criminal proceedings that (his solicitors) have in 7 days'. That order was, apparently, made without reference either to the CPS or to the solicitors acting for the applicant in the criminal proceedings. The consequence was that on 20 June 2003 the applicant's solicitors issued a further summons seeking an order that:

> ‘Further directions be given as to if it is appropriate in the light of the recent observations of the CPS for the applicant to serve on the
>
> **[2004] 1 FLR 411**
>
> respondent all statements (his) solicitors have in relation to the criminal proceedings in this matter.'

[15] That summons came before me on 26 June and I adjourned it to 11 July. Amongst other directions, I gave the applicant permission to appear by counsel instructed in both the criminal and the wardship proceedings and I invited the CPS to appear and to make representations. I suspended the operation of the order for disclosure made by Hogg J on 17 June 2003.

The argument

[16] For the applicant, Mr Lionel Swift QC argued that it was contrary to both practice and principle for prosecution statements (of which there were currently eight) to be made available for any purpose other than service on the accused person and use in the presentation of the criminal proceedings. Furthermore, the practice was clear that witnesses making prosecution statements were not shown copies of their statements until immediately before the criminal trial to which the statement related. The purpose of showing the statement to the witness at that point was to allow the witness to refresh his memory. Mr Swift referred me to the statements of practice in the current editions of *Archbold: Criminal Pleading, Evidence and Practice2003* (Sweet & Maxwell) and *Blackstone's Criminal Practice2003* (Oxford University Press). I was also referred to Home Office Circular No 82/1969 and to *R v Richardson* [1971] 2 QB 484.

[17] Mr Swift submitted that it was unnecessary for the mother to see her statement in the criminal proceedings in order for her to provide evidence in the wardship proceedings. In addition, he submitted that there was strong reason to believe that in the event the statements were disclosed to

the mother, the opportunity would be taken by the mother and the deponents on the mother's side to alter their evidence and to synchronise one with the other and generally to tailor their evidence to suit their purposes. In support of his argument on this point, Mr Swift referred me to passages in tape-recorded telephone conversations between the applicant and the mother and to a preliminary view expressed by Bracewell J that an email purportedly sent to the applicant by the mother was a forgery. Mr Swift also relied on the fact that the statements were res inter alios actaand were not contemporaneous, at least as far as the allegations of harassment were concerned.

[18] For the CPS, Ms Sheff's position was very simple. Her concern was to protect the integrity of the criminal process and to ensure that the applicant had a fair trial. The mother was the chief prosecution witness in the criminal proceedings. She had made a statement. The long established practice of the criminal courts was not to give prosecution witnesses copies of their statements, or to allow them to retain copies for a substantial period pre trial. In this regard, she adopted the submissions of Mr Swift. Ms Sheff also relied on the ongoing investigation into the allegation of indecent assault as a further reason for refusing disclosure.

[19] For the mother, Mr Setright pointed out that the applicant had agreed to disclosure on 16 June 2003. He complained that neither he nor his instructing solicitor had seen the latest correspondence with the CPS in which the latter's position was made clear. He pointed to the fact that the court had a broad discretion to order disclosure, and to the wider proposition that in Art 6 of the European Convention for the Protection of Human Rights and

Fundamental Freedoms 1950 terms it was only in the exceptional case that material in the possession of one party would be withheld from the other parties. In short, the applicant should not be permitted to perform a volte-face, and at the very least the material should be disclosed to the guardian, so that she could examine it and bring it to the attention of the court any material within it which she perceived to be relevant to the wardship proceedings.

[20] Mr Setright also pointed to the fact that there had been an element of disclosure since in a statement made by the applicant's mother in the wardship proceedings, she refers to being shown a statement made by the mother to the police on 20 May 2003. She says she was shown this by the applicant's criminal solicitor at the magistrates' court.

[21] For P, Miss Ford sought disclosure of the documents in the criminal proceedings to enable the guardian to read them and inform herself from them as to the appropriate means to represent the interests of the child. There would be no breach of the confidentiality of the criminal proceedings. If the guardian then took the view that there should be disclosure to the mother, she would seek the court's permission for such disclosure to be made. By these means, there would be no compromise of the criminal proceedings.

[22] Both Mr Swift and Ms Sheff opposed disclosure to the guardian. The former said that it was unnecessary for the guardian to see the statements in order for her to carry out her duties. Furthermore, if the guardian read the mother's statement in the criminal proceedings there was always the risk that the information thereby obtained might influence the manner in which the guardian interviewed the mother; and even if that was not actually the case, the appearance of unfairness would persist. Mr Swift repeated that there was nothing to stop the parties in the wardship saying whatever they liked. The guardian could properly fulfil her function by examining the evidence in the wardship and interviewing the parties.

Analysis and discussion

[23] I have come to the conclusion that this is a case in which the submissions of Ms Sheff and Mr Swift are to be preferred, and where the need to protect the integrity of the criminal process and to ensure that the applicant has a fair trial in the criminal proceedings are the factors which are entitled to the greatest weight.

[24] The mother's case in the wardship proceedings is that the applicant (assuming he is the biological father of the child) should not have contact with P. There is nothing in the existence of the criminal process which prevents or inhibits her setting out her case fully. Equally, whilst in terms of process, it might be preferable for the criminal trial to have been concluded before any contested application for contact, it was not suggested by Ms Sheff that any such hearing, conducted within the wardship and on evidence confidential to the wardship, would prejudice the outcome of the criminal trial.

[25] By contrast, if there was disclosure of the prosecution statements into the wardship proceedings at this stage it would be a breach of the long-standing criminal practice and would run the risk of compromising the criminal process.

[26] Equally, I do not think that the guardian needs to see the statements for the purposes of representing P. Her stance on issues of fact will, I anticipate, be neutral: they will be for the court to resolve. Whilst I was initially attracted to the idea of disclosure to the guardian as a means of ensuring that all

relevant material was before the court in the wardship proceedings, I am persuaded by Mr Swift and Ms Sheff that this course runs the risk, at the lowest, of giving the appearance of unfairness, and is unnecessary for the proper performance of the guardian's duties.

[27] Furthermore, I was not persuaded by Mr Setright's argument that there already had been partial disclosure due to the mother's statement having been shown to the father's mother. Mr Swift told me that this occurred in the context of an application for his client for bail, and argued that the applicant was entitled to use the prosecution statements in his defence of the criminal proceedings. I accept that argument, and do not think that the sight by the applicant's mother of the mother's witness statement in the criminal proceedings opens the door to wider disclosure, any more than the mother's reference to it in her statement in the wardship proceedings.

[28] I have therefore come to the clear conclusion that there should be no disclosure of the prosecution statements into the wardship proceedings at this stage.

The way forward

[29] As I have already stated, it is of the utmost importance that the paternity issue is settled by DNA testing as soon as possible, and in any event by 19 August. The order made by Hogg J on 16 June required the identity of the tester to be agreed by 20 June. If I cannot be assured that this question is fully in hand, I will make a further order in relation to it.

Disclosure of the wardship papers to the solicitors acting for the father in the criminal proceedings

[30] On 5 June 2003 the applicant's solicitors in the wardship proceedings issued a summons, returnable on 15 July 2003, for permission to disclose the wardship papers to the solicitors acting for him in the criminal proceedings. The summons also seeks permission to use the evidence filed in the wardship proceedings in cross-examination in the criminal proceedings. Very sensibly, and in order to avoid a further hearing on 15 July, the parties agreed that I should make an order in terms of para 1 of the applicant's summons (disclosure) on the basis that any use of the evidence in the criminal proceedings (paras 2 and 3) would need to be the subject of a further application.

The mother's evidence in the wardship proceedings

[31] I am very anxious that the case should be in a fit state for Sumner J to deal with it appropriately at the interim hearing on 19 August. Directions for the subsequent hearing on 17 November 2003 will, of course, be a matter for him. I have read the mother's statement dated 13 June 2003. It refers to her statement in the criminal proceedings (which she says she is willing to disclose but which, of course, I have not seen and have excluded from the wardship proceedings).

It states that it is not the mother's intention to traverse, at this stage, each and every allegation made by the applicant against her, which she describes as ‘mostly untrue in whole or in part or are allegations taken out of context or misrepresented'.

[32] It does not seem to me that the mother's statement properly sets out her case on the contact issue. It makes clear that, on her case, the agreement between them was that he was to have no involvement in the upbringing of the

child. That, however, is only one aspect. Although she exhibits the ‘Camden paperwork core assessment' which identifies the allegation of indecent assault, she does not make any allegation of sexual misconduct by the father in relation to P in the body of the statement, nor does the statement deal, for example, with his allegation that she retains a sample or samples of his sperm and that she told him she was prepared to use it against him if he insisted on pursuing his application for contact.

[33] The court in the wardship proceedings, as well as the applicant, needs to know the entire case the mother is advancing on the contact issue. In particular, Sumner J will need to know on 19 August all the mother's objections to contact. I propose, therefore, unless persuaded otherwise, to direct that the mother file a further statement within 14 days of today setting out in full all her objections to the applicant having contact with P. The applicant will have liberty to file a further statement in reply, if so advised, 14 days thereafter. By these means Sumner J will at least have a full picture of the application and the opposition to it.

[34] The actions of the police in investigating the mother's apparent allegations of sexual misbehaviour by the applicant towards P are not, of course, a matter for me. My only plea is that they proceed with that investigation and reach a conclusion upon it at the earliest possible opportunity.

[35] I do not require the CPS to be represented on 19 August 2003. I do, however, propose to direct that no later than close of business on 15 August the CPS advises the guardian's solicitor by letter as to the current state of the criminal proceedings and the police investigation into the sexual allegations. Once again, that should enable Sumner J to have an up-to-date picture and give any further directions required.

[36] I have deliberately reduced this judgment to writing so that it is available for the use of the court on 19 August. I should, however, be grateful if junior counsel could draft the order setting out the various directions I have made.

Order accordingly.

Solicitors:*Finers Stephens Innocent* for the applicant

Dawson Cornwall for the first respondent

Aitken Kelly Associates for the guardian, second respondent

FAY ELIZABETH BAKER

Law Reporter