

## **THE ESTABLISHMENT OF PATERNITY UNDER ENGLISH LAW**

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### **I. INTRODUCTION - The Relevance of Paternity**

Although the main thrust of my paper is the establishment of paternity, to put this issue into its context it needs to be acknowledged at the outset that under English law the genetic father is not always regarded as the legal father. Accordingly, I begin my paper by answering two important preliminary questions, namely, who, as a matter of substantive law, is regarded as the legal father, and what is the legal significance of fatherhood.

#### **A Who is the legal father?**

In general the genetic father, that is the man whose sperm fertilised the egg<sup>1</sup>, is regarded under English law as the legal father. There are, however, two exceptions to this position<sup>2</sup>, namely :

- where the man is a donor whose sperm is used for « licensed treatment »<sup>3</sup> and whose consent to the use of his sperm has been obtained in accordance with the requirements of Sch 3 to the Human Fertilisation and Embryology Act 1990 (ie. sperm donors whose sperm is used for assisted reproduction treatment) ; and
- the man's sperm is used after his death<sup>4</sup>.

In such cases a child so conceived could be legally fatherless<sup>5</sup>.

There are also occasions where a man is treated as the legal father notwithstanding he is not the genetic father. Thus under s 28(2) of Human Fertilisation and Embryology Act 1990 a husband is treated as the father of a child carried by his wife as a result of placing in her of an embryo or of sperm and eggs or her artificial insemination<sup>6</sup>, unless it is shown that he did not consent to his wife's treatment<sup>7</sup>.

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<sup>1</sup> As Bracewell J pointed out in *Re B (Parentage)* [1996] 2 FLR 15 at 21, it is irrelevant how the sperm fertilised the egg, ie. sexual intercourse is not a prerequisite to fatherhood.

<sup>2</sup> See the Human Fertilisation and Embryology Act 1990, s 28(6), which only applies to children carried by women as a result of the placing in them of embryos or of sperm and eggs, or of their artificial insemination on or after 1 August 1991: s 49(3).

<sup>3</sup> Ie treatment requiring those who offer it to be licensed under Sch 2 to the 1990 Act.

<sup>4</sup> In any event before sperm can be used or stored the donor must have consented in writing: Sch 3, para 1 to the Human Fertilisation and Embryology Act 1990, cf *R v Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687, CA, in which, exceptionally, the applicant was allowed to take her dead husband's sperm to Belgium for treatment, notwithstanding that written consent to the taking of his sperm had not been given by the husband before his death.

<sup>5</sup> Such as in those cases where such children are born to a woman who has no husband or partner deemed to be the legal father under s 28(2) and (3) of the 1990 Act, discussed below.

<sup>6</sup> In each case the 'treatment' must have been given on or after 1 August 1991. In the case of children conceived by artificial insemination (but by no other means) between 4 April 1988 and 1 August 1991, the husband is similarly treated as the father.

<sup>7</sup> Ie. it is presumed unless, proved to the contrary, that he did consent.

Where the man and woman are not married (or, if they are, but there is a judicial separation order<sup>1</sup> in force), then under s 28(3) of the 1990 Act the man will be treated as the father of any child conceived as a result inter alia of donated sperm used for a woman in the course of *licensed* « treatment services »<sup>2</sup> provided for her and the man together. In these instances legal fatherhood is not therefore dependent upon paternity but rather upon marriage<sup>3</sup> to the woman so treated or, in the absence of marriage, upon the man and woman receiving licensed treatment together<sup>4</sup>.

It may be added that under English law there are two means (but only two means) by which legal parenthood can, subsequent to the child's birth, be transferred, namely, through adoption and, what are termed, 'parental orders'. Both means require a formal court order.

The former order is equally well known in Continental systems, though it should be said that English law only recognises full adoptions (that is where the legal relationship between the both parents and the child is completely and irrevocably severed<sup>5</sup>) and does not, as in France, for example, have any notion of simple adoption. Adoption orders can only be made in respect of a child, that is, a person under the age of 18<sup>6</sup>.

Parental orders were introduced by s 30 of the Human Fertilisation and Embryology Act 1990 to provide a means whereby a 'commissioning couple' can acquire legal parenthood for a child carried by another woman as a result of the placing in her of an embryo or sperm or eggs or her artificial insemination, effectively, as a result of the making of a surrogacy arrangement<sup>7</sup>. There are a number of conditions attached to the making of such an order. In particular :

- Only a married couple can apply and the gametes of one or both of them must have been used to create the embryo;
- the application must be made within six months of the child's birth;
- at the time of the application the child's home must be with the applicants ; and
- the carrying mother (and, where relevant, her husband) must have agreed unconditionally to the making of the order<sup>8</sup>.

In these two instances, parenthood in general and fatherhood in particular, are established and are consequently provable by the court order.

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<sup>1</sup> An order which relieves each spouse from the obligation to live together but which does not formally bring the marriage to an end.

<sup>2</sup> Viz. that covered by Sch 2 to the 1990 Act.

<sup>3</sup> 'Marriage' for these purposes includes a void marriage; s 28(7)(b) of the 1990 Act.

<sup>4</sup> The meaning of 'treatment together' is not straightforward, though a good approach is to ask whether the parties had embarked upon a joint enterprise the object of which is for the woman to conceive and give birth, per Bracewell J in *Re B (Parentage)* [1996] 2 FLR 15 and approved by the Court of Appeal in *R v. Human Fertilisation and Embryology Authority, ex p Blood* [1997] 2 All ER 687, per Lord Woolf MR. Because the treatment in question must be by a 'licensed person', treatment abroad will fall outside these provisions, see *U v.W (A-G Intervening)* [1998] Fam 29.

<sup>5</sup> Adoption Act 1976, ss 12 and 39.

<sup>6</sup> Adoption Act 1976, ss 12 and 72(l). English adoption law is discussed in detail in *Lowe and Douglas Bromley's Family Law* (9th edn) ch 15.

<sup>7</sup> I.e. an agreement whereby a woman agrees to carry a baby for someone else and to hand over the child at birth.

<sup>8</sup> The court must also be satisfied that, save for expenses reasonably incurred, no money or benefit has been paid or received in connection with the making of the order. For further details see *Lowe and Douglas, op. cit.*, 267-269.

## **B What is the significance of legal fatherhood?**

In part as a legacy of formerly only recognising a legal relationship between a parent and a legitimate child, English law continues to distinguish fathers whose children have been born in lawful wedlock from those whose children have not. In the former case fathers, (like all mothers) automatically have parental responsibility for the child from the moment of its birth, whereas in the latter, they do not<sup>1</sup> (though they can subsequently acquire responsibility either through the making of a parental responsibility agreement with the mother or through the making of a parental responsibility order by the court)<sup>2</sup>.

This, however, is not to say that fatherhood *per se* has no legal significance. Crucially, all fathers (and mothers) are liable to maintain their child<sup>3</sup>. Rights of succession automatically flow from the parent - child relationship regardless of whether the mother and father are married to each other<sup>4</sup>, as do the rules on prohibited degrees of marriage and incest<sup>5</sup>. All fathers have a right to apply without leave for orders concerning the child's upbringing under s 8 of the Children Act 1989.<sup>6</sup> Where a child has been taken into local authority care there is a presumption that there be reasonable contact between the child and each parent regardless of whether they are married to each other<sup>7</sup>. Marriage is similarly not the crucial element in determining questions of deportation of the father or of the child<sup>8</sup>.

On the other hand, in the absence of having parental responsibility, among other things, the unmarried father's formal agreement is not required for his child's adoption<sup>9</sup>. He cannot appoint a guardian;<sup>10</sup> he does not have extensive rights to consent to his child's medical treatment; he has no independent power to discipline his child; he cannot object to the issuing of a passport to his child nor to the mother taking the child out of the United Kingdom; he cannot object to the local authority 'accommodating' his child, he cannot object to his child's marriage, and he has no 'rights of custody' for the purpose of the Hague Convention on International Child Abduction 1980<sup>11</sup>.

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<sup>1</sup> Children Act 1989, s 2(l), (2). Note: in the case of adoption and parental orders the 'father' has parental responsibility.

<sup>2</sup> Children Act 1989, s 4 discussed by Lowe and Douglas, *op. cit.*, at pp. 377-387.

<sup>3</sup> See the Social Security Administration Act 1992 ss 78(6) and 105(3) and the Child Support Act 1991, ss 3(2) and 54(l).

<sup>4</sup> See eg. the Inheritance (Provision for Family and Dependents) Act 1975, s 25(l) and the Family Law Reform Act 1987, s 18.

<sup>5</sup> See the Marriage Act 1949 and the Sexual Offences Act 1956.

<sup>6</sup> Children Act 1989, s 10 (interpreted in the light of the Family Law Reform Act 1987).

<sup>7</sup> Children Act 1989, s 34.

<sup>8</sup> See Lowe and Douglas, *op. cit.*, at 287 where they point out that immigration officers have been instructed to take account of the provisions of the European Convention on Human Rights particularly following *Berrehab v The Netherlands* (1988) II. EHRR 322.

<sup>9</sup> *Re M (An Infant)* [1955] 2 QB 479 and *Re C (Adoption: Parties)* [1995] 2 FLR 483.

<sup>10</sup> Children Act 1989, s 5(3)-(4).

<sup>11</sup> *Viz* pursuant to Art 3.

## II. ESTABLISHING PATERNITY

What makes English law outstandingly different to Continental systems is that it provides no means for a man to make a binding voluntary recognition of paternity. Instead, binding declarations of paternity can only be made by a court and even then only in certain proceedings (see further below). Consequently, presumptions of paternity based on marriage can always (ie. there are no time or circumstantial bars<sup>1</sup>) be rebutted in subsequent court proceedings. Conversely, paternity of unmarried men technically always has to be proved (but see further below).

This substantive position should not, however, be thought to mean that in cases where fatherhood is relevant, paternity has to be established in formal court proceedings. On the contrary, presumptions of paternity based on marriage to the mother (see further below) are normally relied upon and even where the parties are not married common recognition and acceptance of paternity will usually be sufficient for the man to be treated as the father. Thus, for example, unless disputed<sup>2</sup>, the Child Support Agency does not have to go to court to prove paternity to make a valid and ultimately enforceable maintenance assessment against a person it considers to be the unmarried and absent father<sup>3</sup>. Furthermore, proof of paternity is surprisingly not formally required for a man to make a parental responsibility agreement with the mother<sup>4</sup>.

In any event, as the Lord Chancellor's Consultation Paper comments<sup>5</sup>, 'Where a man is recorded in the birth register as the father of the child, a certified copy of the registration is accepted as *prima facie* evidence of paternity in most matters of inheritance, nationality and citizenship.'

In other words, in practice, voluntary assumptions of paternity are commonly made and accepted under the English system notwithstanding that they may be open to challenge in subsequent court proceedings.

It remains now to consider in more detail the various requirements under English Law.

### A Presumptions and *prima facie* evidence of paternity

#### 1. *Presumption that the mother's husband is the father*

In common with numerous legal systems, English law presumes that a child born to a married woman is that of her husband - the well known civil law maxim « *pater est quem nuptiae demonstrant* » applying equally this side of the English Channel as it does on the other<sup>6</sup>.

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<sup>1</sup> Cf. the position under some European regimes, see further below.

<sup>2</sup> Viz. under s 26 of the Child Support Act 1991. See further below.

<sup>3</sup> See generally Lowe and Douglas, *op. cit.*, at 730ff.

<sup>4</sup> Agreements are made pursuant to the Children Act 1989, s 4 (1)(b). All that is required is for the parties to complete and then sign before court witnesses a prescribed form. No scrutiny is carried out by the court even as to whether the man is the father. See Lowe and Douglas, *op. cit.*, 378ff.

<sup>5</sup> "1. Court Procedures For the Determination of Paternity. 2. The Law on Parental Responsibility for Unmarried Fathers" (March 1998), para 26.

<sup>6</sup> This maxim was adopted as early as the twelfth century. See Glanvil, book 7, ch 12, Bracton, fol 6, Co Litt 373 and Blackstone's Commentaries 1,457.

This means that, if it is alleged that the husband is not the father, the burden of rebutting the presumption is cast on the asserter. This presumption applies even though the child is born so soon after the marriage that he must have been conceived beforehand<sup>1</sup> and, in the case of a child born after a divorce or of a posthumous child, if he was born within the normal period of gestation after the divorce<sup>2</sup> or the husband's death<sup>3</sup>. In *Preston-Jones v Preston-Jones*<sup>4</sup> the House of Lords agreed that judicial notice could be taken of the fact that there is a normal period of gestation (although the period is variously given as 270 to 280 days or as nine months), but Lord MacDermott added that judicial notice must also be taken of the fact that the normal period is not always followed. It would seem, however, that the longer the period deviates from the normal, the more easily will the presumption be rebutted, until there comes a time when it is not raised at all, although it is difficult to say where the line is to be drawn.

Conflicting presumptions arise if the child must have been conceived during the subsistence of a marriage since terminated by the husband's death or divorce and the mother has remarried before the birth. It is submitted, however, that in the absence of evidence to the contrary the first husband should be presumed to be the father, since it ought to be presumed that the mother had not committed adultery<sup>5</sup>.

It is to be noted that where a child is born to an unmarried mother there is no presumption of paternity not even where the child is born to a cohabiting couple, though no doubt strong inferences may be drawn from the fact of cohabitation.

Whether there should be a presumption of paternity in the case of cohabiting couples, as there is in some Commonwealth jurisdictions<sup>6</sup>, was considered but rejected by the Law Commission<sup>7</sup> on the basis that, unlike marriage, which requires no further evidence, cohabitation is not so easy to prove.

The absence of a presumption of paternity by reason of cohabitation does not, however, mean that an unmarried man can never be assumed to be the father for, as we now discuss, registration of a man as the father on the birth certificate is *prima facie* evidence of fatherhood as is a finding of paternity in previous court proceedings.

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<sup>1</sup> See *Gardner v Gardner* (1877) 2 App Cas 723.

<sup>2</sup> *Knowles v Knowles* [1962] P 161.

<sup>3</sup> *Re Heath* [1945] Ch 417 at 421-2, per Cohen J.

<sup>4</sup> [1951] AC 391

<sup>5</sup> See *Re Overbury* [1955] Ch 122, where Harman J found in favour of the first husband's paternity on the facts. Aliter, if the child must have been conceived when the husband and wife were living apart under a decree of judicial separation since it is apparently presumed that the spouses observed the decree and did not have intercourse: *Hetherington v Hetherington* (1887) 12 PD 112 and *Ettenfield v Ettenfield* [1940] P 96, 110. *Sed quaere*, since the decree relieves the parties from cohabiting and does not forbid intercourse?

<sup>6</sup> Such as Tasmania, New South Wales and Ontario, see Law Com. No 118 *Illegitimacy* (1982) para 10.23, n 120.

<sup>7</sup> Law Com No 118, at para 10. 54.

## 2. *Registering a man as the father on the birth certificate*

Under the Births and Deaths Registration Act 1953, s 2 the child's married parents are obliged to register the birth within 42 days of the child being born<sup>1</sup>. Failure to do so constitutes an offence<sup>2</sup>. Unmarried mothers are under a similar obligation. In contrast, the unmarried father has no obligation to register himself as the father and indeed, has no general right to do so. The unmarried father's name may, however, be entered on the register in the following circumstances<sup>3</sup>:

- (i) at the joint request of the mother and the father, in which case both must sign the register;
- (ii) at the mother's request upon production of a declaration<sup>4</sup> by her and the father to the effect that he is the father;
- (iii) at the father's request upon production of a declaration by him and the mother to the effect that he is the father ; or
- (iv) at the written request of either the mother or the father upon the production of a copy of a parental responsibility agreement, a parental responsibility order or a court order requiring him to make financial provision for the child<sup>5</sup>.

If the child's birth has been registered with no father named, it may be re-registered showing the father's name if one of the above conditions is satisfied<sup>6</sup>.

In short, in the case of a birth outside marriage, "the father's identity does not appear in the register unless he attends the register office and signs the register jointly with the mother, or if one parent registers the birth alone and produces acceptable documentary evidence of paternity"<sup>7</sup>. In fact, in most cases the father's details are included. In 1996, for example, of the 232,663 births outside marriage registered in England and Wales (constituting 35.8% of all registered births in that year) the father's details were included for 181,647 (78%) of them<sup>8</sup>. Although, as we have said, being registered as the father on the birth certificate is commonly sufficient proof of paternity, the fact remains that registration is intended to establish a record of the birth and not as proof of parentage.

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<sup>1</sup> This obligation can be satisfied by giving the required information in person to the registrar or by sending it by post: s 40. A married mother can refuse to register her husband as the father, though this in itself will arguably not rebut the presumption of paternity.

<sup>2</sup> See s 36 of the 1953 Act. The maximum penalty is a fine not exceeding Level 1 on the standard scale (at the moment: £200). Although there is no specific offence for giving false details, deliberately naming a man to be the father when he is known not to be, constitutes the offence of perjury.

<sup>3</sup> Births and Deaths Registration Act 1953, s 10 as substituted by the Family Law Reform Act 1987 s 24 and amended by the Children Act 1989 Sch 12, para 6.

<sup>4</sup> Namely, a duly signed and witnessed declaration on a prescribed form – viz. Form 2 under Sch 1 to the Registration of Births and Deaths Regulations 1987.

<sup>5</sup> But not a maintenance assessment made by the Child Support Agency, nor even a court declaration of paternity made under s 27 of the Child Support Act 1991. See further below.

<sup>6</sup> Births and Deaths Registration Act 1953, s 10A, as substituted by the Family Law Reform Act 1987 s 25 and amended by the Children Act 1980, Sch 12, para 6. Re-registration can also be made following a declaration of parentage: s 14(A) of the 1953 Act, added by the Family Law Reform Act 1987 s 26. Special arrangements are made for the registration of parental orders under s 30 of the Human Fertilisation and Embryology Act 1990 by Sch 1 to the Parental Orders (Human Fertilisation and Embryology) Regulations 1994 and for adoptions under the Adoption Act 1976, Sch 1.

<sup>7</sup> See the Lord Chancellor's Consultation Paper, op. cit., at para. 27.

<sup>8</sup> See the Lord Chancellor's Consultation Paper, op. cit., at p. 2. In 74.4% of the joint registrations, the father and mother were living at the same address.

Accordingly, being named on the birth certificate as the father is only *prima facie* evidence of paternity<sup>1</sup> and not binding proof of it. In other words, as with presumptions of paternity based on marriage, fatherhood can subsequently be challenged in court proceedings.

### 3. *Findings of paternity in court proceedings*

Surprisingly, even findings of paternity in court proceedings, do not necessarily bar further challenges in subsequent court proceedings. Indeed, it is only under s 56 of the Family Law Act 1986 (discussed further below) that declarations of paternity<sup>2</sup> are binding for all purposes. Nevertheless former proceedings may raise an estoppel as to paternity. For example, if the issue of the child's parentage has been determined in divorce proceedings, the finding will bind the spouses as between themselves, but it cannot bind either of them as against a third person, nor can it bind the child or any other person who was not a party to the proceedings<sup>3</sup>. On the other hand, under the Civil Evidence Act 1968<sup>4</sup>, where a person has been found to be the father in any relevant proceedings<sup>5</sup> before any court in the United Kingdom, that is *prima facie*, albeit not binding, evidence of paternity in any subsequent proceedings.

## **B Legal Procedures For Establishing Paternity**

As the Lord Chancellor's Consultation Paper says<sup>6</sup>, there are a variety of reasons why a determination of paternity may be needed: the child may require it in order for example to amend his birth certificate, or to establish a right to inherit property, or to acquire nationality or citizenship; the father may require it to seek a parental responsibility order, or a s 8 order under the Children Act 1989; and the mother or Child Support Agency may need it to establish paternity, so that the father can be required to contribute to the child's maintenance.

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<sup>1</sup> Brierley v Brierley [1918] P 257. It is an interesting point as to whether there is any difference between '*prima facie* evidence' and a 'presumption' though arguably, the latter is stronger than the former and therefore harder to rebut (see further below). But note, if, as has been mooted (see below), an unmarried man registered as the father is to have automatic parental responsibility, then, arguably, registration would have to raise a Presumption of paternity.

<sup>2</sup> Cf. court orders transferring parentage by the making of adoption or parental orders, which are similarly binding for all purposes.

<sup>3</sup> BvAG[1965] P278. But the husband's failure to deny that a child is a child of the family in undefended proceedings will not raise an estoppel, because to permit it to do so might invite unnecessary litigation: Rowe v Rowe [1980] Fam 47, CA.

<sup>4</sup> Section 12, as amended by the Family Law Reform Act 1987 s 29 and SI 1995/756.

<sup>5</sup> Defined to mean National Assistance Act 1948 s 42, Social Security Act 1986 s 26, proceedings under the Children Act 1989, and proceedings which would have been relevant proceedings for the purposes of s 12 of the Civil Evidence Act 1968 in the form in which it was in force before the passing of the Children Act 1989 (viz Family Law Reform Act 1969 s 6, Guardianship of Minors Act 1971, Children Act 1975 s 34(l)(a), (b) or (c), Child Care Act 1980 s 47, Family Law Reform Act 1971 s 4, and proceedings concerning the revocation of a custodianship order under the Children Act 1975 s 35) and the Child Support Act 1991 s 27: Civil Evidence Act 1968 s 12(5), as amended by the Courts and legal Services Act 1990 s 116, Sch 16, para 2, Child Support Act 1991 s 27(5) and SI 1995/756, art 6.

<sup>6</sup> Op. cit., at paras. 6 and 7.

There is, however, no single procedure applicable to all the foregoing circumstances to establish parentage. Instead there are three different ways in which the issue of parentage may be determined by the court, namely :

- under s 56 of the Family Law Act 1986,
- under s 27 of the Child Support Act 1991, and
- in any other civil proceedings in which the court is called upon to resolve a dispute about paternity.

#### 1. *Section 56 of the Family Law Act 1986*

Under s 56 the 'child' but no one else, can seek the following declarations:

- (1) that the person named in the application is the father or the mother, or that particular persons are the parents of the applicant ;
- (2) that the applicant is the legitimate child of his parents, and
- (3) that the applicant has become or has not become a legitimated person.

It will be noted that this Act only offers a possible remedy to a 'child' and not therefore to a parent seeking to establish his legal ties to the child. Moreover, although an unmarried person can be declared to be a parent, it is not possible to obtain a declaration of illegitimacy<sup>1</sup>. Furthermore, an applicant may only seek a declaration about his own status and not that of anyone else (though in determining his own status, the marital status of the alleged parents<sup>2</sup> may also be put in issue).

Where the truth of the proposition to be declared has been proved to the court's satisfaction, the court shall make that declaration 'unless to do so would be manifestly contrary to public policy'<sup>3</sup>. If a declaration is made, it is binding upon the Crown and all other persons,<sup>4</sup> and the Registrar General will be informed<sup>5</sup>. If the declaration is refused, the court cannot grant a declaration for which an application has not been made<sup>6</sup>.

#### 2. *Section 27 of the Child Support Act 1991*

Under the Child Support Act 1991, maintenance assessments may be made against absent parents. However, liability only fixes on legal parents and one way to prevent an assessment being made is to deny parentage. Indeed, anecdotally, this legislation has led to increasing numbers of married men denying paternity.

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<sup>1</sup> Family Law Act 1986, s 63.

<sup>2</sup> Ibid., s 58 (5)(b). But not grandparents as previously.

<sup>3</sup> Section 58(l). This *proviso* seems to put into statutory form the power exercised in *Puttick v A-G* [1980] Fam 1.

<sup>4</sup> Section 58(20).

<sup>5</sup> Section 56(5) as added by the Family Law Reform Act 1987.

<sup>6</sup> Section 58(3).

Under s 26 of the 1991 Act, if the alleged parent denies parentage, a maintenance assessment cannot be made unless, in effect, the defendant has previously been bindingly found to be the parent viz through adoption, a parental order, a s 56 declaration under the Family Law Act 1986, a s 27 declaration under the 1991 Act (see below) or where he has been found to be the father in relevant proceedings in England and Wales. Where none of these instances apply (and it will be noted that presumptions of paternity based on marriage or prima facie evidence of paternity based on birth registration are not included) then under s 27 of the 1991 Act the Child Support Agency or the person with care may apply to court for a declaration that he is or is not a parent of the child.

Declarations obtained under s 27, however, have limited effect in that they are only effective for child support and maintenance purposes<sup>1</sup>.

### 3. *Incidental findings of paternity in other civil proceedings*

Effectively compensating for the lack of a general court procedure for establishing paternity any court is empowered to make a finding in any civil proceedings where the issue seems relevant. However, as has already been said, though such a finding binds the parties to the litigation, it is only *prima facie* evidence of paternity in subsequent court proceedings.

## C Proving paternity in court

### 1. *Rebutting the presumption of paternity based on marriage*

As we have seen, under English law, as with many other jurisdictions, the husband is presumed to be the father of a child born to his wife. At common law the accepted view was that this presumption could only be rebutted by evidence establishing beyond reasonable doubt that the husband could not be the father. However, the Family Law Reform Act 1969 s 26 states that the presumption may be rebutted upon the balance of probabilities<sup>2</sup> which means, according to Lord Reid in *S v S, W v Official Solicitor (or W)*<sup>3</sup>, that even weak evidence must prevail if there is no other evidence to counterbalance it and, in the light of the subsequent House of Lords decision in *Re H (Minors) (Sexual Abuse: Standard of Proof)*<sup>4</sup>, this would seem to be the current position.

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<sup>1</sup> See s 27(5). An unsuccessful attempt was made during the passage of the Child Support Act 1995 to amend s 27 so as to make a declaration of paternity binding for all purposes. See further below for further calls to make declarations more generally binding.

<sup>2</sup> This implements the recommendations of the Law Commission: see Law Com, No 16, Blood Tests and the Proof of Paternity in Civil Proceedings (1968), para. 15. In criminal proceedings apparently the presumption must still be rebutted by evidence placing the matter beyond reasonable doubt.

<sup>3</sup> [1972] AC 24 at 41.

<sup>4</sup> [1996] AC 563, which established that there is only one civil standard of proof and *inter alia*, discredited *Serio v Serio* (1983) 4 FLR 756 which suggested that in relation to paternity the standard of proof was higher than that needed in an ordinary civil action. But see further below as to whether there is any difference in rebutting '*prima facie* evidence of paternity'.

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The presumption can be rebutted by proving to the requisite standard either that the husband did not have intercourse with his wife at the relevant time<sup>1</sup>, or that the child was not the issue of that intercourse. This latter assertion normally implies that the wife has committed adultery. It is established, however, that the fact that the wife has committed adultery does not *per se*<sup>2</sup> rebut the presumption, because this merely shows that the husband or the adulterer could be the father<sup>3</sup>. In these circumstances the most common way to rebut the presumption is by the use of blood tests<sup>4</sup>.

## 2. *Rebutting prima facie evidence of paternity*

As, we have seen, a finding of paternity in previous court proceedings (other than under s 27 of the Child Support Act 1991) and being named as the father on the birth certificate, is *prima facie* evidence of paternity. It is clear, however, that such evidence can be rebutted and, as with the presumptions based on marriage, the standard of proof required, is the standard civil test, on the balance of probabilities.

Whether there is any difference in the cogency of evidence required to tip the balance is perhaps an arguable point. Although *Re H (Minors)(Sexual Abuse: Standard of Proof)* establishes that there is but one civil standard of proof, namely the balance of probabilities, in Lord Nicholls' view<sup>5</sup> in applying this test one should have in mind that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. On this basis it could be thought that since, arguably the weakest evidence of paternity is registration, less urgent evidence is needed to rebut it than to rebut the presumption of paternity based on marriage or a previous court finding of paternity particularly where that issue has been fully canvassed.

## 3. *The use of blood tests*

In cases where paternity is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to rebut the presumption or allegation of paternity or to establish parentage. Until DNA tests became publicly available<sup>6</sup> reliance was placed on blood tests. The great drawback of such tests, however, is that, although they can definitely show that a man *cannot* be the father, they can only show with varying degrees of probability that he is the father. In contrast, DNA tests (or genetic fingerprinting as it is sometimes known) can, by matching the alleged fathers DNA bands with that of the child's (having excluded those bands that match the mother's), make positive findings of paternity with virtual certainty.

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<sup>1</sup> See eg the Aylesford Peerage case (1885) 11 App Cas 1, HL: *Morris v Davies* (1837) 5 Cl & Fin 163, HL. In *Smith v May* (1969) 113 Sol Jo 1000 the presumption was rebutted even though the parties admitted sharing the same bed.

<sup>2</sup> Aliter if the husband can be shown to be infertile.

<sup>3</sup> It was formerly held that this was so even though the husband invariably used a contraceptive (*Francis v Francis* [1960] P 17 but this might now rebut the presumption on the balance of probability if the other man did not use one. Similarly, if the presumption is raised by the wife's pregnancy at the time of the marriage, it cannot be rebutted merely by showing that she had intercourse with another man before her marriage: *Gardner v Gardner* (1877) 2 App Cas 723, HL.

<sup>4</sup> In theory it remains possible to rebut the presumption upon the basis of race or genetic characteristics. Unlike some countries, for example Denmark, the English courts have never had the power to order so-called 'anthropological tests' when, for example, blood tests prove inconclusive. The Law Commission (Law Com No 16 Blood Tests and the Proof of Paternity in Civil Proceedings, para 16), however, did not recommend the introduction of such tests in England because of the then doubts about their medical validity.

<sup>5</sup> [1996] AC 563 at 586.

<sup>6</sup> *Viz.*, in the UK, on 1 June 1987 see *Re J (A Minor) (Wardship)* [1988]1 FLR 65.

As DNA profiling can be made from blood samples (as well as other bodily samples) it was possible to incorporate such testing into the existing system of court directed tests on blood<sup>1</sup>. Although DNA tests are more expensive than conventional tests they became possible to obtain via a court direction following the increase of fees permitted to be charged<sup>2</sup> and with the appointment of those practitioners authorised to carry out tests. In other words applicants can effectively choose which test they want according to the amount of money they are prepared to pay.

(a) *The power to give directions for the use of blood tests*

The power to give directions for the use of blood tests is governed by s 20 of the Family Law Reform Act 1969. This provides that in any civil proceedings<sup>3</sup> in which the paternity of any person falls to be determined by the court, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is, or is not, thereby excluded from being the father of that person. This power is sometimes loosely referred to as a power to *order* blood tests but, as Ward LJ pointed out in *Re H (A Minor) (Blood Test: Parental Rights)*:<sup>4</sup>

« Section 20 does not empower the court to order blood tests, still less to take blood tests from an unwilling party: all it does is permit a direction for the use of blood tests to ascertain paternity. »

Notwithstanding Ward LJ's clear statement, it seems that a distinction should be drawn between adults and children, since, according to Hale J in *Re R (A Minor) (Blood Tests: Constraint)*<sup>5</sup>, while there is an absolute embargo against forcing an adult to supply blood against his will, there is no such bar against ordering a supply of blood from a child even to the extent of ordering physical restraint against him or her.

It is important to appreciate that s 20 does not inhibit the giving of evidence. If all the parties agree, they do not have to obtain the court's consent before having a test carried out. What the Act does is to give the court a discretion to direct a test if they do not agree.

Section 20 is silent as to when such a direction should be made but in *S v S, W v Official Solicitor (or W)*<sup>6</sup> the House of Lords held that the correct approach is not to make a direction where it is in the child's best interests to do so, but only to refuse to make a direction where it would be against the child's interests to do otherwise. Furthermore, the House of Lords refused to accept that the mere fact that a test could establish conclusively that the child was illegitimate was sufficiently against his interest to withhold consent, even though as in *W v Official Solicitor*, this would leave him with no known father at all.

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<sup>1</sup> Indeed, it was for this very reason that it was felt unnecessary to implement s 23 of the Family Law Reform Act 1987 which would empower courts to direct 'scientific tests' being made on bodily samples, see eg *Re CB (A Minor) (Blood Tests)* [1994] 2 FLR 762 at 768. The Government has recently signalled its change of mind in this, see further below.

<sup>2</sup> Viz. under the Blood Test (Evidence of Paternity) (Amendment) Regulations 1989 (SI 1989/776).

<sup>3</sup> In the absence of 'civil proceedings' there is no jurisdiction to make a freestanding order for directing blood tests to be taken to determine paternity: per Balcombe LJ in *Re E (A Minor) (Parental Responsibility)* [1994] 2 FCR 709 at 718-719.

<sup>4</sup> [1996] 4 All ER 28 at 36, CA.

<sup>5</sup> [1998] Fam 66.

<sup>6</sup> [1972] AC 24

The danger is far outweighed by the demands of public policy that all relevant evidence should be made available. In their view it will usually be in the child's interest - as well as in the public interest - that the truth should be known and a direction given. As Balcombe LJ later put it in *Re F (A Minor) (Blood Tests: Parental Rights)*<sup>1</sup>, *S v S* established inter alia that :

« Public policy no longer requires that special protection should be given by the law to the status of legitimacy ... The interests of justice will normally require that available evidence be not suppressed and that the truth be ascertained whenever possible... In many cases the interests of the child are also best served if the truth is ascertained... However, the interests of justice may conflict with the interests of the child. In general the court ought to permit a blood test of a young child to be taken unless satisfied that would be against the child's interests ; it does not first need to be satisfied that the outcome of the test will be for the benefit of the child... It is not really protecting the child to ban a blood test on some vague or shadowy conjecture that it may turn out to be for its advantage or at least to do it no harm. »

Notwithstanding general agreement as to what the test is, there has been some difficulty and inconsistency in applying it. In *Re F*, the Court of Appeal upheld a refusal to direct a blood test to be taken upon the application of a man claiming to be the father (and who had never seen the child) and opposed by the mother, in a case where the child had been conceived and brought up in an existing marriage, albeit that at the time of conception the mother had been having sexual relations with her husband and the applicant. The court held that the child's welfare depended upon her relationship with the mother and on the stability of the family unit, which included the mother's husband. Anything which might disturb that stability was likely to be detrimental to the child's welfare and therefore, unless this could be counter-balanced by other advantages to her of ordering a test, it would be wrong to do it.

Effectively, the decision in *Re F* amounted to saying that, if the child is being brought up in an intact family and the test is opposed by the parent, then it is likely to be thought contrary to the child's interests for a direction to be made. However, this decision should be contrasted with *Re H (a minor) (blood tests : parental rights)*<sup>2</sup> in which a married women became pregnant soon after beginning a sexual relationship with another man. Throughout the affair she continued to have sexual relations with her husband, who five years previously had had a vasectomy (though he had never checked on the success of the operation). At first the mother intended to leave her husband and set up home with her lover, but she ended the affair before the child was born, and indeed, the child was registered in her husband's name. As in *Re F*, the mother opposed the making of a blood test direction upon an application by her lover, who was seeking contact. She argued that pursuing contact would destabilise her own marriage which had only recently been put together again, and that that would be to the child's disadvantage. The Court of Appeal rejected her arguments, holding that the mother's refusal to undergo a test was not determinative of whether the court should direct such a test, though it remained a factor to be taken into account.

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<sup>1</sup> [1993] Fam 313 at 318.

<sup>2</sup> [1996] 4 All ER 28.

But a more important factor was, according to Ward LJ, the right of every child to know the truth about their parentage unless their welfare clearly justifies the 'cover up'. As he pointed out, this right to know is underlined by Article 7 of the UN Convention on the Rights of the Child. Among other factors to be considered, his Lordship considered that any gain to the child from preventing any disturbance to his security had to be balanced against the loss to him of the certainty of knowing who he was. Accordingly, while the risk of disruption to the child's life both by the continuance of the paternity issue as well as the pursuit of the s 8 order were obviously factors which impinged on the child's welfare, they were not, in his judgment, determinative of the blood testing in question.

Although Ward LJ himself **did not accept that the two cases** were indistinguishable, it is hard to reconcile *Re F* and *Re H*, though the latter seems more in tune with the House of Lords' approach in *S v S*. It remains to be seen whether in the future the destabilising of the family argument will be successful, though it is to be observed that on that score neither case was particularly strong in the sense that the alleged father brought his action within weeks of the child's birth. It might conceivably be different if an action is brought many years after the child's birth<sup>1</sup>.

(b) *The need for consent*

As previously indicated, in the case of adults (and those aged 16 or 17) there is no compulsion attached to the direction. This is made clear by s 21 which expressly provides that, except in the case of a person suffering from mental disorder, samples may not be taken without his consent if he is over 16. Section 21 (3) also provides that a blood sample may be taken from a person under the age of 16 years 'if the person who has the care and control of him consents'. Although at first sight this would seem to prevent the court ordering a test on a child against the parents will, Hale J in *Re R (A Minor) (Blood Tests : Constraint)*<sup>2</sup> felt able to overcome this possible objection by the simple expedient of ordering the delivery of the child into the care and control of the Official Solicitor at a particular time and place for the purpose of taking a blood sample, and made it plain that the Official Solicitor was permitted to consent on the child's behalf.

Although there is a power of refusal under s 21, s 23 (1) permits the court to draw such inferences as appear proper from a person's failure to give consent or to take steps to give effect to the direction. Indeed, in *Re A (A Minor) (Paternity : Refusal of Blood Test)*<sup>3</sup> Waite LJ went so far as to say that given the background of scientific advance:

« ... if a mother makes a claim against one of the possible fathers,<sup>4</sup> and he chooses 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 his refusal to be tested - reasons which it would be just and fair and reasonable for him to be allowed to maintain. »

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<sup>1</sup> Cf. *B v B and E (B Intervening)* [1969] 3 All ER 1106.

<sup>2</sup> [1998] Fam 66.

<sup>3</sup> [1994] 2 FLR 463, at 473, CA. For an earlier example of a husband reasonably refusing to submit to a blood test, see *B v B and E (B intervening)* [1969] 3 All ER 1106, CA.

<sup>4</sup> At the time of conception the mother was having sexual relationships with three different men.

Following this, in *Re G (Parentage : Blood Sample)*<sup>1</sup> Ward LJ said:

« ... the forensic process is advanced by presenting the truth to the court. He who obstructs the truth will have the inference drawn against him. »

### III REFORM PROPOSALS

Certain aspects of the English law on paternity are currently under review and are the subject of a Consultation Paper issued by the Lord Chancellor's Department<sup>2</sup>. Of particular relevance to this discussion<sup>3</sup> is the Departments consideration of whether

- a) the statutory power to direct scientific tests contained in s 23 of the Family Law Reform Act 1987 should be implemented, and
- b) it is feasible and appropriate to establish a single court procedure for determining paternity.

#### A Implementing the provision to direct scientific tests

As the Paper points out<sup>4</sup>, the advantage of implementing s 23 of the 1987 Act to permit testing to be carried out on non-invasive bodily samples such as cranial hair or saliva, as an alternative to blood, is that it would

- (a) enable those who cannot undergo blood testing for religious or medical reasons to take advantage of these test, and
- (b) bring the courts' powers into line with the voluntary DNA testing scheme carried out on behalf of the Child Support Agency.

It might also be added that another advantage is that it opens up the possibility of being able to carry out tests on samples of persons who are dead.

The Paper explains that subject to the views of consultees, it intends to implement s 23. Since it is difficult to imagine what arguments could be put against implementation, it might be supposed that it is only a matter of time before s 23 will be brought into force.

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<sup>1</sup> [1977] 1 FLR 360, at 366, CA.

<sup>2</sup> '1. Court Procedures for the Determination of Paternity. 2. The Law On Parental Responsibility For Unmarried Fathers' (March 1998).

<sup>3</sup> Views were also sought on whether to place the presumption of paternity based on marriage on a statutory footing as in Scotland, see Law Reform (Parental Child) (Scotland) Act 1986, which also included a presumption of paternity in the case of an unmarried man being registered as the father. One advantage of this would be to enable an amendment to be made to the Child Support Act 1991, s 26(2) so as to allow a maintenance assessment to be made by a Child Support Officer as is currently the case in Scotland. Given that this would not preclude a subsequent challenge being made, it would seem to be a reasonable proposal. It might in any event be pointed out that, if as the Consultation Paper proposes (ibid at para 59), an unmarried man would have automatic parental responsibility if he is named as the father on the birth register, then that in itself would surely mean that registration would create a presumption of paternity and not merely *prima facie* evidence of it.

<sup>4</sup> Ibid. at para. 36.

## **B Establishing a single court procedure for determining paternity**

The Consultation Paper highlights a number of anomalies of the current legislative framework, not least that declarations of paternity made under s 27 of the Child Support Act 1991 are not valid in other court proceedings nor even, acceptable as proof of paternity for the purpose of registering, or re-registering a birth outside marriage. It notes also that only a child can seek a declaration under s 56 of the Family Law Act 1986 and even then it is not possible to obtain a declaration that a named person is not the parent of a particular child. It asks whether the two provisions should be extended to take account of the above-mentioned gaps. Taking these points in turn. The case for considering a s 27 declaration under the 1991 Act as acceptable evidence for registration purposes seems overwhelming, nor is it obvious why such declarations are not effective in other court proceedings. The case for amending s 56 also seems similarly strong particularly so as to permit declarations that a person is not a parent. It also seems odd that there is no mechanism by which an adult can seek a general declaration as to parentage.

The Consultation Paper then poses the more intriguing questions, namely, can a single procedure be introduced for obtaining a declaration of parentage that would be "valid" in all circumstances and, if so, should the mother's views be taken into account if she did not want her child's paternity to be determined, as for example when the child had been conceived as a result of rape or where the putative father had a history of violence against the mother or other children.

In principle, it seems right that an adult should be able to obtain a declaration of parentage and indeed a declaration that they are not the parent of the child in question. At the very least such declarations should provide *prima facie* evidence of parentage for all purposes. If, however, they are to be as binding as a declaration under s 56, then there is an argument for (a) confining the power to the higher courts and (b) for providing some extra safeguards.

At the moment, under the 1986 Act notice of applications under s 56 has to be given to the Attorney-General but, as the Consultation Paper observes, given the high degree of certainty produced by DNA tests, there must be a question mark as to the need for his automatic involvement. The Paper asks whether differentiation should be made for s 56 proceedings based on DNA testing and those that are not. While it can certainly do no harm to vest a court with a general discretion to refer the papers to the Attorney-General, given the availability of DNA testing one can also ask whether binding declarations should normally be made without such tests.

It is submitted that neither a s 56 declaration nor any proposed one for adults should normally be made unless the court is satisfied that it is impossible or impracticable (for example, that the relevant person is dead or untraceable) to carry out a DNA test or that a relevant party has unreasonably refused to comply with the direction.

As for the suggestion that a relevant consideration on whether or not to make a declaration might be the mother's opposition in cases of rape or violence on the part of an alleged father, one is bound to have misgivings, if only because it could only operate to prevent the court from establishing the truth. On the other hand it has to be acknowledged that (a) a mother can properly decline to name the father in certain cases where the Child Support Agency wishes to make a maintenance assessment<sup>1</sup> and (b) the court, can as we have seen, decline to make a blood test direction in cases where harm to the child might result. While there might be a case for expressly empowering the court to refuse to direct a test where it believes it would be harmful to the child, it is surely questionable to base such a refusal on the possible harm to the parent alone.

#### IV SUMMARY AND CONCLUSIONS

As we have seen, paternity is not always relevant to the establishment of legal fatherhood, but in those (the vast majority) of cases where it is, there is no method by which English law recognises as binding any acknowledgements made outside court. Thus, while in common with many other legal systems, English law is prepared to presume that a child born to a married woman is that of her husband and that, in the case of children born to unmarried parents, being named on the birth certificate is *prima facie* evidence of paternity, such presumptions or assumptions can always be subsequently rebutted in court proceedings. In other words, unlike some other jurisdictions, English law imposes no time limits<sup>2</sup> to establish his paternity even where the mother and her husband are happily living together<sup>3</sup>. Accordingly, there is no such impediment as for example that discussed under Dutch law in the European Court of Human Rights' decision in *Kroon v The Netherlands*<sup>4</sup>, in which it was impossible to obtain the recognition of the biological father's paternity (the child being born of a stable relationship between a man and a woman but at a time when the woman was married to another man) unless the mother's husband denied paternity.

As we have also seen, there are a number of different court proceedings in which paternity may be established but only one in which a declaration is binding for all purposes, namely, that under s 56 of the Family Law Act 1986, which can only be sought by a child. Clearly our law in this respect is in need of simplification and rationalisation, though as we have also seen, the Lord Chancellor's Department has issued a Consultation Paper to do just that.

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<sup>1</sup> Under s 6(2) of the Child Support Act 1991, those on benefit who therefore have to authorise action can be exonerated from having to name the father if there are reasonable grounds for believing that it would lead to risk that the claimant or child would suffer harm or undue distress.

<sup>2</sup> There is, for instance, no equivalent of the French rule that where the so-called "possession d'état" terminates, interested parties must contest paternal affiliation of the child within 30 years: Hauser/Huet-Weiller, *Traité de Droit Civil-La Famille* (2nd ed. 1993), n 14 at p.422, cited by Frank 'The Establishment and the Consequences of Maternal and Paternal Affiliation' at the 37th Colloquy on European Law on Legal Problems Relating to Parentage (September 1998, Malta).

<sup>3</sup> See eg. *Re H (a minor)(blood tests: parental rights)* [1996] 4 All ER 28, discussed above.

<sup>4</sup> (1994) 19 EHRR 263.

No matter what civil court proceedings are invoked, where paternity is in issue the English courts can make directions for blood tests to be carried out. These tests cannot be ordered against the will of the adult parties, though they can be forced upon the child. However, if an adult party unreasonably refuses to undergo a test then appropriate adverse inferences may be drawn. It is to be noted that in deciding whether or not to make a direction the court is not bound by the paramountcy of the child's welfare but rather it should only refuse to make an order where it would be harmful to the child<sup>1</sup>. This means that blood test directions are the norm, the court taking the view that it is better for the child to know the truth even if that means being found to be illegitimate or even with no known father.

At the moment, although DNA profiling can be carried out on blood samples, the statutory power to direct that there be 'scientific tests' on bodily samples under s 23 of the Family Law Reform Act 1987, has not yet been implemented, though all the signs are that the Government intend to bring it into force. It seems difficult to argue against implementation. If, however, such tests are introduced one question that might arise is whether there is a case for considering whether, at least in some instances, it should be made compulsory. If, for example, a sample such as discarded cranial hair or an extracted tooth is already available, should permission to test it be required. Indeed the whole issue of whether tests should be compulsory raises the question as one leading commentator has put it<sup>2</sup>, "whether a child's right to know his origins supersedes the right to bodily integrity of the person who is to undergo testing."

To Continental lawyers, the English system will seem strange, with its lack of acknowledgement of voluntary recognitions of paternity and its readiness to allow challenges of paternity in subsequent court proceedings without condition. Of course our system is not without its weaknesses but its overwhelming advantage is its flexibility which is arguably more in tune with both the European Convention on Human Rights with regard to respect to family life under Article 8, and Article 7 of the United Nations Convention on the Rights of the Child, under which the child has the right to know who his or her parents are.

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<sup>1</sup> See *S v S, W v Official Solicitor (or W)* [1972] AC 24, discussed above.

<sup>2</sup> Rainer Frank, *op. cit.*, n 87.