

Private Law Children

February 2025

KL v BA (Parental responsibility) (Rev1) [2025] EWHC 102 (Fam)

27 January 2025

Link to full judgment [here](#).

Overview

Deputy High Court Judge Powell clarifies lower court rulings as to the parental responsibility consequences when a father named on the birth certificate is later found to not be the biological father.

The ruling provided the welcome clarity that a declaration of non-parentage results in the parental responsibility ab initio, requiring neither a further order of the court to remove it or a welfare assessment.

Facts [4]-[14]

The case concerned applications for a child arrangements order and other orders for a four-year-old child, MA. When the mother (BA) informed the applicant (KL) she was pregnant with MA, KL believed he was MA's biological father and was registered on the birth certificate. It was agreed that BA and KL shared care of MA at the start of her life.

Just over three years later BA and KL's relationship came to an end, at which time BA informed KL that he may not be MA's biological father. Genetic testing confirmed this was the case and that another man, ST was the biological father. ST did not want to play an active part in MA's life at present and instead wished for her to make her own decisions when she was old enough.

Despite genetic testing, KL still considered MA to be his daughter and due to their close bond wished to continue to be a father to her; despite accepting he was not her biological father. After separation MA lived with her mother and continued to spend time with KL, but once arrangements broke down the mother refused to allow unsupervised contact to take place. Resultantly, KL issued proceedings seeking a child arrangements order.

As well as seeking a child arrangements order, KL also made an application for a parental responsibility order. In a dispute resolution appointment before lay magistrates, it was asserted on behalf of KL that he had parental responsibility because he was still named on the birth certificate, and an order was sought to continue his parental responsibility in the interim. BA sought to have KL's parental responsibility removed. The lay magistrates decided that KL's parental responsibility remained and continued until further order of the court.

Shortly after this hearing, BA took MA abroad and as they had not returned after a few months, KL sought and obtained a location order at a hearing before Theis J. Three months later, BA made an application for a declaration of non-parentage in relation to KL. Orders were eventually made for the declaration of non-parentage and other issues concerning interim contact, consolidation of outstanding applications of MA and continuation of Tipstaff orders. Judgment regarding the issues surrounding parental responsibility were set out in a reserved judgment, detailed below.

Issues

The issues to be decided were set out in paragraphs [2]-[3] of the judgment and included:

1. Whether the effect of a declaration of non-parentage renders acquisition of parental responsibility under s.4(1)(a) of the Children Act 1989 void ab initio, or whether KL had and retained parental responsibility that could only be removed by order of the court
2. If parental responsibility could only be removed by court order, whether such an order was to be made automatically or whether it required a welfare analysis by the court.

Statutory framework [15]-[19]

Paragraphs [15]-[19] set out the relevant statutory framework to be considered. The key provisions included s2 and s3 of the Children Act 1989 (CA) regarding the framework and definitions of parental responsibility for children and who should automatically gain it.

Perhaps the most important section that was found to be of particular significance throughout the judgment was s 4 CA setting out how a father can acquire parental responsibility and how this parental responsibility should be removed.

Finally, the judge set out the specific provision surrounding registration of fathers on the birth certificate when parents are not married under s10(1)(a) to (c) of the Births and Deaths Registration Act 1953.

Previous decisions [20]-[43]

Helpfully, the judge then outlined the previous case law surrounding parental responsibility following a discovery of non-parentage. The judge outlined that these issues are 'the subject of different judicial opinion and conflicting published decisions at High Court and Circuit Judge level'[20].

The first previous decision was RQ v PA which made obiter comment at [34] surrounding this issue and accepted submissions that as the father was not the biological father of the child. The reasoning for this decision was that 'he does not have parental responsibility because section 4 CA 1989 does not apply (to an individual who is not the father)'. This decision supported the proposition that a non-biological father is not benefitted by s4 Children Act 1989 acquisition of parental responsibility.

The court then discussed the further high court decision of Re G (Declaration of Parentage: Removal of Person Identified as Mother from Birth Certificate (No.1)) [2018] EWHC 3360 (Fam) at [23] where obiter comments suggested that there was no holding of parental responsibility once a parent was removed from the birth certificate.

The judge then discussed the two recent cases of Re SB [2022] EWFC 111 and Re C [2023] 3 WLR 1 in more detail due to the clear similarities between those cases and the current cases. More specifically, in all three cases ‘the effect on the putative parental responsibility of an unmarried man who had been proved not to be the biological father of a child fell to be determined’ [24].

In Re SB [2022] EWFC 111, particular discussion surrounded the construction of s4 (2A) CA. In this case HHJ Case held that by using the word ‘person’ rather than ‘father’ in this section, Parliament appeared to envisage a non-biological father being the subject of an application to dispense with parental consent. Using this assumption, the court in this case concluded that only a court order could remove the parental responsibility of a non-biological father, who gained it via the birth certificate. It was also clarified that in deciding whether to make such an order, the court should base its decision on welfare.

In the second case of Re C [2023] 3 WLR 1, HHJ Moradifar concluded that the ability to acquire parental responsibility under s4(1)(a) CA was based on a rebuttable presumption that he was the biological father of the child. If that presumption is rebutted, the man’s status as the father cannot continue. It was held that parental responsibility could be lost by a court order, as required by s4(2A) CA, but distinguished from Re SB in holding that it did not require a welfare analysis. It was decided that a declaration that parental responsibility ceased ab initio was contrary to both public policy and the intentions of parliament as it would mean any previous good faith exercise of a non-biological fathers’ parental responsibility was threatened.

The refusal to hold that parental responsibility would cease ab initio was mirrored by HHJ Case’s second judgment in Re S (No.2) [2023] EWFC 58 B, due to being held to be contrary to parliamentary intention and public policy. There were fears that this would lead to presumed fathers’ parental responsibility being doubted as soon as the mother made a statement doubting paternity and could open the possibility of post facto litigation challenging previous decisions made in good faith by a man believing he had parental responsibility. This second judgment did, however, differ from Re C in that HHJ Case still held a welfare analysis should be conducted before an order was made.

Positions of each party [44]-[61]

KL argued that he acquired parental responsibility under s4(1)(a) Children Act 1989 and that it was not void ab initio as a result of not being MA’s biological father. Therefore, he submitted that his parental responsibility could only be removed by a court order. It was argued that if it were found to be void ab initio, this would cast uncertainty as to the legal decisions he made when exercising his parental responsibility. It was argued again that this would be contrary to public policy. It was also argued that in deciding whether to grant an order removing parental responsibility, a welfare analysis should be undertaken.

The respondent argued that KL never acquired parental responsibility due to not satisfying the requisite criteria under s4(1)(a) CA by not being the biological or legal father. It was argued that subsequent finding of non-paternity rendered the parental responsibility void ab initio. It was submitted that this section reflected Parliamentary intention that parental responsibility could only be obtained by a parent by being named on the birth certificate. The respondent argued against the interpretation put forward in Re SB of the word ‘person’ in s4(2A) CA including a non-biological father named on the birth certificate. This was argued by relying on the explanatory notes of s.111 of the Adoption and Children Act 2002, in which parental responsibility termination was granted to

an 'unmarried father' not a 'person'. Overall, the respondent submitted that unreasonable weight in previous cases was being placed on the word 'person' and that the previous decisions went against parliamentary intention by broadening the approach of who could acquire Parental responsibility for a child. It was also submitted that the public policy reason put forward in previous case law of protecting exercises of parental responsibility before a discovery of non-parentage, could not justify the more expansive reading of this section. In the alternative, it was argued that if it were not void ab initio, a welfare analysis was not required for a court to grant an order.

Discussion [62]-[87]

The discussion seemed to focus on statutory interpretation and deciding whether KL acquired parental responsibility under s4(1)(a) CA. At paragraph [64] the judge questioned whether if paternity was known before the birth was registered, KL could have been placed on the birth certificate and could have subsequently acquired parental responsibility. It was stated that the only possible answer to this discussion was that KL would not have been able to register on the birth certificate and 'KL was not MA's 'father' under the common law, whether biological or legal, even though he believed that he was'.

It was held that the natural and ordinary meaning of the words in s4(1)(a) CA was to only grant parental responsibility to biological fathers. It was not agreed in the judgment that parental responsibility can be acquired under s4(1)(a) CA by reason of a mistake of parentage. Emphasis was also placed on the importance of not broadening the scope of individuals who gained parental responsibility for a child despite being ineligible under s4(1)(a) CA. The argument that the word 'person' rather than 'father' in s4(2A) CA evidenced parliamentary intention for removal of parental responsibility requiring an order was disagreed with and the judge held that ' A 'person' under s.4(2A) can, logically and grammatically, be simply a 'father' under s.4(1)' [74]. This was supported by the contention that if Parliament had wanted to extend this to include people like KL they could have explicitly done so, which they did not. It was agreed that deciding otherwise would place an unsuitable weight on the word 'person'.

When discussing the argument that finding parental responsibility void ab initio would cause legal difficulties, the judge highlighted that it had not been made clear actually what legal difficulties these would be. Due to this, the judge held that if there are no legal difficulties that could be identified, it cannot be contrary to find parental responsibility void ab initio.

Conclusion

Due to the reasons set out above, the judge concluded that:

1. KL did not acquire parental responsibility under s4(1)(a) CA and so never held parental responsibility;
2. Accordingly, no order was required under s4(2A) CA to remove parental responsibility and no welfare analysis was required; and
3. KL's other applications made for child arrangement orders and other orders would be considered under ordinary principles in the Children Act 1989.

St.Mary's

FAMILY LAW SPECIALISTS



Prepared by:

Charlotte Thomas

charlotte.thomas@stmarysfamily.co.uk