

Neutral Citation Number: [2013] EWHC 1901 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Date: 5 July 2013

Before :

THE HONOURABLE MR JUSTICE PETER JACKSON

Between :

Ms M

Applicant

-And-

Mr F

1st Respondent

-And-

Mr H

2nd Respondent

Barbara Connolly QC & Samantha King (instructed by Dawson Cornwell) for the Applicant
Deborah Eaton QC & Madeleine Reardon (instructed by Withers LLP) for the 1st Respondent
Matthew Persson (instructed by Osbornes) for the 2nd Respondent

Hearing dates: 2 - 5 July 2013

Judgment date 5 July 2013 with subsequent rulings made on 18 July 2013

JUDGMENT

Mr Justice Peter Jackson:

1. These proceedings concern the legal parentage of a child aged two. He was conceived after his mother (Ms M) met his biological father (Mr F) on an internet website where Mr F was advertising his services as an unpaid sperm donor. The central dispute between the mother and the father is whether the conception was the result of artificial insemination (as he says) or sexual intercourse (as she says). If conception was the result of sexual intercourse (known as natural intercourse or NI) Mr F will be the legal parent of the child, but if it was the result of artificial insemination (AI) the question of parentage depends on the effect of the Human Fertilisation and Embryology Act 2008.
2. The third party to the proceedings is Mr H, the mother's husband at the time of the child's birth. He is almost 30 years older than Ms M and Mr F, who are in their middle years and hold high academic and, in Mr F's case, professional qualifications.
3. Ms M has applied for a declaration under s.55A of the Family Law Act 1986 that Mr F is the legal parent. She has also applied for financial provision for the child under Schedule 1 of the Children Act 1989.
4. I have read and heard evidence from the three adults and received submissions on the following questions:
 - (1) What were the circumstances of the conception?
 - (2) If conception was by AI, has it been shown that Mr H did not consent within the meaning of s.35 HFEA 2008?
 - (3) If it is shown that Mr H did not consent, is the consequence that Mr F is the child's legal father, or that the child has no legal father?
5. I select the following information from an agreed chronology of events.

2003	Mr F, who had previously been a licensed clinic donor since 2000, registered as a sperm donor on an internet website. Over the following years, he was an active donor, by his own account fathering some 30 children by means of AI or NI. He also registered with two other websites but never received any responses through them.
2004	Ms M and Mr H met.
2008	Ms M and Mr H married.
2009	They took medical advice about their chances of having children in the light of Mr H having undergone a vasectomy.

- 15.2.10 They were advised by a specialist clinic that the chance of their conceiving was 'pretty grim'.
- 21.2.10 Ms M contacted Mr F via the website. She misleadingly told him by e-mail that Mr H was in support of donor insemination and that he would like to meet him.
- 29.3.10 The first of twelve meetings between Ms M and Mr F before the birth of the child. Ms M and Mr H travelled to London by train. They argued about Ms M's plans, which Mr H did not like. They met Mr F at a station and all three went (as I find) to a nearby café outside the station. After a very short time Mr H, who never sat down, left and Ms M and Mr H went to Mr F's nearby flat where he provided her with sperm with which to inseminate herself. Ms M says that in the process Mr F attempted to seduce her but that he desisted. In the month afterwards, arguments between Ms M and Mr H continued.
- Mid-4.10 Ms M informed Mr F that she was not pregnant and they arranged another meeting.
- 23-26.4.10 Second meeting. Ms M met Mr F at his flat. Ms M alleges that they had sexual intercourse on each of the four days and that on 25 April she stayed the night, sharing Mr F's bedroom. On the other nights she stayed in a hotel with Mr H, who had travelled to London. Mr F says that there was no sexual activity and that AI took place each day.
- 21-23.5.10 Third meeting. Ms M stayed for the weekend with Mr F at his flat. He gave her a spare key. She states that over the weekend they engaged in sexual intercourse at least seven times. Mr F's cousin and his girlfriend were occupying the spare bedroom. Mr F says that AI took place and that Ms M stayed overnight in his study, used as a third bedroom.
- 4.6.10 Ms M told Mr F that she was pregnant. She also informed Mr H. He reacted violently.
- 26.6.10 Mr H accompanied Ms M to a clinic where her pregnancy was terminated at his demand.
- 28.6.10 Ms M told Mr F that she had had a miscarriage.
- 21.8.10 Mr F moved to a property intended for occupation by himself, his then girlfriend and their first child. They had met via the website in 2008 and he has fathered two children with her by NI. In fact, the girlfriend did not move in due to the deteriorating state of the relationship: at this time she was pregnant with the second child.

- 31.8.-4.9.10 Fourth meeting. Ms M stayed at a hotel for three nights and a B&B for one night. She says that Mr F visited the hotel several times and that they had sex. Mr F accepts that he visited twice and says that he donated sperm at the hotel. Ms M, having undergone a termination, was upset at seeing an old newspaper article about a child born as a result of other donor activity by Mr F.
- 5.9.10 Ms M contacted the website to report a problem with a sperm donor who had been having sex. She received an unsympathetic response from the site's founder.
- 6.9.10 Email message Ms M to Mr F: *"I hope you don't think that I'm ungrateful for your donations and your time which is clearly precious. I am, exceedingly grateful! And I couldn't ask for a better donor/biological father..."*
- 23.9.10 Fifth meeting. Ms M states that Mr F stayed overnight with her in a hotel and they had sexual intercourse at a time when she was not ovulating. Mr F says that they met for a pizza so that he could quell her anxieties about the newspaper article, and they did not spend the night together.
- 3-4.10.10 Sixth meeting. Ms M stayed overnight with Mr F at his new home. She says that there was sexual activity on both days, and that on 3 October it was without her consent. In February 2013 she reported this and other incidents mentioned below to the police. Mr F denies any sexual activity on that occasion. It is agreed that the conception of the child will have occurred at this time.
- 12.10.10 Ms M discovered that she was pregnant, but did not tell Mr F.
- 12.10.10 Mr F's mother died suddenly.
- 22.10.10 Mr F contacted Ms M and asked her to come to London.
- 23.10.10 The funeral of Mr F's mother was held.
- 28-30.10.10 Seventh meeting. Ms M stayed overnight with Mr F in his house and they had sexual intercourse each day. Mr F states that it was the first time that sexual activity occurred. Ms M alleges that on 29 October it was without her consent. Mr F denies this. Ms M says that she was upset to see details of Mr F's full range of donor activities and relationships on his computer.
- 24.11.10 Ms M and Mr F planned to meet, but were prevented by Ms M's ill-health.

- 12.10 Mr F moved to stay at a friend's flat
- 3.12.10 Ms M informed Mr F she was pregnant.
- 8.12.10 Eighth meeting. Ms M stayed overnight with Mr F at the friend's flat and they had sexual intercourse.
- 16.12.10 Ninth meeting. Ms M stayed overnight with Mr F and they had sexual intercourse.
- 1.11 Mr F moves to a new address.
- 2.11 Tenth meeting. Ms M and Mr F meet and have sexual intercourse. Ms M alleges lack of consent to aspects of the sexual activity. Mr F denies this.
- 6.4.11 Ms M and Mr H separate.
- 27.4.11 Eleventh meeting. Ms M alleges lack of consent to aspects of their sexual activity. Mr F denies any lack of consent.
- 10.5.11 Twelfth meeting. Ms M stays overnight with Mr F.
- 6.11 Birth of the child.
- 14.7.11 Ms M composed a long email, as if written to a female friend, and deliberately 'misdirected' it to Mr F in the hope of rekindling his affections.
- 8.8.11 Ms M registered the birth. The certificate does not name the child's father.
- 8.8.11 'Nicole White' sent an email to Ms M alleging that Mr F "*uses his donor status to get women into bed*". Ms M produces this as an exhibit but cannot say how she obtained it. Mr F has since September 2011 alleged that 'Nicole White' is an alias for Ms M.
- 19.8.11 Ms M sent an email to the journalist using the false name 'Andy Hitchings'. The message contains discreditable information about Mr F. Ms M says she did not compose the message herself but that she copied it from an email account to which 'Nicole White' had given her the password.
- 19.8.-24.9.11 Stream of c.20 messages between 'Andy Hitchings' and the journalist, planning complaints and publicity about Mr F. Ms M admits writing some, but denies writing others.

- c.20.8.11 Ms M made a complaint to Mr F's professional body, using the name Andy Hitchings.
 - 8.11 'Edward Mason' made a complaint in very similar terms to Mr F's employer.
 - 29.8.11 The website founder replied to a complaint about Mr F from 'Edward Mason' saying that Mr F had been banned from the site for undertaking NI. Mr F alleges that 'Edward Mason' is an alias used by Ms M. She denies this.
 - 30.8.11 The 'Andy Hitchings' complaint to Mr F's professional body was dismissed as not relating to his professional activities.
 - 9.11 Mr F says that an ex-girlfriend and two previous recipients contacted him to say they had been phoned by journalists. Mr F met Ms M concerning the threatened publicity. She told him that she too had been contacted. In fact she was in touch with at least one journalist herself.
 - 9.11 The intended article was not published following legal intervention on behalf of Mr F.
 - 2.12 Ms M and Mr H's marriage ended by decree absolute. They finally separated at about this time.
 - 19.3.12 Ms M issued her application for a declaration of parentage.
 - 8.12 Court-ordered DNA testing indicated that Mr F is the child's biological father.
 - 10.12 The case was set down for hearing in February 2013, but was then transferred to the High Court for hearing in July 2013.
 - 22.2.13 Ms M made allegations of rape to the police. Both parties were formally interviewed in the following months, transcripts being available to this court.
 - 24.6.13 The police advised that they were not intending to refer the matter to the CPS.
 - 2-5.7.13 Hearing.
6. The burden of proving an allegation is on the party that makes it, and the standard of proof is the balance of probabilities.

7. As the chronology shows, Ms M and Mr F agree that AI occurred on their first meeting in March 2010. They also agree that they were engaged in a full sexual relationship from their seventh meeting in late October 2010 until their twelfth meeting in May 2011. The dispute concerns what happened on the two days of their sixth meeting in early October 2010, during which the child was conceived, and at their previous four meetings in April, May, August and September 2010, which occurred over the course of thirteen days in total. Mr F says that these meetings involved fifteen donations by AI: Ms M says they involved fifteen days of sex.
8. Before giving my assessment of the witnesses and the evidence, I make some general points. Happily, many children are born to individuals or couples who have faced challenges in conceiving. Some births follow treatment at licensed clinics and others originate from informal arrangements. Either way, those involved must often be confronted by profound feelings and powerful forces. These include, relevantly to this case, a yearning for children, a need for friendship and a hunger for sex, forces that can overpower and defeat routine social conventions.
9. Nor should it be forgotten that, however difficult or unsatisfactory the circumstances of conception may have been, a child – as here – has been born. But it is naïve to ignore the difficulties that can arise from time to time. Even in the field of regulated fertility treatment there are clear examples: laboratory error (*Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091; incorrect clinic procedure (*Re E & F* [2013] EWHC 1418 (Fam)); deception (*Re R (a Child)(IVF: Paternity of Child)* [2005] 2 AC 621). Nonetheless, regulation is broadly successful in protecting participants from exploitation and from health risks, while providing some certainty about legal relationships. Codes of Practice limit the number of times a person can donate sperm: in this country a donor can normally donate to a maximum of 10 families (see HFEA donation policy). In comparison, participants in informal arrangements have to judge all risks for themselves. They may not be in a good position to do so. Those seeking to conceive may be in a vulnerable state and not all donors are motivated by altruism.
10. This informal trade is not unlawful, but it is not regulated in any meaningful way. The website in this case (which I will not name as it has not participated in the proceedings) is a case in point. It charges not inconsiderable fees to those looking for donors while projecting a rose-tinted account of successful, problem-free conception. It supplies a document entitled ‘Donor Agreement’ that purports to record agreement that the donor will have no rights in relation to the child and that the mother *and the child* will have no rights against the donor in any circumstances. The concern is that documents of this kind create the false impression that these informal arrangements are somehow regulated. While there is nothing wrong, and much to be recommended, in people recording their intentions, no one should be misled into believing that will have legal effect.
11. In reality, on the evidence I have heard, there is no effective control whatever of the activities resulting from websites of this kind: for example, although it is said to be a cardinal rule of the website that it is ‘AI only’, Mr F’s own public profile on the site openly advertised him as offering ‘AI and NI’.

12. The present case amply demonstrates the risks involved for all participants in this process. It has taken a high toll on the well-being of each of the adults and has threatened Mr F's career. The costs are enormous. The parties have spent almost £300,000 in legal fees: in round numbers, Mr F £200,000, Mr H £13,000 and Ms M £81,000 (of which £61,000 relates to the period since she became legally aided on 1 May 2013).
13. I now turn to my assessment of the witnesses, starting with Mr H. I found him to be a generally reliable witness and I accept his evidence in almost every respect. He did not want to have children at his age, but was swept along by his wife's wishes. Once Mr F came onto the scene, he was effectively out of his depth, and powerless in the face of what developed into an intense extramarital affair. His only decisive intervention was to insist upon Ms M having a termination, a stance he now regrets. After the breakdown of the marriage, Mr H has remained on reasonably amicable terms with Ms M, but I do not accept the suggestion that he has tailored his evidence in her favour.
14. The one aspect of Mr H's evidence that I do not rely upon is his record of intimate e-mails from Mr F that he says he found in his wife's account. I do not believe that Mr H was being untruthful and I accept that he saw something in the account to fuel his suspicions of an affair, but the process by which these were produced at a late stage has not been satisfactorily explained and I ignore this evidence.
15. In relation to Ms M and Mr F, the situation is different. On the strength of facts that they admit, they are both individuals that have over long periods of time been untruthful, devious and manipulative. In relation to contested issues, I regret that they both lied extensively throughout their evidence, and one of them was of course lying about the central issue of the child's conception.
16. Examples of Ms M's deceptions are these:
 - (1) Her opening e-mail to Mr F stated that she was healthy (she has a medical condition) and that Mr H was excited about donor insemination (he was against it but she hoped to bring him round).
 - (2) She told Mr F that she had miscarried his child, when she had in fact had a termination.
 - (3) Her 'misdirected' email to a girlfriend, deliberately sent to Mr F, is the work of a fluent fabricator.
 - (4) Her use of the 'Andy Hitchings' name and e-mail account shows a capacity for determined and malevolent action to achieve her ends, and also demonstrates that she will use an alias when it suits her.

- (5) I find that she wrote those 'Andy Hitchings' emails that she denies writing. Her criterion for accepting or denying authorship was no more than an assessment of the damage that the truth would do to her case.
 - (6) I find that she probably wrote the 'Nicole White' and 'Edward Mason' e-mails for the reasons given in Mr F's opening submissions. She has had two years to prove that these people exist in the face of Mr F's allegation that they do not, but she has made no attempt to do so.
 - (7) If I am wrong about point (6), the only plausible alternative is that Ms M conspired with one or more other persons unknown to pursue her campaign against Mr F.
 - (8) Ms M's reason for keeping a transcribed log of text messages was that it was as a record for the child. This is unconvincing; a more likely explanation is that she kept the information as a form of insurance.
17. I found Ms M to be an unimpressive witness in relation to the above matters and to show no sign of discomfort when caught in an obvious lie. She freely stated that she is motivated by her own need for Mr F to be punished.
18. Examples of Mr F's deceptions are these:
- (1) His calculating betrayal of his girlfriends, to whom he made promises that he was no longer engaging in sperm donation, and his unabashed dishonesty in concealing his overall activities from recipients with whom he entered into relationships.
 - (2) His casual untruthfulness on his website profiles about the number of children that he had fathered, lies that would only work to his benefit by disguising a level of hyperactivity that might have deterred responsible approaches.
 - (3) His deliberately misleading first statement, in which he trumpets the rules of the website as being 'AI-only' in an effort to create the impression that this was the case here, when in fact he had been engaging in and advertising sexual activity through the website for years.
 - (4) His untruthful evidence in these proceedings and to the CSA that he had not had sexual intercourse with Ms M until December 2010 or January 2011, when on his own case it occurred in October 2010.
 - (5) His gratuitously inaccurate statement that sexual intercourse with Ms M began 'at her instigation'.
 - (6) His denial of certain text messages to and from Ms M, taking the same selective tactical approach as she has done.

19. As to the last matter, the log of text messages was produced by Ms M in an unsatisfactory form (allegedly transcribed in edited form from notes that no longer exist of texts that have been 'lost'). Having exercised due caution in the light of Ms M's general dishonesty, I nevertheless find that the record can be viewed as a reasonably reliable journal of this form of communication between the couple. The messages have the spontaneous and often inconsequential flavour of real life, are congruent with the content of the contemporaneous emails, and are in my view beyond even Ms M's powers of fabrication. Moreover, had she wanted to invent evidence, she would probably have inserted some direct and unambiguous reference to sexual activity, but there is none. Many texts are accepted by Mr F, but only where they do him no damage.
20. Mr F's evidence was clearly given, but he had clearly taken the strategic decision to tell the truth where possible and to lie where necessary. He at least conveyed some impression that he would have been more comfortable telling the truth if circumstances had not prevented it.
21. On the central question of the manner of this child's conception, I have reached the clear conclusion that Ms M's evidence is greatly to be preferred to that of Mr F. My reasons are these:
 - (1) Her account of the sexual activity is detailed and has been consistently maintained. It was unshaken during her evidence.
 - (2) As a straw in the wind, her answer to an unexpected question about what happened to the AI equipment after the first meeting (which was that she kept bringing but not using it) had the ring of truth.
 - (3) Allowing for the difficulty faced by any witness in breathing life into a denial, Mr F's evidence on the issue lacked any real conviction.
 - (4) His new-found certainty that the first occasion of sex was in late October is inconsistent with his previous accounts and best explained by his having decided to sail as close to the wind as he could in terms of dates.
 - (5) If the first occasion of sex occurred in October it would have been at one address: if it was in December or January, it would have been at another, Mr F having moved in the meantime. A mistake about dates might be explained: a mistake about venue cannot be accounted for so easily.
 - (6) My findings about Mr F's unreliability as a witness are of course relevant.
 - (7) While of no great importance, it would be a curiosity that the child was conceived by AI at a meeting that was the immediate predecessor of his parents' very first sexual activity.

- (8) The coy and flirtatious tone of their emails and texts from the start suggests that the couple's relationship had swiftly progressed far beyond AI. The approach seems to have been to communicate in way that was not explicit, chiming with the wish to keep the affair hidden from their partners. Of interest, the tone of the texts and emails is no different before and after October 2010.
- (9) I attach no real significance to the use of the term 'donor' by either parent when it is clear that this was used interchangeably in their minds for AI and NI. As Mr F put it, *'I call it donation by sex or receptacle'*.
- (10) I reject Mr F's case that a simple friendship and closeness developed between himself and Ms M arising from the intimate nature of AI. The sheer amount of time the couple spent together in a variety of private places from April 2010 onwards is a strong indicator that they were meeting for more than repeated AI.
- (11) Mr H believed from an early stage that his wife was having an affair, and I believe that he had good grounds for thinking so.
- (12) On the evidence, Mr F did not commonly engage in extended continuous asexual relationships with the women he met through the website. He has an unmistakable track record of inveigling or encouraging recipients into engaging in sexual activity with him from the very first meeting. Ms M's account of Mr F making a pass at her during the first meeting is consistent with descriptions given by others. Of note, Mr F accepted that he had given her the option of AI or NI within minutes of their first meeting, which was highly inappropriate when she was a stranger who had come for AI.
- (13) I accept that Mr F first became involved in licensed donation altruistically and even now, I do not discount a residual element of altruism in his make-up or forget that there are many much-wanted children alive today as a result of his efforts. However, I am clear that in relation to his website activity his mainspring has been to meet his own needs, at least at a sexual level. This is seen by his behaviour in 2007, when he advertised himself in graphic terms as willing to participate in a 'breeding party', i.e. a male-dominated orgy designed to get a woman pregnant, though there is no suggestion that he actually took part in such activity. Likewise, he referred in evidence to an occasion when he engaged in sexual activity with both members of a lesbian pair who had approached him via the website.
- (14) The fact that Mr F is bound in his professional life by a clear code of ethics makes the risks he was taking the more surprising. His prolific sexual activity with recipients amounted to a brazen flouting of the rules of the website, such as they were. In one relevant period of 2-3 months alone, he was on his own account having sex with three women and providing AI to two others. Most of these contacts had to be kept secret from the other women involved. The

sheer logistical challenge alongside his professional life will have been a burden that he would have been likely to have laid down if he had not been driven on by some degree of compulsion. He even kept up and refreshed a posting on a different website, from which he never received any custom over a period of years, and despite the volume of applications the main website was reliably producing.

- (15) I reject Mr F's case that Ms M main motivation is financial, but accept that much of her behaviour is explained by a desire to damage him in any way she can as a way of getting redress for his deeds and his lies.
22. I say nothing about whether any aspect of the couple's sexual activity was nonconsensual, the matter not having been investigated in any depth at this hearing.
23. For the above reasons, I find that sexual intercourse took place between Ms M and Mr F on all occasions bar the first meeting. I accordingly declare that the child was conceived by ordinary sexual intercourse and that in consequence Mr F is not only his biological father but also his legal parent.
24. While this disposes of the proceedings, I will shortly record my conclusions on the other issues in deference to the evidence and submissions.
25. I find that Mr H acquiesced in the AI that took place at the first meeting but that it has been shown that he did not consent. His failure to vocalize his objection or to have taken active steps to prevent the AI could only amount to consent if they were the outward signs of an inward consent. They cannot convert something short of consent into consent within the meaning of s.35 HFEA. Nor does the reverse burden of proof dilute the meaning of consent itself. Insofar as this is in any way hard on Mr F, who could for a short while at the beginning have been forgiven for believing that he was going to be meeting a united couple, it should be borne in mind that he made no effort whatever to find out what Mr H actually thought when they very briefly met. Moreover, by the time of the second meeting in April 2010, Mr F was well aware that Mr H was against AI and he was certainly against NI in any circumstances.
26. I do not accept the argument on behalf of Mr F that it must be proved not only that there was an absence of consent but also that the absence of consent had been communicated to all those affected. This is not what the statute says and it would not be possible for absence of consent to be communicated to 'all those affected' in many situations, including most obviously a situation in which the husband did not even know that the wife had embarked on AI.
27. Nor do I accept the argument on behalf of Mr F that the HFEA is an exclusive code governing parentage in all cases, so that if Mr H is ruled out as a parent because he did not consent to AI, the child will have no father. The statute only governs situations that fall within its footprint: the situation described would fall outwith the footprint, and the common law would continue to apply. As a result Mr F would be the legal parent.

28. Lastly, I do not accept Mr Persson's interesting but ambitious submission that the HFEA does not apply to unlicensed AI at all. While this is not the occasion to do justice to the detail of the submission, I do not read s.35 in this way. If unlicensed AI is becoming more prevalent as a result of the internet, there may be a strong argument for reviewing a statutory scheme that has licensed AI as its paradigm. But what the law is and what it ought to be are two different questions.

Following the above:

29. In consequence of the above judgment, a number of matters arise, upon which the parties have made brief oral and written submissions. These relate to re-registration of birth, parental responsibility, directions in the financial application and an application for a prohibited steps order restricting the disclosure of information about the proceedings. Finally, there is the question of costs.
30. Re-registration of birth The court will notify the Registrar General of the declaration of parentage within 21 days: Family Law Reform Act 1986, s.55A(7). The Registrar General may then re-register the birth: Births and Deaths Registration Act 1953, s.14A.
31. Parental responsibility Re-registration by the Registrar General under s.14A does not confer parental responsibility on the father, because s.14A is not one of the enactments specified in Children Act 1989, s.4(1A) (and see Hershman and McFarlane, Children Law and Practice, A[218]-[220]).
32. Although he has played no part in the child's life, Mr F now wishes his name to appear on the birth certificate and would like to have parental responsibility. Ms M does not agree to that at this stage, but is willing to discuss contact and reconsider in the light of events. If Mr F wishes to apply for parental responsibility in future, it is open to him to do so.
33. Financial application The parties have agreed directions in relation to the Schedule 1 application, which will proceed before a District Judge.
34. Prohibited steps application Mr F seeks an order in these terms:
1. *No party may, without the permission of the court, disclose to any person other than their respective legal advisors any of the evidence, oral or written, which has been adduced during these proceedings.*
 2. *No party may disclose to any person other than their respective legal advisors, close friends and family members, or medical professionals treating either themselves or the child any information relating to the circumstances of the conception of the child.*
 3. *For the avoidance of doubt, paragraphs 1 and 2 of this order prohibit disclosure of any information covered by those paragraphs in any of the following ways:*

- a. *By email to any person other than those included in paragraph 1 of this order;*
 - b. *By posting the information on any website or internet forum;*
 - c. *By publishing the information via Twitter, Facebook or any other social media;*
 - d. *By disclosing any of the information to any representative of the Press.*
4. *Other than specifically provided for in this order, any disclosure which would otherwise have been permitted by Family Procedure Rules 2010, r.12.73 or 12.75 is prohibited unless the party wishing to make such disclosure has obtained the permission of the court.*
35. Mr F seeks this order to prevent what is described as prurient interest in the circumstances of the child's conception. He points to the findings about Ms M's past behaviour in relation to third parties as heightening this risk. He is anxious to protect his personal position, that of the child and that of third parties, including other children fathered by him. He fears that the financial proceedings may prompt Ms M to renew her public campaign against him.
36. Ms M, who initially appeared attracted by the idea of such an order, now opposes the application. She considers that she should be free to discuss such information or desist from doing so as she sees fit in so far as is otherwise permitted by law.
37. FPR 2010 r.12.73 and r.12.75 protect information arising from the proceedings, either by way of written or oral evidence, or by description of what occurred in court, but at the same time permit disclosure of information relating to the proceedings in defined circumstances, which do not include communication to the public at large. However, in the absence of a specific order, there is nothing to prevent anyone talking privately or publicly about matters that do not originate from within the proceedings: the mere fact that information arising independent of the proceedings is then referred to within the proceedings does not mean that it cannot continue to be spoken of.
38. In this case, Mr F applies for greater restrictions than those imposed by the rules. In balancing the interests that arise under Articles 8 and 10, I am clear that this is not a case in which it would be appropriate for the court to make an order of this kind. Looking at the matter from the point of view of the child, I doubt that the sort of transient publicity that might follow either of the parties speaking publicly would have any real effect on his welfare or of other children. This is not an encouragement to anyone, and in particular Ms M, to go to the press. On the contrary, all parties would no doubt be wise to desist from washing dirty linen in public, but that is a matter for them, and not for the court to regulate in the circumstances of this case. I am not influenced by Ms M's change of stance: had the parties been united in the application, I would still have refused it.
39. Costs Ms M seeks an order that Mr F should pay her costs, while Mr H seeks an order that Mr F should pay his costs on an indemnity basis. Mr H's costs, it will be recalled, come to £13,000 and Ms M's to £81,000, of which £61,000 is publicly funded.

40. This has been a free-standing application for a declaration of parentage, which has turned entirely on a central dispute of fact. Surrounding that dispute there have been other factual issues tending to prove or disprove the central fact, or going to the parties' credit.
41. The court may make any order as to costs as it thinks just: FPR 2010, r.28.1. CPR 1998 r.44.3 provides that the court must have regard to all the circumstances, including the conduct of the parties. This includes conduct before, as well as during, the proceedings, and whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party has pursued or defended his case or a particular allegation or issue.
42. The general rule in r.44.2(2) (that the unsuccessful party should pay the costs of the successful party) is disapplied in family proceedings. It is not usual to order costs in cases about children, for all the reasons given by Wilson J in *Sutton London Borough Council v Davis (No 2)* [1994] 1 WLR 1317 at 1319. In the context of public law proceedings, *Re T (Costs: Care Proceedings: Serious Allegations Not Proved)* [2012] UKSC 36 [2013], 1 FLR 133, establishes that the court should only make a costs order where a party's conduct in relation to the proceedings has been reprehensible or significantly unreasonable.
43. On behalf of Ms M it is argued, relying on *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, 2010 1 FLR 1893, that where the issue has been one of pure fact-finding, the question of costs is ring-fenced and that accordingly the case for a costs order is strong.
44. *Re J* is summarised in the judgment of the Supreme Court in *Re T* as follows:
 19. In *re J (Children)* [2009] EWCA Civ 1350 involved contact proceedings between a mother and father. The district judge held a fact finding hearing to resolve allegations of violence made by the mother and denied by the father. Most of the mother's allegations were held to be established and she sought the costs of the hearing. The district judge refused her application and made no order as to costs. The mother appealed to the county court. She invited the judge to draw a distinction between the fact finding hearing and that part of the hearing that related to the welfare of the children. The judge declined to do so. He held that the father had not acted unreasonably in giving evidence in opposition to the mother and dismissed her appeal.
 20. On appeal to the Court of Appeal, Wilson LJ, giving the only reasoned judgment, held that the circuit judge had been wrong not to adopt a "compartmentalised" approach. He held at para 17:

"The order for a bespoke fact-finding hearing was surely to consign the determination of the mother's allegations into a separate compartment of the court's determination of the father's application for an order for contact. It went almost without saying, although the circuit judge chose to say it, that the optimum outcome of the contact application could be determined only by reference to the findings made at the fact-finding hearing; but the effect of the direction for a separate fact-finding hearing was that the costs incurred by the mother in relation to that hearing can confidently be seen to be wholly referable to her allegations against the father. There was, in that sense, a ring fence around that

hearing and thus around the costs referable to it. Those costs did not relate to the paradigm situation to which the general proposition in favour of no order as to costs applies."

21. Wilson LJ went on to hold that the husband had not acted irrationally and that a proper exercise of the court's discretion did not depend upon why he chose to deny allegations that he must have known were true. He remarked that issues of fact arose in most disputed cases in relation to children and that his decision in the instant case should not be taken as an indication that it was appropriate to make an order for costs in the vast run of such cases. He held, however, that the mother's case fell into "a separate and unusual category". It was devoted exclusively to consideration of the serious and relevant allegations made by the mother against the father, most of which were established. In these circumstances he held that the proper order was for the father to pay two thirds of the mother's costs of the hearing.
22. **This decision could have been justified on the ground that the costs in question had been caused by the father's unreasonable refusal to admit the facts that were ultimately proved against him**, but Wilson LJ's reasoning appears to have been simply that a party who makes allegations of fact against another party that prove to be unfounded, or who challenges allegations of fact that prove to be well founded, should be liable for the costs of resolving those issues, whether his conduct was reasonable or not. **(my emphasis)**
45. In determining the appeal of the local authority in *Re T*, the Supreme Court concluded:
 44. For these reasons we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings.
46. Following *Re T*, and noting the passage from paragraph 22 that I have highlighted, I believe that this principle can be applied in all kinds of proceedings concerning children, regardless of whether the proceedings involve local authorities or private parties, or whether the hearing is a welfare hearing, a fact-finding hearing or a mixture. Orders for costs may be made where a party's conduct has been reprehensible or significantly unreasonable, but not otherwise.
47. In cases that turn on fact-finding as opposed to a welfare evaluation, costs orders may be more common. It is easier to see unreasonableness where the central issue is one of pure fact and when the untruthful party knows very well what he or she is doing, or where a local authority has been guilty of misconduct, as in *G v E and Manchester City Council and F* [2010] EWHC 3385 (Fam). In contrast, in a welfare determination, the court should be ready to entertain genuine arguments about a child's welfare, even if one view must in the end prevail. The range of reasonable approaches may be wide and in normal circumstances, it will not be appropriate to describe the approach of the unsuccessful party as having been reprehensible or significantly unreasonable. But the underlying principle for an award of costs is the same, even though the circumstances in which it must be applied will differ. For a recent example of an order for costs against an unreasonable litigant in contact proceedings, see *Re G (Children)* CA (Civ) 9 July 2013.

48. Concerning the basis of assessment, in *Excelsior Commercial & Industrial Holdings v Salisbury Hammer Aspden & Johnson and Ors* [2002] EWCA Civ 879, Lord Woolf MR said this:

This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement.

In *Re B* 2007 EWCA Civ 921 it was noted that an order for indemnity costs is an exceptional one in children cases.

49. In the present case, which is essentially a fact-finding exercise, I find that the conduct of Mr F and Ms M has to differing degrees been reprehensible and significantly unreasonable. In the case of Mr F, he bears the lion's share of responsibility for the proceedings happening at all. As early as November 2011, he claimed that the conception was by AI and that accordingly he was not the child's parent. But while this was the big lie, Ms M for her part increased the complexity and cost of the case by her lesser lies.
50. Mr H has behaved entirely properly in relation to the proceedings.
51. On behalf of Mr F, Ms Eaton QC argues that:
- a. Mr F already bears by far the greatest costs burden of all the parties and a costs order would severely penalise him without conferring an equivalent benefit on Ms M, most of whose costs have been met by public funding.
 - b. An order for costs would be unfair given the court's findings about Ms M's behaviour, which increased the costs and made it harder for Mr F to tell the truth in the face of the threat of public exposure. Mr F has also had to meet the legal costs relating to Ms M's attempts to have articles about him published in the press and her allegations against him of rape.
 - c. As to Mr H, indemnity costs orders are wholly exceptional and are not to be made simply because the court has preferred one party's account of the facts to another's. Mr H failed to take any steps directly to inform Mr F of the absence of consent, and his evidence about the emails was not relied upon by the court.
52. I do not give much weight to Ms Eaton's first argument. Mr F has been anything but thrifty in paying his own lawyers and the fact Ms M has become legally aided is not relevant to Mr F's costs liability.
53. There is something in Ms Eaton's second argument. Ms M's campaign began in July 2011, some months before legal proceedings were signaled and issued, and her approach undoubtedly put Mr F on the defensive. However, while this may reduce Mr F's responsibility for costs, it cannot extinguish it: despite the difficulties, he should have told the truth and, if he had, most of the costs would not have been incurred.

54. I conclude that Mr H is entitled to an order that Mr F should pay his costs, to be assessed on the standard basis. Mr H has been a victim of both his former wife and of Mr F but has chosen to apply for a costs order against Mr F alone. I do not believe that it would be just to increase Mr F's liability to pay Mr H's costs by selecting the indemnity basis for assessment.
55. I am satisfied that Mr F should bear the bulk of Ms M's costs. However, he is entitled to a discount in the light of Ms M's own misconduct. I consider that in round terms a reduction of one quarter is appropriate. By coincidence, some three-quarters of Ms M's cost have been occurred since she became legally aided. In the circumstances of the case, justice will best be done by ordering Mr F to pay her costs from that date, with Ms M bearing her own costs before then.