



Neutral Citation Number: [2024] EWCA Civ 241

Case No: CA-2024-000351

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice Francis
GU23P00395/ZC23P01808

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 March 2024

Before :

LORD JUSTICE PETER JACKSON
and
LORD JUSTICE BAKER

T (Children: Non-Disclosure)

**Charles Hale KC and Laura Morley (acting pro bono) (instructed by Penningtons Manches
Cooper LLP, acting pro bono) for the Applicant Father**
Andrew Bagchi KC and Helen Jefferson (instructed by Hall Brown Family Law)
for the Respondent Mother
Richard Jones (instructed by Freemans Solicitors) for the Respondent Children
by their Children's Guardian

Hearing date : 8 March 2024

Approved Judgment

This judgment was handed down remotely at 12 noon on Monday 18 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

1. This is an appeal, for which we grant permission, from an order permitting relevant evidence to be withheld from another party to private law family proceedings.

The background

2. The surrounding circumstances can be shortly stated. There are proceedings concerning two children, aged 12 and 8 respectively. Their parents separated in 2021, and the court unfortunately became involved. The children's time was shared, with them staying with their father for six nights a fortnight and for half the school holidays. The father wanted parity and a shared live-with order, while the mother said that co-parenting was not working and that the father's time should be reduced.
3. A two-day hearing took place before Her Honour Judge Lynn Roberts in June 2023 and on 3 July 2023 she gave a definitive judgment and made orders broadly as sought by the mother. She found the parents to be very different people. The mother had adjusted to the separation better than the father, whose behaviour had been very unreasonable in ways that were harmful to the mother and had a negative effect on the children. After due consideration, she found that his behaviour could properly be described as coercive and controlling. He needed to be consulted about everything and tended to make mountains out of molehills. His interpretation of co-parenting was not reasonable and the judge had no confidence that he would willingly change his approach. Nevertheless, she recorded that the children had a rich experience in both households. She made a live-with order in favour of the mother only and reduced the amount of time the children spent with the father to four nights a fortnight with a visit after school in the intervening week, and half the school holidays.
4. The father did not seek to appeal from Judge Roberts' order but, consistent with her assessment of him, he did not accept her findings in their entirety. Further trouble was inevitable, and it soon arose. After disagreements between the parents on minor issues, matters became much more serious after last October's half term. The younger child, who I will call Tom, began to show acute distress. This alarmed the mother, who took professional advice from the GP, the school, a mental health nurse and the local authority. On advice, she notified the father that she was stopping contact. In the result, the father last saw the children on 6 November 2023.

The current proceedings

5. In November, both parents applied to the court. On 7 December 2023, the mother made a without notice application to Judge Roberts supported by two statements. In the first, she referred to the fact that some of Tom's behaviour was accompanied by statements about self-harm and suicide. In the second, she exhibited a report dated 8 November 2023 from the mental health nurse which described an initial assessment of Tom at school the previous day. The report stated that Tom had asked that the information he had disclosed should not be shared with his dad. The author said that the report should not be passed on without a formal request through the NHS Trust and it was felt that sharing it could cause an increased risk of harm from the father towards Tom and of harm from Tom towards himself.

6. Judge Roberts made an order suspending the father's contact and ordering him not to remove the children from the mother's care or from their school. She gave permission to the mother not to serve her second statement on the father. She appointed a Children's Guardian for the children and fixed a hearing on notice to the father, which took place on 12 December. On that occasion she continued her orders, recording that the father had anyhow agreed not to try to obtain the withheld information or remove the children from the mother's care or from their schools. The Guardian was directed to file a position statement ahead of the next hearing, setting out her recommendations as to interim contact and as to whether the confidential material ought to be disclosed to the father. Finally, the issue of disclosure was transferred for consideration at High Court level.

The hearing on 31 January

7. After the hearing on 12 December, the Guardian carried out a number of enquiries, speaking to both parents, the children, and the mental health nurse. She set these out in a Note that was seen by the court only. The overall picture was that by late January Tom was showing less distress, but that he remained emotionally fragile and had not yet been able to return to school.
8. The parties appeared with their representatives before Mr Justice Francis on 31 January 2024. In her position statement, the Guardian proposed that there should be a psychological assessment of the whole family and that all contact should continue to be suspended until that could be carried out. In relation to disclosure, an agreed position appeared to have been reached before the hearing began. The father sought disclosure of the withheld material and the Guardian supported that request. The mother expressed neutrality. The father's position statement cited the relevant authorities about non-disclosure.
9. The Guardian's submissions detailed her enquiries and continued:
 - “10. Having undertaken all of those enquiries, the Guardian is of the clear view that the “closed” material should be disclosed to F. The information is plainly relevant to the outcome of the proceedings, and in global terms, unless F knows that information, and the professionals evaluate his response to it, there can be no proper assessment of him. Any progress would thus be stifled and this would not be in line with the children's overall welfare. The Court will of course also have to consider F's Article 6 rights.
 11. The Guardian has carefully considered the impact on the children of such disclosure and their Article 8 rights. Whilst further consideration will need to be given to when and how they are told that F is aware of the “closed” material, if the Court decides there should be no interim contact, any risk will be sufficiently ameliorated for the time being.”
10. The hearing began with all parties being present. The judge then heard from the mother's and Guardian's representatives only and at that point he read the July 2023 judgment. Having done so, he delivered a closed judgement in which he recorded that

his initial instinct had been to order disclosure, but that reading the judgment had led him to a different view. He recited some paragraphs from it, saying that the impact on him had been profound. His hope had been that the father might benefit from seeing the withheld material and reflect on his behaviour, but he now found it more likely than not that the father would not act appropriately if disclosure was allowed. He found that there was a real risk that the father would be unable to control his need to be in charge and allow himself to put his own controlling interests before his son. He had to balance the risk of Tom becoming worse as a result of disclosure and the risk of harm increasing. He was not prepared to take that risk. It would also be a breach of trust for the father to be told about information given by Tom to the nurse. That led to a real risk that he would not feel listened to and would be less likely to say things that were important to his well-being. The starting point was that the father would be entitled to see the withheld material even though Tom did not want that, but there was a real risk of harm in this case. There was likely to be a psychological assessment of the whole family and the issue of disclosure might need to be considered again after that point. He took note of the Guardian's submissions but with great respect took a different view.

11. The father and his representatives were then re-admitted and were informed of the judge's decision. They were given the opportunity to make submissions, following which the judge gave an open decision, noted (no doubt incompletely) in these terms;

“It’s incredibly difficult for counsel, not fair... I have profound sympathy for your client thinking that but I have to make a decision in terms of balancing risks...

I have taken into account all the authorities although I do not have time in an extempore judgment to go through each one individually – but I have considered them and regard to them nonetheless.

I’m sorry but at the moment you haven’t persuaded me that I should change my mind... I accept it is an unusual course for a judge to trample over Article 6/Article 8 rights – not going to say that I have trampled on them I have just put them on hold.

You can apply at any time, but I am happy for it to be included in the order that he may have permissions to review once the psychological assessment has taken place.

I think the expert can still do the assessment. I don’t agree your client can’t partake in it, although I do accept he will be disadvantaged. I don’t see how it wouldn’t be possible.

There’s also the judgment of HHJ Roberts. Not flattering comments to your client. I don’t know if he has learnt from that process but if he can demonstrate that he has benefitted from the experience at the final hearing before HHJ Roberts then great, that would be fabulous progress.

My focus is on [Tom]. I am dealing with welfare. But I am balancing rights – and they are in conflict.”

12. The judge’s order reads:

“4. The mother shall continue to be permitted to withhold the contents of her confidential statement and the exhibits attached to it (‘the Confidential Material’) from the father.

5. Permission to the father to renew his application for the disclosure of the Confidential Material to him once a psychological assessment has been conducted.

6. For the avoidance of doubt paragraphs 5-9 of the order of HHJ Roberts dated 12 December 2023 shall also remain in force pending further order of the court.”

13. Father’s counsel applied to the judge in writing for permission to appeal. Refusing permission, the judge stated that he identified this as a finely balanced case. He acknowledged that it would be a rare case where this interference with a litigant’s rights was justified but he had to balance extremely serious risks. It was a highly unusual case and he felt compelled to place Tom’s welfare above the father’s rights. It was an extreme decision in an extreme case. He had identified the risks to Tom’s welfare that he considered to be present if the father saw the confidential material at this stage. It was crucial that the father had deliberately used the children’s therapy as a bargaining tool to secure what he regarded as an advantage in the case. The decision was not permanent and could be reviewed after receipt of the psychological report. On balance, the risk to Tom’s welfare was one that was inappropriate to take at this stage having regard to the paramountcy principle.

The appeal

14. The father now appeals to this court on 4 grounds:

1. The Court erred in law by failing to disclose the confidential material to the father in light of the Guardian’s position and the father’s position that there should be such disclosure for the reasons clearly set out by both parties, both in writing and orally, and the mother’s unopposed position; the case was not finely balanced but firmly balanced in favour of disclosure.

2. The Court failed to carry out a correct balancing test in respect of the risk to the children and their Article 8 rights and the undeniable interference with the father’s Article 6 rights to a fair trial, to know the case against him, to be able to respond to that case and to be able to engage properly and fully in any assessment of him and the family.

3. The Court failed to carry out a correct balancing test (proportionality) in respect of the children’s Article 8 and the father’s Article 8 rights, given that contact has been suspended

and the father's ability to challenge was disproportionately impacted without access to the confidential material. Further, the decision is flawed, given the failure to consider any appropriate safeguards, including those promoted by the Guardian. The decision in fact impacts the ability of all parties to undertake the family assessment that the court determined should take place.

4. By ordering continued, open ended, non-disclosure of the confidential material, the court failed to ensure a fair hearing and fair process, and it denied the father access to natural justice.

15. The Guardian, who supports the appeal, also argues that the hearing was not fair. Her counsel had drawn the judge's attention to the decision of the President in *London Borough of Barking and Dagenham v RM & LS* [2023] EWHC 777 (Fam), where an example of a fair format for a hearing of this kind can be seen, but here an adverse decision was taken before the father was heard.
16. The hearing before us lasted for some two hours, with all parties being present for the first and last half hours only. The remainder of the hearing took place in the absence of the father and his representatives.
17. It was common ground between the parties that the appeal did not concern contact and that there needs to be a psychological assessment of the family; the Guardian is working on this and will consult the parents before putting a proposed expert to the court.
18. The parties' positions emerged clearly during the course of the hearing. For the father, Mr Hale KC and Ms Morley, acting pro bono along with their instructing solicitors, distilled their grounds of appeal. They contended that the judge's decision was not reached by a properly balanced process of evaluation or an application of the correct legal test. Had he approached matters correctly he would have been bound to find that disclosure with safeguards was the only proper course. As it is, the father is left in the dark, without any contact, and unable to participate meaningfully in any family assessment. For the mother, Mr Bagchi KC and Ms Jefferson referred to the mother's scepticism about the father's ability to restrain himself from trying to take control of this delicate situation. They supported the judge's decision on the basis that he had applied the correct principles and reached an unassailable conclusion. In the alternative, if the decision was set aside and the father was given the withheld information, the mother thought it important that appropriate advice was received from the court-appointed psychologist before the children were told that this had happened. For the Guardian, Mr Jones advocated disclosure of the material to the father subject to careful controls. The mother and the Guardian agreed that this is not a case in which the issue of partial disclosure or 'gisting' of the material arises: the question is whether it should be disclosed in its entirety or not at all.
19. At the end of the hearing we informed the parties of our decision and orders. We gave brief reasons, upon which I will now expand.

Non-disclosure

20. The approach to an application for relevant evidence to be withheld from a party to proceedings is well-established. In *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, [1995] 2 FLR 687, the issue was whether statements made by children could be withheld from a parent, in that case in adoption proceedings. Lord Mustill summarised the matter in this way:
- “(1) It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party...
 - (2) ... the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.
 - (3) If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.
 - (4) If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.
 - (5) Non-disclosure should be the exception not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.”
21. These principles aptly apply to the present case, where the welfare of a subject child is relied upon as justifying non-disclosure. They have been extended since the advent of the Human Rights Act 1998 to encompass applications for non-disclosure based on a risk of harm to others, for example: *Re B (Disclosure to other Parties)* [2001] 2 FLR 1017 and *Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60, [2013] 1 FLR 948.
22. A court that is asked to authorise non-disclosure in the interests of a child should therefore ask itself these questions:
- (1) Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?
 - (2) Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?
 - (3) Can the feared harm be addressed by measures to reduce its probability or likely impact?

- (4) Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?
- (5) Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?
- (6) Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?

Application to this case

23. The information about Tom's distress contained in the mother's statements inevitably caused serious concern. With justification, no complaint is made about the short-term orders made by Judge Roberts, difficult though they were for the father. But by the time the case returned to court seven weeks later, matters had moved on. Tom's Guardian had made enquiries, had reported that his position was calmer and had advised that the normal process of disclosure should be resumed, as to which the mother was neutral. That being so, the case for prolongation of non-disclosure evidently required clear justification.
24. The context for the decision was that there would be no immediate resumption of contact. Further, the mother's first statement revealed the concerns in respect of Tom's thoughts of self-harm, and the withheld material did not contain any strikingly different information. The first thing that the court therefore had to assess was the nature and probability of the harm that might result from the father receiving this further material. On the basis of Judge Roberts' findings, he could not be relied upon to react sensitively, and serious harm could undoubtedly result from him blundering in. Francis J was entitled to be concerned about that risk. However, he then needed to consider what might be done to counteract it. The father, who lives near to the children, had broadly obeyed Judge Roberts' injunctions and no-contact orders and the question was therefore whether he would be likely to disobey an order specifically restraining him from speaking to the children about the withheld material. The judge did not address that question. He noted that Tom would regard it as a breach of trust if his father was told, and would be less likely to speak in future, but that risk could be managed in the short term by the children remaining unaware of the court's decision. It was not right to regard either the child or the mental health professional as having a veto on disclosure, and the judge did not approach the matter in that way, but he did not identify the nature and probability of the risk to the children or the measures that might be taken to reduce it.
25. Nor was there an evaluation of the overall advantages and disadvantages to Tom of disclosure taking place. No consideration was given to the difficulties for the child of continued secrecy, or the difficulties for the court in reaching a workable outcome if information continued to be withheld. The judge accepted that there would be some disadvantages to the father in taking part in the psychological assessment without disclosure, but he did not think that it would be impossible for him to do so. With respect, that was unrealistic. It would require the expert to be instructed in terms that were partly withheld from the father, and to be required to assess the father on the

basis of information that could not be shared. That would heavily compromise an assessment designed to pave the way to a better future, even if the father agreed to take part in it, which was doubtful. The Guardian was making clear recommendations which the judge was bound to engage with if he was going to depart from them.

26. Rights under Articles 6 and 8 exist equally for the protection of the deserving and the less deserving. In making his decision, the judge referred to the father's rights, but he does not appear to have given them any weight. He was struck by Judge Roberts's findings about the father's self-centeredness in relation to two episodes predating the earlier proceedings, but these fell far short of providing a foundation for depriving a parent of information about his child in the midst of a crisis, particularly as it was being said that he had significantly brought it about.
27. Finally, the judge envisaged that the issue of disclosure would only be revisited after the expert assessment had been completed. He did not assess the impact on the whole family of non-disclosure continuing for what was likely to be several months.
28. I therefore conclude that the judge's approach to the issue of disclosure was insufficiently thorough and that his order cannot stand. It is not then necessary to look in detail at what occurred at the hearing, but it must be said that where a court excludes a party from part of a hearing it should not reach its ultimate decision without hearing from that party to the greatest practicable extent. Here, the father was left in the position of trying to change the judge's mind. He may not have had access to all the material, but his counsel made cogent submissions about the legal principles and about the consequences of non-disclosure. There will be situations where the disadvantage to a party in this position is unavoidable, but they must be given the opportunity to assist the court before it reaches its decision, not after.
29. As matters stand, this court is in as good a position as the judge to reach a decision in respect of disclosure. I would accept that there would be an increased risk of emotional, psychological and even serious physical harm to Tom if the father was able to involve himself without restraint in the current delicate situation. However, there is no reason to believe that he will disobey orders preventing him from having contact of any kind with the children until there has been a thoroughgoing expert assessment, knowing as he now does of the serious consequences of any breach. Moreover, the risks essentially arise from unrestricted contact and not from disclosure. As to the issue of breach of trust, the children need not be told that disclosure has taken place until that can be done with the benefit of expert guidance. The psychological assessment can only take place effectively with the parents being on an equal footing. It is unlikely to be in Tom's interests to believe that a secret is being kept from his father indefinitely and, far from helping him, that secrecy is likely to become more burdensome over time. From the father's point of view, continued non-disclosure provides him with a grievance when he should instead be reflecting on Judge Roberts' findings. I am therefore not satisfied that the risks cannot be managed, or that it is in Tom's overall welfare interests for non-disclosure to continue. Finally, there is no compelling reason to override the father's rights to have the same information as the other parties and, as I have said, good reason to place him in a position where he can read it, and seriously reflect upon it.
30. For these reasons of principle and practicality, we made orders in the following terms at the end of the hearing:

- (1) Permission to appeal is granted.
- (2) The appeal is allowed.
- (3) Paragraphs 4 and 5 of the judge's order are set aside.
- (4) Subject to paragraph (5) below, the Guardian's solicitor shall disclose to the father copies of the Bundle of Closed Documents and of her Note of Enquiries.
- (5) The disclosure under paragraph 4 is made on these conditions:
 - a) It shall not be made until noon on 18 March 2024.
 - b) Paragraphs 5-9 of the order of Her Honour Judge Roberts dated 12 December 2023 shall remain in full effect until further order.
 - c) The father shall not disclose to or discuss the contents of the material disclosed under paragraph (4) with anyone except his legal advisers and any person in respect of whom the Guardian has given her prior written consent.
 - d) No person shall inform the children that the material has been disclosed to the father without the agreement of all parties following advice from the court-appointed psychologist, or the permission of the court.
 - e) A warning notice addressed to the father shall be attached to subparagraphs (c) and (d) above.
 - f) The father has been informed by this court of the gravity of the orders made under this paragraph and the likely consequences of any breach.
- (6) The proceedings are remitted to Her Honour Judge Roberts for an urgent case management hearing following disclosure of the material to the father, to settle the terms of appointment of a psychologist and to give any other directions.
- (7) [Directions for that hearing]
- (8) The Guardian's solicitor shall send a copy of this order to the NHS Trust and the local authority.
- (9) No order for costs.

Lord Justice Baker:

31. I agree.
