Neutral Citation Number: [2021] EWFC 37

Case No: BW19P00194

IN THE FAMILY COURT

Sitting Remotely

Date: 30/04/2021

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

D	**Applicant**
- and -	
E	**First Respondent**
- and-	
G	**Second Respondent**
(By her Children's Guardian)	

- -

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Ms J. Richardson (instructed by **Nottingham Family Law**) for the **Applicant**
The First Respondent did not appear and was not represented
Ms Karen Lennon (instructed by **Milburn Solicitors**) for the **Second Respondent**

Hearing dates: 19 April 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 30 April 2021.

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THE HONOURABLE MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. The court is concerned with the welfare of G, born in 2012 and now aged 8. G is represented by Ms Karen Lennon of counsel, through her Children's Guardian Mr Lenaghan. The mother of G is D (hereafter "the mother"), represented by Ms Richardson of counsel. The father of G is E (hereafter "the father"). He does not appear before the court and is not represented.

2. The following applications with respect to G are before the court and fall for determination at this final hearing:

   i) An application by the mother for a child arrangements order pursuant to s.8 of the Children Act 1989.

   ii) An application by the mother for a specific issue order to change G's surname pursuant to s.8 of the Children Act 1989.

   iii) An application by the mother to terminate the father's parental responsibility for G pursuant to s.4(2A) of the Children Act 1989.

   iv) An application by the Children's Guardian for an order pursuant to s.91(14) of the Children Act 1989.

3. As I have noted, the father has not attended the final hearing and is not represented before the court. This reflects a pro-longed pattern of non-engagement by the father in these proceedings. The father did appear before this court by way of video link from prison on 19 June 2020. At that hearing I made clear to the father the steps he needed to take in order to engage with the proceedings and directed that he provide a statement of evidence by 31 August 2020 addressing each of the mother's applications, the father having stated he intended to seek legal advice upon his release from prison. Notwithstanding the father's stated intention to secure legal advice and, indeed, to pursue his own application for a child arrangements order, none of the directions given by the court were complied with by the father. The father failed to attend a hearing before this court on 5 October 2020 despite the solicitor for the child having written to the father with a copy of the order of 19 June 2020 explaining the directions made by the court. The father has also failed to comply with further directions made by the court on 5 October 2020 with a view to facilitating his participation in these proceedings. He has been served with the application of the Children's Guardian for an order pursuant to s.91(14) of the Children Act 1989.

4. Most recently, the father contacted the solicitor for the child by telephone on 1 March 2021 and provided his email and a postal address. During that telephone call the solicitor for the child re-iterated to the father the directions that had been made by the court, including direction that he provide a statement to the court, and reminded him of the date of this final hearing. The solicitor for the child also advised the father to take independent legal advice. The solicitor for the child confirmed all of this in an email to the father on 1 March 2021. Despite the solicitor for the child emailing the father again on 9 March 2021 and writing to him at the address he gave to the solicitor on 1 March 2021 on 11 March 2021, the father has made no further contact, has not

provided a statement and has not attended today. He has made no contact with the court.

5. Within the foregoing context, I am satisfied that it is appropriate to proceed to determine the applications before the court in the father's absence. I am satisfied that the father has had proper notice of this hearing, that he has been provided with the notice of the applications and the relevant documents and that he is well aware of the opportunity the court has provided him to file evidence in this matter. The father has not contacted the court to advance any reasons for his non-attendance. Within this context, I am satisfied that it is reasonable to conclude that the father either knows, and has accepted, the consequences of this final hearing proceeding in his absence or that he is indifferent to the same. Further, in circumstances where the father failed to attend previous hearings before this court and has not answered the correspondence sent to him by the solicitor for the child at the email and postal addresses the father *himself* supplied, I am satisfied that a further adjournment would not be likely to secure the attendance of the father.

6. In circumstances where the court has determined that there is no need for a fact finding exercise in light of the nature and extent of the father's criminal convictions, I am further satisfied that the prejudice to the father and to the forensic process of proceeding in his absence is significantly mitigated, notwithstanding the draconian nature of the orders applied for. By contrast, I am satisfied that significant prejudice would result for both G and the mother were this matter to be further adjourned. These proceedings have now been ongoing for some 18 months, with significant delay caused by the current COVID-19 pandemic and by the non-engagement of the father. It is plain from the papers that this delay has strained the mother's psychological wellbeing and that G is aware of her mother's concerns and anxiety. It is well beyond time for these proceedings to be resolved and for G to benefit from some certainty with respect to her future.

7. Within this context, I am satisfied that, having regard to the requirement of the overriding objective to deal with cases justly, expeditiously, and fairly, it is appropriate now to proceed in the absence of the father.

BACKGROUND

8. The parents entered into a relationship in 2009 and separated on 9 March 2014. As I have noted, G was born in 2012 and was 16 months of age at the time of the parents' separation. The father is named as such on G's birth certificate.

9. Following the parents separation the father applied for a child arrangements order permitting him to spend time with G. The issue in those proceedings centred on the mother's concerns regarding the father's mental health, allegations that he had engaged in a course of harassment against her following the end of their relationship and allegations that there had been an incident of domestic violence in the relationship and a wider course of coercive and controlling behaviour. These allegations have been denied by the father and no findings were made in those proceedings. A s.7 report completed by Cafcass recommended that child arrangements with respect to G progress in a stepped manner, with supervised contact moving to unsupervised contact in due course. A final order was made in the proceedings in December 2014. That

order provided for unsupervised contact between the father and G twice a week with an expectation that contact would move to overnight contact in six months' time.

10. It is plain from the material before the court that the father has a significant offending history. On 25 July 2014 the had father received a caution for pursuing a course of conduct amounting to harassment for sending 500 text messages in 24 hours to the mother, some of which caused her distress. On 28 October 2015 the father was accused of wounding with intent to do grievous bodily harm by using a vehicle to assault a person, resulting in injury. During 2015 the father also came under investigation for sexual offences against a child. Within that latter context, and on the advice of police and Children's Services, the mother stopped contact between the father and G and moved home with G. Within this context, the father has had no contact with G since 18 July 2015, when G was 2 years old and has not exercised parental responsibility for her during that time. G now has no recollection of her father.

11. On 11 November 2016 the father was convicted of the offences of causing or inciting a female child under the age of 16 years to engage in a sexual act and meeting a girl under the age of 16 following grooming. The father was found to have groomed a 14 year old girl and tried to have a sexual relationship with her in full knowledge of her young age. Police records indicate that when the father became aware that the victim had made known the sexual abuse the father contacted the victim and made threats towards her. The father was sentenced to two years imprisonment and made the subject of a 10 year Sexual Harm Prevention Order. On the same day the father was convicted of dangerous driving and battery, having punched a female victim to the face and driven his car at that female victim. In discussions with the Children's Guardian more recently, the father sought to justify his sexual offending by asserting that his victim had claimed to be older than she was and that he had not realised that she was, in fact, only 14 years old.

12. For the foregoing offences the father was incarcerated between November 2016 and September 2017. Upon his release on licence in September 2017 the father breached the terms of his licence. On 30 July 2018 the father was convicted of two breaches of his Sexual Harm Prevention Order by being in possession of an Internet enabled device without monitoring software and allowing a child under the age of 16 to be present at his home address whilst prohibited from doing so. As a result, the father was again incarcerated between July 2018 and November 2018.

13. On 11 July 2019 the mother caused a letter to be sent to the father by her instructing solicitors inviting him to consent to the removal of parental responsibility. No reply was received from the father and the mother issued proceedings on 27 September 2019.

14. Concerns continued during 2019 regarding alleged offending and confirmed offending by the father. On 5 August 2019 no further action was taken in respect of an allegation that the father had raped a female aged 16 years or over on 15 June 2018. On 10 October 2019 no further action was taken in respect of an allegation that the father had stalked a female victim by sending her numerous messages purporting to know her whereabouts and stating the harm that would come to her. Towards the end of 2019 the father was convicted of harassment and sentenced to a period of imprisonment. That harassment included sending sinister messages to the female

victim, including "watch where you walking before you get shanked and it will not be me who is doing it". Within this context, in describing the conduct for which he was convicted, the father informed the Children's Guardian that he had placed a post on Facebook advertising for someone to harm the partner from whom he had recently separated, with a reward of £1000 for anyone willing to cause her harm. The Facebook entry included a statement that the father wished for his ex-partner to be chopped up or her head removed, albeit the father asserted to the Children's Guardian that he was not responsible for that part of the post. Whilst accepting this conduct was wrong, the father was not able to articulate for the Children's Guardian why he pursued such a course of conduct. The father was released from prison on 17 August 2020. Having reviewed the Police disclosure the Children's Guardian concludes as follows with respect to the father's offending history:

> "It is also very clear from the nature of the complaints that [have] been made to the police that [the father's] behaviour to his victims has not only been verbally threatening, but [has] also been physically and sexually abusive, and that there is a tendency for him to minimise this and within the police interviews a lack of compassion or understanding for the victims."

15. Within the foregoing context, a report from the Probation Service, dated 31 January 2020, concludes that the two categories of people at risk from the father would be children and intimate partners. With respect to children the risk arises specifically in respect of those children aged between 13 and 15 years of age. The nature of the risk presented by the father is that of sexual grooming and involving a girl in sexual activity with concomitant emotional and psychological harm. The Probation Officer considers that the degree of harm would depend on the extent to which the father was able to exercise power over, or influence or manipulate the victim.

16. With respect to intimate partners, the Probation Officer considers that the father presents a risk, particularly at the end of a relationship, of malicious communication, stalking and harassing type behaviours, the impact of which will be threatening and intimidating. The Probation Officer advises that there is, in this context, the potential for serious harm. The report of the father's Offender Manager dated 11 March 2020 concludes that, in the context of his most recent conviction for harassment of a former intimate partner, the father presents a medium risk of serious harm. As I have noted, the father has failed to attend court to challenge the foregoing evidence. There is no evidence before the court to demonstrate that the father has engaged in any therapeutic of other work designed to address his offending behaviour or to reduce the risks he has been assessed to present towards adolescent children and former female partners.

17. This court also has the benefit of a final report of the Children's Guardian dated 17 April 2020. In that report the Children's Guardian recommends that the child arrangements order made in 2014 be discharged and that there be no contact between G and her father. In this regard, the Children's Guardian expresses himself thus:

> "Given the nature of the offences that he has perpetrated, and taking into account the probation risk assessment suggesting that there is a high risk of harm to any intimate partners, of whom [the mother] was one previously, and also because of the serious risk of harm to any adolescent girl, it is inconceivable, in my opinion, that any form of contact should be permitted

> between [the father] and G whether directly or indirectly as it would not be in her best interests or welfare to facilitate this. Neither do I believe that this could be safely managed without potentially compromising the safety of [the mother] or G at any time in the foreseeable future and in fact the risks of doing so would increase, given his criminal profile, as G approaches adolescence. I therefore believe that the previous Child Arrangements Order needs to be discharged as there is no realistic prospect of any contact or any sort taking place through her childhood and the court should consider making an order for no contact"

18. The Children's Guardian expresses the firm opinion that it is in G's best interests for her surname to be changed to 'D' by omitting that element of her surname that currently derives from the father. Within this context, Ms Lennon submits that the change of name proposed by the mother is reflection of reality and that, time having passed, to suddenly be known by a different surname would not be in G's best interests. The Children's Guardian does however highlight a concern that support will need to be available for G to assist her to deal with the longer term issues of identity arising out of the fact that she has no relationship with and has, to date, been given no information with respect to the father. Whilst the mother asserts that she will source professional guidance when it becomes apparent that the same is required, the Children's Guardian is concerned about the lack of such resources in the area in which the mother and G reside.

19. Whilst the report of the Children's Guardian compiled in April 2020 recommends that the father's parental responsibility should be heavily prescribed by the use of specific issue and prohibited steps orders rather than being terminated, upon instruction of counsel Ms Lennon, a position statement was filed on 17 June 2020 in which it was conceded on behalf of the child that both the Safeguarding Letter provided by Cafcass for these proceedings, and the report of Children's Guardian dated 17 April 2020, misstate the legal test for the removal of parental responsibility, the former stating incorrectly that the threshold is "incredibly high" and the latter stating incorrectly that the test as one of "very exceptional circumstances". However, through Ms Lennon, the Children's Guardian now accepted that the test is in fact that articulated in this judgment below. The Position Statement of the Children's Guardian was provided to the father at a hearing on 20 June 2020 which the father attended. Within this context, and applying the correct test, the Children's Guardian no longer seeks to oppose the application of the mother to terminate the parental responsibility of the father.

20. With respect to his application for an order under s.91(14) of the Children Act 1989, through Ms Lennon the Children's Guardian contends that the pattern of the father's behaviour during the protracted proceedings with respect to G demonstrates that he does not accept any of the recommendations and has required the court to adjudicate upon each and every issue whilst at the same time failing to comply with any of the court's repeated orders directing him to file evidence in response setting out his basis of his challenge. Further, within the context of the father's offending behaviour towards ex-partners as outlined above, and the risk that is identified as flowing from that offending behaviour, the children's guardian contends applications under the Children Act 1989 made without the need for permission will represent another avenue for the father to control and harass the mother.

21. The mother's case is set out in her statement. In that statement the mother relates the history that I have recounted and, in the context of that history, contends that should the court refuse to grant the applications before it both G and herself will be at risk of further harm and ongoing instability and insecurity by reason of the unmitigated risks presented by the father. Within this context, the mother contends that it is *plainly* in G's best interests for each of the applications before the court to be granted.

22. As I have noted, the father is not before the court. I have however, taken account of the fact that he has in the past made repeatedly clear to the Children's Guardian that he opposes the applications made by the mother to discharge the child arrangements order made in December 2014, to change G's surname and to remove his parental responsibility for G. The father has also in the past indicated to the Children's Guardian that he intended to pursue contact with G upon his release from prison. The father reiterated firmly each of these positions to the court when he attended the hearing before me on 19 June 2020. Notwithstanding this, no application has been forthcoming by the father in with respect to contact or for any other form of relief. The father has not indicated a position with respect to the application pursued by the Children's Guardian for an order under s.91(14) of the Children Act 1989 notwithstanding his being served with the same.

THE LAW

23. The law to be applied to each of the four applications before the court is well settled and can be stated relatively shortly.

Child Arrangements Order – Termination of Contact

24. Applications for a child arrangements order under s.8 of the Children Act 1989 require the court to apply the principles set out in s.1 of the 1989 Act. In this case, the order sought is that there be no contact between G and her father. Within this context, I in particular note and bear in mind that s.1(2A) of the Children Act 1989 provides as follows:

> "(2A) A court, in circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare."

25. With respect to assessing whether the contrary is shown for the purposes of s.1(2A) of the Children Act 1989, I further bear in mind that the courts have, historically, held that it is almost always in the interest of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living. This principle, and the following further applicable principles can be drawn from the decisions of the Court of Appeal in *Re C (Direct Contact: Suspension)* [2011] 2 FLR 912 at [47], *Re W (Direct Contact)* [2103] 1 FLR 494 and *Re J-M (A Child)* [2014] EWCA Civ 434 at [25]:

    i) The welfare of the child is paramount and the child's best interests must take precedence over any other consideration.

ii) There is a positive obligation on the State and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact.

iii) However, the positive obligation on the State, and therefore on the court, is not absolute. Whilst authorities must do their utmost to facilitate the co-operation and understanding of all concerned, any obligation to apply coercion in this area must be limited since the interests, as well as the rights and freedoms of all concerned must be taken into account and, more particularly, so must the best interests of the child.

iv) Excessive weight should not be accorded to short term problems and the court should take a medium and long term view.

v) Contact should be terminated only in exceptional circumstances where there are cogent reasons for doing so, as a last resort, when there is no alternative, and only if contact will be detrimental to the child's welfare.

vi) The key question, and the question requiring stricter scrutiny, is whether the court has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.

26. These principles must be read in light of FPR 2010 PD12J, entitled *Child Arrangements and Contact Orders: Domestic Abuse and Harm*, which provides as follows at paragraph [7]:

> "In proceedings relating to a child arrangements order, the court presumes that the involvement of a parent in a child's life will further the child's welfare, unless there is evidence to the contrary. The Court must in every case consider carefully whether the statutory presumption applies, having particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm."

27. The foregoing principles set out in PD12J are expressed by reference to domestic abuse. However, it is plain that this approach will apply, in proceedings relating to a child arrangements order, to all allegations or admissions of harm to the child or parent relevant to the question of contact or evidence indicating such harm or risk of harm. Within this context, I note that paragraphs 35 to 37 of PD12J enjoin the court, *inter alia*, to take the following factors into account when considering child arrangements in cases where the court is satisfied that such harm has occurred:

i) The court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

ii) The court should apply the individual matters in the welfare checklist set out in s.1(3) of the Children Act 1989 with reference to the harm that has occurred and any expert risk assessment obtained.

iii) In particular, the court should consider any harm which the child, and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made.

iv) The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact.

v) The court should consider, *inter alia*, whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of abuse against the other parent and the capacity of the parents to appreciate the effect of past abuse and the potential for future abuse.

Change of Surname

28. Where an application for a change of surname is made in the absence of an order specifying where the child should live (as is the situation in this case having regard to the terms of the child arrangements order of 4 December 2014) the application is made under Part II of the Children Act 1989 (per *Dawson v Wearmouth* [1997] 2 FLR 629). Within this context, the application falls to be determined by reference to s.1(1) and s.1(3) of the Children Act 1989.

29. In *Dawson v Wearmouth* [1999] 1 FLR 1167 the House of Lords (which did not disturb the procedural position articulated in the foregoing paragraph) made clear that name of a child is not a trivial matter but an important matter, is not a question to be resolved without regard to the child's welfare and requires all the facts and circumstances of the individual case relevant to the welfare of the child to be taken account and weighed up against each other. Within this context, Lord Mackay of Clashfern held at p.1173 that the court must apply the criteria in s 1 of the 1989 Act, including s 1(5), and not make an order for the change of name unless there is some evidence that this will lead to an improvement from the point of view of the welfare of the child. Within this context, at p.1177 Lord Jauncey of Tullichettle observed as follows:

> "My Lords I accept, of course, as the authorities make clear, that the changing of a child's surname is a matter of importance and that in determining whether or not a change should take place the court must first and foremost have regard to the welfare of the child. There are many factors which must be taken into account, not only those pertaining to the present situation but also those which are likely to affect the child in the future."

And at p.1178 Lord Hobhouse of Woodborough further observed as follows:

> "It has often been observed that the use of surnames is among the questions which give rise to the most deeply felt disputes between parents. As in other areas, the parents are liable to see the question raised as reflecting upon their own rights. It is clear from the arguments which have been advanced in the courts below and even to some extent your Lordships' House that the father and mother see the present dispute largely in such terms. They are mistaken. Once the dispute has arisen, the paramount consideration is the welfare of the child. The attitude and views of the individual parents are

> only relevant insofar as they may affect the conduct of those persons and therefore indirectly affect the welfare of the child."

30. Subsequent to the decision of the House of Lords in *Dawson v* Wearmouth, the Court of Appeal in Re *W (A Child) (Illegitimate Child: Change of Surname), Re A (A Child), Re B (Children)* [2001] Fam 1, sub nom *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930 at [9] held that the following factors will fall for consideration on an application seeking to change the surname of a child, stressing that such factors are only guidelines which do not purport to be exhaustive, with each falling to be decided on its own facts with the welfare of the child the paramount consideration and all the relevant factors weighed in the balance by the court at the time of the hearing:

    i) On any application, the welfare of the child is paramount and the judge must have regard to the s 1(3) criteria.

    ii) Among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance recognition of the biological link with the child's father. Registration is always a relevant and an important consideration but it is not in itself decisive. The weight to be given to it by the court will depend upon the other relevant factors or valid countervailing reasons which may tip the balance the other way.

    iii) The relevant considerations should include factors which may arise in the future as well as the present situation.

    iv) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.

    v) The reasons for an earlier unilateral decision to change a child's name may be relevant.

    vi) Any changes of circumstances of the child since the original registration may be relevant.

    vii) In the case of a child whose parents were married to each other, the fact of the marriage is important and there have to be strong reasons to change the name from the father's surname if the child was so registered.

    viii) Where the child's parents are not married to each other, the mother has control over registration and, within this context, the degree of commitment of the father to the child, the quality of contact, if it occurs, between father and child, the existence or absence of parental responsibility are all relevant factors to take into account.

Termination of Parental Responsibility

31. Where, as in this case, the father has acquired parental responsibility pursuant to s.4(1)(a) of the Children Act 1989 by being registered as the subject child's father, his parental responsibility may only be removed by an order of the court pursuant to s.4(2A) of the 1989 Act. Having regard to the terms of s.1 of the Children Act 1989,

when deciding whether to terminate a father's parental responsibility, the child's welfare is the court's paramount consideration (that question being a question with respect to the upbringing of a child pursuant to s.105(1) of the Act) but is not *required* to consider the factors set out in s.1(3) of the 1989 Act, as an order terminating the father's parental responsibility is not an order specified in s.1(4) of the 1989 Act. However, in *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166 the Court of Appeal made clear at [12] that:

> "[12] When a court is considering an application relating to the cessation of parental responsibility, the court is considering a question with respect to the upbringing of a child with the consequence that by s 1(1)(b) of the CA 1989 the child's welfare will be the court's paramount consideration. By s 1(4), there is no requirement upon the court to consider the factors set out in s 1(3) (the 'welfare checklist') but the court is not prevented from doing so and may find it helpful to use an analytical framework not least because welfare has to be considered and reasoned. Given that the cessation of parental responsibility is an order of the court, the court must also consider whether making such an order is better for the child than making no order at all (the 'no order' principle in s 1(5) of the CA 1989)."

32. With respect to the factors to be taken into account, in *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048, Singer J held as follows at p.1052:

> "I start from the proposition that parental responsibility – both wanting to have it and its exercise – is a laudable desire which is to be encouraged rather than rebuffed. So that I think one can postulate as a first principle that parental responsibility once obtained should not be terminated in the case of a non-marital father on less than solid grounds, with a presumption for continuance rather than for termination.
>
> The ability of a mother to make such an application therefore should not be allowed to become a weapon in the hands of the dissatisfied mother of the non-marital child: it should be used by the court as an appropriate step in the regulation of the child's life where the circumstances really do warrant it and not otherwise.
>
> I have been referred in outline to four authorities as to the circumstances in which a court will make an order for parental responsibility on application to it under s 4, notwithstanding maternal opposition and, more particularly, as to the criteria and considerations which are relevant. The authorities in question are: *Re H (Minors) (Local Authority: Parental Rights) (No 3)* [1991] Fam 151, sub nom *Re H (Illegitimate Children: Father: Parental Rights) (No 2)* [1991] 1 FLR 214; *Re C (Minors) (Parental Rights)* [1992] 1 FLR 1, in the Court of Appeal, and *Re G (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 504, also in the Court of Appeal; and, finally, a decision of Wilson J, *Re P (A Minor) (Parental Responsibility Order)* [1994] 1 FLR 578.
>
> Such applications for parental responsibility orders are governed by the considerations set out in s 1(1) of the Children Act, namely that the child's welfare is the court's paramount consideration. I can see no reason why that

> principle should be departed from in considering the termination of a parental responsibility order or agreement.
>
> Key concepts to the consideration of the making of an order are evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case."

33. Within this context, in *CW v SG (Parental Responsibility Consequential Orders)* [2013] EWHC 854 (Fam), [2013] 2 FLR 655 Baker J (as he then was) endorsed the approach taken by Singer J in *Re P (Terminating Parental Responsibility)*. In *CW v SG (Parental Responsibility Consequential Orders)*Baker J held as follows at [59]:

> "As in *Re P*, I find that, if the father did not have parental responsibility, it is inconceivable it would now be granted to him, and that this is a factor I should take into account when considering this application to terminate his parental responsibility. Furthermore, like Singer J in *Re P*, I find that in this case there is no element of the bundle of responsibilities that make up parental responsibility which this father could, in present or foreseeable circumstances, exercise in a way which would be beneficial for D."

34. The decision of Baker J (as he then was) was upheld by the Court of Appeal in *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166, in which Ryder LJ (as he then was) held as follows at [13] and [14] with respect to the factors to be taken into account on an application to terminate parental responsibility pursuant to s.4(2A) of the Children Act 1989:

> "[13] The paramountcy test is overarching and no one factor that the court might consider in a welfare analysis has any hypothetical priority. Accordingly, factors that may be said to have significance by analogy or on the facts of a particular case, for example, the factors that the court considers within the overarching question of welfare upon an application for a parental responsibility order (the degree of commitment which the father has shown to the child, the degree of attachment which exists between the father and the child and the reasons of the father for applying for the order) may be relevant on the facts of a particular case but are not to be taken to be a substitute test to be applied (see *Re M (Parental Responsibility Order)* [2013] EWCA Civ 969, [2014] 1 FLR 339, at paras [15] and [16]).
>
> [14] An unmarried father does not benefit from a 'presumption' as to the existence or continuance of parental responsibility. He obtains it in accordance with the statutory scheme and may lose it in the same way. In both circumstances it is the welfare of the child that creates the presumption, not the parenthood of the unmarried father. The concept of rival presumptions is not helpful, although I entirely accept that the fact of parenthood raises the welfare question, hence the right of a parent (with or without parental responsibility) to make an application under s 8 of the CA 1989 without permission (see s 10(4)(a) of the CA 1989). There is also ample case-law describing the imperative in favour of a continuing relationship between both parents and a child so that ordinarily a child's

> upbringing should be provided by both of his parents and where that is not in the child's interests by one of them with the child having the benefit of a meaningful relationship with both. A judge would not be criticised for identifying that, as a very weighty, relevant factor, the significance of the parenthood of an unmarried father should not be under estimated."

35. Within the foregoing context, it is also important when considering an application to terminate the parental responsibility of an unmarried father to have regard to the shared nature of parental responsibility when the same is conferred upon both parents. In this context, in *Re W (Direct Contact)* [2013] 1 FLR 494 at [80] McFarlane LJ (as he then was) observed as follows:

> "Whether or not a parent has parental responsibility is not simply a matter that achieves the ticking of a box on a form. It is a significant matter of status as between parent and child and, just as important, as between each of the parents. By stressing the "responsibility" which is so clearly given prominence in the Children Act 1989, section 3 and the likely circumstance that that responsibility is shared with the other parent, it is hoped that some parents may be encouraged more readily to engage with the difficulties that undoubtedly arise when contemplating post separation contact than may hitherto been the case."

Section 91(14)

36. Section 91(14) of the Children Act 1989 provides as follows with respect to applications made only with the leave of the court:

> "(14) On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court".

37. With respect to the application of s.91(14) of the Children Act 1989, the following principles can be drawn from the reported cases, and in particular *Re P (Section 91(14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573; *Re P (Children Act 1989, ss 22 and 26: Local Authority Compliance)* [2000] 2 FLR 910; *Re G (Contempt: Committal)* [2003] 2 FLR 58; *Re S (Contact: Promoting Relationship with Absent Parent)* [2004] 1 FLR 1279; *Re B (Section 91(14) Order: Duration)* [2004] 1 FLR 871; *S v B & Newport City Council: Re K* [2007] 1 FLR 1116; *Re S (Permission to Seek Relief)* [2007] 1 FLR 482; *Stringer v Stringer* [2007] 1 FLR 1532; *Re S (Permission to Seek Relief)* [2007] 1 FLR 482 and *Re G (Residence: Restrictions on Further Applications)* [2009] 1 FLR 894:

i) In each case the court has to carry out a balancing exercise between the welfare of the child and the right of unrestricted access of the litigant to the court:

ii) Section 91(14) should be read in conjunction with s 1(1) which makes the welfare of the child the court's paramount consideration.

iii) The power to restrict applications to the court is discretionary and in the exercise of its discretion the court must weigh in the balance all the relevant circumstances.

iv) An important consideration is that to impose a restriction is a statutory intrusion into the right of a party to bring proceedings before the court and to be heard in matters affecting his/her child.

v) The power is therefore to be used with great care and sparingly, the exception and not the rule.

vi) It is generally to be seen as a weapon of last resort in cases of repeated and unreasonable applications.

vii) Beyond this, in a suitable case and on clear evidence, a court may impose the leave restriction in cases where the welfare of the child requires it, although there is no past history of making unreasonable applications. However, before making an order in such circumstances the court will need to be satisfied first that the facts go beyond the commonly encountered need for a time to settle to a regime ordered by the court and the all too common situation where there is animosity between the adults in dispute or between the local authority and the family; and secondly that there is a serious risk that, without the imposition of the restriction, the child or the primary carers will be subject to unacceptable strain.

viii) A court may impose the restriction on making applications in the absence of a request from any of the parties, subject, of course, to the rules of natural justice such as an opportunity for the parties to be heard on the point.

ix) A restriction may be imposed with or without limitation of time. An order which is indeterminate or is to last until a child is 16 should be an exceptional step because it is, in effect, an acknowledgement that nothing more can be done. If such an order is made the court must spell out why and what needs to be done to make a successful application in the future.

x) The degree of restriction should be proportionate to the harm it is intended to avoid. Therefore the court imposing the restriction should carefully consider the extent of the restriction to be imposed and specify, where appropriate, the type of application to be restrained and the duration of order.

xi) It is not permissible to impose conditions on a s 91(14) order. However, it is permissible for a judge imposing a s 91(14) order to identify a particular issue and to suggest to the litigant that unless he could show that that particular issue had been addressed any future application for permission to apply to the court for further relief was unlikely to be successful.

DISCUSSION

38. Having regard to the evidence before the court, and to the submissions made on behalf of the mother by Ms Richardson and on behalf of the child by Ms Lennon, and

having regard to the objections voiced by the father to the Children's Guardian, I am satisfied that it is in G's best interests to make the following orders:

i) A child arrangements order providing that G will live with the mother, with the child arrangements order of 4 December 2014 being discharged.

ii) An order providing for G's surname to be changed from 'D-E' to 'D'.

iii) An order terminating the parental responsibility of the father for G.

iv) An order preventing the father from making further applications to the court under the Children Act 1989 without permission until G reaches the age of 16.

39. My reasons for deciding that the foregoing orders are each in G's best interests are as follows.

40. In examining G's welfare needs, in my judgment a particularly significant factor in this case in each of the applications that fall for decision by this court is that G has no relationship with, or indeed any recollection of the father. Within this context, any decision of the court that maintained an obligation to promote contact between G and the father, which maintained that part of G's surname that derives from the name of the father and/or that maintained the father's parental responsibility for G would necessarily involve, particularly with respect to contact and her surname and either now or in relatively short order, a significant change to G's current circumstances, namely the introduction of G to the fact that she has a father and to his identity and the commencement of contact with a person she knows nothing of and has never met and the use of a surname she knows nothing of and has never used. These would be very significant changes for G. Further, such changes in G's circumstances would bring with them the need for challenging and potentially destabilising and disrupting conversations with G regarding those changed circumstances.

41. Within the latter context, in my judgment a further significant factor in this case is that whilst the father has on a number of occasions expressed his opposition to the applications made by the mother, and evinced an intention to apply for a child arrangements order, he has in fact taken no positive steps to oppose the applications of the mother or to pursue applications designed to secure his involvement in G's life, despite being given ample opportunity by the court to do so. In particular, notwithstanding the repeated direction of the court, the father has presented no evidence in opposition to the court, has not attended this final hearing and has not issued an application for a child arrangement order under Part II of the Children Act 1989. Within this context, the very marked change of circumstances summarised in the foregoing paragraph, and the concomitant need for challenging and potentially destabilising and disrupting conversations with G by way of explanation, would necessarily take place without any guarantee that the father would thereafter engage with G or maintain any or any consistent involvement in her life.

42. I am further, and in any event, satisfied that a further particularly significant factor in this case in each of the applications before the court is the assessed level of risk of harm that the father presents to adolescent children and former partners as detailed in the reports from the Probation Service and having regard to his extensive offending history. As I have noted, the father has not appeared at this final hearing to challenge

the risk assessments provided by the Probation Officer and his Offender Manager. Whilst I accept that the risk assessments available to the court were conducted over 12 months ago, there is no evidence before the court that the father has, either whilst serving sentences of imprisonment or since his release from his last period of incarceration, engaged in any therapeutic or other relevant interventions to address his history of criminal behaviour or the risks he has been assessed as posing to adolescent children and former partners as recently as March last year. Once again, this is despite the court repeatedly affording the father the opportunity to present evidence to the court by way of response to the mother's applications.

43. In the circumstances, this court must proceed on the basis that the father continues to present the level of risk of sexual, emotional and physical harm set out in the unchallenged assessments available to it and, accordingly, that he continues to present an appreciable risk of serious harm to both G and to the mother. I am further satisfied on the basis of the father's offending history and the risk assessments available to the court that the risk of harm he presents to G is likely to increase as she reaches adolescence and the risk harm to the mother is unlikely to decrease from its present level absent work by the father in circumstances where the mother falls into the category of an ex-partner. In addition, I am satisfied, having regard to the nature and extent of the father's past conduct towards the mother and other former partners, as evidenced by the father's caution and convictions, that the latter risk is likely to be significantly exacerbated by any difficulties that were to arise in respect of contact were a child arrangements order to be made, or in respect of decisions relating to G's upbringing were the father to retain parental responsibility for G and therefore require to be consulted in respect of such decisions.

44. Within the foregoing context, I am satisfied that it is in G's best interests for there to be no contact between G and the father. I have borne carefully in mind that there is a positive obligation on the State and therefore on the judge to take measures to promote contact, grappling with all available alternatives and taking all necessary steps that can reasonably be demanded, before abandoning hope of achieving contact. I have also borne very carefully in mind that, as now reflected in s 1(2A) of the 1989 Act, it is presumed in the interests of a child whose parents are separated that he or she should have contact with the parent with whom he or she is not living. However, it is also clear that that obligation is not absolute and that that presumption is a rebuttable one, having regard to the totality of the evidence before the court. In this case, as I have found above, I am satisfied on the evidence before the court that G has no relationship with and is at present unaware of the identity of her father, that the father has taken no steps, either in these proceedings or at all, to seek orders facilitating such a relationship and that the father at present constitutes a significant risk of sexual and emotional harm to G and of emotional and physical harm to the mother, which risk remains entirely unmitigated by acknowledgment by the father and therapeutic or other intervention consequent upon such an acknowledgment.

45. Within this context, and holding G's welfare as the court's paramount consideration I am entirely satisfied in these exceptional circumstances that contact between G and her father would be detrimental to her welfare. Further, in light of the difficulties I have summarised above, I am satisfied that there is no alternative to an order for no contact that will adequately protect G, both from the risk of sexual and emotional harm the father presents to her directly and from the adverse impact on her of the risk

of emotional and physical harm that the father continues to present to the mother. Having regard to the terms of PD12J, in the foregoing context I am in particular satisfied that an order for contact would expose G to an unmanageable risk of sexual and emotional harm. Having regard to the nature and extent of that risk of harm, as indicated by the father's criminal history and the risks assessments before the court and the father's failure to date to undertake any work to mitigate those risks, I cannot be satisfied that the physical and emotional safety of G and the mother could, as far as possible, be secured before, during and after contact. Further, having regard the nature of the father's offences, certain of the statements he made to the Children's Guardian regarding the same and the father's failure to file evidence in or to otherwise engage in these proceedings, I cannot be satisfied that the father is motivated by a desire to promote the best interests of the child rather than using the process to continue a form of control over the mother.

46. In the circumstances, I am satisfied that it is in G's best interests to discharge the child arrangements order of 4 December 2014 and to order that there by no contact between G and her father until further order of the court.

47. I am also satisfied that it is in G's best interests to make a specific issue order permitting the change of her surname to 'D'. I have of course borne in mind that G was registered with the surname that she currently has. I am further mindful that registration of her name represents acknowledgment of the formal biological link that exists between G and the father. However, whilst always relevant and important considerations, these factors are not in themselves decisive. This is particularly the case where there has been a very significant changes of circumstances for G since the original registration as set out above. Within this context, I am satisfied that less weight attaches in this case to the fact that G was registered with a surname that incorporates the father's surname and that registration represents acknowledgment of the formal biological link that exists between G and the father. Further in this case, having regard to the evidence before the court I am satisfied that there are a range of countervailing reasons which point to a change of surname being in G's best interests having regard to her welfare as the court's paramount consideration.

48. The unchallenged evidence before the court demonstrates that G has only ever been known by, and herself knows, the surname 'D'. G clearly identifies as being an 'D' and considers her family to be that of her mother and her extended maternal family. In the circumstances, the change sought by the mother reflects the reality that has been in place for G for as long, or almost as long as she has understood the concept of having a name, with that part of the surname that she derives from the father being unknown to her, and accordingly holding no meaning for her at this time. In this case the mother and the father are not married to each other and, in the circumstances, it is the mother who had control over the registration of G's birth. Within this context, I am satisfied that the lack of commitment demonstrated by the father to G as evidenced by his lack of engagement in these proceedings, the absence of any contact between G and her father since 2015 and the absence of any exercise by the father of his parental responsibility for G since that date are all factors that point to a change of G's surname being in her best interests.

49. Finally, the factors that must be taken into account by the court when considering a change of surname include those which are likely to affect G in the future. Whilst many children are required to bear the stigma of their parents' criminal conduct by

bearing their surname, I do attach some weight to the impact on G in the future of having a surname incorporating the father's surname. Within context of the rural community in which G resides, in which the father's surname is not a common one, and the notorious nature of a number of the crimes committed by the father that have been the subject of some publicity, I am satisfied that retaining a surname that incorporates that of the father does place G at an appreciable a risk of being stigmatised by association in the future. Whilst not determinative as a factor, I do consider that this is a factor that the court is entitled to, and should take into account in the particular circumstances of this case having regard to the totality of the evidence before the court as a factor weighing in favour of allowing the mother's application to change G's surname as being in her best interests.

50. For all of the reasons set out in the foregoing paragraph, I am satisfied that the evidence before the court in this case that a change of surname name will lead to an improvement from the point of view of the welfare of the G and that, applying the criteria set out in s.1 of the Children Act 1989, including the principle set out in s.1(5) of the Act that the court must apply the criteria in s 1 of the 1989 Act, including s 1(5), such order should be made.

51. Turning next to the application by the mother to terminate the father's parental responsibility, I am satisfied that it is in G's best interests also to grant that application.

52. The authorities set out above make clear that the court must ask itself whether, were the father now to be applying for an order conferring parental responsibility for G on him, an application for parental responsibility would be granted. In seeking the answer to this question the court will consider, amongst other factors, evidence of attachment and a degree of commitment, the presumption being that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case. I also have regard to the fact that the removal of parental responsibility from a parent is serious step that must be justified on the available evidence and proportionate. However, these factors must all be considered with a view to answering that the *fundamental* question for the court, namely whether it can be said to be in G's best interests for the father to have parental responsibility for her, taking her welfare as the court's paramount consideration.

53. In light of the matters set out in this judgment, I am entirely satisfied that were he now to apply for a parental responsibility order, such an order would not be granted to the father. There is no evidence before the court demonstrating an attachment between the father and G. Indeed, G has no memory of her father by reason of the termination of contact consequent upon the father's sexual offending. Likewise, there is no evidence before the court that the father has demonstrated the level of commitment to G that would support the making of a parental responsibility order. First, the father engaged in offending behaviour that was entirely antithetic to his continued safe and consistent involvement in G's upbringing and the exercise of parental responsibility for her. Second, the father has taken no steps since his convictions to address his offending behaviour or the risk he has been assessed to continue to present to adolescent children and former partners so as to permit safe contact and relationship building with G. I am satisfied that this speaks to a lack of commitment on the part of the father to his daughter. That conclusion is reinforced in my judgment by the fact that, third, within these proceedings the father has failed to engage, including failing

to follow through on his stated intention to seek legal advice and apply for orders designed to reinstitute his relationship with G. In addition to these matters, having regard to the nature of the father's convictions, and the risk assessments that are before the court, I am satisfied that were he to have parental responsibility for G there is a significant risk he would seek to use it to seek to control the mother in context of his historic harassment of her and other former partners. In circumstances where the mother would have to consult the father with respect to decision making for G if he had parental responsibility, having regard to the conduct for which the father has been convicted and cautioned and the risks identified that the father has in no way taken steps to mitigate I am further satisfied that this would be intolerable for the mother and would act to destabilise her, with a concomitant impact on the stability, safety and security of G.

54. Within this context, and reminding myself that, other things being equal, a parental responsibility order should be made rather than withheld in an appropriate case and that the removal of parental responsibility from a parent is serious step that must be justified on the available evidence and proportionate, I am entirely satisfied that the father would not succeed in securing parental responsibility if applying for it at this point. In the circumstances, I make an order terminating the father's parental responsibility for G as being manifestly in her best interests.

55. Finally, I turn to the application made by the Children's Guardian for an order pursuant to s.91(14) of the Children Act 1989. It is important to acknowledge that the father does not in this case have a history of making unmeritorious applications in this case. Whilst he has consistently opposed the applications made by the mother but failed to file and serve evidence in opposition, and has stated an intention to make an application but has not done so, these matters are not by themselves generally sufficient to justify an order pursuant to s.91(14) of the 1989 Act. However, as the authorities make clear, in an appropriate case the court may grant an order pursuant to s. 91(14) of the Act notwithstanding that although there is no past history of making unreasonable applications where the facts go beyond the need for a time to settle to a regime ordered by the court or animosity between the adults in dispute or between the local authority and the family and where there is a serious risk that, without the imposition of the order, the child or the primary carers will be subject to unacceptable strain. On balance, I am satisfied that this is such a case.

56. The assessed level of the risk of harm posed by the father in this case to G and to the mother is serious. It is plain that, absent the father taking steps to acknowledge and address that assessed level of risk by engaging in therapeutic or other remedial work, any application he makes for a child arrangements order will inevitably face significant hurdles. Against this, the impact of such an unmeritorious application on the wellbeing of the mother, and hence the security and stability of G is likely to be considerable in light of the matters I have set out in this judgment. Within this context, in my judgment it would not be in G's best interests for the father to be able to issue an application for a child arrangements order without first being required to demonstrate to the court through the mechanism of a permission application that he has taken the steps that are, on the evidence before the court, the obvious precursor to such application having a chance of success. Absent this step, there is plainly a risk, particularly in light of the father's convictions for harassment, that G will be disturbed needlessly by applications that have minimal chance of success because the father has

not taken the steps required to address the matters that presently justify an order that there be no contact between himself and G. Whilst I accept that imposes a *restriction* is on the statutory right of the father to bring proceedings before the court it does not *deny* the father access to the court with respect to G. Rather, the order pursuant to s.91(14) of the Act introduces an additional stage in this case in circumstances where (a) it is plain on the evidence that this is a case in which a parent will need to demonstrate he has addressed the risk he poses *before* the court will be in a position to determine any application for a child arrangements order and (b) where it would not be in G's best interests to become aware of such an application as it would be disruptive and distressing to the mother to be served with such an application, until the court had satisfied itself that the application should proceed. Within this context, I am satisfied that the application of the Children's Guardian for an order under s.91(14) of the 1989 Act should be granted.

57. I am further satisfied that this order should subsist until G reaches 16 years of age. I am mindful that an order of this duration is an exceptional step and that the court must spell out why and what needs to be done to make a successful application in the future. I am satisfied that the context set out in this judgment, and in particular the lack of *any* evidence that the father intends to address his offending behaviour and assessed level of risk means that the father is not yet even at the stage of understanding what he needs to do to *begin* the process by which he will place himself in a position where the court can give serious consideration to any application for permission to apply. Within this context, I am satisfied that an extended order is merited in order to prevent G and the mother being disrupted by premature applications by the father under the Children Act 1989 made before he has undertaken the work required to address the serious risk of harm he currently presents.

58. I also bear in mind once again that throughout the period over which the order pursuant to s.91(14) remains operational it will be open to the father to apply to the court to seek permission to make an application for a child arrangements order in respect of G, supported with relevant evidence that he has taken steps to address offending behaviour and to mitigate the risks he is assessed to present to children and former partners. However, the father should be in no doubt that in order to have a chance of successfully prosecuting an application for permission to apply for a child arrangements order in respect of G, he must first takes steps to acknowledge and address his criminal behaviour and the risks arising therefrom as identified by the Probation Service by undertaking the therapeutic or other interventions that will enable him to do so. Absent such work, and whilst the court will deal with any application for permission on its merits, it must be considered unlikely that any application by the father for permission to apply for a child arrangements order under the Children Act 1989 would be successful.

CONCLUSION

59. In conclusion, I am satisfied that it is in G's best interests to grant each of the applications made by the mother in this case. In the circumstances, I will make a child arrangements order providing for G to live with the mother, discharge the child arrangements order dated 4 December 2014 and make an order that there be no contact between G and the father. I will further grant a specific issue order changing G's surname to 'D' and an order terminating the father's parental responsibility for G. Finally, upon the application of the Children's Guardian, I will make an order that that

no application for an order under the Children Act 1989 may be made with respect to G by the father without leave of the court, such order to last until G reaches the age of 16 years.

60. That is my judgment.