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Neutral Citation No [2023] EWHC 1879 (Fam)

IN THE HIGH COURT OF JUSTICE

No. FD22P00662

FAMILY DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 9 February 2023

Before:

SIR ANDREW McFARLANE

THE PRESIDENT OF THE FAMILY DIVISION

(In Private)

B E T W E E N :

LONDON BOROUGH OF BARKING & DAGENHAM

Applicant

- and -

(1) RM

(2) LS

(3) THE CHILDREN

(BY their children's guardian Rosemary Boulton)

Respondents

MR R JONES and MISS M ELSWORTH (instructed by **London Borough of Barking & Dagenham**) appeared on behalf of the **Applicant**.

MISS O MAGENNIS (instructed by **L. Collins of Copperstone Solicitors**) appeared on behalf of the **First Respondent**.

THE SECOND RESPONDENT did not appear and was not represented.

MISS J HENDRICK (instructed by **Dawson Cornwell LLP**) appeared on behalf of the Guardian.

J U D G M E N T

THE PRESIDENT:

- 1 This is a sensitive application brought in the course of ongoing care proceedings with respect to two young children. The case itself, after a lengthy period, is soon to be listed for IRH.
- 2 At least in October 2022, if not before, the local authority became aware that the mother in the proceedings was born with the status of HIV positive. She has lived her life with that status. It is a very sensitive matter. She tells the court in her witness statement that her family knew of this circumstance. She was born HIV positive because her mother was HIV positive, but it has caused difficulties in the family and polarises opinion about her.
- 3 She has been in a relationship for a significant amount of time with the children's father. She has never told him that she is HIV positive and although they are separated they see each other on a daily basis because both are seemingly, and this is a welcome part of the case, very much involved in the daily life of the children. She does not wish him to be told at any stage that she is HIV positive.
- 4 The local authority applied to the court for direction, submitting that this information, despite the mother's understandable concerns, should be disclosed to the father. The mother made a cross-application for the court to direct that the information should be withheld from him.
- 5 The matter was heard initially by Keehan J, who made a determination. That went to the Court of Appeal, his decision was overturned and the matter comes back to me as a different tribunal now to hear the matter again.
- 6 The case was listed this morning for a case management hearing and the initial question for the court is whether the father should be given notice in general terms, without any specific

reference to the information itself, to the fact that the court is being asked to direct that information which will be relevant in the proceedings should be withheld from him.

7 The position of the parties is that the mother very strongly opposed the father being given any notice at all. That position is supported by the children's guardian. The local authority, however, submit that he should be given notice of the fact that an application of this nature is being made so that he can be represented and heard upon it.

8 This is not an easy decision. The baseline, in term of authority as to the way the court should proceed, is to be found in the decision of *Re M (Disclosure)* [1998] 2FLR at 1028, a decision of LJJ Pill and Thorpe in which, as it happens, I was leading counsel for the appellant mother, who was the person who, on the order of the judge in the lower court, had been excluded from knowledge of the sensitive information in that case.

9 The judgment of LJ Thorpe summarised the background to the jurisprudence as it had developed. In particular, the House of Lords decision in *Re D* [1996] AC 593, which set out the broad principles. But also, more recently, a decision of Johnson J in a case of *Re C (Disclosure)* [1996] 1 FLR 797. Lord Justice Thorpe adopted a summary presented to the court in *Re M* of the approach put forward by Johnson J in *Re C* in these terms:

1. "The application should be transferred to the High Court.
2. Notice of the application should be given to the party from whom the material is intended to be withheld.
3. It is essential that any party to whom the information was not to be revealed should have the opportunity of making representations to the court.
4. Finally, in many cases it would appropriate to follow the practice endorsed in *Re K* (House of Lords) in 1965, namely, disclosure in the first instance to counsel only and thereafter obviously counsel will have the opportunity to apply for onward transmission to the client."

The judge of Thorpe LJ, which was endorsed by Pill LJ, plainly accepted that summary.

- 10 Insofar as the word “essential” is included in that summary, Mr Jones, leading Miss Elsworth, on behalf of the local authority before this court, rightly points out that Johnson J, in *Re C*, did contemplate that there might be a case where notice was not given to the party who was to be kept in the dark but that he, Johnson J, could not envisage ever taking such a step. It is accepted that that is the short but clear statement of authority. It is a Court of Appeal authority and this court must follow it.
- 11 Subsequent cases have sought to apply the approach and it is of particular note that two decisions relate to the topic to HIV status. The first is *Re P* [2006] 2 FLR at 50 and the second is the *London Borough of Brent v N & P* [2005] EWHC 1676 (Fam). The first of those involved a mother who was HIV positive and the issue was in private law proceedings relating to the arrangements for handover at that contact. Mr Justice Bodey indicated that this was a rare case where notice would not be given to the father. The second case, *Re B*, before Sumner J, concerned the fact that the foster carer was HIV positive and the question was whether or not that information should be disclosed to the biological father in the course of care proceedings and, again, the judge decided that disclosure should not be given and notice was not given to the father of the hearing that was taking place about that issue.
- 12 Against that background, the local authority submits that the court should give notification to the father on the basic approach of first principles, backed up by *Re M*, that he does need to know that there is an application. The submission is also made, as I understand it, that it is going to be difficult to conduct the proceedings in a way that does not alert him to the fact that there is undisclosed material which the court is relying upon and that they, to use my phrase, not Mr Jones’s, the nettle should be grasped at this stage because not to do so will simply allow a situation to develop where he becomes aware that there is this information but he has not been heard at the time that the court made his decision to withhold it.

13 For the mother, she is extremely concerned about this situation. She rightly, and I entirely accept this, perceives that if the father is told today, as it might be, that there is going to be a hearing about whether or not information should be kept from him, he will spend the time between now and whenever that hearing is “pestering” her as to what it is that the case is all about and that would be extremely difficult for her and although the submission was not made to me in these terms the children are around whenever the parents are around and if there was a dispute between them about this it would not be at all easy to handle.

14 More generally, the mother very strongly submits that nothing of this nature about her HIV status should ever come to the knowledge of the father because he is likely, on his track record, to use it against her to “talk it round the town”, as it were, and that would cause significant problems for her. It may also damage the working relationship that they have which, as I understand it, is amiable and very child-focused on a day-to-day basis, where they interact for the benefit of their two children and assist the lady who is regarded as the maternal grandmother in caring for them.

15 On behalf of the guardian, the guardian’s position is different from the mother’s in that the guardian’s underlying position is that this information about HIV status is important within the substantive case. The written submission of Miss Hendrick, counsel for the guardian, says this:

“The mother’s argument throughout the appeal process relies heavily on the concept that this information is not relevant to anything other than the father’s knowledge of the mother’s HIV status, i.e., it is argued that it has no impact on any welfare decision to be made in relation to the children. This is not agreed on behalf of the children’s guardian and it is submitted that the issue of the mother’s HIV status is a fundamental part of the case in both the context of welfare and threshold.”

16 Despite that position, which envisages the issue of HIV status being one of the important matters which are raised at the care final hearing, the guardian nevertheless submits that for the reasons that the mother puts forward at this preliminary stage, it is not necessary for the

father to be given any notice of it at all. She, from her perspective, and I would anticipate she has seen how things are in this family, she, like the mother, puts a premium on not rocking the boat in regard to the relationship that the two parents have with each other in their day-to-day care of the children. The submission is also made by Miss Magennis on behalf of the mother and Miss Hendrick on behalf of the guardian, that the position of the father is going to be protected if the case is to proceed on this issue without him because the local authority will be arguing in favour of disclosure, as will the children's guardian. So, his pitch, as it were, if he were given notice, is going to be covered before the court.

17 So the submission for the mother and the guardian is really this, the court should get on with the hearing without giving any notice to the father. If the court decides that the information should be disclosed to him, then so be it and nothing will be lost by his absence at the hearing about disclosure and if it is not disclosed but the father, as is accepted, has to be told there is information that is not being disclosed, that will be altogether more easily policed, to use my word, with the court explaining to the father how life is to be conducted in relation to dealings with the mother and the children and the court retaining control rather than matters being left to the father and the mother on the ground, him simply being given notice of the fact that the application is going to be heard but not what it is about.

18 This is not an easy decision to take and it is an important decision. Were I to be sitting where the mother sits, I would be extremely anxious about the decision that the court is being invited to take and I certainly approach matters on that basis and respecting her position.

19 Looking forward, given the focus that the guardian now puts upon the mother's HIV status in the main hearing, it is very difficult to understand how the case can be litigated before a Care Court in a way that does not put the father on notice to this and cause him to be as inquisitive as the mother fears he might be in the short term now. All parties agree he has

got to be told that there is material that he is not being given information about which the court will take into account and so I have that matter very much in mind.

20 Although the father's position, as one presumes it would be, will be argued before the court on the issue of disclosure with the local authority and the guardian being in favour of disclosure, in my view, that is not the same as a party being given notice of the fact that a hearing is taking place and having their own representative able to make submissions on their own behalf to the court. The right to a fair trial under Article 6 is a very important right. The court should not compromise it to any significant degree unless there are very good reasons for doing so. That line of thinking, although in 1998 not cast in that way, will have been in the minds of Johnson J and the Court of Appeal in *Re M* in holding that it was essential for any party to whom the information was not to be revealed having an opportunity to make representations to the court. It is the basic default position and whilst one avoids using the word "exceptional", to my mind, very strong and clear reasons have to be put forward to justify proceeding without giving any notice to the father of what the court is doing.

21 In the course of submissions, I canvassed a way forward which is that the father is simply told of a hearing date, the next hearing in the case. That would be unremarkable. And if that is all he is told then it is unlikely to cause him to ask the mother anything about the substance of the hearing. The father's lawyers would be told, in essence, that there is an application to withhold information from him but they would be directed by the court order not to give the father any information about the nature of that application. They could therefore prepare for the hearing, they could be made privy to any legal submissions that are to be made about the legal approach without being told the substance of the information and then the court would proceed at the next hearing, with the father represented before the court and decisions could be then taken as to what information, if any, is given to his representatives about the substance of the information itself, namely, the mother's HIV

status. I am persuaded that that is the way we should proceed and the father's right to a fair hearing requires the court to give him basic notice.

- 22 I have taken account of the decision of *Re P* and the separate decision involving Brent Council, but I do observe that in both those cases the HIV status of the two individuals involved was of marginal importance in relation to the issue in the case and approaching the matter on the basis of proportionality the obvious essentially private nature of information about HIV status outweighed the need to pass on the factual information to one or other of the parties in the case.
- 23 That is not the position here. The guardian's submissions, which may or may not be right, put the HIV status of the mother in the centre of the spotlight in the care proceedings. That alters the approach of the court from the approach taken in those two cases, *P* and *Brent*, both of which describe what is a course of action outside the approach that the Court of Appeal decision in *Re M* says must be the court's approach in these cases.
- 24 So, despite my understanding of the mother's dismay at the decision that I make, I consider it is a proportionate step to take to direct that the father is to be given notice of the date of the hearing when this matter will be considered. He is not to be given any notice of the substance of the application or the fact that there is an application for disclosure. His legal team, that is the solicitors and counsel, if instructed, are to be given notice the nature of the application, they are to be given copies of any legal submissions that are to be made but they are not to be told at the moment what the nature of the information is. We will then proceed at the next hearing with an initial discussion as to what, if any, information they are given and how the hearing is to be conducted.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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