



Neutral Citation Number: [2023] EWHC 291 (Fam)

Case No: RG19P01136

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

Between:

B **Applicant**
- and -

C **Respondent**
-and-

The Secretary of State for Justice

Mr Michael Gration KC and Ms Julia Townend (instructed by KJ Smith Solicitors) for the Applicant

The Second Respondent appears in person

Ms Carine Patry KC and Mr Alex Laing (instructed by the Government Legal Department) for the Intervenor

Hearing dates: 9 February 2023

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.

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in it) to be published on condition always that the names and the addresses of the parties and the children must not be published.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. In these proceedings I am concerned with the question of whether a person with foreign parental responsibility for the subject child should receive notice of these proceedings pursuant to FPR r. 12.4. The circumstances of this case are highly unusual, if not unique.
2. The subject child is A, known as ‘A’. The applicant is the biological mother of A, represented *pro bono* by Mr Michael Gration, King’s Counsel and Ms Julia Townend of counsel. The biological father of the child, as confirmed by DNA testing, is C, who appears in person. He is currently serving a twenty-three year sentence of imprisonment for child sexual offences in circumstances that will become apparent. Whilst a production order had been made by the court for today’s hearing, the prison had not booked a place for the father in the video suite. In the circumstances, it was not possible for him to attend the hearing. Given the limited scope of the hearing, I determined to proceed in his absence with liberty to him to apply to set aside the directions the court is invited to make today.
3. The Secretary of State for Justice has accepted an invitation to intervene in these proceedings. The Secretary of State is represented by Ms Carine Patry, King’s Counsel and Mr Alex Laing of counsel. The person with foreign parental responsibility for A, D, has not been given notice of these proceedings to date, his current whereabouts being at present unknown.
4. This matter was listed for final hearing today. In the event, the hearing proceeded as an uncontested adjournment application by the Secretary of State. Whilst, in the circumstances where the adjournment was unopposed and the court was satisfied that such an adjournment was necessary the court was initially minded to deal with the adjournment application on paper, within the body of the C2 application for the adjournment, the Secretary of State raised again the issue of notice of the proceedings being given to D. Whilst this issue had been considered by the court at an earlier hearing, this was before the receipt of a report from an expert in the law of the foreign country in which A was born confirming that D holds parental responsibility for A under the law of that foreign country and, hence, retains it in this jurisdiction by operation of Art 16 of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter ‘the 1996 Hague Convention’) now that A is habitually resident here. In the circumstances, I determined that the matter should remain in the list so that the issue of notice could be revisited.
5. The mother, for understandable reasons, opposes any suggestion that D should be given notice of these proceedings. The reasons the mother advances in support of this position are set out in the Position Statement of Mr Gration and Ms Townend, supplemented this morning by Mr Gration’s oral submissions. Whilst formally neutral on the issue of notice to D, on behalf of the Secretary of State Ms Patry and Mr Laing made a number of submissions that have caused me, ultimately, to consider it appropriate for attempts to be made to locate D with a view to giving him notice of these proceedings, subject to that process being capable of completion within the time

available between now and the re-listed final hearing and careful control of the information provided to D should he seek to engage in these proceedings.

BACKGROUND

6. It is not necessary for the purposes of this case management decision to set out the background to this matter in detail. The relative simplicity of the following account of facts belies the complexity of the legal situation to which those facts give rise and the emotional pain that they have caused, particularly to the applicant mother.
7. The mother and father met in the foreign country in which A was born in 2016 via the Tinder dating app. During the course of the parents' relationship in that jurisdiction the father claimed he was a man called 'D' and used a passport in the name of 'D'. After A was born in 2017, his birth was registered in the foreign country in which A was born and the father's name on A's birth certificate was given as 'D'. It subsequently transpired that the passport used by the father to register A's birth in the foreign country had been stolen from the person who was in fact D, that the father's name was in fact C and that he was wanted in the United Kingdom in connection with a series of serious child sex offences. The father was subsequently arrested in the foreign country in which A was born and extradited to this jurisdiction, where he was convicted of sexual offences against children and sentenced to twenty-three years in prison.
8. The ensuing legal consequences of the foregoing situation are complicated. As I have already noted, the expert in the law of the relevant foreign country instructed in these proceedings has confirmed that as a result of the circumstances summarised above, D has parental responsibility for A under that foreign law, which subsists in this jurisdiction by operation of Art 16 of the Hague Convention now that A is habitually resident here. As I have noted, the current whereabouts of D are not known. He is therefore at present unaware that the theft of his passport in the foreign country in which A was born has led, ultimately, to him holding parental responsibility under the law of that foreign country for a child that is not his, with all of the obligations consequent thereon.
9. The Children Act 1989 does not apparently include a power to terminate the parental responsibility acquired by D upon the registration of the birth of A in the foreign country in which A was born and which subsists pursuant to Art 16 of the 1996 Hague Convention following A moving to the jurisdiction of England and Wales. A is now habitually resident in England. In the circumstances, the courts of England and Wales have jurisdiction in relation to A pursuant to Art 5 of the 1996 Hague Convention.
10. Within the context of her applications to this court, the mother suggests various legal routes by which the court could exercise power to terminate D's now confirmed parental responsibility for A or by which such a power could be created. In particular, the mother contends that it may be necessary to read down s.4(2A) of the Children Act 1989 or for the court to make a declaration that that provision is incompatible with the European Convention on Human Rights. Alternatively, it is proposed that the court may exercise its inherent jurisdiction to terminate the parental responsibility or rely on the public policy exception within Art 22 of the 1996 Hague Convention. The position of the Secretary of State remains to be definitively articulated, the reason for

his adjournment application being the need to consult across a number of government departments in circumstances where the outcome of this case could have wide ramifications. However, and provisionally, on behalf of the Secretary of State Ms Patry and Mr Laing indicate that it is likely he will oppose the solutions advanced on behalf of the mother and propose others.

11. The parties' competing positions will fall to be determined at the final hearing. At this stage, the court must consider whether, in light of it being confirmed that D holds parental responsibility for A under the law of the foreign country in which A was born and which subsists in this jurisdiction under Art 16 of the 1996 Hague Convention, D should be given notice of these proceedings.

LAW

12. FPR r. 12.4 provides as follows with respect to the giving of notice of proceedings to a person with foreign parental responsibility:

“12.4 Notice of proceedings to person with foreign parental responsibility

(1) This rule applies where a child is subject to proceedings to which this Part applies and –

(a) a person holds or is believed to hold parental responsibility for the child under the law of another State which subsists in accordance with Article 16 of the 1996 Hague Convention following the child becoming habitually resident in a territorial unit of the United Kingdom; and

(b) that person is not otherwise required to be joined as a respondent under rule 12.3.

(2) Subject to paragraph (2A), The applicant shall give notice of the proceedings to any person to whom the applicant believes paragraph (1) applies in any case in which a person whom the applicant believed to have parental responsibility under the 1989 Act would be a respondent to those proceedings in accordance with rule 12.3.

(2A) Notice shall not be given to a person to whom the applicant believes paragraph (1) applies if the court directs that such notice is not necessary.

(3) Unless a direction has been made under paragraph (2A), The applicant and every respondent to the proceedings shall provide such details as they possess as to the identity and whereabouts of any person they believe to hold parental responsibility for the child in accordance with paragraph (1) to the court officer, upon making, or responding to the application as appropriate.

(4) Where the existence of a person who is believed to have parental responsibility for the child in accordance with paragraph (1) only becomes apparent to a party at a later date during the proceedings, that party must notify the court officer of those details at the earliest opportunity.

(5) Where a person to whom paragraph (1) applies receives notice of proceedings, that person may apply to the court to be joined as a party using the Part 18 procedure.”

13. FPR r. 12.4 accordingly applies to a person who holds parental responsibility for the subject child under the law of another State, which subsists under Art 16 of the 1996 Hague Convention following the child becoming habitually resident in this jurisdiction (FPR r.12.4(1)(a)) *and* who is not required to be joined as a respondent under rule FPR r. 12.3 otherwise than by virtue of his holding parental responsibility (FPR r. 12.4(1)(b)).
14. Having regard to the terms of FPR r. 12.4(1)(b), the effect of which as I have noted is to render FPR r.12.4 applicable only where the holder of foreign parental responsibility is not otherwise required to be joined as a respondent under rule 12.3, it is also necessary to consider the rules concerning who is and who is not required to be joined as a respondent to these proceedings. The applications before the court are as follows:
 - i) An application under the Children Act 1989 for an order terminating the parental responsibility of the father (if he has acquired it).
 - ii) An application for an order terminating the parental responsibility of D.
 - iii) An application for appropriate relief under the inherent jurisdiction of the High Court.
 - iv) A declaration of incompatibility in relation to s.4(2A) of the Children Act 1989 with the Human Rights Act 1998.
 - v) An application for certain orders pursuant to section 8 of the Children Act 1989.
15. FPR r. 12.1 sets out the scope of the rules in FPR Part 12, which includes private law proceedings under Part II of the Children Act 1989 and proceeding under the inherent jurisdiction of the High Court. Within this context, the table set out under FPR r.12.3 provides that every person whom the applicant believes to have parental responsibility for a child *will* be a respondent to proceedings for an order under ss. 4(2A), 4ZA(5) or 4A(3) of the Children Act 1989 terminating a parental responsibility order or agreement. With respect to an order relating to the exercise of the court’s inherent jurisdiction outside wardship, FPR r.12.3 provides that the respondents shall be the parent or guardian of the child and any person who has an interest in or relationship with the child.
16. Where a person falls within the terms of FPR 12.4(1) then, subject to FPR r.12.4(2A) the applicant *must* give notice of the proceedings to that person if that person would have been a respondent on the grounds that it was believed they had parental responsibility under the Children Act 1989 under FPR r.12.3.
17. FPR r 12.4(2A) was inserted by the Family Procedure (Amendment) Rules 2020. Whilst not an easy provision in light of the double negative it contains, it permits the court to direct that notice of proceedings need not be given to a person with foreign

parental responsibility where the giving of notice is not necessary. The Secretary of State has helpfully drawn the attention of the court to the Explanatory Memorandum to the Family Procedure (Amendment) Rules 2020, which provides as follows with respect to the amendments concerning the rules governing the notification of persons with foreign parental responsibility:

“Exception to requirements to notify persons with foreign parental responsibility and related amendments: amendments made by rules 16, 20, 21 and 24.

Rules 12.4 and 14.4 of the Family Procedure Rules contain requirements for applicants in certain children proceedings, including adoption proceedings, to notify individuals who hold or are believed to hold parental responsibility for the child under the law of another country. However, case law is clear that a court can make exceptions to these requirements in very limited circumstances. The amendments to rules 12.4 and 14.4 clarify that an exception can be sought from the court, and that the requirement will not apply if such an exception is granted. An amendment is also made to rule 14.21 to clarify that similar directions can be sought, in adoption proceedings regarding parents without parental responsibility, not just from the High Court but also from the family court, and rule 19.4 is amended in consequence of this change.”

18. The proper interpretation of FPR r. 12.4(2A), and in particular the ambit of the court’s discretion under that rule, has not been the subject of consideration in the authorities. Whilst recognising the obvious distinctions, Mr Gration and Ms Townend suggest that an imperfect analogy is offered by the authorities concerning the approach to be taken to providing notice to fathers without parental responsibility where a child has been relinquished for adoption by a mother following a concealed pregnancy.
19. In such cases, FPR r. 14.21 permits the adoption agency or local authority to ask the court for directions as to the need to give notice of an intention to place a child for adoption. Recognising that the facts are far from the present case, Mr Gration submits that the leading authority on FPR r. 14.21, namely *A, B And C (Adoption: Notification of Fathers And Relatives)* [2020] EWCA Civ 41, is relevant in this case as, in circumstances where in *A, B And C (Adoption: Notification of Fathers And Relatives)* the Court of Appeal suggested that absence of notification will be the exception, the decision explains why the Explanatory Note to the to the Family Procedure (Amendment) Rules 2020 is drafted in the way it is, applying as it does both FPR r. 12 and FPR r. 14, which is concerned specifically with adoption.
20. FPR r. 12.3(3)(b) and FPR r. 14(3)(b) (to which Mr Gration and Ms Townend also refer) permits the court to remove a person who is automatically a respondent to the proceedings, including a father with parental responsibility, as a party to the proceedings. The authorities which deal with the removal of a father with parental responsibility as a party to proceedings to which Part 12 or Part 14 apply also emphasise the exceptional nature of an order removing a parent with parental responsibility as a party to the proceedings (see *Re A (Father: Knowledge of Child’s Birth)* [2011] 2 FLR 123).

DISCUSSION

21. On balance, I am satisfied that D should be given notice of these proceedings in circumstances where it has now been confirmed that he holds foreign parental responsibility for A. My reasons for so deciding are as follows.
22. I am satisfied that D falls within the terms of FPR r.12.4(1), at least in respect of the applicant's application for an order under s.4(2A) of the Children Act 1989. For the reasons I have set out, he is a person who holds parental responsibility for A under the law of another State, which subsists under Art 16 of the 1996 Hague Convention following the child becoming habitually resident in this jurisdiction (FPR r.12.4(1) (a)), and he is not required to be joined as a respondent under rule FPR r. 12.3 in respect of the application under s. 4(2A) of the Children Act 1989 otherwise than by virtue of his holding parental responsibility. With respect to the application under the inherent jurisdiction, it is arguable that D is a person who 'has an interest in' A for the purpose of FPR r.12.3 and therefore he is required to be joined to that application otherwise than by virtue of his holding parental responsibility for the purposes of FPR r.12.4(1)(b).
23. Within the foregoing context, with respect to the mother's application under s.4(2A) of the Children Act 1989, the question pursuant to FPR r. 12.4(2A) is whether it is necessary for D to be given notice of the proceedings. With respect to the mother's application under the inherent jurisdiction however, it is arguable that the question is whether, exceptionally, it is necessary to dispense with notice to D. For the present purposes, I am satisfied that these two positions amount broadly to the same question, namely is it necessary in this case for D to have notice of the proceedings.
24. I understand why in this case, in order to assist the court, Mr Gratton and Ms Townend sought to draw an analogy with the cases under FPR r.14.21 dealing with the need to give fathers without parental responsibility notice of an intention to place a child for adoption, and the cases under FPR r.12.3(3)(b) and r. 14.3(3)(b) dealing with removing a father with parental responsibility as a party to the proceedings. However, and as anticipated by Mr Gratton and Ms Townend, I find the analogy of limited assistance in this case in circumstances where the facts of this case are *so* significantly removed from the cases under FPR r.14.21 and rr. 12.3(3)(b) and 14.3(3) (b).
25. By reason of the theft and fraud committed by the father, D has parental responsibility for A in the circumstances I have described. By s.3 of the Children Act 1989, this confers on D in respect of A all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. Whilst it is unlikely that steps would ever be taken to enforce them, the status conferred on D by virtue of being registered on the child's birth certificate as the A's father also carries with it legal obligations including, for example, potentially in some jurisdictions financial provision for the child. Within this context, the subject matter of these proceedings is the question of whether and how parental responsibility for A can be removed from D. In the circumstances, I am satisfied that D has an acute interest in the outcome of the proceedings.
26. This conclusion is reinforced by the fact that, as matters stand, it would appear that there is no obvious legal mechanism to divest D of parental responsibility for A. Within this context, whilst if given notice of the proceedings D may wish to have no involvement with them, in my view it is equally likely that he would wish to make

strenuous arguments to the court that a way has to be found to relieve him of a legal status, and the obligations consequent thereon, that he did not ask for and which has been conferred on him only as the result of theft and fraud, in particular given that he will remain subject to those obligations if a way is not found. Again, a person who, as it has now been confirmed in this case, has been wrongfully attributed parental responsibility as the result of theft and fraud has an acute interest in the question of whether the law can remedy that situation. As Ms Patry rightly noted in her submissions, such a person may well wish to come to the court and argue that there *must* be a way to remedy a situation he finds himself in through no fault of his own.

27. Further, and in this context, I am satisfied that D has an Art 6 right to a fair trial in respect of the question of whether the status currently conferred on him and the legal obligations flowing from that status should be removed. Whilst I accept the submission of Mr Gratton and Ms Townend that D does not have Art 8 rights in respect of A, as I held in *Bury Metropolitan Borough Council v ML* [2022] EWHC 746 (Fam), civil rights and obligations for the purposes of Art 6 will include those derived from parental responsibility:

“It is plain from the wording of Art 6 that it cannot be the case that a father with parental responsibility conferred by domestic legislation derives his civil rights and obligations for the purposes of Art 6 only from such Art 8 rights as he is able to establish. Rather, the father's civil rights and obligations for the purposes of Art 6 will extend to those derived from the fact that the father has parental responsibility by operation of law under the Children Act 1989 s.3 (which defines parental responsibility as meaning "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property") and a formal status in proceedings derived from the FPR 2010 r. 12.3. This much was recognised by Court of Appeal in *Re B (Children)* [2021] EWCA Civ 122 , where Macur LJ held at [13]:

“There will obviously be cases where the issue of Article 8 rights will take considerably more examination. The erstwhile family ties that are recognised by designation of parental responsibility do not always march hand in hand with the exercise of those rights as to demand the protection of Article 8 and, as a corollary, Article 6, of the HRA and vice versa. However, the statutory framework provided by the Family Procedure Rules differentiates between a father with and those without parental authority even if they do have Article 8 rights. In the former case the father is an automatic party, in the latter, he must be notified of the proceedings. The imperative text in FPR Part 12, rule 12 and FPR PD 12C recognises the importance of the father, or other parent's, participation in the family proceedings beyond, I would suggest, for reasons of procedural fairness. However, in either case, the Court in accordance with FPR rule 6.1 and 6.36 may dispense with service upon him/her if in the circumstances it is necessary to safeguard the welfare interests of another predominant party and/or the child.”

28. I understand entirely why the mother is worried about the impact of giving D notice of the proceedings on her privacy. However, I am satisfied that even if D wishes to

be joined as a party having been given notice of the proceedings, it is unlikely to be necessary in this case for him to receive any personal information concerning the mother. The issue before the court in these proceedings is primarily a legal one, concentrating on the question of whether it is possible for the court to divest D of parental responsibility for A. The determination of that question is unlikely to require D receiving private information concerning the mother or A. By FPR r. 6.36 the court can make orders dispensing with the service on D of any document that is to be served in these proceedings where appropriate.

29. I am also acutely conscious of the impact on the mother and A of further delay in this case. In circumstances where, at best, the only information concerning D currently available is his name, date of birth and city of birth, it will take time to locate him, if indeed it remains possible to do so. However, some further delay in this case is now inevitable in circumstances where I am satisfied that it is appropriate to grant the application made by the Secretary of State for a further adjournment of this matter for the reasons I have described. In those circumstances, some time is now available to undertake the task of seeking D's whereabouts. The Secretary of State has indicated his willingness to assist with that task and this court can make disclosure orders to public agencies with a view to identifying D's current address. I am clear that any such search will be time limited and must be completed in a timescale commensurate with the listing of the adjourned final hearing in this matter.

CONCLUSION

30. For the reasons set out in this judgment, I am satisfied that it is necessary in this case for D to have notice of the proceedings in circumstances where it has now been confirmed that he holds foreign parental responsibility for A and I so direct. If the parties consider it is necessary for the court to make disclosure orders against public agencies in order to facilitate that outcome, I will consider such applications on paper if they are sought by agreement.
31. That is my judgment.