Neutral Citation [2023] EWFC 122 (B)
SD23C50107

IN THE FAMILY COURT AT HASTINGS

The County Court
Bohemia Road
Hastings

21 July 2023

Before

RECORDER MCKENDRICK KC

Between

A COUNTY COUNCIL

Applicant

AND

(1) A MOTHER

(2) A FATHER

(3) M (A Child, by her Guardian**)**

Respondents

Mr Christopher Rice instructed by the Local Authority Solicitor for the applicant
Ms Sarah Forster instructed by EJ Moyle for the first respondent
Mr Joseph Stanger of Horsham Family Lawyers for the second respondent
Mr James Sharpe instructed by GoodLaw Solicitors for the third respondent

APPROVED JUDGMENT

This judgment was handed down remotely at 14.00, 21 July 2023 by circulation to the parties' representative by email and by release to the National Archives

The Recorder:

Introduction

1. By way of an application, dated 8 June 2023, the first respondent seeks an order discharging the second respondent from these proceedings. The proceedings seek to determine the applicant's application, dated 16 May 2023, for a care order in respect of a child (a girl) born in January 2011, now aged 12 years old. I shall refer to her throughout as M.

2. After a short hearing at 14.00 on 14 July 2023 at which the advocates made submissions, I reserved judgment. After reflecting on the written evidence and the submissions made, I dismiss the mother's application for the reasons set out in this judgment.

3. Further necessary documents were provided to the court between 17-19 July 2023. A draft embargoed judgment was provided to the advocates on 20 July 2023. All parties agreed to publication of an anonymised judgment.

The Background and the Proceedings

4. The first respondent is the mother of M. The second respondent is M's father. They were in relationship from 2005 until May 2011. They married in 2009. They divorced in October 2013. M was born during the marriage. Both the first and second respondents have parental responsibility for M. The first respondent has filed a witness statement in support of her application to discharge the second respondent, dated 12 June 2023. In that witness statement she gives evidence that she left the relationship and the marriage because of the domestic abuse and domestic violence she suffered from the second respondent. She gives evidence that the second respondent was also coercive and controlling of her. She says that in 2005 he pushed her head through a window which caused her to suffer two black eyes and a broken nose. She says he forced her to undergo two abortions. She gives evidence that in 2006 he kicked her down the stairs. In 2007, she says the second respondent bent her fingers back to the extent she required to attend hospital and her fingers were placed in a splint. In 2010, she says the second respondent grabbed her by the throat, punched her and threw her to the bed. She says the second respondent assaulted her because she was pregnant and, contrary to his wishes, did not want to terminate the pregnancy. She gives evidence that these are examples of many incidents of domestic violence. She also says his controlling behaviours led him to lock windows and doors at their home to restrict her liberty. She gives evidence that she was terrified of him.

5. In her witness statement, the first respondent also gives evidence that the second respondent had little or no interest in the welfare and upbringing of M. After the first respondent left the home and ended the relationship she gives evidence that the she only saw the second respondent in two occasions: once in November 2011 and once at a garden centre on 24 December 2011. Both occasions were to permit the second respondent contact with his daughter, M. On the last occasions she gives evidence that he became very aggressive and therefore she 'fled the area,' and moved away and changed her name to protect herself and M.

6. The second respondent issued proceedings in March 2012 for the purposes of having contact with M. The proceedings were concluded by way of an order of District Judge Prigg, dated 3 August 2015.The judge dismissed the application for direct contact and

ordered that it was in M's best interests for there to be annual indirect contact (letters and photographs) between M and (i) the second respondent; (ii) the second respondent's parents (M's paternal grandparents); and (iii) the second respondent's other child (M's half sibling). The order states the first respondent was to keep these letters and photographs and to show them to M.

7. The final order of District Judge Prigg followed a fact finding hearing. At the hearing of the application before me, I queried what facts were found and what orders were made. The first respondent's solicitor helpfully sent me documents from those proceedings on 17 July 2023. I made an order on 14 July 2023 to disclose those documents from the earlier private law proceedings into these public law proceedings. Included within the documents is a 'schedule of allegations' and a note of an *ex tempore* judgment of District Judge Dowell following a fact finding hearing on 22 November 2012. It is not clear who authored the note or whether the district judge approved the note of judgment. The following findings appear to have been made and I quote them from a schedule attached to the note of judgment:

    a. "Argument in kitchen. Water fell over [X] unintentionally. F pushed M so severely that caused her head to hit the window causing some pain and at least black eyes."
    b. "F placed foot in M's back; his reckless or angry reaction caused M to fall down the stairs. M had grazed shoulder, pain t right side of face. In hospital one hour."
    c. "M did not trap finger in door. M's explanation was the F grabbed the phone and inadvertently hurt M's finger"
    d. "M and F had an argument, shouting involved. F hit M in the abdomen (on the stairs). F assaulted M in area between the ribs and the hips knowing that M was three months pregnant. F sat on M (in the bedroom)."

8. M is, as I understand it, is a reference to the mother, the first respondent and F is a reference to the Father, the second respondent. I note the schedule contains several allegations in respect of which there are no findings. Some of the allegations made in respect of which there are no findings are similar to those set out in the first respondent's witness statement to discharge the second respondent.

9. The first respondent witness statement gives evidence that notwithstanding the final order made in 2015 for indirect contact, she is unaware of any attempt by the second respondent to make use of the order and send a letter or photograph. She says there has been no contact since then. I am not entirely clear when there was direct or indirect contact between the second respondent and M prior to the 2015 order.

10. The first respondent states she has post-traumatic stress disorder arising out of the relationship. She has high levels of anxiety, nightmares and a lack of sleep. She gives evidence that "Even now the possibility of seeing [the second respondent] causes me to be on the edge of panic and I quickly become overwhelmed with fear and reduced to tears. I have spent years being frightened and living in fear of [the second respondent]. This has caused me to be hyper-vigilant when I am out and about."

11. She states that M 'does not have any memories of her father as she was just a tiny baby when she last saw him'. The first respondent reports that M does not wish to see

her father. She states she believes that the second respondent poses a risk to M and to herself.

12. In addition, the first respondent filed and served a witness statement from her father in support of her application to discharge the second respondent.

13. The application is to discharge the second respondent from the public law proceedings about M, brought by the applicant. The interim threshold document filed and served is dated 24 May 2023. It sets out allegations of the first respondent's serious drug misuse involving cocaine and cannabis. It alleges she was found in a car, following a collision, holding a 'crack (cocaine) pipe' and in the possession of class A drugs. The document goes on to set out allegations of neglectful parenting of M.

14. M was placed in foster care in early March 2023, on the basis of a section 20 Children Act 1989 (hereafter "the 1989 Act") agreement between the applicant and first respondent.

15. At a hearing on 24 May 2023 District Judge Spanton made an interim care order in respect of M. I understand at that hearing the applicant, first and third respondents were all legally represented. The second respondent was neither present nor represented, being, at that stage, unaware of the proceedings. The judge made a series of important case management decisions and listed the proceedings for an Issue Resolution Hearing on 9 October 2023.

16. The judge ordered that the hearing of the first respondent's application would be listed to be heard at a hearing with a two hour time estimate. The order made directions for the applicant (in the substantive proceedings) to write to the second respondent with a copy of the judge's separate order (not the detailed case management order referenced in the paragraph above) and a copy of the first respondent's application to discharge him. It was ordered that all respondents to the first respondent's application were to file and serve statements in response by 14 June 2023. The District Judge also ordered:

> *"Pending determination of the mother's application the father shall only have sight of those documents agreed between the parties, redacted and that are necessary for the discharge hearing*
>
> *No other document shall be sent or served on the father pending the outcome of the hearing of the discharge application"*

17. The second respondent filed and served a witness statement, dated 13 July 2023 in which he gives evidence that:

> "*I confirm that the prospect of being involved in court proceedings in respect of [M] has caused me to experience a great deal of stress and anxiety. I suffer from COPD which is a lifelong terminal condition. Following consideration of the court documents I have experienced difficulties with breathing and an increase in my asthma attacks.*

My position is that I do not seek to oppose the mother's application for me to be discharged as a party to the current care proceedings. I do not feel able to take part in these proceedings due to my health concerns.
I understand that this decision means I will not have the opportunity of being involved in current care planning in respect of [M] or be aware of her current circumstances and the history of her care or file a statement responding to the evidence filed in this case. Nevertheless my position remains that I do not wish to remain a party to the proceedings….
I would hope in the future if [M] did want to see me or have indirect or direct contact with me this could perhaps be facilitated by whoever is caring for [M]."

The Hearing on 14 July 2023

18. At the outset of the hearing and mindful both of the nature of the application and the requirements of Family Procedure Rules, Practice Direction 3AA I invited only the parties' advocates to attend to discuss the necessary participation directions. The advocates were in person at the County Court in Hastings. I was informed the first and second respondents would dial in by the telephone which they did. The Guardian and the social worker attended by CVP with their cameras on. It was not necessary to make any further directions. I was informed about what matters I was requested to keep anonymous, such as the first respondent's name and geographical location.

19. The advocates made reference to the written evidence and made submissions.

20. Ms Foster, on behalf of the first respondent, relied on her written position statement which urged me to discharge the second respondent. In oral submissions she described her application as "unusual" and that it "could be described as draconian". She referred me to the decision of Hogg J in Re W (Discharge of Party To Proceedings) [1997] 1 FLR 128.

21. Mr Rice, on behalf of the applicant, explained that in the light of the second respondent's written evidence and his desire to be discharged as a party the applicant was content for the second respondent to be discharged. However it was noted:

    "*Prior to receiving the statements of and position statement on behalf of [the second respondent], the LA had indicated to the parties that whilst acknowledging the concerns that the mother had raised but putting aside the (high) legal test to be applied for discharge, on balance, it did not support the application and considered that it would be in [M]'s interests for her father and indeed wider family to have potential involvement in her life.*"

22. I was referred to the decision of Macur LJ in Re B (Children) [2021] EWCA Civ 1221.

23. Mr Stanger, on behalf of the second respondent, filed a position statement which submitted:

    [The second respondent] has considered his position carefully and at length.

The father has filed a statement dated 13 July 2023 confirming that he does not seek to oppose the mother's application for him to be discharged from these proceedings.

The father indicates in his statement that he suffers from chronic obstructive pulmonary disease (COPD) which is a terminal condition and asthma. Since receiving the mother's application and supporting documents [the second respondent] has had increased episodes of breathing difficulties and asthma attacks. It is his view that this is due to the significant stress and anxiety he experiences at the prospect of becoming involved in these proceedings.

The father understands the implications of his decision most notably that in the event of the court approving the mother's application he will in effect absent himself from being involved in future care planning for [M] in the course of these proceedings and will not play a part in this case.

24. Mr Stanger confirmed that the second respondent had only had sight of: the first respondent's application; her witness statement; the witness statement of her father; the order I referred to above from the District Judge and a covering letter sent by the applicant local authority. This letter and the supporting documents referred to above were sent to the father's solicitors on 26 June 2023. He confirmed neither he nor his client had seen the interim threshold document. Mr Stanger concluded his submissions by saying the second respondent is "very positively saying [he] would like to be discharged".

25. Mr Sharpe's written and oral submissions noted the Guardian, on behalf of M, is neutral on the first respondent's application. His position statement noted:

> "…as part of her enquiries, she has spoken directly with [M] about the father on 12th July 2023. The guardian has written as follows:
>
> > *[M] told the [guardian] she knows her father is called [*redacted*]. She showed the [guardian] a photo of him on her telephone. She told the [guardian], "[H]e did domestic violence to my mum and tried to kill me in my mum's stomach." She said, "I don't want to know about him."*

26. Mr Sharpe developed his submission around five points:

    a. There are lots of unanswered questions in the background.
    b. The legal test is a high one for discharge of a party with parental responsibility.
    c. There is a tension between the second respondent's position statement and witness statement in that he appears to want contact with M but wants to be discharged as a party.
    d. There was a lack of clarity about the mother's allegations and it was not clear why indirect contact was ordered in 2015.

e. The court was reminded that M knows who her father is and has a photo of him on her telephone. She is also aware of two half-siblings and the court in the public law proceedings will need to consider contact in any event, which would involve communication with the second respondent.

27. I asked the advocates whether consideration had been given to listing this application to be heard before a High Court Judge sitting in the Family Court, but it appears it was considered best it was heard expeditiously, locally, at the level of a Circuit Judge. I also queried whether there was any legal argument before the District Judge in respect of whether the test was met for the order made that the second respondent was not to be served the documents generated in the proceedings, other than those permitted in the order of 24 May 2023. I understand from the advocates present that there was not.

28. I was invited to excuse the father and his solicitor and then deal with some further case management, but determined I should not do so, until the first respondent's application is determined and there is clarity about the second respondent's position as a party.

The Legal Background

29. The importance of parental responsibility is clearly set out by Cobb J at paragraph 40 of B and C (Change of Names – Parental Responsibility – Evidence) [2017] EWHC 3250 (Fam); [2018] 1 FLR 1471.

30. The Family Procedure Rules apply to the application. Upon issuing of the applicant's Form C110A, the second respondent was automatically joined as a respondent by way of the operation of Rule 12.3 (1).

31. Rule 12.3 (3) states:

> (3) Subject to rule 16.2, the court may at any time direct that—
> (a)any person or body be made a party to proceedings; or
> (b)a party be removed.

32. Rule 12.3. (3) should be read with Rule 1.1 the Overriding Objective which states *inter alia*:

> 1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.

33. Hogg J decided Re W (Discharge of Party To Proceedings) [1997] 1 FLR 128 prior to the current statutory scheme. She discharged the father against stark facts which are set out in the headnote to the law report:

> *"The applicant was the mother of two children who were born in 1990 and 1992. The respondent was the natural father of these two boys. There had been a half-sister who was born in 1989, the respondent being her stepfather. On 8 October 1991 this child was found dead in her bedroom having been*

grossly sexually abused. The stepfather was in due course charged with, and convicted of, her murder and sentenced to life imprisonment with a recommendation that he serve a minimum of 18 years. Care orders were made in respect of the two boys and they went to live in a residential unit with their mother for a period of time before being rehabilitated into the community. The father had not seen the elder boy since going into custody and had never seen the younger boy as he was born after the father's imprisonment. The father had no parental responsibility with regard to either child; the application made by him in the care proceedings was adjourned sine die. He had had nothing to do with the mother and the two children since being taken into custody in October 1991 and it was unlikely that he would make any contribution to their lives in the future. In 1996 the mother made an application to discharge the care orders. She wished to prevent the father from being involved and therefore made an interlocutory application for an order that he cease to be a party to the proceedings. "

34. Hogg J held:

> *"It has been argued that this application comes within s 1(1) of the Children Act and that the paramount consideration before me would be the welfare of the children. That has been argued against, and a case Re X (Care: Notice of Proceedings) [1996] 1 FLR 186 has been brought to my attention, where Stuart-White J dealt with the question of whether a father should be served with notice of proceedings. He took the view that in that case, although the welfare of the child concerned was an important consideration, it was not the paramount consideration, and I am also of that view. So the welfare of these two children, while important, is not the paramount consideration.*
>
> *It is a very serious matter to prevent a natural parent from being a party to care proceedings or proceedings relating to a care order. If I were to exercise my discretion against the father I should not do it lightly, but I should do it only having regard to all the circumstances of the case and regarding it as reasonable and proper, bearing in mind that it is an extreme thing to do."*

35. Hogg J's decision has been considered more recently by Gwyneth Knowles J in A Local Authority v F and M and X and Y [2018] EWHC 451 (Fam). The background facts are summarised at paragraph 12 and set out an appalling history of abuse:

> *The father was convicted of three counts of causing a child under 13 to engage in sexual activity; seven counts of cruelty to a person aged under 16; a count of sexual assault on a child under the age of 13; and assault of a child aged under 13 by penetration. These offences were committed between January 2006 and June 2009. X and Y were the victims of the sexual offences and they were also the victims of the offences of cruelty as was Z. The cruelty offences involved the father assaulting the children by slapping, punching, and kicking and pulling the girls' hair. The children were subjected to a regime whereby all would be made to get up very early in the morning and would be sent to bed as soon as they returned from school. The father also sexually abused his daughters by getting them to masturbate him and he touched the vagina of one girl. The offences came to light after X told her*

foster carers about her fears of being returned to the father and of being once more abused by him.

36. The father was sentenced to twenty two years imprisonment.

37. As a result, the applicant local authority sought the following relief summarised by Gwyneth Knowles J at paragraph 2:

> *a) Whether the father should remain a party to the proceedings to revoke the placement orders with respect to both girls;*
> *b) Whether the father should remain a party to proceedings pursuant to s.34(4) of the Children Act 1989, the purpose of those proceedings being to deny him any form of contact to the girls;*
> *c) An application under the inherent jurisdiction whereby the local authority sought a declaration that it be absolved from any statutory obligation set out in the Children Act 1989 to consult, refer to and/or inform the father about any aspect of the girls' progress, development and/or well-being;*
> *d) An application for permission to invoke the internet jurisdiction in relation to the girls;*
> *e) An application for an order or declaration that (i) the local authority be absolved of its duty to provide notice to the father of any future legal proceedings involving the children and (ii) the court officer should not serve the father with notice of any proceedings or any documents relating to any future proceedings or join him as a party to any future legal proceedings without the permission of this court.*

38. In those proceedings, the father was given notice of the applications and attended a hearing by telephone from prison. He was given limited redacted disclosure of documents (see paragraph 34) but the judge ruled that he was not entitled to all papers which would have amounted to a violation of the girls' Article 8 right to respect for their private lives.

39. Party status is dealt with at paragraphs 37 to 49. The judge concluded that the father's Article 8 ECHR right to respect for family life were engaged and his Article 6 right to a fair trial were required to be considered. When balancing his rights against the girls', the harm that would be caused to them by permitting him to remain a party was sufficiently grave that discharge was necessary. Paragraph 48 states:

> *Balancing those considerations, I find that the harm that would occur to the girls arising from the father's participation in these proceedings is so grave that their right to privacy should prevail over any Convention right held by their father. The circumstances of this case are exceptional. I therefore discharge the father as a party to the placement order proceedings and to the contact proceedings. That is a just and proportionate decision within the context of the Convention rights in play and pays proper regard to the welfare issues in this case.*

40. I also note the detailed survey of the case law regarding the related but different issue of the correct test to determine whether or not fathers/family members should be

notified of the existence of a child who might be adopted undertaken by Peter Jackson LJ (with the agreement of Sir Andrew McFarlane P and Nicola Davies LJ) in A, B and C (Adoption: Notification of Fathers and Relatives [2020] EWCA Civ 41 and his conclusion at paragraph 84:

> *"For these reasons I conclude that while child welfare, prompt decision-making and a comprehensive review of every relevant factor, including those mentioned in the checklists, are all central to the notification decision, the decision is not one that is formally governed by the provisions of s.1 of the CA 1989 or of the ACA 2002 and the welfare of the child is not the paramount consideration of the local authority and the court in this context."*

41. In the summary provided at paragraph 89, sub-paragraph 6 notes:

> *There is no single test for distinguishing between cases in which notification should and should not be given but the case law shows that these factors will be relevant when reaching a decision:*
> *(1) Parental responsibility. The fact that a father has parental responsibility by marriage or otherwise entitles him to give or withhold consent to adoption and gives him automatic party status in any proceedings that might lead to adoption. Compelling reasons are therefore required before the withholding of notification can be justified.*

42. Also of great assistance is what Peter Jackson LJ said at paragraph 89 (7):

> *It has rightly been said that the maintenance of confidentiality is exceptional, and highly exceptional where a father has parental responsibility or where there is family life under Article 8. However exceptionality is not in itself a test or a short cut; rather it is a reflection of the fact that the profound significance of adoption for the child and considerations of fairness to others means that the balance will often fall in favour of notification. But the decision on whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in the individual case.*

43. I note in particular the appeal in respect of C, which was an appeal against an order dismissing a mother's application to permit the applicant local authority not to serve the father. The appeal against this order was dismissed.

44. I have also been assisted by the learning of MacDonald J in A Local Authority v B (Dispensing with Service) [2020] EWHC 2741 (Fam). In these proceedings before the High Court's Inherent Jurisdiction, the court was required to consider an application for authorisation of the 17 year old child's deprivation of liberty. Within the proceedings the court was asked to make an order dispensing with service of the application on the father. MacDonald J acceded to that application, noting that notification to the father could lead to "very serious harm" to the extent that the child may require to be the subject of Mental Health Act 1983 interventions. The analysis of the balancing between a party's Article 6 ECHR rights and the subject of the proceedings Article 8 ECHR rights set out at paragraphs 26 to 29 is of assistance in resolving the application. MacDonald J held:

In the earlier case of A Local Authority v M and F [2010] 1 FLR 1355 (not cited before the Court of Appeal in Re A (Father: Knowledge of Child's Birth)) Hedley J was concerned with a father who the police considered presented a wholly credible threat of harm to the mother and the children and who Hedley J found was "a man who rejoices in evil, is indifferent to consequence and is determined to visit his proclivity for evil upon the mother and the children". In circumstances where the father had parental responsibility for the subject children and had lived with them, Hedley J considered that Art 6 and Art 8 of the ECHR provided the appropriate analytical framework within which to determine whether their existed exceptional circumstances justifying withholding notice from the father.

With respect to Art 6, Hedley J noted that the right of access to the court is not an absolute one and not every limitation or even exclusion is unlawful, highlighting the seminal passage in Ashingdane v United Kingdom (1985) 7 EHRR 528 at [57]:

> *"... the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired [and] a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."*

Within this context, Hedley J held that in considering the right of the father to participate in accordance with his rights under Art 6 the court should start with full participation then consider partial participation, effected in this case by the disclosure of redacted documents and then, only as a device of last resort, his exclusion from the proceedings.

With respect to the relationship between Art 6 and Art 8, and reminding himself that respect for Art 8 rights may also of itself have procedural implications, Hedley J highlighted the following passage in the judgment of Dame Elizabeth Butler-Sloss P in Re H and G (A Child) (Adoption: Consultation of Unmarried Fathers) [2001] 1 FLR 646 at [43]:

> *"This raises the difficult question of the impact of the rights of other parties under Art 8, and the welfare principles, on the right to a fair trial. There must, however, in principle, be some qualification of the right of a party to be heard in proceedings. This would be likely to arise under two separate categories, namely, a policy decision of the court, in the exercise of its right to run its own proceedings within the requirements that there should be a fair trial, and, secondly, the practicalities of service on a potential litigant or his attendance at the hearing. There will be cases where notice to a father would create a significant physical risk to the mother, to children in the family, or to other people concerned in the case (see for instance Re X (Care: Notice of Proceedings)[1996] 1 FLR 186). That might result in the*

court balancing the fairness to the father of notice, against the real risks of the consequences of such notice."

The procedural aspects of the Art 8 right to respect for family life have been held to be particularly important in proceedings concerning children and young people that are brought by local authorities, not only within the court process but also within the assessments and decisions undertaken by the local authority within the context of such proceedings. The local authority, when seeking to take protective measures in respect of a child or young person, is under a heavy obligation to ensure that all stages of the procedure are transparent and fair, both in and out of court. Art 8 requires the local authority to involve parents fully in the decision making process at all stages of the safeguarding process and in the formulation of a plan to protect the child's welfare (see for example Re G (Care: Challenge to Local Authority's Decision) [2003] 2 FLR 42 and Re (Minors)(Care Order: Implementation of Care Plan); Re W (Minors)(Adequacy of Care Plan) [2002] 1 FLR 815).

45. I also rely on the learning of Baker LJ (with the agreement of Singh and Phillips LJJ) in A (A Child) (Withdrawal of Treatment: Legal Representation) [2022] EWCA 1221 at paragraphs 26 to 32 and in particular his reliance on common law rights to fairness. In only quote what was said at paragraphs 31 and 32:

"*As Lord Reed put it at paragraph 68:*

"... justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken."

These principles apply to all litigation, including in the protective jurisdictions in the family courts and the Court of Protection. The fact that the welfare of a child is the paramount consideration in proceedings under the Children Act 1989 and the inherent jurisdiction relating to children, and that any act done, or decision made, under the Mental Capacity Act 2005 for or on behalf of a person who lacks capacity must be done, or made, in his best interests does not obviate the requirement for a procedure which pays due respect to persons whose rights are significantly affected by such decisions. The specific procedural requirements will, however, be tailored to take into account the nature of the protective jurisdiction and the extent to which such persons are permitted to participate will depend on the specific circumstances of the case."

Analysis

46. In determining the first respondent's application I apply the legal principle summarised above.

47. Whilst it is clear that M's welfare is not the paramount consideration, I have M's welfare very firmly in mind as I determine her mother's application to discharge her father from these proceedings which focus on her welfare.

48. I am grateful to the Guardian for updating the court as follows in her counsel's position statement:

> "[*M] informed the guardian that she has recently made contact with the maternal grandfather, [redacted]. [M] said she would like to know about him and potentially meet him. The guardian believes a viability assessment should be completed of him to assess what role he could play in [M]'s life.*
> *[M] said that contact with the mother was good and is the right amount. The guardian seeks for the contact notes to be served.*
> *The foster carer informed the guardian that there have been some recent difficulties with [M]'s behaviour, such as pushing boundaries and getting angry with the foster carer. The guardian believes [M] is struggling with complex feelings of loss and trauma. The foster carer believes [M] will benefit from counselling, and [M] said she thought it would be helpful as well. The local authority is invited to outline the support it can provide to [M] and the foster carer."*

49. I am concerned about M's welfare. She appears isolated. Notwithstanding the efforts of her foster carer, M is placed in a vulnerable situation. I am concerned she is lonely. As most English school holidays begin today, I wonder what she will be doing over the next six weeks. She is only 12 but is required to take on board very profound emotional challenges, given what is alleged in the interim threshold, with the result that separation has been necessary. As a 12 year old, she is (probably) old enough to suffer a significant emotional reaction to the enforced changes in her life, but she may not be equipped to try to manage those changes (as much as any person, of whatever age, can easily process, adapt and respond to fundamental relationship changes). I need not overburden this judgment with the background detail which led the applicant to issue proceedings, but the comprehensive and helpful witness statement of the social worker, dated 5 May 2023 provides an alarming background to the issue of the applicant's application. I quote an example of the background which gives rise to very significant concerns for M's welfare:

> *"Further concerns were raised on 27th February 2023 through a SCARF report. The report states: "[M] was seen on CCTV to be walking around barefoot where there were needles lying around and [the first respondent] was in a known drug user's bedroom"*

50. At one moment, it appears the first respondent proposed alternative carers, who M, herself, described as her mother's "bosses" in respect of whom the first respondent is alleged to sell drugs.

51. M's father knows nothing, or very little, of this background.

52. The second respondent was married to the first respondent when M was born in January 2011. He therefore has parental responsibility, see section 2 (1) of the 1989 Act. His parental responsibility places him in respect of M, in the same position as the

first respondent (see Children Law and Practice *Hershman and McFarlane* at paragraph 315). The learned authors also note that in such circumstances parental responsibility can only be removed by an adoption or parental order.

53. The second respondent is named as M's father in her birth certificate, but as noted above that is not how he acquired his parental responsibility. A father who has acquired parental responsibility by way of his registration as the father on the birth certificate is treated differently by operation of the law. Parental responsibility acquired in such circumstances, can be terminated by court order on the application of the child or a person with parental responsibility, see sections 4 ((2A) and 4 (3) of the 1989 Act.

54. These are conscious choices made by Parliament which reflect the importance of marriage and parenthood.

55. I note in passing, however, that even a father with parental responsibility acquired through his marriage to the mother at the time of the birth of the child, can be made the subject of a court order, which limits and circumscribes the exercise of parental responsibility if the welfare of the child requires it. In B and C (Change of Names – Parental Responsibility – Evidence) supra Cobb J prohibited the father from taking any steps in the exercise of any aspect of his parental responsibility for a child acquired through his marriage to the child's mother at the time of the child's birth.

56. In determining this application, I have been troubled that the second respondent has not been served with the substantive application by the applicant in respect of his daughter. There has been no application pursuant to Rule 6.36 to dispense with service on him. It is not surprising that the applicant has not sought that, given their initial position to the first respondent's application was that the father had a role to play. I am concerned about the fairness of determining the first respondent's application in circumstances where the Family Procedure Rules require the applicant to serve its application for a care order on the second respondent and this has not yet taken place. When I discussed with Mr Stanger my concern that the second respondent had not seen the application papers and arguably it could be said that his position not to oppose the application was not based on an informed position, I understood Mr Stanger to make clear the second respondent did not seek access to any further papers and his position was a considered one.

57. I understand the order of 24 May 2023 to, in effect, pause service on the father pending determination of this application. I discussed with the advocates whether the District Judge had been fully addressed on the case law relating to dispensing with service or more generally not serving or disclosing documents within proceedings. I had in mind the decision of MacDonald J above and also the decision of Munby J (as he then was) in Re B (Disclosure to Other Parties) [2001] 2 FLR 1017 where he held:

> *"Although, as I have acknowledged, the class of cases in which it may be appropriate to restrict a litigant's access to documents is somewhat wider than has hitherto been recognised, it remains the fact, in my judgment, that such cases will remain very much the exception and not the rule. It remains the fact that all such cases require the most anxious, rigorous and vigilant scrutiny. It is for those who seek to restrain the disclosure of papers to a*

litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the need for a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary."

58. Notwithstanding my concerns about the fairness to the second respondent, given he is represented and is not seeking any further documents, I shall proceed to determine the first respondent's application. I shall return to the issue of the documents in the proceedings at the end of this judgment.

59. Pursuant to Rule 12.3 (3) it is necessary to consider the exercise of the court's discretion to direct that the second respondent be removed as a party to these proceedings, having regard to the over-riding objective. That is a case management decision, but one in which the court must fully consider the first respondent's Article 8 rights to respect for her private life and her protection from emotional harm which these proceedings could cause her, as a result of the second respondent's party status and participation in the proceedings. The court must also consider the second respondent's right to exercise his parental responsibility and his common law right to fairness and/or his Article 6 rights to a fair hearing. The over-riding objective dictates that any case management decision must be 'just' which requires a focus on the second respondent's rights. The court, as a public authority must balance the first respondent's rights to ensure the second respondent's participation within the proceedings themselves do not become an instrument of emotional harm. Further the over-riding objective requires the court to 'have regard to the welfare issues involved'.

60. Therefore, whilst consideration of whether the second respondent should no longer be a party is a case management decision, it is one which must properly weigh the harm the first respondent states exists or would develop; the fairness /justice of whether or not the second respondent is a party in the context of the proceedings; and also importantly the welfare of M.

61. I note the stark factual backgrounds to the decisions of Hogg J and Gwyneth Knowles J which led to the courts in those proceedings making a direction to remove the fathers as parties to the proceedings. I note the reference to 'extreme' or 'exceptionality'. I prefer not consider whether the circumstances here are, or are not, exceptional or extreme, but rather seek to apply what Peter Jackson LJ said, namely that exceptionality is not a test or a shortcut. An intense focus is required which considers the factors identified which the court must carefully weigh to arrive at the correct exercise of the court's case management discretion.

62. In resolving the first respondent's application I acknowledge the severity of the findings made in the earlier proceedings. There is a discrepancy between her evidence in support of her application and the findings. The second respondent does not give evidence on this matter. I am not clear whether he disputes her evidence on those

factual matters because he seeks to be discharged or he has simply not dealt with it. The fairest way to proceed to determine this application is to take into account the clear findings. The assaults on the first respondent were cruel and dehumanising. I accept that as a result of what the first respondent has suffered at the hands of the second respondent, his participation in these proceedings fills her with anxiety. I accept her written evidence set out above about the effect of the second respondent's involvement in these proceedings. That is the starting point. The second respondent's party status and participation in the proceedings is likely to cause her anxiety and some distress. There is no clear evidence of the potential impact on M or any real evidence of her knowledge of the proceedings.

63. I also note the following:

    a. after the fact finding in the private law proceedings, the second respondent remained a party and participated in the proceedings from 2012 to 2015 with the result an order was made for indirect contact;
    b. the second respondent has not contacted the first respondent or M for eight years, since 2015;
    c. the second respondent's position in these proceedings is currently not to want to participate in them, to the point he has given instructions to his solicitor to seek to have him discharged as a party;
    d. as a result of Practice Direction 3AA, Practice Direction 12J and sections 62 to 67 of the Domestic Abuse Act 2011 the court has considerable powers to control proceedings and power to protect parties and witnesses. Further, through the Judicial College, family court judges receive effective training in domestic abuse and domestic violence and are assisted to try to understand how those who have been the subject of domestic abuse experience the family justice system.

64. The court cannot entirely remove or eliminate the first respondent's anxiety or fears brought about by the second respondent's involvement in these proceedings. It can however take meaningful steps to reduce the pressures of the litigation on the first respondent given the case management and statutory powers to which I have made reference above. The court can also carefully determine which documents it is necessary to serve on the father and make directions for careful redaction of documents which are served. These are important tools that operate to seek to ensure that the Family Court is not an entirely forbidding landscape for someone who has experienced significant domestic abuse. But pausing there, at a human level, these may not at first blush provide this first respondent with much comfort and I take that into account. I am satisfied, however, that any anxiety or distress the first respondent may experience, can be ameliorated through such measures. After careful consideration, in my judgement, her concerns expressed about the second respondent's party status are not at the level of severity to provide compelling reasons to justify discharge of this father from the proceedings. The findings relate to matters over ten years ago. The second respondent has not attempted to contact the first respondent for eight years. The first respondent's application does not engage with or properly consider the range of measures the court can apply. The second respondent's evidence does not suggest any attempt to abuse his position as a party to harm the first respondent or M, quite the opposite.

65. Further, the second respondent's parental responsibility is of fundamental importance. That much is made clear by Parliament both through the importance attached to parental responsibility acquired through the birth of a child in marriage as set out in the 1989 Act but also through Parliament's approval of the Family Procedure Rules (a Statutory Instrument laid before Parliament) which requires the applicant to automatically make the second respondent a party and serve him the papers, subject only to the case management rules I am concerned with. Further, there is no application before me to restrict the exercise of second respondent's parental responsibility in any way. There is no application invoking the court's Inherent Jurisdiction before a High Court Judge to dispense with the applicant local authority's obligations to inform the father as is required by various sections of the 1989 Act. As the Guardian notes on behalf of M, the second respondent would be consulted in respect of these proceedings and the role, if any, of his contact would fall to be considered. That may involve him in the proceedings, absent any further application, in any event. He may even be a witness.

66. I also remind myself of M's apparent isolation. She is aware of, I am told, two half-siblings on the paternal side. There may be wider paternal family. She may benefit from some involvement. The court cannot form a view without evidence and careful consideration of the impact on her of some limited contact with her parental family. But removing the second respondent from the proceedings, may make it more difficult to identify family who may provide some comfort or support to M. I take into account the applicant's initial view to the first respondent's application that the second respondent may have a role to play. I take into account the Guardian's reservations expressed through her counsel, albeit her position on behalf of M is one of neutrality.

67. Furthermore, the second respondent has now indicated, should M want contact with him, he would hope that could be facilitated, whether that is through correspondence or meeting in person. No doubt such a thought fills the first respondent with anxiety. M's currently expressed view is not to want contact with her father. However these may be issues which require to be confronted by the court and the parties at a future stage. Plainly, any such consideration would be entirely M focused and would require the most sensitive and careful consideration. I note that could take place whether the second respondent is a party or not.

68. I also consider there is some Article 8 ECHR family life between the second respondent and M notwithstanding the fact there has been no contact between them since 2015. M has a picture of the second respondent on her telephone. She is aware of her father. The second respondent has parental responsibility and in his evidence to this court would seek facilitation of contact with his daughter, should she wish it. Given M's current situation, the court should be slow to discount the limited aspects of family life that exist. I have had regard to what Gwyneth Knowles J said in A Local Authority at paragraph 43 and her reference to the judgment of Munby J (as he then was) in his survey of the Strasbourg case law in Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075; [2005] 1 FLR 308. Those Article 8 ECHR rights are protected by Article 6 ECHR.

69. Plainly being removed as a party impairs the second respondent's right to a fair trial of his Article 8 ECHR rights to respect for family life which are in focus during the

application for a care order. The Article 6 ECHR rights can be subject to significant case management, as recognised in Ashingdane v United Kingdom (1985) 7 EHRR 528. However, at this stage, removal of the second respondent as a party is disproportionate given the case management and statutory powers I have set out above. These can be considered first to reduce and limit the serious concerns the first respondent expresses about the second respondent's participation. In these proceedings, the court can only be satisfied there would be no violation of the second respondent's Article 6 ECHR right to a fair trial, if it has first considered and applied directions in respect of disclosure and redaction and participation directions to manage the court experience for the first respondent and found those to be wanting and that notwithstanding them, the second respondent's participation was harmful. In many cases it may well be that the court need not 'road test' them because the risk of harm, is obvious and made out immediately on the evidence. However, on the written evidence before me, this is not such a category of case. I reach this conclusion fully aware that the second respondent's wishes to be discharged. However, exercising the court's quasi-inquisitorial role and mindful he has not been served with the proceedings, I nonetheless approach the question of fairness and his Article 6 rights, setting aside his 'consent' given he does not have the underlying papers.

70. However, even if I am wrong about the existence of the second respondent's Article 8 ECHR rights and through them his Article 6 ECHR rights, I am satisfied that his common law rights to fairness equally apply and require protection, see A (A Child) (Withdrawal of Treatment: Legal Representation) supra. Removal of his party status, particularly in circumstances he has not been served, would be inconsistent with his common law right to be fairly permitted to participate in proceedings.

71. I arrive at the following main conclusions:

    a. Through the court's powers regarding disclosure, redaction and participation directions, the second respondent's party status and participation does not, at this stage, cause a level of harm to the first respondent that would justify the significant step of removing a father with parental responsibility from the care proceedings;
    b. The second respondent's removal as a party would be inconsistent with his common law rights to fairness and/or his Article 6 ECHR right to a fair hearing;
    c. There are welfare considerations for M in as much that removing the father from the proceeding will mean he is less well informed about M and it may make it less easy for the court to consider whether there are parental family members who may play a role in M's life.

72. For these summarised reasons, I cannot accede to the first respondent's application to make a direction discharging the second respondent from these proceedings. Having weighed the various factors there are no sufficiently compelling features identified to properly permit the court to exercise its discretion and discharge the second respondent. The first respondent's application is accordingly dismissed.

73. That is not, however, the end of the matter. The second respondent's evidence is that he positively wishes to be discharged given his age and ill-health. I repeat my concern that he has not been served. He does not seek service. I propose therefore to consider

his witness statement and position statement as an application to be discharged from the proceedings on the grounds of the anxiety it causes him to be a party seen in the context of his physical ill-health. I dispense with the requirement for him to make a C2 application pursuant to Rule 18.4 and will discharge him as a party on the following basis:

a. this judgment and the interim threshold (redacted if necessary) are to be served upon him;
b. he has permission to file and serve a witness statement within 14 days of service of the documents set out above;
c. should no witness statement be received he will be discharged as a respondent with immediate effect, with liberty to apply on 7 days' notice to the parties, to re-apply to become a respondent;
d. should he file and serve a witness statement wishing to remain a party, the proceedings will be listed for a directions hearing to consider any application made by any party (such application to be made within 7 days of service of the witness statement) for: (i) dispensation of service and/or non-disclosure of identified documents; (ii) redaction of documents; (iii) any other relevant directions or orders and, of the court's own motion, any necessary participation directions.

74. I make these directions: (i) as a result of the concerns in respect of the fairness to the second respondent of being discharged in circumstances where he has not been served; and (ii) arising out of the court's welfare concerns in respect of M. Whilst the background of her family life is a poor one, given the findings made eleven years ago, there may yet be something she can gain from the knowledge of her father and his wider family. That, as I have already said, would require sensitive and careful consideration by the Family Court, but her current circumstances which have led the applicant to issue these proceedings, dictates that no hint of family life, however, impaired or imperfect should be made more remote, at this stage.

75. I am very grateful to all the advocates for their considerable assistance and ask them to draft an order to give effect to this judgment.