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Neutral Citation No [2023] EWHC 777 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

No. FD22P00662

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 17 March 2023

Before:

SIR ANDREW MCFARLANE
PRESIDENT OF THE FAMILY DIVISION

(In Private)

B E T W E E N :

LONDON BOROUGH OF BARKING & DAGENHAM

Applicant

- and -

(1) R M

(2) L S

(3-4) THE CHILDREN

(through their Children's Guardian, Rosemary Boulton) Respondents

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

MS J LEE (instructed by Gary Jacobs & Co Limited) appeared on behalf of the First Respondent.

THE SECOND RESPONDENT did not appear and was not represented.

MS J HENDRICK (instructed by Dawson Cornwell LLP) appeared on behalf of the Third and Fourth Respondents.

J U D G M E N T

THE PRESIDENT:

- 1 I have decided that, despite the very great weight that needs to be attached to the mother's Art.8 rights to privacy with respect to this exquisitely private information, it is necessary for her HIV status to be disclosed as it is a matter of relevance within the care proceedings and therefore must be disclosed to the father. These are my reasons.
- 2 The applications before the court arise in the course of ongoing care proceedings which are currently being case-managed by District Judge Landes. The proceedings relate to two children: a girl born five years ago and a boy born two and a half years ago. Tragically, the boy was one of twins. His twin survived for some 10 weeks or so, but then died at that stage, and this has had a major impact as it surely must have had on the mother and the wider family.
- 3 The circumstances that led to the local authority issuing care proceedings were triggered by an event in February 2022 when the mother was found to be under the influence of alcohol, and weaving in and out of traffic with the eldest child in her care. The local authority had known of the family's circumstances for a deal of time and, against that background and the fact that the mother was for a significant time dealing with an alcohol problem, the authority decided that the time had come to issue care proceedings.
- 4 The matter came before the court and initially the plan was for the children to be removed but, most fortunately, arrangements were put in place whereby the care of the children is shared in the home that the mother shares with the lady who is regarded by her as her *de facto* mother, but is in fact her aunt. Between the two of them, they care under a plan monitored by the local authority at home.
- 5 The children's father is fully involved, but the couple had a stormy relationship. There is a history of domestic abuse going back over the years but, despite that, they are able to rise above their own difficulties, as one adult to another, and to come together to provide shared

care for the children. The court's understanding is that most, if not every, day the father visits and plays some part in the care of these two young children.

6 The proceedings have carried on before the district judge on the basis that they may well be resolved around a care plan, whether it is under a care order or supervision order, which seeks to crystallise the current arrangements. The difficulty that has arisen and leads to the application before the court today relates to the fact that, tragically, the mother has since birth been HIV positive, she having inherited that condition from her own birth mother. Her condition has been treated, positively, since she came to this country and maybe even before back in her home country of Zambia. She takes antiviral medication, and regular tests indicate that the condition is kept under control. From time to time, the children have been tested for HIV and they have not been positive.

7 The issue is whether the mother's HIV positive status should be disclosed to the father. She is plain that he does not know about it. The fact that her mother was HIV positive and that she is HIV positive is known to her family. The degree to which the family have this information is not clear in the papers. The account given through counsel, Ms Lee, today is that the mother has assumed that the wider family know because of the way that they have treated her over the years, but nothing has been explicitly said by them. However, in her statement for the purposes of this issue being litigated before the court, the mother says at para.4:

“My mother passed away when I was five years old and various family members cared for me until my mother's sister took me under her wings and cared for me. She knew of my health condition and kept me safe from other family who taunted and verbally abused me because of my condition. I refer to her as my mother and my children refer to her as Grandma.”

So, that statement indicates that her HIV-positive status was known from a very early stage, when she herself was a child back in her home country. Be that as it may, the court has proceeded in evaluating these issues on the basis that the mother's wider family knows of the HIV status and the father does not, and the mother believes that the wider family's

reaction to her status in part, if not entirely, explains the negative relationship that very largely she has with them.

- 8 The HIV status of the mother was not known to the local authority during its early involvement with the family, and it became information that was disclosed to them because the doctor who was treating the mother and monitoring the children wrote on 4 October 2021 to the local authority, unilaterally and without the mother's consent, informing them of this health condition and expressing concern that the children had not been brought for testing as had been expected and as, in the doctor's view, was needed. This information then led to the issue being considered once the care proceedings started as to whether it should be information that should be disclosed.
- 9 I am not going to go through the full procedural history, but the matter came to be determined by Keehan J initially. He determined in October 2022 that the father should be informed, but that decision was challenged on appeal and the appeal was compromised by agreement between the parties, and so the issue has come back for rehearing before a different judge, and that is how it comes to me and that is the process that I have been embarked upon.
- 10 Today's hearing has been established with a degree of procedural flexibility available to the court. At the court's direction, the father has attended the Royal Courts of Justice together with his counsel, Ms Moore, but they have been asked to wait in a different part of the building. They do not know anything of the procedural history relating to the mother's HIV status that I have described. They are unaware that there was a decision by Keehan J and an appeal and further hearings before me on a previous date and today. They are at court in the event that the court needed to hear in some way from Ms Moore on behalf of the father or indeed from the father if matters proceeded in that direction. Indeed, before this morning, counsel representing the local authority, the mother and the guardian had contemplated that Ms Moore would indeed come before the court to make submissions on the issue of

disclosure, notwithstanding that she might not be told what the substance of the factual background that was up for consideration might be.

- 11 In the event, that strategy changed shortly before the hearing and I accepted that the right way forward was to hear the three parties before the court make their substantive submissions and then consider the court's position at that stage, either moving on to engage Ms Moore or, if the court was clear that a decision could be made on the submissions that have been made, making that decision. That latter state of determination is the one that I have reached.
- 12 The legal context within which this application falls to be determined is not controversial as between the parties. The starting point is that the mother is entitled to respect to her private life rights under Art.8 of the European Convention on Human Rights. There is extant case law which indicates that information of this very personal nature, in relation to a person's medical condition, should attract substantial weight and be regarded as highly personal information and is not material that should normally be disclosed without the consent of the individual. The matter comes before the court, obviously, because there are proceedings with respect to the children and there are the rights of other individuals in play, namely the rights of the children and the rights of the father in particular.
- 13 The approach to be taken, as it was prior to the enactment of the Human Rights Act, was established in case *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593, and, in the leading speech of Lord Mustill, the relevant principles were enumerated in five clear paragraphs.

'It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party. This principle applies with particular force to proceedings designed to lead to an order for adoption, since the consequences of such an order are so lasting and far-reaching.

When deciding whether to direct that notwithstanding r 53(2) of the Adoption Rules 1984 a party referred to in a confidential report supplied by an adoption

agency, a local authority, a reporting officer or a guardian ad litem shall not be entitled to inspect the part of the report which refers to him or her, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.

If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.

If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.

Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.’

At that stage, the House of Lords had its focus upon the interests of the child, but it is plain that, if not then, certainly following the implementation of the Human Rights Act and the ‘bringing home’ into English law of the European Convention on Human Rights, the rights of any other relevant adult party must be considered.

14 As he did in so many ways, Munby J, as he then was, has done service to the legal profession and the Family Judiciary by drawing together the jurisprudence on this matter and distilling it into clear propositions, and he did that primarily in his judgment in *Re B (Disclosure to Other Parties)* [2001] 2 FLR at p.1017. I am not going to read large parts of that judgment with which I am familiar, but the principal conclusions seem to be these.

First of all, at para.64, where Munby J says:

“In the first place, although R is entitled under Art.6 to a fair trial, and although his right to a fair trial is absolute and cannot be qualified by either the mother’s or the children’s or indeed anyone else’s rights under Art.8, that does not mean that he necessarily has an absolute and unqualified right to see all the documents.”

I interpolate, obviously, R at that stage is standing in the shoes of the father in this case.

15 Munby J moved on at para.66 to say this:

“Secondly, however, I am satisfied that there is no longer, if there ever was, any warrant for saying that the only interests capable of denying a litigant access to the documents in a proper case are the interests of the child or children involved in the litigation. If the interests of a child are capable in the proper case of having this effect, then so, in principle it seems to me, must be the interest of anyone else who is involved, whether as a victim, party, or witness, and who can demonstrate that their Art.8 rights are sufficiently engaged.”

Again, intervening there, that is plainly the position of the mother before this court.

16 Then later, in para.67, where Munby J enumerates some nine principles that he draws from his review of the authorities, two are of particular note. First of all, number five:

“So, a limited qualification of R’s right to see the documents may be acceptable if it is reasonably directed towards a clear and proper objective – in other words, if directed to the pursuit of the legitimate aim of respecting some other person’s rights under Art.8 – and if it represents no greater a qualification of R’s rights than the situation calls for. There may accordingly be circumstances in which, balancing a party’s *prima facie* Art.6 right to see all the relevant documents and the Art.8 rights of others, the balance can, compatibly with the Convention, be struck in such a way as to permit the withholding from a party of at least some of the documents. The balance is to be struck in a way which is fair and which achieves a reasonable relationship of proportionality between the means employed and the aim sought to be achieved, having regard to the nature and seriousness of the interests at stake and the gravity of the interference with the various rights involved.”

17 Then, at the latter part of number six:

“Non-disclosure can be justified only when the case for doing so is, to use Lord Mustill’s word, ‘compelling’ or where it is, to use the court’s words in *Campbell and Fell v The United Kingdom* [1984] ECHR 8, ‘strictly necessary’.”

18 So, that is the structure and the weighted test the court is entitled to look to protect the mother’s rights to privacy in this regard, but it has to balance the consequences of non-disclosure, which would be, if the material was before the court in the care proceedings, to prevent the father knowing this information and knowing what is said about it by the

professionals in the course of their evidence in the conduct of proceedings where his rights are directly engaged in determining the future plans and welfare analysis for his children.

19 The starting point in this case must be that very substantial weight is to be attached to the mother's rights. If the material was not relevant to the care proceedings, then the mother's rights, to my mind, would undoubtedly trump the issue and determine it. That is effectively the purport of the two previously decided cases on this point: one, the case of *London Borough of Brent v N & P* [2005] EWHC 1676 (Fam), a decision by Sumner J; and the second, the case of *Re P* [2006] 2 FLR, a decision of Bodey J. In both those cases, for different reasons and different factual contexts, those two judges determined that the information that was to be withheld, which was HIV status in both cases, was simply not relevant to the court process and that was the end of the matter.

20 So the application for disclosure, which is made by the local authority and supported by the guardian, only gets to the starting blocks, as it were, if relevance is established. But what is said about it? Well, a number of points are made. Firstly, it is submitted on behalf of the local authority that this is key information that is relevant for the planning for the future of these children in any event. They submit that it is information that the father should know so that:

- (a) he can be aware of the need to ensure that the children's HIV status is monitored and, if necessary, any needs are met in that regard; and
- (b) he can be aware of the mother's status and the need for her to look after her own health.

It is also said to be important for him to know rather than, at a later stage, coming across the information in an uncontrolled, unpredicted way, either through the children – who really cannot have any understanding of this material now at their age, but at a later age –

disclosing it or, indeed, it seems to me, one or other of the mother's wider family members telling him.

- 21 The mother fears that when the father is told this information he may react in a very negative way. She fears that he will be upset with her, putting it in relatively neutral terms – this is a case with a substantial history of domestic abuse – but she also fears that he will talk about it around the town and spread the information generally in a way that would only be and could only be very adverse to her interests. So the local authority say that there is something of a ticking time bomb, to use the phrase that Mr Jones on behalf of the authority used this morning, in the father not knowing, but at some future stage coming to know the information in an unplanned, unsupported way.
- 22 Moving on with that line of thought, what is proposed here is that the father is not simply told the information by receiving a written statement in the care proceedings, or by his lawyer telling him, or him being brought in front of me and the court telling him. The proposal is that he is booked into an appointment at the HIV clinic that is attended by the mother and for the clinicians there to give him this information and immediately explain to him the implications of it and answer any medical questions that he may have about it. At the same time, it is suggested that he would be given clear advice about not spreading the information and holding it within his own knowledge and it going no further. So, that is part of the thinking of the local authority, whose general position is that it is important for the father to be given this information in any event.
- 23 The second element whereby it is said to be relevant to the proceedings is that unfortunately, in her attempts to hide the information, the mother has from time to time, it is said, either been dishonest in the way that she has dealt with the professionals or otherwise acted contrary to the best interests of the children. In the guardian's position statement for this hearing, Ms Hendrick, counsel for the guardian, lists at para.20 some six ways in which it is said that the mother has been dishonest. I will list them very shortly:

- (1) she failed to seek appropriate medical testing for the children;
- (2) she was allegedly dishonest when talking about the testing for the children;
- (3) she allegedly has not been consistent in engaging with her own medical treatment, leaving her at risk and leading her own viral load to be detectable, therefore creating a risk to the children;
- (4) that she was dishonest in going against an indication given by the judge on a specific instruction by the local authority;
- (5) it is said that all these previous factors must be seen in the light of the fact that this lady has a previous alcohol abuse problem and that the risk posed by untreated HIV may be relevant to the children's welfare; and
- (6) it is said that the lack of honesty with professionals in the court trying to determine welfare issues has a wider implication.

Those points, which go further than simply honesty, go to the welfare of the children.

24 So far as the local authority are concerned, they share the guardian's analysis, but they also point to the fact that there have been two independent professional assessments of the mother in this case, one by a psychologist and another by an independent social worker, and in the course of Mr Jones' submissions at an earlier stage of this morning's hearing, he submitted that the mother had not disclosed to either of those two experts the fact that she was HIV positive. Yet, part of the background of the case is that the mother does not have a good relationship with many of her maternal family members, which she attributes to her HIV status and Mr Jones submitted that there is therefore a gap in the assessment. There is known to be something of a problem in terms of support and relationships within the maternal family, but the experts will not know why that is.

25 In the course of her submissions, Ms Jessica Lee, counsel for the mother, was given instructions during the hearing, which were that when the mother was being interviewed by Dr Leonard, the psychologist, the mother did tell her that she was HIV positive and Dr

Leonard assured her that “this would not be included in the report”. So, it is said, it is less of a problem because Dr Leonard knew of the information.

26 So, the issues really put before the court by the local authority and the guardian are that this information is now of central interest both in determining the welfare outcome for the children and the details of the care plan, partly because of what is said the mother’s behaviour has been in deceiving professionals involved, partly because of the gap, as it is said, that exists in the assessments, and partly because of the need for the care plan to be explicit about the need for testing of the children over the years.

27 The submission was made – and it is one that was encouraged by me in questioning – that it is really not possible to contemplate how those matters could be litigated within the care proceedings without the father:

(a) becoming aware that something was being withheld from him; and

(b) actually having to go in and out of the hearing from time to time so that he was not present when the experts were questioned about this topic, but was present when they were questioned about others, and was not present when the mother was questioned about her honesty and other issues in relation to this matter, but was present when she was questioned about other matters.

The submission was made that that would simply be an unfair process and frankly untenable in any practical way.

28 So, all of that turns upon whether the information is relevant to the care proceedings. Well, in response, Ms Lee, on behalf of the mother, asks rhetorically and clearly and firmly in her submissions, “Why is the material relevant?” She points to the fact that the arrangements for the children are settled, they are working well, the children are well looked after, the boat does not need rocking by giving the father this information at all. Even if the information becomes current within the care proceedings, Ms Lee asks, “What difference

will it ultimately make to the outcome of the case for the children?”, and that is a strong submission. There is no suggestion before this court that this information would very radically alter the care plan for the children, and so Ms Lee submits it is just not necessary to go there and for the information to be disclosed.

29 Approaching it in this way, I understand what is said about the bottom line, as it were, of the care plan, and it is difficult to see how a different plan would be put together for the children in terms of where they are going to live and who the people are who will have charge of their care, but that does not mean that this material is not relevant. I accept the submissions that have been made by the local authority and the children’s guardian that it is relevant information, partly because it seems to me that it is essential that it is a known known for those who have parental responsibility for the children that they may, in future, turn out to be HIV positive and that there is a need for that question to be kept under regular monitoring and for the mother’s health also to be protected by regular monitoring of her and regular taking of her medication. The father has parental responsibility for these children, and it seems to me that the judge dealing with the case needs to be satisfied about this element of the care plan just as he will need to be satisfied as all others. So, the judge needs to be across this issue, it needs to be a central part of the court’s deliberations, and the father needs to know about it as well.

30 I also accept the submission that currently there is a gap in what is written in the assessment reports about the mother because this factor simply is not mentioned; neither was it mentioned to the agency that conducted the hair strand testing that she underwent to monitor her alcohol consumption. We do not know, in terms of having heard from Dr Leonard, whether that expert confirms the mother’s account of telling Dr Leonard about her HIV status. That will no doubt have to be clarified in due course. But the local authority and the guardian must be entitled to ask the doctor and the independent social worker about this issue and how it impacts on their understanding of the mother’s functioning as an adult, whether it has any impact upon the mother’s alcohol abuse over time, whether it has an

impact upon her place in the wider maternal family. So, whilst it may not alter the ultimate plan for the children in terms of where they live, it is of relevance to the way they are brought up, to the way they are protected, to the way those responsible for the children's care act with respect to each other, working on truthful and correct information.

31 It is also relevant in a different context because it is alleged that the mother has failed to be honest with the professionals at various junctures of the last 18 months or more since this information became current. Honesty on the part of parents who are going to be given the sole, primary or a major role in caring for children in the future is often thought to be an essential requirement. The local authority and the court need to be able to trust the parent to do what they are expected to do and to say honestly what has happened in any circumstance. That is perhaps of some heightened relevance where the underlying problem is alcohol abuse. There is a need for honesty about that, and where the mother has been less than fully honest, or may have been less than fully honest, that is a matter that the local authority, the guardian and the court are entitled to investigate.

32 The local authority and the guardian's case before this court in favour of disclosure thus gets to that starting block. It is relevant, and so this case moves into a different territory from the case before Sumner J and the case before Bodey J, and we really move to the balancing exercise that has to be undertaken as described by Munby J in *Re B* and in other authorities. In this, Ms Lee's submissions are very firmly put to the court and properly so.

33 In short, it is said it is impossible to underestimate the weight that should be afforded to this very personal and very private information, which is of a highly personal nature. In response to the court putting to Ms Lee the difficulties that would arise if the hearing had to be conducted in a way that allowed the court to engage with the issue but kept the information from the father, Ms Lee says, "Well, if that is the case, that is what has to happen because, on any view, the weight that has to be afforded to the mother's Art.8 rights will outweigh and be disproportionate to the damage that would flow to her by letting the

information out.” The mother simply cannot contemplate the fallout from the father getting to know that she is HIV positive. In her statement to the court, she lists the consequences. She believes, as I have already indicated, that he will react very badly to not having been told this information before. It is likely that he will cause trouble by spreading the information around his family and around the community more generally.

34 But, with specific reference to the children, Ms Lee says, “What will be the impact of a destabilising of the parents’ relationship on the current care plan and the care arrangements for the children?” It works well. Despite their difficulties, the parents get on sufficiently for the father to be fully involved in the care of the children, as I have described, and Ms Lee submits that the consequences of disclosure that would be devastating for the care plan and for the co-parenting arrangements which are going so well. On the other hand the benefits of disclosing it – namely that it becomes relevant in the care proceedings, that it can be discussed in the care proceedings and that the father knows the information – simply do not match up to the adverse consequences for the mother personally and for the children of making disclosure.

35 The case is one that is properly balanced in that way. The mother’s case is a substantial case before the court, and a decision has to be taken as to quite where the proportional weight lies in terms of protecting her rights but also meeting the rights of the children and the father within the process more widely.

36 Having looked at the factors as best I can, listing them as I have in this judgment, despite the weight that attaches to the need for the mother’s rights to privacy to be protected, I consider that it is necessary for disclosure to take place. I consider that the submissions made by the local authority and the guardian point properly to matters that need to be considered fully in the care case, and that cannot be done without disclosing the information to the father. I consider that the father’s reaction can be reduced, if it might be highly negative, by the way in which he is given the information, and by the professional support that he is given. I

consider that if he is ever going to be told this information, then the optimum time to do so is now within a professionally supported context, namely the care proceedings being before the court, the local authority fully involved and with lawyers acting for him, rather than learning at some unpredictable, unplanned way in the future. It is also, it seems to me, for the reasons I have given, important that the father knows or has his eyes open to the fact that this is an issue in this family and knows that irrespective of the proceedings.

37 So, for those reasons that I have now given, I come to the view that it is necessary and proportionate for the information to be disclosed, notwithstanding the weight that I have given to the mother's Art.8 rights.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

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