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Neutral Citation Number: [2021] EWHC 3375 (Fam)

Case No: DE21C00071

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/12/2021

Before :

MRS JUSTICE LIEVEN

Between :

A CITY COUNCIL

Applicant

and

MOTHER

First Respondent

and

FATHER

Second Respondent

and

X

(a child, acting through her Child's Guardian)

Third Respondent

Mr James Cleary (instructed by A City Council) for the Applicant
Mr Ben Clulee (instructed by Nelsons Law) for the First Respondent
The Second Respondent did not attend and was not represented
Ms Maria Mulrennan (instructed by Cafcass) for the Third Respondent

Hearing dates: **24 November 2021**

Approved Judgment

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This case concerns an application by A City Council ('LA') for a final care order in respect of X. There is also before me an application by the Mother for an injunction preventing the LA from consulting with the Father about any issues concerning X. The LA had applied for a declaration that it was not required to consult the Father, but they now seek leave to withdraw that application. The making of the final care order is not contested. However, the LA do contest the making of the injunction sought by the Mother.
2. The LA was represented before me by Mr Cleary, the Mother by Mr Clulee and the Guardian by Ms Mulrennan. The Father, as is explained below, has not been notified of these proceedings and therefore was neither present nor represented. The Father is named on the birth certificate and therefore has parental responsibility.
3. X is now 13 years old. She has been diagnosed as having a '*...disordered avoidant attachment pattern co-morbid with ASD/ADHD exhibiting hypersensitivity to sensory stimuli and sleep problems*' (per the psychologist instructed, Dr Jacqueline Lynch). This has manifested itself in a series of dangerous and highly risky behaviours and it is accepted by all parties that she is beyond the control of her Mother. All those represented agree that it is in her welfare interests for a care order to be made. There is evidence that X puts herself in highly dangerous situations and is at considerable risk of child sexual exploitation.
4. When X was 4 weeks old the Father committed a serious assault upon the Mother leaving her unconscious. He has not seen X since this assault 13 years ago. He was convicted of assault and received a custodial sentence. There was then a further custodial sentence of 3½ years. The Mother subsequently obtained a non-molestation order and a Residence Order against the Father. In 2010 the Police served the Mother with an "Osman Warning" referring to intelligence they had received suggesting that the Father posed a high risk to the Mother of serious physical harm, which could result in her death.
5. In around 2012 the Father did seek contact with X. Although I have not seen any court order, Mr Clulee told me that the Father had been ordered to attend a domestic abuse course before any contact would be ordered and that he failed to do so. It was around this time that the Mother obtained a Prohibited Steps Order against the Father.
6. In 2015 the Father carried out an assault on his then partner. Subsequently the Father was given a sentence of life imprisonment.
7. It is against those background facts that the Mother says that she is in very great fear of the Father. It is quite obvious from her witness statement, the submissions made on her behalf and, very briefly, her demeanour in the (remote) hearing, that her fear is genuine. No party has suggested otherwise.
8. Care proceedings were issued on 23 March 2021, at which point X had been residing in LA care under s.20 of the Children Act for 4 months. An Interim Care Order was made on 30 March. As the Father had parental responsibility, he automatically became a party. On 30 March the Mother applied for the Father to be discharged as a party on

the grounds of the risk he posed to the Mother and the fact that he had played no part in X's life since she was 4 weeks old.

9. On 22 April Judge Afzal determined that the Father should remain a party but should not be given notice of the proceedings or sent any documents. The LA agreed to do life story work with X, in part regarding her parent's relationship, and Dr Lynch, a psychologist, was instructed.
10. The LA's final evidence stated that it would be seeking an order under s.34(4) and an order under s.22 to allow them to dispense with the duty of keeping the Father informed as to matters relevant to X's care. The evidence said that the LA were seeking the s.34(4) order "*in recognition of the fact that it would inappropriate and potentially dangerous to promote contact between X and her birth father*".
11. The Mother's evidence supported the making of a Care Order and set out the grounds for her fear of the Father, both in respect of herself and X. The Guardian supported the making of a Care Order.
12. On 9 August the LA made an application for a declaration that they be discharged from duties to inform the Father under s.22. The matter was listed for a final hearing on 15 September 2021.
13. However, on 18 August the LA indicated that it had changed its position on s.22 and wished to withdraw its application. This was on the grounds that there was insufficient evidence to say that X was at risk of suffering significant harm if the Father was consulted.
14. The Mother then filed a Position Statement seeking to persuade the court not to give the LA leave to withdraw their application and seeking a declaration under the inherent jurisdiction that the LA was absolved of its duties under s.22 and s.26 of the Children Act, and seeking to include that members of the paternal family should also not be consulted.
15. The Guardian in effect supported the Mother's application but suggested that there should be no consultation with the Father without the Mother's consent and that if that consent was not forthcoming the LA could apply back to the court.
16. On 28 October 2021 HHJ Williscroft transferred the case to the High Court.
17. There are two interlinked, but factually separate issues before me. Firstly, whether the LA should retain either a duty or a discretion to consult the Father about any decisions made in respect of X; and secondly, what steps if any should be taken in respect of X having contact with the Father.
18. In respect of contact, Dr Lynch carried out a psychological assessment of X. Dr Lynch's report included the following:

"[X] expressed a wish to have contact with her birth father but was not able to evidence that she was able to understand the pros and cons of this decision and balance the conflicting issues to come to an informed decision.

Most importantly [X] was not able to balance the potential emotional impact of contact with her father on herself or to think through the experience of seeing him in prison.

Given this, whilst [X] is verbalising a desire to see her father, I do not feel that she is exhibiting the level of emotional competency to make this decision as an informed choice at this time, and it is therefore the responsibility of the professionals and adults in her life to determine if contact is in her best interest until she meets majority.

This decision would need to balance what a professional feels [X] would gain from contact with her father, and how this would add to her sense of self balanced with the potential destructive impact of trauma in seeing her father along with the potential for rejection. [X] is not emotional stable enough to manage contact at this time if the balance is not strongly in the positive for her.”

19. I was told at the hearing that X has been having some contact with her paternal aunt, W. This has apparently gone well. The Mother is content for this contact to continue as she trusts W not to inform the Father or other family members. X has expressed an interest in having contact with her two paternal half-siblings. However, Mr Clulee told me that the Mother believes that these children have been adopted, so the issue of any contact with them may be an intensely sensitive one and not a matter I can consider in this judgment.

The Law

Statutory Duty to Consult a Parent

20. The duties of a local authority to consult with the parents of a child in their care are set out in sections 22 and 26 of the Children Act. Section 22(4) states:

“(4) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—

....

(b) his parents

regarding the matter to be decided.

....

(6) If it appears to a local authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise their powers with respect to a child whom they are looking after in a manner which may not be consistent with their duties under this section, they may do so.”

21. Section 26(2)(d)(ii) and (i)(ii) specifies that regulations can be made on the involvement of parents in the reviews of a looked after child. The appropriate regulations are the

Care Planning, Placement and Case Review Regulations (England) 2010 ('the regulations'). The regulations note that a parent must be provided with the local authority policy on review meetings (section 34(2)(b)). They also require that the Independent Reviewing Officer must ensure:

“that, so far as reasonably practicable, the wishes and feelings of C’s parents, or any person who is not C’s parent but who has parental responsibility for C, [and the views of the appropriate person,] have been ascertained and taken into account’ (section 36 (1) (c)).”

22. Section 84 of the Children Act sets out the sanctions if the duties specified under the Act are not followed by a local authority:

“(1) If the Secretary of State is satisfied that any local authority has failed, without reasonable excuse, to comply with any of the duties imposed on them by or under this Act he may make an order declaring that authority to be in default with respect to that duty.”

23. The High Court may make ‘a wide range of injunctions for the child’s protection’ under the inherent jurisdiction (per paragraph 1.3 of Practice Direction 12D of the Family Procedure Rules). There is no dispute in this case that an injunction could be granted under the inherent jurisdiction to stop the LA from informing the Father of any matters relating to X.

24. The parents of the subject child are automatic respondents to any application under the inherent jurisdiction (rule 12.3 of the Family Procedure Rules).

25. *In Re C (Care: Consultation with Parents Not in Child’s Best Interests)* [2006] 2 FLR 787 the court considered a declaration to absolve a local authority of its duty to consult a father under s.22 and s.26 of the Children Act 1989. In this case the father had been convicted of sexually assaulting the subject child and remained in prison for this at the time of the final hearing. Coleridge J granted the declaration and made the following observations:

- a) The matters to be considered on an application to remove the father as a party, or by extension not to serve the father with documents relating to the case, were similar to those to be taken into account when considering if the father should be consulted following a final care order [30];
- b) The welfare interests of the subject child are the paramount consideration [31];
- c) It is ‘a very exceptional case’ which would attract relief of the type sort, and the court would need to balance the competing rights of the father and the subject child to a private and family life [32];
- d) In a case where there was no possibility of adoption, then the local authority would not be taking any ‘very significant’ decisions such as adoption or a move out of the country, and rather ‘it is merely a question of the details of this child’s life being worked out by the local authority under the umbrella of a care order’ [34]

- e) ‘...this father has, as matters stand, forfeited consideration of his rights in relation to making decisions about this child’s future. I cannot think that he can usefully participate in discussions about what is in S’s best interests in circumstances where he has in the past wholly disregarded them...’ [35].

26. The decision in *Re C* was endorsed by Gwynneth Knowles J in *Re X and Y (Children)* [2018] 2 FLR 947. The father in that case had also been convicted of sexual offences against the subject children and was serving a lengthy prison sentence. Gwynneth Knowles J granted the declaration that the LA had no duty to consult the father, and said:

“52. The breadth of section 26 of the Act was described by Hayden J in these terms [Re O (A Child) [2015] EWCA Civ 1169]:

"[27] ... The objective of the process here is to ensure not only that there is proper planning but that the plan for the child continues to be the correct one, developing and evolving as the child's needs change. It is to fortify the rigour of review that the section imposes a wide-ranging duty to consult, not least with the parents. Even a parent who has behaved egregiously may nonetheless have some important contribution to make in the future. The requirement to solicit the views of a parent is not contingent upon a moral judgement of parental behaviour; it is there to promote the paramount objective of the statute as a whole, i.e. the welfare of the child. These duties are a statutory recognition of the need appropriately to fetter the corporate parent..."

I accept that analysis and note that Hayden J agreed that a local authority could only be absolved from its duty to consult and to provide information to a parent in " exceptional circumstances ", approving the judgment of Coleridge J in Re C (Care: Consultation With Parents Not In Child's Best Interests) [2005] EWHC 3390 (Fam), [2006] 1 FLR 787 [see paragraphs 28 and 29 of Re O].”

27. In *Re X* the removal of the father as a party was considered, but the parties had agreed – following an indication from the court – that the father should be served with notice of the applications and a reduced bundle. The factual context in that case was plainly somewhat different from the present. The grounds for excluding him from information about the children turned on his conduct to them, and their welfare (and wishes). In the present case, the issue is rather the risks posed by the Father to the Mother and X, and the balance between the competing rights of the Father, Mother and X.

The position of the parties

28. The LA initially had made the application to be absolved of any duty to consult the Father. However, they subsequently changed their position, sought to withdraw that application and opposed the injunction sought by the Mother.
29. Mr Cleary made clear that the change in position was as a result of legal advice rather than any change in the view of the social work team. He referred to the competing Article 8 rights of the Father and of X, and to the Father’s Article 6 rights. He submitted that the test, as set out in *Re X* and the cases referred to therein, is one of exceptional

circumstances to justify this level of interference in the Father's Article 8 rights. He submitted that although the facts of the case were "concerning" they did not amount to exceptional circumstances and, as such, the test was not met. He pointed to the fact that the Father had not made any threats to the Mother since at least 2010, and there was no direct evidence of risk to X as opposed to her mother.

30. Mr Clulee, on behalf of the Mother, referred to the Mother's evidence of her extreme fear of the Father. He pointed to the Judge's sentencing remarks and the unequivocal evidence of the Father's dangerousness. He accepted the test of exceptional circumstances being required but said the facts of this case met that test.
31. The Guardian supported the Mother's position.

Conclusions

32. The Father is X's biological father and is named upon the birth certificate and therefore has parental responsibility. A decision that he should not be consulted or informed about matters relating to X is therefore prima facie an interference in his Article 8 rights.
33. However, in my view, relatively little weight should be given to the Father's Article 8 rights on the facts of this case. Firstly, he has not seen X since she was 4 weeks old, some 13 years ago, and has made very little effort to be involved in her life. As I understand it, he made one application for contact but then failed to undertake the domestic abuse work which the judge required. Therefore, his real-life involvement in X's life has been virtually non-existent. Although this may not entirely extinguish Article 8 rights, depending on the facts of the case, it must significantly diminish the weight that any court would give to them.
34. Secondly, when X was a very young age, the Father carried out a very serious assault on the Mother. This, together with his subsequent violence to another woman, has put the Mother in real and wholly justified fear of him. Those actions have themselves further undermined any reliance he could place upon his "family life" rights. Although the violence was exercised upon the Mother, rather than directly on X, it is by now generally accepted that domestic abuse between parents has a very serious impact on children within the family.
35. It follows from this that, in the words of Coleridge J, the Father has largely if not wholly forfeited his right to be involved in X's life and therefore his Article 8 rights in respect of her. Article 6 adds nothing at this stage as the decision was made by Judge Afzal, rightly in my view, that the Father should not be served with the documentation, which meant he could not make any submissions during the court process. The removal of his Article 6 rights in the present case is justified by the impact on the Mother's rights. The child's Article 6 rights were fully protected by the involvement of the Guardian.
36. There is however another aspect to this case which the LA appear to have left out of account, namely the Mother's Article 2 and Article 3 rights. The evidence shows beyond any doubt that the Father is a seriously dangerous man to those he wishes to harm. The police in 2010 were sufficiently concerned about the safety of the Mother as to serve her with an "Osman warning", not a step that the police undertake lightly.

37. Mr Cleary argues that the evidence of risk to the Mother arose some years ago, and that there is no evidence that the Father poses a direct threat to X. However, in my view that rather misses the point. It is obviously not possible to test the risk to the Mother, and it may be that the Father had no reason to threaten or commit violence to the Mother in the years between 2010 and when he was sentenced to life imprisonment. However, given his history, I wholly accept the Mother's genuine fear that if the Father became aware of the allegations of child sexual exploitation, he might blame the Mother or, for whatever reason, feel motivated to encourage violence against her. The likelihood of the risk is simply unquantifiable, but the harm if it were to manifest itself is potentially very great. The Osman warning and the 2015 assault and its aftermath show what the Father is capable of.
38. Mr Cleary argued that there was no evidence of risk of harm to X. However, even if the Father posed no direct risk to X, a matter which is impossible to speculate upon, the physical and emotional harm to the Mother of placing her at risk (or even just the fear of it), will itself impact very negatively on X. In carrying out the balancing exercise, I am not limited to considering direct impacts to the child but can also take into account the impact on the child of her mother being in fear of serious assault.
39. I have considered whether the Father could be given some highly redacted level of information. However, it is not possible in my view to do this in a way that is meaningful but doesn't create a risk to the Mother.
40. For the reasons I have explained, I would give the Father's Article 8 rights little weight on the facts of this case. I am more concerned about X's stated desire to have contact with her Father. It is the view of Dr Lynch, and I believe the social worker, that X is not *Gillick* competent in respect of decisions about her Father. That is highly likely to be the case. X is only 13, but also has mental health diagnoses that mean that she functions at a significantly younger age. She is most unlikely to be able to understand the emotional and psychological implications of making contact with her Father, quite apart from the potential consequences to her mother. I am therefore satisfied that at the present time X should not have contact with her Father, even on an indirect and highly managed basis.
41. For all these reasons it is appropriate at the present time, and in accordance with the balance of rights under the Human Rights Act, for an order to be made that the LA must not consult or inform the Father about any matters concerning X. If that position changes in their view in future years, then they must apply back to the court for a variation of the order.
42. I also make the Care Order. There is no dispute that threshold is crossed. I do not need to rehearse the various matters under the welfare checklist given the agreed position. X is at the present time beyond her Mother's control and in need of very considerable care and support that her Mother is not at the moment able to give her. The Guardian supports the making of the order and I find it is in her welfare interests to do so.