

Withholding notice of care proceedings from parents without parental responsibility

Mani Singh Basi, Barrister, 4PB

Lucy Logan Green, Barrister, 4PB



Mani has a broad practice covering all areas of family law with a particular focus on disputes relating to children.



Lucy has a busy practice which encompasses all areas of children law with a focus on public law.

When a local authority issues care proceedings under Part IV of the Children Act 1989, those with parental responsibility for the subject children are automatic respondents to the local authority's application. There is a further obligation on the local authority pursuant to Family Procedure Rules 2010 ('FPR 2010') PD 12C para 3.1 to notify 'every person whom the applicant believes to be a parent without parental responsibility for the child'.

Below, we will examine the circumstances in which a parent without parental responsibility may not be notified of extant care proceedings.

The exceptionality of a decision not to give to a father notice of care proceedings or adoption proceedings was emphasised by Thorpe LJ in *Re AB (Care Proceedings: Service on Husband Ignorant of Child's Existence)* [2003] EWCA Civ 1842, [2004] 1 FLR 527 who stated that:

'3. . . . It is clear that the court has a general discretion to grant exception from the requirements of the rules but that power is on the authorities only to be exercised in highly exceptional circumstances'.

When dealing with care and placement proceedings, it is worth considering the statutory provisions and the duties of a local authority. As outlined at para [29] of *Re A, B and C (Adoption: Notification of Fathers and Relatives)* [2020] EWCA Civ 41, [2020] 1 FLR 1157.

'Part III of the CA 1989 concerns support for children and families in England. Broadly, section 17 imposes a duty on local authorities to promote the upbringing of children in need by their families so far as is consistent with their welfare, while section 22C requires local authorities to place looked-after children with parents or relatives unless that would be inconsistent with their welfare or is not reasonably practicable. Where there are care proceedings, the s.1 checklist in the CA 1989 includes a requirement for the court to have regard to the capacity of the child's parents and of other relevant persons to meet the

child's needs. In this context a parent includes a father without parental responsibility. Where there are proceedings for a placement order or an adoption order, the parallel checklist in the ACA 2002 requires the court and the local authority as the adoption agency to have regard to the lifelong effect on the child of ceasing to be a member of the original family and becoming an adopted person, to the relationship the child has with relatives (defined in s.144 as grandparents, siblings, and uncles and aunts) to their ability and willingness to provide a secure environment and meet the child's needs, and to their wishes and feelings. These provisions are given procedural effect by the FPR 2010 and the Adoption Agencies Regulations 2005, which impose duties on the local authority as the adoption agency and upon the Children's Guardian as the child's litigation friend to obtain information about these matters.'

In *Re L (Adoption: Contacting Natural Father)* [2007] EWHC 1771 (Fam), [2008] 1 FLR 1079, Munby J commented:

'25. . . . The court has an unfettered discretion, to be exercised having regard to all the circumstances and in a manner compliant with the requirements of the Convention. That said, and where there exists family life within the meaning of article 8 as between the mother and the father, one generally requires 'strong countervailing factors' (*Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 at para [48]), 'very compelling reasons indeed' (*Re C (Adoption: Disclosure to Father)* [2005] EWHC 3385 (Fam), [2006] 2 FLR 589, at para [17]) or 'cogent and compelling grounds' (*Birmingham City Council v S, R and A* [2006] EWHC 3065 (Fam), [2007] 1 FLR 1223, at para [73]) to justify the exclusion from the adoption process of an unmarried father without parental responsibility. At the end of the day, however, every case is different and has to be decided having regard to its own unique circumstances.'

When specifically considering fathers without parental responsibility, in *Re P (notice of care proceedings to father without parental responsibility)* [2019] EWFC 13, Judge Bellamy (sitting as a Deputy High Court Judge) considered an application by the local authority to disapply para 3.1 PD12C in circumstances where the father was serving a custodial sentence for offences relating to his sexual relationship with the teenage birth mother. Applying *Re CD (Notice of care proceedings to father without parental responsibility)* [2017] EWFC 34 the judge considered the competing factors as follows below.

Article 8

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is headed, 'Right to respect for family and private life'. It provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

The first question for the court is therefore whether there is any relationship between the parent and the child which could properly be described as amounting to 'family life'?

In *Re CD*, having considered the relevant authorities, the court summarised the way that an answer to this question may be reached as follows [at 29]:

'In summary, when considering whether 'family life' exists, the following points emerge from the authorities: (a) the determination of whether family life exists is essentially a question of fact;

(b) family life is not confined solely to marriage-based relationships; however, (c) mere biological kinship is not of itself sufficient to constitute family life; (d) cohabitation, though not a pre-requisite, is an important factor to be taken into account when considering the existence or otherwise of family life; however, (e) other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family life; (f) there must be evidence of a close personal relationship, a demonstrable interest in and commitment to the child.’

Article 6

Article 6.1 of the Convention is headed ‘Right to a fair trial’ and states, so far as is relevant, that:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

In *Re M (a child: adoption proceedings)* [2014] EWHC 1128 (Fam) Theis J held that if a father does not have any Art 8 rights then Art 6 is not engaged. The reverse – that if Art 8 is engaged then Art 6 is also engaged – appears logically to apply.

Requirement to serve Form C6A

In *Re CD* the court observed [at 44–45]:

‘44. The right to receive a copy of Form C6A is not limited to those who are able to establish that they are entitled to the protection of article 8. The right to receive a copy of Form C6A exists for the benefit of every father whom a local authority ‘believes to be a parent without parental responsibility for the child’ irrespective of whether or not that parent has *de facto* family ties. The difference between a father who is able to establish *de facto* family ties and a father who is not able to do so is that the former is entitled to the protection of article 8 and article 6 whereas the latter is not. The practical consequence

of that distinction, in my judgment, is that the threshold for determining that it is not appropriate for such a father to receive Form C6A is lower for a parent who does not have the protection of article 8 and article 6 than it is for a parent who has that protection.’

45. Although the threshold for determining that a parent should not be served with a copy of Form C6A is lower for those parents who do not have article 8 and article 6 rights than it is for those who do, the decision that such a parent should not be served with Form C6A still needs to be justified on the facts and not in an arbitrary manner. Risk and welfare will be important factors in considering whether to give permission to a local authority not to serve a birth father with Form C6A.’

Judge Bellamy concluded as follows in *Re CD* [at 46]:

‘46. Each year local authorities issue care proceedings in the Family Court in which the fathers of the children concerned do not have parental responsibility and who, though not parties, are nonetheless entitled to receive a copy of Form C6A. Until they receive Form C6A some fathers are in a state of ignorance about the existence of their child. Others are aware of the existence of the child and of the fact that they are the child’s biological father but have thus far shown no interest in the child’s life. For the children involved it is important that attempts are made to engage with their birth father and perhaps also his wider family. The starting point must be two-fold. First, that it will normally be in the interests of the child that her birth father should receive a copy of Form C6A thereby enabling him to apply for party status so that he can participate in the proceedings. Second, that the child and her mother should not be put at risk of harm as a result of seeking to engage the father in the proceedings. It is a matter of balance and that is the case whether or not the father is entitled to the protection of Article 8 and Article 6.’

Another key case to consider is that of *Re A (Relinquished baby: Risk of domestic abuse)* [2018] EWHC 1981 (Fam). This was a successful application in the High Court where a declaration was sought that it was permissible and lawful for the Local Authority to place a child for adoption without notifying the child's putative father and / or their extended paternal and maternal family members. As indicated, this article is only focusing on not providing fathers with parental responsibility with notice, but Cobb J provided useful guidance at para [19]:

- i) Each case is fact-sensitive (*Re RA* at [31]);
- ii) The outcome contended for here is 'exceptional' (*A Local Authority v the mother* at [1]/[7])
- iii) The paramount consideration is the welfare of A; section 1(2) Adoption and Children Act 2002 ('ACA 2002')
- iv) The court must have regard to the welfare checklist in section 1(4) ACA 2002;
- v) It is a further requirement of statute (section 1(4)(f)(iii) ACA 2002) that the court has regard to the wishes and feelings of the child's relatives;
- vi) Respect can and indeed must be afforded to the mother's wish for a confidential and discreet arrangement for the adoption of her child, although the mother's wishes must be critically examined and not just accepted at face value; overall the mother's wishes carry 'significant weight' albeit that they are not decisive (*Re JL and AO* at [47], [48] and [50], and see also *Re RA* at [43(vi)]);
- vii) Article 8 rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the Article 8 rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent (*Re TJ* at [26]);
- viii) Adoption of any kind still represents a significant interference with family life, and can only be ordered by

the court if it is necessary and proportionate (*Re RA* at [32]);

ix) A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough 'analysis' of the options is necessary (*Re JL & AO* at [32]); 'analysis' is different from 'assessment' – a sufficient 'analysis' may be performed even though the natural family are unaware of the process (*Re RA* at [34]). As I said in *Re RA* at [38]:

"in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed".

As is apparent in the case law, the principles governing any application not to inform a father without parental responsibility of care proceedings are clear. For a party to succeed in such an application there is undoubtedly a high bar to cross. Consideration must be given to the welfare of the child, the serious nature of adoption and the provisions within the European Convention of Human Rights.

It should be noted for those in practice dealing with such issues at the coalface that it is imperative in such circumstances that a mother is able to obtain clear legal advice quickly. These applications will often need to be made promptly, particularly if there has been no pre-proceedings involvement with a local authority and decisions are being expedited. For example, the mother's legal team may need to make an urgent application to prevent a local authority who wishes to undertake their statutory duty to make contact with the putative father. It must be borne in mind that only cases which involve the most extreme and egregious behaviour are likely to succeed

and thus this is not an application to be made in anything but the more extraordinary circumstances.