7BR

High Court rules on journalist's application for access to papers in care proceedings

On 31 July the High Court handed down judgment in the case of *Newman v Southampton City Council and others [2020] EWHC 2103 (Fam)*, which concerned the application of freelance journalist Melanie Newman to view the court files and other materials in a set of care proceedings which concluded in October 2018.

The case is significant because, although journalists have been permitted to attend private family hearings since 2009, this is the first reported occasion where a court has been asked to determine whether, and to what extent, a member of the press should be permitted to access the underlying documentary material in a case. Since the application was wide-ranging, seeking disclosure of all relevant material including witness statements, expert reports, local authority notes, and medical and police disclosure, the court had the opportunity to consider the competing interests at stake in relation to the full spectrum of typical documents in care cases.

The decision also comes during the course of the 'Transparency Review' currently being undertaken by the President of the Family Division, which considers whether the line between confidentiality and transparency in family proceedings is correctly drawn. The evidence-gathering stage of that review concluded in May 2020, and the report is awaited.

Background: the care proceedings

The background care proceedings concerned a child, M, who was removed from her mother's care in June 2015. The matters which precipitated the local authority's involvement included two occasions where her mother had administered an EpiPen in circumstances where it turned out to be unnecessary. Although in the initial stages of pre-proceedings investigation the case was treated as one of potential Fictitious and Induced Illness (FII), by the time proceedings were initiated the local authority's concerns about the mother related more generally to 'over-protectiveness'.

At the conclusion of the initial care proceedings, M was placed by agreement with her father. However, shortly afterwards that placement failed. M's mother applied to discharge the care order, but the local authority cross-applied for a placement order. In June 2016 the Mother's application was dismissed and the local authority's was allowed. M was to be placed for adoption.

The Mother sought to appeal the placement order to the Court of Appeal, but – being ineligible for legal aid – was unable to do so without first raising some £20,000 in funds. With some difficulty she was ultimately able to raise the money, and in January 2018 the Court of Appeal

set aside the placement order and remitted the case for a rehearing. The judgment of King LJ, reported as *M (A Child) [2018] EWCA Civ 240,* gathered press attention, not least because of the observation that 'the serious finding that the mother presents a significant risk of physical harm to E is inadequately analysed and based on the slimmest of evidence' [55].

When the matter was due to be reheard, three journalists including Ms Newman attended the hearing as they were permitted to do by the Family Procedure Rules (r.27.11). By that stage, however, the local authority's plan had changed to one of rehabilitation to the mother. The matter concluded by way of an agreed final order, with no hearing of evidence or submissions.

The application

Thereafter, the Applicant applied to the High Court seeking access to the full bundles of materials from the care proceedings. Ms Newman has a long-standing interest in reporting on proceedings in the family court, and is particularly interested in cases alleging FII (and the related concept of 'overanxious' parenting). She considered that the case raised important public interest questions, in light of:

(a) the nature of the local authority's concerns about the mother;

(b) the Court of Appeal's observations that the placement order was made on 'the slimmest of evidence';

(c) reports that that the local authority had one of the highest rates of adoption for under-5s in England;

(d) the manner in which the local authority had changed its position on adoption after the Mother's successful appeal; and

(e) the fact that she had very nearly not been able to appeal due to legal aid restrictions, meaning M had very nearly been separated from her permanently on what proved to be unlawful grounds.

The application before the High Court was for access to the documentation only. The Applicant accepted that she would require further permission form the court should she wish to publish a story. Her purpose was therefore at this stage investigative, although she contended that the public interest questions raised were sufficient to warrant journalistic assessment of the material. It was also her case that, because of the manner in which the case had concluded, her right of access to the court hearing under FPR r.27.11 was insufficient in the circumstances:

because of the parties' agreement there had been no hearing of evidence or legal argument, and therefore no true 'transparency'.

M's mother fully supported the application, and (although she did not play an active role in proceedings) had furnished the court with a statement where she said that M herself (aged 7 ½) consented to it. M's father, who had been notified of proceedings, did not respond.

The local authority and the child's Guardian, who had been appointed for the purpose of these proceedings, both objected to the application, though to different degrees. The local authority had conceded access in redacted form to a limited number of documents pertaining solely to the mother or containing only information already in the public domain by virtue of the published Court of Appeal judgment.

In the lead-up to the final hearing of the application, third parties had been identified who were said to be potentially affected by the order sought. These included reporting experts, NHS trusts, other local authorities, and police constabularies. Those parties were invited to comment on the application. Some did not comment, others consented, and others responded to say that they objected to disclosure of the material, usually on the basis that it was confidential.

Legal principles

Material from family proceedings involving children is private. M's proceedings had concluded, so the prohibition against publication of her name and other identifying information in s.97 Children Act 1989 was no longer active; however, other rules required the Applicant to gain the court's permission before she could access the documents which she sought. The majority of that material fell within the scope of s.12(1)(a) of the Administration of Justice Act 1960 ('AJA 1960') which makes it a contempt of court to publish 'information relating to proceedings' in most cases involving children. This restriction does not stretch to material which was not prepared for the purposes of proceedings, such as medical records and police disclosure, even when it is disclosed into proceedings (see *A v Ward [2010] EWHC 16*). However, that material is protected by general principles of confidentiality including rights to privacy protected by Art.8 ECHR.

The court does, however, have an inherent jurisdiction to permit the disclosure of material where otherwise prohibited by s.12 AJA 1960. It also is able to permit disclosure of otherwise confidential material where necessary and proportionate in the public interest. In each case, the court is required to conduct a balancing exercise between competing rights: here, this meant balancing Art.8 ECHR (concerning privacy rights) and Art.10 (concerning free speech).

This is the latest in a long thread of cases on the subject of open justice and transparency in family proceedings, balancing the real and important interests in maintaining confidentiality against the no less important public interest in ensuring that the public – through their watchdog, the media – are able properly to scrutinise a system whereby the state can intervene in private life in the most serious ways. It is well-established that, when balancing Art.10 and Art.8 rights in such cases, the court should undertake what was called the 'ultimate balancing test' in *Re S (A Child) (Identification: Restrictions on Publication [2004] UKHL 47*:

(i) First, neither right has precedence over the other as such;

(ii) Second, where the rights are in conflict, it necessitates an intense focus on the comparative importance of the specific rights;

(iii) Third, the justifications for interferences with or restraint of each right must be considered;

(iv) Finally, the proportionality test must be applied to each.

The decision

In arriving at her judgment, Roberts J considered that the Applicant's Art.10 rights were plainly engaged in her request to access the documentation, even as separate from any request to publish it. It was part of the scope of her journalistic activity to seek to look behind the judicial process and examine the administrative processes within the local authority which had ultimately caused the matter to come to court, and had shaped the way the case was presented: [120-121].

However, she determined that M's privacy rights were also engaged, even in circumstances where the disclosure sought was only disclosure to a single journalist, to a similar extent as if the application was for publication: [122-123].

Although M's mother had consented – and said that M herself consented – to the application and the infringement upon M's privacy which it entailed, M's interests fell to be assessed independently of her mother's consent: [124-128].

Medical and health records: [131-137]

The documents insofar as they related to the mother could be disclosed. As for material to do with the child, Roberts J considered that even though the disclosure sought was to the Applicant alone, it would still 'represent a clear court-directed intrusion of this child's most basic and fundamental rights to a private family life' [136]. The mother's consent did not tilt the balance

in favour of disclosure. Although M's medical history was highly relevant to proceedings, there was sufficient information about those already in the public domain.

Contact records [139-140]

The case for withholding these records were considered to be 'less compelling than those relating to medical records'. However, the local authority had maintained that the notes included references to private information relating to M's family (although no further detail was given and of course the Applicant did not know what those references were). In light of that, and the extent of the redaction exercise which would therefore be necessary over hundreds of pages of records, Roberts J held that disclosure was not proportionate.

Police disclosure [141-142]

Disclosure of these documents was also refused. Much information about the family's involvement with police was already in the public domain, and in any event the mother could give the Applicant a full narrative account. In view of this, disclosure and the revelation of private information which that would entail was unnecessary and disproportionate.

Previous social care records [143]

The records of two different local authorities' involvement with the family were considered irrelevant, as those were not the authority which had brought the proceedings.

Child Protection Conference and multi-agency minutes and reports [144-145]

The Applicant was correct that scrutiny of the judicial process alone was insufficient to achieve true transparency: the public, through its proxy in the media, must also be able to scrutinise the administrative processes which led to proceedings in the first place. However, there were good public policy reasons for maintaining the confidentiality of intra-organisational deliberations and enquiries, and those were not unseated on the facts of the application.

Expert reports and professional communications [146-156]

The Applicant was permitted to see the expert reports which related to the mother and her current partner, subject to redactions. Those reports were relevant to local authority decision-making, and had not been analysed in detail in the published judgments. On the other hand, there was good reason for maintaining the confidentiality of underlying communications between the experts, as it was important to maintain confidence that experts' deliberations would not be open to public scrutiny.

Social care assessments and witness statements [157-160]

The social care records in relation to M were withheld. They would need to be heavily redacted to protect the privacy rights of M and other family members. Disclosure of largely redacted notes would run the risk of underinformed reporting. The position was similar in relation to witness statements. This was so even though, as the Applicant had pointed out, had she attended a final hearing on evidence those statements would have formed the basis of the oral evidence which she would have been permitted to hear in court.

However, the Applicant was permitted access to position statements and case summaries on the basis that they were necessary to assist her in contextualising the issues. Some redactions would be necessary.

Conclusion

Although the case is in many ways unique to its facts, what it does acknowledge is that journalistic access to underlying material in a case can be part of the exercise of their function as the watchdog of the justice system. That function includes interrogation of the administrative systems which underlie the judicial system, and there may be cases where attendance at court hearings and release of judgments may not be enough. The judgment also gives some indication of the way in which courts may treat future applications by members of the press to view a range of typical material from care proceedings.

Kate Temple-Mabe acted pro bono for the Applicant journalist, instructed in her own right through the Advocate Pro Bono Unit in the early stages of proceedings, and later on instructed by Howard Kennedy LLP, as junior to a leading privacy law QC.