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England and Wales High Court (Family Division) Decisions

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This judgment was delivered in private. It consists of 39 paragraphs The judge hereby gives leave for it to be reported.

Neutral Citation Number: [2023] EWHC 1892 (Fam)
Case No: DE20C00043

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
21/07/2023

B e f o r e :

MRS JUSTICE LIEVEN

Between:

DERBYSHIRE COUNTY COUNCIL	**Applicant**
- and -	
SHANNON MARSDEN	**First Respondent**
- and -	
STEPHEN BODEN	**Second Respondent**
- and -	
THE CARERS	**Third and Fourth Respondents**
- and -	
CHILD A (A Child, through the Children's Guardian)	**Fifth Respondent**

Ms Julia Cheetham KC and Mr James Cleary (instructed by Derbyshire County Council) for the Applicant
Ms Clare Grundy (instructed by Derbyshire Family Law Group) for the First Respondent
Mr Anthony Finch (instructed by Elliot Mather) for the Second Respondent
Ms Lorraine Cavanagh KC and Ms Penelope Stanistreet-Keen (instructed by Banner Jones) for the

Third and Fourth Respondents
Mr Andrew Norton KC and Ms Anne Williams (instructed by Kieran Clarke Green) for the Fifth Respondent
Ms Louise Asprey for His Majesty's Courts and Tribunals Service
Sanchia Berg, an accredited journalist of the British Broadcasting Corporation, attended and made submissions
Patrick Sawyer, of 'The Daily Telegraph', and Callum Park, of the Press Association, attended the hearing

Hearing dates: 27 April & 18 May 2023

HTML VERSION OF APPROVED JUDGMENT

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This judgment was handed down remotely at 10.30am on 21 July 2023 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE LIEVEN

This judgment was delivered in private. It consists of 39 paragraphs The judge hereby gives leave for it to be reported.

Mrs Justice Lieven DBE :

1. This is an application by three media organisations for the release of various documents relating to care proceedings under the Children Act 1989 ("CA"). The background to this matter is particularly tragic as the proceedings related to Finley Boden, a young child who was killed by his parents on 24 December 2020. Finley and his sibling, Child A, were the subject of care proceedings brought by the Local Authority, Derbyshire County Council ("LA"), and had been returned to their parents following a hearing on 1 October 2020.

2. I held two hearings on this matter, at the first on 27 April 2023 I ordered that certain documents could be released to the media, but a process of redaction and, as appropriate, gisting had to be undertaken before the documents could be released. At the second hearing, the documents had been redacted in a way that all parties were content with, and the only outstanding issues were whether the Lay Justices and the Legal Adviser who had been involved in the original decision could be named by the media.

3. The LA was represented by Julia Cheetham KC and James Cleary, the mother was represented by Clare Grundy, the father was represented by Anthony Finch, Child A's carers were represented by Lorraine Cavanagh KC and Penelope Stanistreet-Keen, Child A was represented by Andrew Norton KC and Anne Williams, and His Majesty's Courts and Tribunals Service was represented by Louise Asprey. Sanchia Berg, an accredited journalist of the British Broadcasting Corporation, attended and made submissions, Patrick Sawyer, of the Daily Telegraph and Callum Park, of the Press Association, also attended the hearings.

4. The brief outline of the factual background of this case is that Finley and Child A were made subject of an Interim Care Order ("ICO") on 13 March 2020. The matter was allocated to the Lay Justices. The children were placed with the Maternal Grandparents ("MGP") under the terms of the ICO.

5. The case came before the Justices on 1 October 2020 for an Issues Resolution Hearing ("IRH"). That hearing was held by telephone, as was normal for Justices hearings at that point in the Covid Pandemic. All parties at that hearing agreed that the children should be transitioned back to the care of the parents. The principal issue before the Justices was the length of the transition plan. The LA submitted that the transition period should be four months, and the matter then to come back before the

court for final orders to be made if the transition had been successful. The LA in their submissions pointed to the fact that the parents had not been honest in relation to their drug taking, and to the particular challenges that had been posed by the Pandemic in relation to contact between the parents and the children.

6. The Cafcass Guardian set out a careful final analysis. She took the view that the children should be in the full time care of their parents within a period of 8 weeks. This position was supported by the parents.

7. I do not consider it appropriate to seek to summarise the arguments on both sides, particularly as the very point of this application is for the press to be able to see and report on the issues that arose in the case. It is sufficient to say that it was a balanced decision of the type that very frequently comes before the Family Court, at whatever level. There was nothing surprising, or in my view inappropriate, about the decision that was made or the process undertaken.

8. The Justices accepted the position of the Guardian and the parents and determined that the children should be transitioned back to the full time care of the parents within 8 weeks. A final hearing was fixed for late January 2021.

9. Tragically, Finley died on 24 December 2020. The parents were arrested and subsequently charged with murder. On 14 April 2023 they were convicted at Derby Crown Court of murder.

10. In the light of Finley's death, the care proceedings in relation to Child A were reallocated to High Court level and on 20 May 2022 Morgan J made a Reporting Restriction Order ("RRO"). I made subsequent RROs on 4 October 2022 and 3 April 2023. There is no application to vary the RRO and the terms by which it seeks to preserve the privacy of Child A and his/her carers.

11. Unsurprisingly there has been a great deal of media interest in the trial and in understanding the circumstances by which the children were returned to the care of the parents.

12. The applications before me are:

    (a) An application by Sanchia Berg for the BBC dated 21 April 2023 seeking disclosure of:

        i) The ruling made on 1 October 2020;

        ii) Supporting documents and reports which were presented to the court which included skeleton arguments and case summaries for the hearing on 1 October 2020

    (b) An application by Patrick Sawyer for The Telegraph dated 11 April 2023 seeking a copy of the ruling of the Family Court on 1 October 2020.

    (c) An application by Callum Parke for the Press Association dated 17 April 2023, that which is being applied for is unclear from the face of the application.

The law

13. A combination of s.97 of the Children Act 1989 ("CA") and s.12 of the Administration of Justice Act 1960 ("AJA") prohibit, to a significant extent, the publication of information about care proceedings and the evidence generated therein. Unauthorised breach of these requirements renders the publisher liable for contempt of court.

14. Rule 12.73 of the Family Procedure Rules 2010 ("FPR") deals with the communication of information relating to proceedings held in private, which includes care proceedings. Rule 12.73 states:

    "Communication of information: general

    (1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court)

may be communicated –

(a) where the communication is to –

(i) a party;

(ii) the legal representative of a party;

(iii) a professional legal adviser;

(iv) an officer of the service or a Welsh family proceedings officer;

(v) the welfare officer;

(vi) the Legal Services Commission;

(vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;

(viii) a professional acting in furtherance of the protection of children;

(ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

(b) where the court gives permission;

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G".

15. These applications fall within FPR r12.73(1)(b), namely where the court may give permission for the publication.

16. The leading cases on the disclosure of material out of care proceedings are *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76; *Re EC (Disclosure of Material)* [1996] 2 FLR 725; *Re H (Care Proceedings: Disclosure)* [2009] 2 FLR 1531 and *X & Y (Children: Disclosure of Judgment to Police)* [2014] EWHC 278 (Fam).

17. The Court of Appeal in *Re EC*, in the judgment of Swinton-Thomas LJ, set out ten points for a judge to consider when conducting the balancing exercise in deciding whether to order disclosure:

"(1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of section 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

*(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the *86 police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children.*

(9) In a case to which section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place."

18. The law as to the balancing of the competing matters under the Human Rights Act 1998, namely Article 8 (right to privacy and a private life) against Article 10 (right to freedom of the press), has been considered in the family law context in *Tickle v Griffiths* [2021] EWHC 3365, upheld by the Court of Appeal in [2021] EWCA Civ 1882.

19. In *Newman v Southampton City Council* [2021] EWCA Civ 437 the Court was dealing with an application for the release of documents from care proceedings to the press. The legal framework is set out at [12] to [34]. At [27] King LJ emphasised the importance of identifying the purpose to which it is intended for the material to be put and the scope of the information sought. The facts of Newman were very different from the present case. Ms Newman was a journalist who wished to carry out an investigation into the background of the case that had come before the Court. At [48] to [49] King LJ said:

"48. In my judgment, what Ms Newman seeks is beyond anything that either the guidance or authorities have to date had in mind. Ms Newman seeks to embark upon what has been referred to as an "archaeological dig". She wishes to trawl through thousands of highly confidential documents, many of which refer in detail to the most intimate medical and psychological details of this child's life, in order to see if something turns up. Almost certainly something would 'turn up' as it has long been acknowledged that things went wrong in this case to the significant prejudice to the mother, but mainly to the detriment of M. This is abundantly clear from the Court of Appeal judgment in the appeal against the making of the placement order.

49. Ms Newman is not seeking to push the boundaries of transparency in the family courts by way of a better understanding of the court process, or of the hearings which took place in respect of M, or even particularly to hold the judge or the family justice system to account. Ms Newman seeks to delve beyond the court proceedings themselves and to have access to documents such as social care and medical records in her capacity as an investigative journalist in order to track through the decision-making process which informed the decision to apply for a placement order. It should be understood that in saying this I do not in any way criticise Ms Newman's proper journalistic desire to hold the local authority to account. I am, however, seeking to establish the context in which the balancing exercise had to be conducted by the judge."

20. In recent times there has been a shift in the Family Court towards recognising the public importance of greater openness in the family justice system. This was articulated by the former President of the

Family Division, Sir James Munby, in *Re J* [2013] EWHC 2694, where he said: *"there is a pressing need for more transparency, indeed much more transparency, in the family justice system."*

21. In January 2023 Sir Andrew McFarlane, President of the Family Division, launched the Transparency Pilot which allows reporters to report what they see in the pilot courts, subject to strict rules about preserving the anonymity of the children, families, and some professionals involved in the cases. The present case does not fall within one of the pilot courts. However, the public importance of allowing greater public knowledge and scrutiny of the family justice system is now well established.

22. None of the parties in principle resist the application for disclosure of documents sought by the press, subject to the protection of Child A and his/her carer's privacy. The Guardian highlights the emotional harm that Child A has already suffered and the great importance of protecting his/her current placement, and his/her privacy into the future. The Guardian accepts the public interest in the case and the fact that a good deal of information about the family is already in the public domain by reason of the criminal trial.

23. On the facts of this case, I do not consider the balance between Article 8 and 10 rights particularly complicated. On the Article 10 side of the balance, there is significant, and legitimate, public interest in understanding the circumstances of Finley's death. He was, at the time of his death, subject to Family Court proceedings and had been allowed to go home to live with his parents. It is important that the public have sufficient information to understand the difficult decisions, with competing considerations, that have to be made in cases such as this. The release of the documents sought allows informed press and public consideration of the roles of the various agencies involved, the LA, Cafcass and the Courts, and the various matters that were taken into account before the decisions were made.

24. The release of relevant documents allows press reporting and debate to be based on full information, as opposed to speculation and partial knowledge of the circumstances of the case. It is important here that the criminal trial, although doubtless having large amounts of information about the circumstances of Finley's death, will not have had information about the care proceedings.

25. On the Article 8 side of the balance, it is of great importance to protect the privacy of Child A and of those caring for him/her, including the wider family. They have had to deal with the tragic loss of Finley, and the trauma of the criminal trial.

26. I have put in place a RRO that limits any reporting to protect the anonymity and Article 8 rights of Child A and those caring for him/her. Given the criminal trial, the press necessarily has information which they are restricted from publishing in the interests of protecting those privacy rights. In broad terms, the RRO restricts the publication of names, photos and information about schools which could lead to the identification of Child A or his/her carers. I have ordered that any material disclosed as a result of this judgment is redacted to ensure that that information is not disclosed.

27. None of the parties disputed that the documents listed, subject to redactions, should be given to the press. The parents expressed some concern about releasing any information which could lead to Child A's identification. However, in the circumstances, I put very much more weight on the submissions of the Guardian and the carers, both of whom accept the principle of the documents sought being released.

28. The next issue is whether the names of the Magistrates and the Legal Adviser should be allowed to be published. As I said in *Tickle v Herefordshire CC* [2022] EWHC 1017, it is important to be clear that the statutory restrictions on information relating to care proceedings have the purpose of protecting the anonymity of the children (and possibly their families) in proceedings rather than professionals involved. At [78] I said:

> *"However, the powers of the Court to order anonymisation in relation to professionals need to be exercised with considerable care. Social workers are employees of a public authority conducting a very important function that has enormous implications on the lives of others. As such, they necessarily carry some public accountability and the principles of open justice can only be departed from with considerable caution."*

29. The role of the judge is one that beyond any doubt requires public accountability and openness. No party submitted that the Magistrates should not be named. Further, I was shown no case that gave any support to an argument that the names of judges in a case could not be publicly named.

30. Society is necessarily very grateful for the role undertaken by Lay Justices for no remuneration and involving giving up much of their time. However, Lay Justices are judges and, in cases such as this, making very important decisions that impact on children and families in the most significant way. As such, there is no case for their names not to be in the public domain when decisions are made, in the same way as would the names of judges who had made such decisions.

31. I note that no person specific information was put before me concerning either the Lay Magistrates or the Legal Adviser which would impact on the balance to be struck here, save that they may live in small communities where they would be known.

32. The position of the Legal Adviser is potentially somewhat different because they are an HMCTS employee rather than a member of the judiciary. At the second hearing HMCTS was represented by Ms Asprey who submitted that the Legal Adviser should not be named as they were not conducting a judicial function.

33. However, during the course of the hearing it was made clear that a panel of Lay Justices cannot make a decision without the presence and involvement of a Legal Adviser.

34. Section 3(1) of the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018 provides in its schedule for authorised court and tribunal staff to "(a) provide legal advice to judges of the family court and justices of the peace, and (b) exercise judicial functions where procedure rules so provide".

35. The Legal Adviser derives their authority from the appointment by the Lord Chancellor pursuant to section 31O of the Matrimonial and Family Proceedings Act 1984 as inserted by the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018.

36. There does not appear to be any statutory provision stating that the family Lay Bench cannot make a decision without a Legal Adviser. However, rule 27.2 (5)(6) Family Procedure Rules 2010 set out the functions of the Adviser when a decision is given. Implicit in those terms are that consultation and presence of the Legal Adviser is required before the Bench can make the decision:

> **Rule 27.2 Reasons for a decision : proceedings before a lay justice or justices**
>
> (1) This rule applies to proceedings in the family court before a lay justice or justices.
>
> (2) After a hearing, the court will make its decision as soon as is practicable.
>
> (3) The court must give written reasons for its decision.
>
> (4) Paragraphs (5) and (6) apply where the functions of the court are being performed by –
>
> (a) two or three lay justices; or
>
> (b) by a single lay justice in accordance with these rules and Practice Direction 2A.
>
> (5) The justices' legal adviser must, before the court makes an order or refuses an application or request, make notes of –
>
> (a) the names of the lay justice or justices constituting the court by which the decision is made; and
>
> (b) in consultation with the lay justice or justices, the reasons for the court's decision.
>
> (6) The justices' legal adviser must make a written record of the reasons for the court's decision.

(7) When making an order or refusing an application, the court, or one of the lay justices constituting the court by which the decision is made, will announce its decision and –

(a) the reasons for that decision; or

(b) a short explanation of that decision.

37. It follows from this Rule that a Lay Bench cannot make a decision unless a Legal Adviser exercises their functions.

38. As such, the Legal Adviser is an integral, and legally required, part of the decision making process. As such it appears to me to be right that their names can in principle be placed in the public domain. Again, no person specific circumstances were put before me as to why this particular Legal Adviser should not be named.

39. For these reasons I find that the press are entitled to name, if they so wish, both the Lay Magistrates and the Legal Adviser who were involved in this case.

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