IN THE MATTER OF A AND B (CHILDREN) ZE19P00172

AND IN THE MATTER OF THE CHILDREN ACT 1989

BETWEEN THE FATHER APPLICANT

THE MOTHER RESPONDENT

A AND B (BY THE CHILDREN'S GUARDIAN) RESPONDENTS

THIS IS THE JUDGMENT OF DJ COONAN HANDED DOWN IN PRIVATE ON 18TH OCTOBER 2021.

DISTRICT JUDGE COONAN GIVES PERMISSION FOR THIS JUDGMENT TO BE PUBLISHED.

THE JUDGMENT IS BEING DISTRIBUTED ON THE STRICT UNDERSTANDING THAT IN ANY REPORT NO PERSON OTHER THAN THE ADVOCATES OR THE SOLICITORS INSTRUCTING THEM (AND OTHER PERSONS IDENTIFIED BY NAME IN THE JUDGMENT ITSELF) MAY BE IDENTIFIED BY NAME OR LOCATION AND THAT IN PARTICULAR THE ANONYMITY OF THE CHILDREN AND THE PARENTS MUST BE STRICTLY PRESERVED.

IN ATTENDANCE:

THE MOTHER AS A LITIGANT IN PERSON

MS GLOVER COUNSEL FOR THE CHILDREN

X THE EXPERT

MS JESSICA LEE DIRECT ACCESS COUNSEL FOR X

MR FARMER THE APPLICANT FOR PUBLICATION OF THE COURT'S DECISION ON 12TH JULY 2021

THE FATHER WAS EXCUSED ATTENDANCE AT THE HEARING

1. I have been asked to adjudicate on an application made at the conclusion of a hearing before me on 12th July 2021. The hearing took place in the context of Children Act proceedings. The proceedings have been brought by the father. He seeks to spend time with his 2 children. The children are now also parties to these proceedings. This hearing took place in private. The proceedings are continuing.

2. The application was made by Mr Farmer. He is an accredited member of the press. He had attended the hearing on 12th July 2021. He was of course permitted to do so pursuant to FPR 27.11.2 (f). He sought permission to publish what had gone on before the court on 12th July 2021.

3. There is of course an automatic restraint on the publication of a child's identity in Children Act proceedings by virtue of section 97 of the Act, whilst the proceedings are ongoing. Further, there is a general automatic restraint on the publication of any information relating to

Children Act proceedings before the court when the court is sitting in private. This is through the operation of section 12 of the Administration of Justice Act 1960.The ambit of section 12 was clarified by Mr Justice Munby in Kelly v British Broadcasting Corpn [2001] Fam 59: "….*it was only in the late 1980s that a true understanding of the limited ambit of section 12 emerged…. In essence what section 12 protects is the privacy and confidentiality (i) of the documents on the court file; and (ii) of what has gone on in front of the judge in his courtroom"* Mr Justice Munby made clear in that case that section 12 does not prevent publication of the names of the children and the parties; the names and addresses of the witnesses (including expert witnesses); identification of the nature of the dispute in the proceedings; the text or summary of the whole or part of any order made in such proceedings.

4. In so far as any part of what Mr Farmer seeks to publish falls within the restraint of section 12 AJA and for which he therefore need permission, the Practice Guidance dated 2014 dealing with transparency in the family courts emphasises the importance of open justice and transparency. The relevant part for the purposes of Mr Farmer's application is paragraph 18. It states: *"……..the starting point is that permission may be given for judgments to be published whenever a party or an accredited member of the media applies for an order permitting publication and the judge concludes that permission for the judgment to be published should be given".* Paragraph 19 sets out how that decision is to be arrived at. It states *" In deciding whether and if so when to publish a judgment the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Article 6 (right to a fair hearing); 8 (respect for private and family life) and 10 (freedom of expression) and the effect of publication upon any current or potential criminal proceedings".* Further the 2019 Practice Guidance as to Reporting in the Family Courts at paragraph 14 states "*…. Having considered the relevant evidence and submissions, the court should conduct the balancing exercise between privacy and transparency by balancing ECHR Article 8 and Article 6 and 10 and by having regard to the best interests of the child as a primary consideration".* As to the interplay between the various competing rights Lord Steyn stated in In Re S (FC) (a Child) (Appellant) [2004] UKHL 47 "*First neither article has, as such, precedence over the other. Secondly where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific right being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test".* In A LOCAL AUTHORITY V W, L,W,T AND R (by THE CHILDREN'S GUARDIAN) [2005] 1564 Sir Mark Potter P summarised the approach to the requisite balancing exercise as follows: *The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity in that neither article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the courts to examine the justification of interfering with each right and the issue of proportionality is to be considered in respect of each……Lord Steyn strongly emphasised the interest in open justice as a factor to be accorded great weight in both the parallel analysis and the ultimate balancing test….."* McDonald J in H v A (N0 2) [2016] 2 FLR 723 stated that *" …the impact of publication on children must be weighed by the court….Within the balancing exercise the child's best interests are not paramount but rather are a primary consideration. Those best interests must accordingly be considered first although they can be outweighed by the cumulative effect of other considerations…..the courts have made it clear that when the court is considering whether to depart from the principle of open Justice ……. It will require clear and cogent evidence on which to base its decision"*

5. What is it that Mr Farmer seeks to publish? This developed over time. In my order dated 12th July 2021 I recorded that : *"Mr Farmer sought leave of court to publish information from today's hearing limited to confirmation as to the court's replacement of an unnamed expert for that on another in circumstances in which professional accreditation was raised as an issue."* I did not deal with the oral application for permission at that hearing because the Children's guardian was without instruction. Neither did I give directions for the unnamed expert to be given notice of the application as it was not proposed at this stage that this expert be named. I listed a discrete hearing on the issue of publication on 26th July 2021. On the 21st July 2021 Mr Farmer emailed to the court as set out below. (I have replaced the name of the expert with the letter X): *"(2) I am not proposing to write anything which would identify the parties or the child. (3) I merely want to report the issue relating to the expert. (4) On July 12, I was concerned about naming X largely because X wasn't at the hearing and wasn't represented. I was concerned about X being unfairly taken unawares. (5) However, it strikes me that the situation has changed. X must now be aware of your order. I assume X's aware of the hearing on 26th July and I imagine knows that I was at that hearing on July 12. (6) In those circumstances I'd like to name X. (7) I want to report your order that X should be replaced by another expert and report your explanation for that order. (8) X was not criticised at that hearing and I'm not intending to make any criticism. (9) I merely want to summarise your reasoning: mother had discovered there was ' no regulatory authority at all in relation to X; better to have a report from an expert both parents are happy with; it helps if reports prepared by an expert (who)is subject to relevant regulatory bodies".*

6. At the publication hearing on 26th July 2021 I was concerned that X in the interests of fairness should be given an opportunity to respond to Mr Farmer's application as now set out in his email dated 21st July 2021. I gave directions that Mr Farmer should file with the court by 27th July 2021, a draft of the wording for which he sought permission to publish. I gave permission for X to file a position statement. I gave directions for the filing of skeleton arguments. In the event, I received and read both a position statement and a skeleton argument from X. I received and read a skeleton argument from the mother and a skeleton argument from the Children's guardian. I received a further email from Mr Farmer on 27th July 2021.

7. What Mr Farmer wants permission to publish is set out in the email dated 27th July 2021. He stated in his email *"I want to report that you decided X should be replaced by another expert and report your explanation for that decision. And report the context of your decision. I make the application on behalf of PA Media (formerly the Press Association). ……I am not proposing to write anything which would identify the parties or any child in any way. I will merely refer to a mother and a father and a dispute relating to children when putting the expert issue into context. I am proposing to name you and say you are based at Croydon and oversaw online hearings. I only want to report a number of facts. I haven't heard any criticism of X, so I have no criticism to report. (I'm not intending to make any criticism). I want to report that : mother carried out research into X and, as a result, asked you to appoint a different expert; you decided X should be replaced; you said mother had discovered there was 'no regulatory authority at all in relation to X; you concluded that it was better to have report from an expert both parents were happy with and that it helped if reports prepared by an expert were subject to relevant regulatory bodies. (I'll fully and accurately quote the words you used)".*

8. Mr Farmer did not provide the court with a draft of the wording about my decision on 12th July 2021 that he proposed to publish. However, he set out the gist of it in his email.

9. In that same email, Mr Farmer detailed his submissions as to why there should be disclosure. He submitted that parents had a right to know *"what decision you have made in this case and why you made it".* He asserted *"Lawyers, social workers, teachers, guardians, and other judges should also be told about your decision". "If a parent has any concerns about X they ought to be able to read about your decision". "Most parents assume that all experts are regulated and will be surprised by your decision". "I would argue that reporting your decision is in the public interest……. I would also argue that reporting your decision ……is in line with the now lengthy drive for transparency in family courts. Sir James Munby, then President of the Family Division said in his 2014 Practice Guidance on the publication of judgments that the public had a 'legitimate interest in being able to read what is being done by the judges in its name'. ….. I don't know how many children are involved in private and public law disputes in England and Wales annually. The number must run into thousands. Many of those children will be subject to reports by experts like X and Ms Rogers"* (the expert subsequently appointed in place of X). *"Their parents surely have a right to know what decision you have made in this case and why you made it. If you think it's better that experts are subject to regulation, then many parents will heed your words and might well ask if the expert in their case is regulated. Lawyers, social workers, teachers, guardians and other judges should also be told about your decision. Reports by experts such as X can be the basis for decisions that children should leave home or move from one parent to another. (I imagine most parents assume that all experts are regulated and will be surprised by your decision)."*

10. Leaving to one side for the moment the question of the disclosure of X's identity, neither X nor the Children's guardian are in principle opposed to the proposal to publish what went in in court on 12th July 2021 as proposed by Mr Farmer although the Children's Guardian has some observations to make about further matters that should be included which have been omitted by Mr Farmer. The mother fully supports Mr Farmer's proposal. The father was and remains neutral. Mr Farmer does not intend to publish the names of the children or otherwise publish information such that the children could be identified. The children's identities are in any event protected under section 97 CA 1989 and in the balancing act for the purposes of section 12 AJA it is clear from Mr Farmer's proposal that the article 8 rights of the children and the parents would be protected. Leaving aside the proposal to identify X, I am quite satisfied that the powerful factor of open justice holds sway and the balance is clearly tipped in favour of Mr Farmer's article 10 right to publish.

11. However, Mr Farmer wants also to identify X as part of that publication. He submitted that it was in the public interest to name X. He submitted that in so far as he was given permission to publish my decision, it was only logical and fair to name X. He continued *"If I don't name X but merely refer to an expert, every expert in every family court case will come under suspicion including Miss Rogers."* Mr Farmer continued: "*experts are normally named in judgments and media reports. There is an ongoing debate about naming doctors but not about naming experts. Bailii is laden with judgments naming experts. They're appointed because they are independent. They're akin to lawyers and judges in that respect. Naming experts and lawyers and judges doesn't identify parties. Why shouldn't experts and lawyers and judges be named?*

(If experts were never publicly named how would guardians and lawyers find the experts they needed?). I also think there's an accountability point. Judges must be accountable because they're public servants and make decisions which change peoples' lives. Doesn't the same logic apply to experts? If they're paid to provide expert reports which can change peoples' lives shouldn't they also be accountable to the public?" Mr Farmer completed his submission by stating *"I submit that the public has the right to know when judges are unhappy with experts and why and a right to know about your decision in relation to X. I submit that my article 10 rights should prevail in this case. If I report your decision, it's logical and fair that I should name X. If I don't name X but merely refer to an expert every expert in every family court will come under suspicion. Imagine if Tesco recalled a washing powder after discovering that it turned clothes red but didn't reveal the name of the washing powder. All washing powder sales would collapse overnight."*

12. The mother vigorously supports Mr Farmer in naming X as part of Mr Farmer's publication of what the court decided on 12th July 2021. The father has adopted a neutral stance. X opposes any identification of themselves as part of that publication. The Children's guardian supports X in this regard.

13. It is pertinent in this regard to refer back to the 2014 Practice Guidance on Publication of Judgments and Transparency in the Family Courts. At paragraph 20 it is stated: *"in all cases where the judge gives permission for a judgment to be published….(i) public authorities and expert witnesses should be named in the judgment approved for publication unless there are compelling reasons why they should not be so named."* Within this context, as was made clear by MUNBY J in BBC v Cafcass Legal and Others [2007] EWHC 919 and repeated in Ward (and others) v Ward and Ward [2010] EWHC 16 and repeated in X,Y and Z and Morgan v A local Authority [2011] EWHC 1157 *" both the 'disclosure jurisdiction' and the 'restraint jurisdiction' have to be exercised in accordance with the principles explained by Lord Steyn in Re S (A Child) (identification: Restrictions on Publication) [2004] UKHL 47……. that is by a 'parallel analysis' of those of the various rights protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which are engaged leading to the 'ultimate balancing test' reflecting the Convention principle of proportionality…."*. Munby J in the BBC case also referred to an extract from a speech by Lord Nicholls of Birkenhead in Reynolds v Times Newspaper [2001] 2 AC 127 in itself referred to in the case of Re S: *"The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."*

14. Section 12 Administration of Justice Act does not place an automatic restraint on the disclosure of the identity of X. X therefore asks the court to exercise its restraint jurisdiction. It will be for X to satisfy me that protection of their article 8 rights compellingly outweighs the article 10 rights of Mr Farmer to publish their name as part of publication of my decision

15. Both the Children's guardian and X submit that in order to undertake the parallel analysis and the ultimate test of proportionality, the court needs to have some clarity as to what it is that Mr Farmer seeks to achieve by publishing my decision. I agree that it must be part of the balancing exercise to have some focus on the purposes of publication. In this regard it cannot be said that Mr Farmer's purpose in publishing is to alert the public to the fact that the court on the 12th July 2021 expressed a judicial preference generally that experts should be

regulated. My decision was confined to the facts of this case. It cannot be to report that the court was unhappy with X as an expert and that this was the reason for them being discharged. The recitals to my order clearly demonstrate otherwise. I draw the conclusion from what Mr farmer stated in his email dated 27th July 2021 that he seeks to publish in order to demonstrate how experts are appointed in the family court and the fact that an expert might be appointed who is not regulated within their primary discipline and wants to disclose the identity of X as an example of an appointed expert who is not "regulated" within their primary discipline.

16. In favour of publication of X's identity is the fact that such publication would not directly or indirectly lead to the identification of the children or the parents. Their article 8 rights will not be infringed. The mother positively supports the identification of X and the father takes a neutral stance. There is the importance of transparency in family proceedings. There is the very clear steer in the case law and the practice guidance that the names of experts should be published in the absence of compelling reasons to the contrary.

17. *The Case of SW v United Kingdom* a decision of the European Court of Human rights dated 22nd June 2021 usefully describes the nature and extent of the article 8 rights of one who was not a party to proceedings. In this case the party seeking recompense for breach of her article 8 rights was the social worker in underlying family proceedings. The court stated *" The notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which extends to a number of aspects relating to personal identity including a person's physical and psychological integrity……..a person's right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life, since a person's reputation is part of his or her personal identity and psychological integrity…….In order for Article 8 to come into play the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life…….In this regard the notion of 'private life' does not exclude in principle activities of a professional or business nature since it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world…….An attack on an individual's reputation which obstructs his or her ability to pursue a chosen professional activity may therefore have consequential effects on the enjoyment of the right to respect for his or her 'private life'. "*

18. X submits that they are in fact regulated and therefore they cannot be used by Mr Farmer as an example of an "unregulated" expert. They rely on the fact that they are a member of the Academy of Experts.

19. In any event they assert that as they are not a practicing psychologist and do not otherwise fall within the other protected titles within the remit of HCPC, they are not required to be regulated.

20. X further submits that the case law dealing with disclosure of the names of experts covers experts who have engaged fully in the underlying proceedings. They have done the underlying work and have produced reports. They might have given evidence. Their work had been scrutinised by the courts and been subject to criticism. X asserts that in contrast they had a mere "cameo" role in the family proceedings. In this regards they stated in their skeleton argument that they were asked to provide a CV on 7th January 2021 by the solicitor for the

children. X sent their CV and costings. On 7th April 2021 they received an email from the solicitor for the children stating that they had been instructed and that the LOI was being finalised. On 26th May 2021 the solicitor for the children sent an email querying accreditation and was informed the next day by email that the mother had made an application to discharge X as the jointly instructed expert and that the mother's objection arose from the fact that X was not regulated by either HPCP or the British Psychological Society. X stated that they had never met any of the family members; they had not read any papers and they had not undertaken any assessment.

21. If X is right in their assertion that they are in fact regulated through the Academy of Experts or alternatively are not required to be regulated (and it is not for me to make a determination of the matter one way or another), I am not satisfied that there would be an invasion of their privacy in the sense described in the case of SW referred to above such that it trumps the article 10 rights of Mr Farmer to reveal their identity.

22. However, and in any event, there are other factors which in my judgment are of significance to consider in the balancing exercise. Firstly, the mother accepted the joint instruction of X. The mother was at the time represented by solicitors. X's CV was available to be examined. Even a cursory examination of that CV would have revealed that X was not regulated under HCPC and that they were not a chartered member or indeed any other type of member of the British Psychological Society. Neither the mother nor her solicitors objected to that instruction. Secondly this court made no criticism of X at the hearing on 12th July 2021. Thirdly X took no active part at all in the family proceedings before they were de- instructed. All they had actively done (and this was at the behest of the children's solicitor) was to send through their CV.
23. I do not accept the Tesco washing powder example provided by Mr Farmer as analogous to this situation. All that is required of parties and their representatives is to refer to and consider the 2016 Guidance from the Family Justice Council and the British Psychological Society and in that context, consider carefully the proposed expert's CV. In so far as the purpose of Mr Farmer's publication is to throw a light on the appointment of experts and in particular psychologists, their regulatory framework and in relation to that, the operation of the Guidance referred to above, then it seems to me that this can be easily achieved without naming X. I do not consider that, in so far as I permit the disclosure of my decision, it would be illogical for me to restrain disclosure of X's identity. As I have already stated Mr Farmer's aims can be achieved without naming X. I am satisfied that the naming of X in the circumstances will not only be unnecessary to Mr Farmer's aims in publication of my decision but will be unfair in that there is a danger that, in so far as they will be referred to as an expert discharged by the court, their reputation will be damaged. This of course in a context where this court has made no criticism of X. In all the circumstances I consider that a restraint on the publication of X's identity is a proportionate interference with Mr Farmer's Article 10 rights. On the other hand, I consider that publication of X's identity will be a disproportionate interference with X's Article 8 right to privacy.

24. Pursuant to the Practice guidance of 2014 I set out below the information as to what went on in court on 12th July 2021 for which I give permission to publish.

> I replaced expert X with expert Y. X had been appointed by order dated 19th March 2021 to undertake a global family assessment. X referred to themselves in their CV,

amongst other things, as a psychologist. The mother had done some research about the qualifications of X after their appointment by the court and had discovered that they were not regulated by either the Health and Care Professions Council (HCPC) or the British Psychology Society (BSP). The mother had in consequence applied to replace X. The father opposed the replacement of X on the basis that when they had been appointed, X's expertise and credentials were known to the parties and the court at the hearing on 19th March 2021. The Children's guardian took a pragmatic approach and supported the mother's application to replace X in order to maximise the potential for the assessment to progress smoothly in what were on any view protracted and fractious proceedings and in which the mother clearly had no confidence in X after what she had discovered about X. This court too took a pragmatic approach and replaced X for Ms Rogers for the reasons advanced by the Children's guardian. Ms Rogers was subject to HCPC regulation. The court concluded for the purposes of that decision that it was indeed better for the parents to have a report from an expert that both parties were happy with and that it helped in terms of establishing their trust in the expert's opinion, if the report was prepared by an expert who was subject to the relevant regulatory body. However, this court made no finding as to whether the mother was justified in her lack of confidence in X. It made no criticism of X at all. The court at this hearing made no findings and made no criticism because X was not at that hearing and had received no notice of the mother's application.

25. The court restrains the publication of X's name.

DJ COONAN

18TH OCTOBER 2021