

Non-disclosure of relevant evidence in the interests of a child

Re T (Children: Non-Disclosure) [2024] EWCA Civ 241

How should an application to withhold relevant evidence from a party be dealt with, where it is argued that doing so is in the interests of a child?

On 18 March 2024, Peter Jackson LJ and Baker LJ granted an appeal against the High Court's decision to allow ongoing non-disclosure of a statement and set out the questions that a court should ask itself when faced with such an application.

Background

The case concerned two children, 12 and 8, with the application for non-disclosure focussing on the younger child, whom the court referred to in its Judgment as Tom.

The matter had already been through one set of proceedings, at the conclusion of which, on 03 July 2023, HHJ Roberts ordered for the children to spend 4 nights per fortnight with their father and found that he had behaved in an unreasonable manner that amounted to coercive and controlling behaviour.

Sadly, during the following October half term, Tom began to show acute distress, including making statements about self-harm and suicide. The mother took advice and ceased contact. Both parents applied back to court in November 2023.

In December 2023, the mother made a without notice application supported by two statements, the second of which exhibited a report from a mental health nurse describing her initial assessment of Tom. The report stated that Tom had asked for information he disclosed not to be shared with his father and that the report should not be passed on without a formal request through the NHS trust due to the increased risk of harm from father to Tom and Tom towards himself. HHJ Roberts made an order suspending contact and gave permission for the mother not to serve her second statement on the father. At an on notice hearing on 12 December 2023, the judge appointed a Guardian and the matter was transferred to the High Court.

The case came before Mr Justice Francis on 31 January 2024, by which time the Guardian had made enquiries and reported that Tom was more settled, although still fragile. The Guardian recommended a psychological assessment of the family which was agreed by all parties. The father sought disclosure of the withheld material, supported by the Guardian and not opposed by the mother. The Guardian considered that the material should be disclosed so that professionals could properly evaluate the father's response and that if there was no interim contact, any risk to Tom would be ameliorated.

The court heard from the mother and Guardian only before reading the Judgement of HHJ Roberts from the original proceedings. The Judge then gave a closed judgement to the mother and Guardian only that the material would be withheld due

to the *a real risk that the father would be unable to control his need to be in charge and allow himself to put his own controlling interests before his son.*

The father was then readmitted to the hearing and informed of the judge's decision and only then given an opportunity to make submissions. The judge was not persuaded to change his mind, citing the unflattering comments made by HHJ Roberts in her original judgment. The judge noted the father could apply at any time but had permission to review once the psychological assessment had taken place.

The father applied in writing to the judge for permission to appeal, which was refused. The judge acknowledged it was a rare case where this interference with a litigant's rights was justified, but *it was a highly unusual case and he felt compelled to place Tom's welfare above the father's rights.*

The father appealed to the court of appeal.

The Law

The appeal court reiterated the approach to an application for relevant evidence to be withheld from a party to proceedings, found in *Re D (Minors)(Adoption Reports: Confidentiality)* [1996] AC 593, [1995] 2 FLR 687:

- (1) It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party...
- (2) ... the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.
- (3) If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.
- (4) If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.
- (5) Non-disclosure should be the exception not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling."

These principles also extend to applications for non-disclosure based on risk of harm to others (for example *Re B (Disclosure to other Parties)* [2001] 2 FLR 1017 and *Re A (Sexual Abuse: Disclosure)* [2012] UKSC 60).

The appeal court then went on to set out the following questions that a court should ask itself when faced with an application for non-disclosure in the interests of a child:

- (1) Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?
- (2) Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?
- (3) Can the feared harm be addressed by measures to reduce its probability or likely impact?
- (4) Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?
- (5) Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?
- (6) Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?

Application and Conclusions

The appeal would be allowed.

The judge's approach to the issue of disclosure had been insufficiently thorough.

Whilst Tom's distress was inevitably a cause for concern, the position was calmer in January 2024 and the case for ongoing non-disclosure required justification.

Francis J did not properly identify the nature and probability of the risk to the children of disclosure or the measures that might be taken to reduce it. Given HHJ Roberts' earlier judgment, he was entitled to be concerned that there was a risk the father would act insensitively and cause harm by *blundering in*. However, he then needed to consider what could be done to mitigate that risk. The father had obeyed the non-contact order made by HHJ Roberts and the court failed to address the question of whether he would be likely to disobey any order specifically restraining him from speaking with the children about the withheld material. There was a risk that Tom would feel there had been a breach of trust, but that could be managed in the short term by the children remaining unaware of the disclosure and *it was not right to*

regard either the child or the mental health professional as having a veto on disclosure.

There was additionally no evaluation of the overall advantages and disadvantages to Tom of disclosure taking place. No consideration was given to the consequences of ongoing secrecy or the difficulties in the court reaching an outcome if information continued to be withheld.

In balancing the children's interests against the father's rights and consequences to him of non-disclosure, the judge had referred to the father's Article 6 rights but had not given them any weight in coming to a decision.

Finally, the judge had envisaged that the issue of disclosure would only be revisited after the psychological assessment but had not assessed the impact on the family of non-disclosure continuing for what was likely to be several months.

Distilling the principles set out above, the withholding of relevant information from a party should only be ordered where doing so is *strictly necessary* following an analysis of advantages and disadvantages to the child's welfare of the disclosure/non-disclosure and balanced against the rights of the deprived party.

it will be crucial in such applications for the parties and the court to clearly identify the nature and risk of the harm that is alleged may arise if disclosure is made and also whether and how that risk can properly be managed in the wider context of the case.

Finally, the duration and scope of the non-disclosure must be addressed so that any interference with a party's rights and the administration of justice is proportionate to the risk of harm.

As an important aside, the court also commented on the manner in which the disclosure hearing proceeded: *where a party is excluded from a hearing the court should not reach its ultimate decision without hearing from that party to the greatest practicable extent. Here, the father was left in a position of trying to change the judge's mind ... There will be situations where disadvantage to a party in this position is unavoidable, but they must be given the opportunity to assist the court before it reaches its decision, not after.* An example of a fair format for a hearing of this kind can be found in *London Borough of Barking and Dagenham v RM & LS* [2023] EWHC 777 (Fam).

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