IN THE COURT OF APPEAL, CIVIL DIVISION **CASE NO. DE19P00318**

ON APPEAL FROM THE ORDER OF MRS JUSTICE LIEVEN

IN THE MATTER OF THE CHILDREN ACT 1989

***In the matter of* [X] (A CHILD)**

WRITTEN SUBMISSIONS ON BEHALF OF THE INTERVENER, RIGHTS OF WOMEN

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25th October 2021

I. INTRODUCTION AND RoW'S POSITION IN OUTLINE

1. Rights of Women[1] ('RoW') is grateful to the Court for the opportunity to intervene in this appeal. RoW is a specialist charity with expertise in providing legal advice to women who are experiencing or are at risk of experiencing violence against women and girls ('VAWG'), including domestic and sexual violence. In RoW's view, the issues raised in this case are of fundamental importance to women's experience of the Family Court system and public confidence in that system.

2. RoW intervened at first instance, in writing[2] and orally, and has throughout its intervention in this matter sought to *"provide [the Court] with a more rounded picture than it would otherwise obtain"* (per Lord Hoffmann, *E v. The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2009] 1 AC 536, at §2). Similarly, these written submissions are informed by the understanding RoW has from its work with victims of domestic abuse, and their interaction with the Family Court, and they seek to consider the instant appeal, and broader issues concerning publication, in the context of the gendered impact of domestic abuse, and of VAWG. RoW is mindful of the fact that, first, the Court of Appeal now has access to its earlier submissions, at first instance and, second, that they broadly support the submissions advanced on behalf of Ms Tickle, Mr Farmer, the Mother and the Guardian in opposing the Father's appeal. RoW does not seek to repeat their previous submissions; nor to repeat any of the material in the skeleton arguments provided thus far. RoW invites the Court to uphold Lieven J's careful and detailed judgment, arrived at with the benefit of lengthy written submissions on behalf of each party and following oral submissions delivered over the course of 1.5 days.

3. RoW notes that Baker LJ, when granting the father permission to appeal, considered there was a *"limited prospect of a successful appeal against this decision"* but:

> *"An appeal would, however, allow this Court to review those [legal principles relating to the publication of judgments in the family courts] and, if appropriate, give further guidance* ***in light of the public interest in the transparency of the family justice system in general and its approach to cases of domestic abuse in particular****"* ***(emphasis added)***

[1] RoW is a registered charity 1147913 and Company Limited by Guarantee.
[2] At first instance, RoW's submissions consisted of: (i) **Written Outline Submissions** (dated 1st July 2021) and (ii) a **Note Filed in Response to Judicial Questions**, filed following RoW's oral submissions on 15th July 2021, along with accompanying documents. All are attached to these submissions as they do not appear in the Core Bundle, received by RoW on 18th October 2021.

4. In those circumstances, and in light of the unique opportunity this case presents, RoW intends to ground its submissions in the experiences of the women RoW works with on a daily basis; focussing on what *"transparency"* really means for them and developing the arguments it made at first instance in respect of an Article 8 right to *"informational self-determination",* that is: *"The right of the individual to decide what information about himself [or herself] should be communicated to others and under what circumstances."*[3], as described by Lieven J in her judgment at [§33-37].

5. This right applies both to the mother and X, and in the course of these submissions, RoW will further invite the Court to give guidance as to the circumstances in which the Court should give permission for information relating to proceedings to be communicated to third parties, as allowed for by r.12.73(1)(b) of the FPR 2010.

II. TWO CATEGORIES OF TRANSPARENCY

6. On RoW's analysis, there are two, separate and distinct categories of *"transparency"* as it relates to the Family Court:

    a. The first (and the focus of the present appeal thus far) is transparency on a broader systemic level: the right of the free press to report on what is happening in the Family Court; the public policy arguments in favour of a greater degree of transparency and (by extension) a greater degree of confidence in the Family Court. RoW fully endorses those laudable aims and the powerful submissions in favour of publication in this particular case, however, it is concerned that the argument for *"transparency"* has become synonymous with these national level issues and thus less focused upon the lived experience of the women who find themselves in the Family Court, holding onto fact-finding judgments that they are not allowed to share with anyone else;

    b. The second category, and insofar as RoW's is concerned the category which is of fundamental importance to very many of the women it works with, is transparency on a narrower much more personal and immediate, smaller scale. It is the ability to tell one's own story, complete with the detail of any Children Act 1989 proceedings, to friends, relatives, schoolteachers and others in their community. It is the ability to

[3] Alan F. Westin, Privacy and Freedom (1970). The phrase also draws on the German constitutional concept of *informationelles selbstbestimmum*, the individual's right to decide, on the basis of the concept of self-determination, when and within what limits information about his or her private life should be communicated to others.

obtain support from an ID(S)VA. It is the ability to point to an anonymised judgment on BAILII and say: *"this is about me"*, without fear of criticism from the Family Court or a punitive application being made by the perpetrator of abuse. It is that category – the ability to be transparent and open about one's own experiences – which RoW invites the Court of Appeal to give further guidance on in the course of disposing of this appeal, a need which is more pressing as it is unlikely to feature heavily in the President's forthcoming Transparency Review, given the parameters of the same.

7. The facts of the present case are *atypical* in many respects. In RoW's experience:

   a. It is very rare for a mother in Children Act 1989 proceedings to find a journalist attending a hearing with a view to reporting some of those proceedings unless – as per the facts of the present case – one or both of the parties has a pre-existing public platform. RoW notes that Mr Farmer only discovered the existence of this case because he guessed that Family Court proceedings were afoot and started to track them down [p110];

   b. It is very rare for a judge, at the conclusion of a private law fact-finding hearing, to explore the issue of publication of its judgment with the parties <u>unless</u> there is a representative from the media who seeks permission to report material from the proceedings. It is – as far as RoW is aware – almost unheard of for a judge to engage with the judgment being shared with the survivor's immediate network;

   c. Many of the women engaged in Children Act 1989 proceedings who have successfully sought findings against their ex-partner are concerned about whether they can share this information with those in their immediate circle, including close friends, relatives, professionals involved with the family (e.g. school teachers) and members of their community, in order to gain support. The law governing their ability to do so is far from clear, and guidance is desperately needed.

8. RoW has already set out at [§11-14] of its **Written Outline Submissions** of 1st July 2021 the difficulties victims of domestic abuse experience in working out (and having confidence in) what they can and cannot say about proceedings both whilst they are ongoing, and after their conclusion. The EX710 produced by the HMCTS and referred to in RoW's **Note Filed**

in Response to Judicial Questions (15th July 2021) serves to illustrate the problem further. It sets out, in a manner consistent with the law as it presently stands, a narrow range of people with whom information can be shared, and the limited and specific purposes for which that is permitted. The invitation to discuss the question of wider disclosure with a legal representative is, however, simply not available to many of the individuals RoW works with.

9. RoW invites the Court to consider, in light of its recent endorsement of an approach towards domestic abuse that focusses more on patterns of behaviour, rather than determining specific factual allegations[4], the following question: would this mother, if the father's appeal is allowed, be able to describe herself as a survivor of domestic abuse, either to friends and family or as part of her campaign work? It is not at all clear to RoW that she would.

10. Per Munby J (as was) in *In the Matter of B (A Child)* [2004] 2 FLR 142, s12 AJA 1960 prohibits the "*publication*" of accounts of what has gone on in front of the judge sitting in private, as well as notes, transcripts, extracts, quotations or summaries from a judgment [173]. On the analysis of Munby J "*publication*" is expansively defined to include "*information communicated through the media but includes private communications to individuals*" [§68-72]. Section 12 does not prohibit publication of *"the nature of the dispute",* as long the publication does not cross the line into publication of summaries of the evidence of those proceedings [§77-79], i.e. those matters which *"the substance of the matters which the Court has closed its doors to consider"* (endorsing Wilson J's analysis in *X v Dempster*).

11. HHJ Williscroft's finding that the mother was subjected to serious domestic abuse at the hands of the father is, self-evidently, part of the substance of the matters which the Court closed its doors to consider. It is the overarching conclusion of her judgment. Sharing that information then cannot, in RoW's view, confidently be said to fall on the right side of s12. It follows that the mother's description of herself as a victim of domestic abuse (and, somewhat perversely, any link to having been *found* to be the victim of domestic abuse within the Family Court) can only confidently be relayed by her if one of the exceptions set out in the FPR 2010 applies: r. 12.73(a) of the FPR 2010 prevents *"information related to proceedings"* being communicated to anyone other than those listed in r. 12.73(a), a finite list, comprising of limited number of professionals, or in accordance with r. 12.75 and

[4] Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448 [§51]

PD12G, unless the Court has otherwise given explicit permission to the contrary (see r. 12.73(b)).

12. Although r. 12.75(a) provides for communication of information to obtain support, advice or assistance it limits that both in the type of support that can be sought:

    a. It must be by *"confidential discussion"* which may well exclude lay support in the form of friends and relatives where guarantees of confidentiality are unrealistic; and

    b. It must be support sought *"in the conduct of the proceedings".* That can only mean that once the proceedings have concluded, support, advice or assistance cannot be sought in relation to their conduct.

13. The first row of PD12G (which allows a party to communicate information to a lay adviser or McKenzie Friend) is similarly restricted to circumstances where the party is seeking advice or assistance *"in relation to the proceedings".*

14. The complexity and the absence of any real clarity must be viewed not through the lens of lawyers and judges, who have the time and resources to forensically examine and evaluate these points, but litigants-in-person who may experience several barriers in accessing justice. They may be non-English speakers, they may have learning difficulties or other mental health problems, in addition to the barriers they face as a victim of domestic abuse. Additionally, they may be from a Black or minoritised background and believe that they have been discriminated against during the proceedings but cannot reach out for support in relation to this. It may well be the case that the only steer they have about discussing the proceedings with third parties is the standard rubric included within the Compendium of Standard Orders[5] published and updated on Judiciary.UK website, which warns thus: *"The names of the family and the children are not to be disclosed in public without the court's permissions"*.

15. If the father's appeal were allowed then, the mother in the present case finds herself – notwithstanding the extraordinary privilege that has been bestowed upon her as an elected Member of Parliament – in almost exactly the same position as many of the women RoW

[5] Published and updated on https://www.judiciary.uk/publications/practice-guidance-standard-children-and-other-orders/. Accessed on 24th October 2021.

works with: unable to tell her friends, relatives or anyone else that a judge in the Family Court has found, as a fact, that she was subject to very serious domestic abuse at the hands of her ex-husband. She cannot point to any version of HHJ Williscroft's judgment – whether redacted or "warts and all" (as at one stage sought by the father) – and say: "this is me". In fact, it is certainly arguable that she would have to be far more circumspect in what she says to anyone for fear of, inadvertently perhaps, lifting the cloak of anonymity on the judgment. It is an invidious position for any survivor of abuse to find themselves in. The Mother in the instant case could, had she not been in children proceedings, publicly campaign about her experiences of abuse and discuss those experiences openly and in as much detail as she chose either with her support network or the public at large, subject to the laws of defamation – as could others in her situation. On the very particular facts of this case, it would also create an entirely perverse situation whereby the mother could, as recorded by Lieven J at [§52], refer to or even read out the fact-finding judgment in Parliament, relying on Article IX of the Bill of Rights, but remain unable to discuss those details with anyone else or in any other context. Notwithstanding her position as an MP, she would remain ultimately silenced as a survivor of domestic abuse in her daily life, as would X.

16. The father's opposition to the media's application and his approach on appeal focus squarely on X's Article 8 rights. His approach is very similar to those advanced by the father and rejected by the President of the Family Division in *Re Al M (Publication)* [2020] EWHC 122 (Fam), upheld by this Court in *Re Al M* [2020] EWCA Civ 283. His arguments require careful scrutiny. RoW is concerned that there may develop a trend whereby perpetrators of domestic abuse endeavour to rely on the Article 8 rights of their children as the sole or fundamental basis upon which publication – in any form – should be refused. It is also concerned to note that a significant plank of the father's submissions seem to rely on criticisms of the conclusions of the fact-finding judgment (which has not been appealed) and displays a clear lack of insight into the harm perpetrated against the mother, and its impact upon X. Whilst RoW accepts that perpetrators of abuse should not prohibited from advancing both rights and welfare-based arguments, it is respectfully submitted that the Court must approach such arguments with some care and be astute to be manner in which arguments framed by reference to the child's welfare may serve, or seek to serve, an ulterior motivation. In particular, RoW is concerned about perpetrators of domestic abuse being empowered to use Family Court proceedings as a tool of control: paragraph 36(c) of PD12J (albeit in the section headed: *"Factors to be taken into account when determining whether to make child*

arrangements orders in all cases where domestic abuse has occurred") requires the Court to consider the conduct of both parents and in particular, whether the perpetrator of abuse: *"is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent".* Attempts to fetter and limit publication by a perpetrator of abuse must be viewed through that prism. The Court may consider it instructive to consider the father's attempts to prevent publication against the clear Parliamentary intent of protecting survivors of domestic abuse from further harm evidenced in s67 of the DAA 2021, which, although not yet brought into force, provides for amendments in respect of "barring orders" under s. 91(14) of the CA1989, extending the circumstances in which they can be granted to include circumstances where further applications would put the child or another individual at risk of harm.

17. It is important to recognise that silencing the mother leaves her less able to obtain support and develop support networks. That will, inevitably, have an impact on her care of X. More fundamentally, X's Article 8 rights are engaged and infringed whether non-anonymised publication is allowed or refused. Although the focus of the parties at first instance and on appeal has been on balancing X's Article 8 rights if publication is allowed in the form sought by Ms Tickle, Mr Farmer and the mother, it is RoW's submission that they are also engaged and infringed if the father's appeal is allowed and Lieven J's decision overturned, because this is, in reality, X's story, and in preventing the mother from being able to be share her story then X is equally prevented. Not only will X's Article 8 right to informational self-determination be fettered, but there is a real potential for harm if X cannot talk frankly and openly about their childhood and the conclusions of HHJ Williscroft as they get older. It is of fundamental importance that that information is capable of being shared with teachers, and that X is able to discuss it with peers if they choose to.

18. RoW will invite the Court to adopt the following by way of guidance:

    a. To record that a victim of abuse speaking about their personal experiences of abuse does not fall within the scope of "*information related to proceedings*" even if those same allegations have been raised within proceedings before the Family Court;

    b. Consideration, with the input of the victim of abuse, should always be given to the manner in which the disclosure of a judgment and/or a schedule summarising the

conclusions of any fact finding in which allegation of domestic abuse have been established may take place to the professional network around the family, and this should specifically include any ID(S)VAs or other organisations working with the survivor but not included in the exhaustive list of individuals in r. 12.73(a) of the FPR 20210;[6]

c. When considering the publication of a judgment in an anonymised form at the conclusion of a fact-finding hearing in which findings of domestic abuse have been made – per the 2014 guidance – the Court must, together with the victim of abuse, consider and set the parameters for the Court's decision to be shared with members of the victim's support network; and

d. The Court should also be alive to victims of domestic abuse who wish to campaign openly about their experiences, even if no media representative seeks permission to publicise information arising from the proceedings on a non-anonymised basis.

19. As per its **Written Outline Submissions** prepared for the hearing before Lieven J, RoW does not support the identification of women who do not wish to be identified. That would run entirely contrary to the right to informational self-determination. It also invites the Court to draw a distinction between the approach to sharing fact-finding judgments where abuse has been proven; versus those where the Court has concluded that the person making an allegation has not discharged their burden of proof. RoW would concede that exonerating judgments of the nature referred to in [§3] of its **Written Outline Submissions** fall under a different category. It is concerned however, that the threat of a judgment being published on a non-anonymised basis if findings are not made would act as a powerful disincentive to run a domestic abuse case, in circumstances where there are already so many barriers to doing so.

III. CONCLUSION

20. For the above reasons, RoW respectfully invites the Court to dismiss this appeal.

[6] A social worker falls within the scope of rule 12.73(1)(a)(viii) "*a professional acting in furtherance of the protection of children*", disclosure is also permitted in accordance with PD12G to "*a health care professional or a person or body providing counselling services for children or families*" but only "*to enable the party or any child of the party to obtain health care or counselling*"

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