CA on appeal from Manchester County Court (His Honour Judge Iain Hamilton) before The President, Thorpe LJ, & Rix LJ. : 28th July 2003

THORPE LJ:

1. There have been long running proceedings in the Manchester County Court between the parents of AG born on 3 July 1996. The central issue has always been contact, or rather lack of contact, between AG and her father Mr B. I will refer to him throughout this judgment as the father. His Honour Judge Hamilton has had charge of the case for some time. There was a major hearing commenced on 10 March 2003, in preparation for which Judge Hamilton had given directions in November 2002 and January 2003. At the conclusion of the March hearing Judge Hamilton reserved his decision, handing down a written judgment on 2 May 2003. Paragraph 3 of the resulting order reads as follows: *"The father is prohibited from disclosing in any manner any papers or documents filed in these proceedings or their content or any school reports he may obtain to either Dr Richard Gardner or Dr Ludwig Lowenstein or any other expert in parental alienation syndrome or any other agency or organisation such as Families Need Fathers without the specific permission of the court."*

2. By paragraph 7 of the order a penal notice was attached to paragraph 3.

3. The father, as a litigant in person filed a notice of application in the Civil Appeals Office seeking permission to appeal.

4. The papers were referred to me and on 11 June I ordered an oral hearing on notice with appeal to follow if permission granted limited to the restriction in paragraph 3 of the order below on disclosure to 'any other agency or organisation such as Families Need Fathers …'. On 24 June the President ordered that CAFCASS Legal Services be invited to appoint an Advocate to the Court at the oral hearing.

5. The father was referred to the RCJ Advice Bureau where he received great assistance from Mr Alexander Mercouris. Amongst other things Mr Mercouris secured for the father representation through the Bar Pro Bono Unit.

6. Finally notice of the oral hearing was given to Families Need Fathers to enable them to give their views to the Advocate to the Court and also to make written submissions.

7. Thus at the hearing on 1 July the father was represented by Mr Spon-Smith, the mother by Ms Hobson, who appeared in the court below, and the guardian ad litem for AG by Miss Korol. CAFCASS Legal instructed Mrs Heather MacGregor as advocate to the court. Helpful written submissions were received from Families Need Fathers.

8. Before turning to the various submissions I would wish to record the extent to which these preliminary arrangements have borne fruit. Mr Spon-Smith, given the fact that he appeared for CAFCASS in the case of ***Re M*** **[**2002] EWCA Civ 1199, [2002] 3 FCR 208, could not have been a more discriminating choice on the part of the Pro Bono Unit. The assistance that we received from Mr Spon-Smith at the hearing was of the highest order. He put the father's case succinctly, persuasively and always powerfully. Without that presentation it would have been impossible for the court to have concluded the oral argument within the only available date for the constitution.

9. Equally significant was the assistance given by Mrs MacGregor. As well as presenting well prepared and carefully considered submissions on the law she devoted the lunch-hour to taking soundings from the representative of Families Need Fathers and from the RCJ Advice Bureau.

10. Miss Hobson made a valuable contribution as the only counsel to have appeared below and she and Miss Korol achieved considerable economy by discussing their respective positions in advance and adopting submissions wherever possible.

11. Finally thanks to their written submissions a clearer picture emerged of the nature and extent of the services provided by Families Need fathers to its members and the extent to which those services depend upon open communication.

12. I turn now to counsel's submissions. Mr Spon-Smith at once acknowledged that the judges of the Family Division possess a wide ranging inherent jurisdiction that can be deployed in the truly

exceptional case, as an illustration of which he cited ***Thompson and Venables v News Group Newspapers Limited & Ors*** [2001] 1 FLR 791. No one disputed that the present appeal (for permission was granted at the hearing) does not begin to approach that territory.

13. Accordingly Mr Spon-Smith submitted that in bitterly contested cases, sadly all too common, the welfare of children is well protected by general provisions of primary and secondary legislation. Those provisions are respectively section 12 of the Administration of Justice Act 1960, section 97(2) of the Children Act 1989 and Rule 4.23(1) of the Family Proceedings Rules 1991.

14. Since these are the legislative provisions that determine the outcome of this case it is convenient to set out their relevant parts at this stage of my judgment.

15. The relevant provisions of the Administration of Justice Act 1960 are as follows:

"12. Publication of information relating to proceedings in private

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say –

(a) where the proceedings –

(ii) are brought under the Children Act 1989"

16. The relevant section in the Children Act 1989 is:

"97. Privacy for children involved in certain proceedings

(2) No person shall publish any material which is intended, or likely, to identify –

(a) any child as being involved in any proceedings before [the High Court, a county court or] a magistrates court in which any power under this Act may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did no know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the [Lord Chancellor] may, if satisfied that the welfare of the child requires it, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(5) For the purposes of this section –

'publish' includes –

[(a) include in a programme service (within the meaning of the Broadcasting Act 1990;] or

(b) cause to be published; and

'material' includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale."

17. Rule 4.23 provides as follows:

"4.23 Confidentiality of documents

(1) Notwithstanding any rule of court to the contrary, no document, other than a record of an order, held by the court and relating to proceedings to which this Part applies shall be disclosed, other than to –

(a) a party,

(b) the legal representative of a party,

(c) the guardian ad litem,

(d) the Legal Aid Board, or

(e) a welfare officer,

without leave of the judge or district judge."

18. Mr Spon-Smith's first submission was that, given the wide-ranging restrictions provided by the legislation and the resulting protection, additional and specific provisions, such as those enunciated by the judge in paragraph 3 of his order of 2 May 2003, were quite unjustified.

19. His second submission was that the two statutes prohibited either publication or publishing. That meant, according to the Shorter Oxford English Dictionary some public notification or announcement. That prohibition certainly did not extend to limited confidential exchanges to private individuals or

organisations with whom a party has a proper interest in communicating. Although the rule was more widely drawn in that it prohibits any disclosure it is narrower in that it relates only to documents.

20. Third Mr Spon-Smith submitted that the list of individuals or bodies excepted from the prohibition imposed by Rule 4.23 was too narrowly drawn and clearly acted to the prejudice of a litigant in person who could not seek advice as a parent or aid in presenting his case to the court without either suffering a significant handicap or being forced to make an application to a judge or district judge for release from the rule's restriction.

21. Finally Mr Spon-Smith submitted that even if Judge Hamilton had the jurisdiction to restrain the father's communication with an association the words of the order, 'any other agency or organisation such as Families Need Fathers …' was too imprecise to be enforceable.

22. Miss Hobson for the mother accepted that paragraph 3 could not stand as drafted and she adopted Mrs MacGregor's submissions. She submitted that paragraph 3 should be replaced with a form of order approved by this court in its recent decision of ***Re G*** [2003] 2 FCR 231. Miss Hobson pointed out that the father had not attended the hearing on 2 May which would have allowed Judge Hamilton to consider any objection to the form of order proposed.

23. Miss Korol equally accepted that the order below had been too broadly drawn, she too sought an order in the form adopted by this court in *Re G* and, like Miss Hobson, she submitted that the penal notice was necessary to protect AG, given the whole history of the case.

24. Mrs MacGregor contested Mr Spon-Smith's construction of publication, which, she submitted must in this context be capable of catching private conversations. She accepted that consideration should clearly be given to some enlargement of Rule 4.23, although she stressed the pitfalls of any general enlargement. She too supported the substitution of an order in the mould of that approved in *Re G*, although omitting any reference to individual experts who testified in the proceedings below.

25. These are my conclusions. Mr Spon-Smith's contention that the words publication and publish in the two statutes should be given the dictionary definition was advanced during the course of his argument in the case of *Re M*. My reaction was expressed at paragraph 21 and Wall J's between paragraphs 65 and 68. It seems to me that we reached the same conclusion by a different route or by different reasoning. What I did not accept in the case of *Re M* and what I do not accept in the present appeal is that publication requires the degree of formal promulgation suggested by Mr Spon-Smith. Obviously information may be published orally. In the case of *Re M* we held that an oral communication by a person to a child protection agent did not amount to publication. But it does not follow that an oral statement by one individual to another cannot amount to a publication. All depends on the surrounding facts and circumstances. I add that the definition of publish in section 97(5) was not referred to in argument and does not assist in determining Mr Spon-Smith's contention.

26. At paragraph 21 of my judgment in *Re M* I referred without citation to paragraph 8-79 of the second edition of Arlidge, Eady and Smith on Contempt. The meaning of publication in section 12 is thus explained by the authors: *"Unless it is clear from the statutory context that some other interpretation is intended, it is submitted that the wide interpretation of the common law, and particularly the law of defamation, would be the natural one to adopt. That is to say, the 'publication' contemplated by section 12(1) would not be confined to information communicated through the media. Thus, private communications to individuals may very well constitute contempt unless permission has previously been obtained from the court itself."*

That seems to me to be the sensible construction and I would adopt it.

27. For those reasons I reject Mr Spon-Smith's second submission that an oral communication between a party to Children Act proceedings and a member or members of Families Need Fathers could not in law amount to publication.

28. However I see greater force in Mr Spon-Smith's first submission. The statutory provisions and the rules in conjunction do provide a comprehensive boundary between the interests of privacy and the right to free speech. A party to Children Act proceedings has only to seek a judge's permission if he has a legitimate ground for disclosing case papers to a person not included in the (a)-(e) categories of

Rule 4.23. However where the parties to the proceedings are represented the judge has the confidence that the parties will be carefully advised by their own lawyers as to the boundary between the permissible and the impermissible, particularly when requested by the court so to do. If the party to the proceedings is unrepresented then it is in my judgment clearly open to the court to make a specific order applying the statutory restrictions to areas of the case that require particular protection.

29. I accept Mr Spon-Smith's fourth submission that the drafting of paragraph 3 of the order of 2 May is both too general and too imprecise to be acceptable. An order to which a penal notice is attached must be clear and easy to understand, particularly if it requires an act or prohibits an act by a litigant in person.

30. There is no discernable distinction between the outcome sought by the two respondents and the advocate to the court. When it comes to disposal I would simply allow the appeal and substitute for paragraph 3 of Judge Hamilton's order an order prohibiting the father either by himself or by his servants or agents until further order from disclosing (a) any document held by the court, (b) the text or summary of a judgment or (c) the text or summary of an order to any person: save that in the course of seeking advice as to the conduct of his case the father may disclose a summary of:
i) The orders made within these proceedings.
ii) The nature of any proposed application to the court.
iii) The issue or issues to be determined by the court.
iv) The position of the other parties and the experts, including CAFCASS.

31. Although we have allowed the appeal on this narrow issue I record that on the 1 July there were also listed renewed applications for permission to appeal the directions orders of November 2002 and January 2003 which had been refused on paper by Hale LJ on 5 March 2003 and the father's renewed application for permission to appeal all other aspects of the order of 2 May. Mr Spon-Smith did not represent the father in these applications which he advanced himself orally to the court. All those applications were dismissed for reasons given in extempore judgments. The refusal of those wider permission applications recognised Judge Hamilton's considerable experience and expertise, the full and careful judgment delivered on 2 May and his firm, consistent management of a difficult case. In drawing paragraph 3 of his order as he did Judge Hamilton did not have objections from the father, who did not attend, nor did he have the benefit of the decision of this court in the case of *Re G* which, although given on 10 April 2003, was not reported until 14 June 2003.

32. This appeal has focussed attention on the shortcomings of Rule 4.23. Rule 4.23(1)(b) grants a general dispensation for disclosure of court papers to the legal representative of a party. That provision may be said to discriminate against the unrepresented litigant. These rules were formulated by the Family Proceedings Rules Committee approximately 13 years ago. Since that date there has been a significant increase in the percentage of family cases in which one or other of the parties is unrepresented for all or part of the proceedings. There are no statistics to substantiate that assertion but it is universally recognised as the reality by all specialists in this field. The provision of legal aid in family proceedings is a shrinking rather than an expanding welfare service. In recent years support services for litigants in person have made an increasingly valuable contribution to the performance of the family justice system in the courts of trial and in the Court of Appeal. Arguably a litigant in person seeking the help of the RCJ Advice Bureau or the Personal Support Unit at the RCJ should not be obliged to apply for the permission of a judge or a district judge before disclosing the case papers to a case worker.

33. The President, in the course of her judgment in ***Re G,*** endorsed the views of Hale LJ in granting permission to appeal when she said of the role of Families Need Fathers in that case: *"Again, I have to say, having read many of the communications in question, a great deal of very helpful advice and sound wisdom was provided to the father as a result of his communications in that discussion."*

Again I pose the question does the litigant in person have to seek the permission of a judge or a district judge before taking his case to Families Need Fathers?

34. Further the litigant in person may wish to enlist the help of a McKenzie Friend in presenting an impending or prospective case to the court. In many cases McKenzie Friends provide a valuable

service not only to the litigant in person but also to the court in reducing the litigant's understandable feelings of anxiety and confusion when confronted by the court in session. In many instances the McKenzie Friend will assist the litigant in person to identify the relevant issues and to abbreviate the overall presentation. Must a litigant in person seek the permission of a judge or district judge before disclosing the case papers to his McKenzie Friend?

35. Further a litigant in person may wish to seek advice from a registered parenting charity not in relation to the presentation of the continuing case but in relation to issues thrown up by the case, such as relationship problems or the reduction of barriers that the litigation has created. If such an approach requires the disclosure of court papers should that be the subject of an application for prior permission?

36. Finally I instance the litigant in person who wishes to approach a mediation service. Must he seek the permission of a judge before taking the case papers to a preliminary meeting?

37. In posing these questions I intend only to raise the policy issue. Obviously the attraction of a judicial filter is the maintenance of judicial control and the reduction of abuse that might flow from a liberal extension of the exceptions specified in sub-paragraphs (a)-(e). On the other hand some of the instances which I have given above might be made the subject of specific exception without much if any foreseeable risk of abuse. Given that further amendments to the Family Proceedings Rules 1991 are planned for the autumn of this year I would invite the Rules Committee to consider the modernisation of Rule 4.23 by extension of those to whom disclosure can be made without prior judicial permission.

RIX LJ:

38. I agree, and there is an additional reason why I am pleased to adopt the varied order proposed by Thorpe LJ at paragraph 30 of his judgment. That is because of the combination of the judge's orders whereby his prohibition (at paragraph 3) of any disclosure by the father without the specific permission of the court operated on top of the judge's further order (by paragraph 5) preventing the father from making 'any application for residence or contact or enforcement of contact' without leave of the court. The effect of those two orders working together was that the father, who had acted as a litigant in person, could not even take advice, without the specific permission of the court, about how or in what circumstances or by what submissions he could approach the court for it to exercise in his favour permission to bring further proceedings relating to residence or contact, and all this without limit as to time. That, it seems to me, is a 'Catch 22' situation which, if the father had been represented at the hearing at which the judge made his order, or perhaps even if the father had been present to speak for himself, it is likely that something would have been said to bring home to the judge the unfortunate consequences of such a juxtaposition. Accepting as I do the need and good sense of the judge's order under paragraph 5 limiting the father's right to disturb by further litigation the equilibrium of the judge's solutions save with the prior leave of the court, it becomes the more important to safeguard the father's right at least to receive appropriate advice about how he might, in suitable circumstances, approach the court in future.

THE PRESIDENT:

39. I also agree with the judgment and the conclusions of Thorpe LJ, which I have had an opportunity to read in draft. I should also like to pay tribute to all counsel in this case, but in particular to the masterly written and oral submissions of Mr Spon-Smith prepared at very short notice. His representation of the father through the RCJ Advice Bureau was of the greatest assistance to the litigant in person and to us. Without the help of Mr Spon-Smith it would have been very difficult to have concluded the appeal within a reasonable time.

40. I do not propose to revisit the conclusions of Thorpe LJ with which I agree. I am however concerned about the difficulties which have come to light in the application of the Family Proceedings Rules 1991 to the increasing number of litigants in person appearing before our family courts. In cases where it is clear that the unrepresented litigant wishes to provide information about the case to outsiders, a suitable form of order can be made by the court on the lines of the order made in *Re G* [2003] 2 FCR

231. It should not however be necessary in all cases for the parties to return to court in order to enable the litigant in person to obtain sensible advice.

41. Rule 4.23 clearly has its shortcomings and needs to be revisited. A litigant in person should be entitled to seek legal advice and general assistance more widely than is contemplated by the wording of rule 4.23, for instance from the RCJ Advice Bureau, or similar organisations based at other courts or the CAB or, in some cases, the Personal Support Unit. There are other organisations which a litigant might wish to approach to seek advice. Thorpe LJ posed the question whether a litigant in person ought to seek the permission of a judge or district judge before taking his case to an organisation such as Families Need Fathers or to a McKenzie Friend or to those engaged in the mediation process. I see the problem and am sympathetic to trying to achieve an acceptable solution. I feel however that any amendment or addition to rule 4.23 requires careful thought and I agree with Thorpe LJ that the Rules Committee should consider possible amendments to meet the current situation in the courts.

42. In the meantime I can see no objection in principle for a litigant to provide to those from whom he seeks advice non-identifiable information about a problem which affects himself and his family. The disclosure of the papers, however, would be contrary to the present rule and if the litigant wishes to disclose them to anyone outside those set out in Rule 4.3(a-e), unless or until there are changes to the rule, s/he should seek permission from the court.

43. I agree therefore that the order of 2 May 2003 was too general and too imprecise, particularly since a penal notice was attached to it. I also agree that the appeal should be allowed and that the order proposed by Thorpe LJ should replace paragraph 3.

ROBIN SPON-SMITH (instructed by Bar Pro Bono Unit) appeared for the appellant father.
KATHRYN M KOROL (instructed by Messrs Green & Co of Manchester M3 2WJ) appeared for the Guardian Ad Litem.
HEATHER HOBSON (instructed by Messrs Glaisyers of Manchester M13 0SH) appeared for the mother.
HEATHER MACGREGOR (instructed by CAFCASS Legal) appeared as advocate to the court.