# RE X (CARE: NOTICE OF PROCEEDINGS)

Family Division

Stuart-White J

24 May 1995

*Care – Care proceedings – Child's putative father brother-in-law of child's mother – Care proceedings instituted by local authority – Child's putative father not being served with notice of proceedings and unaware that he was child's father – Effect of serving putative father of child potentially catastrophic – Whether court had discretion to direct that putative father without parental responsibility should not be served with proceedings – Circumstances in which discretion should be exercised*

The mother of X was an unmarried Bangladeshi girl aged 17. The father of the child was the mother's brother-in-law. The father did not know that the mother had given birth to a child by him. The local authority sought a care order in respect of X, with a view to an adoptive placement. The mother, supported by the guardian ad litem, sought a direction that notice of the proceedings should not be served on the father. The evidence before the court was that if the liaison between the mother and her sister's husband came to the knowledge of the wider community, the mother would face ostracism from that community, that the family of the putative father would be put under great strain, and that the overall effect could be catastrophic. The local authority contended that notice of the proceedings should be served on the putative father.

**Held** – directing that the father should not be served with notice of the proceedings – r 4.4(3) of the Family Proceedings Rules 1991 cast upon the local authority the duty of serving a putative father with notice of public law proceedings instituted in respect of a child, even though the putative father did not have parental responsibility for the child. Rule 4.8(8), however, conferred upon the court a general discretion to direct that the rule requiring service of notice of the proceedings upon the putative father should be disapplied. As regards the exercise of that discretion, whilst it was plain that the welfare of the child was an important consideration, it was not the paramount consideration. The court was entitled to consider, quite independently of the welfare of the child, the effect on the child's family which would be likely if notice of the proceedings were to be served on the putative father. There were factors in the case, to which the local authority had pointed, which indicated that the father should indeed be served with the proceedings. On balance, however, the well-being of the family and the long-term well-being of X were likely to be better served if the putative father was not served with notice of the proceedings and did not become a party to the care application.

**Per curiam**: it might well have been the intention of the draftsman of r 4.8(8) of the Family Proeedings Rules 1991 that the discretion as regards service of notice of proceedings conferred upon the court by virtue of that rule should assist the court in cases where practical difficulties as to service arose. None the less, that rule did clothe the court with a general discretion whether or not proceedings should be served. In a case where, for instance, service of particular proceedings would give rise to a very real danger of serious violence, the court had a discretion to direct that notice of proceedings need not be served on a particular individual notwithstanding that service would otherwise be required under the rules.

**Statutory provisions considered**

Family Proceedings Rules 1991 (SI 1991/1247), rr 4.4(3), 4.8(8)

*Charmaine Murray (solicitor)* for the local authority
*Katherine Watson (solicitor)* for the guardian ad litem
*David Hershman* for the mother

**STUART-WHITE J:**

I have before me a particularly difficult and sensitive point about the service on a putative father of notice of an application by a local authority for a care order. The child concerned is only a matter of a few weeks old and was born to a young unmarried Bangladeshi girl, part of a Bangladeshi community. The local authority does not know at the moment the name of the putative father of the child, but the circumstances are such and the information which it does have at its disposal is such that it would not be difficult for the local authority to discover the name of that putative father. They know where he lives and, more important and to the point, they know the relationship which he bears to the mother of the child. Namely, he is the husband of that mother's sister. He is her brother-in-law.

It has been urged upon me, both by counsel for the mother and on behalf of the guardian ad litem, that the effect of serving notice of these proceedings upon the putative father would be catastrophic in a number of ways. It takes not, perhaps, much imagination and only comparatively superficial knowledge of the Muslim/Bangladeshi culture to see how that catastrophe could occur. I am told that there is a really severe danger that revelation amongst the community of the child's birth and, in particular, of the nature of the relationship between that child's natural parents would have a number of specific effects.

It would result first of all, I am told, in the ostracism from her community of the mother herself. She is, as I understand it, 17 years of age. It would also make it very improbable, so I am told, that a marriage could be arranged for her; certainly a marriage within her faith and within her culture.

It would also place the very greatest strain on the family of her sister and that sister's husband, the putative father, and raise serious question marks over whether the marriage of those persons could endure. In short, it would have a destructive effect upon the whole of the family into which this child has been born.

There is available some evidence to support that view. The guardian ad litem has taken the trouble to consult an independent cultural expert at some length and it is that expert's advice which forms the basis of the submissions put forward on behalf of the guardian that these are possible, perhaps, even probable results of disclosure.

The original intention of the mother's family, though understandable, was one which the court could not possibly have supported and is no longer being asked to support. Their hope was that it might turn out to be possible for the child to be fostered for a period and then returned to that family for adoption under a pretence that the birth had taken place, perhaps in Bangladesh, but in any event to some parents who were not connected with the family. That would have been a deception, no doubt from laudable motives which the court could not have countenanced and, after advice, the mother and her family no longer seek that route and acknowledge, first of all, that the local authority should have the care order which they seek. And, secondly, that the result of that care order will be a placement, probably for adoption, outside the family of the mother herself though no doubt, if possible, with Bangladeshi parents. That is the background to this matter.

What then are the rules which I am being asked to consider? Rule 4.4(3) of the Family Proceedings Rules requires that the applicant local authority shall give notice, written notice, of the proceedings and of the date and place of the hearing or appointment fixed under para (2)(a) of that rule to the person set out, for relevant class of proceedings, in column (iii) of Appendix 3 to the rules. Now column (iii) of Appendix 3 to the rules in relation to applications under s 31 of the Children Act 1989 specifically refers to every person whom the applicant believes to be a parent without parental responsibility for the child, and so that rule casts upon the applicant local authority a duty to serve notice of the proceedings upon the person whom they believe to be the father of the child.

The question then arises whether that is an absolute rule or whether the court has a discretion to disapply it. Mr Hershman, on behalf of the mother, and the guardian ad litem both submit that such a discretion is afforded to the court by r 4.8(8), which reads as follows:

> 'In proceedings to which this Part applies, where these rules or other rules of court require a document to be served, the court may, without prejudice to any power under rule 4.14, direct that –
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> (a) the requirement shall not apply;
> (b) the time specified by the rules for complying with the requirement shall be abridged to such extent as may be specified in the direction;
> (c) service shall be effected in such manner as may be specified in the direction.'

It may well be that that paragraph, when drafted, was not drafted in contemplation of the sort of situation that has arisen in this case. It is probable that the draftsman had in mind practical difficulties as to service and problems of that general nature.

But reading that rule as it appears, it seems to me that it does clothe the court with a general discretion to decide whether or not proceedings should or should not be served. One can contemplate, and this, I think, is not beyond the bounds of possibility, a situation where service of particular proceedings might give rise to a real danger of very serious violence and in situations of that kind the court would, in my judgment, have a discretion under this paragraph to disapply the rule requiring service and I am prepared to hold that the court does have a discretion created by that rule to disapply r 4.4(3).

The question next therefore arises as to how I should exercise that discretion. There has been canvassed before me the question of whether, in deciding how to exercise that discretion, this question is a question with respect to the upbringing of a child. If it is, then the child's welfare is the court's paramount consideration. If it is not, then the child's welfare is not the paramount consideration though, of course, in considering any question relating to a child, the welfare of the child is likely to play a very large part in the court's thinking. There is, I am told, no authority and it is perhaps not surprising that there is no authority on the question of whether this particular discretion involves determination of a question with regard to the upbringing of a child. I have been reminded about the line of cases relating to the grant

of leave to bring proceedings and the weight of authority in favour of the view that such applications, namely applications for leave, are not questions with respect to the upbringing of a child, and it is submitted by analogy that this question is not a question with respect to the upbringing of a child.

I agree with that submission. I think that it is not and that accordingly this child's future welfare, though it is plainly an important consideration, is not the paramount consideration. Thus, I am entitled to consider, quite independently of the welfare of the child, the effect on other persons, namely that child's family.

The local authority submits that, whether or not I have a discretion, and they have submitted, as I hold wrongly, that I do not, I should exercise that discretion in favour of not disapplying the rule. In other words that I should hold that they ought to serve the proceedings and they put forward, it seems to me, two perfectly sound arguments in favour of that view.

They say first of all that the court should not add its weight to proceedings carried on, effectively, in secrecy. They say furthermore, that in due course, when consideration is given to the placing of this child for adoption, they need to be in a position to counsel the putative father. That seems to me to be one of their less strong points, if I may say so, but that they also need to be in a position to discover as much as they can about the medical history of that gentleman so that any possible difficulties in relation to the child can be identified. Those are perfectly sound points.

Against that the mother and the guardian ad litem put, first of all, the destructive effect on the child's family; and the guardian, in particular, puts before me for my consideration this point: that when the child becomes 18 she will be entitled to take steps to find out about her natural family. If that which the local authority say should happen has happened, that child will find out not only that she was born out of wedlock, but that she was born not of an incestuous but of a quasi-incestuous relationship and, perhaps more seriously even than that, that her birth has (if this does occur) been the cause of the destruction of her mother's family.

It may be that none of that would occur, but I am satisfied on the basis of the information I have had from the guardian who has consulted an expert on the topic that it represents a very real risk.

It will thus be apparent why I consider this to be a difficult and a sensitive decision which the court has to make. I have held that I have a discretion and I have concluded, not without some very considerable hesitation, that I ought to exercise the discretion in favour of disapplying r 4.4(3) and directing that service of these proceedings upon the putative father should not take place. In doing that, I am conscious of the possibility that he may get to know about what has occurred by other means and I am conscious of the possibility that if that happens, then the last state might be worse than the first. It is again a matter which I have had very much to bear in mind, but carrying out the balancing exercise to the best of my ability, it seems to me that the well-being of this family, and more important from my point of view, the future and long-term well-being of the child with whom I am concerned, is likely better to be served if the putative father is not so served and does not become a party to the care application and that is my direction.

*Order accordingly.*

Solicitors: The names of instructing solicitors are omitted in the interest of preserving anonymity.

CHRISTOPHER WAGSTAFFE
*Barrister*