IN THE HIGH COURT OF JUSTICE, FAMILY DIVISION CASE NO. DE19P00318
IN THE MATTER OF THE CHILDREN ACT 1989

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

WRITTEN OUTLINE SUBMISSIONS ON BEHALF OF THE INTERVENER, RIGHTS OF WOMEN

FOR THE HEARING BEFORE MRS JUSTICE LIEVEN ON 15th – 16th JULY 2021

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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 matter. RoW specialises 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. RoW:
   a. supports disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women ('BMER women'), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women;
   b. provides legal advice via specialist telephone legal advice lines covering family law, criminal law, immigration and asylum law and sexual harassment at work;
   c. provides legal information in the form of legal guides on our website and training for professionals; and
   d. aims to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

2. These submissions – informed by the understanding RoW has from its work with victims of domestic abuse, and their interaction with the Family Court – seek to consider the instant application, and broader issues of publication/publicity, in the context of the gendered impact of domestic abuse, and of VAWG. RoW is mindful of the fact that they are in broad agreement with submissions made by a number of the other parties[2], and seeks in these short written submissions to add value on specific additional aspects relevant to its expertise. RoW advances the following core submissions in the course of its intervention:
   a. Judges undertaking the balancing exercise when considering publication and/or applications to relax restrictions must give proper weight to all aspects of the parties' rights, which includes the right of a victim to *share* their own story – protected by both Article 10 and Article 8;
   b. That the present structure of the law, and the restrictions applying to Family Court proceedings, has the effect of tending to silence those who have sought the protection of the Family Court even when they have been vindicated through that process in a manner that does not apply to those who have not come before the Family Court in Children Act proceedings;

[1] RoW is a registered charity 1147913 and Company Limited by Guarantee.
[2] Namely the two journalists, Louise Tickle and Brian Farmer, and the Mother.

c. Judges in the Family Court must ensure that the public interest in publication is properly considered;
d. There is a pressing need for higher levels of publication of private law judgments across a range of cases, including the outcome of fact-finding hearing concerning domestic abuse, and, particularly, coercive control; and
e. In applying those submissions to the particular facts of the instant case, the journalists' application to permit the publication and reporting of the judgment of HHJ Williscroft should be acceded to.

II. CORE SUBMISSIONS ON BEHALF OF RoW

A. THE RIGHT TO SHARE AND INFORMATIONAL SELF-DETERMINATION

3. Traditionally, the balancing act in disputes of this nature has focussed on the (perceived) tension between the child's Article 8 rights, and the Article 10 rights of those who seek to be able to publish the decision. However, this binary view of Article 8 *versus* Article 10 is overly simplistic. As far as the authors are aware, the Article 8 or 10 rights of those whose allegations of domestic abuse have been vindicated and seek to share information have not yet been considered in any meaningful way in decisions concerning the publication of Family Court judgments where findings of domestic abuse have been made.[3] RoW invites the Court to consider this important issue: the rights of victims of such abuse to both freedom of expression, protected by Article 10, and also to what is, in essence, informational self-determination, protected by Article 8.

4. The issue of the Article 10 rights of women who allege that they are victims of domestic violence, coercive control or other forms of VAWG has been explored, to an extent, in a number of recent cases, in this jurisdiction and elsewhere, in relation to libel law.[4] Article 10 rights and victims' and survivors' narrative ownership have also been considered in other media law contexts. The European Court of Human Rights ('ECtHR') has also made clear,

[3] The naming of parties subjected to malicious allegations, or following exoneration occurs from time to time: *Norfolk County Council v Webster & Ors* [2006] EWHC 2733 (Fam) (, *P and Q (Children: Care Proceedings: Fact Finding)* [2015] EWFC 26 (where a father was named who had been accused of participation in a satanic cult sexually abusing children), *Buckinghamshire County Council v Andrew & Ors* [2017] EWFC B19 (a decision concerning Ehlers Danlos syndrome), and *Gibbs v Gibbs* [2020] EWHC 2134 (Fam) (where an executive summary was prepared following committal proceedings).

[4] E.g. *Stocker v Stocker* [2020] AC 593 and *Depp v News Group Newspapers* [2020] EWHC 2911 (QB) in this jurisdiction, and there have been similar cases elsewhere, e.g. Sandra Muller's recently successful appeal in France: https://www.france24.com/en/france/20210401-french-metoo-founder-wins-historic-defamation-appeal. There has also been substantial academic comment regarding the interaction of the laws of defamation with the #MeToo or #BalanceTonPorc movements.

in the context of defamation law, that a person's right to reputation protected by defamation law must be balanced against the right to speech and expression in Article 10, and that the expression of experiences of abuse fall within the sphere of a persons' right to express themselves, but further their right in Article 8 (private life and right to self-determination) and Article 14. In respect of the Convention and VAWG, there is, of course, extensive ECtHR jurisprudence, which we briefly address below.

5. In respect of Article 8, the ECtHR has previously held that the concept of "private life" is a broad term not susceptible to exhaustive definition. It includes the physical and psychological integrity of a person. It protects the right to personal development, and the right to establish and develop relationships with the outside world. The notion of personal autonomy is an important principle underlying the interpretation of Article 8's guarantees (see *Pretty v The United Kingdom* [2002] Fam. Law 588 at [§61]). As Munby J (as was) noted[5]:

> '35. Article 8 thus protects two very different kinds of private life both the private life lived privately and kept hidden from the outside world and also the private life lived in company with other human beings and shared with the outside world. […] So amongst the rights protected by Article 8, as it seems to me, is the right, as a human being, to share with others — and, if one so chooses, with the world at large — one's own story, the story of one's childhood, development and history. […] It is natural for us to want to talk to others about ourselves and about our lives. It is fundamental to our human condition, to our dignity as human beings, that we should be able to do so. This, after all, is why totalitarian regimes seek to silence those who will not conform not merely by taking away their right to speak in public but also by depriving them of human companionship.
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> 36. The personal autonomy protected by Article 8 embraces the right to decide who is to be within the "inner circle", the right to decide whether that which is private should remain private or whether it should be shared with others. Article 8 thus embraces both the right to maintain one's privacy and, if this is what one prefers, not merely the right to waive that privacy but also the right to share what would otherwise be private with others or, indeed, with the world at large. So the right to communicate one's story to one's fellow beings is protected not merely by Article 10 but also by Article 8.'

6. The ECtHR Article 8 jurisprudence now makes clear that the Convention protects what RoW term informational self-determination, drawing on Westin's famous description of privacy, *"The right of the individual to decide what information about himself [or herself] should be communicated to others and under what circumstances."*[6]

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[5] *Re Roddy (a child) (identification: restriction on publication), Torbay Borough Council v News Groups Newspapers* [2003] EWHC 2927 (Fam)

[6] 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.

7. Arising from the above RoW advances the following propositions:
   a. Beyond the fact that hearings in the Family Court are almost always held in private, the ability to communicate the "*substance*" of proceedings before the Family Court is subject to further heavy restriction[7];
   b. The definition of 'publication' applied in respect of s.12 of the Administration of Justice Act 1960 "*means that most forms of dissemination, whether oral or written, will constitute a publication*"[8];
   c. The effect of the restrictions may restrict the ability of parties to family proceedings to discuss their experiences, the evidence, or the finding of the Family Court with friends, family, or other members of their support network given that those discussions may arguably not fall within the ambit of rule 12.75 of the FPR 2010[9];
   d. The restrictions limit the ability of individuals to campaign and speak publicly about their experiences in the Family Court in a personal capacity, or even on an anonymous basis; and
   e. When considering the question of publication it will be necessary to consider the summarising and/or redaction of judgments to ensure that victims of domestic abuse are able to exercise some control about the degree of sensitive private information is placed in the public domain (whether anonymised or not).

8. In this instance, especially bearing in mind the nature of findings of allegations of sexually abusive conduct, the concession made on the part of Ms Tickle and Mr Farmer as to omission of those portions of the judgment in any published version is an appropriate one.

9. Arising from the recommendations contained within the Committee on the Elimination of Discrimination against Women's ('CEDAW') *General recommendation No. 35 on gender-based violence against women*,[10] RoW would question whether the present restrictions, and the infrequent publication of judgments:

[7] Concerns have been raised as to the continuing fitness of the provisions of s.12 AJA 1960 within the broader Transparency Review currently being undertaken. In light of the manner in which s.12 provides a general framework for the analysis of ECHR rights a question may arise as to the compatibility of the provision generally, and specifically as it relates to victims of domestic abuse, acknowledging its differential gendered impact
[8] *In the matter of B (A Child)* [2004] EWHC 411 at §82.(iii)
[9] This depends upon whether the ability to obtain "*support*" or "*advice*" are free-standing or whether they are linked (as in the case of "*assistance*") to the "*conduct of the proceedings*"
[10] CEDAW, July 2017; it updates its predecessor, CEDAW's General Recommendation No. 19.

a. Permit sufficient scrutiny to eliminate the "*application of preconceived and stereotyped notions of what constitutes gender- based violence against women, what women's responses to such violence should be […]*" [§26(c)];
b. Facilitate "*data collection and monitoring […] to accelerate elimination of gender-based violence against women*" [§28][11]; and
c. Fulfil the recommendation to repeal "*[a]ll laws that prevent or deter women from reporting gender-based violence […]*" [§31(c)].

10. RoW has serious concerns in relation to the *identification* of parties to family proceedings as a general proposition. It is of fundamental importance that women who do not wish to be identified in judgments or publications, are not. Any approach to the contrary could have the effect of deterring reporting if it leads victims to be concerned about being identified. On the other hand, the greater facilitation of anonymised discussion of experiences may increase public awareness without leaving victims of abuse exposed in a manner which might impact on them, and their children, negatively. Nevertheless, RoW is supportive of those victims who wish, in consideration of their own particular experiences and circumstances, to campaign in a manner that does identify themselves and, as the court has repeatedly acknowledged in its consideration of the importance of a name to media reporting, those willing to do so may well be capable to achieving a disproportionate impact in improving and enhancing public debate on the functioning of the Family Court, and awareness of domestic abuse.

B. THE SILENCING OF THOSE SEEKING THE PROTECTION OF THE FAMILY COURT

11. It is a curiosity of the current system that women who do not seek the support of the Family Court with regards to their children may, with only the fetter of defamation law, seek to have their story published and reported on by others, or even post about it themselves on social media. (See, for example, Ms Nicola Stocker in *Stocker v Stocker* [2020] AC 593.) However, women who are engaged in family law disputes concerning their children, either on their own application or in response to their ex-partner, may at the very least, *feel* more restricted in the degree to which they can share information. The restriction may have the effect of

[11] In *H-N (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448 the Court of Appeal noted (albeit with a caution against complacency) that "*the number of appeal in private law children cases is small […]*" [§11] when this is a poor metric of the overall functioning of the Family Justice System. The critical ability, recognised at §13, of "*victim and parent support groups and other bodies […] to seek to hold the Family Justice System to account for its failures*" is significantly compromised by the current lack of transparency.

precluding a victim from discussion of the abuse suffered in the specific context of the findings actually found to have been proven by the Family Court.

12. For victims of domestic abuse, particularly in the context of coercively controlling relationships, the feeling (or reality) of being silenced, and a separation from friends and family can be core elements of the abuse they suffer. For those experiences to be mirrored by the impact of the restrictions applicable to Family Court proceedings is troubling. Furthermore, the sense that both the harm suffered *within* a relationship, and any further harm which may be caused *within or by* proceedings, are hidden (perhaps to the advantage of abusers and Judges) further deepens the mistrust in a system which at its core *must* be focused on actively facilitating the protection of vulnerable children, and participants[12].

13. The lack of clarity over the law leaves many women and lawyers extremely cautious about what they can and cannot say even after proceedings have finished. Few of the women RoW speaks to seek to campaign about their experiences publicly, but they do wish to be able to talk to their support networks. They wish to be able to provide information to the professionals that work with their children and are very unsure about what can be disclosed and to whom. The current rules in PD12G do not even permit women to show their IDVA/ISVA papers unless that IDVA/ISVA is informed enough to recognise that the support they provide could be classed as McKenzie Friend support.

14. In considering this aspect, RoW draws to the Court's attention certain relevant principles established in the ECtHR's extensive jurisprudence on VAWG. The right to live a life free from violence and the prohibition on gender-based VAWG has evolved over the last 25 years into a principle of customary international law. In *Opuz v Turkey* (2010) 50 EHRR 28 the Court recognised that such violence constitutes discrimination against women, and it has also recognised that women are often frightened to speak out about the violence they suffer and the particular vulnerability of victims of VAWG *"who often fail to report incidents"*.[13]

C. THE NEED FOR PROPER CONSIDERATION OF THE PUBLIC INTEREST

[12] Such is reflected in Practice Direction 12J's focus on the impact of abuse on the subject child *and* on their caring parent.
[13] *TM and CM v Moldova*, App No 26608/11, 28th January 2014, §60.

15. The court has, in this instance, the benefit of the full participation (in the case of Ms Tickle, with direct access representation) of representatives of the media[14]. This has the undoubted effect of enhancing the court's consideration of the public interest. The presence, and participation, of the media tends (for obvious reasons) to widen the scope of reporting[15] but judges in the Family Court must ensure that they carry out an appropriately robust assessment even without the benefit of media attendance.

16. In the vast majority of cases – heard in private and without any media awareness, let alone attendance – the court does not have this considerable advantage. Indeed, again unlike in the instant case, the court may well also be considering the question of publication against a unified resistance to publication and/or publicity on the part of the parties. In such circumstances it is all too easy for publication, and the public interest, to be overlooked.

17. RoW notes the following:
    a. The importance of open justice and freedom of expression were considered and summarised by the Court of Appeal in *Newman v Southampton City Council & Ors* [2021] EWCA Civ 437 (see §§38 – 39)[16];
    b. There is a tendency within the Family Court, and especially for those representing children, to adopt a negative posture in relation to the question of publication without acknowledging, or properly addressing, the countervailing public interest arguments[17];
    c. Assertions of harm, or the likelihood of harm, arising from publication are often advanced on the basis of generalised assertions without a proper process of forensic analysis in a manner deprecated in relation to other evaluative aspects of the Family Court's work;
    d. There is a need, pursuant to Article 6, to promote confidence in the judicial process. In this regard the judiciary has a special role as "*the guarantor of justice*" and *"must enjoy public confidence if it is to be successful in carrying out its duties*"[18]. It is notable that confidence in the Family Court is at a low ebb, in the experience of RoW, both amongst those who appear before it, and the public at large; and

[14] It must, properly, be acknowledged that a particular accredited journalist cannot be expected to represent and argue for *each* dimension of the public interest which may arise in a particular case and the obligation remains on the court to survey the wide canvas of potential, and potentially competing, interests
[15] Two recent examples of the media successfully resisting aspects of RROs sought, or made, can be found in *PA Media Group v London Borough of Haringey & Ors* [2020] EWHC 1282 (Fam) and *Re Q, R and S (Children) (RRO Application)* [2021] EWHC 1492 (Fam)
[16] The case related specifically to the disclosure of *documents* from proceedings to a member of the media
[17] The court has the assistance of considering, in this instance, the manner in which the submissions on behalf of the child, acting through X guardian, have been advanced
[18] *Prager and Oberschlick v Austria* (1996) 21 EHRR 1 at §34 as quoted by Munby J in *In the matter of B (A Child)* [2004] EWHC 411 at §97

e. The approach adopted within the Court of Protection demonstrates that an alternative default can be established with an apparently positive impact upon the scrutiny capable of being applied to, and the public perception of that Court.

D. THE PRESSING NEED FOR PUBLICATION OF JUDGMENTS

18. In issuing Practice Guidance on "*Transparency in the Family Courts*"[19] ('the 2014 guidance') Munby P (as was) noted that "*there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system*". RoW would submit that this pressing need has not diminished in the 7 years since the Practice Guidance was issued[20]. In addition, RoW notes the importance of the CEDAW and ECtHR context, summarised above.

19. At its most basic, in order to be able to protect both adult and child victims of domestic abuse, the Family Court has to ensure that private individuals (as opposed to local authorities) are prepared to seek out and engage its services.

20. In RoW's experience, that is not the case. RoW often encounters women who are apprehensive about the treatment they will receive in the Family Court. It is little wonder, in the context of the decisions which were successfully overturned by the Court of Appeal in *Re H-N(Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, and the consequential reporting of the same.

21. It should be noted that in so far as the 2014 guidance led to the publication of judgments those primarily arose in the field of public law proceedings notwithstanding the categorisation of judgments arising from "*a substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm have been determined*"[21] as falling within the class of judgments that "*the judge must ordinarily allow to be published*"[22].

[19] 'Transparency in the Family Courts: Publication of Judgments: Practice Guidance' issued on 16th January 2014.
[20] The difficulties arising from reliance upon Practice Guidance was considered in 'Transparency through publication of family court judgments' (March 2017) Doughty, Twaite and Magrath pp.14 – 16 and arose in *Re C (A Child) (Publication of Judgment)* [2015] EWCA Civ 500, see §§21 – 22.
[21] There is no limitation in the guidance that the '*allegations*' referred to relate solely to harm suffered by a child and do not extend to harm suffered by a parent, or other individual (e.g. a non-subject child, or adult sibling)
[22] Per §15(i) of the 2014 guidance. RoW would note the recent, and unusual, publication of just such a first instance fact-finding decision in *Father v Mother (Fact Finding Hearing)* [2021] EWFC B36.

22. Whilst commentary, most notably from the former President of the Family Division[23], has rightly focussed on the need for transparency to ensure public accountability for Judges and the Family Court there is an obvious tendency for publication to arise in circumstances where there has been a *failure* of process[24] (mirroring a trend in public law judgments to tend to highlight poor local authority, and social work, practice). Unless there is a broader commitment to the publication of judgments, including prosaically those which demonstrate day-to-day good practice[25], it is far harder to have an accurate understanding of the scale of problems, the ways in which such fact-finding should take place, and – frankly – for parents to have any level of confidence in the system.

23. It is, respectfully, submitted that the court should, even before the application made by Ms Tickle, have given consideration to the question of publication of judgment, an issue which was especially clear given the background and parties to the case.

E. THE BALANCE IN THE PRESENT CASE

24. At this stage, RoW makes the following brief observations on the balance to be struck in the instant case:
    a. The case is *atypical* in relation to the public profile of both parents as an MP[26], and a former MP, and in the degree to which details of the family's life are in the public domain. It has rightly been observed that the fact that the father was conducting himself in such a grossly abusive manner whilst an MP (necessarily serving vulnerable constituents), and a government minister weighs in favour of publication;
    b. The mother's desire to speak about, and have published, aspects of her experiences as examined *and found proven* by the Family Court is a matter of real significance when combined with:
        i. Her public profile;

[23] Revised submission of Sir James Munby dated 14th May 2021 to the Transparency Review.
[24] See, by way of example, *JH v MF* [2020] EWHC 86 (Fam), *H-N and others (Children) (Domestic Abuse: Finding of Fact Hearings)* [2021] EWCA Civ 448, and *Re A (Domestic Abuse: Incorrect Principles Applied)* [2021] EWFC B30
[25] Whilst the decision of Hayden J in *F v M* [2021] EWFC 4 was rightly praised by the Court of Appeal in *H-N* it is unrealistic to expect that all cases could be heard by a High Court Judge over a period of 10 days and thus a more representative sampling is crucial
[26] RoW notes the specific argument raised in respect of the Parliamentary privilege available to the mother. It may follow that the media, in a similar manner to the position in respect of so-called 'super-injunctions', would assert a right to report such statements albeit such comments having been made in Parliament may not, without more, remove the automatic restraints which would apply to statements made outside Parliament.

ii. The importance of MPs (and indeed others in the public eye and positions of prominence) contributing their personal experience, as elected representatives, to public discussion of domestic abuse, and the Family Court to enhance the public's understanding of such issues;

iii. The degree to which the father previously sought to control the public understanding of their relationship (including in his interaction with the media *and* in his threats to the mother herself);

iv. The impact on the mother of feeling "s*ilenced*" in exacerbating the abuse she suffered at the hands of the father

c. The age of the subject child, and the information already in the public domain, both serve to reduce the adverse impact of the publication of the judgment and the identification of X parents; and

d. The mother's view of both the potential impact on the child and on the merits of the applications, as a holder of parental responsibility and as X primary carer, should be accorded weight (albeit that they are not determinative)[27].

III. CONCLUSION

25. RoW will amplify these submissions orally, taking account of the full submissions received from all parties by that time. RoW hopes to assist the Court in considering these important issues, and to perform the key role of an intervener as described by Lord Hoffmann in *E v The Chief Constable of the Royal Ulster Constabulary* [2009] 1 AC 536, at [2]: to *"provide [the Court] with a more rounded picture than it would otherwise obtain."*

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[27] Per *Newman v Southampton City Council, ibid.,* §§62 – 73.