



Association of **Lawyers for Children**

Promoting justice for children and young people

**Transparency - The Next Steps:
A Consultation Paper from President of the Family Division
15 August 2014**

**A Response
21 November 2014**

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Name: Association of Lawyers for Children (the 'ALC')

Details: The ALC is a national association of lawyers and others working in the field of children law. It has over 1,400 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, and local authorities, but includes other legal practitioners and academics. The Executive Committee is drawn from a wide range of practitioners and others across England and Wales. Several leading members are specialists with over 20 years' experience in children law, including local government legal services and academia. Many have written books and articles and lectured in children law, chair key socio-legal groups such as the Interdisciplinary Alliance for Children (IAC) and children forums concerned with law, practice and legal aid; several hold judicial office.

The ALC exists to promote access to justice and child friendly for children and young people in England and Wales in the following ways:

- i. It works for the implementation of the United Nations Convention of the Rights of the Child (UNCRC)
- ii. It works to ensure separate and independent legal and welfare representation of children and to maintain properly funded legal mechanisms to enable all children and young people to have access to justice
- iii. It provides high quality training for lawyers and non-lawyers concerned with the rights, welfare, health and development of children.
- iv. It provides a forum for the exchange of information and views involving the development of the law relating to children and young people
- v. It is a key reference point for members of the profession, Governmental organisations, charities and academics.

The ALC is a key stakeholder in all government consultations pertaining to law, practice and legal aid in children law. It provides socio-legal evidence-based responses to Government consultations on public and private law children issues providing oral and written evidence to Select Committees, Bill Committees and All Party Parliamentary Groups concerned with children and families in family justice. It also funds or co-funds research where key evidence is lacking or incomplete in the face of proposed changes to child law and practice. It produces a journal (The ALC 'Newsletter') and runs national conferences and seminars on all aspects of child law and practice and related clinical and socio-legal research.

Introduction

- 1 The ALC's response will focus on the effects of the current 'transparency' agenda on the children and young people who are involved (whether as parties, or as the children of parties) in the family justice system.
- 2 With regard to the views of children and young people, the ALC co-commissioned, with NYAS, a further consultation on the views of young people on media access, "Safeguarding, Privacy and Respect for Children and Young People & The Next Steps in Media Access to Family Courts" (July 2014) undertaken by Dr Julia Brophy with Kate Perry, Alison Prescott and Christine Renouf (herein *Safeguarding Privacy and Respect for Children*).
- 3 This response should be read in conjunction with that report¹ as well as the research previously conducted for the Children's Commissioner for England in 2010 ("The views of Children and Young People regarding Media Access to Family Courts", herein, the OCC Report) and responses to the (then) DCA 2007 consultation.
- 4 This response should also be read in conjunction with the response made by the Interdisciplinary Alliance for Children, to which the ALC is a signatory.
- 5 The response is provided on the basis that, in the view of the ALC, the primary objective of the court rules, legislation and associated practice directions and guidance in this field should be to safeguard children and young people, promote their welfare and thus protect their privacy. Young people point out that in the face of the commercial imperatives of the media, the risks and dangers of social media – and lifelong implications for them of details placed there - they look to family judges to safeguard them and protect their privacy during but also following completion of proceedings. Protecting children's privacy should be a primary objective of family justice not an exception.
- 6 It is also the firm view of the ALC that the profound changes proposed, even if they are introduced incrementally, should undergo parliamentary scrutiny, as was envisaged in the Children Schools and Families Act 2010. Specifically (and as set out in the IAC response to the consultation):
 - i. The issues should be subject to a proper public consultation (not simply advertised in the legal arena) in which the issues for all children and parents

¹ www.alc.org.uk/publications/responses/nyas_alc_report_safeguarding_privacy_and_respect_for_children

are clearly stated and the views and concerns of young people to date fully explained to the general public.

- ii. There should be an *independent* review of the changes made to the Family Proceedings Rules in 2009² and proper parliamentary scrutiny of any further proposed changes - as recommended by the Justice Committee (which recommended the Ministry of Justice should begin afresh) and as accepted by Government in its response to the Select Committee Report.
 - iii. It is only at that stage that a meaningful child impact assessment can be undertaken.
- 7 The ALC believes that there are other, better ways of educating and informing the general public about the work of family courts, and for scrutinising the work and decisions of family courts where that is considered necessary. There are a wide range of possibilities such as education for young people on citizenship which could include work to promote a better understanding of the family justice system, with repetition of the very successful open days for the general public, run by various family proceedings courts in recent years. The creation of the Single Family Court provides an excellent opportunity to extend that programme to all levels of the court system.
- 8 Research in another common law jurisdiction (Canada) identifies that in practice, where people need information about civil justice issues, most do not now go to newspapers but rather to the internet³.
- 9 The need for a fully independent agency to access complaints by parties to proceedings about issues of unfairness in process and case management decisions (as distinct from appeals) should be considered. As young people and others have identified, other public bodies (e.g. education, health, and social care) have independent inspectorates to scrutinise and evaluate their work. Those bodies publish reports which the public can access and read. As also identified such reports are not limited to one case or a partial view of one case; rather, they explore work against published criteria for good practice and across a range of cases and activities giving the public a more comprehensive picture of how a service is performing, along with recommendations for change and further review. In other words, they are not a snapshot of one case but a transparent review of the quality of the service provided – against clear criteria and standards set by law and practice guidance.

² Now incorporated into the Family Procedure Rules 2010 r27.11 and Practice Direction 27B

³ Lowe D, Schmold N and Stratton M (2006) Beyond the Headlines: The role of print media in public understanding of the Civil Justice System. Civil Justice Project and the Public Project. Canada. <http://www.cfcj-fcjc.org/clearinghouse>.

The Consultation Questions

Operation of Practice Guidance of 16 January 2014: Publication of Judgments

- 10 The consultation paper seeks views on the impact and working to date of the Practice Guidance of 16 January 2014 on Publication of Judgments in the Family Courts and in the Court of Protection and views as to any ways in which Guidance in the Family Courts can be improved and, perhaps, extended. Particular attention is drawn to:
- (i) The impact on children and families, whether immediate, short term and long term, for example, the risk of a child in later life coming across an anonymised judgment about his background and learning details of it for the first time
 - (ii) The impact on local authorities and other professionals
 - (iii) Any change in the level and quality of news and reporting about the family justice system.

The views and impact on children

- 11 The President is anxious, with regard to all aspects of transparency, to hear the views and experiences of children and young people who have been through, or know of others who have been through, the family justice system.
- 12 In providing further information from young people who have been through the system and which directly addresses the issues on which information is requested, the ALC hopes this response will be especially helpful.

Listing issues

- 13 The President also seeks views and suggestions as to whether any steps can be taken to enhance the listing of cases in the Family Division and the Family Court so that court lists can, as the media have suggested, be made more informative than at present as to the subject matter of the proceedings (but *not* by naming the parties).

Proposed disclosure to the media of certain court documents

- 14 Views are also sought on proposed guidance, dealing with the disclosure to the media of certain categories of document including medical reports, subject to appropriate restrictions and safeguards, to facilitate the media's understanding of a case and to assist them in performing a 'watchdog' role.

Possibility of public hearings in family courts

- 15 Preliminary, pre-consultation views about the possible hearing in public of certain types of family case.

The ALC Response

Operation of Practice Direction of 16 January 2014: publication of judgments

- 16 There appears to have been a significant increase in the numbers of judgments published since January 2014. Publication of judgments has enabled the press to run short pieces on topical cases, e.g. in the London Evening Standard - <http://www.standard.co.uk/panewsfeeds/judge-hails-addicts-adoption-move-9229901.html>;

The Yorkshire Evening Post - <http://www.yorkshireeveningpost.co.uk/news/latest-news/top-stories/baby-boy-was-fourth-child-to-be-taken-from-depressed-dad-1-6639454>

- 17 This has not, however, led to a significant examination or analysis in the media of how the family justice system works and the principles and safeguards under which it operates. For example, in the coverage of the first case cited above there is no mention that in proceedings to remove her child, the mother would have had separate legal representation, would have been independently assessed or that the child would also have had legal and welfare representation. There was also no information or link to a website such as the British and Irish Legal Information Institute (BAILII - <http://www.bailii.org/> - see below, para 25) where the public could read the entire judgment.

The practicalities of publishing judgements

- 18 Certain practicalities cannot be ignored, not least other pressures on the judiciary and on practitioners (e.g. the legal landscape after the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) and increasingly limited availability of legal representation in family cases (see <https://www.gov.uk/government/statistics/legal-aid-statistics-april-2014-to-june-2014>).
- 19 Judgments not only have to be transcribed (if delivered ex tempore) – and legal aid is no longer usually available to fund the cost of transcription – but also anonymised, not only to remove any reference to names, but also any reference to details that might identify individuals in the case (so called “jigsaw” identification). This places considerable burdens on the judiciary and on practitioners, at a time when resources are increasingly limited. This places considerable burdens on the judiciary and on practitioners, at a time when resources are increasingly limited. It should also be noted that legal practitioners will have a retainer with their clients (whether parent or child) and that retainer will be limited (where costs are funded through a legal aid certificate)

to only work which is within the scope of the legal aid certificate and the rules and guidance published by the Legal Aid Agency. Practitioners will continue to do what they can to assist the court but it is unrealistic to expect them to do work which is not remunerated at a time when levels of legal aid remuneration are already low and where further reductions are envisaged.

- 20 In these circumstances, there has to be a risk that judgments will not be adequately anonymised, and that identification of individuals – and particularly children – will be possible from personal details contained in those judgments. Young people demonstrated in both the OCC (2010) research and the NYAS-ALC (2014) consultation how certain details from cases enable children and families to be identified in local communities – and potentially worldwide across the internet. Some of those case details are included in cases published on BAILII.
- 21 A recent example of lack of vigilance by news media occurred in relation to the criminal proceedings against the publicist, Max Clifford, in which a major news company identified a woman during a broadcast. The woman, who has lifelong anonymity under the terms of the Sexual Offences (Amendment) Act 1992, complained to the police when she heard her name 17 minutes into an edited clip published on Sky's website on 10 October 2014. Sky was contacted and the clip was taken down within the hour; and it subsequently ‘...apologised over an error which led to one of Max Clifford's victims being named in a recorded broadcast of his appeal against his eight year jail sentence for sex offences’. While it was removed within an hour of publication, the damage was done and according to Lord Justice Treacy, the incident had "significantly affected" the woman concerned⁴.
- 22 As the above case demonstrates – and as young people identify - it is difficult to see how any legal remedy could mend that ‘mischief’ and the lifelong consequences for the person concerned. Once sensitive information has been published, it is in the public domain. In the illustration above, there is no reliable way of knowing how widely it had been circulated before it was removed from the website. It may remain in the public arena for the rest of that woman’s life, already downloaded and shared.
- 23 In the NYAS-ALC (2014) report and the OCC report (2010), young people were specifically asked about the publication of judgments. They were consistent in their views and concerns about publishing personal sensitive information in judgments that would enable children and families to be identified, for example:

⁴ The Press Gazette, <http://www.pressgazette.co.uk/sky-news-apologises-after-error-led-max-clifford-victim-being-named-recorded-broadcast-appeal> 10 Nov 2014

‘Young people understood judgments provide accurate information of events and the reasons for a court decision but were concerned about ‘jigsaw identification’. They said the capacity of reporters and others to trace children has not been addressed’.

- 24 Young people in the 2014 report, in particular, said that this level of publicly available information may make abused children more vulnerable to inappropriate attention from predatory adults. They felt this issue had not been addressed by policy makers or Parliament.
- 25 The publication of carefully anonymised judgments, on a free and easily accessed website (i.e. BAILII) can be a direct and authoritative way of showing how and why the family judges make their decisions. But this also has risks for already vulnerable children and young people not previously addressed and in a climate where we are only just beginning to explore and understand how vulnerable young people in care are located, groomed and further abused.
- 26 Notwithstanding those concerns for the risks and future safety and security of children, placing judgments on BAILII requires both judges and advocates to have time and be funded to ensure that judgments do not in any way, directly or indirectly, aid the identification of the children and families concerned.
- 27 However, in the absence of a properly designed evaluation of the effect of publishing more judgments – which, where possible, should include the views of the young people and families concerned - the available information about the effects of publication will remain anecdotal. It is thus impossible to form an objective view as to whether publication has proved beneficial, harmful, or neutral in its effects. Young people’s views, as recorded in the NYAS-ALC report, raise valid concerns which should be subject to an independent investigation.

Judgments and ‘later life’ impact issues for children

- 28 With regard to any impact on children and families, and risks to young people of coming across an anonymised judgment about their background and learning details of it for the first time, the issues are more complex than suggested.
- 29 As a precursor to setting out the complexities, however, we would ask what happened to the Ministry of Justice (MoJ) proposal to produce ‘Later Life Judgments’ for children and young people? It is somewhat ironic that we now address the publication of judgments for the consumption of the press and the general public – yet have not, it appears, moved forward on how information can and should be made available for the very children whose lives and circumstances are changed by court decisions.

Children/young people and seeing judgments ‘at the time’

- 30 Notwithstanding that lacuna with regard to children as a key constituent group in contemporary family justice, with the support and assistance of an appropriately qualified adult, an older child may – emotionally – be able to cope with seeing a judgment around the time that final decisions are made.
- 31 If a child is not able to manage this, for whatever reason, then there will have to be careful and sensitive planning for how and when the details of the judgment are to be provided to the child. The timing of this cannot and should not be driven by whether or not a judgment has been published.
- 32 The complexities of this field – in the absence of a coherent policy on later life judgments for all children - are further illustrated by reference to those cases in which there is no future involvement of a local authority or other agency (e.g. CAMHS) that could provide professional help. The difficulties for this group of children become impossible if a judgment has been published, and publicly linked (directly or indirectly) to an individual child.
- 33 In any event, the children’s guardian, in specified proceedings, must ensure that a child who is of sufficient age and understanding is notified of the court’s decision and that the decision is explained to the child (PD16A, para 6.11). The availability of the judgment can assist in this process, but only if – if published – it has been anonymised and the child’s privacy protected.
- 34 If written judgments are to be increasingly available to the public through BAILII and elsewhere, coherent and nationally consistent plans must be put in place regarding how and when judgments are explained to children, and who will be responsible for providing and overseeing that process. It would also be important to commission independent research with young people about this process.
- 35 There is a clear example from the Civil Division ([OPO v MLA & Anor](#) [2014] EWCA Civ 1277 (09 October 2014) of how the courts will act to protect children when the publication of information about them is likely to cause psychological harm (in this case, based on tortious liability for intentional harm under the *Wilkinson v Downton* principle – described in the judgment as “an obscure tort”).

The impact on local authorities and other professionals

- 36 The main effect is the extra work required to ensure that judgments are appropriately anonymised, at a time when resources (including funding) are increasingly scarce.

However, there has been no evaluation of this, and this is needed. Local authorities remain concerned about jigsaw identification of children and families – locally and on the web.

Any change in the level/quality of news and reporting about the family justice system

- 37 Some short factual pieces (rather than comment or opinion) based on published judgments have been published. However, independent robust research is required to investigate whether there has been any change in reporting. It is simply not good enough to rely on anecdotal views in this complex and important area of policy. We are, for example, aware of views that the reporting of family cases, based on judgments, has been factually inaccurate but that practitioners have been so concerned about safeguarding children and their privacy rights that they have not taken issue with inaccurate reporting – precisely because the fundamental inaccuracies make identification unlikely, whereas raising issues about inaccuracy could lead to identification. That may be fortuitous for children and young people, but nevertheless in terms of stated objectives it is highly unsatisfactory.

Listing of cases and provision of more detail of case content for the media

- 38 With regard to whether any steps can be taken to enhance the listing of cases in the Family Division and the Family Court so that lists are more informative as to the subject matter of the cases, the ALC is unclear as to how this would serve the interests of children, young people, and their families, and has no suggestions as to how court lists should be made more informative for the media.
- 39 Clearly, the media may want to be informed of hearings that deal with issues upon which it might be interested in reporting. This is not necessarily the same as such reporting being in the public interest. Moreover, giving more case details through the listing procedure risks being haphazard and inadequate: what criteria might be applied, who would apply them and provide more information and to whom (and indeed how, since few newspapers now employ court reporters) - and would parties be consulted?
- 40 Whatever method might be used to alert the media, the question of media attendance at a particular hearing should be canvassed as part of case management, with an opportunity for all parties to make representations, in advance of the hearing, particularly if court documents are to be available to the media. The evidence from young people demonstrates the importance of the timing of this issue in order that they (and indeed parents) can make informed decisions about levels of compliance and future participation.

Guidance on disclosure to the media of certain categories of court documents to the media and to assist the media in performing a ‘watchdog’ role.

41 The ALC has a fundamental concern as to whether the contemporary media can act as a “watchdog” in relation to the operation of the family justice system. An independent inspectorate would be better suited to a system wide evaluation in the face of a complaint and could be made statutorily accountable in a way that in general, would be inappropriate for the media.

42 Moreover, the nature of the media has radically altered in the last 30 years. For example, Bob Franklin, professor of journalism studies at Cardiff University argues:

‘Hard news is declining and there has been a movement towards ‘lifestyle journalism’, often provided by PRs or agencies. It is cheap and fairly easy’

He continues:

‘I often wonder why we train our students to cover the courts and council meetings because when they get jobs they rarely have to do either. Journalists do not get out of their offices as much as they used to. There is a lot more juggling the wires [news agencies] and press releases.....Newspapers don't want to run lengthy court reports. We are playing up to an attention deficit disorder...’

‘After all, discussing the latest celebrity dress is easier than uncovering corruption on a local council’⁵

43 Duncan Campbell (the Guardian’s long-time crime correspondent) argues of journalism today:

‘Nowadays you get much more homogenous news with all the media chasing the same stories....

....most newspapers, and the BBC and others, have websites and they can see from the number of hits a story gets what is popular.....

...you will find a story about [Cristiano] Ronaldo or Kate Moss will be massively hit, which you will not necessarily get from an interesting story with nobody famous in it.’

⁵ <http://news.bbc.co.uk/1/hi/uk/7773014.stm> 10.03.09 . See also <http://www.cardiff.ac.uk/jomec/resources/QualityIndependenceofBritishJournalism.pdf>.

Campbell says crime coverage has been one of the biggest casualties, with newspapers and broadcasters massively downsizing their teams”⁶

- 44 The ALC also bears in mind the current, *voluntary*, regulatory framework, after the Leveson Enquiry: culture, practice and ethics of the press⁷. It remains unclear how effective that framework will be. Sir Alan Moses, chair of the Independent Press Standards Organisation (IPSO), when he delivered the Society of Editors Lecture (9 Nov 2014), reportedly said that:

‘When IPSO was launched we were all told how different the regulatory regime would be now that there was power to fine up to a million pounds or 1 per cent of annual turnover. And they said: “There you are, now you can show your mettle by fining someone a million pounds, that’s what you need...’

You only have to say that to see how unlikely that is. Proper, successful independent regulation will not be established by manic firing of a big bazooka - and anyway we don’t know how to fire it: the instruction booklet for the use of so novel a weapon is rather too complicated for we ordinary mortals at IPSO to understand.’

He also reportedly said:

‘We do not want a boring defensive press: we want a free fair and unruly press ruled only by an independent regulator IPSO who will support you and encourage you to remain so.’⁸

- 45 The ALC does not think this sits well with the notion of a role of the contemporary media as ‘watch dog’ on family justice.
- 46 Sheila Coronel (Public Sentinel: News Media & Governance Reform)⁹ gives one view:

“The watchdog doctrine, after all, dates back to an era when the “media” consisted largely of small-circulation and largely polemical newsletters and the state was dominated by a landed aristocracy. The argument then was that private ownership protected the press against state intervention. But private

⁶ <http://news.bbc.co.uk/1/hi/uk/7773014.stm> 10.03.09

⁷ <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/> .

⁸ <http://www.pressgazette.co.uk/content/ipso-chair-sir-alan-moses-fearless-press-can-also-be-fair-press>

⁹ Norris P (ed), published by The World Bank, Washington DC

<http://www.hks.harvard.edu/fs/pnorris/Acrobat/WorldBankReport/Chapter%205%20Coronel.pdf>

ownership has not shielded the press from market pressures, resulting in the downgrading of watchdog reporting in favor of fluff and entertainment. In other words, while a press autonomous of government should in theory act as watchdog, it cannot do so given the constraints of market-based media. The liberal orthodoxy—stuck in romantic, 18th-century notions of small papers fighting autocracy—therefore privileges the media’s watchdog role vis-à-vis the state while putting the press in the service of corporate power.”

- 47 Young people also take issue with the notion that the media can act as a watchdog over family justice: they see that notion as not only out of date but impossible to fulfil within the terms of the current industry. Rather, along the lines elucidated by Franklin, Campbell and Cornel above in their analyses of the contemporary terms and framework of the media, they refer to the commercial imperatives under which the media now operates. They said the motivating force for press reporting was commercial – they did not experience it as driven by a public interest or an educational imperative, for example:

‘... because journalism is such a competitive field – they are all fighting to get their name out there...so they put their own influence on things – or make them up – so their story sounds realistic and the best, so it will be picked up by the TV [and] we [the readers] think it is true but in fact 60-70% of it is probably twisted or not real.’ (Male, 16 years)

- 48 Equally they state in the clearest possible terms that they do not trust the media (and in that they are aligned with many adults)¹⁰. According to findings from the NYAS-ALC (2014) report:

- Young people were unconvinced about arguments as to the benefits of ‘public exposure’ through the press: it represented a ‘poverty’ of thought in the development of public services to respond properly to complaints. ‘Oversight’ by the press will not resolve complaints about lack of fairness.
- Overall, young people do not trust the media. Their views are drawn from several sources but overall they said reporting was often dishonest and misleading, that stories were selected – and manipulated - to sell newspapers, that reporters put pressure on people to comment in situations where they have already indicated they do not wish to comment on an issue or event. They also said newspapers

¹⁰ IPSOS-MORI survey data indicates that in the years 1983 – 2011 no more than 22% of the public trusted journalists to ‘tell the truth’ - see <https://www.ipsos-mori.com/researchpublications/researcharchive/15/Trust-in-Professions.aspx>

'twist' details; and they do not give the full story, or a balanced 'picture' of events reported.

49 These views are based on their experiences as consumers of media output (reading newspapers, watching TV news reports, etc.) but also personal experiences with the media. Several young people had direct experience of involvement with reporters from both print and television. For example:

- One young person had been involved in a fundraising event, through which she had been interviewed by a reporter but was misquoted in the published material [female, 18 years].
- Another young person with considerable experience with the media gave examples of reporting (by print and TV media) which he identified as selective. For example, he said that the reporting on a demonstration he had attended had focused on a small minority of problems, despite the fact that the event was overwhelmingly orderly and peaceful with young people wishing to discuss with reporters their concerns and how to take things forward in a constructive manner. He also said newspaper coverage had under reported the number of young people on the demonstration and failed to report the concerns relayed to reporters by young people about educational policy [male, 20 years].

50 When asked about whether court documents should be shown to the media, the view was equally clear: young people are unanimous in their rejection of this proposal, based on their concerns for the safeguarding implications and the privacy rights of children and young people. For example, they argued:

'Why should they do that – what you've said and what's happened in your life is confidential to the people you trust. They're debasing that trust if they are going to reveal that written information to reporters.' [Female, 17 years]

'What you say to the professionals is confidential – the court is breaching your confidentiality if it releases that information to reporters.' [Female, 18 years]

'No – they don't need to know that information it goes back to the issues of the child's right to confidentiality.' [Male, 16 years]

51 Both the NYAS-ALC and the OCC reports identify that:

- i. When told about media access to court records, children and young person will be unwilling/unable to talk further about parental ill-treatment; they will

withhold information – from social workers, doctors, their welfare and legal representatives, and from the judge.

- ii. Children and young people said they must be told – and be told early in cases (for many children in public law cases that means pre proceedings) – about media access to court hearings, to documents and to the potential for reporting cases – even though they should not be named.
- iii. They said that was an ethical duty of professionals, and an obligation under article 12 of the United Nations Convention on the Rights of the Child (UNCRC) to tell them about media access: once informed they can then make an informed decision as to whether/how to proceed with giving their views and account of their situations.

52 To ensure that happens, and in order to comply with article 12 UNCRC, children’s guardians and children’s solicitors will have to take particular care to ensure that children are consulted regarding the documents filed on their behalf.

53 This also has far reaching consequences for clinicians. The General Medical Council’s code of ethics sets out rules in relation to confidentiality:

‘Confidentiality is central to trust between doctors and patients. Without assurances about confidentiality, patients may be reluctant to seek medical attention or to give doctors the information they need in order to provide good care. But appropriate information sharing is essential to the efficient provision of safe, effective care, both for the individual patient and for the wider community of patients.’¹¹

Specifically in relation to children the GMC states:

‘Respecting patient confidentiality is an essential part of good care; this applies when the patient is a child or young person as well as when the patient is an adult. Without the trust that confidentiality brings, children and young people might not seek medical care and advice, or they might not tell you all the facts needed to provide good care.’¹²

54 The ALC, as an organisation that exists to promote access to justice and child friendly justice for children and young people in England and Wales, is deeply troubled at the prospect of court documents being shown to the media, given how clearly young people have rejected this proposal, and the implications for their willingness to engage in proceedings and with professionals. In balancing the ECHR article 10 right to free speech, against the article 8 right to respect for privacy and the article 6 right to a fair

¹¹ http://www.gmc-uk.org/Confidentiality_English_0914.pdf_48902982.pdf

¹² http://www.gmc-uk.org/guidance/ethical_guidance/children_guidance_42_43_principles_of_confidentiality.asp

trial, considerable weight has to be given to the very clear implications of young people deciding to withhold information from professionals, if it might be disclosed to the media. This has to be seen in the context of the UNCRC article 12 and the ethical obligation to inform children, from the outset, that the media may have access to information about them. As indicated above, in care cases, that would include information provided at the pre-proceedings stage.

- 55 There is also the question of how legal and social work professionals, and clinicians, would draft court documents that would or might be shown to the media. Indications are that, in reality, such documents would be drafted not only to be as anonymous as possible, but also to be anodyne and uninformative. The point of these documents is to assist the court in making the best possible decisions for children and young people, and that should remain the case.
- 56 As is mentioned in the consultation, particular care will have to be taken in cases in which there are litigants in person (LIPs - with/without a McKenzie Friend). It is not clear how LIPs would be helped to manage the complex and demanding process of disclosure, and the issues regarding anonymisation. In both the 2010 and the 2014 reports, young people clearly identify that parents in proceedings are vulnerable and cannot be relied upon to place their children's interests before their own in wishing to talk to the press. Children thus look to the judge to protect them.
- 57 Given the views of children and young people, and the issues identified above, the ALC cannot agree that any disclosure would be in the interests of children and young people. It is difficult to see how disclosure would encourage the sort of frankness required in family proceedings, or facilitate the "problem solving" approach that has been so successful in projects such as the Family Drug and Alcohol Courts.
- 58 In addition to the position of the GMC and concerns of clinical colleagues on this issue including breach of patient-doctor confidentiality, we have two further concerns regarding any proposals to disclose court records to the media. First, there is no indication of how the media will use the information contained in court documents. We assume there will be further proposals relaxing the rules (see below para 72) on publication of 'sensitive personal information' from cases. We cannot, however, over emphasise the disservice that will be done to the family justice system if, for example, documents disclosed at the start of cases (pre fact finding/agreed threshold statement) and thus a snapshot, are treated as 'fact' by the media. Nor can we agree that it would be acceptable for such documents to be made available to enable a 'fishing trip' by the media in search for those cases most likely to be/become newsworthy/headline

grabbing for the reasons outlined above, regarding the impact on all children subject to proceedings.

- 59 Second, it would be important to have some clarity on how proposals for the release of sensitive private information to the media meet the requirements of both accuracy and processing of information within the terms of the Data Protection Act 1998, as well as appropriate risk management. Parties to the proceedings, and any other person (including individual legal representatives, judges, and journalists) handling such information are potentially liable to the imposition of a monetary penalty by the Information Commissioner for any breaches of data protection¹³.
- 60 The cost to public bodies of non-compliance with the DPA can be considerable. For example, in August 2014, the Information Commissioner's Office (ICO) served a £180,000 penalty on the Ministry of Justice over serious failings in the way prisons in England and Wales have been handling people's information¹⁴. Local authorities have also been fined, for example, Leeds City Council was served a monetary penalty of £95,000, Plymouth City Council £60,000 and Devon County Council £90,000, after separate incidents saw details of child care cases sent to the wrong recipients, while the London Borough of Lewisham was issued a penalty of £70,000 after social work papers were left on a train¹⁵.
- 61 The threat of such penalties has a cost. As well as possible increases in insurance premiums (to cover the risk of such penalties), there is now the need to cope with additional levels of e-mail encryption which have to be paid for in terms of the cost of software and time required in opening and storing encrypted e-mails.

Accredited media who actually attend the hearing

- 62 With regard to whether documents should be disclosed only to members of the accredited media who attend the hearing (or to any member of the accredited media entitled to attend, whether or not they do) the ALC does not support disclosure to any member of the media, whether they attend court or not.

¹³

http://ico.org.uk/for_organisations/data_protection/~media/documents/library/Data_Protection/Practical_application/how-we-deal-with-complaints-and-concerns-a-guide-for-data-controllers.pdf

¹⁴ http://ico.org.uk/news/latest_news/2014/repeated-security-failings-lead-to-180000-fine-for-moj-26082014

¹⁵ http://ico.org.uk/news/latest_news/2012/local-councils-fined-over-300000-for-losing-personal-data-17122012:

Processing court documents for the media: cost, confidentiality and contempt

- 63 It is also not clear how documents would be disclosed to a member of the media who does not attend a hearing, how the extent of the disclosure could be managed, and how confidentiality would – or could - be maintained.
- 64 The cost of providing disclosure ought to be borne by the media, but it is not clear how that would work in practice, and how any risk of satellite litigation would be managed.
- 65 The existing rules regarding contempt would have to be retained. However, the ALC remains concerned that legal remedies for any breach of privacy are ineffective as far as young people are concerned (e.g. see the case of inadvertent disclosure of name in the Max Clifford case above). Once information is disclosed, particularly once it is posted on websites and/or social media, privacy is breached, that cannot be undone, even if young people have access to the courts (and funding – which we suggest is highly problematic) to take legal action.
- 66 Moreover, although websites can be taken down, the information contained on them can be published anew on other websites, or new websites that replace them, and that can be set up anywhere in the world. The English courts have already made it clear that they cannot control the foreign media, albeit some restrictions could be put in place, in the interests of the child:

‘There was an obvious and compelling need for public debate to be free and unrestricted and the mother had an equally obvious and compelling claim to be allowed to tell her story. However, the child’s welfare demanded that neither he nor his carers should be identified’. Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions) [2014] EWHC 6 (Fam)

- 67 This provoked comment by the BBC:

‘A senior family judge says he cannot stop the foreign media from publishing the story of a Slovakian mother whose son has been placed into care.’¹⁶

This is not quite what the judgment says.

- 68 In all of this, the ALC is mindful of the experience of the senior judiciary in managing media presence in court, and the reporting of cases, within a complex legal framework. That is not necessarily the experience of other members of the judiciary or the magistracy. If media access to information is to be extended, there will have to be

¹⁶ <http://www.bbc.co.uk/news/uk-25738425>

clear guidance and support for all levels of the judiciary, including magistrates, together with full and on-going training.

- 69 The ALC remains of the view that the only way to balance the rights and interests of children and young people, against a public interest in open justice and the ability of the media to report on court proceedings, is to do so on a case by case basis. In considering the case of *Luckwell v Limata* [2014] EWHC 502 (Fam) - see Appendix IV and para 71), the ALC believes that the courts should be satisfied that the interests of children and young people have been fully taken into account, before making any decisions about media access and reporting of individual cases. In private law proceedings that may mean that children and young people must be made parties to proceedings in order to enable them to express a view or for a view from a suitably qualified professional to be put on their behalf.
- 70 Appendix I sets out examples of recent case law in which the courts have applied the current rules and carried out that balancing act. These cases illustrate how the current framework enables the court to take into account the right to respect for the privacy of children and young people, and give that weight.

Preliminary, pre-consultation views about the possible hearing in public of certain types of family case

- 71 The consultation asked what types of family case might initially be appropriate for hearing in public, what restrictions and safeguards would be appropriate and what form might a pilot take.
- 72 The ALC's views are based on findings from work with young people to date (OCC, 2010; NYAS-ALC, 2014 and the (then) DCA consultation, 2007), and the impact on clinical and welfare practices to safeguard children:
- Young people point out that family courts are private: they do not want hearings to be a source of prurient interest, entertainment or an alternative to reality television.
 - Young people point out that they do not choose to have their circumstances made the subject of family proceedings, or to have judges decide their future care.
 - They are opposed to public hearings which risk becoming free entertainment. They make the point that these hearings are not another variant of "reality TV", but concern serious decisions being made about the real lives of real children and young people.
 - They propose other ways of ensuring the public has accurate information about cases and where necessary, avenues to ensure cases have been tried fairly and

that parents and indeed children have been heard. They do not think the contemporary media can or should undertake this task.

- 73 While it may be thought that family proceedings in which arrangements for children do not feature directly, such as financial cases, could be appropriate for hearing in public, the ALC think that every case has to be scrutinised individually. Blanket rules concerning certain types of case would be unhelpful. The case of *Luckwell v Limata* [2014] EWHC 502 (Fam) (see Appendix IV) is an example of a financial case heard in open court but where our concerns about implications for the privacy of children do not appear to have been considered.
- 74 As identified in the consultation paper, section 12 of the Administration of Justice Act 1960 does not apply to a hearing where the court sits in public. Thus the protection against the publication of information relating to proceedings would not apply. The Family Procedure Rules 2010 (FPR) do not permit communication to the public or any section of the public, of any information relating to the proceedings, and FPR 12.75 (communication of information for purposes connected with the proceedings) does not permit disclosure of an unapproved draft judgment handed down by any court.
- 75 Similarly, the consultation document notes that the confidentiality attached to documents and information produced under compulsion ends when the material is read out in open court.
- 76 As set out at the beginning of this response, the ALC is of the view that such fundamental changes require parliamentary scrutiny, as was envisaged in the Children Schools and Families Act 2010. Amending the FPR, even if sufficient to effect any such changes, would not involve such scrutiny; that is ironic, when the very issue at hand is greater 'transparency'.
- 77 It is also somewhat ironic that certain children in private law disputes which are referred and remain in a mediation (or ADR) process and remain so are afforded more protection for their privacy needs than those children (in private or public law) whose cases are heard in family courts. Family Mediation Council General Principles for mediators and mediation¹⁷ make it clear that all discussions and negotiations in mediation must be conducted on a legally privileged basis: it also means that safeguarding the immediate and long term privacy of children becomes dependent – not on their needs, but rather on the willingness/ability of their parents to mediate.

¹⁷ <http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/> - see Appendix III.

Conclusions

Safeguarding, children's privacy, and improving public information and system accountability

- 1 The ALC is of the view that safeguarding the immediate and long term interests, welfare and privacy of vulnerable children is the paramount task of contemporary family courts. Young people said children look to family judges to protect them where parents and others have failed/cannot do so; that protection includes prioritising their safety and privacy.
- 2 Proposals for media access to court records go further than the law and practice in most other common law jurisdictions: they have not been subjected to proper public or parliamentary scrutiny. The ALC thinks they are a serious change of practice with regard to vulnerable children and families and should therefore be subject to a proper public review and Parliamentary scrutiny. That is in the interests of children and families – and the reputation and future of the family justice system.
- 3 The ALC is in favour of a number of approaches that would genuinely improve public information about the family justice system but it is not of the view that this can be achieved via the contemporary media.
- 4 We support the development of an independent inspection unit – which includes opportunities for public/lay representation on a board/panel to assess, in appropriate cases, allegations of unfairness, poor evidence and wrong decisions.
- 5 Extending media access to the family courts, and to the documents filed in family proceedings, is not the way to achieve greater 'transparency', given the remit and limitations of the contemporary media industry and the views of young people and the effects on them of any such changes. As young people identify, one-off media coverage of a case cannot achieve the same picture for the public as a systematic inspection, review and reporting of cases. That model contains benefits for the public and also learning points for professionals including family court judges.
- 6 We appreciate the President is attempting increment change; we are however concerned that issues are becoming fragmented and confusing. We are concerned about lack of attention to patient-doctor confidentiality and to the implications of the Data Protection Act 1998 - and to the rules as to what might be published. In these circumstances and given the views and risks to young people we are of the view that issues should be returned to Parliament and to proper public scrutiny.

APPENDIX I

Cases

***Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR**
Extract from article in **Family Law Journal** December [2013] **Fam Law 1549**, Alistair
Macdonald QC and Julie Moseley, St Philips Chambers, Birmingham

J is for jurisdiction: *Re J*

“In *Re J* the President has made clear that the Art 10 freedom of parents to express opinions online via social media, even in language which is crude, insulting and vulgar, and of the press to publish those opinions more widely, even in language which is robust, colourful or intemperate, will continue to be guarded jealously by the courts. As the President emphasised, ‘freedom of speech is not something to be awarded to those who are thought deserving and denied to those who are thought undeserving’. Where however the exercise of that freedom becomes a disproportionate interference in a child's rights under Art 8, *Re J* reiterates the process that is available to protect the child's right to privacy and anonymity. Further, *Re J* also makes clear that in the ever advancing age of social media, the fact that the medium employed to disseminate opinions and information is a foreign based internet website does not prevent that process being used where restraint of publication becomes necessary to protect the rights of the child.” (However, compare that with ***Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam)**)

Family Law Journal – Newline, November 2013 **Publicity for family courts: *Re J***

Under the headline: ‘Let “glare of publicity” into family courts, says Munby’ the online *Law Society Gazette* of 10 September 2013 reported *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR (forthcoming and noted above at p 1389). The item said that Sir James Munby P, ‘has defended the right of individuals aggrieved by the family courts process to post their grievances on the internet, even when expressed in “vigorous, trenchant or outspoken terms”.’ The President had said ‘there is a pressing need for more transparency, indeed for much more transparency, in the family justice system’.

‘Transparency’, a term Sir James treats cautiously (‘what it has become conventional to call transparency’) has been a powerful theme of his judgments since his appointment to the Family Division. In *Re J* he reminds the reader (especially at paras [20] to [40]) of his own, and number of other, cases on the subject. He stresses the balance which may have to be

struck between the respect for privacy for children and the right of parents and the press to give publicity to family cases, especially care and adoption proceedings.

Limits of legislative restriction

This note looks at the President's analysis of the law in *Re J*. He sets out the legislative restrictions on publicity and then goes on to explain the importance to the family justice system that it should receive publicity, starting by pointing out the 'automatic constraints' on publicity. Section 97 of the Children Act 1989 prohibits publication but only until the conclusion of proceedings (*Clayton v Clayton* [2006] EWCA Civ 878, [\[2007\] 1 FLR 11](#)).

Section 12 of the Administration of Justice Act 1960 provides as follows:

(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 –

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.

The section relates to 'proceedings in private', including family proceedings but narrows those proceedings to those in relation to children and only to 'proceedings before any court' and it does not apply to 'anyone involved in the proceedings' (e.g. expert witnesses, social workers, the local authority, etc and see *Clayton* above). Injunctions for the anonymity of others involved in the process – e.g. medical witnesses, social workers, etc – will rarely be granted, 'unless there are compelling reasons' (para [24]).

The court may by order extend or reduce the automatic constraints on publicity but to do so it must conduct a balancing exercise within the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as described by Lord Steyn in the House of Lords in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [\[2005\] 1 FLR 591](#) (at para [17]). It is 'necessary to measure the nature of the impact. ... on the child' of what is in prospect, said Lord Steyn. Therefore, said, Sir James, the interests of the child must be a primary consideration (*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [\[2011\] 1 FLR 2170](#), at para [33]). The balance must be drawn between respect for

the child's private life (Art 8) and the right of the press and a parent or others who might want (as in *Re J*) to publicise information (Art 10).

In conducting that balancing exercise, the primacy of the best interests of the child must be considered. This was further explained in the Supreme Court in (not considered by Sir James) *H(H) v Deputy Prosecutor of the Italian Republic, Genoa (Official Solicitor intervening)* [2012] UKSC 25 where Lord Kerr said:

'It is unquestioned that in each of these cases, the children's article 8 rights are engaged. As a matter of logical progression, therefore, one must first recognise the interference and then consider whether the interference is justified. This calls for a sequencing of, first, consideration of the importance to be attached to the children's rights (by obtaining a clear-sighted understanding of their nature), then an assessment of the degree of interference and finally addressing the question whether extradition justifies the interference.' (para [144])

'[N]o factor must be given greater weight than the interests of the child.' (para [145])

Like *ZH, H (H)* related to children in immigration proceedings (i.e. not involved with publicity) but the principles in relation to the interests of children are parallel.

***Re P (Enforced Caesarean: Reporting Restrictions)* [2013] EWHC 4048 (Fam) (Family Division; Sir James Munby P; 17 December 2013)**

An Italian mother had been made the subject of a declaration authorising the performance of a Caesarean section due to her lack of capacity (*Re AA (Mental Capacity: Enforced Caesarean)* [2012] EWHC 4378 (COP), [2014] 2 FLR (forthcoming and comment at [2014] Fam Law 283)). Her child had been taken into care at birth and had now been placed for adoption. The case had been reported extensively in the media both in this country and worldwide. His Lordship had made two orders when the story had broken: first, in the Court of Protection, that any further applications in proceedings in that court relating to the mother be reserved to and listed before and heard by the President; secondly, in the Chelmsford County Court, that any proceedings relating to the child that might be issued in that court be transferred to the Family Division and that any further applications in those proceedings or in any future proceedings relating to the child be reserved to and listed before and heard by him. The following day the Council sought a reporting restriction order without notice, which was refused. It then renewed its application on notice, which was granted on a temporary basis by Charles J to whom the President had released the matter (*Re P* [2013] EWHC 4383 (Fam)).

Held – granting an order prohibiting the publication of information revealing the identity or whereabouts of the child or her carers –

(1) The court must conduct a balancing exercise, focusing on the comparative importance of the specific rights in play in the individual case and treating the interests of the child, although not paramount, as a primary consideration: *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [2014] 1 FLR (forthcoming) applied.

(2) The public has an interest in knowing and discussing what has been done in this case, both in the Court of Protection and the County Court. It is hard to imagine a case which more obviously and compellingly requires that public debate be free and unrestricted.

(3) The mother has an equally obvious and compelling claim to be allowed to tell her story to the world. To deny her the right to speak out, using her own name and displaying her own image, would be an affront not merely to the law but also to any remotely acceptable concept of human dignity and indeed, humanity itself.

(4) The child has an equally compelling claim to privacy and anonymity. The child's welfare demands imperatively that neither she nor her carers should be identified and neither the compelling public interest nor the mother's compelling claim to be allowed to tell her story would be advanced one iota by such identification.

(5) As Charles J had concluded, the identification of the mother or father of the child should not be restrained; and the court's order accordingly permits the publication of the mother's first and maiden (but not married) name and would come to an end were the child to be returned to her mother's care.

Per curiam: Two points must be addressed with honesty and candour. How can the family justice system blame the media for inaccuracy in the reporting of family cases if, for whatever reason, none of the relevant information has been put before the public? Secondly, the case must surely stand as final, stark and irrefutable demonstration of the pressing need for radical changes in the way in which both the family courts and the Court of Protection approach the issue of transparency. Many more judgments must be published, including those of circuit judges.

***Re P (Enforced Caesarean: Adoption)* [2014] EWHC 1146 (Fam)
(Family Division; Munby J; 15 April 2014)**

This was in the President's words the 'final chapter' in the litigation relating to an Italian mother and a child born by Caesarean section. The Caesarean had been authorised by declaration due to the mother's lack of capacity: *Re AA (Mental Capacity: Enforced*

Caesarean) [2012] EWHC 4378 (COP), [2014] 2 FLR (forthcoming and reported at [2014] Fam Law 283). The child was taken into care at birth and placed for adoption. Subsequently the President made an order prohibiting the publication of information revealing the identity of the child or her whereabouts or those of her carers: *Re P (Enforced Caesarean: Reporting Restrictions)* [2013] EWHC 4048, [2014] 2 FLR (forthcoming and reported at [2014] Fam Law 414).

In February 2014 the prospective adopters applied for an adoption order. A district judge directed that the matter be listed before the President and that the mother and father (who did not have parental responsibility) be given notice of the hearing. The father (who had never seen the child) did not respond. At a hearing on 1 April 2014 the prospective adopters were legally represented and social workers from the local authority were present. The mother and father were neither present nor represented. Since November 2013 there had been email exchanges between the mother and the local authority concerning the pending proceedings. The mother indicated that she could not attend the hearing personally and was not represented. The local authority asked whether she wished to place her views before the court. The final email from the mother stated that she wished her child the best, loved her and prayed to see her again, but was trying to forget the bad experience. No application of any kind was made to any first instance or appellate court by the mother or father or by the Italian authorities. In particular, neither the mother nor the father had made any application under s 47(5) of the Adoption and Children Act 2002 for leave to oppose the making of an adoption order.

Held – making the adoption order –

The confidential report from social workers on the proposed adoption indicated the bond between the child and the prospective adopters and the social workers warmly and wholeheartedly supported the application to adopt. The prospective adopters were admirably equipped to meet the child's needs now and in the future. The child was thriving in their care. In all the circumstances and having regard to the welfare checklist in s 1(4) of the 2002 Act, the child's welfare throughout her life required – indeed demanded – that she be adopted. Nothing else would do.

***Rapisarda v Collandon* [2014] EWFC 1406
(Family Court; Sir James Munby P; 8 May 2014)**

The Queen's Proctor applied to dismiss a large number of divorce petitions and also to set aside decrees of divorce obtained in consequence of a conspiracy to pervert the course of justice 'on an almost industrial scale'. An important question arose as to the impact on

reporting of the proceedings of the Judicial Proceedings (Regulation of Reports) Act 1926. Section 1 (headed 'Restriction on publication of reports of judicial proceedings') provides so far as is material:

(1) It shall not be lawful to print or publish, or cause or procure to be printed or published –

...

(b) in relation to any judicial proceedings for dissolution of marriage . . .any particulars other than the following, that is to say:

- (i) the names, addresses and occupations of the parties and witnesses;
- (ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given;
- (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;
- (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment . . .

Section 1(2) imposes penalties for contravention of the Act.

Section 1(4) of the Act provides so far as is material that:

Nothing in this section shall apply ...

(B) to the printing or publishing of any notice or report in pursuance of the directions of the court ...

Held – directing under s 1(4)(B) that there be liberty to the media and others to publish whatever report of the proceedings they may think fit –

(1) The aim of the statute was to strike a balance between the principle of open justice and the need to curb reports from the divorce court for the protection of public morality: *Clibbery v Allan* [2002] EWCA Civ 45, [\[2002\] 1 FLR 565](#), at para [88]. The aim of the legislation was 'not the protection of the parties' privacy but the prevention of injury to public morals ...': In *Re Guardian News and Media Ltd and Ors* [2010] UKSC 1, [2010] 2 AC 697 per Lord Evers JSC at para [24]. Section 1(1)(b) applied to an application by the Queen's Proctor to set aside a divorce: *Moynihan v Moynihan* [\[1997\] 1 FLR 59](#).

(2) Pending new legislation, the only means of avoiding the impact of s 1(1)(b) is a direction pursuant to s 1(4) (which provision had not been considered in *Moynihan*). That provision gave the court a discretion to order that the whole of the proceedings be published. It was appropriate to make such a direction in the circumstances of this case.

Per curiam: Parliament may wish to consider as a matter of urgency whether the retention of the 1926 Act on the statute book was justified.

***London Borough of Waltham Forest v AD* [2014] EWHC 1985 (Fam)
(Family Division; Keehan J; 9 May 2014)**

The child, now 3, saw her mother die from multiple stab wounds inflicted by the father. She was taken into police protection and thereafter into foster care. The father was currently standing trial for murder. The local authority's application under s 39 of the Children and Young Persons Act 1933 had failed, as the child did not come within its remit, and they now made the present application for a reporting restriction order.

Held – refusing to make a reporting restriction order –

A reporting restriction order should only be granted in the most compelling of circumstances. Here, the court was not satisfied on consideration of the competing Articles – the rights of the media under Art 10 and the rights of the child under Art 8 – that there was clear or cogent evidence that the risk of harm to the child if she were named in connection with the reporting of her father's trial would either thwart the therapy she was receiving or undo the benefits she may derive from therapy. The potential risks were speculative and did not overcome the high hurdle required before placing a restriction upon the press and broadcast media as to the manner in which they reported the trial. The issue of naming the child had to be left to the good sense and professionalism of the editors of the press and broadcast media.

Per curiam: (a) Those applying for reporting restriction orders had to give proper and adequate notice to the press and broadcast media; a few hours' notice was wholly unacceptable.

(b) Local authorities ought to give very careful thought to alternative means of achieving the aim they sought from reporting restriction orders and, in future, should consider writing to editors, inviting them not to name a particular child in connection with a particular story, clearly setting out the reasons for the request.

DE v AB (No 2) (Permission Hearing: Publicity Protection) [2014] EWCA Civ 1064 (Court of Appeal; Ryder LJ; 24 July 2014)

The mother's application under Sch 1 to the Children Act 1989 for financial provision for the child was refused by the Senior District Judge and an injunction was granted restraining the parties from disclosing to third parties documents used in the proceedings. The mother's appeal from both orders was dismissed by Bodey J. The mother's application for permission to appeal Bodey J's orders was refused on the papers and she renewed her application at an oral hearing. The husband applied for the permission hearing to be heard in private, which application was heard by Ryder LJ as a preliminary issue.

Held – ordering the proceedings to be held in public but making orders under s 11 of the Contempt of Court Act 1981 preventing the prohibited information being disclosed into the public domain without the court's permission, and extending the injunction –

The principle of open justice may be derogated from only where a hearing in private is strictly necessary to achieve justice between the parties and where the degree of privacy is kept to an absolute minimum. Given the move towards increasing transparency in the family justice system, it would be a retrograde step and potentially damaging were an appellate court to be persuaded to sit in private on anything other than an exceptional basis. In this case the permission hearing necessarily involved discussion of details which were subject to the injunction: were those details to enter the public domain, the permission hearing would have destroyed the very thing the injunction was intended to protect. However, it was not necessary for the appellate court to sit in private: a more proportionate solution was possible in circumstances where no member of the public chose to attend the hearing. Temporary publicity protection orders would be made order to cover the permission hearing, to be extended after the refusal of permission to appeal, together with the injunction. Any reporting would anonymise the identity of the parties and the child.

Cumbria County Council v M and Others [2014] EWHC 2596 (Fam) (Family Division; Peter Jackson J; 28 July 2014)

The fact-finding judgment following care proceedings arising from the death of one of six children in a family, had not been made public but had nonetheless recorded alleged shortcomings into the investigation of the death and had been disclosed to a number of agencies including the CPS. A schedule of failings analysing the investigation in greater detail had also been produced by the children's legal team and disclosed to some of the agencies. In light of the imminent coroner's inquest and the possibility of criminal proceedings, the local authority were granted a reporting restriction order cast in narrower terms than they had asked for; the media had robustly opposed the application. In the wake

of that hearing the media applied for disclosure of the fact-finding judgment and the schedule of failings and also requested that the present judgment record two practice issues that had arisen during the reporting restrictions hearing: none of the parties within the family proceedings had presented their arguments on time (an earlier order had directed the arguments to be in the hands of the media in advance) and, secondly, the authority had asked for the widest restrictions on the basis that the court could cut back on its request.

Held – ordering disclosure of the fact-finding judgment subject to a series of written undertakings by a senior legal advisor in each of the participating media organisations –

(1) The balance fell in favour of disclosure of the fact-finding judgment to identified legal advisors to the media for an identified purpose and subject to strict controls. Media lawyers needed to know the nature of the court's findings to allow them to consider the justification for the continuing reporting restrictions, particularly where the conduct of public agencies was under scrutiny. Furthermore no harm or unfairness to the parties or any agencies was anticipated as a result of the present limited controlled disclosure and the imposed conditions would prevent the leak of information beyond the legal advisors.

(2) It was neither necessary nor appropriate for the schedule of failings to be disclosed to the media. All the necessary information was in the judgment.

Per curiam: (i) In relation to the reporting restriction hearing, the matter of timeliness of presentation of arguments was remedied by means of a provisional ruling and allowing the media the final word about the scope and drafting of the order before it came into effect. That led to a productive dialogue and agreed draft reflecting the overall ruling.

(ii) Secondly, the 'scatter-gun' approach used by the authority in relation to the breadth of the order was inappropriate in such applications. It was the responsibility of any applicant, particularly a public authority, to analyse the need for restrictions and only to seek those which could reasonably be justified.

Control of foreign media - Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions) [2014] EWHC 6 (Fam) cf <http://www.bbc.co.uk/news/uk-25738425> - "A senior family judge says he cannot stop the foreign media from publishing the story of a Slovakian mother whose son has been placed into care."

Family Law Journal November 2014 - Update Extra

"In an application by Gloucestershire County Council for the committal to prison of **Matthew John Newman** [2014] EWHC 3136 (Fam) in which judgment was handed down on 3

October 2014, Sir James Munby President of the Family Division was dealing with two matters of contempt in the aftermath of care proceedings. In May 2014 HHJ Wildblood ordered that Mr Newman be forbidden from 'harassing employees of the local authority's children's team and/or legal department'. Mr Newman then sent 14 emails to various local authority employees and a Facebook message to the mother of another of those employees. Having found Mr Newman guilty of contempt, Sir James re-iterated his comments in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam) [\[2014\] 1 FLR 523](#), a case that attracted much attention at the time, as follows:

'I articulated, not for the first time, two points which in my judgment are and must remain of fundamental, indeed constitutional, importance. The first (para 36), was the recognition of "the importance in a free society of parents who feel aggrieved at their experiences of the family justice system being able to express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system." I added that the same goes, of course, for criticism of local authorities and others. The second (para 38), was the acknowledgement that the "fear of . . . criticism, however justified that fear may be, and however unjustified the criticism, is, however, not of itself a justification for prior restraint by injunction . . . even if the criticism is expressed in vigorous, trenchant or outspoken terms . . . or even in language which is crude, insulting and vulgar." I added that a much more robust view must be taken today than previously of what ought rightly to be allowed to pass as permissible criticism, for "Society is more tolerant today of strong or even offensive language." I summarised the point (para 80): "an injunction which cannot otherwise be justified is not to be granted because of the manner or style in which the material is being presented . . . nor to spare the blushes of those being attacked, however abusive and unjustified those attacks may be."

"I stand by every word of that. But there is a fundamental difference between ideas, views, opinions, comments or criticisms, however strongly or even offensively expressed, and harassment, intimidation, threats or menaces. The one is and must be jealously safeguarded; the other can legitimately be prevented. The freedom of speech of those who criticise public officials or those exercising public functions, their right to criticise, is fundamental to any democratic society governed by the rule of law. Public officials and those exercising public functions must, in the public interest, endure criticism, however strongly expressed, unfair and unjustified that criticism may be. But there is no reason why public officials and those exercising public functions should have to endure harassment, intimidation, threats or menaces. There is freedom of speech, a right to speak. But this does not mean that the use of words

is always protected, whatever the context and whatever the purpose. As Holmes J famously observed in *Schenck v United States* (1919) 249 US 47, 52:”

“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”

“Freedom of speech no more embraces the right to use words to harass, intimidate or threaten, than it does to permit the uttering of words of menace by a blackmailer or extortionist. Harassment by words is harassment and is no more entitled to protection than harassment by actions, gestures or other non-verbal means. On the contrary, it is the victim of harassment, whether the harassment is by words, actions or gestures, who is entitled to demand, and to whom this court will whenever necessary extend, the protection of the law. I do not wish there to be any room for doubts or misunderstanding. The family courts– the Family Court and the Family Division – will always protect freedom of speech, for all the reasons I explained in *Re J (Reporting Restriction: Internet: Video)* [2013] EWHC 2694 (Fam), [\[2014\] 1 FLR 523](#). But the family courts cannot and will not tolerate harassment, intimidation, threats or menaces, whether targeted at parties to the proceedings before the court, at witnesses or at professionals – judges, lawyers, social workers or others – involved in the proceedings. For such behaviour, whatever else it may constitute, is, at root, an attack on the rule of law.”

“I emphasise, therefore, that Judge Wildblood was perfectly justified in granting the injunction in paragraph 5 of the order of 16 May 2014. Such orders can, should, and no doubt will, be made in future by the family courts when the circumstances warrant. I should add, moreover, that the protection of the law is not confined to the grant in appropriate circumstances of such injunctions. Harassment is both a criminal offence and an actionable civil wrong under the Protection from Harassment Act 1997. And quite apart from any order of the court, it is a very serious contempt of court to take reprisals after the event against someone who has given evidence in court. I do not want anyone to be left in any doubt as to the very serious view that the court takes of such behaviour. In appropriate cases immediate custodial sentences may be appropriate. And deterrent sentences may be justified. The court must do what it can to protect the proper administration of justice and to ensure that those taking part in the court process can do so without fear.”

APPENDIX II

(And see Appendix IV below)

Hearings in public

Duckworth: *Matrimonial Property and Finance*:

“C Hearing in Public or Private?”

1 Access by the press

[141]

It is a cornerstone of the English legal system that justice is done in open court¹. As Bentham put it: ‘Publicity is the very soul of justice.’ People are not generally allowed to hide away the details of their family and private life in the 21st century². A judge is not entitled to sit in private out of concern for public decency or morality³. Nevertheless, it is open to Parliament to make inroads into this principle. CPR, r 39.2 (proceedings that may be heard in private) and FPR 2010, r 27.10 (family proceedings to be in private) collectively constitute such an inroad⁴. Further, the implied undertaking of confidentiality prevents either party from making any ulterior use of information and documents that come to light during the proceedings⁵. Privacy in these cases does not violate the right of fair trial under ECHR, Art 6⁶.

It used to be the case that proceedings under Family Law Act 1996, Part IV for occupation orders and non-molestation orders were not ‘private’ unless the court made them so⁷. However, this rule has now changed as a result of FPR 2010, r 10.5.

FPR 2010, r 27.11 provides as follows, so far as material:

‘27.11 Attendance at private hearings

(1) This rule applies when proceedings are held in private, except in relation to –

(a) hearings conducted for the purpose of judicially assisted conciliation or negotiation;

...

(2) When this rule applies no person shall be present during any hearing other than –

(a) an officer of the court;

(b) a party to the proceedings;

(c) a litigation friend for any party, or legal representative instructed to act on that party's behalf;

(d) an officer of the service or Welsh family proceedings officer;

(e) a witness;

(f) duly accredited representatives of news gathering and reporting organisations; and

(g) any other person whom the court permits to be present.

(3) At any stage of the proceedings the court may direct that persons within paragraph (2)(f) shall not attend the proceedings or any part of them, where satisfied that –

(a) this is necessary –

(i) in the interests of any child concerned in, or connected with, the proceedings;

(ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or

(iii) for the orderly conduct of the proceedings; or

(b) justice will otherwise be impeded or prejudiced.

(4) The court may exercise the power in paragraph (3) of its own motion or pursuant to representations made by [a party or a witness], and in either case having given to any person within paragraph (2) (f) who is in attendance an opportunity to make representations ...'

The rule does not imply a blanket power to exclude the press whenever the court thinks fit⁸. Rather, duly accredited journalists⁹ may attend to observe the process; albeit the detail of what they may report remains a matter for the court's discretion, to be exercised on a case by case basis in the light of relevant statute and case law¹⁰. Two general principles may perhaps be stated¹¹:

(1) the detail of people's finances is rarely of any legitimate public interest; and

(2) the court is jealous of any disclosure that is given under compulsion (as is true of nearly all disclosure in financial remedy proceedings)¹².

As an alternative to allowing the press to report the progress of a case, the court may release a judgment to be published on suitable terms as to anonymity. This may be used to protect, for example, the children of celebrities, or information that is commercially sensitive. But the court may not, in so doing, falsify the facts; and the privilege of anonymity may be lost where a party is guilty of shameful litigation conduct¹³.

When preparing evidence for hearing, parties should assist the court by placing confidential material in an annex so that it can be readily identified by the court and covered by appropriate injunctions¹⁴.

The President of the Family Division, Sir James Munby, has observed on a number of recent occasions that the family courts need to move in the direction of greater transparency and publicity about what they do¹⁵. At least one High Court judge has treated this as a mandate to sit in open court unless there are strong reasons to the contrary¹⁶. Whether FPR 2010, r 27.10 goes so far is perhaps open to question.

¹*Scott v Scott* [1913] AC 417.

²*Ambrosiadou v Coward* [2011] EWCA Civ 409, [\[2011\] 2 FLR 617](#), per Lord Neuberger MR, *sed quaere*: this may be too wide.

³*Scott v Scott* [1913] AC 417 at 435, per Viscount Haldane LC. Nor is royalty a ground for closing the court: *Harb v King Fahd* [2005] EWCA Civ 632, [\[2005\] 2 FLR 1108](#) (challenge to the jurisdiction to be in open court; however, detailed maintenance claim should be heard in private).

⁴*Clibbery v Allan* [2002] EWCA Civ 45, [\[2002\] 1 FLR 565](#), CA (Butler-Sloss P, Thorpe and Keene LJ).

⁵*Ibid*; and see [\[92\]](#) above.

⁶*B v UK; P v UK* [\[2001\] 2 FLR 261](#), ECtHR.

⁷*Clibbery v Allan* [2002] EWCA Civ 45, [\[2002\] 1 FLR 565](#), CA.

⁸*D v D (Divorce: Media Presence)* [2009] EWHC 946 (Fam), [\[2009\] 2 FLR 324](#), Charles J. See also *Spencer v Spencer* [2009] EWHC 1529 (Fam), [\[2009\] 2 FLR 1416](#), where Munby J gives a thorough exposition of the relevant statute and case-law.

⁹Under a card-carrying system that has been in force for some years.

¹⁰Eg AJA 1970, s 10 (power of court to prohibit publication of all information relating to the proceedings or a part of the proceedings); ECHR Arts 6, 8 and 10 (competing rights of fair trial, privilege and free speech). See also President's Guidance in relation to Applications consequent upon the Attendance of the Media in Family Proceedings (22 April 2009) at [H\[5\]](#), which alerts practitioners to the problems but offers no solution other than to wait for a test case.

¹¹*A v A (Reporting Restriction)* [\[2013\] 2 FLR 947](#), DJ Bradley.

¹²See, eg, *A v A (Reporting Restriction)* [\[2013\] 2 FLR 947](#), DJ Bradley (permission to report finances refused; some public interest in reporting about H's business, but since this information came through compulsion, refused also).

¹³*Lykiaradopulo v Lykiardopulo* [\[2011\] 1 FLR 1427](#), CA (H and his family, a well-known Greek shipping dynasty, falsified documents and perjured themselves; order of Baron J granting anonymity set aside); *W v W (Financial Provision: Form E)* [\[2004\] 1 FLR 494](#), per Mr N Mostyn QC (people who do not fill in Form E carefully may be 'named and shamed').

¹⁴*Ambrosiadou v Coward* [\[2011\] 2 FLR 617](#), CA.

¹⁵See eg 'View from the President's Court: the Progress of Reform' [2013] Fam Law 548, and *Practice Guidance: Transparency in the Family Courts: Publication of Judgments* [\[2014\] 1 FLR 733](#).

¹⁶Holman J: see eg *Luckwell v Limata* [2014] EWHC 502 (Fam), [2014] Fam Law 792 where not even the identity of the parties and their children was protected."

***Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam)
(Family Division; Roberts J; 7 August 2014)**

A financial remedy case involved very substantial assets; the wife sought equal division and the husband claimed she should receive 25% on the basis of his special contribution. The judge when reading in preparation for the final hearing considered that there would be media interest and invited submissions on media attendance and reporting restrictions. The husband applied to restrict reporting of: (i) the children's identities; and (ii) commercially sensitive information about his business. The restriction on publicity of the children's identities was agreed between the parties. The press did not initially make any application but subsequently did; their position was that there should be no reporting restrictions in relation to the hearing (save in respect of the children's identities), or in the alternative that the court should either sit in public or make an order under the Judicial Proceedings

(Regulation of Reports) Act 1926. The wife adopted a neutral stance as to the reporting restrictions but contended that the implied undertaking of confidentiality in financial proceedings did not apply to the media who were not parties and that the 1926 Act did not apply to these proceedings.

Held – imposing a reporting restriction in the terms sought by the husband –

(1) Obiter dicta by the President in *Rapisarda v Colladon* [2014] EWFC 1406, [2014] 2 FLR (forthcoming and reported at [2014] Fam Law 1254) indicated that it was at least arguable that the 1926 Act applied to financial remedy proceedings. Whilst in the light of the wife's neutral stance the issue did not strictly need to be decided, the court would assume that the Act applied and operated to restrict the publication of information and reports of financial remedy proceedings, save in so far as the court made directions specifying that certain information could or could not be reported under s 1(4) of the Act.

(2) The fundamental principle and starting point is the common law principle of open justice: *Scott v Scott* [1913] AC 417. That principle had been entrenched by the Human Rights Act 1998, giving force in domestic law to Arts 6 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. However, there are and always have been exceptions to the principle of open justice. Hearings in private do not of themselves breach Art 6: *B v United Kingdom; P v United Kingdom* [2001] 2 FLR 261, *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427. The High Court has jurisdiction under s 6 of the Human Rights Act 1998 and/or the inherent jurisdiction to strengthen or relax the default position in relation both to attendance at court hearings and the reporting of cases. The exercise of the court's discretion involves the balancing exercise between competing Convention rights: *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591.

(3) In general, financial remedy proceedings are heard in private, albeit that the media have the right to attend. Family Procedure Rules 2010, r 27.11(3) (b) gives the court power to direct that the press be excluded if satisfied that justice would otherwise be impeded or prejudiced if the media remained in court.

(4) Confidentiality was very important to the husband. His Art 6 rights might be engaged if he felt constrained in his evidence. However, the media's rights under Art 10 had to be considered, given that the case involved the principle of special contribution in very big money cases, in which there was a legitimate public interest. Neither Convention article took precedence and they were clearly in conflict in this case. The competing rights of the media and of the parties, weighed together with the overarching principle of open justice and the

implied undertaking as to confidentiality, fell firmly in favour of privacy in relation to financial matters being maintained. Breaching the confidence attached by the parties and by the court to financial disclosure would not assist the public nor enhance understanding of the family justice system. The reporting restrictions sought by the husband were an entirely justifiable restriction on the rights of the press under Art 10.”

There is also discussion in recent editions of Family Law Journal of issues of confidentiality for children within proceedings, and within mediation/DR (in those mediation cases in which children are consulted). For example:

From Family Law Journal, Fam Law August [2014]1141 Sir Hugh Bennett, “Family Law Finance Arbitration: a new dawn”

Advantages

I take them in no particular order of importance. First – confidentiality. All the proceedings before the arbitrator are entirely confidential. The media and the public are not admitted. Rule 16 of the scheme makes it abundantly clear that the arbitration and its outcome are confidential. All documents, statements, information and other materials in the arbitration are confidential, as are all transcripts of evidence and/or submissions. I suggest that this is a real bonus for parties who do not relish their family disagreements, whether great or small, being bandied about in the national or local media. With the family courts now travelling at a gallop towards hearings being heard completely in open court, those couples caught up in a broken relationship who want their disputes adjudicated in private now have that option. Indeed, I have recently learned of a financial case in the Family Division where the judge held the final hearing not only in open court but had all the barristers dressed in their wigs and gowns with he himself dressed in his judicial robes. I comment – in a family finance case? Is this really what twenty-first century litigants want?

But what, you may say, happens then when the award comes to the court for implementation? Will not the parties lose their privacy? Well, look at how the President dealt with the case of *S v S*. He simply said that he had read the necessary papers and approved the award and consequential orders. In para [22] of the judgment he said he did not propose to go into the details of the case as 'why, after all, in case like this should litigants who have chosen the private process of arbitration have their affairs exposed in a public judgment?' So, nobody was any the wiser as to the identity of the parties or the facts of the case. If an award is challenged which necessitates a judgment I am optimistic that the courts will adopt the same approach.

Family Law Journal May [2014] Fam Law 616, Professor Alison Diduck, Faculty of Law at University College London, “Justice by ADR in private family matters: is it fair and is it possible?”

Fairness

Positioning the state/family relationship in this way isolates the consequences of ‘private’ family decisions from their public meaning and from public concern. It leaves constructing the meaning of ‘fairness’ and ‘welfare’ to the individuals concerned. But, as House of Lords told us in *White v White* [2001] 1 AC 596, [\[2000\] 2 FLR 981](#), the justice of fairness must be measured against social values and as the Sir James Munby P told us in *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [\[2013\] 1 FLR 677](#), so must welfare. Eekelaar and Maclean also make the case that welfare and justice can be characterised as an integration of rather than a conflict of values (J Eekelaar and M Maclean, *Family Justice, The work of Family Judges in Uncertain Times* (Hart Publishing, 2013), at p 159). So, while family privacy is important, as is our freedom to choose how to live in our families of choice, these manifestations of autonomy cannot be detached from the public, social context in which they are made and experienced and the public, social consequences they engender. That is precisely why decisions about the consequences of family legal disputes should also be scrutinised according to rules regarding the justice of process, legal entitlement, social values and rights, and not left to be privately determined by individuals in the name of protecting their autonomy. It is because family law is about determining what it means, both privately and publically, to be a mother, father, partner, husband or wife (F Olsen, ‘Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child’ (1992) 6 *International Journal of Law and the Family* 192, at p 209) that some idea of social justice should prevail in those determinations. These meanings and the families they create as we negotiate the meaning of financial fairness and a child’s welfare are as important socially as they are to the individuals concerned.

Further, it is often said that family disputes are different from other civil disputes; the emotions and intimacy and intensely personal and care relationships associated with them make them particularly amenable to these means of autonomous, private decision making. Mediation, for example, is concerned with communication and relationships, with co-operation and compromise, all characteristics we associate with personal living, intimacy and care and arbitration respects the privacy and confidentiality of a family’s financial situation. Yet family law is also different from other areas of law in another respect and this difference may render it less rather than more amenable to private, autonomous decision-making. Family law was, and still is for the most part, one of the few areas of law actually about men and women, despite the degendered legislative language of ‘parent’ and ‘spouse’.

Much of family law therefore is still about how men and women relate to each other in the privacy of the family, still one of the most gendered of all institutions, and about the private and public consequences of those relations. Family living and therefore family law is profoundly gendered; whether traditional gender roles are reinforced in the particular family concerned or are subverted, they exist, they are noticed and they are often remarked upon. And while we still live in a society in which gender and gender roles have meaning, and in which we believe that that meaning should not result in disadvantage, then the resolution of disputes that affect that meaning must be able to be scrutinised by public norms. For reasons of gender and generational fairness, justice should begin in the family, not be banished from it. We should not return family living to its zone of privacy in which non-intervention by law approved a problematic status quo. Feminist critiques of the public/private divide have brought family living into the public gaze; its disputes must not be, as a matter of policy, buried again (A Diduck and K O' Donovan, 'Feminism and Families: Plus Ça Change?', in A Diduck and K O'Donovan K (eds), *Feminist Perspectives on Family Law* (Routledge, 2006), at p 1)."

APPENDIX III

Family Mediation Council General Principles for mediators and mediation

(<http://www.familymediationcouncil.org.uk/us/code-practice/general-principles/>)

“5.5 Confidentiality

5.5.1 Subject to paragraphs 5.5.3, 5.5.4 and 5.5.5 below mediators must not disclose any information about, or obtained in the course of, a mediation to anyone, including a court welfare officer or a court, without the express consent of each participant, an order of the court or where the law imposes an overriding obligation of disclosure on mediators.

5.5.2 Mediators must not discuss the mediation or correspond with any participant’s legal advisor without the express consent of each participant. Nothing must be said or written to the legal advisor of one party regarding the content of the discussions in mediation which is not also said or written to the legal advisor(s) of the other.

5.5.3. Where it appears necessary so that a specific allegation that a child has suffered significant harm may be properly investigated or where mediators suspect that a child is suffering or is likely to suffer significant harm, mediators must ensure that the relevant Social Services department is notified.

5.5.4 Mediators may notify the appropriate agency if they consider that other public policy considerations prevail, such as an adult suffering or likely to suffer significant harm.

5.5.5 Where mediators suspect that they may be required to make disclosure to the appropriate government authority under the Proceeds of Crime Act 2002 and/or relevant money laundering regulations, they must stop the mediation immediately without informing the clients of the reason.

5.6 Privilege and Legal Proceedings

5.6.1 Subject to paragraph 5.6.2 below, all discussions and negotiations in mediation must be conducted on a legally privileged basis. Before the mediation commences the participants must agree in writing that discussions and negotiations in mediation are not to be referred to in any legal proceedings, and that mediators cannot be required to give evidence or produce any notes or records made in the course of the mediation, unless all participants agree to waive the privilege or the law imposes upon mediators an overriding obligation of disclosure upon the mediator.

5.6.2 Participants must agree that all factual information material to financial issues must be provided on an open basis, so that it can be referred to in legal proceedings.

5.6.3 All information or correspondence provided by either participant should be shared openly and not withheld, except any address or telephone number or as the participants may agree otherwise.

5.6.4 Privilege will not apply in relation to communications indicating that a child or other person is suffering or likely to suffer significant harm, or where other public policy considerations prevail.”

And

“5.7.4 Where qualified mediators undertake direct consultation with any child, they must offer that child confidentiality as to any disclosure that that child may make to them. This must be explained to the participants before they agree to the direct consultation. Confidentiality in direct consultation with children must always be exercised subject to paragraphs 5.5.3, 5.5.4, 5.5.5, and 5.6.4 above.”

APPENDIX IV

(And see Appendix II above)

Luckwell v Limata [2014] EWHC 502 (Fam), [2014] Fam Law 792

A financial case, heard in open court, in which the headnote records the following:

“(7) There was no presumption that financial remedy proceedings should be heard in private; r 27.10 of the FPR 2010 provided no more than a starting point, and the question whether a given case should or should not be heard in public was entirely in the discretion of the court. Only if the public were able to see and hear for themselves how proceedings unfolded in the court room, what the oral evidence and arguments actually were, and indeed how the judge comported himself, was there true transparency, open justice and public accountability (see paras [3], [5]).”

The judgment elaborates as follows

“[5] The reasons why I formed that provisional view, and later (without opposition) directed that I would sit in public were, briefly, as follows. The principle that courts normally sit in public underpins the rule of law in a free and democratic society. Historically, courts sitting at first instance to hear financial cases after divorce have almost always sat in private. But there has recently been a strong shift towards greater transparency. That is evidenced by, amongst other sources, r 27.11 of the FPR 2010 to which I have referred, and by the very recent Practice Guidance: *Transparency in the family courts; Publication of Judgments* [\[2014\] 1 FLR 733](#), issued by the President of the Family Division on 16 January 2014 and coming into effect on 3 February 2014 (before the start of the hearing in this case). At para 2 of his Practice Guidance the President states: ‘... there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system’

However, the judgment continues:

““[6] The evidence and argument in this case lasted 6½ long days in the court room. Although there were some flashes of humour it has been an exceptionally bitter hearing which was very painful to behold. The two sides are now very entrenched indeed. Many hurtful things have been said. Caught in the cross fire are three adored, innocent but vulnerable children.”

It is not apparent from the judgment that any balancing exercise was carried out in deciding to conduct the hearing in open court; or, if it was, whether the interests of these “innocent but vulnerable children” were considered. They were not parties, so their interests were not directly represented. The children were not named, but from the details contained in the judgment, and from the subsequent media reporting, they will be readily identifiable, in a case in which there was reported to be considerable animosity between their parents (with Ms Luckwell’s parents also involved). Details were also reported in the media, including in at least one blog - <http://www.dailymail.co.uk/news/article-2559843/Dont-let-penny-III-cut-135million-Bob-Builder-tycoon-warns-daughter-bitter-2m-divorce-battle-husband.html>

<http://www.telegraph.co.uk/news/uknews/law-and-order/10669170/Wealthy-women-shouldnt-marry-says-daughter-of-millionaire.html>

<http://www.theguardian.com/law/2014/mar/01/judge-overrides-prenup-bob-the-builder-divorce>

<http://www.thelastditch.org/family/>

This contrasts with the decision in *Cooper-Hohn v Hohn* [2014] EWHC 2314 (Fam), in which the husband successfully applied for reporting restrictions to protect the identity of the children, and commercially sensitive information, with his article 6 rights being balanced against the article 10 rights of the media to report on the case (see above).