St.Mary's
FAMILY LAW SPECIALISTS

Transparency: a clearer view

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January 2024

For years, it's been debated whether there should be more transparency in the family courts. Contributing to the slow pace of change is the tension between two major factors: the need to boost public trust in the family court and the need to maintain confidentiality and privacy for those who use the family court to resolve family disputes. The debate whether we should however is over: Nottingham is one of 16 more Courts where the press will be permitted to report, initially in public law proceedings, following positive pilots in 3 other Courts across the country in 2023. The pilot introduces a presumption that accredited media and legal bloggers may report on what they see and hear during family court cases, subject to strict rules of anonymity. The ability to report is being piloted to make sure it can be done safely and with minimum disruption to those involved in the cases, and the courts. This will be done through judges in these courts making a 'Transparency Order', which sets out the rules of what can and cannot be reported.

The current law on privacy and transparency in the family courts

The starting point perhaps is Family Procedure Rule 2010 Rule 27.10, which provides that all family proceedings will be held in private except where the rules provide otherwise or the court directs otherwise. The word "private" has caused confusion, but it means that the general public have no right to be present at a final hearing which includes members of a party's family and other individuals unless they are permitted. Proceedings held in private does not mean that the proceedings are confidential.

Family Procedure Rule 2010 Rule 27.11 provides that no person shall be present at the hearing save for obvious parties, witnesses, etc but then permits:

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

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

However, at para (3): "*At any stage of the proceedings the court may direct, having given he parties and that person opportunity to make representations, that reporters 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."

Regarding reporting restrictions, Section 12 of Administration of Justice Act 1960 prevents information being published when proceedings are held in private and in applications made under the Children Act 1989 (save where permission is granted). Section 97(2) Children Act 1989 further provides that *"No person shall publish to the public at large or any section of the public any material*

which is intended, or likely, to identify (a)any child as being involved in any CA proceedings before the High Court or the family court with respect to that or any other child; or (b) an address or school as being that of a child involved in any such proceedings." Furthermore various case law establishes that the publication of confidential financial information disclosed in financial remedy proceedings is restricted.

The combined effect is that at present whilst accredited media representatives can attend private hearings, they are prevented from publishing information relating to them which renders this attendance effectively meaningless and so private hearings are rarely attended by the media.

Transparency developments: Children

Report of President of the Family Division

The President of the Family Division published a report on 29 October 2021 titled *"Confidence and Confidentiality: Transparency in the Family Courts"*, providing the views and recommendations of the President following a review by a panel and evidence provided by various participants such as the judiciary, experts and journalists. His views and recommendations included within the report in summary were that:

- Increased transparency is a top priority and should be the 'new norm' to enhance public confidence in the family courts and open up the accountability of the judiciary;
- There needs to be a major shift in culture and process to increase transparency;
- The principles of confidence and confidentiality are not mutually exclusive and it is possible to achieve both;
- Family judges should publish anonymised versions of at least 10% of their judgments each year;
- Media representatives are to be allowed to attend family court hearings, have access to certain court documents (such as position statements and witness statements) and be able to report publicly on what they see and hear subject to clear rules and the judge's discretion in each case;
- Restrictions are to remain regarding the anonymity of children and families; and
- The establishment of a Transparency Implementation Group (TIG) to take forward the changes proposed.

Following the President's Transparency Report in October 2021, the Transparency Pilot was launched as a UK government-initiated scheme first in Leeds, Cardiff and Carlisle on 30th January 2023, allowing 'pilot reporters', including accredited journalists (with a UK press card) and legal bloggers (a lawyer who is not involved in the case but is authorised to attend hearings just like a journalist), to report on cases heard in the family court, subject to strict rules of anonymity. Under the new rules, a judge sets out what can and cannot be reported by making a "transparency order" which allows for:

1. Journalists, reporters and bloggers to come into family court hearings, watch the hearing and then report what happens;

2. Journalists, reporters and bloggers to look at certain documents from the case: i.e. basic case documents – if they want to see anything else (SWET), they need the judge's specific permission;
3. And parties can talk to journalists, reporters and bloggers about their own case.

In the Family Court, a Transparency Order is made under rule 27.11 of the Family Procedure Rules 2010 and Practice Direction 27B as modified under the terms of the pilot. A template is attached to the President's Transparency Reporting Pilot Guidance (https://www.judiciary.uk/wp-content/uploads/2023/05/TIG.TOv2FINAL.docx). The President's view is clear: it is possible to enhance public confidence in the family courts whilst also safeguarding the privacy of the families and the children who turn to the courts for protection and resolution. Initially, the Pilot only applied to cases involving public law children issues. The pilot extended to other 'private law' proceedings in May 2023. The President has issued helpful Guidance which can be found here: https://transparencyproject.org.uk/wp-content/uploads/The-Reporting-Pilot-Guidance98.pdf

Recent case law: Transparency Children

Tickle v Herefordshire County Council and Ors [2022] EWHC 1017 (Fam) (Mrs Justice Lieven)

M had applied to discharge a CO made in 2019. A journalist applied to be allowed to see certain documents in a care case and screen an interview with the other in the case within a BBC Panorama interview. Noone challenged her ability to see the documents, but the dispute centred on whether the mother and LA employees should be identified. Ms Tickle stated there had already been reported criticisms of this Local Authority by Keehan J and Ofsted. She referred to various cases, including those where the Court has granted RRO's to restrict naming treating healthcare professionals (where evidence of vilification or harassment), and those where they have been refused.

Lieven J held that,: "*There was a broad interest in the operation of children's services and the family justice system being transparent…"* (and in order to vindicate M's Article 8 rights) *"considerable weight should be given to M's right to tell her own tory, in her own words, as an individual who can be recognised."*

The conclusion was therefore that though the children would therefore be identifiable, Lieven J concluded that the harm to them was relatively limited as they were under 8 years of age. "*It should not always be assumed that publicity and identification of children is harmful to them, let alone is necessarily a barrier to transparency".* She refused anonymity of the social workers as here was no evidence of harassment.

Tickle v Father and Mother [2023] EWHC 2446 (Fam) (Mrs Justice Lieven) 5 October 2023

Most recently this was a successful appeal against a case-management decision in a private law case where the father and the child's guardian opposed the application for the journalist Ms Tickle to attend before the circuit judge to report from proceedings. Mrs Justice Lieven sets out nine principles of transparency in allowing the appeal to permit reporting of private law proceedings until final hearing as follows:

1. Although Family Court proceedings are normally held in private, the press and legal bloggers are entitled to attend under FPR 27.11(2)(f).

2. Such a person can be excluded but only where it is "necessary" in the interests of the child, the safety or protection of the parties or others, or the orderly conduct of proceedings, FPR 27.11(3).

3. In approaching the test of 'necessity' what was said in *Re H-L (a child*), albeit in a different context, is a useful guide.

4. It will rarely, but not never, be appropriate for the court to inquire as to why the journalist is seeking to report or how she/he became aware of the hearing. If the judge becomes concerned one party is seeking to use reporting as a litigation strategy, particularly in the context of issues around coercive control, the judge may wish to inquire into the background to the application to report.

5. In determining whether a reporter can report on what they see and hear in a family court, the judge will have to apply a balance between Article 8 and Article 10 of the ECHR (*Griffiths v Tickle* [2021] EWCA Civ 1882 at [27] – [40]). Neither takes precedence over the other, but the court must undertake an intense focus on how the competing rights apply.

6. The child's best interests, though neither paramount nor determinative, will be critical and should be considered first (*Griffiths* at [71]), although they must still be balanced against other rights asserted and may be outweighed by the cumulative effect of other factors. In most cases in the family court, it will be of great importance to preserve the anonymity of the child, so far as is reasonably practicable.

7. There is a public interest in the reporting of cases in the family courts (per '*Confidence and Confidentiality: Transparency in the Family Courts'* 21 October 2021 McFarlane P).

8. There may well be cases where it is appropriate to adjourn a decision about whether a case can be reported on until the final hearing.

9. In deciding whether to allow reporting, the views of the parties, including the child, are of great significance. However, they are not determinative, so no party has a right of veto against reporting.

Transparency developments: Finance

On the same day as the Transparency Report was published, Mr Justice Mostyn and HHJ Hess launched a consultation on a proposal to introduce a Standard Reporting Permission Order ("RPO") to enhance the transparency of and public confidence in financial remedy proceedings in the Financial Remedies Court. In April 2023 a report into transparency in the FRC was produced, chaired by HHJ Farquar, taking into account a wide range of views and responses from High Court Judges to Deputy District Judges, legal representatives and the Press/Legal Bloggers.

The report considered:

- Transparency as a whole
- Should FRC cases be heard in private or open court
- Should the parties remain anonymous;
- What documents, if any, should be made available to the press/legal bloggers;
- How should highly confidential information (including that which is commercially
- sensitive) be considered;
- Contents of published judgments;
- How to ensure a greater number of judgments in cases involving a lower level of assets, which are generally heard by the District bench can be published.

The report is very comprehensive and several recommendations are made, including (but not limited to):

- On listings, all courts and all levels of judiciary should follow the way cases are listed at DJ/DDJ level with the parties' surname and surname, not letters.
- No change was suggested in respect of who should be permitted to attend hearings, it should remain as parties, their representatives, accredited journalists and legal bloggers.
- There should be a standard form of Reporting Order (RO) setting out what can and cannot be made public by reporters.
- Sufficient documents should be made available to reporters for them to understand the issues (the current position as per FPR 29.12 is that reporters are not entitled to inspect or copy any document without permission of the Court). The report recommends that the default position should be that reporters/legal bloggers should be entitled to have position statements, case summaries, skeleton arguments and the ES1 – documents that are prepared by legal representatives.
- Appears to be a move towards, judgments should be published especially if they are written.
- In respect of the anonymisation of those judgments, a very comprehensive balancing act takes place within the report, the consultation recommends that the default should be one of anonymity at first instance (the proceedings contain financial information, health information and highly personal matters, it will protect the privacy of children, there is a risk that the threat of publicity could distort the proceedings, and, naming the parties' has little purpose to assist with the concept of transparency and the greater understanding of the system).

It is important to note, that the report does recommend that FDRs and out of court settlements do remain private.

Recent case law – Transparency Financial Remedy

The case of *Clibbery -v Allen* [2002] EWCA Civ 45 restricted the publication of confidential financial information disclosed in financial remedy proceedings unless specific permission was provided by the Court. That is no longer good law.

Mr Justice Mostyn first made key comments in respect of transparency in two financial remedy case judgments reported in November 2021. Though in both of these cases Mostyn agreed to anonymise the judgments as the parties had a reasonable expectation that the hearing would preserve their anonymity and he didn't feel it was fair to spring a change of practice on them without forewarning, his default position in the future would be to publish judgments in full without any anonymisation (except for where this would impact upon children).

BT v CU [2021] EWFC 87

"*I no longer hold the view that financial remedy proceedings are a special class of civil litigation justifying a veil of secrecy being thrown over the details of the case in the court's judgment*"

"My default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations"

A v M [2021] EWFC 89

"There seems to have been a certain amount of surprise caused by my decision in BT v CU to abandon anonymisation of my future financial remedy judgments. Views have been expressed that I have snatched away an established right to anonymity in such judgments. This is not so. I do not believe that there is any such right".

Most recently, in *Xanthopoulos v Rakshina* [2022] EWFC 30 and *Gallagher v Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52 Mostyn J handed down his last / latest decisions re the principles governing the openness of financial remedy proceedings not falling within Section 12 AJA 1960, heard in private but which the press and bloggers may attend (r27.10 and r.27.11).

He concluded:

- Cases being heard "in chambers" or "in private" does not equate to an entitlement to secrecy of the facts of the case, but away from public gaze.
- Changes to r27.11 permits journalists and bloggers to be present during a private hearing unless the Court exercises its powers to exclude them.
- An anonymity order can thus only be granted after the Court has carefully considered the balance between Article 8 and 10 rights set out in *Re S* [2004] UKHL 47.
- Such a result will require "strict justification" as it represents a grave encroachment of a party's right (and right of the press) to exercise freedom of expression.
- Mostyn J then admitted on reflection that the proposed standard RPO contained a fallacy: that the premise a journalist cannot reference financial information without a permissive order of the court is incorrect. A journalist under r27.22 can only be restricted in what they report if a specific prohibitory order were made.

Transparency: What are the risks?

As the case law makes clear, the key in restricting reporting is the balance between Article 8 (right to family life) and Article 10 (freedom of expression). Reporting is to be the new norm. How will that affect judicial decision making? Justifying decisions in children's cases should not take priority over protecting children and the identities of them and their parents. There is a risk that core duties such as integrity and independence may be overshadowed by fears as to public scrutiny and opens the door to potentially dangerous outcomes for children.

From a judicial point of view, if resources are not provided to enable more judgments to be published, they will not be. Judges simply have no time. Considering the number of cases that go through the courts each day, chances are that an individual's case won't be reported on in any event. So what is the point? Will Judges be accused of cherry-picking cases worth disclosing and of which there will only be limited criticism?

So too is there a further risk for the children involved. Though anonymity is still in large to be preserved, any increase in the transparency of the family court process and decisions must be balanced against what is best for the children and young people going through proceedings. It risks making one of the most difficult times of their lives made publicly available for years to come.

This step towards increased transparency is a controversial step as it has the ability to compromise confidentiality in circumstances where litigant's disputes are often of a personal and distressing nature. Those individuals who find themselves subject to legal proceedings have been afforded some "comfort" in knowing that proceedings are confidential, and details of their private life will be kept away from the public arena. Though not every case in courts will be reported on – the judge will decide in each case whether it is a suitable case for journalist access to be allowed - if the judge decides that it is, but a party would like it to remain private, those concerns have to be balanced against the overall aim of the pilot and are not determinative. There is an obvious risk to parties feeling unable to participate openly and honestly for fear of reporting. Will reporting hinder openness? What of their ability to participate (PD3AA)?

The aim is to provide greater insight to distil the myths of secret and unfair family courts. But transparency also ignores one fundamental principle of human psychology – we believe what we want to believe and see what we want to see. Providing people with facts to debunk their conspiracy theories as to the "secret family courts" may simply cause them to dig deeper into their delusion.

It does not tackle the biggest injustices in the family court which are due to inordinate delay and failure to deal with private law children cases efficiently and robustly. The press can already report these problems. How are such decisions on reporting and anonymity to be determined? Submissions from those interested are required. The risk of disruption to and further delay of these sensitive cases (if decisions on reporting need to be adjourned), are clear.

Reporters should be well versed in the law so one would hope their subsequent reporting should be accurate. But what if they are not? The chance of misreporting and sensationalist reporting is obvious.

And what about a barrister's ability to publicly express a personal opinion about a past, current or anticipated case? The BSB says counsel can do so to exercise "freedom of expression" but subject to core duties (not compromise own independence and integrity, not to diminish trust and public confidence in profession, client confidentiality and best interests) and guidance. However, Bar Council advice suggests our integrity requires the correction of any erroneous public statements. What if that damages the client's case or consent by the client is refused? If there is any absence of comment will that draw greater media speculation? Will there be greater expectation to do so to offset any criticism of misreporting? Is there greater or lesser liability to contempt of court? No barrister is under a duty to speak to the media, it is not a legal service and so beyond Bar Mutual Insurance coverage. The current rule and guidance don't seem to cover the move to greater transparency but client consent seems crucial.

Will more press reporting lead to recruitment issues if professionals are scrutinised and criticised? In social work, health care, experts, etc? How will that assist an already stretched child protection system?

Regarding financial cases, there is clearly a very strong argument for understanding the basis and rationale for decisions being made by the State concerning the removal of children from their homes (public law cases). But why and how, however, can it be in the public interest for details of the financial ramifications of a divorce to be reported in the press?

Members of the press will be provided with private financial information disclosed in the family court proceedings although they are only entitled to publish a broad description of the types and amounts of assets and income and other financial resources of the parties and the monetary value of the proposals. How will that aid public understanding and judicial accountability?

Could a party utilise the threat of publication against their former spouse to encourage a settlement that may be advantageous or unfair? Even without names, there will be situations where the judgment allows for people to infer who the parties are (location, career, level of wealth etc), could that overhanging threat cause people to want to withdraw from proceedings and settle unjustly?

Alternative forms of ADR such as Mediation and Private FDRs will remain private and it may be that the move towards transparency in court proceedings encourages those with family law disputes to use private ADR so that their details and documents remain private. One concern with this is that a two-tier family law system will be created with only those who can afford to use private ADR methods being able to keep their cases confidential. A consequence of this is the quality and variety of reported judgments which will be limited to those who cannot afford to pay for private FDR.

Transparency: What are the benefits?

Taking a family dispute to court is an inherently stressful and uncertain experience for a parent and family, particularly when you factor in the wide scope a court has in making decisions. As the family court is a private and confidential process, many members of the public know very little about family law proceedings. Often, their only exposure to the family court system is television programmes like Judge Rinder, and high profile celebrities (think Amber Heard vs Jonny Depp) and the other usual cases that hitherto got reported are typically ones that reach the higher courts – complex divorce cases with millions (or billions) in assets, and international children cases. This means that the everyday judgements are not open to public scrutiny.

Fundamentally the overall aim is to improve the courts and make law fairer for everyone. Without it, there are accusations of a secret court with the conclusion that what is being decided and the approach of the court is unfair, unsound or wrong.

Lack of transparency means lack of accountability. With enough reporting of everyday decisions the expectations of the court will be better understood and both the judges, and the courts will be held accountable for the procedural issues. Patterns of decisions and perceived biases can~~not~~ be seen and the risk of a miscarriage of justice thus decreases.

If the pilot goes well and reports on everyday disputes (contact, temporary removal from jurisdiction, divorce) become better understood, it will help mums and dads, husbands and wives in knowing what to expect.

It may also encourage compromise and co-parenting outside of the court – if a parent already has a good idea what is going to happen, then they may be minded to think about settling early without the need to attend court. Equally with financial remedy proceedings, if a party has been able to read a similar case (noting at the current time the lack of modest money cases published), will they be more realistic about their prospects and look to settle the matter and therefore save themselves stress and costs, but save court resources?

Reporters' access is being tested under the Transparency Project to ensure that it can be done safely and with minimal disruption to those involved in the cases and the courts. The cases will still be anonymised. No one is allowed to name or take photos of the mums, dads, husbands and wives or their children. Although it may be possible for a party to recognise your case based on specific details (particularly in the local press) crucially, the aim is to make sure that others cannot identify the case (or child) by any of the facts reported.

Those who can report are restricted and verified: the pilot reporter must complete form FP301 if a legal blogger, or produce ID at the outset of the hearing if a member of accredited media. Pilot reporters are expected to notify the court in advance to ensure all the relevant paperwork can be managed without disrupting proceedings. This prevents any member of the public or person with an interest in the case coming to the hearing under the guise of being a journalist.

No matter what the judge orders, a party does not have to speak to a reporter unless they want to.

Considering the number of cases that go through the courts each day, chances are that an individual's case won't be reported on in any event so the feared risks of privacy won't arise in most cases.

Conclusion (and reminder)

The President of the Family Division is clear that confidentiality does not need to be compromised in the interests of transparency and that the court system can maintain both principles.

A reminder however: Section 12 of Administration of Justice Act 1960 remains, and prevents information being published when proceedings are held in private and in applications made under the Children Act 1989 (save where permission is granted). That is good law: contempt proceedings

were brought against leading counsel in *Griffiths v Tickle* (2022) EWCA Civ 465 for discussing the case with and disclosing documents to a senior children lawyer requesting they be passed to the Association for Lawyers for children for the purposes of considering an intervention on the appeal on which he was instructed (professional advisers but strangers to the proceedings). The Court decided not to purse contempt proceedings determining that its publication of the judgment on the issue itself was sufficient punishment.

Disclosure of confidential material is still a no no, whatever the transparency arguments. Advocates should have a template of the new Order ready for use in case Ms Tickle attends your next hearing!