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Public Law Month

VICTORIA GREEN | CAROLINE HARRIS | LEONIE JAMES

WEEK ONE

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Victoria Green

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Victoria has been a specialist family practitioner for many years, having previously also practised in criminal law. She has appeared at all levels of tribunal and against both junior and leading counsel.

In public law children cases, Victoria has experience of dealing with cases in which there are the most serious allegations of harm to children.

In the private law sphere, Victoria will often deal with both the children and financial aspects of a case on behalf of a client. Her cases often involve an international element.

Caroline Harris

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Caroline specialises in both criminal and family law and has experience conducting cases which involve both criminal and family proceedings. In crime, Caroline acts primarily for the defence, and has experience at all levels up to and including the Court of Appeal.

Caroline has expertise in a broad range of criminal matters including representing clients charged with the most serious matters including murder and serious sexual offences. In public law, Caroline has experience of representing local authorities, parents, guardians and children directly.

As with her criminal cases in her family cases Caroline has conducted cases involving serious allegations including murder, sexual assault and fabricated illness. In private law, Caroline covers all areas including child arrangements and internal and external relocation.

Leonie James

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Leonie specialises in all areas of family law. She joined chambers as a tenant in October 2020 following completion of her pupillage.

Prior to starting pupillage, Leonie was a Research Assistant at the Law Commission, working on the 'Building Families Through Surrogacy' and 'Making a Will' projects.

Leonie is a qualified solicitor, having completed her training contract at a leading family law firm where she gained experience in high net worth matrimonial finance and private law children.

She volunteered on a regular basis in a legal advice centre, advising on all areas of law and managing her own cases.

Disclosure
General overview and recent case law update
Family Law– Children Cases

Victoria Green | Caroline Harris

Introduction:

1. Disclosure is a very wide topic area and if there is a specific area that you had wished we had covered please contact us and we will either provide a short response or try and arrange a further lecture addressing that area.

2. In this lecture we focus on some key areas and also areas that have been explored recently in case law.

Disclosure from Family proceedings

3. The issue of disclosure from family proceedings can arise in any number of circumstances. Most commonly, applications are made for disclosure to the police and/or into parallel criminal proceedings. However, the issues can also arise where disclosure is sought to a wide range of other third parties, and/or into other proceedings within the civil jurisdiction. When disclosure is sought into other civil proceedings, it should be noted that the probability is that those other civil proceedings will be public. That is critical to bear in mind, when considering how wide an audience might then become privy to what is otherwise normally private and confidential information.

4. The Family Procedure Rules sets out the starting point as regards disclosure of information from public law children proceedings as follows:

FPR 2010 r.12.73
(1) For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated –
(a) where the communication is to–
(i) a party;

(ii) the legal representative of a party;
(iii) a professional legal adviser;
(iv) an officer of the service or a Welsh family proceedings officer;
(v) the welfare officer;
(vi) the Director of Legal Aid Casework (within the meaning of section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012);
(vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;
(viii) a professional acting in furtherance of the protection of children;
(ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;

(b) where the court gives permission; or

(c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G.

(2) Nothing in this Chapter permits the communication to the public at large, or any section of the public, of any information relating to the proceedings

(3) Nothing in rule 12.75 and Practice Direction 12G permits the disclosure of unapproved draft judgment handed down by any court.

5. Consideration then needs to be given to the statutory framework within which the privacy and confidentiality of family proceedings is maintained, in combination with the jurisprudence as to when and how some disclosure may be permitted.

Section 12 of the Administration of Justice Act 1960

6. Section 12 provides an automatic restriction upon the disclosure of information 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;

...

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

7. There is a great deal of case law in relation to that provision: see, for example, the summary provided by Munby J in Re B. (A child) (Disclosure) [2004] EWHC 411 (Fam); [2004] 2 F.L.R. 142.

s.97(2) Children Act 1989

8. A further automatic restriction on disclosure is imposed by s.97(2) of the Children Act 1989 as follows:

(2) 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 proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

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

9. Whilst not readily apparent from the wording of section 97 itself, it is settled law that the section is to be interpreted restrictively (as a result of Art 10 of the ECHR), with the relevant prohibition to end on the conclusion of the proceedings: Clayton v. Clayton [2006] EWCA Civ 878, [2006] Fam 83, [2007] 1 FLR 11, at [48] – [60]. Therefore, any automatic protection under that section will only exist until the conclusion of any proceedings.

10. The restrictions under section 97 of the 1989 Act may be dispensed with by the family court, "if satisfied that the welfare of the child requires it" (section 97(4) of the 1987 Act). However, Munby J. (as he then was) broadened the circumstances in which those restrictions may be dispensed with in Norfolk County Council v Webster & Ors [2006] EWHC 2733 (Fam). It was a case which concerned an application by parents to speak to the press about an alleged miscarriage of justice, and in allowing disclosure he said this:

57. In the present case counsel have raised an important question as to how section 97(4) is to be construed. The point arises because, as will be recalled, the power to dispense with section 97(2) is, on the face of it, confined by section 97(4) to those situations where "the welfare of the child requires it".
58. In my judgment section 97(4) cannot be construed in this restrictive way. In Clayton v Clayton [2006] EWCA Civ 878, [2006] 3 WLR 599, the Court of Appeal held that the effect of section 3 of the Human Rights Act 1998 was to require section 97 to be read in a Convention-compliant way, because section 97 constitutes a specific restriction on the media's rights under Article 10. In the same way, section 97(4) must likewise be construed in a Convention-compliant way, not limiting the occasions on which section 97(2) is dispensed with to those where the welfare of the child requires it but extending it to every occasion when proper compliance with the Convention would so require. In other words, the statutory phrase "if... the welfare of the child requires it" should be read as a non-exhaustive expression of the terms on which the discretion can be exercised, so that the power is exercisable not merely if the welfare of the child requires it but wherever it is required to give effect, as required by the Convention, to the rights of others.
...
59. ...section 97(4) has to be read as permitting the court to dispense with the prohibition on publication in section 97(2) where the right of free expression under Article 10 or other Convention rights require it. To do otherwise would, as Mr Warby put it, place the child's interests on a pedestal in a way which is incompatible with the Convention. I agree.

Exercising the Discretion

11. By virtue of the above framework, disclosure is thereby prohibited unless permission has been granted by the court. The current authoritative statement of the law on disclosure to third parties from family proceedings remains the Court of Appeal decision in Re C (A Minor)(Care Proceedings:Disclosure) [1997] Fam 76, also cited as Re EC (Disclosure of Material) [1996] 2 FLR 725. It has been applied when the courts have considered disclosure to a wide range of third parties including the police, probation, various professional medical bodies and the administrative court for the purposes of a judicial review application.

12. In Re C, the court was concerned specifically with whether or not documents from care proceedings should be disclosed to the police. Swinton Thomas LJ set out the following matters which a judge will consider when deciding whether to order disclosure:

    "It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case.
    (1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.
    (2) The welfare and interests of other children generally.
    (3) The maintenance of confidentiality in children cases.
    (4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which s98(2) applies ...
    (5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.
    (6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.
(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, school, etc. This is particularly important in cases concerning children.
(9) In a case to which s98(2) applies, the terms of the section itself, namely, that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.
(10) Any other material disclosure which has already taken place."

13. In Re X Children [2007] EWHC 1719 (Fam) Munby J (as he then was) added that the factors set out above needed also to be set in the context of individuals' rights under the ECHR as follows:

"21. Inevitably, in a case such as this, there are a number of different and often competing interests involved, some private and some public. Typically, these interests will be protected by one or more of Articles 6, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
22. The exercise of the judicial discretion which arises in these cases thus requires consideration of a very wide range of factors. In the final analysis it involves a balancing exercise in which the judge has to identify, evaluate and weigh those factors which point in favour of the disclosure (or restriction) sought against those factors which point in the other direction. There is, therefore, a balance to be struck between the various competing interests.
23. Since the coming into effect of the Human Rights Act 1998, that balance has to be struck having regard to the various rights and interests protected by the Convention which are engaged. And the balance has to be struck in accordance with the principles explained by Lord Steyn in In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593, at para [17], and by Sir Mark Potter P in A Local Authority v W [2005]

EWHC 1564 (Fam), [2006] 1 FLR 1, at para [53]. That is, by a 'parallel analysis' of the various rights protected by the Convention which are engaged, leading to an 'ultimate balancing test' reflecting the Convention principle of proportionality. This, as Lord Steyn emphasised in In re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47, [2005] 1 AC 593, at para [17], necessitates "an intense focus on the comparative importance of the specific rights being claimed in the individual case." As Sir Mark Potter P put it in Clayton v Clayton [2006] EWCA Civ 878, [2006] Fam 83, at para [64], "such applications fall to be decided not on the basis of rival generalities but by focussing on the specifics of the rights and interests to be balanced in the individual case."

24. It is important to recognise that in this balancing exercise the interests of the children involved, although obviously important, are not paramount. That principle was already established before the Human Rights Act 1998 came into force: see Re X (Disclosure of Information) [2001] 2 FLR 440 at para [23]. It has now been reinforced by the subsequent Convention jurisprudence."

14. In Re Z (Children) (Disclosure: Criminal Proceedings) [2003] 1 FLR 1994, Munby J (again) had given specific consideration to disclosure of information from family proceedings into criminal proceedings, and held that it would be an exceptional case where a Family Court could properly deny a criminal defendant access to material which might enable him to defend himself more effectively against a serious criminal charge. To deny the disclosure, would in fact be contrary to the children's interests: para [13]:

"the children, precisely because they are the [Defendant's] children, themselves have a direct and important interest in ensuring that there is no miscarriage of justice in the criminal trial and in ensuring that the truth, whatever it may be, comes out." I went on: "In this as in other respects, better for the children that the truth, whatever it may be, comes out." In the present case, as counsel for the CPS correctly observes, and the point was picked up and adopted by counsel for Mrs X, it is important for the future welfare of the children that the Defendant is dealt with for his crime in the most appropriate manner and on the basis of an accurate rather than a distorted view of the relevant facts. So the children themselves have an

interest in there being proper disclosure. As counsel for Mrs X pithily observed, it is in the interests of the children that the Defendant receives a fair and just sentence. I agree."

15. Sir James Munby then expanded on that same theme when as President in Re W (Children) [2017]EWFC 61 he said:

"'Subject always to the imposition of any necessary safeguards and conditions, family courts should not stand in the way of, and should, on the contrary, take all appropriate steps to facilitate, the proper administration of justice elsewhere. This principle is well recognised in the authorities both in relation to the criminal justice system and in relation to tribunals as varied as those dealing with medical discipline and criminal injuries compensation. It is, of course, equally applicable in relation to the civil justice system.'"

Is the Child's Welfare Paramount?

16. There is a potentially interesting argument to be made about whether the paramountcy principle applies within disclosure applications, notwithstanding that which was said in Re X Children above. In Re W. (Children) (Care Proceedings: Publicity) [2016] EWCA Civ 113; [2016] 4 W.L.R. 39, concerned the publication of a judgment given in care proceedings that had been heard in private. MacFarlane LJ (as he then was) referred to the possibility of a tension or conflict between the generally accepted view that welfare is not paramount in such situations with some of the Court of Appeal authorities:

41. During the hearing of the appeal we accepted the jointly argued approach of counsel and that, in turn, was the basis upon which we came to the decision on the appeal which we announced at the conclusion of the oral hearing. In the process of preparing this written judgment, however, I have come to the preliminary view that there may be a conflict, or at least a tension, between the apparently accepted view that welfare is not the paramount consideration on an issue such as this, on the one hand, and Court of Appeal authority to the contrary on the other hand. As this present judgment is a record of the reasons for our decision announced on 23rd November 2015 and that decision

was based upon the children's welfare not being the paramount consideration, I do no more than flag up this potential point which, if it is arguable, must fall for determination by this court on another occasion.

42. The key authorities to which I am referring are a criminal case in the House of Lords, Re S (Identification: Restrictions on Publication) [2004] UKHL 47; [2005] 1 AC 593, a private law family case in the Court of Appeal, Clayton v Clayton [2006] EWCA Civ 878; [2007] 1 FLR 11 and a public law child case in the High Court, Re Webster; Norfolk County Council v Webster and Others [2006] EWHC 2733 (Fam); [2007] 1 FLR 1146.

43. Although, in my view, a reading of those cases may give rise to a potential point relating to the paramountcy of the child's welfare, which, as I have stated, must fall for determination on another occasion, it is not necessary to go further in this judgment and consider the matter in any detail.

17. The generally accepted view that welfare is not paramount when the court is considering a disclosure issue, relies upon the well-known authorities of Re S (Identification: Restrictions on Publication) [2004] UKHL 47; [2005] 1 AC 593, Re J (A Child) [2013] EWHC 2694, A (A Local Authority v W) [2005] EWHC 1564 (Fam) and PJS v News Group Newspapers [2016] UKSC 26 and the 'ultimate balancing exercise' referred to in those authorities.

18. In R.J. v. Tigipko [2019] EWHC 105 (Fam); [2019] 4 W.L.R. 68, Mostyn J, however, came to a different conclusion, in the context of wardship proceedings before him, where he held that the children's welfare was paramount when the issue was one of publication of identities:

37. The next preliminary matter is whether in adjudicating the father's application I apply the paramountcy test set out in section 1(1) of the Children Act 1989. This will be the case if I am "determining a question with respect to the upbringing" of the girls. In this regard I fully agree with Lord Pannick QC and Ms King QC that the question I am confronting squarely concerns the upbringing of the girls. I am being asked to allow publicity as a coercive measure – to "encourage" the

mother and MGF to comply with my substantive determination that it is in the best interests of these children that they live in London under the primary care of their mother but with very substantial secondary care from their father. I just do not understand how it can be said that this is not a question with respect to their upbringing.

……

38. I have been urged by Mr Wolanski and by Mr de Wilde to give an alternative decision if I were wrong in my primary conclusion that the issue I am deciding concerns the upbringing of the girls. In that event their interests would be the, or possibly a, primary consideration. I have heard some interesting argument about how that less weighted interest should be balanced against other factors. However, I have concluded that I must have faith in my primary conclusion.

…

40. In my judgment the decision that I make must be based exclusively on my evaluation of what is in the best interests of these girls.

19. Section 1 of the Children Act 1989 requires the court to consider the welfare of the children to be the paramount consideration, where it is concerned with a question about 'the upbringing of a child'. See Baroness Hale for the Supreme Court in ZH (Tanzania) v Secretary of State for the Home Department [2011]2 AC 166, paragraphs 21-26, especially paragraph 25. See also Clayton v Clayton [2006] EWCA Fam 83 at paragraph 59: the interests of the child are the paramount consideration in cases concerned with the upbringing of the child (see also [111-114], [128-143]). Section 97, too, makes specific reference to the dispensing of the prohibition on publication if the court is satisfied that the welfare of the child requires it. That approach, it could be argued, is designed to protect children's confidentiality during the course of proceedings unless their welfare requires otherwise. That would be said to be consistent with the policy objectives of the Children Act 1989 and may be thought an appropriate qualification to Article 10 in order to protect vulnerable children during the course of proceedings.

20. Set against that, however, has to be a consideration of whether the issue of disclosure can be said to relate to "the upbringing of the child".

"Upbringing" is defined within s.105(1) as including "the care of the child but not his maintenance". The definition of upbringing given by Ward LJ In re Z (A Minor) (Identification: Restrictions on Publication) [1997] Fam 1 was as follows:

> "[29E] A question of upbringing is determined whenever the central issue before the court is one which relates to how the child is being reared".

21. Simply because the issue of disclosure may result in a decision being made that impacts on a child's well-being does not mean that it falls within the ambit of Section 1. If it were otherwise, any orders made that touch on a child's upbringing would be covered by Section 1 (e.g. orders in relation to sentencing in the criminal court).

22. That is consistent with obiter comments by the Court of Appeal in Al Maktoum v Al Hussein [2020] EWCA Civ 28. In that matter, the court was concerned as to whether the judgments of the President should be published. It had been an additional ground of appeal by the father in that case, that the President had been wrong to have conducted a balancing exercise (as described at §25 of the judgment), but should instead have proceeded on the basis that the interests of the children were paramount. Although the matter was not determined by the Court of Appeal (given that it was the Court's view that in any event it made no difference to outcome) Lord Underhill said at §84:

> *"We are bound to say that it is our strong provisional view that the argument which the father wishes to advance is ill-founded."*

23. That is not to say, however, that the child's welfare is not of great importance as a factor within the balancing exercise. That was in essence the point made in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, 2011 2 AC, as referred to in the Al Maktoun case. The child's best interests must be a primary consideration, although not the primary consideration.

24. That view is consistent with other reported authorities, including the following.

25. Re W (Wardship: Publication of Information) [1992] 1 FLR 99, concerned an application to publish information concerning a ward of court. In considering whether to grant an injunction to prevent a newspaper publishing information concerning the ward, the Court of Appeal held that the court should carry out a balancing exercise in which the welfare of the child or the need to protect him was not paramount, but had to be weighed against the right of the press to publish matters of genuine public interest. Reference was made within the judgment to the comments of Butler-Sloss, LJ who pointed out in Re M and N (Minors) [1990] Fam 211, 223 and [1990] FCR 395, 401C that, "In this situation the welfare of the child is not the paramount consideration."

26. In Re X (Disclosure of Information) [2001] 2 FLR 440, Munby J (as he then was) stated:

> *"The interests of the child (which, as I have pointed out, typically point against disclosure) are a 'major factor' and 'very important' – the words used respectively by Sir Thomas Bingham MR in Re L (Police Investigation: Privilege) [1995] 1 FLR 999, 1019C, and by Swinton Thomas LJ in Re C (A Minor) (Care Proceedings: Disclosure) [1997] Fam 76, 85D, sub nom Re EC (Disclosure of Material) [1996] 2 FLR 725, 733. In the present state of the authorities these words, as it seems to me, are to be preferred to such alternative formulations as the phrase 'the most important factor' used by Balcombe LJ in Re Manda [1993] Fam 183, 195E, sub nom Re Manda (Wardship: Disclosure of Evidence) [1993] 1 FLR 205, 215, or the phrase 'first and foremost' used by Hale J in Cleveland County Council v F [1995] 1 FLR 797, 802G. But be that as it may, it is clear that the child's interests are not paramount."*

27. Similarly in the case of Northumberland County Council v Z, Y, X (by her Children's Guardian), The Government of the Republic of Kenya [2009] EWHC 498 (Fam) before Munby J (as he then was), he stated at §70:

"Mr Y and Ms Z ask how any of this is going to benefit X. The plain answer is that it is not going to be of any benefit to X but that, with respect, is largely beside the point. Disclosure of the kind being sought here is not confined to those situations where it is for the benefit of the child who was the subject of the proceedings. That is clear enough from Re EC itself. There are many public policy reasons why disclosure may be appropriate, many of which may hardly impact on, let alone benefit, the child whose case has been before the court."

28. The distinction to be made with the position in R.J v Tigipko [2019] EWHC 105 (Fam) is that in that case, the disclosure was ordered as a coercive measure to seek to compel compliance with the court's welfare orders. The disclosure thereby directly related to the upbringing of the children.

29. There is in fact no case in which it has been suggested that s.97 might undermine the balancing exercise that it is suggested that the court should undertake when considering such a disclosure application. By contrast, the case of London Borough of Lewisham v D and others [2010] EWHC 1238 (Fam) concerned a disclosure application, whilst care proceedings were still ongoing, (and thus s.97 would have been of relevance). Stephen Cobb QC as a DHCJ (as he then was) stated:

"I have considered the wide range of factors relevant to the issues in the case, and have sought to identify, evaluate and weigh those factors which point in favour of the disclosure sought against those factors which point in the other direction. There is, therefore, a balance to be struck between the various competing interests. For the purposes of this review of the relevant factors a reasonable place to start is Re EC. It is vital that I should have regard to the various Human Rights considerations which require to be protected and I do so. I of course remind myself that the welfare of the children in this balancing exercise, although obviously important, are not paramount."

30. Setion.97 was not directly referenced within the judgment, but the case is an example of the matter of disclosure being in front of the court during proceedings, and s.97 therefore being in play.

31. Somewhat frustratingly, s.97 would also appear to have been of relevance to the matters being considered in Re M [2019] EWCA Civ 1364 (Fam), [2020] 1FLR 50, given the application in that case was also made in the course of care proceedings, and yet again no reference was made by the Court of Appeal to those provisions. What is of some importance however, is that the Re EC test was reaffirmed, the President saying:

> *"[30] Despite the passage of over twenty years all counsel in the present appeal accepted that Swinton Thomas LJ's distillation of the relevant law in Re C has continued to be the leading authority to which all levels of the Family Court regularly turn when determining applications for disclosure of material to the police...*
> *"[70] I consider that the approach described by Swinton-Thomas LJ in Re C continues to point to the likely relevant factors and describes how the balance is to be struck between the competing factors that are in play. There is no basis for this court now abandoning this well established and familiar test, and I respectfully decline the invitation to do so."*

Preservation of Privacy / Anonymity

32. Inevitably, in most cases where disclosure into any public forum is being considered, a significant factor in the balancing of the Re EC factors, will be the potential loss of privacy for the children concerned. In a decision that has been expressly endorsed by the Court of Appeal, , Munby J examined the factors in Re X (Disclosure of Information) [2001] 2 FLR 440 and said the following in relation to the importance of maintaining the confidentiality and privacy of family proceedings:
'(i) First, there is the interest of the particular child concerned in maintaining the confidentiality and privacy of the proceedings in which he has been involved, what, as I have already said, Balcombe LJ referred to as the "curtain of privacy".

(ii) But there is also, secondly, the interest of litigants generally that those who, to use Lord Shaw of Dunfermline's famous words in Scott (Otherwise Morgan) and Another v Scott [1913] AC 417, 482, sub nom Scott v Scott (1913) FLR Rep 657, 692 "appeal for the protection of the court in the case of [wards]" should not thereby suffer "the consequence of placing in the light of publicity their truly domestic affairs". It is very much in the interests of children generally that those who may wish to have recourse to the court in wardship or other proceedings relating to children are not deterred from doing so by the fear that their private affairs will be exposed to the public gaze – private affairs which often involve matters of the most intimate, personal, painful and potentially embarrassing nature. As Lord Shaw of Dunfermline said: "The affairs are truly private affairs; the transactions are transactions truly intra familiam".

(iii) Thirdly, there is a public interest in encouraging frankness in children's cases, what Nicholls LJ referred to in Brown v Matthews [1990] Ch 662, 681C, sub nom B v M (Disclosure of Welfare Reports) [1990] 2 FLR 46, 63 as the frank and ready co-operation from people as diverse as doctors, school teachers, neighbours, the child in question, the parents themselves, and other close relations, including other children in the same family, on which the proper functioning of the system depends. Just as it is very much in the interests of children generally that those who may wish to have recourse to the court in wardship or other proceedings relating to children are not deterred from doing so by the fear that their private affairs will be exposed to the public gaze, so it is very much in the interests of children generally that potential witnesses in such proceedings are not deterred from giving evidence by the fear that their private affairs or privately expressed views will be exposed to the public gaze.

(iv) Fourthly, there is a particular public interest in encouraging frankness in children's cases on the part of perpetrators of child abuse of whatever kind. The importance of this principle is under-scored by s 98(2) of the Children Act 1989, the purpose of which, as Swinton Thomas LJ pointed out in Re C (A Minor) (Care Proceedings: Disclosure) [1997] Fam 76, 85E, sub nom Re EC (Disclosure of Material) [1996] 2 FLR 725, 733, is to encourage people to tell the truth in cases concerning children, the incentive being that any admission will not be admissible in a criminal trial.

(v) Finally, there is a public interest in preserving faith with those who have given evidence to the family court in the belief that it would remain confidential. However, as both Ralph Gibson LJ in Brown v Matthews [1990] Ch 662, 672B, sub nom B v M (Disclosure of Welfare Reports) [1990] 2 FLR 46, 54, and Balcombe LJ in Re Manda [1993] Fam 183, 195H, sub nom Re Manda (Wardship: Disclosure of Evidence) [1993] 1 FLR 205, 215 make clear, whilst persons who give evidence in child proceedings can normally assume that their evidence will remain confidential, they are not entitled to assume that it will remain confidential in all circumstances. For, as Swinton Thomas LJ pointed out in Re C (A Minor) (Care Proceedings: Disclosure) [1997] Fam 76, 85F, sub nom Re EC (Disclosure of Material) [1996] 2 FLR 725, 733, s 98(2) does not give the added incentive of guaranteed confidentiality.'

33. Concerns as to a loss of privacy can however, potentially, be addressed by a conditional disclosure order being made, such that the disclosure is subject to steps being taken which preserve the anonymity of some or all of the parties to the family proceedings. In Re X Children [2007] EWHC 1719 (Fam), Munby J made an order providing for disclosure, but made the order for disclosure conditional. Munby J made clear that the court can impose appropriate conditions in respect of disclosure where "[38] that is necessary to hold the balance fairly and in a Convention-compliant manner" and stated it was not simply a choice between ordering and refusing disclosure. At paragraph 39 he made clear that "sometimes it may be appropriate to disclose only parts of certain documents or to disclose documents in an edited or redacted form". The disclosure that he ordered was upon the bases inter alia, that no part of the documents were to be read into the public record or otherwise put in the public domain, and that nothing should be published that might lead to the identification of any of the persons referred to in the documents (other than the Defendant). The application was for disclosure of documents to the CPS, and he said as follows:

> 41. At the same time it is quite clear in my judgment that this is a case where the sensitivities and the needs in particular of the children are such that the family court must keep a tight control over the use that may hereafter be made of the documents which are to be

disclosed (and of the information contained in them). In particular, proper compliance with the requirements of the Convention demands that the family court must be involved in any decision to put any of these documents (or the information contained in them) into the public domain: see the analysis of the Strasbourg jurisprudence in A Health Authority v X (Discovery: Medical Conduct) [2001] 2 FLR 673. And in this case, as in that case, this necessary objective is appropriately achieved by my making an order modelled on the order which I made in that case. Hence the terms of the order set out in paragraph [53] below.

42. I should emphasise that my making of an order containing these conditions does not indicate any lack of confidence on my part with those concerned in the criminal proceedings, let alone any lack of confidence in the extremely experienced Circuit Judge who is conducting the proceedings in the Crown Court. On the contrary, it is only right for me to record that the Circuit Judge has, throughout the criminal proceedings, imposed and maintained in place an order made under section 39 of the Children and Young Persons Act 1933. My concern is simply that those concerned with the criminal proceedings must inevitably see things from that perspective. Not being, as I am, immersed in the family proceedings, they may not appreciate all the implications for the children (and indeed for Mrs X) of the deployment in that context of some seemingly innocuous piece of information. As against that, I am acutely conscious of the fact that my own understanding of the criminal proceedings is necessarily far from complete – which is why both the CPS and the Defendant's own representatives must be free to return to the family court for the purpose of obtaining either the disclosure of further documents or the relaxation of the conditions which I have attached to my order.

34. Care too needs to be taken as to the risks of 'jigsaw identification'. In H v A (No 2) [2015] EWHC 2630 Fam, McDonald J considered the issue of jigsaw identification, and concluded however that:

"The risk of 'jigsaw identification' is not however a reason in itself to withhold the publication of a judgment. The question in each case will be whether, having regard to the evidence before the court and all the circumstances of the case, the interference in the Art 8 rights constituted by the risk of 'jigsaw identification' arising out of publication outweighs the interference in the Art 10 right of freedom of expression constituted by withholding publication."

35. A decision to publish a judgment is a case management decision. Thus, even following publication it is a decision which may be revisited in light of a change in circumstances. The effect of publication on any current or potential proceedings is a factor alongside the Articles 6, 8 and 10 rights that arise for consideration. A judgment may be published in its original form accompanied by a "tightly drawn" reporting restrictions order where necessary, or it can be published in a redacted form when necessary.

Disclosure from Family proceedings into police investigations

36. There have been 2 quite recent authorities concerning this type of disclosure, and for that reason it is specifically considered within this note. Save for disclosure permitted by FPR 2010, Part 12, Chapter 7 and PD12G, there is no presumption in favour of disclosure to the police, and each case should be judged on its own merits according to the Re EC checklist. The Children Act Advisory Committee Handbook of Best Practice in Children Act cases, Section 7, contains detailed guidance upon the procedure to be adopted where a request is made for disclosure of material to be used in criminal proceedings.

37. In Re M (Care Proceedings: Disclosure) [2019] EWCA Civ 1364, [2020] 1 FLR 50, the parents were of British nationality but had travelled to Syria in or around 2014 and their two children were born there. In November 2018 they came to the attention of the UK authorities whilst being held in immigration detention in Turkey. When the family arrived in the UK in January 2019, the parents were arrested under s41 of the Terrorism Act 2000 and the children were taken into police protection. Care proceedings were immediately initiated. On 1st February, the police issued an application for disclosure of material, eventually limited to the statements filed by the parents and their

lawyers' position statements. At that stage, the parents had not been charged with any offence and had given no comment interviews to the police. Mr Justice Keehan, at first instance granted the request for disclosure. The parents appealed. The issues for appeal turned upon the 'privilege against self incrimination' and an accused's 'right to silence'. The parents argued that the application was made far too early in the course of the family proceedings and the police investigations and that there was insufficient evidence provided by the police to justify the application. It was argued that the parents had a right against self incrimination and a right to silence which was being infringed by this disclosure. The appellants' case was that no disclosure should take place until the police have established the need for disclosure based upon a prima facie evidential basis.

38. The Court of Appeal dismissed the appeal, saying that in the Family Court it is the privilege against self incrimination which directly applies rather than the right to silence, that does not (this only applied when questioned by the police). Keehan J had been right to conclude that the granting of the application would not breach the parents' right to silence. The material subject to the disclosure application did not incriminate either parent but simply gave an account of ordinary activities in Syria. Even where material might contain potentially incriminating evidence, that would not be a complete bar to disclosure. The leading authority of Re C / Re EC remains fit for purpose and was correctly applied. When applying the Re EC factors to the case:

'The judge rightly attributed weight to the factual context which, as well as indicating a reasonable belief as to likely harm to the children, underlines the importance of supporting the investigatory agencies involved in protecting society at large.' (Paragraph 80)

39. In Re A (Care Proceedings: Disclosure) [2020] 2 FLR 1 [2020] EWCA Civ 448 the Court of Appeal, was concerned with whether disclosure should be permitted of documents that outlined the parents' accounts of the circumstances which they claimed had given rise to their 9 week old child sustaining severe brain injuries, which had left him very severely disabled. The judge had ordered that the judgment should be disclosed to the police

pursuant to PD 12G; in that, the judge had made findings that the child had suffered the injuries as a result of a shake, either with or without an impact, and that the possible perpetrators were the mother or the father. The parties had agreed that the judge should also order further disclosure to the police in relation to expert medical evidence, statements from members of the extended family and accounts given by family members to various treating physicians. The issue was in relation to the narrative statements given by the parents, which it was accepted would be relevant to the police's investigation as to whether criminal charges should be brought, albeit they did not contain any admissions by either parent. The Court of Appeal again reaffirmed that the Re EC checklist remained fit for purpose, and said that the judge had correctly structured her judgment, addressing each factor in turn. It was unsurprising that the judge had commented that on the facts of this case, the issue of confidentiality was "more apparent than real" since there had already been considerable disclosure. Whilst there had been no s.98(2) CA 1989 warning in relation to self-incrimination when the parents had given their evidence, any such failure is not determinative of an application for disclosure in any event. When all that was left in relation to the issue for disclosure was the parents' inconsistent accounts, whether through their own statements or made orally to the Guardian, an order for disclosure was described as inevitable when they were relevant to the police investigation even though they cannot be used as evidence.

3. Disclosure in children proceedings to others, parties, those instructed within the proceedings, other professionals etc:

40. There are really two key areas I want to touch on: firstly the duty to disclose to other parties in family proceedings and then secondly the right or ability to disclose to non-parties outside of proceedings.

41. The FPRs do not provide a disclosure code for parties to follow in family proceedings and so to a large extent we are governed by the common law. This is to some extent set out in the CPR Pt 31. The FPR 21 is limited dealing only with definitions, disclosure against a third party (FPR r 21.2) and claims to withhold disclosure (FPR 21.3).

A) General duty to disclose in children cases:

42. I am going to start with a recent quote from the President, which reminds us of the overarching criterion:

Sir Andrew McFarlane in Re P (a child: remote hearing) [2020] EWFC 32 :
'The overarching criterion is that whatever mechanism is used to conduct a hearing must be in the interests of justice, that issue being assessed by reference to the unusual circumstances that prevail and the unhappy alternative if a hearing is adjourned. Every hearing we conduct in whatever form must provide a fair hearing.'

43. Re P is not about disclosure but this wording is perfect for many situations in cases we will be involved in, as a key factor is all our cases is fairness. In my opinion when considering disclosure in children cases, this is a helpful starting point.

44. The reason I start with fairness, is that there is a general duty to disclose relevant material in children proceedings – this makes considerable sense when we consider the need for fairness.

45. As stated previously, there is only limited guidance about disclosure within the FPR 2010. Case law provides the key to the issue of disclosure in this area, including the decisions of:
    - The ECtHR in McMichael v UK: ECHR 2 Mar 1995
    - The House of Lords in Re D (minors) (adoption report: confidentiality) [1996] AC 593 [1995] 2 FLR 687 and
    - Charles J in Re R (care: disclosure: nature of proceedings). [2010] EWHC

46. In re D (Minors) (Adoption Reports: Confidentiality) [1996] AC 593 Lord Mustill summarised (at page 615) the propositions upon which the House of Lords approached the issue of disclosure in that case:

    1. 'It is a fundamental principle of fairness that a party is entitled to the disclosure of all materials which may be taken into account by the court when reaching a decision adverse to that party. This

principle applies with particular force to proceedings designed to lead to an order for adoption, since the consequences of such an order are so lasting and far-reaching.

2. When deciding whether to direct that notwithstanding rule 53(2) of the Adoption Rules 1984 a party referred to in a confidential report supplied by an adoption agency, a local authority, a reporting officer or a guardian ad litem shall not be entitled to inspect the part of the report which refers to him or her, the court should first consider whether disclosure of the material would involve a real possibility of significant harm to the child.
3. If it would, the court should next consider whether the overall interests of the child would benefit from non-disclosure, weighing on the one hand the interest of the child in having the material properly tested, and on the other both the magnitude of the risk that harm will occur and the gravity of the harm if it does occur.
4. If the court is satisfied that the interests of the child point towards non-disclosure, the next and final step is for the court to weigh that consideration, and its strength in the circumstances of the case, against the interest of the parent or other party in having an opportunity to see and respond to the material. In the latter regard the court should take into account the importance of the material to the issues in the case.
5. Non-disclosure should be the exception and not the rule. The court should be rigorous in its examination of the risk and gravity of the feared harm to the child, and should order non-disclosure only when the case for doing so is compelling.'

47. There has been a trend of issues of disclosure being determined by reference to the ECHR, however following Brexit that is very likely to change. The general duty of disclosure is that parties must disclose within children law proceedings all documents and information of which they are aware that are relevant to those proceedings unless one of a limited number of exceptions applies.

B) The exceptions to the general duty of disclosure:

48. The general duty is subject to important potential exceptions which include:
    a. Confidentiality: when one person confides in another where he has notice that it is expected that it is being provided in confidence. There is a public interest in respecting this, however it can be overridden by a competing interest or by statutory requirement for example a fair trial Re A (Sexual Abuse: Disclosure) [2013] 1 FLR 948.
    b. Legal professional privilege; (see below)
    c. Litigation privilege; (see below)
    d. Public interest immunity;
    e. Privilege against self-incrimination: It may be overridden eg in the public interest Brown v Scott [2003] 1 AC 681.
    f. Privileged discussions for the purpose of conciliation/ non-court disputes;
    g. Data protection (see below)
    h. Confidentiality under ECHR Art 8 right to respect for private life.

49. There is the recent case of Lancashire County Council v E and F - [2020] 1 FLR 1071 - Resisting disclosure on the basis of religious grounds

Legal professional privilege and litigation privilege – the impact on a duty to disclose:

50. Those acting for parties in children cases need to be alive to the fact that they, as well as their clients, have a duty to make full and frank disclosure. As the law currently stands, the concept of litigation privilege does not apply in Children Act cases: see Re L (A Minor) (Police Investigation: Privilege) [1996] 1 FLR 731. This means that the parties and their lawyers owe a duty to the court to give full and frank disclosure in all matters connected to children proceedings. There is a helpful note that was prepared by the BSB on this which states:

Litigation privilege

"In Re L (Police Investigation: Privilege) [1996] 2 FLR 731 the House of Lords decided that litigation privilege does not apply in care proceedings. Lord

Jauncey of Tullichettle, with whom the majority agreed, was of the view that care proceedings are non-adversarial in nature. Litigation privilege has no place, therefore, in relation to reports based on the papers disclosed in such proceedings and obtained from a third party within them. Accordingly all such reports must routinely be disclosed and served within proceedings; as should communications from any party with court appointed experts.

19. However, if the report in question was not prepared for the purposes of the care proceedings but for the purposes of criminal proceedings, legal professional privilege may still arise. In S County Council v B[2000] 2 FLR 161, Charles J held (at 174C-E) that the father could claim legal professional privilege in care proceedings in respect of his communications with medical experts who had been instructed solely for the purposes of criminal proceedings. Further, the privilege is absolute (see p173B-D) and the duty of full and frank disclosure which arises in care proceedings does not override that privilege….

Legal professional privilege

Communications between clients and their advisers (legal advice privilege)
20. In Re L above, Lord Jauncey stated that his decision in relation to litigation privilege "… does not of course affect privilege arising between solicitor and client". In S County Council v B (above), Charles J decided (at 179E-F) that Re L preserved legal professional privilege in respect of communications between solicitor and client, and draft statements and discussions as to the relevant facts between solicitor and client for the purposes of proceedings under the Children Act 1989: see also Wall J in A Chief Constable v A County Council [2002] EWHC 2198 (Fam) at [96]. Accordingly, legal professional privilege applies to communications with the client in family proceedings (see also Lord Nicholls, in Re L on this point).

21. Legal professional privilege rests upon the principle that a client must be free to consult his legal advisers without fear of his communications being revealed. In this way, the interests of the administration of justice are maintained. Privilege is absolute, and remains even where he who asserts the privilege no longer has any recognisable interest in upholding that privilege (R v Derby Magistrates Court ex parte B[1996] 1 FLR 513).

51. However, in Essex County Council v R [1993] 2 FLR 826 in which Thorpe J said:

> *'For my part, I would wish to see case-law go yet further and to make it plain that the legal representatives in possession of such material relevant to determination but contrary to the interests of their client, not only are unable to resist disclosure by reliance on legal professional privilege, but have a positive duty to disclose to the other parties and to the court. To take this case as an instance: were it otherwise, a statement of great significance in judging the potential risk of the parents to their surviving child would have gone surveyed and its exclusion might therefore have resulted in a distorted assessment of that risk. Indeed if parties initiate or are joined in proceedings, with or without leave, and within those proceedings seek to establish rights or to exercise responsibilities in relation to a child whose future is the issue for the court's determination, it should be understood that they too owe a duty to the court to make full and frank disclosure of any material in their possession relevant to that determination;'*

C) Special advocate and Closed Material Procedure:

52. A closed material procedure allows the court to prevent production of certain documents to one or more parties to the proceedings. In such cases there will be material that is so sensitive and confidential that it requires not only the court to sit in private but that part of that hearing will be closed to one or more or the parties. Being closed means that the court will consider material and hear submissions on the relevant material without the knowledge of those parties. It should be noted that Public Interest Immunity is different to closed proceedings, in PII only the judge and the party/third party in possession of the material sees the material. In closed proceedings one or more party is excluded.

53. In general, closed proceedings are only permitted by statute or where the welfare of a child demands Al Rawi & Ors v The Security service & Ors [2012] AC 531, Secretary of State for the Home Department v MB [2007] UKHL 46.

54. The exceptions to the rules to disclose lead to a consideration of special advocates, the use of which is exceptionally rare.

55. JSA 2013 s.9 enables the Attorney General to appoint a qualified lawyer to represent a party in any closed material procedure application etc.

56. The role of the special advocate was described by Sedley LJ in Murungary v Secretary of State for the Home Department [2008] EWCA Civ 1015 para 17 as "to test by cross examination, evidence and argument the strength of the case for non-disclosure" and if the case for non-disclosure is made out, "to do what he or she can to protect the interests of [the other party], a task which has to be carried out without taking any instructions [from the other party or his lawyers] on any aspect of the closed material".

57. On occasion, disclosure issues can be so sensitive that it will be necessary for the court to consider the appointment of a special advocate. Regard should then be had to the President's Guidance: The Role of the Attorney General in Appointing Advocates to the Court or Special Advocates in Family Cases, [2015] Fam Law 574 which stresses that it will be rare for a special advocate to be requested by a judge below that of the High Court Bench and expressly requires consideration to be given to which party is to pay the costs of the special advocate.

58. Special Advocates were used for (probably) the first time in Re T (Wardship: Impact of Police Intelligence) [2010] 1 FLR 1048 to 'filter' evidence, the disclosure of which was resisted. In A Chief Constable v YK, RB, ZS, SI, AK and MH, [2010] EWHC 2438 (Fam), [2012] Fam 102 Sir Nicholas Wall P held that the use of the special advocate procedure was a matter of last resort to be used where the special advocate could do something that it would not be appropriate for the judge to do. In Re A (Sexual Abuse: Disclosure) [2012] UKSC 60, [2013] 1 FLR 948 (a vulnerable young adult witness confronted by an argument that her confidentiality should be breached so she could give evidence against a father in children proceedings) Lady Hale, confronted with a suggestion that closed material could be considered in that case, answered:

[34] It is in this context that it has been suggested that the court might adopt some form of closed material procedure, in which full disclosure was made to a special advocate appointed to protect the parents' interests, but not to the father himself. It faces two formidable difficulties. The first is that this Court has held that there is no power to adopt such a procedure in ordinary civil proceedings: Al Rawi v Security Service (JUSTICE intervening) [2011] UKSC 34, [2012] 1 AC 531.... It is arguable that a greater latitude may be allowed in children cases where the child's welfare is the court's paramount concern. But the arguments against making such an inroad into the normal principles of a fair trial remain very powerful ... The essential requirement of any fair procedure is that the person who stands to lose his rights has an opportunity effectively to challenge the essence of the case against him. There may be cases in which this can be done by offering him a 'gist' of the allegations and appointing a special advocate to scrutinise the whole of the material deployed against him. In a case such as this, however, it is not possible effectively to challenge the allegations without knowing where, when and how the abuse is alleged to have taken place. From this information it is inevitable that X's identity will be revealed. Even if it were theoretically possible to devise some form of closed material procedures, therefore, it would not meet the minimum requirements of a fair hearing in this case.

D) Definitions in the FPRs

59. The FPRs sets out some definitions – the one for "discloses" is interesting....

Interpretation

21.1.

(1) A party discloses a document by stating that the document exists or has existed.

(2) Inspection of a document occurs when a party is permitted to inspect a document disclosed by another person.

(3) For the purposes of disclosure and inspection—

(a)"document" means anything in which information of any description is recorded; and

(b)"copy" in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.

60. So under the CPR you have 'disclosed' something once you have said it exists. Though in family proceedings when we say disclosure in practice we usually mean inspection and often production. As technically it is 'production' that is the act of producing documents that have been inspected at court.

61. Often when we are in proceedings and it is agreed that disclosure to a third party should happen there will be that discussion of "do we need an order" and often we get out the red book and we will look at the table at 12G and a view may be reached that if we are all agreed why don't we just do a consent order anyway… Disclosure of papers has that ability to make us doubt ourselves as to whether we are breaking the rules.

E) Family Procedure Rules 12.75: Communication of information for purposes connected with the proceedings

62. So following on from section 1 above, these are interesting rules and in fact there are both positives for us and negatives – they permit us to disclose matters to our colleagues but also allow disclosure for people to make a complaint about us…

FPR 12.75

(1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party –

(a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;

(b) to attend a mediation information and assessment meeting, or to engage in mediation or other forms of non-court dispute resolution;

(c) to make and pursue a complaint against a person or body concerned in the proceedings; or

(d) to make and pursue a complaint regarding the law, policy or procedure relating to a category of proceedings to which this Part applies.

(2) Where information is communicated to any person in accordance with paragraph (1)(a) of this rule, no further communication by that person is permitted.

(3) When information relating to the proceedings is communicated to any person in accordance with paragraphs (1)(b),(c) or (d) of this rule –

(a) the recipient may communicate that information to a further recipient, provided that –

(i) the party who initially communicated the information consents to that further communication; and

(ii) the further communication is made only for the purpose or purposes for which the party made the initial communication; and

(b) the information may be successively communicated to and by further recipients on as many occasions as may be necessary to fulfil the purpose for which the information was initially communicated, provided that on each such occasion the conditions in sub-paragraph (a) are met.

F) Discussing a case with a colleague FPR 12.75 (1)(a)

63. I am including this as a point of interest, but I hope I am not alone in saying sometimes when you are in a case you want to discuss it with a colleague to ask their opinion and run past them what you are doing etc. Where does the power to disclose to our colleagues come from? The answer is FPR 12.75(1)(a) which permits disclosure of details of a case concerns children where it is a confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings.

64. Also, colleagues will come to us and ask for advice and support, which clearly we can provide. Once you have done that can you further disclose the discussion? The answer is no. "Where information is communicated to any person in accordance with paragraph (1)(a) of this rule, no further communication by that person is permitted."

G) Mediation: To attend a mediation information and assessment meeting, or to engage in mediation or other forms of non-court dispute resolution:

65. A party or the legal representative of a party can disclose information in order for mediation to take place as this is for both assessment and also to engage in mediation under FRP 12.75 (1)(b)

H) The table at Practice Direction 12G: communication of information by a party for other purposes

66. At Annex A of these notes you have the table at Practice Direction 12G, this table address the communication of information by a party etc for other purposes.

67. The table has changed over the years I have been in practice, so I would suggest that when relying on it and the power to be able to disclose – have a check before you say it is in there. I am not going to go through every column but will address those that we come across most commonly.

68. The table sets out that a person specified in the first column may communicate to a person listed in the second column such information as is specified in the third column for the purpose(s) specified in the fourth column PD 12G 2.1.

69. It is divided into three separate headings:
    - Communication of information by a party etc for other purposes
    - Communication for the effective functioning of Cafcass and Cafcass Cymru
    - Communication to and by Minister of the Crown and Welsh Ministers

Communication of information by a party etc for other purposes

70. There are 15 permitted purposes of communication of information from within proceedings under this heading. I am not going to set out all of them here, but the ones that I think we come across most commonly:

Disclosure to a health care professional or a person or body providing counselling services for children or families:

A party (column 1) can communicate to a health care professional or a person or body providing counselling services for children or families (column 2) any information relating to the proceedings (column 3) to enable the party or any child of the party to obtain health care or counselling (column 4).
PD12G

71. This should be therefore straight forward, but the caveat is the 'to enable'. Often when we have a report in proceedings in contains a precise of all the information that report. So for example your client has a report by an expert directed in proceedings and it recommends treatment eg CBT. That report would clearly assist in the GP understanding why your client is seeking a referral. However, there are often details of another party in that report which can be highly confidential which are not relevant to treatment that is needed – it doesn't therefore obviously follow that the full report is disclosable.

72. If the proceedings are still ongoing and the party seeking to disclose has a legal team this is easy to resolve (although with additional work for us) as the report can be redacted. But if proceedings are concluded this becomes more difficult. There is also then consideration of GDPR – see below.

Adoption panel and medical advisor appointed under the Adoption agencies:

A party (column 1) can communicate to an adoption panel (column 2) any information relating to proceedings (column 3) to enable the adoption panel to discharge its function as appropriate (column 4).

A party (column 1) can communicate to a local authority's medical adviser appointed under the Adoption Agencies Regulations 2005 or the Adoption Agencies (Wales) Regulations 2005 (column 2) any information relating to proceedings (column 3) to enable the adoption panel to discharge its function as appropriate (column 4).

Complaints, accreditation, indemnity insurance, quality assurance assessment

73. There are also a number of provisions allowing disclosure for general matters that may arise as a subsidiary to proceedings, clearly without these rules it would cause the court to be faced with continued applications for permission to disclose.

l) Third party material and the use within family proceedings:

The General Data Protection Regulation (GDPR) and Post Brexit.

74. Regulation (EU) 2016/679 – the General Data Protection Regulation – was implemented by the European Union in May 2018. The regulation is designed to safeguard personal data and protect privacy throughout the European Union and the European Economic Area (EEA). It also sets out rules for transferring data to other nations elsewhere in the world. However, as of January 2020, the UK is now in a transitional phase of Brexit until the 31 December (the 'implementation period'). During the Brexit transition, the UK remains bound by GDPR and will be until at least the end of the year. Post that there is a possibility that the duration of this transition could be extended by up to two years with the mutual agreement of both the UK and the EU or there could be an implementation of statute retaining certain EU regulations. But currently how matters will proceed as from 2021 are far from clear.

75. Currently the lawful bases for processing third party data/material are set out in Article 6 of the GDPR. At least one of these must apply whenever you process personal data:

(a) Consent: the individual has given clear consent for you to process their personal data for a specific purpose.

(b) Contract: the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.

(c) Legal obligation: the processing is necessary for you to comply with the law (not including contractual obligations).

(d) Vital interests: the processing is necessary to protect someone's life.

(e) Public task: the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.

(f) Legitimate interests: the processing is necessary for your legitimate interests or the legitimate interests of a third party, unless there is a good reason to protect the individual's personal data which overrides those legitimate interests. (This cannot apply if you are a public authority processing data to perform your official tasks.)

76. A direction in the order addressing that the use of third party material has been considered and is permitted may be a way of ensuring that it is clear that this has been addressed.

J) Disclosure when you are concerned that you client may harm themselves or others

77. Sadly in children cases there are occasions when we have disclosure which suggests that either the client or another person may be at risk of harm and we then are left in the situation of considering whether we can disclose that information. Considering this from the perspective of the rules and what is permitted for solicitors. Key sources of guidance are:
    a. SRA Solicitors' Code of Conduct
    b. Law Society Family Law Protocol
    c. Resolution Guide to Good Practice
    d. Bar Code of Conduct
    e. SRA Professional Ethics helpline
    f. Bar Council Ethical Enquiries line

78. The SRA Code of Conduct deals with confidentiality and disclosure. The guidance to the rule contains the following paragraphs:
"12. You may reveal confidential information to the extent that you believe necessary to prevent the client or a third party committing a criminal act that you reasonably believe is likely to result in serious bodily harm.
13. There may be exceptional circumstances involving children where you should consider revealing confidential information to an appropriate

authority. This may be where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but refuses to allow any disclosure. You must consider whether the threat to the child's life or health, both mental and physical, is sufficiently serious to justify a breach of the duty of confidentiality."

4. Disclosure from the police into public law cases

79. It is well established and has now been in place since January 2014 when the formal arrangements were agreed between the police, CPS and the President of the Family Division, to provide for a two-way flow of information and material between parallel criminal investigations/proceedings and any proceedings before the Family Court. As set out above the information is to flow more easily into the family proceedings from the police investigation than from the family proceedings into the police investigation.

October 2013 – Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearing

80. This applies to cases involving criminal investigations into alleged child abuse (both sexual and non-sexual) where the victims were aged 17 or under at the time of the alleged offence and/or there are Family Court proceedings concerning a child. The aims include the provision of early notification to the local authority and the Family Court that a criminal investigation has been commenced (together with the details and timescale of any prosecution), and to provide notification to the police and the CPS of any application to the Family Court for disclosure of prosecution material into the family justice system. In addition, insofar as it is consistent with the rules and the common law duty of confidentiality, the aim is to facilitate timely and consistent disclosure of information and documents from the family justice system to the police and/or CPS.
81. As soon as reasonably practicable, and in any event on the issue of proceedings, the local authority should provide notice to the police of the contemplation or

existence of family proceedings using the form in Annex D to the 2013 Protocol; the form itself acts as a request to the police for disclosure. In like manner, within five working days of the commencement of the investigation, the police with provide the local authority with details of the criminal investigation via a police 'single point of contact' ('SPOC').

82. Where an application is made within family proceedings for the disclosure of prosecution material, the local authority must notify the police and the CPS within two days of the application of the date and time of any hearing. The local authority, via a local authority SPOC, is required to collate such material for the police to assist the criminal investigation, however that material is not to include documents relating to Family Court proceedings unless they are documents which are lodged at court, or used in the proceedings, which already existed. The local authority is to send to the police copies of relevant Family Court judgments (and summaries thereof) in the possession of the authority (redacted if necessary).

83. In many cases this works well, but on occasion it can be necessary to obtain an order. An order requiring the police to disclose material may be made on the application of any party to the proceedings (Re R (Child Abuse: Video Evidence) [1995] 1 FLR 451). Such applications should normally be made against the chief constable and should be made to the court which is seised of the care proceedings.

84. If the initial protocol procedure / disclosure orders have not proved effective then it may be necessary to issue a witness summons (formerly known as a subpoena duces tecum) requiring the police to produce the material. In deciding whether to order disclosure, the court will have to balance the public interest in maintaining the confidentiality of documents, the disclosure of which might prejudice or inhibit a pending prosecution or investigation, against the public interest in ensuring that a local authority has all material that may assist it in making the best proposals for the future of the child whose case is before the court (Nottinghamshire County Council v H [1995] 1 FLR 115 and Re M (Child Abuse: Video Evidence) [1995] 2 FLR 571; Re S (Contact: Evidence) [1998] 1 FLR 798).

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