Transparency in the Financial Remedies Court

The Final Report of the Financial Remedies Sub-Group of

The Transparency Implementation Group

April 2023

Index

Chapter 1 – Introduction

1.1 In January 2022, the then National Lead Judge for the Financial Remedies Court, Mostyn J considered that the issue of Transparency in the FRC was one that should be fully investigated. I had chaired a committee to look into various aspects of the FRC in 2021 and he requested that the same team should take on this task. At the same time, the Transparency Implementation Group (TIG) had been created by The President with four sub-groups on Press Reporting, Anonymisation of Judgments, Contacts with Media and Data Collection. It was decided that our group should be a fifth sub-group dealing with Transparency issues in the FRC and work under the TIG umbrella. The ambit of the report is to consider all issues of transparency as they impact upon the FRC.

1.2 In order to consider all of the issues involved in this work, it was decided that there should be additional members added to the group from 2021 and there have also been changes of personnel. The wide variety of experience and geographical spread of the group members has been maintained and enhanced. The full committee members are set out below, but in short, they include judges of all levels including High Court, Circuit Judge, District Judge and Deputy District Judge as well as barristers and solicitors. There is also representation from the press and a legal blogger.

1.3 It was considered important to understand how the issue of Transparency was considered in other jurisdictions, both within England and Wales and elsewhere. I am hugely grateful to the contributions provided by Penelope Reed KC, Adam Wolanski KC and Victoria Butler-Cole KC as to the approach taken in the Chancery Division / Business and Property Court, King's Bench Division and Court of Protection respectively. They each provided us with a detailed paper which we have summarised within the report and taken into account in all our deliberations.

1.4 We have also received very helpful contributions from practitioners in jurisdictions beyond England and Wales as to how their Courts deal with the issues that we are considering. These have been provided from Scotland, Ireland, USA, Canada, Australia and New Zealand. We have set the responses out in table form within the report. They provide invaluable insight into the varied approaches in each of the jurisdictions, all of which have been considered by the group as a whole.

1.5 There are undoubted areas of controversy involved in the issues which the group have considered. It was considered important to obtain the views of as many people as possible to inform us as to the general view of those that deal with these issues on a daily basis. To this end, we produced a survey for people to respond to, over a 2 month period. We received a total of 585 responses, including over 100 full time judges, 288 solicitors and 135

barristers. The group has read and analysed each and every response that has been received. The overall results are set out within the report, and references are made to specific answers within various chapters to illustrate the views that have been provided.

1.6 It would not have escaped the notice of those involved in Financial Remedy work that there have been several decisions of Mostyn J that pertain to Transparency in the FRC which have been published during the currency of this group preparing this report. There have also been many articles written in which it is suggested that this report must set out the view of the group on the law in this area, specifically on the issue of anonymity, but also dealing with other issues. I make no apologies in stating that it is not for this report to set out what we consider the law to be on any particular, controversial, point. That must be a matter for the Court of Appeal. We acknowledge that there are different approaches to certain issues by different judges at High Court level and that this is far from ideal. We have attempted to take into consideration all the relevant factors on the matter and set out our conclusions as to the way forward. It will be for others to decide whether the conclusions that we have reached should be implemented and, if so, how this is to occur.

1.7 I am hugely grateful to all the members of this group who have devoted so much time and energy into all the work that has been carried out to finalise this report. This has involved attendance at numerous regular remote meetings, an in person all day meeting, ongoing consideration of all the information that we have received, including reading all of the responses to the survey, and writing and re-writing the chapters of the report to deal with a landscape that has been ever changing as we have conducted our work. This work has all been conducted in the group members' 'spare time' as they have continued their day jobs as judges, lawyers and journalists. It has been a mammoth task and they have all approached it with complete professionalism and dedication, way beyond that which could or should be reasonably expected. I must include a particular thanks to Henrietta Boyle who has been the secretary for the group throughout and has managed to produce the minutes of our lengthy meetings.

1.8 I also thank the non FRC practitioners referred to above for their contributions, which they have provided, even though they do not work in the field. I must add that Hope Williams, barrister from 5RB, provided significant input into the paper on practice in the KBD and Daniel Currie from St. John Buildings chambers prepared the excellent precis of the 3 papers from the different jurisdictions. Finally, I thank all the practitioners that assisted in providing their views of the issues beyond the jurisdiction of England & Wales. These individuals will not 'benefit' at all from their efforts as it will not impact upon their work but gave their time freely, nonetheless.

HHJ Stuart Farquhar

April 2023.

Members of the Group

Stuart Farquhar	Chair - Circuit Judge – Lead FRC judge in Kent, Surrey and Sussex
Henrietta Boyle	Secretary – Barrister 1 Hare Court
Sir Jonathan Cohen	High Court Judge
Louise McCabe	Circuit Judge – Wolverhampton & Birmingham
Susan Bennett	District Judge – Lead FRC judge for Mid & West Wales
Deborah Dinan-Hayward	District Judge – Derby
Caroline Park	Solicitor – Hughes Fowler Carruthers, London
Helen Robson	Solicitor – Caris Robson, Northumberland, sits as Deputy District Judge
Samantha Hillas KC	Barrister – St. Johns Buildings, Liverpool
Harry Oliver KC	Barrister – 1 KBW, London
Lucy Reed KC	Barrister – 36 Family, London & St John's Chambers, Bristol. Legal Blogger – sits as a Recorder and member of The Transparency Project
Emily Ward	Barrister, Broadway House Chambers, Leeds – sits as a Deputy District Judge
Sian Harrison	Journalist – Editor, Law Service at PA Media.

Chapter 2 – Executive Summary

2.1 It is not controversial to state that the position in relation to transparency in the FRC is not straight forward. There are many areas in which the law is unclear and other areas where it has become apparent, from the information that we have obtained for the purpose of this report, that there is a large level of misunderstanding as to the current position. The result is that parties and reporters (we will use this term throughout the report to refer to journalists and legal bloggers) are often uncertain as to what is likely to occur in any particular case. It can depend upon which Judge is hearing a case as to whether the press would have any knowledge that it is occurring at all, whether it can be reported and whether the parties can remain anonymous. These are all issues that should not be subject to such vagaries, and it is the aim of this report to make recommendations which would result in clarifying and unifying the position.

Terms of Reference.

2.2 The terms of reference of our group are wide:

"*To consider all aspects of Transparency as far as it concerns the work of the Financial Remedies Court and to report as to suggested ways forward.*

The areas to be covered will include, but are not limited to, the following:

- *Should FRC cases be heard in Private or in 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.*

In making any recommendations, the Sub-Group will consider whether any amendments to the FPR and/or primary legislation would be required to enact such recommendations."

2.3 As we have been working on this report, there are other issues that have come to light, such as how FRC cases are listed, the issue of the rubric to be included on any judgment and the reporting of cases. We have taken it upon ourselves to consider all these issues to ensure that the report is as far reaching as possible and deals with all of the relevant transparency issues within the FRC.

Our Approach

2.4 In order to ensure we had a broad base of knowledge we decided at an early stage to garner as much evidence as possible from as many areas as possible. This has included :

- Papers prepared by specialist KCs from the Chancery and King's Bench Divisions as well as the Court of Protection on how those jurisdictions deal with issues of Transparency;
- Information provided by practitioners from Scotland, Ireland, USA, Canada, Australia and New Zealand on how those jurisdictions considered Transparency in their respective Financial Remedy cases;
- An online survey seeking the views of as many people as possible that held a vested interest in FRC cases;
- Consideration of the many authorities on the issues that have emerged during the currency of this Group's deliberations.

2.5 Once all the information was collated, and all the responses to the survey were considered, we held a face to face meeting to discuss all the options and reached tentative conclusions. An initial format of the report was agreed, and individual group members prepared drafts of the various chapters which were presented to the group and have been subject to much discussion and many alterations. It has not been possible to achieve unanimity on all matters, which is unsurprising, bearing in mind the backgrounds of each of the members of the group. The recommendations set out below however represent the majority (and in some cases unanimous) view of the group.

2.6 It is accepted that there is an overlap in some of the chapters as there are certain aspects of transparency that impinge upon different stages of the FRC process. We decided not to remove this duplication as it seemed unlikely to us that many people would wish to read the report as a whole at any given time. It appeared more likely that certain chapters would be considered individually, in which case it was important that each of the chapters included the relevant information. We apologise to those few dedicated readers that decide to read the report in its entirety in one sitting.

Issues Considered

2.6 **Listing**. The vast majority of FRC cases are heard in the Family Court before District Judges and Deputy District Judges. In general, the names of the parties appear on the publicly available court lists e.g. Smith v Smith. These lists are available for all to inspect on CourtServe, the online Court List distribution service. In contrast, those hearings that are heard by High Court Judges at the Royal Courts of Justice are listed anonymously e.g. A v A. This causes great difficulty for reporters to know where any particular case that is before a High Court Judge is being heard. The group could not find any justification for

this distinction, and we recommend that the High Court should adopt the practice of the rest of the country by publishing lists using the names of the parties.

2.7 It is considered that this will encourage openness, as reporters will know which courts to attend for any particular case and will not have to hunt around attempting to stumble upon the appropriate Court. This will not mean that the reporters can then openly report on the case, including referring to the names of the parties, but at least it will mean that they will have easy access to the relevant court and can accordingly make any representations that they consider appropriate.

2.8 **Attendance at Hearings.** FRC cases are heard in private, and the only individuals permitted to attend are the parties, their representatives, accredited journalists and legal bloggers. We do not consider that there should be any change in the position, but it has become apparent that there is a lack of knowledge as to reporters being permitted to attend hearings. The Transparency Project (an independent charity that is not part of TIG) has produced a short paper on what to do if a reporter attends a hearing and we recommend that this is publicised so that more practitioners and judges are aware of the correct position. It is attached to this paper at Appendix 1.

2.9 **Out of Court Settlements.** This can occur at any time from before issue of proceedings up until the end of the final hearing. At present, all such settlements are private and confidential even though they must be approved by a judge to obtain a final order. The group considers that this level of judicial involvement does not warrant any change to the present position in terms of the information remaining private. It is noted however that there is a risk of a 'two tier' system, as those parties with sufficient funds are able to afford private FDRs and arbitration etc, which is not within the financial reach of most litigants. This provides an advantage in avoiding any press scrutiny into their case.

2.10 On settling their case, parties must submit a D81 form setting out their financial information in brief to allow a judge to consider if the agreement that has been reached should be approved by the Court. The D81 form has been updated in recent years and is now digital. There is an ability to harvest the information from these forms and marry them up with the agreed order in an anonymous form. This could provide invaluable insight into the level of agreement that is being reached and approved and we would strongly encourage that this statistical exercise is carried out (it being understood that this is not presently occurring) to provide this information.

2.11 **Provision of Documents to Reporters.** Whilst reporters are entitled to attend any FRC hearing, they are presently not entitled to see any documentation as of right. FRC hearings are very document heavy and it can be extremely difficult to understand the issues if the background is not known. There are tensions between providing sufficient information to permit reporters to understand what is taking place in a hearing and disclosing documents that can lead to exposure of highly confidential information of a financial, health or

personal nature. We consider that the default position should be that reporters are entitled to see the position statements of the parties (assuming such documents exist) together with the ES1 form which sets out the basic chronology and facts. It is considered that this would be sufficient information in the majority of cases.

2.12 This information would be ordered to be provided by way of a Reporting Order which would set out precisely what documents are to be provided. If there is an objection to the standard order by any party or a reporter, then there should be an application to the judge and the standard order can be amended. No information could be published which breaches a Reporting Order notwithstanding its appearance in a provided document.

2.13 **Anonymity** This is undoubtedly the issue with the greatest controversy following the judgments of Mostyn J in 2022 in which he held that it is wrong in law for parties in the FRC to remain anonymous and that there would need to be a change in law to permit this to happen as a matter of general practice (as opposed to exception). Most other High Court Judges that regularly deal with FRC work appear to us to remain of the view that parties should retain their anonymity, although they do not set out the legal basis for so doing. This has created an uncertainty and it is difficult for judges below High Court level as well as practitioners to understand the present legal position.

2.14 As set out in the introduction, it is not for this group to adjudicate upon the law; that is the remit of the Court of Appeal. We have to consider which approach we consider to be appropriate going forward bearing in mind all the issues. This is set out in some depth in chapter 12. The competing issues are listed and on balance we considered that the default position should be one of anonymity at first instance. This is considered as striking the correct balance. There are many reasons for this, the main ones being:

2.14.1 The nature of the vast array of information that must be disclosed in FR cases, being not just financial, but also in relation to health and highly personal issues.

2.14.2 The need to protect the privacy of children – if their parents are named then their children will undoubtedly be identified.

2.14.3 The risk that the threat of publicity could distort the proceedings in some way, either by a party being more reluctant to disclose vital information or by a party making allegations in the knowledge that the other party would do all they could to avoid that information/allegation being made public.

2.15 There will be cases in which the presumption of anonymity will not be upheld. This would occur in situations of poor behaviour, either within the proceedings by way of litigation conduct or outwith the proceedings in appropriate cases or in other cases where the public interest in permitting identification for some reason outweighs the privacy justifications. That must be a matter for the judge to decide on a case by case basis.

2.16 **Reporting of Cases.** We consider that there should be a standard form of Reporting Order (RO) setting out what can and cannot be made public by reporters. We have used this term because it more accurately sets out its purpose than a Transparency Order or a Reporting Restrictions Order. This order would be commonly made at the First Appointment in cases proceeding in the High Court, where the presence of reporters is common, or in the Family Court at the first hearing at which reporters attend.

2.17 The Reporting Order is intended to provide the parties with protection from intrusive and personal identification whilst allowing reporters access to the information which will permit them to understand the nature of the case and enable them to report the salient information.

2.18 **Publication of Judgments.** Judges of the High Court routinely place their judgments in final hearings on The National Archive. This is because they are inclined to be reserved and delivered in writing. This leads to an emphasis on "Big Money" cases which is undesirable.

2.19 There is a welcome trend in Circuit Judges and District Judges (and rarely Deputy District Judges) in the FRC publishing their judgments and we hope this will be continued. However, it imposes a great burden on the judge, particularly when the judgment is given orally at the end of the hearing, as is normally the case. Without the provision of extra resources for obtaining transcribed judgments, it is unlikely that the emphasis on High Court cases will be reversed. This is an issue that has been considered by the TIG sub-group on Anonymity chaired by HHJ Madeleine Reardon and we support all that is set out within their report to encourage an increase in published judgments in cases below High Court level. This is particularly relevant to FRC judgments as those below High Court level are nearly all 'needs' driven with a different emphasis to those involving High Net Worth individuals.

2.20 **Implementation**. It is not the task of this group to decide which of our recommendations should be implemented but it is appropriate to consider how it could be implemented. The vast majority of the recommendations would be capable of implementation without any need for a change of the rules or of the substantive law. The issue on which we are not able to state the relevant method of implementation is that of anonymity. If the law is as set out by Mostyn J then a change in statute law would appear to be required to permit FRC judgments to be anonymised. If the approach of many other High Court Judges is correct, then no change in law would be required.

Recommendations 'At a Glance'

Issue	Present Position	Recommendation	Impact upon Transparency	Implementation method
Out of Court Settlement	All out of court settlements are confidential and are not subject to transparency. No information is available as to the basis of such settlements.	No change is recommended as to such settlements remaining confidential and private. The general information in D81 forms should be harvested to provide overall information as to how cases settle on an anonymised basis.	The anonymous information from D81s could provide helpful guidance to the type of settlements reached in a variety of cases. Once the information is available publicly, it can be analysed so that levels of settlement can be better understood.	The ability to harvest the information on D81s exists but is not occurring at present. An administrative decision needs to be made to action this work to be done and decide by whom itwould be done.
Listing	Parties are named in most Family Court lists but are anonymised in the RCJ.	All lists should contain the names of the parties together with a short description of the type of hearing.	Any reporter would be aware where a particular case would be heard and would not have to 'hunt' to be able to find the Court to make any applications.	Can be achieved by a change of policy in the RCJ.
Attendance at Hearings	Parties, their representatives and reporters are permitted to attend. There is a widespread lack of knowledge as to reporters being permitted to attend. They are	No change in who may attend but training should be available to inform lawyers/judiciary of the position. A summary of "What to do when a Reporter Attends" prepared by the Transparency	Improve the understanding of the role of reporters in the FRC.	Provide publicity for the Transparency Project summary.

	permitted to attend remotely since July 2022.	Project should be circulated and available in every Court		
Provision Of Documentation to Reporters	Reporters are not entitled to see any document without permission of the Court.	In any case attended by a reporter a Reporting Order should be made which would include as standard that the ES1 and position statements of the parties should be provided. Any derogation from this would be subject to an application. These documents would still be subject to a Reporting Order.	Any reporter attending a hearing will be in a better position to understand the issues. In the absence of such documents, it would be extremely difficult to understand what is occurring within a hearing.	A Reporting Order can be made to permit the provision of such documents in compliance with FPR r29.12.
Anonymity	In the vast majority of cases the parties retain their anonymity. Mostyn J has decided in a number of cases in 2022 that this is not in line with the law, and he has stated that he will as a general rule publish the names of the parties in all FRC cases. This is not presently a course followed by other FRC	The usual position should be that parties retain their anonymity, but this could be lost as a result of relevant conduct/other reasons.	This would provide more certainty for parties and their advisors. This would not alter the position in nearly every case.	This will continue to be the normal practice in nearly every hearing, but if Mostyn J is correct in his view of the law, it would probably require an amendment to Statute.

	judges in the High Court.			
Reporting of Cases	The law is unclear as to what may or may not be reported which has led to the press reporting very few cases as they are uncertain as to what will be permitted in any particular case. A different view of the law has been followed by Holman and Mostyn JJ to other High Court Judges.	In cases in which reporters attend, a Reporting Order should be made setting out the terms of what reporting is permitted in the case. The standard order would permit reporting subject to anonymisation, but this can be amended on application by the parties or reporters.	If there is greater clarity, it is hoped that this will encourage more reporting of FRC cases, although it is understood that if anonymity is retained, reporters are far less likely to have an interest in a case.	This can be achieved by the making of a Reporting Order in the case.
Appeals	Appeals to High Court Judges and the Court of Appeal are generally not anonymised and are held in public. In such appeals reporters are entitled to request sight of skeleton arguments. An appeal to a Circuit Judge is generally held in private, although there is discretion to hear it in public.	No change to the present position is recommended.	It is considered that the present position strikes the correct balance.	N/A
Publication of judgments	The vast majority of	We support the suggestions made	A greater number of	Encouragement for such cases to

	cases that are reported are those at High Court level involving high net worth parties. There are very few reported cases from District Judges/ Deputy District Judges, where an extremely high percentage of cases are heard.	by the Anonymity TIG sub-group which encourages the District Bench and Circuit Bench to publish more judgments. This should occur whenever there is a written judgment available.	reported cases involving non high net worth individuals would provide a greater understanding of how such cases are resolved in the FRC.	be reported and greater 'protected' time being provided to permit judges to prepare such judgments in the lower courts.

Chapter 3 – FRC Current Practice

3.1 There is little controversy in stating that the present situation concerning transparency in the FRC is unsatisfactory. Practice differs depending upon geography, the level of judiciary involved, or, in certain cases, which individual judge hears the case. There are also other issues upon which the law is in a state of flux, leading to lawyers and journalists alike being uncertain as to what is and is not permitted.

3.2 The issues are all fully aired within the main body of the report including the following:

3.2.1 Listing – should the names of the parties be included in the public list? They are named in the vast majority of cases but not when listed in the RCJ.

3.2.2 Who should be able to attend hearings? How can we increase knowledge of the present position as our survey revealed a lack of understanding in terms of the presence of reporters at hearings?

3.2.3 Should reporters have access to any documents? How are they able to understand the proceedings without seeing anything beforehand?

3.2.4 What is a private hearing?

3.2.5 Anonymity. Should the default position be that the parties in FRC cases remain anonymous? This is what happens now in nearly all FRC hearings.

3.2.6 Nearly all reported cases concern either wealthy parties or extremely wealthy parties. How do we ensure that lower value cases - the vast majority of involve sums less than £1m - are reported?

3.2.7 What can reporters report? The law in this area is extremely unclear and without clarity, the press will be slow to report cases.

3.3 It is not intended to set out in this chapter the full position as they are dealt with in the individual chapters, as set out above, but it was considered important to set the scene in relation to the more controversial areas from the outset.

Private hearings

3.4 FPR 2010 r.27.10 provides that financial remedy proceedings take place in private.

3.5 Different views have been taken at a judicial level as to the effect of r.27.10. ***DL v SL***

sub nom L v L (Ancillary Relief Proceedings: Anonymity) **[2016] 2 FLR 552** set out that:

3.5.1 Holman J took the view that r.27.10 "*does not contain any presumption*" that FRP should be held in private (***Luckwell v Limata*** **[2014] 2 FLR 168** at ¶3,) but is a starting point only, easily displaced, in particular by the general principle of open justice and transparency.

3.5.2 Mostyn J took the view that there was a "*strong starting point or presumption which should not be derogated from unless there is a compelling reason to do so*" ¶13.

3.6 There remains at present, opposing practices of different judges of the same level of the FRC as to whether FRP hearings should be in public or private[1]. This was noted at ¶91 of the judgment of King LJ in ***Norman v Norman [2017] EWCA Civ 49***.

3.7 These different opinions stemmed from the view of Mostyn J that "in private" imbued the proceedings with a degree of confidentiality that they would not otherwise have if heard in open court. It appears to have been presumed that an "in private" status resulted in:

3.7.1 A prohibition on (in part at least and as a starting point) the wider publication of information from FRP; and

3.7.2 Anonymisation of any such reporting as occurred.

3.8 That Mostyn J must have presumed this is gleaned from ***DL v SL*** ¶15:

> *"It is my opinion that the present divergence of approach in the Family Division is very unhelpful and makes the task of advising litigants very difficult. A party may well have a very good case but is simply unprepared to have it litigated in open court. The risk of having it heard in open court may force him or her to settle on unfair terms. In my opinion the matter needs to be considered by the Court of Appeal and a common approach devised and*

[1] See at "Transparency in the Family Courts" Doughty, Reed & Magrath 2018 at ¶2.73: Sir Michael Keehan, writing extrajudicially in 2017 identified (at that point at least) that Holman J was probably the only "money" judge of High Court level who took the view that FR proceedings should be in open court.

promulgated. Obviously if the view of Holman J is upheld and adopted then the rest of us will have to follow suit".

3.9 This matter has not since been considered by the Court of Appeal and no common approach has been devised.

3.10 In ***Hodgson v Imperial Tobacco*** **[1998] 1 WLR 1056** at 1071, Lord Woolf MR set out the status of matters "in chambers" (which per *Clibbery* - see below - is synonymous with "in private") in respect of the provision of information i.e. (reformatted for consistency but quoted in full):

3.10.1 "*The public has no right to attend hearings in chambers because of the nature of the work transacted in chambers and because of the physical restrictions on the room available, but if requested, permission should be granted to attend when and to the extent that this is practical.*

3.10.2 *What happens during the proceedings in chambers is not confidential or secret and information about what occurs in chambers and the judgment or order pronounced can, and in the case of any judgment or order should, be made available to the public when requested.*

3.10.3 *If members of the public who seek to attend cannot be accommodated, the judge should consider adjourning the proceedings in whole or in part into open court to the extent that this is practical or allowing one or more representatives of the press to attend the hearing in chambers.*

3.10.4 *To disclose what occurs in chambers does not constitute a breach of confidence or amount to contempt as long as any comment which is made does not substantially prejudice the administration of justice.*

3.10.5 *The position summarised above does not apply to the exceptional situations identified in s12(1) of the Act of 1960 or where the court, with the power to do so, orders otherwise."*

3.11 That being said, the CPR *might* be said to assume that a matter being "in private" carries with it a (silent and unspecified) degree of *confidentiality* CPR 39.2, noting in particular 39.2(3)(c)[2]:

[2] For the purpose of this chapter, where any part of a quotation/citation is **emphasised in bold**, this emphasis has been added by the authors of this report.

39.2 General rule – hearing to be in public

(1) The general rule is that a hearing is to be in public.

(2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.

(3) A hearing, or any part of it, may be in private if –
(a) publicity would defeat the object of the hearing;

(b) it involves matters relating to national security;

(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;

(d) a private hearing is necessary to protect the interests of any child or protected party;

(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;

(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or
(g) the court considers this to be necessary, in the interests of justice.

(4) The court may order that the identity of any person must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that person.

3.12 It is nonetheless central to note that per the then President, Dame Elizabeth Butler-Sloss, in ***Clibbery v Allen*** **[2002] Fam 261 at** ¶51**:**

> *"…the hearings of a case in private does not necessarily, or of itself, prohibit the publication of information about the proceedings or given in the proceedings".*

3.13 Of this was said at ¶85 of ***Norman****:*

> *"There are, in a case like this, two distinct questions. The first is whether the substance of the proceedings may be reported. The second is whether the parties may be named. So far as the first question is concerned, the mere fact that proceedings are heard in private does not of itself prohibit publication of what happens in those proceedings: Clibbery v Allan [2002] EWCA Civ 45, [2002] Fam 261 at [17] and [51]. However, the fact that parties are required to make full and frank disclosure of financial information* ***may justify reporting restrictions relating to that information****": **Clibbery v Allan** at [73] and [79]. But there is no blanket ban: **Clibbery v Allan** at [83].*

3.14 Indeed, in ***Clibbery*** it was noted that the 1991 FPR provided for hearings to be "in

chambers" (1991 FPR r.2.66(2)[3]) and that per ¶50:

> *"For my part, I can see no problem in the application of this procedure under the 1991 Rules, designed as it is* ***to provide a measure of privacy, not necessarily confidentiality, to family proceedings****".*

3.15 It seems clear that it is not a contempt of court to report what has happened at a hearing in chambers *per se* (***Clibbery*** at ¶51 following ***Scott v Scott*** **[1913] AC 417** at pg 444 and 484, ***Att-Gen v Leveller Magazine &*** **Others [1979] AC 440** at 465). See also AJA s.12(1).

3.16 The distinction between *privacy* on the one hand and *confidentiality* on the other, is one of significance, though neither is defined in contradistinction to each other in the family cases. It appears that these have been treated as one and the same and interchangeable. This appears more assumed than legislated (i.e. more one of practice than law) e.g. per Thorpe LJ in ***Clibbery*** said:

> *"90. It was never doubted that publication of such private proceedings was prohibited*
>
> *93. It therefore seems to me that parliament has been sparse in its contribution to unravelling the question of what, if anything, may be extracted from family proceedings in private for subsequent publication. That may be because there seemed to be little need for parliament to legislate****. In the family justice system, the designation 'in chambers' has always been accepted to mean*** *strictly private. Judges, practitioners and court staff are vigilant to ensure that****no one crosses the threshold of the court*** *who has not got a direct involvement in the business of the day".*

3.17 In ***Cooper-Hohn v Hohn*** **[2015] 1 FLR 19** at §151-152 Roberts J said:

> *"151.To that extent, my views as to the nature of the implied duty of confidentiality and its survival as operative and in force as between the parties and the court, notwithstanding the rule changes, remain very much in accordance with the obiter views expressed by Mostyn J in paragraph 50 of W v M.* ***I agree in principle that there is a "core privacy" which attaches to the special class of financial remedy proceedings which are actually held in private and designated as such under rule 27.10.***
>
> *152. I say this not least because it would, indeed, lead to the complete*

[3] Replacing in similar terms Matrimonial Causes Rules 1968 r.81(2)

emasculation of that core privacy if the press were held to have an unfettered right to report in full anything and everything which they heard during the course of the hearing in advance of the judge reaching any conclusions which may subsequently be recorded in a formal judgment, anonymised or not".

3.18 In the past (pre 2009) being "in private" provided de facto confidentiality, in that only those permitted to be in the court room (parties) had access to any information and no-one (other than litigants) was so permitted. Publication as an issue thus simply did not arise. No-one (or rarely did anyone) with an interest in publication have access to that which it was proposed to publish.

3.19 However, now that reporters do have access, the situation has (arguably) changed. But to what, is far from clear in *law*.

Anonymisation and reporting

3.20 This is undoubtedly one of the more controversial issues to be considered and, consequently we considered it important to set out the history in some depth.

3.21 Anonymisation is also considered in greater detail in Chapter 12.

3.22 In considering the practice in the FRC and its origins, a distinction needs to be drawn between pre Autumn 2021, and post Autumn 2021.

3.23 Pre 2021, the practice as identified by Thorpe LJ in ¶¶90 and 93 of ***Clibbery*** was undoubtedly the invariable practice: all assumed (or acted as if) "in private/chambers" meant no information could be published, save with anonymisation at the least.

3.24 The most modern cases commenced with ***W v W (Financial Provision: Form E)*** **[2004] 1 FLR 494,** a decision of Nicholas Mostyn QC sitting as a DHCJ[4].

3.25 As a starting point he drew on ***Clibbery****,* which he said explained how the obligation of confidentiality came about in respect of an *unauthorised* publication of any part of

[4] Per Mostyn J at ¶109 of **W v W** : "*I am not aware of any prior ancillary relief case in which this issue* [anonymisation] *has arisen directly, save for the decision of Bennett J in* ***Norris v Norris [2003] 1 FLR 1142****. There the only child was over 18, and there was no finding of non-disclosure. Bennett J overrode the parties' agreement (expressed in the agreed draft order submitted to the court) that the judgment should be reported anonymously. It is fair to say however that no argument was addressed to the court on the issue of anonymisation.*"

proceedings (which would be a contempt).

3.26 He then drew a distinction between unauthorised disclosure and the different matter of anonymising a judgment. He went on:

3.26.1 to consider that an anonymised judgment is a "secret judgment", falling foul of Jacobs J's decision in ***Forbes v Smith*** **[1998] 1 FLR 835**[5]; and

3.26.2 To hold that ***B v UK; P v UK*** **[2001] 2 FLR 261** had the effect of extending the exception to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, making it permissible for a judgment to be anonymised after balancing the right to protection of the private lives of litigants against the principle of open justice; and then

3.26.3 undertake that balancing exercise.

3.27 Although that balancing exercise led him initially to come down in favour of full publication, he ultimately drew back from naming the parties. This was because he accepted the argument that the Form E did not warn of publicity in the event of any malfeasance and the husband had proceeded on the assumption there would not be any i.e. that the standard "practice" of complete confidentiality would prevail.

3.28 But for this latter 'expectations' argument, it appears the court would have named the parties. However, it is tolerably clear that this approach was not based on the premise that parties should be named as a matter of course in every case but rather that anonymity had been forfeited by the husband's misconduct in that particular case ("*no future non-discloser should expect, at least from me, such an indulgence*" ¶132). Arguably this is an implicit acceptance of the then general practice in the ordinary case i.e. of anonymisation (as for example the same Judge had done in ***GW v RW*** **[2003] EWHC 611**, a few months earlier).

3.29 It was some time before the issue arose again, in ***Lykiardopulo v Lykiardopulo*** **[2011] 1 FLR 1427.** There, the Court of Appeal was considering whether a judgment should be published anonymised from FRP where the husband had been found to have presented a perjured case.

[5] "*Only in cases where there is a cause for secrecy, such as in a trade secrets' case, can it in general be right that a judgment should be regarded as a secret document. Even then it may be only a part of the judgment needs to be secret. I conclude, in the absence of binding authority to the contrary, that when judgments are given in chambers they are not to be regarded as secret documents*."

3.30 The report reveals that the late Baron J, who heard the matter at first instance, was initially against publication which identified the parties.

3.31 The wife appealed the anonymisation. In the Court of Appeal, pre-eminent privacy, and defamation counsel (Richard Spearman QC and Desmond Browne QC) argued the case with no reference at all as to whether or not the prevailing practice of routine anonymisation FRP judgments was to be taken as anything other than read.

3.32 The Court of Appeal were uniform in their acknowledgment of and did not query the practice of anonymisation: Per Thorpe LJ : ¶¶30-31, 45 and 54:

> *30.* ***The practice of privacy has grown up*** *in the Family Division to protect the welfare of children, to deny an inspection that is only prurient* ***and to respect the fact that the financial affairs of any family are essentially private and not a matter of legitimate public interest****.*
>
> *31.* ***The practice in this jurisdiction is compliant with Article 6 rights*** *as is established by the decision of the* ***Strasbourg Court in B v The United Kingdom [2002] EHRR 19***
>
> *45****. An anonymised judgment ordinarily flows from the classic direction that the court gives to the press: any report of this case must not reveal the identities of the children or of the parties****. Once given, the transcriber will substitute initials for names (witnesses as well as parties) and additionally the identity of counsel and solicitors may be withheld if those details would point to a locality.*
>
> *54(ii).* ***The conclusion which she [Baron J] reached accorded with the practice of the Division. The number of ancillary relief judgments published without an anonymisation direction has been tiny in recent times.***

3.33 This assertion as to the status quo in family cases was not confined to the family judges on the court, for Stanley Burton LJ ¶76 & 79 said (echoing ***Clibbery***):

> *76.* ***Parties to a matrimonial dispute who bring before the Court the facts and documents relating to their financial affairs may in general be assured that the confidentiality of that information will be respected****. They are required by the Court to produce the information and documents, and it is a general principle, applicable to both civil and family proceedings,* ***that confidential information produced by those who are compelled to do so will remain so unless and until it passes into the public domain****. That confidence will in an appropriate case be protected by the anonymisation of any reported judgment.*
>
> *79.* ***The general practice of the Family Division is for judgments in ancillary relief cases not to be published, or if published to be anonymised. That is done out of respect for the private life of the litigants and in order to promote***

full and frank disclosure, and because the information in question has been provided under compulsion.

3.34 Following this, the matter was again considered by Mostyn J (not an FRP case) in ***W v M (TOLATA Proceedings: anonymity*** **[2012] EWHC 1679 Fam**. In considering FRP cases, he said ¶33 and 34:

> *33. The reasons that the [ancillary relief] proceedings were (and remain) specifically designated as private business were (and remain) manifold. One reason is that Parliament has already imposed severe restrictions on the reporting of divorce proceedings. At first instance in Clibbery v Allen [2001] 2 FLR 819 Munby J was of the opinion that the Judicial Proceedings (Regulation of Reports) Act 1926 applies to ancillary relief (now financial remedy) proceedings. ...*
>
> *34. In Clibbery v Allen Butler-Sloss P and Thorpe LJ* ***preferred to rationalise the right to privacy by reiteration of the long-standing and well-recognised implied undertaking of non-disclosure of the other party's documents obtained under compulsion. From this they extrapolated the proposition that no information about any aspect of ancillary relief (now financial remedy) proceedings could be published in the press without leave****.*

3.35 The divergence of views between Judges of the Family Division on the applicability of the Judicial Proceedings (Regulation of Reports) Act 1926 ("JP(RR)A 1926") is considered below at paragraph 3.57, as is the reliance on the implied undertaking (as later becomes clear in ***Xanthopoulos v Rakshina*** **[2023] 1 FLR 1388**).

3.36 It was from the foot of the passage set out in paragraph 3.34 above that Mostyn J moved to ***Lykiardopolou*** (noting at ¶38 that anonymity will be forfeited by inter alia gross non-disclosure, or where it was pointless e.g. ***Mills v McCartney***) and duly concluded that at ¶36 that

> *"Generally speaking, a law report of an ancillary relief case would be anonymised. The judgment would be issued and either the law reporters or counsel would be expected to anonymise it".*

3.37 Without reciting the entirety of the analysis, Mostyn J moved on:

3.37.1 to observe that Parliament had failed to bring into force Part 2 of the Children, Schools and Families Act 2010 which essentially provided by ss11-13, 21, and Sch 2 that a contempt will be committed by an unauthorised publication by the media of a judgment or any part of the proceedings which is likely to

lead members of the public to identify an individual as someone who is or has been involved in or otherwise connected with the proceedings, or which reveals certain specified sensitive personal information (principally of a medical nature);

3.37.2 to note that PD27B ¶2.4 states:

> *"The question of attendance of media representatives or duly authorised lawyers at hearings in family proceedings to which rule 27.11 and this guidance apply must be distinguished from statutory restrictions on publication and disclosure of information relating to proceedings, which continue to apply and are unaffected by the rule and this guidance"*

3.37.3 to state that the failure to implement Part 2 of the 2010 Act does not mean that absent a reporting restriction order the media are definitely free to report everything they observe and hear in court and that their freedom depends on the applicability of JP(RR)A 1926.

3.38 Effectively, after a close examination of the Human Rights Act and a consideration of the decision in ***H v News Group Newspapers Ltd*** **[2011] 1 WLR 1646***,* he determined that it was a "highly fact specific balancing exercise" (¶55(iv)) of rights under Article 6 (public hearings and judgments), 8 (respect for private and family life) and 10 (press freedom of expression).

3.39 However, this was not necessarily one which started without a thumb on one particular side of the scales. In the case of FRP, he said the thumb pressed hard at the outset of the exercise in favour of Article 8. As he says at ¶50:

> *"My view is that* ***the starting point in financial remedy proceedings should be that, if sought, a reporting restriction order in equivalent terms to the standard rubric should be granted.*** *It is my view that, generally speaking,* ***only if the court is prima facie satisfied that the case will result in proof of iniquity in some shape or form should that starting point be departed from****. As the White Paper put it "families need to be confident that their privacy will be protected". Or in the words of Stanley Burnton LJ "parties to a matrimonial dispute who bring before the Court the facts and documents relating to their financial affairs may in general be assured that the confidentiality of that information will be respected".* ***The powerful statements, referred to by me at para 17 above, warning of the danger of anonymisation leading to a curtailment of the right to freedom of expression in the reporting of public civil proceedings do not, in my opinion, militate in favour of a derogation from the core privacy that attaches to the special class of (officially private)***

case that is a claim for financial remedies following divorce. *It would be a strange thing if the court's undoubted power to anonymise its judgment were to be emasculated by an unfettered right to report fully the proceedings leading to the judgment".*

3.40 Following this case, Roberts J determined ***Cooper-Hohn***, following the reasoning in ***W v M***. She placed weight on:

3.40.1 the coercive nature of the duty of full and frank disclosure in FPR (¶¶124 and 127);

3.40.2 the quasi-inquisitorial nature of proceedings (¶125);

3.40.3 ***Clibbery*** and ***Lykiardopolou*** generally (¶¶139 - 145) and stated at ¶150:

> *"I accept the submission, which Mr. Vassall-Adams makes to me, that there is a fundamental distinction between a published judgment which sets out the court's reasons and conclusions on the issues arising in the case and the contemporaneous publication of what takes place in a private hearing. I also accept that* ***Lykiardopulo*** *is good and sound authority for the proposition that the fundamental principles governing ancillary relief or financial remedy proceedings, the confidential nature of the financial information disclosed within them and the need to protect that information remains good law, notwithstanding that the media now has access to these private hearings".*

3.41 She concluded (¶166-167):

> *166. "I accept and wholly endorse the first six submissions which Mr. Vassall-Adams has made in relation to the policy considerations, which support the entire structure of the private nature of financial remedy proceedings.* ***I accept also that whilst the principle of open justice remains as relevant in this Division as it does in others, the courts have consistently recognised that financial remedy cases heard in the Family Division involving, as they do, very real and legitimate expectations of privacy and confidentiality for the family, fall into a special category.***
>
> *167. However, to the extent that he seeks to persuade me that there can be no reporting <u>whatsoever</u> of these proceedings unless and until the media make an application to satisfy me that it would be a necessary and proportionate step to take, his proposition - in my view - goes too far. Quite apart from the practical aspects and the inevitability of these*

*proceedings having to be adjourned off part-heard and possibly for a significant period of time**, I have come to the clear conclusion that the proposition he advances in terms of the "blanket" restriction which he seeks is too wide".***

3.42 Thus, per Roberts J (following Mostyn J) it was a matter of performing a balancing exercise taking into account rights under Article 6 (public hearings and judgments), Article 8 (respect for private and family life) and Article 10 (press freedom of expression). But again, the scales were tilted in favour of Article 8 in FRP. In that particular case, she held, tellingly, at ¶176:

"I find that the balance between the right of the media to freedom of expression and their ability to report to the public at large, and the right of the husband and wife to respect for their private and family life, in so far as it relates to the detail of their finances, weighed together with the overarching principle of open justice and the implied undertaking as to confidentiality, falls firmly in favour of privacy in relation to financial matters being maintained".

3.43 It is noted that Roberts J expressly rejected the argument (at ¶153) that the presence of the media in court under FPR 27.11 meant that she *"should assume by the fact of that media attendance alone at this hearing that I am somehow sitting in open court. The terms of rule 27.10 are perfectly clear."*

3.44 That view accorded with that later firm view of Mostyn J in ***Appleton*** at ¶15 & ¶18:

*15"...It is **inconceivable** that Parliament could have intended to destroy the effect of the implied undertaking when it allowed the press to observe these private proceedings as a watchdog. The existence of the implied undertaking in the post rule change era was unambiguously confirmed by the Court of Appeal in **Lykiardopulo v Lykiardopulo [2010] EWCA Civ 1315**, **[2011] 1 FLR 1427**, in particular in the judgment of Stanley Burnton LJ at paras 76 and 79. If Mr Dean is correct then Parliament will have thrown the baby of privacy of confidential information out with the bathwater of a supposedly secretive judicial process.*

*18. I recognise that I may be wrong about the collateral effect of the implied undertaking on third party journalists in the new era. It may be that in this regard **Clibbery v Allan** is now a dead letter and that **Lykiardopulo** was wrongly decided. In **Norfolk County Council v Webster & Ors [2006] EWHC 2733 (Fam)**, a case decided in the old era, Munby J, as he then was, at para 121 held that a case where journalists were permitted to enter court and observe the proceedings under an ad hoc arrangement was not one held "in private" for the purposes of section 12 of the 1960 Act. **That view cannot, so***

it seems to me, survive the opening words of FPR 27.11, which expressly state that the right granted to journalists is to attend a hearing held in private. A hearing cannot be in private and not in private at the same time.

3.45 It also accords with views of MacDonald J at ¶55 in ***HRH Louis Xavier Marie Guillaume v HRH Tessy Princess of Luxembourg &*** **Anor [2017] EHWC 3095**.

3.46 Mostyn J in ***Xanthopoulos*** took a different view at ¶115:

> *"In my judgment, the privacy of the proceedings, which is the key factor relied on in* ***Clibbery v Allan****, is extinguished by the permitted presence of journalists or bloggers under this hybrid arrangement. That permitted presence means that the proceedings are to be treated as if in open court for the purposes of para 106 of Thorpe LJ's judgment"* [In ***Clibbery***].

3.47 Mostyn J gave judgment in ***DL v SL*** on 27 July 2015 and ***Appleton*** on 28 September 2015. Each case flowed from the foot of what was said previously by that judge, and were at their heart, to the same effect: it is a balancing exercise, but one which starts significantly if not entirely weighted in favour of confidentiality, given the nature of FRP derived from that which was set out inter alia in ***Clibbery***, ***Lykiardopulo***, and *FPR 27.10* .

3.48 Thus, in ***DL v SL***, at ¶9-10 and ***Appleton*** at ¶¶16 & 19 he repeated the need for a balancing exercise. But equally, he observed in ***DL v SL*** at ¶¶10-11:

> *10"…there are some categories of court business, which are so personal and private that* ***in almost every case where anonymisation is sought the right to privacy will trump the right to unfettered freedom of expression.*** *These cases are those where the subject matter of the proceedings can rightly be categorised as "private business"*
>
> *11. Ancillary relief (or financial remedy) proceedings are quintessentially private business and are therefore protected by the anonymity principle set out above".*

3.49 In ***Appleton*** he retreated to some extent from the above in terms of weight of emphasis. But that was only to a small degree, ensuring that he had not rendered entirely nugatory the balancing exercise. Nonetheless he still started with unbalanced scales in favour of confidentiality, saying at ¶16:

> *"In my previous judgment [****DL v SL****] at para 10 I stated "there are some categories of court business, which are so personal and private that in almost every case where anonymisation is sought the right to privacy will trump the right to unfettered freedom of expression." After having heard Mr Dean's*

> *excellent submissions I* ***accept that I may have expressed the proposition too strongly.*** *The use of the bridge metaphor may suggest that the Re S [2004] UKHL 47 balancing exercise is not undertaken at all, because the ace of trumps always wins the trick. Even in* ***Clibbery v Allan*** *the President at para 84 accepted that the balancing exercise must be undertaken. It is trite law that in proceedings held in open court the starting point is that the proceedings will be fully public and that any derogation therefrom must be justified. In other words, the freedom of expression side of the scales starts with some heavy weights on it.* ***In ancillary relief proceedings it seems to me that the situation is the other way round. The press have to justify why the core privacy maintained and endorsed by Parliament should be breached. Here the privacy side of the scales starts with heavy weights on it".***

3.50 A new point was considered in ***DL v SL*** and restated it in ***Appleton***: the 1966 International Covenant on Civil and Political Rights.

3.51 This international treaty (of which the UK is a signatory) forms part of the International Bill of Human Rights. Article 14 recognises the right to justice, which includes at Article 14.1 the requirement for hearings to take place in open court with every judgment or ruling made public. However, as Mostyn J observed that Article also (¶11 of ***DL v SL***)

> *"... stipulates that (a) the press or public can be excluded from all or part of the trial when the interest of the private lives of the parties so requires; and (b) that judgment is not required to be public where the proceedings concern matrimonial disputes. In my judgment Article 14 creates a presumption against public judgment in matrimonial disputes, and therefore it logically follows that the proceedings should not be public either as otherwise the privacy of the judgment would be fatally undermined. It is trite law that when exercising a power, a court should do so consistently with the state's international obligations".*

3.52 And in ***Appleton*** he said: "*to allow the proceedings to be reported would make a mockery of that exception [in Article 14]".*

3.53 This treaty is not considered in ***BT v CU*** **[2022] 1 WLR 1349** nor ***Xanthopoulos****,* each of which mark the reversal of his prior views on transparency in FRP generally (see below).

3.54 Both ***DL v SL*** and ***Appleton*** (and ***Cooper-Hohn*** and ***Clibbery*** amongst others) wrestled with JP(RR)A 1926, and its applicability to FRP. This is, as Mostyn J rightly calls it "turbid waters".

3.55 Section 1(1)(b) of the Act provides that in any judicial proceedings for the dissolution or

nullity of marriage or for judicial separation or for the dissolution, annulment, or order for separation of a civil partnership, it is unlawful for the press to publish anything except:

3.55.1 the names, addresses and occupations of the parties and witnesses;

3.55.2 a concise statement of the charges, defences, and countercharges in support of which evidence has been given;

3.55.3 submissions on points of law and the summing up of the judge and findings of the jury (if any) and judgment of the court.

3.56 Whilst this plainly applies to the suit itself, whether it also extends to financial proceedings ancillary to the suit is the central issue of debate. Suffice it to say, if it does, it would be primary legislation significantly preventing publication of information from FRP and therefore bolsters the argument that the starting point should be their confidentiality.

3.57 Different views have been expressed:

3.57.1 Munby J at first instance in ***Clibbery*** said it did apply;

3.57.2 Thorpe LJ in ***Clibbery*** on appeal, said "provisionally" he thought it did not apply (the point was not argued/needed to be decided on appeal);

3.57.3 Butler-Sloss P in ***Clibbery*** said it "may be the case" that it applied;

3.57.4 Munby J in ***Spencer v Spencer*** **[2009] 2 FLR 1416** declined to make a ruling on the issue, and noted his views in ***Clibbery*** were obiter;

3.57.5 Munby P (as he then had become) in ***Rapisdarda v Colladon*** **[2014] EWFC 1406** said it was at least arguable it did apply (not an FRP case and he found a discretion in s.1(4) to avoid its strictures). He noted its application was a matter of "*ongoing uncertainty"* (¶31) which was "*truly a disturbing state of affairs. Something needs to be done, and, it might be thought, done as a matter of urgency*";

3.57.6 Mostyn J in ***W v M*** (without hearing argument on the specific point) "inclined" to the view of Munby J at first instance in ***Clibbery***;

3.57.7 Roberts J did not decide the point in ***Cooper-Hohn***. It was side-stepped as she was invited to proceed on the assumption it did apply, but the court was being asked to exercise a discretion under s.1(4) to disapply its strictures);

3.57.8 MacDonald J in the ***HRH Luxembourg*** case at ¶71-74 noted there was no binding decision on the point and followed the same route as Roberts J in

Cooper-Hohn (although neither party sought to argue it did apply, but if it did, s.1(4) provided the court the discretion to make such order as it saw fit);

3.57.9 Mostyn J in ***DL v SL*** had moved on from "inclining" to agreeing it applied to being "of the firm view" it applied to FRP (¶11) **(**indeed he went on to say it would "be bizarre" if it did not and to disagree expressly with Munby J in ***Rapisdard*****a** that it ought to be repealed, and stated that parliament had clearly "endorsed" its application to FPR on several occasions);

3.57.10 Mostyn J in ***Appleton*** went even further at ¶22 saying:

> *"[The Act] was a derogation, democratically enacted, from the principle of open, fully reportable, justice as so resoundingly proclaimed by the House of Lords in* ***Scott v Scott [1913] AC 417****. Its relevance to the issue I have to decide, which concerns the ability to report proceedings held in private, is that the privacy factor has, up to a point, already been strongly recognised by Parliament even for those cases heard in public"*

3.57.11 It got no mention in ***BT v CU***. But in ***Xanthopoulos*** (although it appears the point was not argued at all) Mostyn J said at ¶129:

> *"I have previously expressed the view that the Judicial Proceedings (Regulation of Reports) Act 1926 applies to financial remedy proceedings (see, for example,* ***Appleton & Anor v News Group Newspapers Ltd & Anor [2015] EWHC 2689 (Fam)*** *at [19] – [22]). I am quite sure I was wrong about that".*

3.58 Whether or not the JP(RR)A 1926 applies will affect what may or may not be reported in all FRP cases as a default position. The cases where it has been considered in detail have either been:

3.58.1 ones where the court seeks to gain support from its terms for the general presumption of confidentiality as a starting point, or entrenched very weighty factor, but have not needed to decide the issue explicitly on the matter before it; and/or

3.58.2 Where there has been an express application relating to permission to report so the court can make such order as it sees fit; on the basis it either does not apply (***Luxembourg)*** or that it does apply but a s.1(4) discretion is being exercised ***(Cooper-Hohn)***.

3.59 But this does not assist with clarity for all those (very many cases) where no application is

actually made either way.

3.60 It can be seen from the consideration of the cases as set out above that until very recently the judicial wind and standard assumptions and practice all blew in the direction of anonymity, with limited or no publication of case details. That changed last autumn.

3.61 In ***BT v CU*** (1 November 2021)**,** Mostyn J said that he had intended to anonymise only the names of children, ¶100:

> *"To reflect the increased emphasis on, and move towards, transparency in financial remedy proceedings. The Consultation Document on Transparency in the FRC dated 28 October 2021 has pointed out that had journalists or bloggers attended the hearing before me they would have been entitled, subject to any reporting restriction order made by me, to have named the parties and to have published anything which had not been disclosed under compulsion".*

3.62 He went on at ¶105 to say:

> *"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. In my opinion it is another example of the Family Court occupying a legal Alsatia (**Richardson v Richardson [2011] EWCA Civ 79, [2011] 2 FLR 244**, para 53, per Munby LJ) or a desert island "in which general legal concepts are suspended or mean something different" (**Prest v Petrodel Resources Ltd and others [2013] UKSC 34, [2013] 2 AC 415**, para 37, per Lord Sumption)".*

3.63 He ended with ¶113:

> *"…it should be clearly understood that 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".*

3.64 However, on 23 December 2021 Roberts J published ***LS v PS & Q*** **[2021] EWFC 108**, on 16 March 2022 Moor J published ***DX v JX*** **[2022] EWFC 19**, and on 22 March 2022 Peel J published ***WC v HC*** **[2022] EWFC 22**. All of those cases were reported anonymously.

3.65 This difference of approach is perhaps best illustrated by:

3.65.1 The non-anonymised publication of the "big money" MPS decision of Mostyn J of ***Collardeau-Fuchs v Fuchs*** **[2022] EWFC 1** on 21 February 2022.

3.65.2 The anonymised publication of the (very similar) "big money" MPS decision of Peel J in ***MG v GM (MPS LSPO) (Rev 1)*** **[2022] EWFC 7** of 1 March 2022.

3.66 In neither case was anonymity argued yet a different approach was taken in the same court by successive lead FRC judges just eight days apart. That is not to say which approach was correct in law, but it is a notable replication of the similar problem of inconsistency that Mostyn J identified at ***DL v SL*** at ¶15.

3.67 It is important to be clear that ***Xanthopoulos*** does not seek to obviate the need for the Article 6, 8 and 10 balancing exercise, as set out above in the line of cases since ***Clibbery***.

3.68 Indeed, it expressly endorses the need for one at ¶¶103-105. ¶104 sets out the same key passage from passage from ***H v News Group Newspapers*** (at ¶21 of Lord Neuberger MR) as was set out by Mostyn J in ***W v M*** at ¶14.

3.69 However, what is now said is that in reality, that exercise has simply not been carried out at all in most cases. This is likely correct, for whilst it has been said to have been carried out overtly in those cases referred to above (where there was an application or dispute on transparency issues to be determined), the practical starting point for all other cases appears to be automatic anonymisation. Even in those cases where the exercise has been carried out, the scales start (per the prior authorities) weighted so far in favour of the privacy of FPR that they rarely (save in the most exceptional case) ever move the other way.

3.70 What it appears ***Xanthopoulos*** aims to do is to remove the thumb from the scales on the side of Article 8 and place a new weighty digit on the side of Articles 6 and 10.

3.71 This can be done (it is said), by removing the factors previously relied upon in support of the prior practice. Specifically:

3.71.1 At ¶99 - Whilst previously the status of proceedings being "in private" was said to be important in the balance, a renewed emphasis on ***Hodgson v Imperial Tobacco*****,** is now said to mean that "in private" means nothing more than without the public present rather than confidential. As to this see above, identifying the eliding of "privacy" with "confidentiality" running through the key prior cases.

3.71.2 At ¶107 - ¶116 – the ***Clibbery*** reasoning is said to be wrong or at least

superseded: whereas before (by the Court of Appeal) it was said that the implied undertaking of confidentiality was a factor favouring confidentiality, and that that was not (per Mostyn J, Roberts J and MacDonald J as set out above) undermined by the rule change in 2009 and introduction of r.27.11[6] (press attendance), Mostyn J now says it was so undermined, at ¶115 (see above) and ¶116:

> *"Therefore, in my judgment, the rule change which allows journalists and bloggers into the proceedings has the effect of completely overturning the reasoning of the Court of Appeal which carved out an exception to the general rule concerning the reportability of proceedings heard in private".*

3.71.3 At paragraphs ¶117-122 Mostyn J considers whether the 2002 template for judgments (the "rubric") is effective or even correct, and considers it neither, whereas in ***W v M*** at ¶36, he took the opposite view. In each instance he derives support for the opposing views from citing different parts of the same paragraph of the same decision of Munby J ***Re RB (Adult) (No 4)*** **[2012] 1 FLR 466**.

3.72 From this footing Mostyn J considers that the presumption against publication in FRP has been misunderstood (including by him in past cases and his 29 October 2021 consultation paper, and the President in *Confidence and Confidentiality: Transparency in the Family Courts* at ¶16), and that the default position is that there is no confidentiality at all, per ¶125:

> *"The correct position is the other way round: financial information referred to in the proceedings is not secret and can be fully reported unless the court makes a specific order preventing publication. The difference is that under the (erroneous) former position the journalist has to ask for permission to report something heard in court whereas under the (correct) latter position a party has to ask for an order preventing the journalist from reporting it".*

3.73 Ultimately, this is still a matter undecided in any binding appellate authority. For other judges of High Court level and above, Mostyn J's current views are not binding[7]. Equally so, his new view of the inapplicability of ***Clibbery*** is no more binding that the

[6] Note also that PD27B is now at ¶115 cited in *support* of the idea that publication is more permissible, given what PD27B para 5.4 says, whereas in ***W v M*** PD27B para 2.4 was said to support the opposite view (see ¶45.b above). This part of PD27B is not referred to in ***Xanthopoulos***.

[7] But quite where that leaves the District and Circuit bench is another matter as set out by HHJ Farquhar in paras 102 – 106 ***X v C*** **[2022] EWFC 79**

contrary obiter views expressed by the Court of Appeal in ***Clibbery***. Ultimately, a definitive answer will require appellate authority after full argument.

Provision of documentation

3.74 The legal position is set out within FPR r29.12 and PD 27B as set out in Chapter 11 and those are not repeated here.

3.75 On consideration of the rules, it would appear that witness statements in FRP (which would likely include a Form E, or replies to questionnaire, since they contain evidence being relied on, and carry (or are meant to carry) affirmations of their truth) are prevented from publication to a third party (including the Press) this being *not for the purpose of proceedings*.

3.76 Consequently, the present position is that, without permission of the court, :

3.76.1 Reporters are not entitled to inspect documents on the court file;

3.76.2 Reporters are not entitled to be given copies of witness statements or use them for purposes other than for the proceedings.

3.77 This is not entirely inviolate (even before the FPR changes on press attendance) as in ***Norfolk City Council v Webster [2007] 2 FLR 1415*** Munby J was considering the issue of the release of documents in care proceedings and made an order providing for a party's leading counsel's position statement to be released to permitted press attendees. He did so on the following basis (emphasis added):

> *42. "Today in the Family Division, as in the other Divisions of the High Court and in the Court of Appeal, we have a system under which many matters that would in the days of purely oral advocacy have been spoken in court by counsel are now set out in written documents, prepared by counsel, which are pre-read by the judge before the hearing and which are therefore not read out in court during the hearing. In other words, we have a system today under which the necessary advocacy is in part written advocacy though still in major part oral advocacy in the traditional manner. This system is intended to further the proper administration of justice. It does so in various ways including, in particular, by shortening hearings (and thereby increasing the throughput of cases through the court system), though at the cost of imposing on the judges the burden of pre-reading – usually, at least in this Division, in the judge's own time – on a scale that would have astonished our judicial predecessors even in the quite recent past.*

> *43. But it is vital that this wholesome move in the direction of an enhanced degree of written advocacy, so very desirable in the public interest from so many points of view, should not be allowed to damage the vital public interest in open justice. If the media are to be permitted to attend a hearing such as that which took place on 3 November 2006 – and for the reasons I gave in Re Brandon Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam) *it was very much in the public interest that they should be – then the very same public interest requires, in my judgment, that the media should be allowed to see documents such as Ms Langdale's position statement.* ***For if the media, and indeed the public generally, are not permitted to see Ms Langdale's position statement the ability of the media, and through the media the ability of the public, to understand what took place during the hearing would be severely compromised – an outcome that would defeat the very purpose of permitting the media to be present"***

3.78 For similar reasons, and after r.27.11 and PD27B were bought into being, Jackson J (as he then was) in ***F v Cumbria City Council*** **[2016] EWHC 14 (Fam)**[8] permitted release to the media who attended a particular children's hearing of various parts of the detailed evidentiary documents (including medical reports and summaries of expert evidence) "*to assist with understanding in the course of the hearing*", though they were not for publication, had to be kept safe, and not copied to others.

3.79 The question of what should occur in general cases is one that we have considered in Chapter 13.

[8] Largely upheld by the Court of Appeal in ***Re W*** **[2016] 4 WLR 39**

Chapter 4 - Transparency in the Court of Protection, Chancery Division and King's Bench Division

Introduction

4.1 It was considered important to understand how issues of transparency were dealt with in Courts other than the Family Court. To that end we sought the advice of King's Counsel that specialise in the Chancery Division (Penelope Reed KC), the King's Bench Division (Adam Wolanski KC) and the Court of Protection ("COP") (Victoria Butler-Cole KC). We are extremely grateful for their invaluable input. We summarise their papers in this Chapter.

The Court of Protection

History

4.2 When the COP came into existence in 2007, there was a general rule that hearings were held in private, and the court had the power to authorise publication of information about proceedings (Rules 90-91, COPR 2007). Medical treatment cases were treated differently in that they were heard exclusively by High Court judges and generally held in public, meaning that in every such case the applicant's solicitors had to file for a reporting restrictions order.

4.3 In 2015 the COP trialled a Transparency Pilot which has since, in effect, become permanent. The general rule was reversed. Hearings were to be held in public with standard orders being made ensuring that the subject of the proceedings was not to be identified. Charles J, the then Vice-President of the COP, gave a judgment supportive of the Arts 8/10 balance falling in favour of public hearings with reporting restrictions (***V v Associated Newspapers Ltd & Ors*** **[2016] EWCOP 21**).

4.4 A standard transparency order was published which is still in use, although it is noted that this order has been subject to criticism for being: *'(a) misleadingly named, since it is about what cannot be published, and (b) incomprehensible to a lay person'*.

Current position

4.5 The standard sequence of events in all COP cases is summarised as follows:

a. '*Paper application issued, including proposed transparency order.*

b. *Court makes the transparency order 'on the papers' before the first attended hearing takes place.*

c. *Any person who disagrees with the content or existence of the transparency order makes submissions on it at the first attended hearing. If there is a significant dispute, the court may invite written submissions and list a further hearing to determine matters. More often, the court may tweak the order based on oral submissions from the parties, and any observers or media representatives, for example by clarifying what facts about P's geographical location and personal situation can be published, and which individuals are to be anonymised in reports*.'

4.6 Hearings are listed using the initials of P, the subject of the proceedings, and should say the hearings are in public. There are no restrictions on who can attend public hearings in the COP although the court has the power to exclude a particular person or class of persons.

4.7 There has been a recent challenge by Mostyn J to Charles J's approach, particularly regarding the removal under the current approach of the requirement to notify the press in advance of making an order that engages Art 10 rights (Transparently clunky – Mostyn J and transparency orders before the Court of Protection – Mental Capacity Law and Policy).

4.8 Recently, the approach has shifted so that the statutory bodies involved are almost always named unless doing so would result in P being identified. Individual doctors or social workers are usually anonymised, but instructed experts are usually not.

4.9 P and P's family are almost always anonymised. P's name is usually only published where P's family or carers want it to be, and there is no evidence that will have a negative impact on P. See the following two cases for examples of the application of the principles regarding publishing P's name: ***PH & Anor v Brighton And Hove City Council*** **[2021] EWCOP 63,** in which the court agreed to remove Tony Hickmott's anonymity following an application by the BBC, supported by his parents, and ***LF v An NHS Trust & Ors*** **[2022] EWCOP 8**, where Hayden J refused an application to remove P's anonymity.

4.10 In financial cases, great detail about P's assets may be included in a judgment. The following examples are provided: ***Re DP (Revocation of Lasting Power of Attorney)*** **[2014] EWCOP B4**, ***Re Jones*** **[2014] EWCOP 59** *(where even P's full name was included) and* ***NT v FS and Ors*** **[2013] EWCOP 684**.

4.11 Discussions take place between the parties, the court and any public observer or media representative about the details referred to in the hearing or in a written judgment to avoid jigsaw identification of P. Observers and media representatives are given copies of position statements and skeleton arguments from the hearing they attend. Sometimes these documents are redacted to remove personal information about P's arrangements which are not likely to be referred to in open court.

4.12 Judges are permitted by Rule 5.9, COPR 2017, to provide copies of judgments or orders made in public to non-parties following an appropriate application.

Evaluation

4.13 The paper concludes that the new system generally works well. Remote access to hearings and the creation of the Open Justice Court of Protection project have increased interest in and accessibility to the COP, but it remains that only a tiny proportion of COP cases are attended by non-parties.

4.14 Even where cases involve famous or very wealthy people the press have not tended to get involved, which may be due to the anonymised listing of COP cases which does not alert the press. As there is no requirement for advance notification of the media, it is difficult for the press to know about such cases unless a party tells them.

4.15 It is relatively rare for transparency orders to be deliberately breached. Family members may inadvertently post things they should not on social media but will generally remove them when the transparency order is explained. The difficulty with the lack of comprehensibility of the transparency orders to the general public arises again here.

4.16 Sometimes people write to their MP or others regarding their concerns about the proceedings, which is a breach of the transparency order. Other families may put information in the public domain before the issue of proceedings to get ahead of arguments regarding anonymity.

The Chancery Division

Civil Procedure Rules

4.17 The starting point is Rule 39.2, CPR 1998. The general rule is that a hearing is to be held in public (Rule 39.2(1)), and the court '*shall take reasonable steps to ensure that all*

hearings are of an open and public character' (Rule 39.2(2A)) unless a hearing *must* be held in private applying the provisions of Rule 39.2(3), which are as follows:

> *'(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice—*
>
> *(a) publicity would defeat the object of the hearing;*
> *(b) it involves matters relating to national security;*
> *(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;*
> *(d) a private hearing is necessary to protect the interests of any child or protected party;*
> *(e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing;*
> *(f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or*
> *(g) the court for any other reason considers this to be necessary to secure the proper administration of justice.'*

4.18 Few cases justify a hearing in private. The more frequently sought order is anonymisation, pursuant to Rule 39.2(4): *'The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.'*

4.19 The basis for the way anonymisation is approached in Chancery cases is found in the guidance of the Court of Appeal in ***H v News Group Newspapers Ltd*** **[2011] 1 WLR 1645** at paragraph 21.

Private financial matters

4.20 The fact that a lot of private and confidential information about parties, who may be famous, is before the court (e.g., in a breach of trust dispute involving family trusts) will not be sufficient to justify a privacy order. Additional factors such as commercially sensitive information will be required to justify such an order. Even then, the court will do the bare minimum to preserve confidentiality. The example of ***Cotton v Brudenell Bruce*** **[2014] EWCA Civ 131** is given, in which the Court of Appeal refused to allow the hearing to take place in private on appeal despite there being competing buyers for the mansion which was the subject of the litigation. Instead, the Court of Appeal directed no one was to refer to the valuation of the mansion or the bids in submissions.

4.21 Disputes under the Inheritance (Provision for Family and Defendants) Act 1975 are most analogous to financial remedy proceedings in that, for example, the Act requires the court to have regard to what the widow/widower would have received if the marriage had ended in divorce rather than death. The Civil Procedure Rules apply to such claims. Privacy orders in such cases are extremely rare, including in claims by minor children. There are, of course, key differences between such cases and financial remedy cases, not least that one of the major protagonists is dead.

4.22 Notably, the fact that 1975 Act, breach of trust and probate cases will be heard in open court is a significant spur to these cases settling. Mediators will ask parties to imagine how they would feel with a great deal of very private financial and personal information being aired in public, including in the press. Very few cases ever get to trial.

Children

4.23 The paper refers to cases involving children in the Chancery Division '*to illustrate how firmly the principle of open justice is ensconced.*' In ***MN v OP*** **[2019] EWCA Civ 679**, the Court of Appeal decided that anonymity should not be the norm for minor beneficiaries in applications made under the Variation of Trusts Act 1958, despite such applications involving very private financial matters relating to the trust and the family benefitting from it being set out in evidence. These applications involve the Court approving on behalf of a minor, unborn, incapacitated, or unascertained beneficiary an arrangement which if such a person had been capacitous they would have consented to.

4.24 Notwithstanding ***MN v OP***, the author's experience suggests that Chancery Masters have tended to make privacy orders in 1958 Act cases if an application supported by some credible evidence to justify protection of the child is made.

Cases where privacy orders are granted

4.25 Privacy orders are granted where trustees seek *Beddoe* relief (directions of the court as to whether trustees should pursue or defend proceedings against or brought by a third party at the expense of the trust fund), as such cases involve discussion in court of the merits of the claim and the production of privileged information such as Counsels' Opinion. Third parties against whom the trustees wish to litigate would be given an unfair advantage by sitting in.

4.26 Other examples of cases justifying privacy orders are: where there might be some security risk to a party if the extent of their wealth were known (e.g. kidnapping), commercial

sensitivity (as referred to above), confidentiality, or where identification of the parties might adversely affect children. However, without cogent evidence to support an application for privacy orders the court will refuse to make such directions.

Documentary evidence

4.27 The use to which documents disclosed within proceedings can be put is also of concern to litigants. CPR 31.22(1) states that a party to whom documents are disclosed may only use them for purpose of those proceedings except where (a) they are referred to or read at a hearing which has been held in public; (b) the court gives permission.

4.28 CPR 31.22(2) provides that a party can seek an order that documents are not be disclosed even if read in open court. However, such orders are rare as the default position is open access.

4.29 As to non-parties, CPR 5.4C allows them access to statements of case, judgments and orders made in public. The court can further permit a non-party to obtain documents from the court records if they satisfy 'the *Dring* test' found in ***Cape Intermediate Holdings Ltd v Dring*** **[2019] UKSC 38**.

4.30 The default position is that non-parties should have access to documents mentioned in open court whether or not read to or by the judge. However, the onus is on the non-party to demonstrate 'a good reason' to access the documents. They must show how access will advance the open justice principle. The other side of the balancing exercise is the risk of harm which disclosure may cause to the maintenance of an effective judicial system and the risk of harm to others.

4.31 If a privacy order is made, it is often accompanied by an order under CPR 5.4C preventing non-parties from having access to court records without a further order.

Conclusion

4.32 Similar amounts of very private personal and financial information are involved in many Chancery Division cases and financial remedy cases in the Family Division, but the approach is very different. Even cases involving children will be heard in open court in the Chancery Division and reported without anonymisation unless a strong case to the contrary can be made. Obtaining privacy orders is unlikely without very good reasons, such as genuine commercial sensitivity or the risk of damaging disclosure of privileged information.

4.33 Litigants do not like their cases being heard in public and will sometimes decide not to make applications as a result. However, it does encourage parties to settle their claims.

The King's Bench Division

Introduction

4.34 The starting point is CPR 39.2 as in the Chancery Division. The test of necessity at CPR 39.2(3) imposes a high hurdle and hearings in private are rare, which is strongly emphasised in Master of the Rolls Practice Guidance on Interim Non-Disclosure Orders at [10] and [12][9], which states that '*derogations from the general principles can only be justified in exceptional circumstances, when they are strictly necessary'*.

4.35 This paper examines the following areas:

4.38.1 Actions for breach of confidence or misuse of private information, including injunctions seeking to restrain the publication of private and confidential information;

4.38.2 Actions involving children, including (i) injunctions seeking to restrain the publication of private information about children and (ii) applications for approval of settlements in personal injury cases;

4.38.3 Committal hearings;

4.38.4 Actions involving vulnerable witnesses; and

4.38.5 Inquiries into debtor's assets pursuant to CPR Part 71.

Private and confidential information

4.36 Applications for interim injunctions to restrain the publication of private and confidential information frequently give rise to publicity issues. In such claims, applications for the hearing to take place in private are commonly made pursuant to CPR 39.2(3)(a) (that 'publicity would defeat the object of the hearing') or CPR 39.2(3)(b) (that it 'involves confidential information … and publicity would damage that confidentiality').

[9] https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf

4.37 However, there is no general exception to open justice where privacy or confidentiality is in issue and the applications will only be heard in private to the extent it is strictly necessary, and such measures must be no more than the minimum strictly necessary (as per [12] of the Master of the Rolls Practice Guidance above).

4.38 It is necessary to conduct some cases in private where:

4.38.1 The submissions will involve discussion of private or confidential information in detail (e.g., ***K v News Group Newspapers*** **[2011] EWCA Civ 439** at [3]);

4.38.2 Cases involving innocent parties who are asked to disclose information to identify a wrongdoer (e.g., ***Coward v Harraden*** **[2011] EWHC 3092 (QB)** at [3]);

4.38.3 Without-notice injunctions to prevent publication of information obtained in a cyber attack (e.g., ***The Ince Group Plc v Persons Unknown*** **[2022] EWHC 808 (QB))**; and

4.38.4 Cases involving blackmail and injunctions to restrain the publication of threatened information (e.g., ***LJY v Persons Unknown*** **[2017] EWHC 3230 (QB); [2018] EMLR 19** and ***SOJ v JOA*** **[2019] EWHC 2569 (QB)**).

Other measures

4.39 More commonly, less drastic measures than private hearings are used in claims for misuse of private information and breach of confidence, such as:

4.39.1 Anonymising one or both parties;

4.39.2 Reporting restrictions prohibiting the publication of the private or confidential information (e.g., ***Ambrosiadou v Coward*** **[2011] EWCA Civ 409**). These can only be made pursuant to s.11 of the Contempt of Court Act 1981 where the information concerned has already been 'withheld from the public' by the court. In general, once information has been disclosed in open court it is too late to obtain a reporting restriction;

4.39.3 Requiring counsel to make oral submissions in a way which avoids revealing the private information (e.g., ***GUH v KYT*** **[2021] EWHC 1854 (QB)** at [17);

4.39.4 Restricting access to sections of the court file (e.g., ***GUH v KYT*** (above) at [17]);

4.39.5 Directing hearings are not recorded pursuant to CPR 39.9(1); and

4.39.6 Where the matter settles, recording the terms of the settlement in a confidential 'Tomlin' order rather than on the face of the order (e.g. ***PJS v News Group Newspapers Ltd*** **[2016] EWHC 2770 (QB)**).

4.40 Hearings are only rarely heard entirely in private, including in particularly sensitive cases. There is also no rule in the CPR equivalent to FPR 27.11 permitting a hearing to take place in private but with members of the press in attendance.

Anonymisation

4.41 Applications for anonymisation must be made prior to the issue of the claim form. The test applicable to anonymisation in privacy and confidence cases is the test at CPR 39.2. The relevant principles were summarised in ***XXX v Camden London Borough Council*** **[2020] 4 WLR 165** at [17]-[21]:

> '*a. CPR 39.2 reflects the fundamental rule of the common law that proceedings must be heard in public, subject to certain specified exceptions. Courts must be careful to prevent extensions of anonymity by analogy – exceptions must not "grow by accretion": R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966 at 977.*
>
> *b. However, CPR 39.4 recognises that orders for anonymity may be made. A number of competing rights are potentially at stake:*
>
> > *i. Courts can give effect to the rights of parties and witnesses who may be at "real and immediate risk of death" or a real risk of inhuman or degrading treatment if their identity is disclosed, engaging articles 2 and 3 of the ECHR. 8*
> >
> > *ii. A person's private life may also be affected by court proceedings, engaging article 8 of the ECHR.*
> >
> > *iii. The common law rights of the public and press to know about court proceedings are also protected by article 10 of the ECHR. See for example, In re Guardian News and Media Ltd [2010] UKSC 1; [2010] 2 AC 697 at [67], in which the applicant media organisations applied to set aside anonymity orders made by the administrative court of the QBD. Granting the application, Lord Rodger of Earlsferry explained the particular*

importance of the media knowing the names of parties, in a passage now frequently cited in open justice cases:

> *"'What's in a name?' 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people."*

c. The High Court's inherent jurisdiction to restrain publicity is the vehicle by which the court can balance these competing rights. An "intense focus" on the comparative importance of the specific rights being claimed is required: In Re S (A Child) (above) at [17].

d. Section 12 of the Human Rights Act 1998 also requires the Court to have particular regard to the importance of freedom of expression; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code.'

Hearings involving children

4.42 As children are protected parties under CPR 21.2(2)-(3), claims for misuse of private information (as with any other civil claim) must be brought through a litigation friend unless the court orders otherwise. In cases involving the children of celebrities, the norm is to conduct the hearing in public, with the names of the children also being recorded in the public judgment: see, e.g., ***Weller & Ors v Associated Newspapers Limited*** **[2016] 1 WLR 1541** (regarding photographs of Paul Weller's children); and ***Murray v Express Newspapers*** **[2009] Ch 481** (regarding photographs of JK Rowling's children).

4.43 By contrast, in ***AAA v Associated Newspapers Limited*** **[2013] EWCA Civ 554** (regarding an article claiming that Boris Johnson fathered a child during an extramarital affair), the infant claimant was anonymised, and the trial was heard in private pursuant to CPR 39.2(a), (c), (d) and (e). A public judgment was delivered in that case but used private appendices. The judge did not set out the reasoning for hearing the case in private, other than that '*it was in the interests of the claimant'*: at [8]. The distinction is likely to rest on the fact that the identity of the child and her association with Johnson was not yet public information, whereas cases like ***Weller*** and ***Murray*** sought to restrain the publication of photographs of children who were already known to the public.

Anonymity for parents

4.44 In cases where the court grants anonymity to the child, this may confer anonymity to the parents, e.g., in ***CHF v The Headteacher and Governing Body of Newick Church of England Primary School*** **[2021] EWCA Civ 613**, in which serious and sensitive

allegations were made about the behaviour of a child towards another child at the school and the child's parents sought judicial review of the way that the allegations were handled. The Court of Appeal found that the original order prohibiting the publication of the child's name, address, or '*any details leading to their identification*' should be extended to provide that the parents could not be named as to do so would identify the children.

Applications for approval of infant settlements

4.45 Following ***X (A Child) v Dartford and Gravesham NHS Trust*** **[2015] EWCA Civ 96** (on appeal from the QBD), the prevailing approach is that applications for approval should be held in open court, but anonymisation granted to the parties with members of the press being free to make submissions before the anonymity order is granted.

Committal hearings

4.46 The ***Practice Direction (Committal for Contempt: Open Court)*** **[2015] 1 WLR 2195**[10] applies to all proceedings for committal for contempt of court. Paragraphs [3] and [4] emphasise the importance of the principle of open justice and the need for any derogation to be strictly necessary. Derogations from open justice should be '*scrutinised with even greater care and rigour than in the case of proceedings generally in view of the criminal or quasi-criminal nature of contempt applications*': ***EWQ v GFD*** **[2013] EWHC 3231 (QB)** at [16].

4.47 There are a tiny minority of cases which have been held in private, including ***EWQ v GFD,*** where the relevant contempt concerned the breach of an order that was designed to preserve confidentiality.

Vulnerable witnesses

4.48 In exceptional cases, KBD judges have made orders to protect witnesses giving evidence on deeply private topics or where there are fears for the safety of the witness.

4.49 In ***Depp v News Group Newspapers Ltd*** **[2020] EWHC 1618** (QB), Nichol J granted an application that part of the evidence of Amber Heard, a witness in the case, would be heard in private as it '*would not be a proportionate interference with Ms Heard's rights under Article 8 [of the ECHR] to insist that she gave evidence about them in public…*' (at [11]). The media were given access to schedules containing the information addressed in

[10] https://www.judiciary.uk/wp-content/uploads/2020/08/practice-direction-committals-for-contempt-2-2.do .pdf

private if appropriate undertakings were given, allowing the media opportunity to consider whether to oppose the application for privacy orders.

4.50 In ***Adebolajo v Ministry of Justice*** **[2017] EWHC 3568 (QB)**, the court granted anonymity to five prison officers and allowed them to give evidence from behind a screen: at [32], [34]. This was to allow the witnesses to give evidence without fear as there was some evidence that the claimant sought retribution against the officers.

Inquiries on debtor's assets

4.51 The procedure in CPR Part 71 enables judgment creditors to obtain information from the judgment debtor for the purpose of being able to better decide which method or methods of enforcement to use. Questioning is carried out by a court officer unless the court has ordered that the hearing should be before a judge: CPR 71.6(2). The examination can be highly intrusive, including the production of pay slips, bank statements, bills, etc. The court officer will ask a series of standard questions: PD 71, para 4.1, including those set out in Appendix A to the Practice Direction[11].

4.52 The presumption is that such examinations will take place in public, as per ***Adare Finance DAC v Yellowstone Capital Management SA*** **[2021] EWHC 2406** (Comm). However, documents elicited under the Part 71 procedure can only be used for the purpose of enforcement: ***Slade v Abbhi*** **[2020] EWHC 2181**.

[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/688117/ex140-eng.pdf

Chapter 5 - The Overseas Position

5.1 The table below sets out the responses from practitioners in a selection of common law jurisdictions. In order to be able to collate and compare the responses, each lawyer was asked to answer the same set of questions which were designed to elicit the position in each jurisdiction in terms of access to court lists, anonymity, restrictions on attendance at hearings and reporting, access to and restrictions for the use of court papers and the extent of any controversy in the respective jurisdictions regarding the position.

5.2 In general, parties' names were widely available in case lists across most jurisdictions, but the position on anonymisation in reporting was more varied, with restrictions in a number of jurisdictions.

5.3 In terms of attendance at hearings, in very broad terms, there were few restrictions but there was much more variation and/or restrictions in terms of what can be reported and in terms of access to documentation.

5.4 The responses to the question about whether there was any controversy regarding the system in each jurisdiction were quite broad, with criticism in Ireland, for example, from litigants who feel the system lacks transparency, although Irish practitioners were said to be broadly supportive of it and conversely with several other jurisdictions expressing concerns about lack of privacy under their respective rules.

5.5 The group found the responses from the various jurisdictions to be helpful and informative. There was some surprise about the system in Australia, in particular, that the system there was more protective of privacy than had been anticipated, with reporting restrictions, anonymisation and strict controls on access to court documents.

	1. Is there free and easy access to the Court lists with the names of the parties available (for financial proceedings)? In other words, is there any restriction on the press and public being aware of a forthcoming hearing?
Scotland	Online rolls published and displayed at court. Not all cases will appear on rolls, but any contentious hearing will certainly appear. There are no restrictions on the press and public being aware of a forthcoming hearing.
Ireland	Public access available to family court lists. Tends to be published the afternoon before they are listed. Anyone can access the lists through the court website however all parties to family law proceedings are referred to by initials and full names are never published.

California, USA	Access is very easy and available online. Actual media offices in the central courthouse in Los Angeles. As a general rule, the California Constitution permits free access to judicial proceedings on financial matters.
British Columbia, Canada	Generally, free and easy access to the court lists with names of the parties available. There are some exceptions generally pertaining to protecting spouses or children in abusive situations, criminal matters, etc. In addition to the exceptions, counsel seeking a closed courtroom for a hearing in a Family Law case may apply to the court to request a publication ban which is decided at the discretion of the presiding judge, in consideration of all of the circumstances of that particular case. Prior to the hearing of the application for a publication ban, counsel is required to give notice of the application to the press. Counsel for the press may then appear and oppose the application. The fact the press is given a "heads up" of the delicate issue that is sought to be banned from publication, can be a disincentive to apply.
Ontario, Canada	It is possible to search the court records to determine if a case has been started with the parties' names – unless it is sealed, which is unusual, or initialised, which is more common but not often done. Parties to a family law proceeding must first attend a case conference with a judge before they can bring any motions for interim relief. All case conferences and settlement conferences were held "in chambers" but now they are held either in person, or virtually but the public cannot access them. No orders can be made at a case conference or settlement conference, unless procedural and on consent. Those types of orders are not usually reported. The judge conducting the case conference, or the settlement conference cannot be the trial judge for the same matter. The briefs filed by the parties for such conferences do not form part of the official court record for the matter, and are not available to the public, as they are usually in the nature of settlement briefs.
Australia	The Federal Circuit and Family Court of Australia (FCFCOA) publishes, in electronic form, the matters that are listed each day (FCFCOA Daily Lists) (meaning listed, for the next single day only) in the Courts/Registries around the country. The case names use the true names of the parties and can be accessed publicly. These lists are published daily and not available after the published day. There are no consolidated lists that can be searched by the public, for example to see "if person X is involved in proceedings".
New Zealand	Family Court lists are displayed outside the Family Court rooms. The information on the court list will include identifying information and it is subject to the same reporting restrictions as information produced at a hearing.

	2. Are the parties' names always used in reporting or are there circumstances in which they remain anonymous?
Scotland	General presumption that parties' names should not be anonymised. It is usually only at opinion (judgment) stage that there is any anonymisation. Can easily find out parties' names by looking online and would look at rolls to check the names of the parties on the date of the hearing. It is rare for cases to be anonymised / for there to be reporting restrictions at preliminary stage.
Ireland	Full names are never published in Irish family law cases. In Ireland, family law proceedings are dealt with in private. This is known as the "in-camera rule". The purpose of the in-camera rule is to preserve the parties' and children's identities in family law proceedings.
California, USA	The names are almost always used although some cases where only initials are used. With good cause, the parties can ask that case names be anonymous, but this is generally restricted to cases involving domestic violence and/or sensitive issues about children. Initials are more often used in dependency or certain other matters where the names of minor children are involved. There are ways around this with bifurcated Judgments (a very basic and substantively empty Judgment may be filed and a substantive one is signed by parties and counsel, but not submitted to the court absent the need to enforce or modify). With regard to enforcement or modification efforts, advance notice is given in order to make efforts at resolution or create an alternative, and less public, means of presenting any issues. The standard is to use party initials in published appellate opinions.
British Columbia, Canada	The parties' names are generally used in reporting but there are exceptions where a publication ban can be sought (e.g. to initialise the names of children). In some cases, judges have on their own accord or on the request of a lawyer appearing made an order that the names of the parties (parents) and the children involved are to be henceforth identified on court documents by initials but this is not as common as it once was.
Ontario, Canada	All cases are opened in the parties' names. A case can only be sealed in unusual circumstances, and often after notice to the media. The more accessible option is to initialise the parties' names, and this is often done if there are issues which could adversely affect minor children (such allegations of abuse by one parent, or the danger that the children could be the target of rumours etc. among their peers).

	The parties' residential addresses, and identifying information, such as social insurance numbers, tax or banking information is usually redacted from any court decision before it is reported. Surnames are used in court decisions unless it is sealed or initialised.
Australia	Cases cannot be reported "publicly" as to do so would potentially breach s121 of the Commonwealth Family Law Act and because it has always existed in that form, Australian media do not seek to report proceedings as they cannot get to the personalities in any event. There is not a culture of reporting family cases. Judgment is published at the conclusion of each defended case, but it is anonymised both as to the names of the parties and in respect of any facts that would identify the parties before publication (occupation and other details). Therefore, all parties have good protection against breaches of their privacy, but also the transparency of the Court system is maintained. This has been the process now for many years and has worked very well. There is no criticism of this.
New Zealand	Judgments about financial matters are often reported in the names of the parties. Judgments involving children are usually anonymised. Under s11B and 11C of The Family Court Act 1980 a person may not publish a report of proceedings that includes 'identifying information' where proceedings involve a vulnerable person or a person under the age of 18. Identifying information includes "information relating to proceedings that includes any name or particulars likely to lead to the identification of any of the following persons: a party to proceedings, an applicant in the proceedings, the person who is the subject of the proceedings, a person who is related to or associated with a person referred to previously, or who may in any other way be concerned in the matter to which proceedings relate e.g. a support person for a party. Comments were made by the Judge in ***Miller v Carey*** **[2015] NZHC 887** relating to the developing practice of 'erring on the side of caution and anonymising judgments where arguably there is no caused to do so', which has led to confusion.

	3. Are there any restrictions as to who is permitted to attend any hearing?

Scotland	Highly unusual for the court to restrict who attends a hearing. Court has limited discretionary power to restrict attendance (bar matters that exclusively relate to public children matters like adoption). However, the right to attend does not equate to the right to publish what happened at the hearing. Press routinely attend cases where there is anyone with profile and will make notes but usually leave reporting until there is a contested hearing, when they can get photos and/or a published opinion.
Ireland	There are restrictions. Prior to 2013, only the parties, their lawyers and any other professionals directly involved could be present at any stage during a family law hearing. Legislation was introduced in 2013 which amended the in-camera rule in family law proceedings to allow journalists and representatives of the press to attend court hearings. This change in the law enables the media, researchers, academics and legal professionals to examine the law in practice in this area.
California, USA	Absent the existence of domestic violence restraining orders, generally not. That discretion, however, vests with the court. There are code sections, for example, which give the court discretion to clear the courtroom of persons not involved in a matter if the matter is related to parentage rather than divorce, again due to issues related largely to the privacy rights of the children. Even in situations where we may have retained a private judge for a hearing (which may be held in our conference rooms, for example) if any member of the public has notice of or hears about the pending hearing technically, we must make that hearing open to the public. Only an issue where it is high profile case.
British Columbia, Canada	The public is permitted into the hearings and can walk freely in or out of the courtrooms.
Ontario, Canada	Not if it is a trial or a motion for interim relief. Judges do sometimes make orders restricting the public from attending, if there are allegations which will be reviewed which could adversely affect minor children. The public cannot attend case conferences or settlement conferences. If the motion or trial is being held virtually it is not clear how the public could attend as the information required to access the hearing virtually is provided

	through "Caselines" which is the electronic filing system the parties (or their lawyers) use to deliver material to the court for use at the hearing.
Australia	All family law cases take place in open court however the Judge has the power to order limitations on persons who can/cannot attend. This is not directed, generally, at members of the public per se, but rather the power is used if there are "support" people who may be intimidatory to the other party or for some other reason their attendance is considered prejudicial. The Court may, of its own motion, or on the application of either party may order a specified person cannot be present in court during the proceedings or part of the proceedings.
New Zealand	Accredited news media have an entitlement to attend a hearing under the Care of Children Act 2004. The Ministry of Justice are responsible for accrediting media. Judge retains a right to exclude an accredited media representative and indeed any other person entitled to attend for some of all a hearing or to hold a hearing in private (s137(6)).

	4. Are there restrictions on what can be reported from within the hearing eg confidential commercially sensitive information, names and ages of children etc
Scotland	In financial remedy proceedings, anything can be reported, unless restrictions are applied. There may be issues about when things can be reported because of the terms of the 1926 Act. There is scope in A v BBC to restrict publication of commercially sensitive information. However, bar is very high – 'commercially ruinous'. If there are children, the norm would be to apply for a Children and Young Persons (Scotland) Act 1937 order prohibiting the identification of children (name, address, school, information regarding identity if under 18, photos), but is often functionless - if the parents are named, the children can easily be identified in practical terms.
Ireland	There are strict conditions and restrictions. The reporting of child and family law cases is permitted; however, journalists and reporters have a duty of care to protect the anonymity of the parties. Legislation prohibits the publication of information that is likely to identify the parties of family law/children proceedings to the public. This generally means that

	names of people and or businesses, geographic references, names of schools etc cannot be reported. It is at the Judge's discretion to exclude the press or to impose restrictions on reporting some of the evidence.
California, USA	Not generally, although again the court has means available to it to keep certain information out of the record based on a showing of danger to the children, etc. Requests can be made with regard to the redaction of identifying information in order to prevent ID theft, etc. Parties can and often do enter into protective orders (agreements for confidentiality) in the context of discovery. This is most common when third parties are involved including community businesses and employers. Courts routinely accept and issue stipulated protective orders. These orders require that the parties only use the documents provided for the case, and that they seek to file any such documents needed in court under seal. Whether the court will grant a sealing order remains up to the court. However, family courts routinely permit documents to be redacted to the extent that is needed to protect the parties from identity theft, and thus all exhibits are typically redacted for bank account numbers, addresses, and social security numbers. The courts have neither the staffing nor budget to manage any particular special processes regarding the protection of private information. In the normal course that would be left to the parties, through counsel or on their own, to take whatever steps they deem appropriate to keep certain information private. Such public dissemination may also be wielded like a sword as leverage against one spouse or the other.
British Columbia, Canada	Only if there has been a publication ban ordered.
Ontario, Canada	Names, ages of children, where they attend school, residential addresses, social insurance numbers and tax information. It is difficult to have a file sealed because of commercially sensitive information, although it has been done in the past.
Australia	Any publication, in particular one identifying children, is against Australian culture and does not happen. If it did, action would be taken by the appropriate authority (the Commonwealth Attorney General). Likewise, commercially sensitive material is not allowed to be published (s121(3)).

New Zealand	S11B of the Family Court Act 1980 sets out that 'any person may publish a report of proceedings in the Family Court'. S11B(3) sets out the exceptions that a person may not, without leave of the court, publish a report of proceedings in the Family Court that includes identifying information where a person under the age of 18 years is the subject of, an applicant, a party to or referred to in proceedings. The same applies in relation to vulnerable persons. The court may grant leave for the above to be published, with or without attached conditions. There are restrictions on ability to publish details that would identify the parties. As a result, the press almost never attend hearings. There are desks in Family Courts across the nation labelled 'media' which are almost always empty. The use of cameras and sound-recorders is at the discretion of the presiding judge.

	5. Are the press/legal bloggers able to have access to any of the Court papers? If so, which ones and how are any costs of this process met?
Scotland	Anything that takes place in open court is available for press reporting and may be reported unless it is prohibited or restricted by order of the court or by law. However, this is always at the discretion of the court. In the past, the reality was that anyone with a press pass was able to go to the court office and peruse the process but there is now a general feeling that the court offices are less willing to hand documents over than they used to be. There is a struggle to get clarity from the court offices about exactly what they would hand over/not hand over and how to try and prevent them handing over material. More work is required on this at a practical level. The media have no preferential legal rights to information, but it is accepted that special facilities should be accorded to them to help ensure fair, accurate and timely court reporting. Court staff should assist journalists to achieve this end. This means that journalists will sometimes have access to more information than members of the general public. Anything that takes place in open court is available for press reporting and may be reported unless it is prohibited or restricted by an order or by law. If a journalist is asking for information about a matter that was heard in open court, it is likely that this information can be provided, even if it would not be appropriate to tell a member of the general public. The principles of open justice must be balanced with data protection and privacy legislation. The underlying principle for providing information to journalists is the need to ensure accurate court reporting. Disclosure should be proportionate and

	considerable care must be taken when releasing information about third parties and matters of a personal nature.
Ireland	No – they are not entitled to court papers.
California, USA	Yes - these are available to any members of the public. That cost, which is nominal, is the obligation of the person wishing to have access. Anyone may walk into the courthouse, pay a "per page" fee for copies, and walk out with copies of any document filed in a non-parentage case. As of today, family law pleadings are not available online. To view the pleadings, you have to physically go to the courthouse and request and review the case file. It is not clear how a file review will happen as files move online and when there are no longer hard copies.
British Columbia, Canada	Only a lawyer can search the court registry files in Family Law cases and obtain Pleadings, Notices of Applications, Affidavits, Reasons for Judgement signed by the presiding judge, or the Reasons for Judgement of Appeals justices, copies of appeal materials, etc. However, a member of the public can hire a lawyer completely unrelated to the case, to search the court files (e.g. notorious case a number of years ago involving owner of an NHL hockey team - press hired own lawyers who searched the court registry files to assist them in their reporting). The person searching the court registry file is required to pay an amount mandated by the Registry, especially if a copy is requested although now judgments are generally published on-line.
Ontario, Canada	The public can access the court files which are open (i.e. the pleadings and sworn financial statements in family law matters), material filed for a motion, documents entered as exhibits at a trial) by paying a 'per page' fee. Before the pandemic it was common in a family law matter for there to be reporters present if a particularly notorious matter was being heard in open court (usually as a result of one of the parties or one of the lawyers alerting the media that the matter was to be heard) but it is much less common now, given how difficult it has become to access the virtual hearings, and to get into the court house itself.
Australia	No - inspection of the Court file or documents for example produced on subpoena to the court are very strictly controlled by the court. Copies are only released in very limited circumstances (usually, to the lawyers only upon receipt of an undertaking not to disseminate any copies anywhere, including to clients).

	The information contained within the documents can be discussed freely with the client of course. Parties to proceedings, or other persons in possession of court papers are also caught by s 121 as well, so there can be no legitimate dissemination of information.
New Zealand	Media need to be present in the courtroom at the time of the proceedings to obtain details of what happened in court. If media are not in court at the time of proceedings, they will need to request access to the court record to obtain details of what happened in court. There are fees payable for requesting access to search or inspect court documents.

	6. Are there any restrictions as to the use of these documents?
Scotland	Only if restricted by the court, or if one of the general prohibitions applies (none of which apply in relation to financial remedy matters). Anything that takes place in open court is made public and may be reported unless prohibited or restricted by court or law. - based on common law precedent dating back to Richardson v Wilson (1879) 7 R 237, per Lord President Inglis at 241. - documents can be referred to only to the extent that they are used in open court. - this does not include proceedings that take place in private.
Ireland	There is no entitlement to court papers.
California, USA	No - other than in the general sense of libel or slander. However, once filed in a public document, and often under penalty of perjury, they may be used by anyone for really any purpose including posting it online.
British Columbia, Canada	There are generally no restrictions as to the use of these documents.

Ontario, Canada	There are restrictions under the Court Rules on parties using material produced in one court file in another.
Australia	Yes, the restriction is absolute. It is also common within proceedings that if confidential information is being provided/exchanged, or produced by non-parties pursuant to subpoena, that there will be an insistence by the concerned person, that the relevant people enter into a Non-Disclosure Agreement before information is provided. If there is a dispute as to this, the courts will almost always side with the person seeking such protection and will restrict the provision of information to the lawyers/commercial or other professional advisors but not allow publication to any other person.
New Zealand	Subject to the same restrictions in relation to the publication of 'identifying information' as set out above.

	7. In general, is there any controversy as to the system used in your jurisdiction?
Scotland	Generally not, but Scotland has fewer defended cases and maybe also less interest in them. See the Elton John publication- as the injunctions granted in England and Wales were not effective in Scotland his name was published in Scotland.
Ireland	There is a regular complaint (generally from people who have gone through the court process) that the Irish family law system does its business behind closed doors and lacks any real transparency. Often it will be the same group of people who have a difficulty with the in-camera rule and the accompanying anonymity – for instance unmarried fathers, who have felt they have received a very raw deal from the Irish family law system.
California, USA	Yes. Many attorneys and litigants in family law believe that more privacy should be afforded. Many people think that the financial details about divorcing couples should remain private, as there is no good reason for third parties to have access to such records.
British Columbia, Canada	Generally, not.

Ontario, Canada	Many Ontario family law lawyers would agree that it would be better if the sworn financial statements and disclosure lists which family law litigants must produce and file with the court could be sealed. A number of clients express concern that their private financial information is in the public record.
Australia	No - the culture is protective of privacy, while continuing to balance well the need to satisfy each party's obligation to provide full and frank disclosure as well as ensuring transparency in procedure and decision-making.
New Zealand	This was hotly debated, and practitioners argued against it but Parliament ignored the arguments and allowed the media to attend Family Court hearings and to report on its cases.

	8. Any further comments you wish to add?
Scotland	Scotland starts from open justice and the court is only able to depart from that if you can bring yourself within the parameters of the particular powers given to the court by statute, common law or via reading down etc. English proceedings seem to start from the opposite place: that the court can do anything it wants, unless constrained, and with a historic expectation that there would be privacy.
Ireland	On occasions, the press has strayed outside of the restrictions, generally this has been inadvertent and more a case of ignorance than a deliberate attempt to circumvent the restrictions. On such occasions, the press has been taken to task and invariably have been deeply contrite. The in-camera rule is far from perfect. However, most family law practitioners in Ireland are broadly supportive of it.
California, USA	In certain locations (Los Angeles, New York, London, etc.) there is such a high degree of interest in the personal lives of others, in particular if those "others" are higher profile. Attorneys do all that they can to keep everyone's private information out of the public record, however if a matter is litigated that may be impossible. There are certain "standard" confidentiality agreements that are often signed; however it is up the parties to enforce the terms as the courts will rarely do so. These kinds of records and information are much harder to access in jurisdictions such as New York, and many practitioners wish that California would follow suit.

	The US / California system is too open, and that the goals of open court proceedings (judicial oversight) could be accomplished while better protecting the litigants' privacy.
Ontario, Canada	Much has changed in Province of Ontario in relation to the administration of justice since the Covid-19 pandemic. Many proceedings which were open when they were heard in person have become private because they moved to being conducted virtually via Zoom.
Australia	The principles which are long established in respect of physical documents and court appearances do not apply equally in respect of electronic documents and proceedings. Publication of Family Law proceedings is a serious matter which the Court will address and is punishable by imprisonment for a term of up to one year.
New Zealand	Practitioners argued against media being allowed to attend Family Court hearings at the time this was being debated. Parliament ignored these arguments and permitted the media at family hearings. However, due to restrictions on the ability of the media to publish identifying details of the parties, the media rarely attend.

Chapter 6 - The Survey: An Overview

6.1 It was decided that the views of as many stakeholders and other interested parties as possible should be obtained. This was performed by way of a survey in June/July 2022 which was sent to the following:

- All FRC judges at all levels from High Court Judge to Deputy District Judge
- FRC Counsel via the FLBA
- FRC solicitors through IAFL and all Heads of Dept of the firms ranked in Chambers & Partners
- Media/Press through Media Lawyers Association, Society of Editors and general e-mail for News Media Association
- Family Law Mediators and Arbitrators through IFLA, Chartered Institute of Arbitrators and Family Mediation Council
- Expert Witnesses through Academy of Experts
- Others including Pension Lawyers, STEP for trustees and the Incorporated Council of Law Reporting.

What was covered in the survey?

6.2 The survey asked questions covering the following issues:

- Attendance at financial remedy hearings, including who should be entitled to attend, what hearings they should be allowed to attend and whether there should be exceptions;
- The media's access to documents from the proceedings, including whether they should be granted access to such documents and, if so, to which documents, how the documentation should be requested and provided, whether the court should have to give permission and who should bear the costs of applying for/providing documents;
- The information which the media should be allowed to report;
- Whether there is a risk that reporting may focus on certain groups (celebrities, high net worth individuals) rather than the work of the financial remedy courts as a whole;
- The anonymisation of judgments;
- The privacy to which parties to financial remedy proceedings should be entitled; and
- Public awareness of public confidence in and transparency in the financial remedy courts.

Responses Received

6.3 There were 585 responses in total. The average time taken to complete the survey (which consisted of 45 questions) was 20 minutes. Of those who responded:

- 77% (452) were lawyers;
- 184 were either salaried or fee-paid judges (with some crossover between part-time judges and lawyers among the participants); and
- 4 were journalists.

6.4 Of the lawyers who responded:

- 63% (288) were solicitors, 29% (135) were barristers, 2% (11) were legal executives and 5% (24) identified as 'other'.

- 38% (169) were part of an organisation (including firms/chambers) with more than 20 financial remedy practitioners, 23% (100) were part of an organisation with fewer than 5 financial remedy practitioners, 22% (96) were part of an organisation with 5-10 financial remedy practitioners and 18% (78) were part of an organisation with 10-20 financial remedy practitioners.

- Financial remedy work made up more than 75% of the caseload of 46% (207) of those who responded. 31% (139) spend 50-75% of their time on financial remedy work, 11% (50) spend 25-50% of their time on financial remedy work and 12% (54) spend less than 25% of their time on financial remedy work.

6.5 Of the judges who responded:

- 12 were High Court judges (plus 7 Deputies), 20 were Circuit Judges (plus 16 Recorders), 71 were District Judges (plus 65 Deputies) and 1 was a Magistrate.

- 26% (50) had a caseload involving 10-20% financial remedy work, 24% (46) had a caseload involving over 30% financial remedy work, 23% (45) had a caseload involving 20-30% financial remedy work, 15% (29) had a caseload involving 5-10% financial remedy work, and 11% (22) had a caseload involving less than 5% financial remedy work.

6.6 In terms of the professional experience of the survey's participants:

- 179 had most experience with cases worth £1m to £5m, 148 had most experience with cases worth £500k to £1m, 80 had most experience with cases worth £0 to £500k, 68 had most experience with cases worth £5m to £10m, 53 had most experience with cases worth £10m to £25m, and 38 had most experience with cases worth £25m or more.

A Summary of the Responses

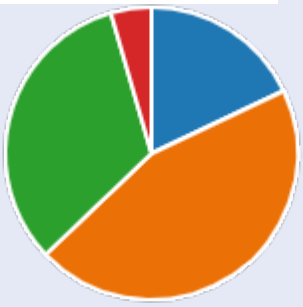
1.
Who should be entitled to attend financial remedy hearings?

Parties and legal representatives only	504
Duly accredited members of news gathering and reporting organisations (“the media”)	276
Legal Bloggers	120
General public	47
Other	17

2.
If you answered 'Other' to Q1 please specify
26
Responses

3.
If you consider individuals other than the parties and their legal representatives should be permitted to attend, which hearings should this apply to:

All hearings	60
All hearings except FDR	150
Final hearings only	109
Other	15



4.
If you answered 'Other' to Question 3 please specify:
20
Responses

5.
Should there be any exceptions (i.e. for attendees to be added / excluded from particular hearings)?

Yes	302
No	284

6.
If you answered 'Yes' to question 5 please specify:
288
Responses

7.
If you have any general comments on attendance at hearings, please provide:
187
Responses

8.
In principle, do you consider media and/or legal bloggers should be granted access to documents from the proceedings?

Yes - go to question 9	171
No - if this is your answer skip to question 16	409
Other	6

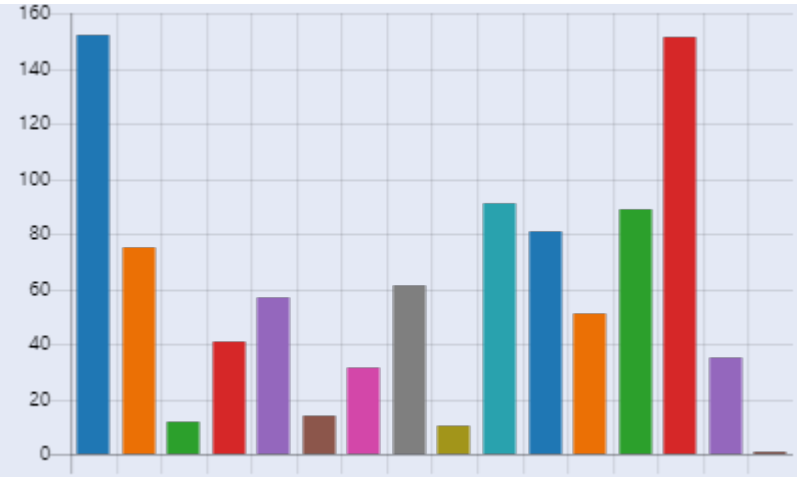
9.
Should media and/or legal bloggers be granted access to documents from the proceedings only if they have attended the relevant hearing(s):

- Yes 144
- No 117

10.
Which of the following documents should media and/or legal bloggers be granted access (multiple answers permitted):

Position Statements and other documents produced by advocates	152
Witness statements	75
Forms E with enclosures	12
Forms E without enclosures	41
First Appointment documents (including ES1 & ES2)	57
Replies to Questionnaires with enclosures	14
Replies to Questionnaires without enclosures	31
Experts Reports	61
Voluntary Financial Disclosure	10
Transcripts of submissions	91
Transcripts of oral evidence	81
Forms D81 and Consent Orders	51
Interim Orders	89
Final Order	151

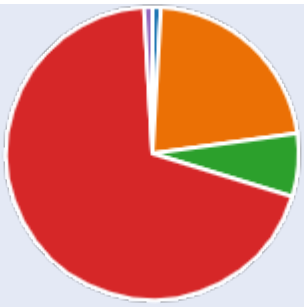
Other - please specify in question 11	35
Other	1



11.
If answered 'Other' to Question 10 please specify:
40
Responses

12.
How should such information be requested and provided?

From the party who owns/controls such documents, no notice to other parties	2
From the party who owns/controls such documents, on notice to all parties	47
From the court, without notice to parties	15
From the court, with notice to parties	149
Other	2



13.
Should permission of the court be a necessary condition to the release of documents?

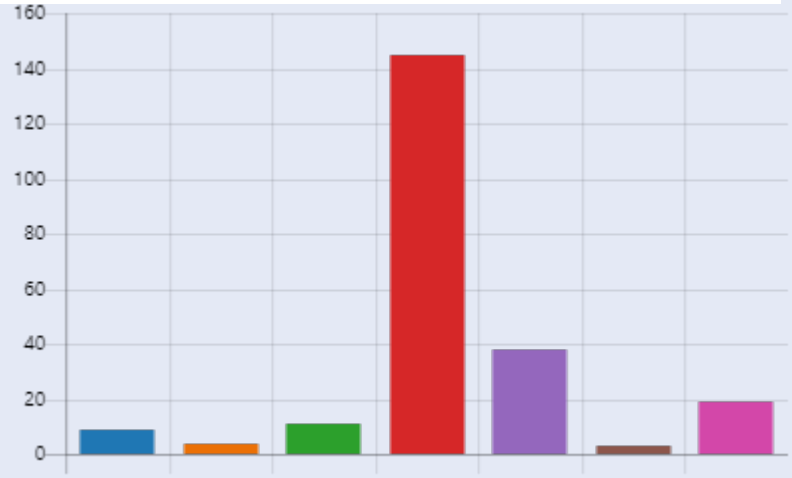
Yes	169

No 65

14.
If answered 'Yes' to question 13, on what criteria and by what process
133

15.
Who should bear the costs of the expense of this this exercise (sharing documentation and any associated court applications)?

The party who owns/controls the relevant documents	9
The parties jointly	4
The unsuccessful party	11
The member of the media and/or legal blogger	145
No order as to costs	38
Costs reserved	3
Costs in the application	19



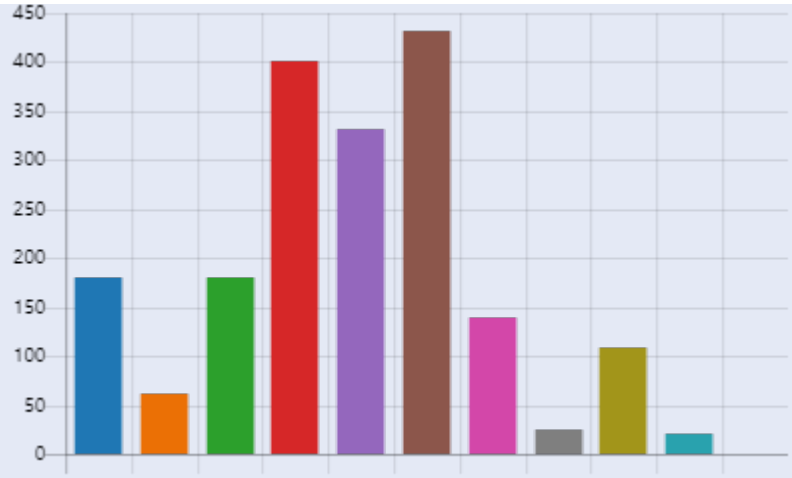
16.
If you have any general comments on access to documents (including in terms of the safeguarding, storage and destruction of documents), please provide:
196

Responses

17.

What information should the media and press and/or legal bloggers be permitted to report?

Names of the parties	181
Photographs of the parties	61
Location (county / city) of the parties	179
A summary of factual issues	400
A summary of evidential issues	331
A summary of legal issues	432
Quotations and summaries from from documents , evidence, submissions etc - please specify in Question 18	140
Everything	24
None of the above	108
Other - please specify in Question 19	21
Other	1

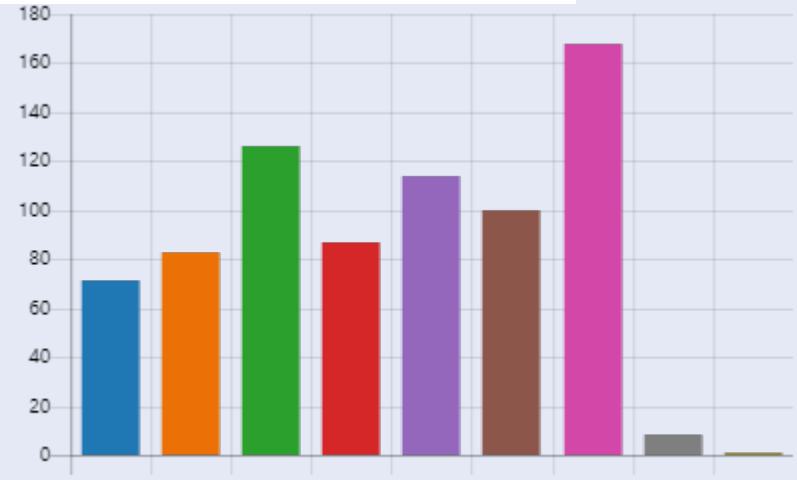


18.

If answered 'Quotations and Summaries' in question 17 which of the following would you include

documents in proceedings	71
interim orders	83
final order	126
oral evidence	87
submissions of advocates	114
comments of the court	100
judgments	168
Other - please specify in question 19	8

Other 1



19.
If answered 'Other' to question 17 or 18 please specify:
36
Responses

20.
Do you agree that there is a risk that greater reporting would focus on certain groups (High Net Worth and/or litigants with a public profile) rather than illuminating the work of the financial remedy courts as a whole: 1 being strongly agree and 5 being wholly disagree
586
Responses
1.62
Average Number

21.
If you have any general comments on reporting, please provide:
183
Responses

22.
Do you consider the default position should be that judgments are anonymised?
Yes 451
No 98
Maybe 37

23.
If answered 'Maybe' to question 22 please add any reasons
37
Responses
Latest Responses

24.
If you want to set out any points in relation to anonymisation please do so:
137
Responses

25.
Do you agree that parties to financial remedy proceedings should be entitled to ***privacy*** (i.e. that information about a party's financial position, health, relationship status, children, inheritance prospects etc should remain private)? 1 being strongly agree and 5 being wholly disagree
586
Responses
1.77
Average Number

26.
Please provide reasons for your answer to Question 24
259
Responses

27.
Do you perceive there to be a lack of ***public awareness*** in the work of the Financial Remedy Courts?

Yes	299
No	125
Maybe	162

28.
If Yes, how should this should be measured and addressed
257
Responses

29.
Do you perceive there to be a lack of ***public confidence*** in the work of the financial remedy courts?

Yes	141
No	283
Maybe	162

30.
If Yes, to question 29 how should this should be measured and addressed
152
Responses

31.
Do you perceive there to be a lack of ***transparency*** in the work of the financial remedy courts?

Yes	182
No	247
Maybe	157

32.
If YES, how should this be measured and addressed:
149
Responses

33.
Please provide any other comments on the matters raised in this consultation and transparency within the Financial Remedies Court
124
Responses
Latest Responses

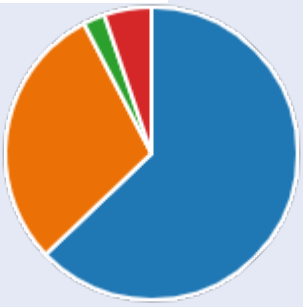
34.
Are you a Lawyer? (For this purpose a full time judge is NOT a lawyer)

Yes - go to Question 35	452
No - go to Question 39 if you are a judge or 42 if not a judge	131
Other	3

35.
If you are a lawyer please specify which of the following best describes your role:

Solicitor	288
Barrister	135
Legal Executive	11

Other 24



36.
If you are a lawyer how many Financial Remedy Practitioners are there within your organisation/firm/chambers?

Less than 5 100
5 to 10 96
10 to 20 78
More than 20 169

37.
What proportion of your caseload / work involves financial remedy work?

Less than 25% 54
25-50% 50
50-75% 139
More than 75% 207

38.
What proportion of your financial remedy work is made up of matters which have proceeded to at least one hearing after issue of Form A?

Less than 25%	80
25-50%	102
50-75%	116
More than 75%	145

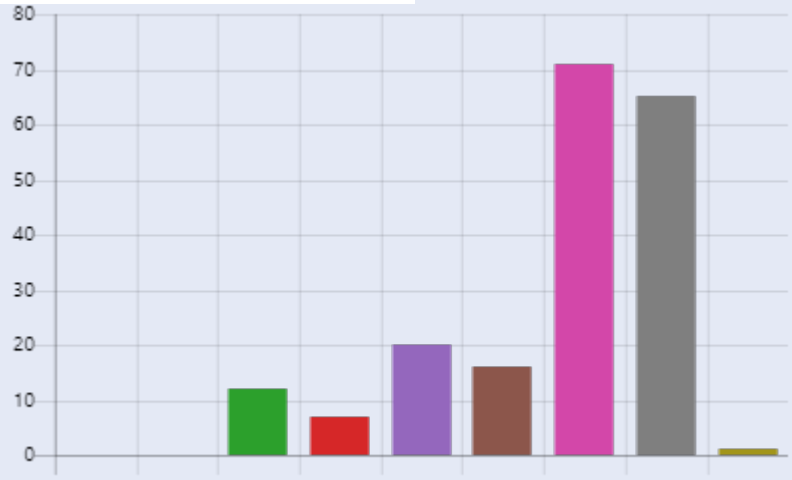
39.
Are you a salaried or fee-paid **judge**?

Yes	184
No - go to question 42	365

40.
If you are a judge, please specify which level:

Supreme Court	0
Court of Appeal	0
High Court	12
Deputy High Court Judge	7
Circuit Judge	20
Recorder	16
District Judge	71
Deputy District Judge	65

Magistrate 1



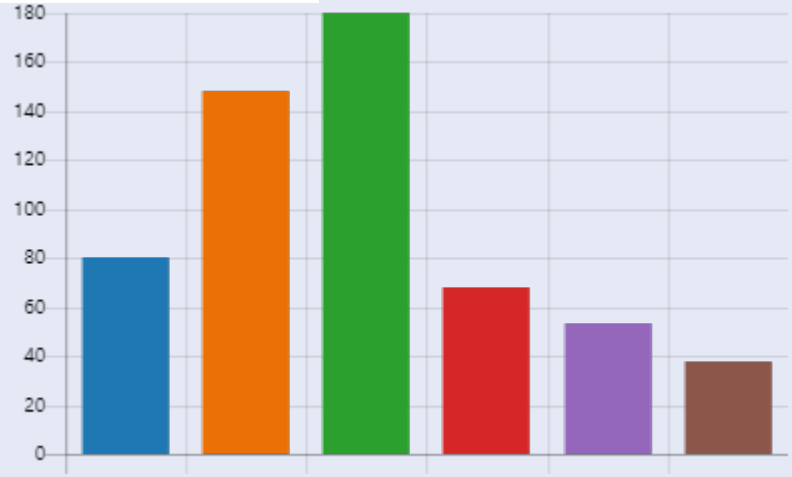
41.
If you are a Judge what percentage of your work is made up of Financial Remedy Work?

Less than 5% 22
5-10% 29
10-20% 50
20-30% 45
Over 30% 46

42.
For **non-lawyers**, please specify your role and or connection to Financial Remedy work (if any):
33
Responses

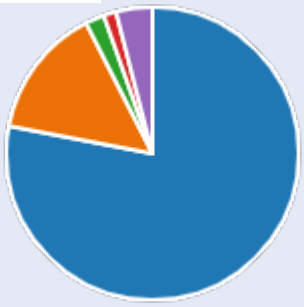
43.
Where you have been involved in financial remedy work, please indicate into which category below the majority of your experience falls

£0 to £500,000	80
£500,000 to £1m	148
£1m to £5m	180
£5m to £10m	68
£10m to £25m	53
£25m+	38



44.
How many Financial Remedy cases have you been involved with in the past 36 months which have been attended by a journalist or legal blogger:

None	447
1-3	83
4-5	12
5-10	8
10 or more	23



Chapter 7 - Should transparency apply to out of court settlements?

7.1 There is a presumption that out of court settlements, by whatever means, avoid the scrutiny that would otherwise occur with transparency. In short, we recommend that this is an appropriate presumption. If parties reach a final settlement before the Court determines a case, the parties' right to privacy should remain. In coming to this conclusion, we considered what publicity would achieve where the parties agree terms of settlement and thought that publicity may result in an incorrect or distorted view to the public, where the Court purposefully has not exercised its discretion, beyond approving a consent order.

7.2 We therefore recommend that the parties should be able to remain anonymous in circumstances where they agree terms of settlement. There is a wide spectrum of circumstances where an "out of court" settlement can be agreed; from an agreement that has never reached the Court at all, to one that is agreed at the doors of the court at a final hearing and therefore still "out of court". It includes agreements reached after issuing an application, or at an FDR, or any other interlocutory hearing in between issuing and final determination.

7.3 There is concern that this approach favours the wealthier litigants as they are the ones that are more able to finance private FDRs and arbitrations. The group accept this to be the case, but we are not in a position to make any recommendations to alter that position. It is simply a point that we have to accept, even though a 'two tier' system is unattractive.

7.3 Dealing with the three scenarios:

Settlement pre issue

7.4 This may be where the parties have deliberately opted out of the Court process (possibly partly motivated by a desire to ensure a degree of, if not total, privacy) and utilised an out of court dispute resolution process such as a private FDR, mediation, or arbitration. We considered what, if anything, needs to be 'reported' of the decision of the Judge, who approves the resulting consent order as a paper exercise, which would almost always now be through the financial remedy consent order portal. It is accepted that the exercise being performed by the Judge is not simply rubber stamping the agreement, and a judicial consideration is being made, but not of such significance that justifies any requirement for transparency.

7.5 Given the proposed data capture with the new form D81s, through which it is intended that an overall view of the types of orders that are made in general, will be obtained, we consider the public interest in such a case is only in understanding the sorts of orders a judge may approve, and the way in which they exercise their discretion. We recommend that this

information should be harvested by the D81 forms, and there is no public interest that we can identify in the names of parties, or their details being made public. Many responding to our survey thought that if there was a risk of publicity, then this may encourage settlement. We recommend that a balance needs to be struck but at this stage of the proceedings, it is in favour of privacy.

Settlement post issue but pre a final hearing

7.6 This may be where the parties have come to an agreement having attended an FDR hearing and following the judicial indication or private FDR evaluation. It is, in our opinion, a principle that FDRs must remain 'private' in order to attract the best chance of settlement, due to the obvious importance of cases resolving at this stage if possible.

7.7 There are good reasons to consider that there should not be publication of too much information prior to the final decision of the Court. We consider there exists the duty of the Court to effect robust case management, perhaps to give 'indications' or to narrow issues as the case proceeds through the interim stages, but that these may differ from the final decision in the Court's ultimate judgment after hearing evidence. The indication is a duty of active case management and the Court's quasi-inquisitorial role in family proceedings, (this being a difference from proceedings in the other divisions). There is no objective determination by the Court where this occurs.

7.8 Documents, including without prejudice offers and without prejudice position statements, are normally available at an FDR. The case may not settle on the day of the FDR hearing but may settle 2 or 3 weeks later. There would be a danger of without prejudice negotiations or without prejudice positions becoming 'open' via the press. Whilst counsels' position statements should be provided to observers, as we consider that those are obvious documents that people should be allowed to see, that would not be the case at an FDR or private FDR at which reporters do not have the ability to attend. Transparency may undermine the efficiency and effectiveness of this negotiation process.

Settlement at the doors of the court 'on the day' or just before the final hearing takes place

7.9 We consider that there are good reasons to consider that there should not be publication of too much information prior to the final decision of the Court. Any agreement reached between the parties may have been achieved for a variety of motives e.g. wanting to avoid cross examination, not being in a financial position to continue, a costs / benefit analysis. When a Court is asked to approve such an agreement, the Judge is not saying 'you have come to exactly the outcome that I was going to order', the Judge is saying, if approved, 'your agreement falls in the range of orders that the court might make, and is fair and

reasonable'. It is likely that the agreement does not represent what the court would have ordered after a contested hearing, but provided the Court approves the order, that does not matter. This approval process is not going to help the wider public understand how the Judge, approving the consent order, exercised his or her discretion. It will have very little use beyond the parties.

Chapter 8 - Listing of FRC Cases

Present position

8.1 There is a significant divergence at present on how FRC cases appear in public lists. If the case is to be heard by any judge other than a High Court Judge then in general it will appear on CourtServe, and on the public list in the Court building with the surnames of the parties. If it is listed in the RCJ/before a High Court Judge (including Deputy High Court Judges) then the case will be listed anonymously by case number only.

8.2 It has not been possible to unravel how the present position has been reached. It is assumed that the parties have always been named in the Family Court as Financial Remedy proceedings were 'ancillary' to the divorce suit itself. It has aways been the position, and remains so today, that divorce cases are not listed anonymously, and consequently it would follow that other ancillary matters would also be listed openly.

8.3 The basis upon which the names are withheld in the RCJ lists is not clear. The impact of it is clear though, as it means that reporters are not able to easily identify those cases which they may wish to report. This causes reporters to have to cover many courts in an effort to try to locate the individuals that they are seeking. In this day and age, that is not a cost that reporters can easily afford.

Should the listing be standardised between the Family Court and the RCJ?

8.4 It is difficult (impossible?) to justify having one rule in the Family Court up and down the country and a different one in the RCJ for the cases which more frequently involve those with significant assets / high profile parties. It cannot be appropriate that the size of the available pot is the deciding factor as to whether a case is listed anonymously or not.

8.5 On the basis that it is important to be more open, then it is not appropriate to even consider the option of the Family Court following the example of the RCJ and listing cases anonymously. Accordingly, we recommend that all cases, wherever they are being heard should be publicly listed with the full names of the individuals concerned. The lists should be available as much in advance as possible, although we recognise the practical problems in producing lists much more than 24 hours in advance, especially where cases do settle. The only exception would be those very rare cases where the security of a litigant would be imperilled by publishing the name.

8.6 The fact that reporters will know where and when a particular case is taking place does not in itself mean that it will be any more 'open' than any case that they manage to stumble upon at present. It will still be a matter for the Court to consider any applications to be able to

report on the case openly without anonymisation. The change in ensuring that all cases are listed by name will simply mean that the 'cat and mouse' chase of discovering where a particular case is listed will end. This way the courts will be able to apply the relevant tests in each and every case in any application made by a reporter to permit full reporting and not just those in which the press is lucky enough to open the correct door.

The issue of published Judgments compromising anonymity

8.7 If a judgment is published, albeit anonymously, then it is not difficult to establish who is involved, if the lists themselves are not anonymised. Every judgment must include the name of the judge hearing the case and the date upon which it is heard. Once that information is available then it would be a simple step to check the name of the case that was listed before that judge on that date on CourtServe to discover the names of the individuals involved. In this way anonymity is lost. We considered if this is a problem that should prevent publication of the parties' names on lists.

8.8 The reality is that at present there is a right for reporters to attend most hearings (not FDRs). It is also the case that many judgments are published in anonymous form, but the dots are not joined by the journalist as they are not permitted so to do. We recommend that judgments should remain anonymous in the main and consequently, the ability to know the names of the people involved does not take the position any further as their identities must not be revealed publicly, either directly or obliquely. We have full confidence in reporters complying with the rules.

8.9 The real mischief is that which could be caused by individuals other than reporters. If it is possible for members of the public to ascertain the facts of a particular case and marry that up to their names through CourtServe then there is a risk that such information could be 'published' on social media. The risk of this occurring is small as it would require the ability to be able to search previous dates on CourtServe and that is not possible as CourtServe delete all of the information at the end of each day. It would only be if the individual is signed up to the service whereby all the lists are e-mailed to them on a daily basis that they would be able to carry out this task. It is unlikely that individual members of the public would wish to sign up for such a premium service and as such we consider the risk to be small, and certainly not of sufficient magnitude to prevent the naming of the parties on Court lists.

Other Information to be Provided on the Court List

8.10 In order to increase the understanding of the public and the press, each listing should include the type of hearing that is being heard. This does not require any great detail but should simply include one of the following:

8.10.1 Preliminary/Interim financial hearing;

8.10.2 Committal in open court;

8.10.3 FDR;

8.10.4 Final hearing.

Chapter 9 - Who should be permitted to attend?

The Present Situation

9.1 This is set out in FPR 27.11 (2) which states:

> "*No person shall be present during any hearing other than –*
>
> *(a) an officer of the Court;*
> *(b) a party to the proceedings;*
> *(c) a litigation friend for any party, or legal representative instructed to act on that party's behalf;*
> *(d) an officer of the service or Welsh family proceedings officer;*
> *(e) a witness;*
> *(f) duly accredited representatives of newsgathering and reporting organisations;*
>
> *(ff) a duly authorised lawyer attending for journalistic, research or public legal educational purposes; and*
>
> *(g) any other person whom the court permits to be present*."

9.2 There are certain rare circumstances in which the press or legal bloggers may be excluded as set out in FPR 27.11(3):

> *"At any stage of the proceedings the court may direct that that persons within paragraph (2)(f) and (ff) 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.*

9.3 If there is an issue as to the attendance of a member of the press or legal blogger, then the court should hear representations in relation to those objections and hear from the relevant member of the press or blogger – FPR 27.11 (4) & (5).

9.4 Reporters need not attend in person. They may attend remotely as per ***Practice Guidance (open Justice: Remote Observation of Hearings) 2022 1 WLR 3538.*** This does not require the court to arrange a link when the hearing is otherwise attended if to do so would create a burden for the court staff.

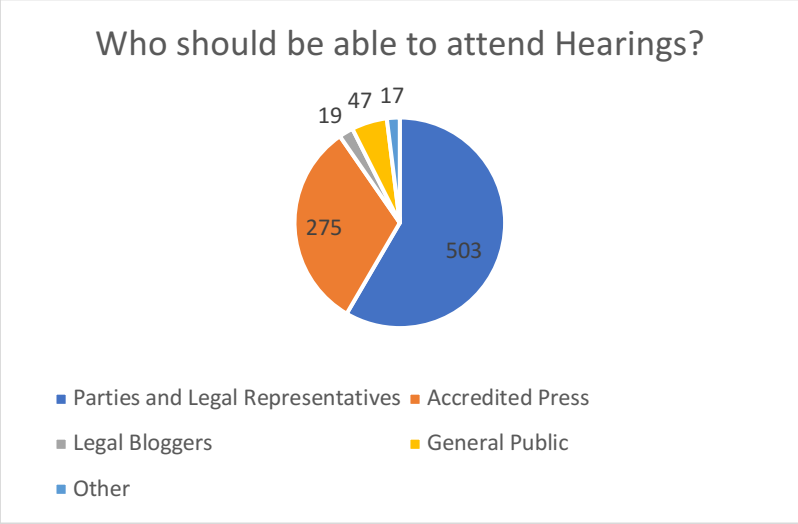
9.5 It follows that the general public may not attend "private" hearings nor indeed other members of the family who are not party to the proceedings unless they have been permitted to do so by the judge. The reality is that nearly all Financial Remedy hearings are attended purely by the parties and their representative / McKenzie Friend, and it is rare for anyone else to be present.

Survey Results

9.6 The survey set out a number of questions relating to attendance at hearings including:

9.6.1 Who should be entitled to attend financial remedy hearings?
9.6.2 Which hearings should this apply to?
9.6.3 Should there be exceptions?

9.7 The overall responses to the question who should be able to attend are set out within the chart below:



9.8 There are perhaps two stand out features to these responses:

9.8.1 That only 275 responders consider that the accredited press should be able to attend hearings, when this has been permitted for many years now. This is indicative that press attendance is rare and that perhaps the legal community is still wary of the press and unaware of the fact that the press is already permitted to be present at such hearings. The numbers supporting legal bloggers attendance (which is also permitted) are even lower, but that may be down to ignorance of the position as that is a more recent change. The lack of knowledge of the position is highlighted by the following quote from one responder, which was not an isolated view: "*members*

of the press should have to meet the judge first and be approved, avoid twitter chancers and fake news bloggers". This highlights the need for education.

9.8.2 There were 47 responses (out of 585 ie 8%) that considered the public should be permitted to attend. This would be a significant alteration to the present position.

Who are 'Others'

9.9 The responses included:

9.9.1 Researchers and those wishing to learn about the court process.
9.9.2 Friends, family, emotional support – limited in number.
9.9.3 McKenzie Friends as present.
9.9.4 Pupil Barristers – as of right and not require seeking permission.
9.9.5 Law students.
9.9.6 Those with a vested interest such as adult children, partners (romantic or business), siblings and parents if affected by the outcome.
9.9.7 Third parties affected by the decision such as trustees/ those holding property which it is suggested belong to one of the spouses and their legal representatives.

What Exceptions?

9.10 The following replies were received:

9.10.1 "*Exceptional sensitivity or highly confidential material in issue".*
9.10.2 *"It should be in the discretion of the judge to adapt the default position. Thus, (i) the judge might decide to hold the entire case in open court or (ii) to exclude media/legal bloggers because of domestic abuse concerns or price sensitive information being divulged. I would not favour specified exceptions. They can be developed by judge led law, as has taken place over the past few years".*
9.10.3 *"Cases involving minors and vulnerable for their protection".*
9.10.4 *"If there is any specific information that, even in anonymised form, would identify a party/the parties".*
9.10.5 *"Where a party is vulnerable".*
9.10.6 *"Cases involving domestic abuse allegations should be private".*
9.10.7 *"If there is a good reason made for another person to attend, I think that could be acceptable but generally speaking, I do not see why media would need to attend hearings. If they were to attend, I do not think that they should attend any hearings before a final hearing".*

9.10.8 *"It should not be possible for one side in a financial remedy case where the parties are public figures to put inappropriate pressure to settle upon the other by relying on serious reputational harm that will be caused by the airing of allegations at a final hearing. there should be some discretion".*

9.10.9 *"There may be a very significant issue to be decided at an early stage which should not be held in private. There may also be issues arising at a final hearing that should not be in public".*

9.10.10 *"Blogger who can demonstrate credentials and expertise, but they must make representations".*

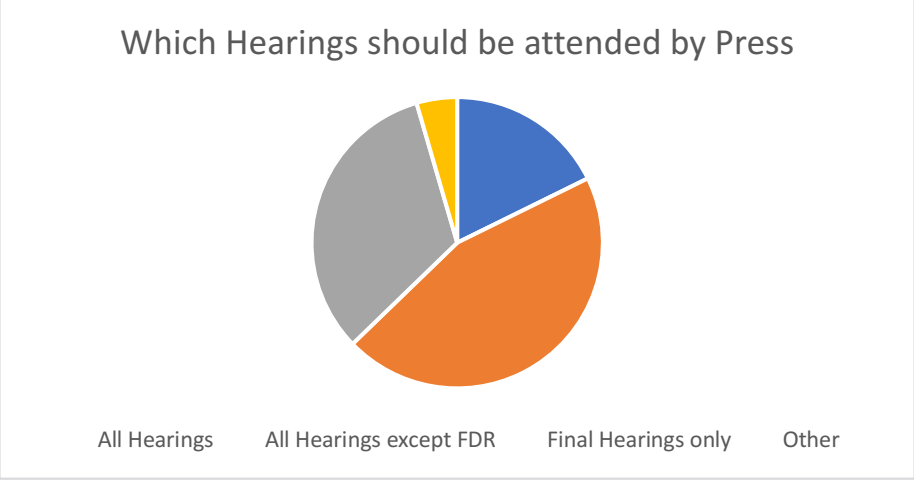
9.10.11 *"There may rarely be cases where a sufficiently novel or noteworthy point is to be decided that it is appropriate for the public to be able to attend in part of whole".*

To Which Hearings should this apply ?

9.11 **Present position.** It is set out in FPR 27.11(1)(a) that the rule as to attendance applies to hearings in private except "*in relation to hearings conducted for the purpose of judicially assisted conciliation or negotiation".* In reality, this means that the rules apply to all FRC hearings save for FDRs.

9.12 It follows that reporters have the right to attend at all other hearings of whatever nature. This will include First Appointments, MPS/LSPO applications, PTRs and final hearings. Despite this being the position for some time, this was only supported by 18% of the responders to the survey, as can be seen below.

Survey Responses on which hearings should be attended by the press



9.13 In terms of those that replied "other" – these included:

9.13.1 "*final hearings and substantive preliminary issue hearings. MPS, Fact Finding etc".*

9.13.2 *"It's not the type of hearing, but the nature of the issues that should determine whether any third party is entitled to attend court".*

9.13.3 *"consideration should be on a case-by-case basis, with applications being made to justify attendance"*

9.13.4 *"Final hearings - so it gives parties every opportunity to settle"*

9.13.5 *"I think media and legal bloggers should be able to attend all hearings except FDRs, but the general public should only be able to attend Final Hearings".*

General Comments from the survey on Attendance at Hearings

9.14 The following were general comments about attendance at hearings:

9.14.1 *"When I have had reported decisions, I have been alarmed at the misreporting in the press on some aspects of the case".*

9.14.2 *"I've attended lots of hearings (so far all children) as a legal blogger, and I don't think my presence has been problematic. In practice I've been able to work almost always consensually and without disruption of the proceedings".*

9.14.3 *"In my view there is simply no justification for making financial cases a special case when the general rule is transparency and open justice, and there is no privacy at the level of the Court of Appeal nor, now, in the Court of Protection which is at least as sensitive as any person's financial affairs".*

9.14.4 *"Family relationships and finances often arise in non-family civil cases, e.g. Inheritance Act cases, harassment and stalking cases, trespass to the person libel etc. which are all held in public. The court has sufficient powers to restrict reporting etc and, in the Court of Protection, can do so generally. Complete privacy in family cases is an anomaly and departure from the principle of open justice without, in my view, an adequate justification".*

9.14.5 *"I understand the need for justice to be seen to be done, but that does not translate to requiring these most private proceedings at the worst time of the parties' lives to be open to press or public. If it did then parties may well be intimidated, humiliated and worrying as much about what the press will say as what needs to actually be done to resolve the case - playing to the audience and making everything far worse. It could also put people in danger in extreme cases, or at least at risk of press harassment: one party may be famous and used to dealing with it, but the other - let alone the children - may well not be".*

9.14.6 *"I feel very strongly that these proceedings are private. This privacy exists to prevent the parties not the court. Where judgments can be published so the work*

of the court can be understood I have never understood the "public interest" in greater transparency it simply serves to sensationalise justice".

9.14.7 *"If a rape or fraud case is heard in public, then it is impossible to justify secrecy in a financial remedy case".*

9.14.8 *"If remote attendance is to be allowed HMCTS has to be properly resourced to ensure that the start of hearings is not delayed".*

9.14.9 *"This appears to be a stalking horse to encourage arbitration where parties can be guaranteed privacy. I really cannot see that save in very exceptional cases there is any need for anyone else to know about financial remedy hearings. It is simply prurience".*

9.14.10 *"Financial hearings should be private. People should not be penalised by having their private financial affairs scrutinised by the general public. Further, this will lead to any party who does not care about publicity effectively blackmailing the one who does. There is no justification for this suggestion whatsoever".*

9.14.11 *"I think there is a public interest in attending hearings, given the lack of trust in the court system and conduct of lawyers and the judiciary. Anything that can increase confidence would be good - although that might require additional training for some people!"*

9.14.12 *"Allowing the press into court is not the way to achieve better public perception of judicial decisions. They (and the public) are interested only in the tittle tattle or the rich and famous. This does nothing to improve public perception and is damaging for the families involved".*

9.14.13 *"The publication of judgments largely meets the needs of open justice in most cases".*

9.14.14 *"Open courts and transparency can be a powerful component in litigation. However, if it is being used to divert litigation to a more private forum, which does not require the court's time and resources, it means those who cannot rely on the private forums are effectively replacing one problem (limited court resources) with another (intrusion and lack of privacy during a process which may be not at all of their making)".*

9.14.15 *"It is a form of duress into settlement in financial cases that one party can hold over the other resulting in them settling contrary to their interests because they want to protect their business or livelihood. There is very rarely a public interest. I have had cases specifically litigating these points and so have seen it on the ground as well as being familiar with the authorities and genuinely so much of the motivation in litigants seeking "transparency" is vitriol and revenge. It's all very well suggesting parties can go to arbitration if they want privacy, but that relies on agreement. A vengeful party will not agree".*

Conclusions

9.15 The remit of this report is to consider how and if transparency may be furthered in the FRC. There were many responses to the survey which sought to reduce the access of reporters to FRC cases. We can see no basis upon which there should be a restriction on reporters attending as is presently permitted pursuant to FPR 27.11.

9.16 There is a significant lack of knowledge amongst the professionals / judges as to the ability of reporters to attend hearings. This is indicative of how infrequently the press ever attend FRC cases, causing practitioners and most judges to be unaware of the relevant rules. This should be addressed by training and awareness. We approve the short document attached to this report setting out the correct approach to be taken when a member of the press or legal blogger attends a hearing which has been prepared by the Transparency Project (Appendix 1).

9.17 Should there be general access to the public? There was little appetite for such a significant extension from those that responded to the survey and the recent authorities from Mostyn J (nor the articles from Sir James Munby) do not suggest that this should occur. These are family proceedings, and even though the focus is rarely upon the children, it is not infrequent that highly personal information is before the Court. Even if the situation was to be clarified that there should not be anonymity in the FRC, as stated in the Mostyn J line of authorities, we are of the view that this would not justify fully open hearings. It is important that the parties to such cases are as 'comfortable' as they can be in discussing such issues, and that is more likely to occur without the general public being permitted to attend, even if the details referred to are capable of subsequent reporting. It would also increase the risk, referred to by many that responded to the survey, of individuals 'playing to the gallery'. The proceedings in the FRC should remain private.

9.18 In terms of the 'others' that were suggested in the survey should be permitted to attend, such as law students, family friends etc, referred to above, we are confident that this can be left to the discretion of the judge on the day. It would be highly unusual for there to be any objection to a pupil barrister attending, and it frequently occurs that a family friend is able to attend as emotional support, especially if there is no objection made in relation to the individual. These issues do not require any further guidance.

9.19 We considered what hearing this should apply to. We consider that the attendance principles should not alter according to the type of hearing save for that which is already in place pursuant to FPR 27.11 ie that the FDR should not be open to the press / legal bloggers. In order for FDRs to be able to successful they do require the judges and parties to be able to explore issues which should not be made public, and openness would be significantly restricted if members of the press could attend such a hearing.

Chapter 10 - Interim Hearings

10.1 Interim hearings have their own considerations. As already observed, within this report, the group is in favour of maintaining the status quo in all hearings up to the final hearing. There has been no significant movement seeking change.

10.2 Interim hearings are largely a matter of case management. The court is often not possessed with full information or the time to consider it in depth. Decisions are taken in the knowledge that adjustment may be necessary at a final hearing. The parties are often at their most vulnerable.

10.3 There are arguments that as interim hearings relate to case management and attempts to encourage settlement of the proceedings themselves that they should not be reported. We considered whether we had a different view as to the reporting of such hearings as opposed to a final hearing. A decision of the Court being reported would, naturally, increase openness which would be considered beneficial. The difficulty we identified with interim hearings, however, is that they are very often decided on extremely limited information. The average interim maintenance application, listed for an hour, determined on the basis of extremely limited submissions when disclosure is far from complete, may well bear no relation to the ultimate, well-reasoned and principled decision of the Court. Reporting such an outcome may not provide information of any value or use, save in respect of publications focusing on procedural issues.

10.4 On balance we reached the conclusion that the ability to report on interim hearings should be no different to that which occurs at a final hearing. There will be a Reporting Order made setting out the parameters of what may be reported but otherwise there would be no further restrictions.

FDR Hearings

10.5 The FDR hearing is the most practically important stage of any financial remedy application. The stakes are high and the desire of the Court to achieve settlement great.

10.6 All matters discussed, all offers made and positions adopted are, of course, privileged. It seemed to us, without any realistic argument, the case that all discussions and outcomes with respect to the FDR must remain confidential in their entirety and should not be the subject of publication in any respect. In any event reporters are not able to be present at FDR hearings.

Chapter 11 – Final Hearings

11.1 The vast majority of first instance financial remedy final hearings take place in private, without the attendance of reporters and the outcomes are unreported on any platform. This may explain why there is confusion amongst members of the profession as to the permitted extent of media involvement and, more generally, the right to privacy of parties and others involved in financial remedy proceedings.

11.2 This Chapter aims to set out in clear terms: (a) what currently happens at final hearings; (b) what respondents to the survey want to happen at final hearings; and (c) what this Group recommends should happen at final hearings, with our reasons for so recommending.

11.3 Each of those three areas above will consider the position regarding (a) attendance at final hearings; (b) the documents to be provided to reporters who attend final hearings and (c) subsequent reporting of what happens at a final hearing, including the issue of anonymisation. There is an overlap with other Chapters of this report dealing specifically with those issues.

11.4 As with the rest of this report, the focus is on a party's right to privacy versus the general right of freedom of expression and to receive information without the interference of public authorities. A shorthand way of putting it is '*privacy v. transparency'*. Decisions involving the exercise of those rights will invariably require a judge to balance competing Convention rights, particularly those set out in Articles 8 and 10. This process is referred to within this Chapter as the '*Re S* balancing exercise', with reference to Lord Steyn's speech at [17] of ***Re S (A child) (Identification: Restrictions on Publication)*** **[2004] UKHL 47**.

THE CURRENT POSITION

The current position - attendance at final hearings

11.5 Financial remedy proceedings are family proceedings. The default position is that they will be held in private (FPR 2010, r.27.10(1)) save where any rule or enactment provides, or the Court directs, otherwise. A final hearing will therefore ordinarily be held in private. This means that the general public have no right to be present at a final hearing (FPR 2010, r.27.10(2)).

11.6 FPR 2010, r.27.11 applies to financial remedy proceedings, including final hearings, held in private. This means reporters can attend.

11.7 The Court may only make a direction to exclude reporters if one or more of the criteria set out in FPR 2010, r.27.11(3) is satisfied, namely that exclusion is necessary in the interests of any child concerned with or connected with the proceedings; for the safety or protection of a party, a witness or a person connected with a party or a witness; or for the orderly conduct of the proceedings; or because justice will otherwise be impeded or prejudiced.

11.8 Such direction can be made of the Court's own motion or on the application of a party, a witness or a child (or the child's representative or guardian), having given any reporter in attendance an opportunity to make representations (FPR 2010, r.27.11(4)).

11.9 Whilst the power to exclude reporters from attending final hearings therefore exists, it is generally considered that a concern about potential reporting would not in itself form a proper basis for excluding a reporter. Any such concern might be alleviated by the making of a Reporting Order or anonymity order, or securing a commitment from a reporter as to postponement or limitation of their report (if they are willing to give such commitment).

The current position - provision of documents to reporters

11.10 For the avoidance of doubt, when we refer to the *provision* of documents to a reporter in this section, this does not mean a reporter can *publish* those documents. We are referring only to the documents which a reporter should be provided with, in order to follow the proceedings.

11.11 A reporter's attendance at a hearing (which includes a final hearing) does not entitle them to receive or peruse court documents referred to in the course of evidence, submissions or judgment without the permission of the court (FPR 2010, PD27B paragraph 2.3).

11.12 A party cannot give any documents relating to the proceedings to a reporter who does not attend at a hearing, as they are bound by an implied undertaking not to make ulterior use of documents compulsorily disclosed by opponents.

11.13 It has been suggested by Mostyn J (***Xanthopoulos v Rakshina*** **[2022] EWFC 30 at [127]**) that a party would not be in contempt of court if they provided a reporter in attendance at a hearing with a copy of their own or even the other party's skeleton argument, because

this would not transgress section 12(1) of the Administration of Justice Act 1960 unless the case was about child maintenance. We agree, that s12 AJA does not generally apply to financial remedy proceedings, but the implied undertaking does apply.

11.14 It is generally acknowledged that, given financial remedy proceedings are heavily document-based, a reporter's right to attend is rendered largely meaningless without sight of key documents to follow the arguments during the final hearing.

11.15 Working on the basis that parties are unlikely to voluntarily share documents with reporters where there is a fear they may be held in contempt for doing so, the Court will ordinarily consider disclosure of documents within proceedings on an application by the reporter.

11.16 In ***Gallagher v Gallagher (No 1) (Reporting Restrictions)*** **[2022] EWFC 52** at [55] Mostyn J considered that provision of skeleton arguments to reporters should be the default position.

The current position – reporting including anonymisation

11.17 As noted at the outset of this Chapter, reporters are unlikely to attend the vast majority of financial remedy final hearings and the risk of reporting in the media about any final hearing is low.

11.18 The drive for open justice (see **House of Commons Justice Committee: Open justice: Court reporting in the digital age; Fifth Report of Session 2022–23**) and the requirement to increase the number of published judgments means reporters' interest in financial remedy proceedings may be piqued, but it remains the Group's view that it is likely to remain the position that the vast majority of financial remedy final hearings will not be attended by reporters. This section therefore deals with the current position (a) on those rare occasions when a reporter attends the final hearing and (b) when a judgment is published.

11.19 When a reporter attends a final hearing, the current legal position is not clear but may be that, absent an anonymity order/RRO, financial remedy proceedings are not secret and what happens at a final hearing could be reported in the media by any reporter in attendance, save where to do so would identify a child involved in the proceedings. That said, most practitioners – including full time judges – work from the opposite position i.e. that a reporter must seek permission of the court before reporting any aspect of the case.

11.20 Whether the onus is on a reporter to seek permission to report or whether the onus is on a party opposing such reporting for an order to prevent it, the Court is required to carry out the case-specific ***Re S*** balancing exercise in each case.

11.21 As to the publication of judgments following a first instance financial remedy final hearing, the usual practice is that such judgments will be anonymised prior to publication. In his article for the Financial Remedies Journal published on 6 July 2022 ("*Some Sunlight Creeps In"*) Sir James Munby calculated that of the 470 such judgments published since 1990, 73.6% of them were anonymised prior to publication.

11.22 The majority of those anonymised, published judgments will have included what is referred to as the 'standard rubric' which states that:

> *"The judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The parties and their children may not be identified by name or location. The anonymity of everyone other than the lawyers and anyone else specifically named in this version of the judgment must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court."*

11.23 In the ***Xanthopoulos v Rakshina*** and ***Gallagher No.1*** decisions referred to above, the Court's view was that the standard rubric is of no effect: the Court's permission is not required nor is the breach of any perceived direction for anonymity a contempt of court.

11.24 However, the position remains that most final hearing judgments are published in an anonymised format, reflecting a balance of the parties' privacy against the right of the public at large, to aid an understanding of the workings of the financial remedies court (see for example ***Barclay v Barclay*** **[2021] EWFC 40**, Sir Jonathan Cohen at [18]). Omission from a judgment of the identify of the parties does not necessarily correspond however to a legal prohibition on the revelation of that identity by a person who knows that information, such as a party or observing reporter.

THE SURVEY RESPONSES

11.25 To recap the headlines of Chapter 6, the survey had 583 respondents which included 458 practising lawyers (including 88 part time judges) and 103 full-time judges. Financial remedy work took up more than 75% of the workload of just under half of the lawyer respondents, the bulk of those undertaking cases involving assets of £1m to £5m.

11.26 In terms of the broad *privacy vs. transparency* debate, 377 respondents 'strongly agreed' that parties to financial remedy proceedings should have privacy i.e. that information about a party's financial position, health, relationship status, children, inheritance prospects etc should remain private, with a further 85 respondents agreeing with that position, but not 'strongly' agreeing. Only 35 respondents disagreed with that position, with a further 28 'wholly' disagreeing.

The survey responses – attendance at hearings

11.27 In line with the general majority view as to privacy, there is minimal appetite for opening up financial remedy proceedings to the general public. Only 8% of respondents were in favour of the general public attending hearings, including final hearings.

11.28 Just under half of all respondents (48%) were in favour of **only** parties and their legal representatives attending hearings. Given reporters can attend a financial remedy final hearing as of right, this suggests either that the current position regarding reporters' ability to attend is misunderstood or that a significant proportion of respondents would prefer a restriction on the right of reporters to attend.

The survey responses - provision of documents to reporters

11.29 The majority of respondents are against reporters being provided with documents from the proceedings (70% of all respondents, 56.3% of full time judges).

11.30 174 respondents (29.7%) were in favour of some provision of documents - 172 of these attempted to complete the follow up question as to which specific documents should be provided. Of these respondents (i.e. those in favour of reporters accessing documents) the majority view was that:

11.30.1 Position statements/advocates statements and final orders should be provided;

11.30.2 Permission of the court should be a necessary condition of release;

11.30.3 The costs of providing the documents should be paid by the media;

11.30.4 The information should be requested from and provided by the court.

11.31 The comments from these respondents (ostensibly in favour of documents being provided to reporters) nonetheless set out the concerns held by practitioners as to the provision of documents to reporters, suggesting that even for the 'pro' respondents, there is a need for

practitioners and their clients to be reassured about the safeguarding of such documents and the confidential details contained in them. A sample of the narrative responses is set out below.

> *"There should be redaction/anonymisation where appropriate. Undertakings should be given by those accessing documents not to make copies and to destroy, perhaps similarly to undertakings given when receiving police disclosure."*

> *"There should be a requirement of confidentiality and destruction within a reasonable time. The purpose is for the public/lawyers to understand the exercise of court discretion. The test should be whether there is a learning point or just salacious reporting."*

> *"The court must be careful not to release anything which would mean a party could have their data published and lead to a loss of money/fraud. Parties may be reluctant to disclose documents which identify their assets in public leading to parties not completing Form E correctly."*

> *"... There would also need to be clear safeguards about the use of this information and storage of it to ensure that private information cannot be accessed by others, particularly if systems are not as secure as those used by lawyers and the courts."*

> *"Any person requesting material must indicate how such material will be stored and how it will be destroyed (and when), and must provide a full list of any individuals who could have access to the material. Documents stored electronically will be to be stored in secure and encrypted servers. I do not have the technical knowledge to go further than this, but careful thought must be given as to what is and is not acceptable storage."*

11.32 It is striking that the above comments (all made by the respondents *in favour* of providing documents to reporters) are similar in content to the concerns expressed by the majority of respondents who were, generally, *against* reporters being provided with documents. Examples of the narrative responses provided by respondents in this latter category are set out below.

> *"(1) I have strong concerns about people not providing full and frank disclosure in circumstances where they are compelled to do so as they are concerned it may be made available to the wider press.*
> *(2) The things that are disclosed on a Form E are highly personal and sensitive. If in the wrong hands it could lead to identity theft. Will legal*

bloggers comply with the same rules about storage and destruction of documents?
(3) It also seems incongruent that the type of information that is being suggested will be made available to the press and therefore widely reported are the things which are also 'highly sensitive' under GDPR and therefore subject to significant sanctions if they are leaked- why should this be any different if reported?"

"1. Documents are going to contain highly sensitive information including information which has a risk of being used in ID fraud/insider trading - activities which could have serious financial consequences. My concern is not what the accredited member will do with the information. My concern is that mistakes happen - documents are not shredded/documents are stored electronically and then accessed by someone who should NEVER have seen them. I cannot give my client the assurances that they will seek on privacy when I cannot account for the actions of third parties who have had access to documents. Elevates the level of risk. Will surely have impact on professional negligence issues/professional indemnity insurance premiums etc."

"A divorce is a private matter between the parties to the proceedings. By enabling the press and/or bloggers to refer to them one is making them accessible to the general public. Far from enabling transparency within proceedings one will create an environment where parties are likely to be more cautious about the arguments they run and this may not be in the interests of justice. Certainly solicitors need to keep copies of all documents that were referred to in a case provide they can be stored safely and confidentially. Unless other third parties can hold personal documents on the same basis as solicitors then I do not believe they should have access to them."

"Documents prepared and information disclosed within financial remedy proceedings are inherently private. If the media are granted access to these documents, there is no way to guarantee that they will remain private. This exposes parties and associated third parties (children – even if their names are anonymised, companies, trusts, etc) to their private information being put into the public sphere."

"Documents should always be redacted so that details of personal finances, addresses, account numbers etc are not shared. They should be destroyed as soon as practically possible. The Court should specify what they may have, in what format, how it should be stored and for how long."

"I am concerned that financial documents contain such personal data that it would not be possible for this to be safely managed if disclosed outside of the parties."

"In an era of data protection and worldwide data and cyber security breaches I cannot see it is safe to enable third parties unrestricted access to every document and piece of information in proceedings. Attending a hearing and hearing submissions and a judgment on principles should suffice. but perhaps if critical to public importance (which would be hard to anticipate as common in financial remedy cases - as compared to children act proceedings) there could be provision to apply for sight of e.g. skeleton arguments"

The survey responses – reporting including anonymisation

11.33 Only 4% of respondents were in favour of publishing all details of a case. 18% of respondents were in favour of publishing nothing at all.

11.34 Generally, the appetite for reporting specific personal information (names/other identifiers) was low and most thought that a summary of the legal issues (77% of respondents) and factual issues (66% of respondents) was sufficient.

11.35 Overall, 77.5% of respondents favoured anonymisation. This increased to 82% for cases involving assets of more than £5m.

11.36 Interestingly, of the 28 respondents referred to in paragraph 11.26 above who 'wholly disagreed' that parties to financial remedy proceedings should be entitled to privacy, 61% of those respondents nonetheless considered the default position should be that judgments should be anonymised.

RECOMMENDATIONS

Recommendations – attendance at final hearings

11.37 This Group makes no recommendations in terms of altering the current position regarding attendance at final hearings as set out in FPR 2010, r.27.11.

11.38 Reporters can attend as of right. Given the suggestion from the survey responses that the current position is misunderstood by practitioners (as well as the clear anecdotal evidence that practitioners are not aware of what processes should be followed when reporters *do*

attend) this Group recommends that a paper setting these out prepared by The Transparency Project should be circulated (see attached, at Appendix 1).

Recommendations - provision of documents to reporters at final hearings

11.39 For the avoidance of doubt, this section deals with the documents this Group recommends should be provided to reporters who attend final hearings. Subsequent reporting of the information contained in those documents is a different issue and is dealt with separately (see 'Recommendations – Reporting including anonymisation' section below).

11.40 For reporters who attend a final hearing (and since July 2022, this includes those that attend remotely) there is a concern about allowing sight of documents which have been filed as a result of compulsion. The concern is about what people who receive those documents will do with them, how those documents will be stored and how personal information would be protected.

11.41 The Group considers that reporters who attend a final hearing should be provided with such documents as are necessary to help them understand the proceedings they are observing.

11.42 The Group recommends that the default position should be that a reporter who attends a final hearing should be provided with the position statements/skeleton arguments/case summaries of the parties' legal representatives. Such documents are prepared to assist the Court to understand the parties' cases. It is not a document prepared under compulsion. The Group also recommends providing reporters with a copy of the ES1, which is a useful summary document setting out the key chronology and players in the litigation.

11.43 The Group does not recommend providing reporters with source documentation (Forms E, replies to questionnaires etc) or ES2s as a matter of course. This could create serious GDPR risks because of the personal information contained in them (full bank account numbers, addresses, company names etc.) and there is concern about how that information would be safeguarded. In any event, skeleton arguments should set out the outline of the assets involved.

11.44 If the Group's recommendation becomes the default position, practitioners may want to consider carefully the level of detail contained in skeleton arguments.

11.45 The Group does not recommend that witness/section 25 MCA 1973 statements are provided to reporters as a matter of course. Witness statements are likely to include

personal information which needs to be safeguarded (see above). Furthermore, such statements may include allegations of personal conduct to which - if the Court considers such issues are irrelevant to the final outcome - the other party may not have had an opportunity of reply. Reporters would ascertain a more balanced view from observing the examination of only those issues the Court considers are relevant. However, in appropriate cases the Court might make a direction for witness statements to be provided where this was necessary to follow the evidence or to report accurately.

11.46 If a reporter wants to see documents other than the skeleton argument and ES1, that decision is for the Court having undertaken the ***Re S*** balancing exercise and not a decision to be made by the parties by consent.

11.47 To alleviate concerns about the storage and/or collateral use of information contained within skeleton arguments/ES1s, reporters should undertake to keep such documentation confidential and not to share documentation received during a final hearing, save that it is acknowledged that a reporter may wish – and should be permitted - to discuss the contents of such documents with their editorial team e.g. to confirm that publication is in compliance with the law.

11.48 The matters above could be emphasised and restated within any rubric on the face of reported judgments for the avoidance of doubt.

11.49 The Group considered whether, notwithstanding the recommended default position regarding the provision of skeleton arguments and ES1s to reporters, it should remain open to the parties to request that such documents are redacted e.g. to preserve commercial sensitivity or for some other compelling reason why documents should be so redacted. However, the Group again reminded itself that provision of documents to reporters and the subsequent publication of information by reporters are two separate issues. In the event a reporter attends a final hearing (i.e. there is no reason to exclude the reporter for any of the reasons set out in FPR 2010, r.27.11(3)) he or she is entitled to hear everything that is said during that hearing. What he or she is permitted to *report* shall be considered in the next section.

Recommendations – reporting of final hearings including anonymisation

11.50 This Group recommends that any decisions as to what can be reported at a final hearing should be made at the conclusion of the final hearing. Not only will this promote balanced reporting, but it will also allow any reporter present an opportunity to consider what details, if any, he or she wishes to report and will allow the parties an opportunity to consider what details, if any, they would object to ending up in the public domain.

11.51 To give effect to this, the Group recommends that in every case where a reporter attends any hearing, the Court should consider imposing an interim anonymity order until delivery of the judgment. The Group considers an interim anonymity order is a proportionate measure to hold the ring pending a ***Re S*** balancing exercise conducted at the conclusion of the case.

11.52 It is the strong recommendation of this Group that the interests of open justice are served by the judgment (be it a written judgment or a judicially approved transcript of an extempore judgment) being made available in every case at the request of any reporter who was in attendance at the final hearing. If the judgment is to be published in any event, a reporter will have access to it along with the general public at large. In other cases, the reporter would have to make a specific request for an official transcript of the judgment and pay the cost of obtaining the same.

11.53 However, the Group has taken account of the strong support for the existing practice of anonymising judgments and recommends a continuation of that practice.

11.54 The Group acknowledges that this will require the Court to conduct the ***Re S*** balancing exercise in every case where a judgment is to be published, including those cases where a reporter requests an official transcript of an extempore judgment following their attendance at a final hearing.

11.55 The Group concludes that the primary focus must be facilitating fair outcomes for Court users. We were concerned to see responses to the survey which considered one 'positive' outcome from naming parties would be that 'more cases would settle'. One consequence is that parties may be under pressure to reach an agreement, possibly on unfair or unfavourable terms. It is essential that parties can engage fully and fearlessly in pursuing a fair outcome in what is such an extremely important area of their lives.

11.56 At the same time, it is important that there is a transparency in terms of the decisions that are being made in the FRC and the ways in which principles are applied. The imperative is to provide a greater understanding of how the system works. The Group could not see that publishing the names of parties would assist this imperative.

11.57 The Group noted that more than 75% of survey participants considered that anonymisation was appropriate. We noted also that most other jurisdictions from whom we obtained information approached the reporting of judgments on this basis, for example Australia, which perhaps has a reputation for being particularly open and transparent.

11.58 We also noted that in the Court of Protection, the default position is anonymity.

11.59 The Group's recommendation as to anonymity does not mean that the Court should pay only lip service to the ***Re S*** balancing exercise. The Court must undertake this case-specific exercise in every case when the competing issues of privacy and transparency must be balanced. However, the conclusion of the Group was that publication of an anonymised judgment would likely represent a fair and appropriate balance of the competing rights in most cases.

11.60 Undertaking the ***Re S*** balancing exercise in each case will give the Court an opportunity to consider the competing submissions (by parties seeking privacy on the one hand and reporters seeking to report on an un-anonymised basis on the other) on a case-specific basis, the Group acknowledging that there may be some cases in which the Court determines, following that balancing exercise, that parties should be named.

11.61 It is not for this Group to set out a list of categories of case in which the balance may be tipped in favour of naming the parties – this is the role of the Court - but examples from decided cases and the survey responses suggested that factors such as egregious litigation conduct, criminal conduct, a party who courts the media and/or lived in the public eye will be relevant to the ***Re S*** balancing exercise. If the parties have been identified in a judgment published at an earlier stage in the case, this may also be a relevant factor to take into account – see the recently delivered judgment following the final hearing in ***Xanthopoulos v Rakshina*** **[2023] EWFC 50** at [176].

11.62 In cases where the Court determines that parties should be named, it would remain open to parties to seek a Reporting Order so that any matters e.g. of a commercially sensitive nature are withheld from the judgment and/or contained in a confidential appendix. Again, this would be the decision of the Court on a case-specific basis after undertaking the ***Re S*** balancing exercise.

11.63 The Group acknowledges Mostyn J's criticisms of the standard rubric in the decisions referred to in this Chapter and accepts that this should be changed to reflect whatever decisions have been made by the Court as set out above in terms of anonymity and/or reporting orders. The rubric should also refer to the Reporting Order, as is set out in Chapter 14 below.

Chapter 12 - Anonymity

12.1 The issue of the publication of (a) judgments; and (b) in press reports generally, in an anonymised form, is the most widely debated of those considered within this report. The importance of the issue attracted the most extensive input from those who responded to the call for evidence in the form of the survey. Accordingly, it has been given the most anxious consideration.

The Present Position

12.2 We respectfully agree with what was said ***Appleton v Gallagher, NGN and PA*** **[2015] EWHC 2689**:

> *"To say that the law about the ability of the press to report ancillary relief proceedings which they are allowed to observe is a mess would be a serious understatement".*

12.3 The position in practical terms, as to anonymity in reporting, is easy to identify:

- 12.3.1 The overwhelming majority of FR judgments that have been and continue to be published, are in an anonymised form; and
- 12.3.2 There are no instances of press reporting of those anonymised judgments and their contents in such a manner as to go behind the judicial anonymisation.
- 12.3.3 There are no instances of press reporting of proceedings without self-imposed anonymity unless the court has itself reported un-anonymised or expressly permitted others to do so.
- 12.3.4 Notwithstanding the decisions of ***BT v CU*** **[2021] EWFC 87***, A v M* **[2021] EWFC 89***, Aylward Davies v Chesterman* **[2022] EWFC 4***, Xanthopoulos v Rakshina* **[2022] EWFC 30** and ***Gallagher v Gallagher (No 1) Reporting Restrictions*** **[2022] EWFC 52** there are:
  - 12.3.4.1 no instances that we could identify or that were reported to us, of press reports seemingly relying upon the comfort or taking up the encouragement that these decisions could be read to provide;
  - 12.3.4.2 very few cases indeed in which a first instance court has permitted reporting of a FR judgment in full other than in an anonymised form on a "standard" basis.

12.4 There appears to be a slight increase in the recent years in tribunals below High Court level choosing to publish their judgments (on Bailli and/or National Case Archives), particularly at Recorder and CJ level. Almost without exception the court has done so in an anonymised form, save where they are appeals.

12.5 An exception was ***Uddin v Uddin*** **[2022] EWFC 75**, where HHJ Wildblood KC did not anonymise, in a case where he was highly critical of the litigation conduct of all parties ("*a disgraceful example of how financial remedies proceedings should not be conducted*"), albeit the judgment records *some* anonymisation had occurred (but not in what areas or of what type).

12.6 In only one of these cases (***X v C*** **[2022] EWFC 79**) was there overt reference made to the recent case law from Mr Justice Mostyn or a balancing test set out.

12.7 At High Court level there is no discernible increase in the rate of reporting of FR judgments in general, and the only substantive change appears to be that one judge now routinely does not anonymise reported decisions (Mostyn J, for obvious reasons). None of the other judges at that level appear to have followed suit[12] save in unusual circumstances[13] or where there has been a prior absence of anonymity for various reasons including past appeals[14].

12.8 The start of the series of cases where anonymity was directly addressed, referred to above, thus did not herald any general change of approach. For example, notwithstanding the decision of ***BT v CU*** being published on 1 November 2021, on 23 December 2021, Roberts J published the anonymised FRP case of ***LS v PS & Q*** **[2021] EWFC 108**, on 16 March 2022 Moor J published the anonymised case of ***DX v JX*** **[2022] EWFC 19,** and on 22 March 2022 Peel J published ***WC v HC*** **[2022] EWFC 22**.

12.9 At least two FR specialists have been clearly averse (from the terms of judgments given) to so doing (Sir Jonathan Cohen and Mr Justice Moor). The lead FR judge, Mr Justice Peel, has been the most prolific publisher of judgments, and all have been anonymised. This split was echoed in the response to the survey (see below) from respondents who identified themselves as judges of High Court level.

12.10 This difference of approach is perhaps best shown by:

12.10.1 The non-anonymised publication of the "big money" MPS decision of Mostyn J of ***Collardeau-Fuchs v Fuchs*** **[2022] EWFC 1** on 21 February 2022.

12.10.2 The anonymised publication of the (very similar) "big money" MPS decision of Peel J in ***MG v GM [MPS LSPO) (Rev 1)*** **[2022] EWFC 7** of 1 March 2022.

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[12] Mr Justice Peel in WC v HC [2022] EWFC 22; HD v WB [2023] EWFC 2 (13th January 2023); VV v VV [2022] EWFC 41; J v F [2022] EWFC 133; Mr Justice Moor in IR v OR [2022] EWFC 20, ARQ v YAQ [2022] EWFC 128, CMX v EJX (French Marriage Contract) [2022] EWFC 136; Mrs Justice Roberts in AB v CD [2022[EWFC 116p Sir Jonathan Cohen in HA v WA & BV [2022] EWFC 110

[13] Treharne v Lamb [2022] EWFC 27 does not set out the basis of decision on non-anonymisation beyond recording certain redactions were agreed between the parties.

[14] e.g. Goddard Watts v Goddard Watts [2022] EWHC 711

12.11 The former decision attracted (briefly) articles in the major national press. The latter passed by without comment of any nature.

12.12 Both cases were essentially dealing with the same law, the same (or similar in general terms) scale of wealth, and yet one set of parties was afforded different publication protections to the other. Where consistency is a matter of import in the application of the law, this leaves a great deal to be desired. Neither case appears (on their face) to conduct any "intense" balancing of rights, and/or express any examinable findings and reasons for the course that was duly taken in respect of anonymisation.

12.13 It is expressly not the role of this report to opine on whether it agrees or disagrees with the approach that was taken in the above MPS cases. Nor, whether we believe the recent statements of law, to be correct, any more than it is our role to opine as to whether we believe the statements of law (by the same tribunals in some cases) in the line of prior cases decided before the autumn of 2021 to be correct. That is uniquely and properly a matter for the Court of Appeal.

12.14 No appeal has been heard or determined on the issues as they have emerged in the post Autumn 2021 jurisprudence. It is not understood that any such appeal on the issue has been brought or is pending. It is a matter of speculation as to the reasons for that: whether it signifies an acceptance of the recently stated position in law generally by advisors and litigants, or that an appeal can of itself render the issue nugatory, or that the appetite for testing principles of law for their own sake, where the cat has already left the bag in practical terms, is not a great one for litigants who would have to fund such an appeal (or defence of it) themselves, for little personal benefit.

12.15 It is the case that not all potential or actual points of law, going either way, have been exhaustively addressed, or where addressed, have done so after a fully contested argument from counsel. This group is not a proxy amicus (let alone taking a side) in any hypothetical appeal and shall not be drawn into being so.

12.16 It is sufficient for the purposes of the task given to us by the President and its terms of reference, to note that:

12.16.1 Decisions of High Court level conflict.
12.16.2 Decisions are not binding on judges of the same level.
12.16.3 There is no definitive view from a binding appellate court.

12.16.4 Some first instances decisions (even by the same judges) contradict themselves (or could be said to), and in some instances seem to conflict with judgments (or at least obiter parts of judgments) of the Court of Appeal.

12.16.5 Courts below High Court level, and as (if not more) importantly, the users of the courts below (which account for the vast majority of the users of the system), are left in doubt.

12.16.6 Thus, in general terms, judges do not know which case or cases they should follow.

12.16.7 Professional advisors do not know what they should be advising clients.

12.16.8 Litigants do not know what to expect.

12.17 In relation to a (slightly) different issue, that which Mostyn J observed in ***DL v SL*** at ¶15 seems apposite here:

> *"It is my opinion that the present divergence of approach in the Family Division is very unhelpful and makes the task of advising litigants very difficult".*

12.18 This group was also greatly concerned about the prevailing apparent inconsistency of approach. For this reason, at least, we recommend a reform to the present state of the law, to dispel doubt, and hence uncertainty for litigants and press alike. It is not to the credit of the family justice system that so much can depend (at High Court level at least) on which particular judge a case comes to be listed.

Evidence Taken

12.19 As set out elsewhere we have:

12.19.1 Invited submission of evidence over a time frame of two months and publicised this invitation before and during the window for submissions.

12.19.2 Received just under 600 responses to a bespoke questionnaire involving opportunities (largely taken up by respondents) to provide narrative evidence alongside tick-box answers to multiple choice questions.

12.19.3 Considered all the relevant and major statute and case law on the topic of anonymity (and other related issues).

12.19.4 Considered the extra-judicial and practitioner sourced commentary in textbooks, journals, blogs and online.

12.19.5 Ascertained the position in a wide number of other jurisdictions.

12.19.6 Ascertained the position in other areas of work, including the King's Bench and Chancery Divisions, and the Court of Protection.

12.20 In summary terms, the call for evidence produced from its 595 responses (noting that several were on behalf of groups of individuals and chambers) the following views were ascertained:

12.20.1 77.5% favoured anonymisation
12.20.2 6.1% were "Maybe"
12.20.3 16.5% were against anonymisation

12.21 The breakdown by asset class of experience in FR is:

Asset experience		Anonymised ?						
From	*To*	YES		NO		MAYBE		TOTAL
£0	*£0.5m*	55	68.8%	20	25.0%	5	6.3%	80
£0.5m	*£1m*	120	81.1%	23	15.5%	5	3.4%	148
£1m	*£5m*	141	78.8%	27	15.1%	11	6.1%	179
£5m	*£10m*	61	89.7%	4	5.9%	3	4.4%	68
£10m	*£25m*	50	79.4%	8	12.7%	5	7.9%	63
£25m		24	63.2%	11	28.9%	3	7.9%	38
BLANK		10	52.6%	5	26.3%	4	21.1%	19
		461	**77.5%**	**98**	**16.5%**	**36**	**6.1%**	**595**

12.22 If one takes just responses from Barristers and Solicitors dealing with asset cases of £5m+ there are 128 responses, of which 105 are in favour of anonymisation, 15 against and 8 "maybe". There is therefore a practitioner response from larger money cases of 82% in favour of anonymisation; 12% against, and 6% "maybe".

12.23 It would be a matter of common sense to observe that it is inherently the case (given the nature of press reporting) that the wealthier are more likely to attract wider press reporting and are more sensitive to the issue as it is the most likely to affect them.

12.24 We do not draw however any particular conclusions from this modest difference or have allowed it to drive the conclusions we have reached, because:

12.24.1 There ought not to be one law for the better off.
12.24.2 Nor should that section of society and their representatives drive conclusions on wider principles to all litigants.
12.24.3 The variance was not particular significant.
12.24.4 The same views in general terms were expressed by the vast majority of respondents, irrespective of the "value" of case. Most respondents engaged with the issues based on principle rather than solely a practice-specific manner.

12.25 The narrative responses are, where appropriate and apposite, referred to below; by their discursive and unique nature, they are not susceptible to simple numerical analysis as to

their terms, but representative themes and weight of evidence by issue/aspect which are referred to.

Competing Arguments on What Should be the Position

12.26 We reiterate (again) that it is not our remit to identify perceived or actual weaknesses in either position taken as to what is the current law. We deal here with the rationales (the current state of the law aside, whatever that may be determined to be) for what it *should* be. We start by setting out what are the key points for and against anonymisation, as a point of principle (i.e. not opining on what the current law is, which takes up most of the case law discussions and recent articles/chapters on the topic). These are drawn from all the evidence received, set out above. They are necessarily summarised.

12.27 The headline positions / arguments <u>in favour</u> of routine <u>non-anonymisation</u> are:

12.27.1 Open Justice Principle.
12.27.2 Non-use of parties' names renders the likelihood of press interest / publishing of press stories less likely and infringes the media's Article 10 rights.
12.27.3 Consistency with cases that come before other civil courts (i.e. non family cases).
12.27.4 Dichotomy between the position on appeal and at first instance.
12.27.5 As an encouragement to reach settlement rather than proceed to contested hearings.

12.28 The headline position / arguments <u>in favour</u> of routine <u>anonymisation</u> are:

12.28.1 Right to privacy & nature of information provided.
12.28.2 Effect on children.
12.28.3 The effect on the giving of full and frank disclosure.
12.28.4 Creation of inequality of bargaining power.
Creation of two tiers of family justice (privately obtained determinations e.g. pFDR and Arbitrations Vs public provided determinations i.e. court) .
12.28.5 That an individual's name is not essential to the examination and understanding of:
12.28.5.1 The law and what it says.
12.28.5.2 How the law is applied to any given set of facts.
12.28.5.3 The reasoning for a decision and competing arguments determined.
12.28.5.4 The operation of the system of family justice generally.

12.29 These are hereafter taken out of turn to consider where issues are related to each other.

The Nature of the Information in an FR Case; Disconnect with "other" Civil cases

12.30 We suggest that this aspect is at the heart of the issue.

12.31 It is a truism that parties in FR claims have a duty of full and frank disclosure of all matters pertinent to the s.25 exercise, which given the width of that section, effectively means the entirety of their financial lives (including those in the future, in so far as it is likely or foreseeable). This is a broad and heavy burden, and adherence to which underpins the efficacy of all FR law and practice. Its enforcement and policing is at the centre of the integrity of the system.

12.32 The audience for this report will need little education on the ambit of information and documents that are disclosed, dissected, and determined in any FR case. As one respondent to the survey put it:

> *"This is the most intensely personal information, that many do not share with even their own family or closest friends. Many / most parents do not share their wills with their children, for example, many do not share the ins and outs of their pay and salary or tax affairs with their neighbours or even their best friends (and even their spouses, and certainly not their children). This is to say nothing of embarrassing or very sensitive indeed personal matters (affairs, relationships, sex life, health status)."*

12.33 It is entirely correct, and powerful to say that FR proceedings are not unique in requiring disclosure of broad ranges of intensely personal information. For example:

12.33.1 Inheritance Act cases will require disclosure of wills, testamentary intentions, personal conversations, and communications between family members, and (depending on the issues in play) details of some parties' personal financial circumstances.

12.33.2 Medical negligence cases require disclosure of health and medical records and information.

12.33.3 Trust, property, and tax proceedings may require disclosure of detailed personal and / or corporate financial matters, family arrangements and tax affairs.

12.33.4 Defamation and misuse of personal information type proceedings can (and often do) centre on embarrassing or sensitive personal matters and communications.

12.33.5 Shareholder disputes require in depth disclosure of commercial and business information.

12.33.6 Intellectual property proceedings deal with commercially sensitive information and documents.

12.33.7 Criminal proceedings examine in detail allegations of wrongdoing of a personal and/or financial nature.

12.34 That being said, we have not been able to identify any other individual set of proceedings (and do not see specific examples of any in the various writings on the subject) which alone and in isolation from any other different proceedings, require in and of themselves, the same width and depth of information and details that are to be given in the same place at the same time, as in FR proceedings. Thus, for example, whilst a shareholder dispute will adduce information in detail about a company, its financial affairs and its trading, it will not encompass the additional production of information about the personal health of a party. A medical negligence claim may evince evidence about a person's health, but not about the detailed running of their company or their spending habits.

12.35 To put that another way, if a Venn diagram were drawn of all the differing sets of proceedings available and the nature of the information, that they each *may* require to be provided or examined in court, some sets of proceedings will inevitably overlap, but the only type proceedings that (subject to their facts) will or could well sit at the central intersection of all, are FR proceedings. No other proceedings traverse (as a requirement) such a full range of a party's personal life.

12.36 It is the combination of the duty to provide full and frank disclosure *with* the width of factors set out at s.25, that places FR proceedings in a different position to any other type of proceedings. So, whilst it is fair to acknowledge there are some types of proceeding that do require disclosure to be full and frank (although in limited circumstances[15]), none are allied with a test of relevance that starts with such an exhaustive list of matters falling within it, of the nature of s.25.

12.37 This much was recognised in ***R v K*** **[2009] EWCA Crim 1640**, which saw the Court of Appeal consider closely the nature of disclosed information in FR proceedings, and the interaction of the obligations on litigants with a further core principle of justice: the privilege against self-incrimination (Article 6) . Lord Justice Moore-Bick (sitting with Mr Justice Holman and Mrs Justice Rafferty) in giving the unanimous judgment of the court said:

> *30. …[Jenkins v Livesey] is of importance for the present case because of the emphasis which their Lordships laid on the duty of the court to have regard to all the circumstances of the case and the corresponding duty on the parties to give full and frank disclosure. The passages in Lord Brandon's speech to*

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[15] See also Lady Hale in *Sharland v Sharland [2015] UKSC 60* at ¶27 " *Family proceedings are different from ordinary civil proceedings… in family proceedings there is always a duty of full and frank disclosure, whereas in civil proceedings this is not universal.*"

which we have referred, particularly that at page 437, suggest that the court cannot lawfully exercise it powers under sections 23 or 24 of the Matrimonial Causes Act unless it does consider all the circumstances of the case, but it must be recognised that it is entirely dependent on the parties for the information required to discharge that duty. Although the Act itself, unlike most statutes which have been held to abrogate the privilege against self-incrimination, does not itself require the parties to ancillary relief proceedings to provide information about their financial resources, or for that matter other relevant information, the Family Proceedings Rules 1991, which are the successors to the Matrimonial Causes Rules 1977 in force at the time of the decision in Jenkins v Livesey, do impose such a duty….

31. The fact that a party is compelled by rules of court to disclose information and documents does not of itself abrogate the privilege against self-incrimination. On the contrary, a party to civil proceedings who is required to give disclosure pursuant to CPR Part 31 is entitled on that ground to withhold production of documents that tend to incriminate him. Moreover, the Family Proceedings Rules do not expressly exclude the privilege, so in the absence of other considerations it would be difficult to argue that they had achieved such a significant result. The argument in the present case, however, is, and must be, that the rules, which are contained in secondary legislation and have the approval of Parliament, must have been intended to have abrogated the privilege, since the court could not discharge the duty imposed on it by section 25 unless the parties were required to disclose all relevant information, even if tending to incriminate them.

32. In our view that argument is well-founded. As the facts of this case and of other cases such as A v A; B v B demonstrate, it would be impossible for the court to discharge its duty under section 25 of the Act if it were deprived of the information on which it is required to act. As Lord Brandon pointed out in Jenkins v Livesey, the requirement that the court should have the full and frank disclosure which it must have in order to discharge its duty is met by rules of court, and those rules must be construed against that legislative background. In our view the purpose of the legislation would be frustrated if parties could withhold from the court relevant information, whether relating to their financial affairs or other matters, on the grounds that to disclose it would tend to incriminate them. For these reasons we are satisfied that parties to such proceedings are not entitled to invoke privilege against self-incrimination in order to withhold information. It follows that in our view the information contained in K's Form E and his answers to Mrs. K's questionnaires was obtained under compulsion. …

12.38 By so doing, the Court of Appeal removed (or curtailed) an Article 6 right of a litigant, based on the nature of and import of the disclosure, compelled on pain of a penal sanction in FR proceedings. It thus struck a different position for a civil litigant to a family one,

justified by the import and width of the information required in such proceedings. As a quid pro quo it deprived the public, through the Crown, of the ability to use such material notwithstanding the "*strong public interest in the investigation and prosecution of crime*" (***Butler v Board of Trade*** **[1971] Ch 680**). It is noted in passing that **R v K** (an appeal), was itself anonymised, for reasons not stated.

12.39 A further difference between civil and family disputes which has been identified by respondents, and which we consider is worthy of regard, is as follows: the (vast majority, at least) of civil cases are begat by, and focussed on, the resolution of an allegation that there has been some form of *wrong* committed by the Defendant / Respondent or right infringed by them, for which a remedy is sought or required, needing disclosure to facilitate its determination.

12.40 To an appreciable extent, one or both litigants in a non-family case can be said to have bought the process and its ramifications on themselves by their free actions and choices. To these, differing and distinct responsibility can (and is in the causation phase) be attached: denying liability and defending a case which should have been admitted or bringing a case that should not have been bought (to take extreme examples).

12.41 Contextually, this is very different in nature to a divorce and the financial consequences of it (underlined by the coming about of the no fault regime) the reasons for which are never (now) examined at all, let alone determined, and (save in the most exceptional cases under s.25(2)(g)) have any influence at all on the quantum of order or terms of decision reached.

12.42 Respondents observed that a divorce is palpably different and the FR proceedings that flow from it equally so, as being more of natural consequences of a blameless occurrence that arises from circumstance and the nature of human relationships rather than deliberate, or discreditable action.

12.42.1 As one put it:

> *"Why you should automatically abrogate all basic personal privacy because you are in the massive proportion of the population whose marriages fail, has never been justified. The fact that people are unable to agree without the assistance of a court should not punish them for that, not least when (i) lawyers and judges are unable to agree on clear outcomes in many cases; (ii) fault for not agreeing and needing court intervention is rarely evenly balanced between protagonists; (iii) it is a basic right to be able to access the judicial system to resolve a legitimate dispute - one's entire life being potentially laid bare should not be the cost of entry".*

12.42.2 As another said to like effect:

"It would be anathema to the recent introduction of 'no fault' divorce if parties who both simply wish to end their marriage - neither of whom is at fault for wishing it - are now forced to allow the public at large to scrutinise the most personal and private details of their lives: their incomes, their assets, their spending habits, the financial arrangements they made in the marriage, the money they spend on their lifestyle and on their children, their investments, the structures in which they hold their wealth, their business interests (and their value), their inheritances, their children's schools, their health difficulties, their children's health difficulties, their extra-marital affairs etc etc.. Even down to the cars they drive and the items of furniture that are in their homes. These are the most incredibly personal and private aspects of people's lives".

12.42.3 A third said:

"Getting divorced is not a crime. Nor is it akin to a civil claim where one party is alleged to have behaved badly and is therefore sued for damages. Parliament has enacted law in which, quite deliberately, the right to a divorce does not require 'fault'. Marriages come to an end for all manner of reasons and the process of redistributing shared finances is tricky but often inevitable. But nobody is at fault and there should be no adverse consequences for simply wishing to end a marriage".

12.43 Whilst acknowledging there is an overlap between FR disclosure and that provided in other proceedings, which are presumptively not subject to anonymisation, it is not a total eclipse, and is in different contexts, thus it is in our view, legitimate for a difference of approach to be considered and justified, if appropriate.

Open Justice, "What's in a Name" and Need for Greater Transparency

12.44 It is beyond argument that at the heart of the issue is the balancing of competing rights: Articles 6, 8 and 10. No one of these are absolute, nor an automatic trump card. That being said, the open justice principle, as examined and pronounced in ***Scott v*** **Scott [1913] AC 417** et passim, is a powerful and weighty one in any consideration.

12.45 We shall not repeat the oft cited sections of that decision here, though that does not denote that they have not been read and carefully considered.

12.46 This group in no way seeks to disagree with those general statements of broad principle.

12.47 The issue under consideration is however, as has been pointed out, one of balancing differing legitimate aims.

12.48 It was recognised in ***Appleton v Gallagher, NGN and PA*** **[2015] EWHC 2689**, that the principle has been derogated from by Parliament in, inter alia, the 1926 Act:

> "*the privacy factor has, up to a point, already been strongly recognised by Parliament even for those cases heard in public".*

12.49 Whether or not the 1926 Act applies to FR proceedings is a matter of some considerable uncertainty, into which this group ought not to descend. But whether or not it applies to FR proceedings, does not detract from the Act being an example of a derogation from the open justice principle in certain instances.

12.50 The Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 expressly brought within the remit of the 1926 Act. cases similar to (but not the same as) "usual" FR proceedings. By s.2(1)(a), it applied the 1926 Act to "failure to maintain" actions under s.22 of the Matrimonial Causes Act 1965, latterly amended again following the Matrimonial Causes Act 1973, to update this reference to s.27 of the Matrimonial Causes Act 1973. More recently still this provision was extended in the Civil Partnership Act 2004 to bring into scope failure to maintain cases in the context of a subsisting Civil Partnership.

12.51 In keeping within our remit, we express no view on how these amendments might effect arguments as to whether the 1926 Act applied to FR proceedings on divorce. It is noted that it may indeed cut both ways:

- 12.51.1 On the one hand proceedings ancillary to divorce were not expressly referred to as falling within the 1926 Act in the amendments, and had an opportunity to do so, and thus it could be said, are excluded intentionally.
- 12.51.2 On the other hand, it may be said that:
  - 12.51.2.1 Such proceedings did not need to be bought within the Act by the amendments as they were already covered, and the amendments were simply to replicate the position for similar disputes albeit between couples who were not divorcing, so which could not conceivably fall within the Act as originally passed i.e. it was rectifying an omission.
  - 12.51.2.2 It is difficult to immediately see why a still married couple should have been treated differently from those undergoing a divorce.

12.52 Either way, the amendment must of itself be taken as an example of a derogation from the open justice principle, and one in relation to proceedings that intensely focus on a personal relationship of marriage, and the private financial affairs of its protagonists.

12.53 We also bore in mind the many arguments and issues not summarised above, including the issue raised by Mostyn J in ***DL v SL*** at paragraph 11 as to Article 14 of the International Bill of Human Rights which he described thus:

> *"… stipulates that (a) the press or public can be excluded from all or part of the trial when the interest of the private lives of the parties so requires; and (b) that judgment is not required to be public where the proceedings concern matrimonial disputes. In my judgment Article 14 creates a presumption against public judgment in matrimonial disputes, and therefore it logically follows that the proceedings should not be public either as otherwise the privacy of the judgment would be fatally undermined. It is trite law that when exercising a power a court should do so consistently with the state's international obligations".*

As to which he said in *Appleton*:

> *"to allow the proceedings to be reported would make a mockery of that exception" [in Article 14]*

12.54 This group considered in detail the issue which can be paraphrased as "What's in a name?" which was addressed thus by Lord Rodger in ***Re Guardian News and Media Ltd*** **[2010] 2 AC 697**:

> *"What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: News Verlags GmbH & Co KG –v- Austria 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in Campbell –v- MGN Ltd at para 59 "judges are not newspaper editors" … this is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report in some austere, abstract form, devoid of much of its human interest could well mean that the report would not be read and the information would not be passed on."*

12.55 The alternative or a tempering position as set out by the European Court of Human Rights in identifying that the public interest is not always on all fours with the media's interest in circulation and its Article 10 rights, was put this way in ***Mosely v United Kingdom*** **[2012] EMLR 1** at paragraph 114:

> *"there is a distinction to be drawn between reporting facts - even if controversial - capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life (see* Armonienė*, para 39). In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life (*Von Hannover v Germany *(2005) 40 EHRR 1, para 65;* Hachette Filipacchi Associés (ICI PARIS) v France*, no 12268/03, para 40; and* MGN Ltd v United Kingdom *(2001) 53 EHRR 5, para 143). Such reporting does not attract the robust protection of article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation (see* Société Prisma Presse v France (dec)*, nos 66910/01 and 71612/01, 1 July 2003;* Von Hannover*, cited above, para 66;* Leempoel & SA E Ciné Revue v Belgium*, no 64772/01, para 77, 9 November 2006; Hachette Filipacchi Associés (ICI PARIS), cited above, para 40; and* MGN Ltd*, cited above, para 143."*

12.56 More recently, in ***Couderc and Hachette Filipacchi Associés v France (Application No 40454/07)***, paragraph 100 , the European Court said:

> *100. The Court has also emphasised on numerous occasions that, although the public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest to society (see* Von Hannover*, cited above, para 65;* MGN Ltd v United Kingdom*, no 39401/04, para 143, 18 January 2011; and* Alkaya v Turkey*, no. 42811/06, para 35, 9 October 2012)*

Effect on Full & Frank Disclosure

12.64 Given the vital importance to the efficacy of the FR process of full and frank disclosure, the perceived effects on this of non-anonymisation were considered by the committee. This was a frequent concern raised by respondents to the survey e.g:

> *"The duty of full and frank disclosure is fundamental to the effective pursuit of a FR application. There is a natural defensiveness to compliance with this duty on the part of the financially stronger party. There also exists a huge reluctance on the part of adults in this country to talk openly (even to family members) about financial matters [according to research carried out by Evolution Money recently reported in the I newspaper]. The unintended consequence of 'automatic' transparency in FR Courts will surely be even more attempts at the avoidance of disclosure and therefore the decrease in effectiveness of court applications".*

And similarly:

> *"There is a potential serious impact on parties' candour – and therefore the court's ability to perform its function properly and fairly - if parties fear that their case can be reported without anonymity";*

12.65 This echoes the stance of those issues raised by experienced judges in prior cases e.g. ***S v S (Inland Revenue: Tax Evasion)*** **[1997[2 FLR 774** and ***HMRC v Charman*** **[2012] EWHC 1448 Fam**, wherein concern as to the degree to which fear of exposure or investigation would adversely affect the conduct of disclosure within FR proceedings generally i.e. fear of publication of information and/or use of documents was considered to be a foreseeable consequence of wider dissemination outwith FR proceedings.

12.66 We considered that the basis of general concerns as to the effect of disclosure compliance was understandable, and neither fanciful nor scare-mongering.

12.67 The group could not identify specific examples of this having happened, for obvious reasons: hitherto there has been a very low chance (near nil) that a litigant would have believed that their affairs and name would automatically be made potentially public. Further non-disclosure is by its very nature not likely to be readily identifiable, save where people have been caught. The absence of specific examples notwithstanding, we considered that these were nonetheless valid concerns to be weighed in the balance in arriving at recommendations, noting in particular that the ramifications of improper disclosure being provided were grave and could strike at the heart of the efficacy of the FR process.

Inconsistency with Position on Appeal.

12.68 It has been said (in case law, commentary and from some of those giving evidence) that it is hard to justify why FR cases dealt with on appeal should be any different to those that are determined at first instance. We considered this was superficially attractive but after closer analysis do not agree that it is an overwhelmingly weighty consideration.

12.69 An appeal differs from first instance hearings in that it is determining whether the *judge* was "plainly wrong", that is to say, whether they acquitted their *public role* correctly. This goes to the heart of the efficacy of the application of the system of family justice.

12.70 In other (less common but not wholly exceptional) cases, it will be to clarify what the law is, for general future application.

12.71 Cases at appellate level rarely involve the actual determination of contested fact, after competing evidence. Where findings of fact are under scrutiny, and error is found, it is more common than not, they are not resolved other than by remittance for a rehearing by a different tribunal.

12.72 Lewison LJ in his Judgment in ***Norman v Norman*** **[2017] 1 WLR 2523** in identifying these differences between first instance and appeal proceedings (paragraphs 83(ii) to (iv)) stated:

> *ii) At first instance proceedings are governed by the Family Procedure Rules, whereas in the Court of Appeal proceedings are governed by the CPR. The starting point under the FPR is that ancillary relief proceedings are heard in private. The starting point under the CPR is that proceedings are heard in public. The Court of Appeal does, however, have the power to sit in private, both under the CPR and under the Domestic and Appellate Proceedings (Restriction of Publicity Act 1968).*
>
> *iii) Decisions of the Court of Appeal are likely to have wider impact that decisions at first instance and are therefore inherently more likely to raise matters of public interest.*
>
> *iv) Except in rare cases, the Court of Appeal proceeds on the basis of the facts as found by the judge. At first instance the parties may adduce a mound of evidence, some of which may be hotly contested, in order to persuade the judge to make findings adverse to one party or favourable to another. Much of this material may be rejected by the judge, or turn out not to be relevant to the matters that the judge has to decide. Even where the judge has made findings of fact, they may not be relevant to the questions that the Court of Appeal has to decide. Thus, the factual detail before the first instance judge is likely to be wider ranging than the material relevant to an appeal."*

12.73 On the quasi-policing role of the system and the public servants who administer it, there is an intense and wide public interest. Further, the decisions on law are ones that echo down through all the lower courts and are of wide application to the generality of cases, in a binding manner. At Court of Appeal level, *stare decisis* rules determine they too are binding on themselves.

12.74 First instance cases, in contradistinction, do not have as their role, one of effectively policing the exercise of judicial (hence public / systemic) function. It is to determine competing arguments as between (predominantly) litigants as private individuals. Further, decisions unarguably at below High Court level and usually at High Court level are not binding on the lower courts, or courts of the same level, so do not have the same potentially systemic wide- and far-reaching effect.

12.75 In determining (i) what the law is; (ii) how it should be applied; and / or (iii) whether a court itself fell into error (as to law, and / or its reasoning and / or its determination of fact), rather than an individual, did so in their chosen promotion of and reliance on particular arguments; an appeal performs a different and wider public function than a first instance tribunal, and has wider implications beyond the instant case given the nature of precedent.

12.76 Insofar as the two different courts are treated differently from an anonymisation perspective, that can be readily understood and justified by the key differences in their role, function and effect.

Encouraging Settlement vs Threat of Publicity and inequality of Bargaining Power

12.77 These issues are taken together, for they are interrelated.

12.78 An appreciable number of those who were in favour of routine publication of un-anonymised judgments identified a core advantage of this being that it would encourage people to settle their disputes, rather than go before a court, and to be subject to the publicity that would ensue (or be perceived to ensue).

12.79 The group felt that as a pure statement of cause and effect, this was correct. But that is as afar as it goes.

12.80 As a statement to *justify* naming (or to counter any suggestion of anonymisation being routine) the argument is flawed, and wrongly promoted as a perceived benefit of reducing financial and resources pressure on a creaking system over an objective and qualitative

assessment of the legitimacy of the system or the wider benefit to justice or fairness of outcome for the users of it.

12.81 It effectively was placing a higher premium on resource saving, than on benefit to litigants and the quality of the system

12.82 The group does not consider that it is a legitimate factor in considering matters of wider principle (open justice versus privacy) that one outcome may create a coercive tool to discourage those that need it from accessing justice.

12.83 Such averred advantages were, we felt, far too simplistic. They proceed from (and can only be meritorious if) it is accepted or assumed that *any* settlement is, per se, better for the litigants than *any* judicial determination, irrespective of the quality that differing outcomes for the parties that might be achieved by each process.

12.84 Whilst the promotion of settlement rather than contested litigation is always to be encouraged, it cannot be *at any cost*.

12.85 The emphasis on the supposed merits of coercing parties into any agreement overlooked that:

12.85.1 A bad or unfair settlement is worse than a good and fair judicial decision; and

12.85.2 Such an approach created the opportunity or abuse for perceived personal gain, or creation of distorted bargaining power.

12.86 As Mostyn J put it in ***DL v SL***, (and the effect is no different for "open court" as for a judgment that names the individuals and is freely available):

> *"A party may well have a very good case but is simply unprepared to have it litigated in open court. The risk of having it heard in open court may force him or her to settle on unfair terms. In my opinion the matter needs to be considered by the Court of Appeal and a common approach devised and promulgated".*

12.87 The group felt that it was inherently harmful to the quality and reputation for the family justice system that a litigant would or could, in effect, be prevented, through fear of public exposure, from pursuing a legitimate or even "very good" case.

12.88 Mostyn J's identified concern above was on all fours with a great many of the respondents to the call for evidence. Many of whom identified, from personal experience, instances of

one party seeking to use the risk of publicity as a stick with which to beat the other into terms of settlement that would or could be regarded as otherwise unfair:

12.88.1 As one respondent put it, open court (meaning as they did non-anonymised wider publication of judgments or the details of the ongoing proceedings) "*is a blackmailers charter e.g. I will reveal your alleged behaviour unless you settle on my terms to avoid a hearing*".

12.88.2 Or as a another said: "*privately minded people may make worse agreements because the other side will sense that they are uncomfortable with the publicity*".

12.88.3 And finally: "*I have been a specialist barrister for 26 years and I have direct experience of one party using the media to bully the other party into submission"*. Variations on this theme were widely identified and reported in the evidence gathered.

12.89 The group considered these (and many like them) were legitimate and significant concerns that must be taken into account in reaching its recommendations. The frequency, strength and particular instances referred to were of sufficient cogency and homogeneity as to rise above the status of being able to be discounted as merely anecdotal. They also struck to the core of the efficacy of the family justice system.

Two Tier System

12.90 A significant number of submissions of evidence identified the appreciable risks of the creation of a "two tier" system of justice that would be created by (or at least exacerbated by) non-anonymisation.

12.91 This goes hand in hand with the observed and judicially encouraged rise in the prevalence of arbitration (including for First Appointments and other discrete hearings) and private FDRs. These routes to dispute resolution being outside the court system, are self-evidently not subject to the same rules and requirements as the court-based system. The parties are free to decide for themselves the degree to which any privacy (or not) applies. The group knew of no example at all, of the parties agreeing to anything other than those hearings, and their evidence and decisions being other than entirely confidential.

12.92 For all the advantages of speed, convenience, control and running costs, these are not free services by any means. Even ones at the lower end of the cost scale are not inexpensive to the majority of the users of the FR court. For all, save those well above average resources, they are (and are likely to remain) prohibitively expensive options.

12.93 We do not comment on the desirability of that being the case, but accept that it is an inevitable consequence of any chosen tribunal being a professional, entitled to and expecting to charge for their services on a case by case basis, in contrast to a publicly funded system with only relatively modest court fees payable to obtain access to it. It is a system that almost invariably does not cater for litigants in person (irrespective of their wealth), who for reasons that we need not address but are well ventilated publicly, are now such a significant proportion of those using the family justice system.

12.94 A significant number of respondents to the call for evidence identified that the incidence of more prevalent non-anonymisation would inevitably lead to the wealthier litigants seeking to take up such private dispute resolution options. This cannot be said to be other than a statement of the obvious.

12.95 As one respondent put it (representative of the views of many):

> *"Many families cannot afford "private" justice through mediation, arbitration or using a private FDR, so the outcome is likely to be that those that can will be able to buy privacy (unless the other party has an axe to grind in wanting publicity) and only those unfortunate to be forced into the court system will have their private affairs spread across the media, inevitably now including social media".*

12.96 And as another said (again representative):

> *Whilst encouraging parties to find alternatives to court is to be applauded generally, when it is given as a solution to those who wish their case to remain private, careful consideration needs to be given to:*
>
> *a) Vulnerable parties requiring the protection of the court;*
> *b) Given the number of parties representing themselves due to a lack of funds, the only alternative dispute resolution that will result in a determined outcome (as opposed to negotiated settlement) is arbitration which is not affordable and so the financially weaker will run out of options in a way that wealthier divorcing couples would not*

12.97 This was commonly repeated e.g.:

> *I think we must be very careful not to push people into arbitration simply because that is the only way they can guarantee privacy. Divorce / financial remedies litigation is distinct from commercial matters where arbitration is apt/popular. Many litigants can ill-afford the court process, let alone the private arbitration process. They should not be deterred from accessing justice by the threat of personal and sensitive financial information being*

made public. This threat has the potential to be used as a form of coercion by one party (often the economically wealthier party, often a husband) against the other. This perhaps unintended consequence should not be overlooked. It would be a major step backwards for women in the 21st century and notwithstanding various other reforms intended to make accessing a divorce more straightforward.

12.98 We considered that the practical impact on those less well-off and/or vulnerable (either through absence of sufficient means, or due to other personal circumstances) of constructing a system that inevitably gave them a less desirable (from their perspective) choice, was one that should only be advocated with caution, and was a concern of considerable force.

Interests of Children

12.99 Many FR cases involve people who are parents, often of minor children (given the national average length of a marriage that ends in divorce is 11 years or so, this is hardly surprising).

12.100 This is an important factor, and one which the evidence repeatedly sought to emphasise. As was often observed, children have their own Article 8 and other rights, independent of their parents. One respondent put it thus:

"also minor relevant children /third parties may be affected - although not parties to the index litigation - their best interests fall to be balanced and considered"

12.101 The position goes:

12.101.1 Age of digital record keeping, the internet and the ease of searching these by any conceivable criteria, the coming about of Bailii and National Archives Cases (rather than specialised and edited law reports choosing to publish just those cases of legal interest) together with the web's relative permanence, has made the issue more acute than hitherto.

12.101.2 This is no longer a society where a child's friend from the playground (or that friend's parents), a schoolteacher or anyone else known to or knowing of the child can be assumed not to be able to access a judgment other than by the remotest of chances (happening across a printed law report in a bound volume of the FLR with it in) or with considerable personal effort. The public resources of bailli, national case archives, blogs and websites now make accessing

information about the minutiae of cases, and about those involved in them, even tangentially so, all the easier, whether deliberately or inadvertently.

12.101.3 The ubiquitous and pervasive nature of social media, including for children, make the ability to share, publish and discuss information, whether it be correct and accurate, or not, unimpeded.

12.102 As Ward LJ put it in ***ETK v New Group Newspapers Ltd*** **[2011 EWCA Civ 439**:

> *[The children] "are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment. "*

12.103 The group noted that there appears to be something of a dissonance between:

12.103.1 The vastly greater open access that now proliferates into the operations and application of the FR courts; and

12.103.2 Pressure for greater information than ever before; and

12.103.3 The wide concerns about and campaigns to control access to and use of personal private information (e.g. Data Protection legislation, GDPR, policing of data gathering and usage thereof by social media companies).

12.104 These were all issues touched on by respondents to the survey.

12.105 The reasons for the non-identification of the children of the parties by name or other identifying details (school, address etc) are well rehearsed, unimpeachable and have not been seriously questioned. The group took them as read and they have been accepted without demur by all of the other TIG sub-groups that are dealing with children cases alone.

12.106 Whilst, most obviously, children will feature in any dispute as to the specifics of child maintenance, they also feature in many other standard aspects of FR cases e.g.:

12.106.1 School fees and tertiary education costs affordability and who should fund them in what proportion and amount.

12.106.2 The location of a home or suitable housing in relation to a school (hence affecting value).

12.106.3 The required sum for housing based on size catering for children's accommodation needs.

12.106.4 The ability of parent with care to work, and the cost and appropriateness of childcare.

12.106.5 Budgets generally, of households in which children spend time (usually considered as part of a spouse's budget, rather than stand-alone child maintenance).

12.107 Other welfare related issues raised, and considered by the group, which in its view were not fanciful, were in particular:

12.107.1 The ease with which a child could themselves learn the details of their parents' divorce, through easily being able to read about them on social media, in publications or even from a judgment, all of which they could find (or happen across) simply by doing nothing more advanced than googling their own surname; and

12.107.2 Friends, acquaintances, associates or similar of the child doing the same, about which a child subsequently learns or is subject to the ramifications thereof.

12.108 The contrast with Schedule 1 cases was noted. A child about whom such issues are at large in the court will be wholly protected by virtue of the particular status of such Children Act proceedings. Yet a child of married parents will not be similarly protected even though the child itself may be of no greater centrality in the Schedule 1 proceedings than in a divorce case covering the very same fundamental issues of income and capital needs. If the rationale for protecting the privacy, welfare and identify of the child in Schedule 1 cases are sound ones (and there is no assertion that they are not) and which automatically *includes* anonymising their parents in reporting about the case or publishing of judgments, the group found it hard to identify any reason why the same protections and safeguards should not equally apply to marriage cases where there are children involved, even indirectly.

12.109 A number of respondents raised the issue of whether non-use of a child's name alone, yet naming its parents, was sufficient to protect the privacy *and* welfare of such minors, whose parents, through no fault of their children, became involved in divorce related proceedings.

12.110 Frequently stated, was the point that the singular piece of information (after the children's own names) which most clearly tends to identify a child, or to allow others easily to do so, is their parents' names. As one representative response put it:

> *"There must be a focus on protecting the anonymity of children – which is impossible if their parents' names are made public".*

12.111 There were general concerns raised (summarised by quoting one response thus: "*why on earth should children be subject to the publicity of their parent's affairs which in turn may subject them to bullying?")* as well as a specific example from the direct experience of a respondent to the survey, of children being subject to unpleasant and unwarranted behaviour as others learned details from that child's parents' divorce e.g. a respondent spoke of: "*the consequences in two cases was bullying of the parties children due to their parents' wealth*.".

12.112 Baroness Hale in ***PJS v News Group Newspapers Ltd*** **[2016] UKSC 26, [2016] AC 1081** emphasised the need for particular care to be taken in considering the interests of children in relation to such matters:

> *"It is simply not good enough to dismiss the interests of any children who are likely to be affected by the publication of private information about their parents with the bland statement that "these cannot be a trump card". Of course, they cannot always rule the day. But they deserve closer attention than they have so far received in this case for two main reasons. First, not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their parents" [the second reason is not pertinent here relating to IPSO Codes of Conduct that arose on the facts of that case]*

12.113 Overall the tenor of evidence received was, as one respondent put it:

> *"What is the true public benefit of transparency, as compared to the harm caused to a child who is unlucky enough to have experienced her parents' divorce and then has the added pain of seeing the unpleasant details of her parents' dispute spread across the press and social media, readily available at the touch of a screen to everyone who knows her?"*
>
> And another said:
>
> *"to open up the marriage warts and all weaponises the content and can have a devastating impact on the family generally, the children in particular"*

12.114 The group considered that if there is a core commitment, as there is assumed rightly to be on the part of all involved in the family law system, to strive to protect the welfare of those children who are directly or indirectly coming into contact with it, or affected by it, then simply removing *their* names from publications about cases was likely to be insufficient.

Recommendations

12.115 The group have carefully considered the competing arguments and rationales, and the expositions of the present state of the law, in coming to its conclusions.

12.116 In particular it is imperative that:

12.116.1 The need to police and understand (and indeed educate as to) the nature of the exercise to be undertaken and the manner in which that is undertaken by the court, always is to be promoted so far as possible without undue adverse consequences.

12.116.2 The disclosure requirements that underpin the very exercise of the powers the court is being called up to adjudicate, should be jealously protected. To make the process more transparent yet risk doing damage to the foundations of its efficacy would be at best pyrrhic.

12.116.3 The expense of total transparency should not be the unnecessary or inappropriate distortion of the integrity of the operation of the system or harm to those that require recourse to it.

12.116.4 The negative impact on children was to be, so far as possible, minimized, and their welfare ought not put in jeopardy or infringed, save where absolutely necessary and clearly justified, and then to the minimum extent possible whilst giving weight to the rights of the media and public generally.

12.117 The open justice principle is of very significant importance. But where that comes into irreconcilable tension with the particular considerations of FR proceedings, as the evidence and arguments set out above tended to identify, a balance needs to be struck. Where the naming of parties could lead to driving them into less open arbitration proceedings or similar (for those that could afford it), the aim of greater transparency may achieve the opposite effect. Equally so, any de facto curtailment of access to justice, especially for those less well off.

12.118 The increased publication of judgments has already increased the degree of policing of and insight into the operation of the FR courts. Particularly so, at below High Court level, where the vast majority of cases are dispatched. That is to be encouraged and promoted, and it is to be hoped following the report of the report of the TIG sub-group on anonymising judgments, chaired by HHJ Madeleine Reardon that there will be an increase in such judgments being published. The greater the detail able to be put in such reports (as well as those at High Court level) serves to promote transparency.

12.119 Ward LJ in ***ETK*** put the broad point (in a different but not unrelated context) as to the balance thus:

> *22…. "In my judgment the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play.*
>
> *23… The decisive factor is the contribution the published information will make to a debate of general interest".*

12.120 The group has concluded that a starting point of general anonymisation of reporting, be it by the media or in the form of final judgments, on publicly and freely accessible websites (e.g. Bailii etc) is the correct place to strike the balance between the need for:

- 12.120.1 The public interest being promoted by more judgments and reports with greater information being published. In turn this provides greater transparency and permits a better understanding and policing of the court's functions to be available to the public; whilst;
- 12.120.2 Suitably protecting the rights and welfare of the litigants, in particular their children; and
- 12.120.3 Guarding the integrity of the system and the necessary provision and use of information on which it relies, and FR proceedings' ability to function fairly for all who have need of it.

12.121 This does not, in our opinion place a veil of secrecy over any such case. The entire salient details of it: the arguments employed, law applied, facts disputed and found, and figures relied upon, could be, in effect, seen by all who read the report. The only secrecy would be in respect of the actual name of the particular litigants (and similarly identifying information), which are details which lend little or nothing to the greater understanding of the case, or the public interest in scrutiny of the system from which it emanates.

12.122 Insofar as any comfort be needed, in recommending a departure (or recommending the retention of an already departed status quo, depending on the view taken of what the current law actually is) from the position in other non-family cases, the committee noted the recent comments of Lord Sumption, in the Financial Remedies Journal:

> *"I think special considerations apply to family law. The proceedings of the courts are part of the public business of the state and unless there are compelling considerations of justice or national security I would in general think they should be open. I am the author of at least two judgments to broadly that effect. There are, however, some rather special considerations in family cases, and I actually think that the family courts are probably too open. There was a time when family proceedings were with minor exceptions closed to the*

public. Family cases normally deal with intense personal tragedies involving quite ordinary citizens. I think that the public does not have a right to know about the internal distresses in a family relationship. The public does not acquire the right to know simply because the family in question is unable to sort out the problem for itself so that the court becomes involved. So, I would make this an exception to the principle that courts transact the public business of the state. Family courts are concerned with sorting out some of the most intimate and emotional issues that an ordinary human being can experience. I regard them as providing a supporting service rather than an adjudicatory service in the sense in which one might use that word in other kinds of case".

Chapter 13 – Which documents should be made available to reporters?

What is the present position?

13.1 In terms of access to documents, FPR r29.12 sets out the current position. Reporters are not entitled to inspect or copy any document filed or lodged without permission of the court.

13.2 FPR PD 27B confirms this, setting out that access to documents in proceedings is not afforded to the press by virtue alone of their permitted attendance under r.27.11.

13.3 FPR 22.19 permits that a witness statement that stands as evidence in chief is open to inspection by anyone unless the court direct otherwise, but this applies only to Part 7 proceedings (matrimonial and civil partnership proceedings) which are heard in public and does not apply to FRP which are heard in private.

13.4 The exceptions to FPR 22.19 allow for any person to ask for a direction that the witness statement is not open to inspection. For the court to grant such an application, it must be satisfied that certain grounds are met, which include "*the nature of any confidential information (including information in relation to personal financial matters)*" in the statement. It is noteworthy that information relating to personal financial matters is considered a relevant exception.

13.5 FPR 22.20 applies to the use of witness statements and, in contrast to FPR 22.19, applies both to proceedings under Part 7 and FRP. FPR 22.20 states that a witness statement "*may be used only for the purpose of the proceedings in which it is served*" save for if the court gives permission for some other use or the witness statement has been put in evidence at a hearing held in public.

13.6 Witness statements would likely include Forms E and replies to questionnaire as they contain evidence being relied on.

13.7 The present position is that without permission of the court:

13.7.1 Reporters are not entitled to inspect documents on the court file.

13.7.2 Reporters are not entitled to be given copies of witness statements or use them for purposes other than for the proceedings.

13.8 In the Court of Appeal, reporters are entitled to see court bundles.

13.9 It is informative to consider the position in civil proceedings under the CPR, which are, by default, heard in open court. In relation to documents, CPR 31.22 provides that a party to whom a document has been disclosed "*may use that document only for the purpose of the proceedings in which it is disclosed*" except where the document has been read to or by the court or referred to at a hearing held in public, or the court gives permission, or the party who disclosed the document and the person to whom the document belongs, agrees.

13.10 CPR 5.4C deals with the supply of documents to a non-party from the court records and records the general rule that a person who is not a party to proceedings may obtain from the court records a copy of:

> *(a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;*
> *(b) a judgment or order given or made in public (whether made at a hearing or without a hearing*" and, if the court gives permission "*any other document filed by a party, or a communication between the court and a party or another person*". The court may however order certain restrictions (e.g. on non-parties obtaining a statement of case, that it is edited etc).

13.11 CPR 5.4C was considered in the case of ***Cape Intermediate Holdings Ltd v Dring*** **[2019] UKQC 38**. In ***Cape*****,** the SC held, at paragraph 44, that the default position was that the public should be allowed access, not only to the parties' written submissions / arguments, which had been placed before the Court and referred to during the hearing (whether or not the judge has read them).

13.12 It was clear that an applicant for disclosure did not have automatic right for access to be granted (save to the extent that the rules granted such a right). Rather, a non-party seeking access must explain why they seek access and how granting the application would advance the open justice principle.

13.13 Setting out the fact-specific balancing exercise to be conducted by the court in every case, Lady Hale identified that the court would have to take in account any countervailing principles:

13.13.1 "…*On the one hand will be 'the purpose of the open justice principle and the potential value of the information in question in advancing that purpose'* ".

13.13.2 On the other hand, will be '*any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others*'*.... There may be very good reasons for denying access.*

The most obvious ones are ...the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality [paragraph 46].

13.13.3 Noted at paragraph 47 was that the practicalities and proportionality of granting the request will also be relevant, and

13.13.3.1 It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day-to-day control of the court process.

13.13.3.2 The non-party who seeks access will be expected to pay the reasonable costs of granting that access.

13.13.3.3 People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so.

13.13.3.4 The burdens placed on the parties in identifying and retrieving the material may be out of all proportion to the benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge.

13.13.3.5 "*In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate*."

What evidence has the group obtained?

13.14 The survey we conducted included the following questions:

'In principle, do you consider media and/or legal bloggers should be granted access to documents from the proceedings?
Should media and/or legal bloggers be granted access to documents from the proceedings only if they have attended the relevant hearing(s)?
Which of the following documents should media and/or legal bloggers be granted access (multiple answers permitted):

a) Position Statements
b) Witness Statements
c) Forms E with enclosures
d) Forms E without enclosures
e) First Appointment documents

f) Replies to Questionnaire with enclosures
g) Replies to Questionnaire without enclosures
h) Expert Reports
i) Voluntary Financial Disclosure
j) Transcripts of submissions
k) Transcripts of oral evidence
l) Forms D81 and Consent Orders
m) Interim Orders
n) Final Orders
o) Other – please specify

a. *How should such information be requested and provided?*
b. *Should permission of the court be a necessary condition to the release of documents?*
c. *If so, on what criteria?*
d. *Who should bear the costs of the expense of this exercise (sharing documents and any associated court applications)?*
e. *If you have any general comments on access to documents (including in terms of the safeguarding, storage and destruction of documents), please specify'.*

13.15 In terms of responses, the headline point was that the majority view was that media and legal bloggers should not be granted access to documents in principle.

13.16 In terms of the groups of responders, 103 full time Judges responded of which 56.3% said there should be no access to documents.

13.17 Of those Judges who responded that there should be access to documents, a significant majority (75%) said that permission of the court should be a necessary condition of release and the majority (61.4%) said that documents should only be provided to those members of the media who attended the hearing (the survey was conducted prior to the change of law in terms of media being permitted to attend remotely).

13.18 The judicial view (61%) was that such information should be requested on notice and via a request to the court. As to the costs, the majority (55%) considered that the media should bear the costs.

13.19 Of the responders who are not full-time judges, only 27% were in favour of any access to documents for the media and of that 27%, the vast majority (68.2%) felt that permission of the court should be a necessary condition of release and only to the relevant member of the media if he or she has attended the hearing. There was a strong preference (71%) for the process of obtaining the documents to be from the court on notice and that the media should bear the costs (59%).

13.20 In summary, the survey responses are clear that the majority consider that:

13.20.1 Reporters seeking documents should do so from the court on notice;
13.20.2 There ought to be court control; and
13.20.3 The requester should fund all the costs of the exercise.

13.21 In terms of which documents, the table below summarises the responses for each individual category of documents.

Documents	Pro	% of those pro docs being made available	% of all
Position Statements and other documents produced by advocates	136	79%	23%
Final Order	130	75%	22%
Interim Orders	83	48%	14%
Transcripts of submissions	82	47%	14%
Transcripts of oral evidence	74	43%	13%
Witness statements	69	40%	12%
Experts Reports	57	33%	10%
First Appointment documents (including ES1 & ES2)	56	32%	10%
Forms D81 and Consent Orders	47	27%	8%
Forms E without enclosures	39	23%	7%
Replies to Questionnaires without enclosures	30	17%	5%
Other - please specify in question 11	22	13%	4%
Forms E with enclosures	11	6%	2%
Replies to Questionnaires with enclosures	11	6%	2%
Voluntary Financial Disclosure	9	5%	2%
Other - specify in next question	1	1%	0%

13.22 The conclusions include the following:

13.22.1 Very few considered that raw financial documents should be provided; and
13.22.2 Most responders in favour of provision of any documents thought that position statements and final orders should be provided.
13.22.3 The narrative comments were overwhelmingly cautious or negative about the provision of documents.
13.22.4 Even amongst responders who were in favour of documents being provided, concerns were expressed about "*commercially sensitive and highly confidential documents*", "*invasion of privacy*" and "*ancillary battles to do with disclosure of documents"* causing "*delays to proceedings already beset with delays*" and

"*a risk that such disclosure will always be used by one party as leverage on the other party*".

13.22.5 There was concern about providing information relating to "*financial transactions made by a private individual, potentially during their marriage when there was no knowledge that court proceedings could be imminent*" which are "*heightened when there are children, contributions from family members and/or a family company involved where provision of such information could be incredibly damaging on a personal or financial level to people outside of the marriage*".

13.23 As a related point, concerns were expressed about parties being "*reluctant to disclose documents which identify their assets in public leading to parties not completing Form E correctly*".

13.24 In terms of the conduct of cases more broadly, concern was expressed about documents which "*contain information such as allegations regarding the other party's non-financial conduct*" given that "*frequently these allegations aren't adjudicated upon by the court and so there would be no finding as to whether the behaviour had occurred or not, potentially leading to unscrupulous spouses adding conduct allegations simply to place pressure on a high profile spouse*".

13.25 In addition, concern was expressed about parties frequently providing "*medical evidence regarding conditions that they may say restricts their earning capacity*" which is by definition "*highly personal, highly confidential information*".

13.26 The above quotes were all expressed by responders who were in <u>favour</u> of provision of some documentation. Even amongst this group, the overall impression is that a need for caution was expressed.

13.27 Turning to the comments of responders who were against document provision, their comments related to the principles of the matter, the impact on disclosure and on the court process itself.

13.28 On the principle, views were expressed that documents prepared in FRP are "*inherently private*" and "*divorcing couples should be awarded the same privacy as everyone else*" because "*there is no need to add to the trauma of divorce"*. Responders commented that "*the prurient curiosity of the public should not be a good reason to override privacy in private family proceedings*". There were fears expressed about "*sensationalising*" stories in the press rather than striving for "*balance and fairness to all*" and that "*often documents are not agreed or present or allege issues of conduct be that personal or litigation where findings have not been made and this would be regarded as headlines*

for articles and could damage the reputation of a party". One responder commented that provision of documents was "*not in the public interest- it simply interests the public*".

13.29 In terms of the impact on FRP, "*strong concerns*" were expressed about "*people not providing full and frank disclosure…as they are concerned it may be made available to the wider press*" and that if documents were made available, there would be "*significant increase in applications for non-standard disclosure e.g. redacted documents or incomplete Forms E*" which would "*not only take up valuable court time but also prejudice the parties' ability to properly scrutinise each other's financial disclosure*" as "*parties will be far less inclined to provide a full picture if they are concerned their Form E will be handed to the media*" and "*as a result, further interim hearings will be needed to address disclosure issues, increasing legal costs and clogging up the courts*".

13.30 Specific comments were made by a number of responders that this was not an issue simply for HNW (High Net Worth) parties or those with a national public profile but that clients "*who are not celebrities whether local or otherwise, and their children, should be entitled to litigate in privacy, not subjected to criticism and derision in the press*" as many of "*our clients…are normal people who need help from the court system*". Furthermore, "*those of us working in regional court centres, with 'ordinary' clients rather than celebrity or high-profile clients, are concerned that in small communities or rural communities, the release of any information can result, even if redacted, in clients and their children being easily identified. The rise in social media runs the risk of them receiving unwanted and unsolicited attention/comment, upon issues which are deeply private, and at a time in life when they are vulnerable and often very 'low'*".

13.31 Across all categories of responders, the consultation highlighted acute concerns about custody, safeguarding, return and/or destruction of documents and protection from misuse including amongst those in favour of provision of documents. Even amongst the latter group, many emphasised limitations, anonymisation and other fetters on content.

13.32 The fears were that "*onward transmission will be uncontrollable*" and that it could not be "*clear who would be responsible for safeguarding the documents*" giving rise to "*problems associated with theft, misuse and wider dissemination*". In short, a concern that there would be an "*ability for private information to reach the wrong hands*". In terms of resourcing, it was expressed that it was *"difficult to see how the Court, with limited resources, can stay on top of online security*" especially as "*the court service could not manage it*" and is already "*acting in an under-staffed and wholly inadequately supported system*" which makes "*prompt communication*" difficult and documents already "*do not*

reach judges before trials start" with a fear that "*the situation would be worse if the court staff were required to deal with additional work*"

Considering the options

13.33 We considered the responses of the consultation carefully. Set out below are the recommendations reached regarding the provision of documents to reporters and the broad reasoning behind these recommendations.

13.34 There are arguments for reporters to be entitled to see more documents to help them understand the proceedings they are observing.

13.35 This needs to be balanced with the strength of concerns expressed in the consultation responses.

13.36 Our recommendations are as follows:

13.37 The provision of any documents to reporters should only be on the basis of an application / as permitted within the Reporting Order.

13.38 The principles of any application should be that the non-party seeking documentation must explain why they seek access and how granting the application would advance the open justice principle.

13.39 It should always be a matter for the court to determine which documents can be made available / accessed by reporters. The principles in the SC case of **Cape** (see above) are helpful in terms of the balancing exercise which the court would need to conduct in relation to such applications.

13.40 There should however be a presumption in favour of provision of position statements and the Form ES1. These are the clearest summary documents which would provide the necessary overview and framework of the case. These documents would appear in a standard Reporting Order but this can always be amended upon application by any party and/or reporter.

13.41 In the event that there is no position statement, it would be open to the Judge or any represented party to explain to the reporters what the case is about. Experience of this approach in the Court of Protection where such explanations are standard at the start of a hearing is a helpful precedent.

13.42 The provision of position statements and ES1s is subject to any redactions which are necessary in order to preserve commercially sensitive information.

13.43 There would be a presumption against the provision of:

13.43.1 Any primary financial information or documents;

13.43.2 Forms ES2, given the extent of the personal information contained therein and the concerns about how that information would be safeguarded;

13.43.3 Witness Statements, given the concern that this may encourage more direct or inappropriate attacks in the presentation of the evidence, that the content of such Witness Statements is often not addressed fully in the hearing, and that there may not always be a right of response, have the potential to mislead;

13.43.4 Expert reports.

13.43.5 Consent Orders and D81s, given the parties in such cases have expressly avoided court proceedings.

13.44 The provision of any other documents lies in the court's discretion.

13.45 The provision of position statements and Forms ES1 provides the necessary overview and balances this with the concerns raised.

13.46 In addition, there should be no prohibition on the parties agreeing to provide a summary document prepared jointly to aid the press.

13.47 In exercising that discretion, the court will only consider material which is in the bundle for the hearing and not, other than in exceptional circumstances, consider material which is not in the bundle. This should exclude therefore any primary financial documentation given that FPR PD27A provides that bundles should not include bank and credit card statements and other financial records.

13.48 The provision of any documents must be subject to clear safeguards in terms of storage, destruction and confidentiality. It is accepted that it is not possible to provide a particular date time limit for destruction of documents for the reasons set out in paragraph 14.35(b) but they should be destroyed once they are no longer required to be retained.

Chapter 14 - Reporting in the FRC/The Rubric

14.1 The ability to report any Financial Remedy proceedings at present is highly restricted and as a result, there is little reporting of any FRC cases. This is, in part down to the law and in part due to a lack of clarity which prevents reporters in knowing what they are able to report and that which cannot be reported.

14.2 In the report ***'Confidence and Confidentiality: Transparency in the Family Courts'*** the President stated *"the time has come for accredited media representatives and legal bloggers to be able not only to attend and observe Family Court hearings but also to report publicly on what they see and hear. Reporting must be subject to very clear rules to maintain both the anonymity of children and family members who are before the court, and confidentiality with respect to intimate details of their private lives. Openness and confidentiality are not irreconcilable, and each is achievable. The aim is to enhance public confidence significantly, whilst at the same time firmly protecting continued confidentiality".*

14.3 In 2015 Mostyn J commented, "*To say that the law about the ability of the press to report ancillary relief proceedings which they are allowed to observe is a mess would be a serious understatement*": ***Appleton v Gallagher*** **[2015] EWHC 2689 (Fam)**. The recent slew of reported cases on the issue of transparency has not made the position any more certain.

14.4 There are a number of hurdles in the way of any reporter deciding to commit to writing any piece on a Financial Remedy case. As on other controversial areas of law, it is not for this paper to set out what we consider to be the correct position in law, but rather to highlight the difficulties in the present position and make recommendations for the way forward. The obstacles to reporting include:

14.4.1 The Judicial Proceedings (Regulation of reports) Act 1926.
14.4.2 s.12 Administration of Justice Act 1960.
14.4.3 ***Clibbery v Allan*** **[2002] Civ 45**.

14.5 **The Judicial Proceedings (Regulation of Reports) Act 1926:** This Act states that "*it shall not be lawful to print or publish, or cause or procure to be printed or published… In relation to any judicial proceedings for dissolution of marriage… Any particulars other than the following..*" The permitted particulars include names addresses and occupations of the parties and witnesses, a statement of the charges, defences and counter charges, submissions on any points of law and the summing up of the judge and the finding of the jury. Any breach of the Act may be punished by a term of imprisonment.

14.6 There are issues as to whether the act applies to Financial Remedy proceedings at all. In ***DL v SL*** **[2015] EWHC 2621** Mostyn J stated at paragraph 11 "*it is my firm opinion that the Judicial Proceedings (Regulation of Reports) Act 1926 applies not merely to the suit for divorce itself but also to the proceedings for ancillary relief. At the time it was passed ancillary relief was an intrinsic part of the divorce itself. Since it has been passed it has been extended to cover proceedings for maintenance under section 27 Matrimonial Causes Act 1973, and its civil partnership equivalent: see section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968. It would be bizarre if it applied to the now nearly obsolete form of maintenance proceedings that is section 27 of the 1973 Act but not to mainstream ancillary relief proceedings."*

14.7 In the case of ***Appleton v Gallagher [2015] EWHC 2689*** Mostyn J considered that the Act was intended to cover the cases that were heard in open court and consequently did not apply to Financial Remedy cases that were heard in private.

14.8 In ***Xanthopoulos v Rakshina*** **[2022] EWFC 30** Mostyn J decided that "*I am quite sure I was wrong about that*" when considering the applicability of the Act to Financial Remedy proceedings. This is on the basis that the Act refers to "statement of the charges, defences and counter charges" which must relate to the dissolution of marriage et cetera, referring to defended divorces and it "*plainly does not apply to a financial remedy application*." It follows that if this is a correct view of the law, then this Act does not create any obstacle in the way of reporting on FRC cases. There remains a lack of clarity on the point.

14.9 **s.12 Administration of Justice Act 1960**: This Act provides that if the proceedings are conducted in private and "*relate wholly or mainly to the maintenance or upbringing of*" a child then in general, it is a contempt of Court to publish information relating to the proceedings. The rule does not apply to "*the publication of the text or a summary of the whole or part of an order made by a court sitting in private*" unless the court makes an order prohibiting such publication pursuant to s.12(2). S.12 does not prevent identification of the parties or the child.

14.10 Section 12 will not apply to the majority of cases in the FRC, but it would cover Children Act Schedule 1 claims, as would s.97 Children Act 1989, which prohibits the publication of information, to a section of the public at large, which is likely to identify the child, for the duration of the proceedings. It is also arguable that a particular Financial Remedies case could fall under the auspices of s.12 AJA 1960 if the main issue between the parties related to the maintenance or upbringing of a child, although such cases are extremely rare. It is another obstacle in the way of a member of the press feeling comfortable in an ability to report any hearing.

Disclosure of Information Disclosed under Compulsion

14.11 The Court of Appeal stated in ***Clibbery v Allan*** **[2002] Civ 45** that parties in Financial Remedy proceedings owe an undertaking to the court not to use information disclosed by the other party under compulsion for any purpose, other than the proper purposes of the proceedings. Further it would be a breach of that undertaking and a contempt of court for a party to publish such information. Any reporter attending such a hearing may well be collaterally bound by that undertaking. The information that is disclosed under compulsion is more or less all of the financial information that is considered in such applications as was made clear in paragraph 106 where Thorpe LJ stated:

> "*all the evidence (whether written, oral or disclosed documents) and all the pronouncements of the court are prohibited from reporting and from ulterior use unless derived from any part of the proceedings conducted in open court or otherwise released by the judge*."

14.12 Consequently, if that cannot be reported then it renders any ability to report on proceedings nugatory.

14.13 In ***Xanthopoulos*** Mostyn J stated that disclosure under compulsion occurs within civil proceedings but this does not prevent the matter being reported due to the fact that the hearings are in public. The Court of Appeal was of the view that as Financial Remedy proceedings were held in private as opposed to public, a distinction could be drawn. Mostyn J held that such an argument could not survive the alteration of the rules in 2009 whereby journalists were permitted to attend Financial Remedy proceedings causing the extinguishment of the privacy of such hearings and that they were now to be treated as if heard in open court. This caused Mostyn J to state (para 115) that:

> "*in my opinion, in the absence of a specific reporting restriction order, a journalist or blogger who receives information by virtue of being present during the proceedings, is fully entitled to publish that information*."

14.14 This group is not aware of any case following the decision of ***Xanthopoulos*** in which any reporter has published such information. No other High Court Judge has followed Mostyn J in this decision, in any reported decision of which we are aware.

14.15 It is difficult to disagree with Mostyn J in ***Gallagher v Gallagher*** **[2022] EWFC 52** paragraph 80 in which he states:

> "*On any view, the law regarding the openness of a financial remedy hearing which is not wholly or mainly about child maintenance is regrettably unclear and contradictory*."

What should Reporters be able to Report?

14.16 The present position is one of such uncertainty that it is very difficult for any reporter to have confidence in knowing what they can or cannot publish and that is creating, in practice, an absence of reporting of FRC cases and the uncertainty is a disincentive to reporters to even attend hearings. It is impossible for reporters to commit any resources to a hearing when they are unaware of what can be published thereafter.

14.17 In practice, the overall position, if the other recommendations of this Group are followed, would be:

14.17.1 The parties should usually be granted anonymity in any reporting save for when an order is made permitting the parties to be named;
14.17.2 Judges of all levels should be encouraged to publish a range of FRC judgments, and this should occur as soon as possible after the cases are heard;
14.17.3 Reporters are permitted to attend hearings, as is presently the case;
14.17.4 Reporters should generally be provided with access to the skeleton arguments of the parties and the ES1;
14.17.5 The present Transparency Pilot is permitting anonymous reporting of Children Act cases in the pilot Courts so long as the ***Re S*** balancing / proportionality exercise has been performed.

14.18 If this is a position that is reached it does not sit well for reporters not to be able to report what has occurred in Court even on an anonymised basis. We do not consider that is a state of affairs that can continue.

The Interplay of the Rubric and Reporting

14.19 The standard template for judgments contains the rubric setting out what may or may not be published. The wording of the rubric is often as follows: "*This judgement was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court*."

14.20 In ***Xanthopoulos v Rakshina*** **[2022] EWFC 30** Mostyn J held that *"It can therefore be seen that the rubric has no relevance to, or impact on, a financial remedy case which is not mainly about child maintenance. A further reason why it cannot operate as a form of*

anonymized ocean and reporting restriction order for financial remedy cases is that it would turn upside down the omission of those cases from the s.12 list of types of secret cases."

14.21 In considering the issue of the rubric, it became apparent that the two issues of reporting and rubric are related. In particular, in most cases in the Family Court there is no written transcript of judgment to which the rubric can be applied.

14.22 As reporters are entitled to attend all FRC proceedings unless excluded, the issue of reporting may arise at any stage of proceedings, and the court should be alert to this. This may be at the First Appointment or at any time thereafter. We propose that in cases in which the press have shown an interest that an order should be made to consider what can and cannot be reported.

14.23 For the purposes of this paper, we intend to call the order made a Reporting Order (RO). The use of the terms Transparency Order and Reporting Restrictions Order seems to us to give the wrong message, the former suggesting that it gives more openness than in fact it offers and the latter sounding unduly restrictive.

14.24 We discussed whether a RO should routinely be made in all cases, regardless of whether there is an application for a RO. We concluded that the burden that this would place on the administration which is already struggling to keep up with orders might be overwhelming. There is next to no attendance by reporters or bloggers in FRC cases outside the High Court, and thus no need for a RO in most cases.

14.25 When it is felt in a case heard by a judge below High Court Judge level that there is call for a RO and as a matter of routine in all High Court cases, which are very often attended by reporters, a RO should be made which will be in a standard form and which can in any case be varied either on application or on the court's own motion as needed. The RO would normally be made at the First Appointment.

14.26 We have modelled the standard form of RO on the proposed Transparency Order (see Appendix 2) of the TIG for Children Act proceedings. Although each case will be considered individually, we suggest that the following should be anonymised unless otherwiseordered:

14.26.1 The names and addresses of the parties (including any intervenors) and their children and any photographs of them;

14.26.2 The identity of any school attended by a child of the family;

14.26.3 The identity of the employers, the name of the business or place of work of any of the parties;

14.26.4 The address of any real property owned by the parties;

14.26.5 The identity of any account or investment held by the parties;

14.26.6 The identity of any private company or partnership in which any party has an interest;

14.26.7 The name and address of any witness or of any other person referred to in the hearing except for an expert witness.

14.27 We concluded that this would provide an appropriate balance between the freedom of expression and the infringement of the private life of the parties. It would permit publication of the finances of the parties in broad detail so as to make any report informed and of interest, without permitting the intimate details of who the parties are, where they live and/or work and, for example, their bank account details, or partnership share being disclosed.

14.28 Any additional request for further anonymisation by the parties or requests by the media to vary can be considered at any convenient time. It is suggested that the advocates (if the parties are represented) draw up a list of any further terms that are not to be published. If practicable parties and reporters should be encouraged to reach consensus on the scope of any justified and necessary prohibitions (see President's Guidance as to Reporting in the Family Court, 2019 and Appendix 1).

14.29 It is difficult to be prescriptive as to the precise further terms of the RO as this will vary from case to case. Whilst we do not endorse the approach that was raised by Mostyn J in late 2021 when he made a proposal for Reporting Permission Orders, we consider the aim of the same in terms of what could be reported, as laudable. The suggested wording of the order was:

> *"In order to enable a journalist / legal blogger to publish a meaningful and intelligible report of the proceedings, the following shall not be regarded as protected financial information: (i) a broad description of the types and amounts of the assets, liabilities, income, and other financial resources of the parties, without identifying the actual items, or where they are sited, or by whom they are held; and (ii) inasmuch as they are based on the material in (a) – € above, a broad description of the open proposals of the parties giving only the monetary value of the proposals and without identifying actual items."*

14.30 The difficulty is to draft the RO in such a way to ensure that this aim is one that is enforceable.

14.31 We recognise that there is an arguable inconsistency between anonymising names in a RO and their appearance on a court list. On balance, we do not think this is an argument of merit. Without the court names on a list, reporters will not know whether the case is worth attending. Reporters are entitled to know whose case is being heard. The media would be entitled to report that the case of Mr X and Ms X is being heard by HHJ Jones.

14.32 What reporters could not do is report upon the substance of the hearing at the same time as identifying the parties because of the near certainty of jigsaw identification. We are confident that reporters will be able to cope with a RO in such circumstances without difficulty.

14.33 We envisage that the RO will in most cases, whether adjusted or otherwise, endure until further order without limit of time. This will include both before and after the delivery of judgment. This is an issue that would require separate consideration in each case to consider whether there is good reason for the RO to be limited in time. The Court of Appeal considered this issue in ***Abbasi v Newcastle NHS Trust*** **[2023] EWCA Civ 331** wherein the balancing considerations are set out.

14.34 None of the forgoing inhibits the identification of parties by order of the judge, where their conduct, the fact that the details of their dispute are already in the public arena, or other matters, make it appropriate.

14.35 There are several specific RO issues which merit comment:

14.35.1 The draft RO at paragraph 6 provides for the RO to continue until further order. However, the court should consider duration in each case. It is likely that in most cases an order unlimited by time would be appropriate, leaving reporters to apply to vary but that is not inevitably the case;

14.35.2 We have not provided in paragraph 14(c) for the reporter to destroy the documents given pursuant to paragraph 9 within a set time. There is a practical problem in that the reporter could in theory be subject to complaint, claim or regulatory proceedings which might require access to the documents; this part of the order cannot be effectively policed; and, the parties are adequately protected by the requirement of confidentiality.

14.36 A judgment provided in written form and available on the National Archives will still need a rubric because it is a public document and readers who did not attend the trial will not know the terms of the RO.

14.37 In Abbasi the issue was raised as to whether the Court had jurisdiction to make a RO. The Court of Appeal concluded that the High Court did have such a power but was silent as to any lower Curt having jurisdiction. We have considered the arguments about whether the Family Court, as opposed to the High Court, has jurisdiction to make Reporting Orders. If it does, it seems to us to arise from MFPA 2014 s31E(1), (see para 15 President's Guidance: Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court Judge level and transfer of cases from the Family Court to the High Court 28 February 2018, which indicates that this power permits 'the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the family court'). We have annexed to this report a suggested draft order on the premise that the Family Court does indeed have the power to make such an order. If it did not, then plainly it should so as to avoid proceedings having to be allocated to the High Court solely for the purpose of making the RO.

14.38 The publication of the judgment should present far fewer problems as the judge has the opportunity to remove from the published judgment, any material that he/she does not wish to be made public.

14.39 If a judgment is to be reported, the rubric used by most judges should be adapted to bring in the RO along the following lines:

> *This matter was heard in private. The judge gives permission for this version of the judgment to be published. In no report of, or commentary on, the proceedings or this judgment may the parties or their children or their addresses be identified. In this case a Reporting Order has been made on ---- which continues in effect.*
> *All persons, including representatives of the media and legal bloggers must ensure that the terms of the reporting order are strictly observed. Failure to do so will be a contempt of court.*

14.40 The reporting would be permitted on a day-by-day basis, but no live reporting/tweeting from the Court should usually be permitted. In most cases (save those in which permission was granted) the reporting would be on an anonymous basis which would undoubtedly reduce the press interest. However, the purpose of transparency is to ensure that a light is shone upon the process, and this does not require the individuals to be named. It will be possible to understand all the relevant issues and why the judge has reached the decision that has been reached, if all of the recommendations that are made in this paper are endorsed and acted upon.

14.41 In those cases where it is decided that the parties should be named, we encourage this to occur at the earliest stage possible to assist reporters in understanding whether they will be able to refer to the parties by name. This will undoubtedly be an important factor for the

reporters to consider whether to remain in the hearing and/or report the proceedings. This may be at the PTR or on the first day of the final hearing. There will be cases in which it is not possible/appropriate to reach such a decision until all the evidence and submissions have been heard. This can only be decided by the trial judge on a case-by-case basis.

Must a journalist/legal blogger be physically present to be able to report a hearing?

14.42 The answer to this point is that with effect from 28th June 2022, an amendment was made to the Courts Act 2003 S.85A and a Practice Guidance (Open Justice: Remote Observation of Hearings) [2022] 1 WLR 3538 was issued. This enables journalists and bloggers to attend cases remotely. This includes cases that are heard in private in the Family Court even if the hearing itself is in person. There can be no distinction between a reporter attending in person or remotely provided that they are in the jurisdiction and susceptible to the reach of the court in the event of any need to enforce restrictions. The decision whether to permit such remote observation is always a matter for the judge having regard to all the circumstances of the case.

14.43 In some courts a late request by a reporter for remote access in a case that is being heard in person will place excessive strain on the court administration. It would be very desirable for any such request to be made in good time.

Chapter 15 - Appeals

15.1 The position in relation to appeals has always been very different to that in first instance cases.

Appeal to a Circuit Judge

15.2 FPR 2010 30.12A deals with appeals within the family courts.

(2) provides that

The appeal court: *may make an order -*

(a) for the hearing of the appeal to be in public.

(b) for a part of the hearing of the appeal to be in public; or

(c) excluding any person or class of persons from attending a public hearing of an appeal or any part of it.

15.3 The rest of the rule goes on to provide a set of circumstances where the court may impose restrictions on the publication of the identity of those involved in the appeal and the prohibition of the publication of information.

15.4 It follows that a circuit judge in the Family Court retains a complete discretion as to whether or not to hear an appeal in public.

15.5 In our experience, it is extremely rare for a Circuit Judge to hear an appeal from a District Judge/Deputy District Judge in public. The parties do not come to court prepared for their appeal to be heard in public unless there has been a previous direction to that effect. Whilst it is possible to imagine circumstances whereby a Circuit Judge might so direct, we do not know of instances where that has happened.

15.6 FPR 30.12(A)(4) provides for the making of a practice direction setting out circumstances when the appeal court would ordinarily hear an appeal in private or in public. No such direction has been made.

The High Court

15.7 The provisions governing the High Court are to be found at PD 30B which provides that:

2.1 Subject to paragraph 2.3, the appeal court will ordinarily (and so without any application being made) –

(a) make an order under rule 30.12A (3)(a) that the hearing of the appeal shall be in public and

(b) in the same order impose restrictions under 30.12A (3) in relation to the publication of information about the proceedings.

Paragraph 2.3 provides that:

In the case of an appeal against the decision or order made in proceedings of financial remedy where no minor children are involved, the court will not normally impose restrictions under rule 30.12A(3).

15.8 The basic rule is that appeals to the High Court will be heard in public. Indeed, they are invariably listed to be heard in public without there normally being an order made that the hearing shall be in public. It is widely understood that appeals to the High Court are heard in public.

15.9 We are not aware of any guidance as to why the distinction between appeals in the family court and those in the High Court differ. It has been suggested that:

15.9.1 The difference arises because an appeal is made against the decision of a public body rather than being an adjudication between two parties; or

15.9.2 That the High Court's sitting in public is a result of the delegation down to the High Court from the Court of Appeal of private law appeals and simply replicates the situation in the Court of Appeal where appeals are virtually always heard in public.

15.11 There does not seem to us to be a convincing reason as to why the difference should exist.

15.12 PD 30B(3) makes provision for the court to provide accredited law reporters and media reporters with copies of the judgment under appeal and skeleton arguments. There are consequential provisions allowing a party to apply for these provisions to be varied and for the redaction of skeleton arguments.

15.13 This provision is almost always overlooked. It is rare for a reporter to ask for such documents or for the court to have such documents ready and available. Most appeals take place in the absence of any reporting of any accredited reporters so that if such a request was made copies would need to be made available.

15.14 It is of interest that there is no corresponding provision to PD 30 B(3) for appeals to the Family Court.

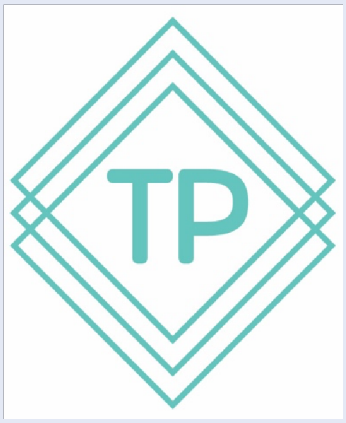
15.15 As in many other areas of the law, it is rare for appeals to be attended by a reporter. In part this may be due to the competing attractions of other cases being held elsewhere and in part because the lists do not clearly provide information which indicates whether the subject matter of the appeal is a children's case, in which instance the likely anonymisation of the parties will remove much of the public interest, or whether the appeal is against a financial remedies order which may or may not be of interest. The public lists should make this clear.

15.16 Appeals in open court are of course open to the public. In High Court appeals, a transcript is routinely ordered and placed in The National Archives.

15.17 No question in the survey related to appeals and we are not aware of any movement for a change in the current regime.

15.18 We do not advocate that there should be a change in the existing rules. High Court appeals are nearly always heard in public and that should remain the case. We suggest that the Circuit bench might be reminded of their ability to hear an appeal in public with the proviso that if so minded, the parties must be notified in advance. We also recommend that the lists make it clear that the case involves a Financial Remedy appeal and that the parties should be named in the list as set out in Chapter 8 above.

APPENDICES



What to do when a reporter attends
(or wants to attend) your hearing
A guidance note for judges & professionals

This guide is designed to assist professionals involved in family court cases to think through issues around the attendance of reporters in those cases. Nothing written here should be treated as legal advice on individual cases or circumstances. The Transparency Project does not give legal advice.

The Transparency Project
January 2023

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WHAT TO DO WHEN A REPORTER ATTENDS (OR WANTS TO ATTEND) YOUR HEARING

Firstly, don't panic. Identify the relevant parts of the Family Procedure Rules ('FPR') and applicable statute.

Next, consider the following key principles and then work through the practical points below.

1. **Reporters are generally allowed to attend hearings – they do not need to 'apply' or give notice**

    a. FPR 27.11 gives a general right of attendance to journalists and legal bloggers to most (but not all) private hearings. Notable exceptions are part 14 (adoption etc) and

hearings involving judicially assisted conciliation (or at any rate those parts of hearings involving judicially assisted conciliation) typically FDR or FHDRA hearings.

b. This right of attendance applies to accredited media representatives (journalists with a press card) and duly authorised lawyers (qualified lawyers attending for journalistic, research or public legal educational purposes – colloquially known as legal bloggers). For convenience the collective term 'reporters' is useful to cover both. You should check the credentials of a reporter, unless they are known to the court. A legal blogger should provide form FP301 (this is not required for a journalist).

c. FPR 27.11(3) defines the limited circumstances in which the court may (of its own motion or on application) exclude a reporter from all or part of a hearing.

d. If there is an issue with the attendance of a reporter the court should hear briefly what the nature of the objection is, and allow the reporter to respond. The court should consider FPR 27.11(3) in deciding whether to exclude the reporter. FPR 27.11(3) requires something more than the fact that the nature of the proceedings is 'private' or that one or more parties would prefer them not to attend. Concerns about potential reporting are not a basis for excluding a reporter from attending. In some cases automatic restraints on publication will apply, in others it may be appropriate for the court to impose them. But a need to restrict publication of information does not necessarily mean a reporter should be excluded from observing.

e. Although it is obviously helpful if a reporter does give notice that they intend to attend, it is not a requirement. In reality, for various reasons, this will not always be possible. A reporter should not be criticised for not giving notice or 'sufficient' notice.

2. **What a reporter is permitted to report will depend upon the nature of the hearing / proceedings.**

a. In private Children Act 1989 proceedings, s12 Administration of Justice Act 1960 ('AJA 1960') will generally significantly curtail what can be published. A reporter may attend but report very little without the permission of the court. In those cases a reporter may wish to make an application to report, and this is usually best dealt with at the end of the hearing.

b. NB The President's Reporting Pilot operating from 30 January 2023 in Carlisle, Leeds and Cardiff is an exception to this, in that the court will usually make a transparency order in such cases in those courts which reverses the presumption against publication and permits anonymised reporting of most of the detail of such cases.

c. S97 Children Act 1989 precludes the identification of a child as the subject of proceedings during the life of the case.

d. In Financial Remedy cases s1 of the Judicial Proceedings (Regulation of Reports) Act 1926 (arguably) applies. There is an apparent divergence of view at High Court level as to whether the implied undertaking of confidentiality arising from the compelled disclosure requirements / duty of full and frank disclosure or the general 'private' nature of hearings precludes the publication of information by reporters (or parties) in circumstances where privacy is attenuated (or destroyed) by the right of attendance by reporters (see *Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52). On one view (per Mostyn J in *Gallagher*) there is no *de facto* restriction on the reporting of information gathered / heard by a reporter at a FR hearing, and if there is to be any such restriction it must be the subject of an on notice reporting restriction order application (on notice to the press via the Media Injunctions Alert Service (aka Copydirect). NB, it has recently been suggested that contrary to PD27B and in accordance with *A v BBC* [2015] AC 588 the media need not be given notice in advance of a *contra mundum anonymity* order (as opposed to a particular respondent) is not required. However, *A v BBC* suggests that steps must be taken to ensure the media are aware after the fact that the order has been made (in civil cases the anonymity order is published on judiciary.uk).

e. Whilst this topic remains controversial, judges may wish to canvas the parties and media/ reporters' positions on these issues at the outset of a hearing attended by the media, in order that a pragmatic and lawful way forward can be found. For example, reporters may not wish to report anything until the conclusion of the hearing, or may be content to agree not to include specific information in their reports, at least for the time being. If necessary and proportionate, the court may make an interim order pending a full *Re* analysis (*Re S (A Child)* [2004] UKHL 47) at the conclusion of the proceedings / substantive hearing – but whether this is appropriate will depend on the circumstances. *Re S* applies and judges should have regard to paragraph 17, per Lord Steyn:

> *'The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present*

purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.'

f. By PD30B appeals are presumptively to be heard in public, but may be taken in private. In cases involving children anonymity orders may be made. Subject to any anonymity or reporting restriction order matters referred to in a public appeal (or other) hearing may be reported (s12 AJA will not apply).

3. A reporter should not be asked to reveal their source

a. A reporter may become aware of or interested in attending a hearing for a number of reasons. It is not appropriate for a judge or legal representative to ask a reporter who told them about the hearing or who invited them to attend. Where a reporter is entitled to attend a hearing they are not required to justify or explain their attendance, and they may decline to respond to such an enquiry. A journalist's duty of confidentiality and professional code of conduct will usually require them to do so and legal bloggers attending for a journalistic purpose are likely to hold to similar standards. Reporters should not be placed under pressure to reveal sources or criticised for not doing so.

b. Judges and legal professionals should remember that journalists attending a family court hearing are outsiders and such requests may have a 'chilling' or intimidating effect upon reporters.

4. Editorial control of reporting is no part of the court's function

a. The court should not engage in enquiries that amount to editorial control or approval or disapproval of proposed journalistic material. Providing material is lawfully obtained and lawfully reported a reporter / publisher is at liberty to publish on their own terms. Such reporting may contain material that a party would prefer not to be included, it may exclude material a party considers highly relevant, it may offer

comment or opinion that is contrary to the view of the court or the parties. Concern that any of these things may happen is neither a proper basis upon which to exclude a reporter from a hearing nor to restrict reporting which would otherwise be permitted. The court should have regard to *Re S* in considering whether to relax or restrict any existing constraint on reporting in the individual case. This will usually involve close scrutiny of any competing Article 8 or 10 ECHR rights, analysis of the specific facts of the case and any arguments about public interest, privacy, welfare etc and a careful balancing of those factors to reach a conclusion which interferes with each of those rights only insofar as is necessary and proportionate.

b. It is not appropriate for the court or parties to require or request sight of a proposed report prior to publication for approval. Most journalists will refuse this as contrary to their journalistic independence.

5. Communication is key

Reporters may in some respects be the outsiders in the room (though a small number have made attendance at Family Court hearings their speciality), but they are generally skilled at thinking creatively about how the balance between privacy and public interest in the reporting of court proceedings can lawfully be achieved. If lawyers and judges engage reporters in discussions / submissions about these issues reporters may come up with a pragmatic proposal that will enable matters to move forwards on an agreed basis, or at least to narrow the issues. What a journalist wants and needs to report will depend upon whether they are a news journalist or are carrying out broader investigative or long form journalism work. What a legal blogger wants and needs to report will differ again.

6. A reporter will need to be able to share information with their editorial team

Any reporter (unless self-publishing) will need to be able to share sufficient information with their editorial and any in house legal team in order to facilitate publication, and to ensure that publication is in compliance with the law and any court orders. Most reporters will assume this is permitted. It is probably helpful to make it explicit to avoid any confusion.

7. Practical steps:

(NB some of these steps may not be applicable or may need some adjustment in Reporting Pilot cases)

Before the hearing (if it is known a reporter is attending) –

- Court to let the parties and their legal representatives know that a reporter is intending to attend

- Court to make arrangements for the reporter to be provided with a link (see Practice Guidance Issued by the LCJ in June 2022 'Open Justice – Remote Observation of Hearings – New Powers, which sets out that 'Remote observation should be allowed if and to the extent it is in the interests of justice; it should not be allowed to jeopardise the administration of justice in the case before the court', and makes clear that this may include remote attendance by a reporter of an otherwise fully attended hearing).

- Check reporter's credentials – for journalists this is a UK press card; for legal bloggers practising certificate or letter from their academic institution or Registered Educational Charity such as The Transparency Project, and form FP301.

- Check the hearing is one which reporters are permitted to attend (FPR 27.11)

- Consider whether a reporter should be provided with key documents to aid understanding (on terms) – e.g. case outline, ES1, skeleton argument, etc, and if so on what terms (see for e.g. *President's Guidance: Attendance of the Media* [2009] 2 FLR 167 "Where a representative of the media in attendance at the proceedings applies to be shown court documents, the court should seek the consent of the parties to such representative being permitted (subject to appropriate conditions as to anonymity and restrictions upon onward disclosure) to see such summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case", and *Newman v Southampton City Council & Ors* [2021] EWCA Civ 437 in which it was confirmed that the *Re S* exercise should be utilised in connection with issues relating to reporters' access to documents).

At the outset of the hearing –

- Deal with any objections to attendance in the presence of the reporter (brief submissions from parties with reference to 27.11(3), with an opportunity to the reporter to respond)

- If not already done, consider whether a reporter should be provided with key documents to aid understanding– e.g. case outline, ES1, skeleton argument, etc. Documents can be provided on terms such as no further distribution / publication pending further order, no reporting of identifying details etc as appropriate.

- Canvas any potential issues regarding reporting – ensure all parties and reporters are on the same page in terms of what can be reported (in a Reporting Pilot case ensure all have the pilot guidance and deal with the terms of the Transparency Order)

- Consider setting time aside at the end of the hearing to deal with such issues. Many reporters will invite the court to deal with this at the end of the hearing when they understand more about the case and can make more informed proposals as to what should and should not be reportable and what (if anything) could be justifiably withheld in order to facilitate the reporting of more editorially important facts (e.g. in a children case a reporter may make sensible concessions / suggestions about specific facts that might be identifying but which are not journalistically essential).

- Remember to deal with any issues / set ground rules about live reporting if requested and permitted / reporting of an ongoing hearing.

- In an FR case where it is clear a reporter will wish to report and a party objects to that the court will need to decide whether an on notice RRO application is necessary / appropriate (depending on its interpretation of the law) and if so how to deal with matters in the interim. It may be appropriate to refer the case to the Lead FR Judge (see Peel J guidance 'Financial Remedies Court Practice Guidance, 13 May 2022').

<u>At the end of the hearing -</u>

- Check back in to see if the reporter wishes to make an oral application for permission to report (if required) or if a party wishes to make representations. In most cases this can be dealt with by brief oral submissions. If not consider adjourning to another hearing, in complex cases this may need to be adjourned to a High Court Judge (See PD27B and President of the Family Division's Reporting Guidance 2018. NB This guidance implicitly relates primarily to children cases, but may nonetheless contain useful pointers for financial remedies cases. It is likely to be revised as part of the work of the President's Transparency Implementation Group).

- Ensure that any order regarding reporting (permissive or restrictive, or in a pilot case a Transparency Order) is drawn clearly and provided to the reporter. The reporter should be copied into the draft order before approval to ensure that all are in agreement that the drafting corresponds with what was ordered by the court / conceded by the reporter.

- Make arrangements for the reporter to be able to communicate with a point of contact about next hearing / hand down of any judgment (whether the court or a legal representative).

- If you are directing that documents should be shared with a reporter ensure this is reduced to writing and a date for compliance by the party is provided.

The Transparency Project
20 January 2023

APPENDIX II: DRAFT REPORTING ORDER

In the Family Court at ---

Case no.

(Delete as appropriate)

The Matrimonial Causes Act 1973

The Matrimonial and Family Proceedings Act 1984

REPORTING ORDER MADE BY [JUDGE] ON [DATE]

TO ANYBODY WHO HAS SEEN THIS ORDER OR IS AWARE OF ITS CONTENTS:
You must obey the terms of this order. If you do not, you may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.

Notice and Definitions:

1. This order is an injunction, which means that you must do what the order says.

2. This order applies to any person who is aware of its contents.

3. In this order, "reporters" means duly accredited representatives of news gathering and reporting organisations and duly authorised lawyers attending for journalistic, research or public legal educational purposes (legal bloggers) (together referred to in this order as 'a reporter') who are entitled to attend a hearing under r.27.11 of the Family Procedure Rules 2010 ('FPR').

Who does this order apply to?

4. The Order applies to:

a. The parties and their lawyers;
b. Any witnesses in the case;
c. Anybody who attends some or all of a hearing in the case;
d. Anybody who is served with a copy of this order or is aware of its contents.

5. This Order will be served on the parties and their lawyers, and any reporter who attends a hearing and wishes to report on what they see, read, or hear.

It is ordered that:

6. This Order will remain in force until further order [but the duration must be considered by the judge in each case].

What may and may not be published?

7. A reporter may publish any information relating to the proceedings save to the degree restricted below.

8. No person may publish any information relating to the proceedings to the public or a section of it, which includes:

a. The names and addresses of the parties (including any intervenors) and their children and any photographs of them;
b. The identity of any school attended by a child of the family;
c. The identity of the employers, the name of the business or the place of work of any of the parties;
d. The address of any real property owned by the parties;
e. The identity of any account or investment held by the parties;
f. The identity of any private company or partnership in which any party has an interest;
g. The name and address of any witness or of any other person referred to in the hearing save for an expert witness.

Documents

9. A reporter who attends a hearing in financial remedy proceedings in accordance with FPR r.27.11, or who indicates in advance that they wish to attend a hearing, is entitled to see the position statement of each party and the Form ES1.

10. Parties to the proceedings and their representatives may not disclose documents from the proceedings to reporters, except as specified above, or with the specific permission of the court. This includes where a document is referred to or quoted from in court that the reporter would not otherwise have access to.

11. Any such requests for copy documents must be made at or before a hearing which the reporter has attended pursuant to FPR r.27.11.

    a. Upon a request being made, the author of the document shall as soon as practicable provide a copy of the document to the reporter.

    b. The reporter may quote from or publish the contents of the document, save that the details at paragraphs 8 of this Order may not be published. Where any document referred to above quotes from a document to which the pilot reporter would not be entitled to see (such as source evidence), the passage quoted may not be reproduced or reported without permission of the court.

12. No other document may be provided to a reporter without permission of the court.

13. A reporter may share documents or information with their editorial team or legal advisor responsible for the publication of their proposed report of the case, providing that they also provide any such person with a copy of this order which will be binding upon that editorial team or legal advisor.

14. Any documents provided to a reporter pursuant to this Order

    a. Must not be shown or provided to any other person save as permitted by paragraph 16 above.

    b. Must be held securely and confidentially by the reporter.

    c. Must be kept for no longer than is necessary whereupon it must be securely destroyed or deleted.

Other Orders

15. Permission for this Order to be served by email. Email shall be effective service for the purposes of FPR Part 6 and FPR Part 37.

16. Liberty to the parties and any reporter to apply on notice to vary or discharge this Order.

17. Any application to vary or discharge this Order should be made by way of D11application, with the fact and nature of any objection being clearly set out in an accompanying position statement.

Dated, etc.