

**Transparency - The Next Steps**

Penningtons Manches’ response to the President of the Family Division

1. Penningtons Manches is a leading firm of solicitors, with particular expertise in family law. A total of ten partners, eighteen associates and a consultant provide specialist family law advice in London, Oxford, Reading and Guildford.
2. The Penningtons Manches family law department has for many years played a significant role in contributing to and informing the development of family law policy. Members of the department currently hold the following positions:
* Chair of Resolution
* Chair of the International Bar Association (IBA) Family Law Committee
* Co-Chair of the IBA Presidential Task Force to combat human trafficking
* President of the International Association of Young Lawyers (AIJA) Private Clients’ Commission
* Membership of the Resolution International Committee
* Membership of the Resolution Children Committee
* Membership of the Resolution Cohabitation Committee
* Fellowship of the International Academy of Matrimonial Lawyers (IAML)
* Membership of the Family Justice Council’s Financial Needs Working Group
1. Penningtons Manches provides family law advice to private individuals. Our clients include lawyers, doctors, people in the world of finance, accountants, entrepreneurs, writers, farmers, academics and teachers and their spouses or partners. Often the cases are factually or legally complex or have an international dimension. Although known for our expertise in ‘big money’ financial remedy cases, the department deals with the full range of private family law issues, including complex private law children cases.
2. Penningtons Manches prides itself on the range of dispute resolution options it is able to provide and places a strong emphasis on resolving disputes out of court, wherever possible. Three members of the department are qualified family mediators, and twelve members of the department are qualified collaborative lawyers. Clients are always referred to the most appropriate method of dispute resolution for their particular circumstances.
3. We have read the responses to this consultation submitted by Resolution and the Association of Lawyers for Children (ALC), as well as the report ‘Safeguarding, Privacy and Respect for Children and Young People and the Next Steps in Media Access to Family Courts’ by Dr Julia Brophy with Kate Perry, Alison Prescott and Christine Renouf.
4. Two members of the department were involved in drafting the Resolution response.
5. Penningtons Manches wholeheartedly endorses the responses from Resolution and the ALC, and Dr Brophy’s report’s recommendations. We have not sought to duplicate their comments in this response but instead to supplement their responses, based on our own experiences as practitioners representing private individuals going through relationship breakdown.

General Comments

1. We do not accept the premise that the media have a ‘watchdog role’ as suggested in the consultation. We do not believe it is their function and nor is it appropriate that it should be. Whilst the press undoubtedly have a role to play in reporting and commenting on the workings of the family justice system and developments in the law, that is not the same as a “watchdog role”, which could better be performed by a Family Courts’ Inspectorate as suggested by Resolution.
2. The natural and perfectly valid desire of journalists to produce a ‘good story’ should not be confused with performing a “watchdog” function. We believe that the public is alive to this and certainly our clients are alive to this. They would not expect the media to have a “watchdog” function or recognise it as having that role. Whilst there has been some sensitive and insightful reporting of family law cases, and the issues raised, there have been other instances where reporting of family cases has focused on the personalities of the celebrity protagonists and the more sensational or salacious aspects of the cases.
3. The consultation paper appears to ignore the huge part played by the internet and social media in disseminating information, and the risks attendant upon holding family hearings in public, thus enabling third parties to attend hearings and disseminate confidential information on social media, which is beyond the court’s power to control effectively.
4. We do not know whether the increasing numbers of reported family judgments are being read by journalists, and used as the basis for newspaper features or news articles to inform the public, as was apparently intended.
5. We are concerned, generally, by the response to Lord Leveson’s inquiry and by the failure to establish a strong, independent body capable of regulating the press.
6. We accept that there are a number of family cases which raise issues of genuine public interest. We consider that these are most likely to be those that focus on the rights of the individual and the wider public good. For the most part, these will be public law children cases and cases being heard in the Court of Protection. We consider that the Judge in such cases is well placed, using the mechanisms already available, to decide on the extent to which the press should be admitted to hearings and the restrictions that should be placed on them, on a case by case basis.
7. We believe there are very few instances in which there is a genuine public interest in the conduct and outcome of proceedings between private individuals. We believe it is essential to distinguish between the fact that the public may be very *interested in* particular proceedings and there being a genuine *public interest* in exposing the private affairs of the individuals concerned to public scrutiny. By way of example, we consider that the media circus that attended the McCartney v Mills McCartney proceedings served no genuine public interest. Instead, it became a battle between two PR teams for the perceived moral high-ground.
8. Our clients are private individuals who are experiencing the pain, grief, anger, fear and anxiety which result from the breakdown of personal relationships. What they are going through is an intensely personal, private experience. Many of them do not even confide in their wider family or circle of friends. The prospect of members of the media and/or members of the public finding out the details of their particular family circumstances would horrify them. We suggest that most people feel that relationship breakdown is a private matter and would not want their ‘dirty linen washed in public’.
9. In theory, our clients have a range of options for dealing with the consequences of their relationship breakdown, ranging from mediation to private hearings to the court process. Some do not have such a choice, however, but are compelled to rely on the courts, either because their situation is uniquely complex, or because they are vulnerable, or because they are simply unable to agree.
10. The vast majority of our clients reach consensual agreement, either through non-court methods of dispute resolution, or as a result of negotiations during a court-based process. Only a small minority are involved in contested hearings. We are concerned that the proposals in the consultation paper, if put into operation, would place significant additional pressures on that minority of clients who do need the court’s assistance but who have done nothing to warrant media attention.
11. In our experience, an increasing number of wealthy clients seek to avoid the court process, either by making use of mediation or arbitration, or by resolving matters through round table negotiations and the use of private hearings. Such dispute resolution methods can be cost effective and can reduce the stress on families, as well as the strain on the court service. We are wholly supportive of such procedures, provided they are entered into voluntarily. However, we do not think that it would be right for clients to feel that they were forced into adopting such procedures, because they were concerned that court proceedings would invariably result in publicity.
12. We are also concerned that private hearings, round table meetings, collaborative law and other forms of dispute resolution (with the possible exception of mediation) are available only to a minority of clients, due to the small pool of specialist lawyers who provide such services, and the costs associated with them. Such methods of dispute resolution are largely not suitable in cases involving litigants in person, or domestic abuse, or wilful failure to provide the financial disclosure which is necessary to enable fair settlements to be reached. For some clients, the only option open to them is the court. We do not believe it is right that people who have to resort to the court for assistance should face having their private affairs exposed in public, whilst other couples, who are fortunate enough to be able to reach agreement or pay for private arbitration, are able to keep private matters private.

Practice Guidance

1. We are not aware of any practical consequences of the increase in the number of cases reported on BAILII. It would be helpful if research could be conducted to see what impact, if any, the publication of more judgments has had on the reporting of family cases, both in terms of volume and in terms of the accuracy and understanding of the nuances of such cases demonstrated in such reporting.
2. We are extremely concerned at the possibility of ‘jigsaw identification’ as a result of the publication of judgments, even if anonymised. Many of the reported ‘big money’ cases contain unique factual circumstances, which would enable easy identification of the family concerned to those who know them, and subsequent wider identification through social media. We do not consider that anonymisation provides any real protection, in such circumstances.
3. We echo Resolution’s call for a formal evaluation of the impact of the publication of such judgments on families and children.
4. In our view there is, as there has always been, a strong public interest in publishing judgments in cases that set a legal precedent. We are not, however, convinced of the utility of publishing judgments in the majority of cases. The factors that lead to an individual matter being dealt with at a final hearing are many and varied and it does not seem to us fair that those clients who are unfortunate enough to find themselves in that position should face the additional strain of publicity,
5. If the present level of reporting of judgments is to continue, then we believe that there is a need for clear guidance as to how anonymity is to be achieved, and who is to be responsible for anonymising judgments. Anonymising judgments is unlikely to fall within the terms of the solicitors’ retainer or counsel’s brief. It would not be appropriate for any responsibility for anonymisation to fall on a litigant in person. We therefore believe that the responsibility should lie entirely with the judge and the Court Service.

Enhanced listing

1. We are extremely sceptical about the utility of adding a brief description to the listing of each case. It seems to be an unnecessary additional burden to place on court staff, who are already under considerable strain.
2. High Court cases, in particular, are frequently complex and multi-faceted and do not lend themselves to being summarised in a ‘catchphrase’.
3. We are already concerned that court staff sometimes overlook the need to preserve confidentiality. We were involved in a case this year, in which the father was well known. By agreement with the other party, the case was dealt with by the court staff under the ‘Lock and Key’ procedure, and all correspondence referred to the child’s name, rather than that of the father. Nonetheless, despite requests, court staff persisted in listing the matter under the father’s surname (he was the respondent), rather than that of the mother. Adding a description of the nature of the case to the court list would make it even more likely that parties would be identified.

Disclosure of certain categories of documents

1. We are particularly alarmed by this proposal and do not believe that it should be put into effect, even in pilot form, unless by means of legislation following wide ranging consultation and detailed parliamentary scrutiny.
2. We oppose the suggestion that advocates should be required to prepare case summaries with the deliberate aim that they should be released to members of the accredited media. We believe that this requirement would potentially cause tension between the advocate and their client. Although, in the overwhelming majority of cases, an advocate’s case summary will be approved by the client, there are occasions on which that is simply not possible and documents are filed in order to comply with the relevant Practice Direction, on the proviso that they are subject to client amendment. It would be disastrous from the client’s perspective if such a document were released to the media.
3. We also consider that there is a real risk that some clients and/or advocates would seek to ‘play to the gallery’ in their case summaries. It is already an established tactic of some solicitors’ firms and counsel to seek to generate a storm of publicity to put pressure on the opposing party to settle. We do not believe that it is appropriate for the court in any way to encourage such behaviour.
4. We are also concerned at the potential costs implications of such a requirement. The costs of drafting ‘media friendly’ case summaries in addition to case summaries which are fit for purpose ie to assist the court, will be borne by the clients, who would have nothing to gain from the process and potentially much to lose, in terms of ‘trial by media’.
5. In relation to the disclosure of certain expert reports, we share and endorse the views of Resolution and the ALC. This would be an extremely troubling development, potentially further increasing the difficulty in identifying suitable experts, particularly in intractable private law cases. The small pool of existing experts is already subject to widespread vilification on the internet and social media and we consider they will be less likely to accept instructions, if they feel that there is a risk of their reports being disclosed to the media.
6. Moreover, we cannot envisage any circumstances in which it would be appropriate for reports or other documents containing confidential medical evidence or information about people’s personal finances to be made public. People rightly believe that such information is private and expect and require it to remain so. As lawyers, we have a duty to maintain client confidentiality and are subject to strict professional rules requiring us to do so. We are also subject to data protection regulations. It seems to us that disclosing documents of this type to the media would be a breach of data protection regulations and an unwarranted intrusion into people’s personal lives.
7. It follows from our opposition to this proposal as a whole, that we do not feel able to comment as to which types of documents should be included, or whether they should be disclosed to all members of the accredited media, or only those who attend the hearing.

Hearing cases in public

1. We have set out in detail above why we do not consider that it is appropriate that the small minority of clients who find themselves involved in contested court proceedings should face potential media scrutiny of their private affairs, not to mention the prurient interest of members of the public who might well find attending a contested family hearing interesting entertainment.
2. Clients are greatly reassured when we are able to explain to them that proceedings will be conducted in private. We understand that there may be certain circumstances (for instance on appeal), where that privacy ends. In that small number of cases, we are able to assist clients in deciding whether the risk of publicity outweighs the potential gains to be made by proceeding with a particular hearing.
3. In our experience, clients are extremely anxious about the possibility of publicity. In those cases where it is a serious possibility, it becomes a factor of magnetic importance to them, even if the real risk of media interest is small. It tends to prevent clients from focusing on the issues, and can result in their making decisions (for instance, to compromise the case in a way which is unfair to them) which they would not otherwise make.
4. In our view, it is quite unnecessary for the vast majority of clients to be faced with such concerns. Whilst we understand that the media will, in fact, be interested only in a very small number of cases, we are concerned that a move to hear all categories of cases in public will cause disproportionate concern to clients. As we have noted above, some of those who are lucky enough to be able to afford to do so are likely to opt for other means of dispute resolution, rather than run the risk of publicity. Whilst this may in itself be a desirable outcome, we do not consider that the threat of publicity is an appropriate way of achieving it.
5. We have had experience recently of a High Court judge conducting a hearing in public, despite the fact that both parties were in agreement that they wished the hearing to be in private. In practice, there was no media interest. However, the fact that the judge decided to hear the case in public meant that the other party’s family members were able to sit in court. Our client found this very intimidating and distressing. She was also anxious at the prospect of reporters coming into court and the risk that she and the child concerned might be identified.
6. We adopt and commend the responses of Resolution and the ALC, as they relate to children proceedings.
7. We are, in addition, greatly concerned at the prospect of financial remedy hearings routinely being heard in public. As the President himself notes, there are significant legal consequences of such a move, which have not been adequately explored. We would be opposed to any such move being introduced, even at a pilot level, without legislation.
8. Full and frank financial disclosure is a pre-requisite for successful resolution of financial remedy claims. It is no coincidence that a significant proportion of those cases that conclude in contested final hearings involve issues of non-disclosure. It is already difficult to convince some clients of the need to provide full financial disclosure. It is extremely important that we are able to reassure them that any disclosure that they do provide will be treated with the utmost confidentiality by the other party and by the court. Any suggestion that the documents themselves (or the contents of the documents) might be disclosed in open court is likely to result in great reluctance to provide such disclosure. Once again, those who can afford to do so are likely to opt out of the court system. Others, unfortunately, will simply not provide disclosure.
9. It follows from our opposition to this proposal as a whole that we are not able to comment on the specific question as to what types of family cases might initially be appropriate for hearing in public and what restrictions and safeguards would be appropriate. For the reasons given above, we do not believe that family cases should be heard in public. In any event, they should certainly not be heard in public unless there has first been a very wide ranging, detailed further consultation, extensive parliamentary scrutiny of what is proposed, and legislation.
10. We would be opposed to even a pilot scheme being introduced without the issue having first been subject to the very wide ranging, detailed further consultation, extensive parliamentary scrutiny and legislation referred to above.

Conclusion

1. We are conscious that the content of this response is overwhelmingly negative. As a general rule, we have seen much that is positive in the recent changes to the family justice system and the move to a Family Court. However, as a firm which represents significant numbers of clients who are likely to be affected by the proposals in the consultation paper, we feel strongly that the proposals ignore our clients’ strong and legitimate desire for privacy. Whilst we understand that the motivation behind the proposals is to increase the transparency of the family justice system, we feel that the risks of the proposed course of action, not only to the happiness, security and wellbeing of children caught up in family proceedings but also to the adults involved, far outweigh any perceived benefits.
2. We believe that the existing arrangements are well able to ensure that the small number of cases in which there is a genuine public interest element are conducted in a way that enables appropriate reporting in the media.
3. People come to the family courts for judicial decision making as a last resort. In our experience it is not something that people undertake lightly, but rather because all other avenues have been explored without success. They come before the court at a very vulnerable point in their lives. Most find the process of making statements, talking to doctors and psychiatrists for the preparation of reports, providing extensive financial disclosure and having to give evidence about very personal and private matters, distasteful and distressing. In our view, it is not justifiable for clients who are already facing such stresses to be exposed, in addition, to the prospect of having their private information handed to a journalist or referred to in open court.

Penningtons Manches LLP

13th January 2015