Can you keep your divorce confidential?

Privacy in the family courts is under scrutiny by the DCA. Tom Amlot examines the current law and the consequences if family cases were to be subject to greater public scrutiny

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'Those who choose to litigate in the civil courts have had to grasp the nettle that anything which is revealed in open court becomes public information. But will this necessarily be the case in the family courts, even if they are opened up in accordance with the proposals?'

The Department for Constitutional Affairs has published a consultation paper on its proposals to allow greater media access to the family courts. The DCA cites its aim as improving public confidence in the courts by making them more transparent and accessible, and one of the main proposals is to allow the press and the public to attend family hearings.

But what will be the consequences of this on couples, particularly well-known couples, in terms of the ability of the press to print details of their private lives? It is a brave editor who chooses a serious news report over a perfectly good piece of celebrity gossip – everyone knows that the latter sells more papers. This now applies to what used to be called broadsheets as much as it does to the tabloids. It is not only celebrities who find their personal lives under scrutiny – the parties in the cases of *Miller* and *McFarlane* could not have anticipated the levels of media scrutiny their personal lives would be placed under. So what, if anything, will your client be able to do if and when the press or members of the public are able to sit in on the final hearing of their ancillary relief claim?

Because the position is different, and is likely to remain different, with respect to the reporting of cases relating to children, this article focuses on the position in relation to divorce suits and ancillary relief.

The current position

At present, divorces are heard behind closed doors. Judges do have the discretion to open proceedings to the public but they rarely do. Only the parties, their legal advisers and those giving evidence in the court room are usually allowed to attend. The position changes if the case goes up to the Court of Appeal or the House of Lords, as the divorce court is then opened up to the press and the general public (which in itself is something of an anomaly, as is pointed out in the consultation paper).

There are restrictions on arguments in court being published by the press. The Judicial Proceedings (Regulation of Reports) Act 1926 restricts reports about divorce proceedings to:

(1) the names, addresses and occupations of the parties and witnesses;

(2) a concise statement of charges, defences and counter-charges in support of which evidence has been given;

(3) submissions on any point of law; and

(4) the decision or judgment of the court.

The press is able to publish that a divorce has been pronounced and they may state the reason for the divorce but they are not allowed to publish any details of adultery or unreasonable behaviour not contained within the judgment.

Documents in family proceedings are generally not open to inspection by the public without leave of the court. It is contempt of court to inspect documents on a court file without leave if it is

A v B, C and D
[2005] EWHC 1651 (QB)
Campbell v Mirror Group Newspapers Ltd
[2004] UKHL 22
Douglas v Hello! Ltd (No 3)
[2005] EWCA Civ 595
HRH Prince of Wales v Associated Newspapers Ltd
[2006] EWHC 522 (Ch)
Lilly Icos Ltd v Pfizer Ltd (No 2)
[2002] EWCA Civ 01

known that leave is required or by deceiving the court clerks to gain access. There are a limited number of court documents that are open to public inspection: Rule 2.36(4) FPR 1991 allows for the inspection and copying of the certificate that the petitioner has proved the contents of the petition. The Rule also allows for inspection and copying of the affidavit in support of the petition. This affidavit contains the evidence required by forms M7(a) to (e) and in itself can potentially be used for juicy revelations, particularly with adultery petitions. However, if the parties have not adopted an entirely adversarial position and there is a degree of co-operation they are likely to agree on wording that does not cause undue embarrassment to either of them, particularly if their solicitors are alive to this point.

The proposed changes

The DCA published its consultation paper 'Confidence and confidentiality: improving transparency and privacy in family courts' on 11 July 2006. The paper sets out the DCA's response to concerns that the family courts operate in an unjustifiably secret way and accusations of bias and unaccountability.

The proposals relevant to matrimonial proceedings are as follows:

(1) harmonisation of attendance and reporting restrictions across all family proceedings;

(2) allowing the media to attend family proceedings as of right;

(3) allowing members of the public to attend proceedings on application or on the court's own motion;

(4) allowing reporting restrictions to be increased or relaxed as a case requires; and

(5) introduction of a new criminal offence for breaches of reporting restrictions.

The DCA writes that the media's attendance would 'help reassure people that the courts are more open, and more transparent', as well as 'act as an important part of the necessary checks and balances to ensure that the system is fair and effective'.

It is proposed that judges would be given the power to exclude the media if appropriate, but why would it be appropriate to exclude the media for the ancillary relief hearing for our high-profile couple? Anyone who has been involved in trying to deny the press access to something they regard as fair game will know the sort of momentum that the pack can acquire on their way from Fleet Street (or Canary Wharf) down to the law courts.

So, assuming that the press will be in the room, the next question is whether there will be any restriction on what they can give to their editors for that evening's print run. In other words, will your client be able to prevent reporting of material before the court?

The proposal is that family proceedings courts and county courts will have the same power as the High Court to impose additional reporting restrictions when necessary to ensure the anonymity of parties and children involved in the proceedings.

Application to prevent reporting of certain evidence

In the first place your client's advocate will have to seek protection from the trial judge to prevent disclosure to the press or public of the material in question. This will be pursuant to the rules by which the new measures are introduced.

It is likely that this sort of privacy or confidentiality application will be analogous to ones that the civil courts are used to hearing. CPR 31.22(2) states:

> The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.

The approach to be taken in considering applications pursuant to this rule is governed by the Court of Appeal decision in *Lilly Icos Ltd v Pfizer Ltd (No 2)* [2002]. This case states:

> The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it *Home Office v Harman* [1983] [quoting Jeremy Bentham] ... 'Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial'.

The judgment continues:

> ... simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document.

The court in this case also spoke of the 'chilling' effect of an order upon the interests of third parties in dealing with issues of confidentiality as between the parties in the case.

Applying *Lilly Icos*, therefore, it is obvious that the starting point in relation to applications that a document be kept confidential is the need to overcome a heavy presumption in favour of open justice. If the proposals to open up the family courts get through, it will be for the very same presumption, namely that the starting point for all courts including family courts is that proceedings should be conducted openly and in public, and if this principle is to be departed from then good reasons for

the departure will need to be made out. It will be very interesting to see how such applications under a new regime will fare. Is the content of a witness statement produced for an ancillary relief hearing to be the subject of a restriction just because it contains revelations which are embarrassing to the other party? Or will some further reason need to be shown as to why the statement contains information which is of itself confidential in nature?

What is confidential information?

The proposals state that through primary legislation the family proceedings courts and county courts will have the same power as the High Court to impose additional reporting restrictions when necessary to ensure the anonymity of parties and children involved in the proceedings. The proposals go on to say:

> To help them decide, we would expect them to consider matters such as (inter alia) where confidential information is involved and others attending would damage that confidentiality.

The leading case setting out the modern law on confidentiality and privacy is *Campbell v MGN Ltd* [2004], in which Naomi Campbell sued a newspaper for damages for breach of confidentiality by publishing details of the therapy she was receiving for drug addiction, including photographs of her leaving a self-help group meeting.

It was held in this case that, provided the claimant could show a reasonable expectation of privacy in respect of the information in question, then whether or not publication of that information can be justified will be a question of balancing the individual's right to privacy with the general right of the public and media to freedom of expression.

A recent High Court decision which applies the law as set out in *Campbell* was *HRH Prince of Wales v Associated Newspapers Ltd* [2006], a claim for breach of confidence against the owner of *The Mail on Sunday* for publishing extracts from the Prince's private handwritten journal chronicling his personal impressions and private opinions of a tour in Hong Kong. The Prince had sent copies of the journal to a limited number of his family, friends and advisers.

The Prince sought the return of his journals, which had come into the hands of the newspaper, and injunctions preventing any further publication from the same. The newspaper defended the claim arguing that the information contained in the journals was not confidential in nature and that the Prince had forfeited any rights to confidentiality by putting aspects of his personal or private life into the public domain.

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Parallel analysis

The judge hearing the Prince's case for summary judgment, Blackburne J, posed himself two questions to decide whether the application in confidentiality should succeed:

(1) Did the claimant have a reasonable expectation of privacy in respect of the contents of his Hong Kong journal?

(2) If yes, what is the result of balancing the Prince's right to privacy pursuant to Article 8 of the European Convention on Human Rights with the newspaper's right to freedom of expression pursuant to Article 10?

If the first of these hurdles is overcome, which it was in the Prince's case, then the court must carry out a balancing exercise of the two competing rights enshrined in the Convention. This balancing exercise has also been called a parallel analysis and it is suggested that the family courts are going to have to get used to conducting this sort of analysis every time they are confronted with an application that certain information must be kept from the prying gaze of the media.

It may be of some comfort to our notional well-known couple that the Prince was successful in his application for summary judgment in respect of the Hong Kong journal, and that the newspaper now faces an inquiry as to the damages suffered by the Prince from publication. In his judgment, Blackburne J said that:

> ... it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and therefore in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.

A note of warning, however: carrying out the parallel analysis of the competing Article rights involves identifying the extent to which there is a legitimate aim justifying interference with the competing right. If your client can establish a reasonable expectation of privacy, which they will probably be able to do in the context of divorce proceedings, if argument is put forward that the right to freedom of expression comes with the legitimate aim of, for example, exposing criminal conduct, wrongdoing or even hypocrisy, then it is likely that the analysis will fall in favour of freedom to publish.

Who will be involved in such applications?

Your client's advocate may be pushing at an open door if they can make out a case for a reporting restriction under Article 8, and nobody is there to oppose the application and make the opposing case under Article 10.

Vindictive though they may feel, it may not be an attractive position for the other spouse to take to be running an argument against a reporting restriction. This would be bound to bring into question their motives in the ancillary relief application and damage their case.

But if media representatives get wind of such an application, they may be able to oppose it. And worse, they may even be able to obtain disclosure of the very confidential information which is in question in order to run their argument.

In the *Prince of Wales* case the newspaper obtained a statement from one of the Prince's former employees which arguably went into matters which were covered by undertakings given in the course of his employment. When the question arose of whether the statement, or certain parts of it, should be the subject of a confidentiality order, various media organisations sought that they should be put on notice of any application for a confidentiality order. Further, they argued that the statement should be circulated to a limited number of media representatives, principally in-house lawyers, who would undertake to keep the same confidential and for the time being only use the information in order to prepare arguments opposing reporting restrictions. David Richards J, hearing the applications as a preliminary matter, concluded that:

> ... it is appropriate that his witness statement should be supplied to the media organisations in advance of the hearing in order to enable them to make proper submissions as to whether the hearing should be wholly in public or partly in private, and so on. It is, in the circumstances of this case, as in all other cases of confidential information, of the highest importance that the confidentiality in the witness statement is preserved pending determination by the court of the confidentiality of its content and, accordingly, the organisations must ensure that the dissemination of the witness statement goes no further than is permitted by the terms of the order which they propose. A heavy responsibility lies on them to ensure that they abide by the terms of the order which they seek and which I make.

Will such limited dissemination become commonplace in the family courts? Will media organisations prove that they are capable of being trusted with information on this basis? It remains to be seen.

Will the family courts become 'open court'?

Those who choose to litigate in the civil courts have had to grasp the nettle that anything which is revealed in open court becomes public information. But will this necessarily be the case in the family courts, even if they are opened up in accordance with the proposals? It is a bizarre concept, but it is in theory possible that those members of the press and public admitted into family courts remain under implied obligations to respect the privacy of those about whose intimate affairs they are being told.

This is not incompatible with the current state of our privacy law: in *Douglas v Hello! Ltd (No 3)* [2005] the Court of Appeal said that information made available to a group of 350 wedding guests could still be considered private. That case concerned the breach of commercial confidence in respect of the wedding photos of Catherine Zeta-Jones and Michael Douglas, but in principle it appears to be possible that clients may be entitled to take action to protect their privacy even in the absence of reporting restrictions. We will have wait and see.

Are we feeling confident in confidentiality?

The implications of allowing the press and the public into court proceedings could be far-reaching. The DCA proposes to beef up reporting restrictions at the same time, but it remains to be seen how effective those sanctions will be when a case involves a well-known couple who may be easily identified from little information.

If there is to be any conclusion to be drawn by practitioners likely to be involved in this type of case, it is that the advantages to avoiding litigation will only increase with the introduction of the proposals. Practical measures that might be taken include:

(1) Use mediation early. Confidentiality terms can be imposed at the beginning of the mediation and then carried through in any open negotiations until a consent order is achieved.

(2) Secure the court file. When issuing a divorce petition request that the court keep the file under lock and key.

(3) Apply for an injunction. By this stage you may be too late but if you become aware of threatened publication of private information then it is imperative to act very fast to avoid being left with nothing but a damages claim that nobody wants to bring.

If you don't manage to avoid litigation, you may have to get used to having your Sunday breakfast spoiled by a client phoning you because they are reading about their divorce along with the rest of the country. ■

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Media friendly clients

Whilst the courts have respected the fact that public figures are entitled to a private life, it should be noted that where someone has voluntarily revealed matters about their private life to the press, that party may no longer reasonably expect the court to prevent publication concerning matters related to the revelation.

A note of warning is in *A v B, C and D* [2005], in which a well-known husband had already revealed details of his drug-taking in the *Evening Standard* and *Tatler*. It was held that he had no reasonable and continuing expectation of privacy of matters that fell within the behaviour he had already spoken about.