

## Paying for Privacy?

The Court of Appeal in *XW v XH [2019] EWCA Civ 549* [2] acceded to the Wife's application for anonymisation and restrictions in respect of the reporting to the public of the details of a substantive appeal. The Wife is appealing a decision of Baker J in the High Court dealing with the financial outcome of her and her husband's finances upon divorce.

Baker J at first instance made reporting restrictions under the Family Procedure Rules and the Court of Appeal were asked to continue those restrictions under the Civil Procedure Rules which govern appeal to that Court.

The test to be applied differs between the High Court and Court of Appeal. At first instance, under the FPR, hearings are in private although accredited media are permitted to attend. On appeal, under the CPR, hearings are in public albeit CPR r.39.2 provides exceptions whereby restrictions may be applied, including to provide confidentiality to the parties or to protect the best interests of a child.

Having considered the previous authorities on the matter, King LJ gave the lead judgment granting the requested restrictions. Underhill and Moylan LLJ concurred.

King LJ balanced the Article 8 rights of the parties and, more significantly, their child, against the competing Article 10 rights of the media and public at large. She found in favour of the former, placing significant weight on the fact that the best interests of the child of the parties merited the making of the requested restrictions.

Central to the consideration of King LJ was the child's medical condition, the implications of which were not fully known to the child. It was argued, successfully at first instance and then in the Court of Appeal, that without reporting restrictions the child's welfare may be harmed. The Court was concerned about the child becoming aware of the implications of his condition without the proper guidance of his parents and that he would no longer be able to lead the normal life which his parents had intended for him had information about his identity and medical condition become public knowledge.

I do not, of course, seek to criticise this judgment, made first by Baker J having heard evidence from the parties and second by the Court of Appeal reliant on the findings of Baker J. However, and with no professional discourtesy intended, the parties and their child benefitted at the hearing from the expertise of no less than seven highly regarded Counsel and two leading family law solicitors' firms. It is seemingly a very costly exercise one must undertake so as to ensure privacy is preserved.

In giving her judgment King LJ considered the authorities of *H v News Group Newspapers Ltd: Practice Note [2011] EWCA Civ 42* and *K v L [2011] EWCA Civ 550*. In the former Lord

Neuberger set out the principles to apply in applications for reporting restrictions stating that no special treatment shall be afforded to certain groups of people including public figures and celebrities. In *K v L Wilson LJ* (as he then was) granted reporting restrictions so as to prevent harm to the child of the parties which might occur should the extent of his parents' wealth be discovered by him or the wider public.

One might be inclined to suggest that anonymity in these cases is the preserve of the wealthy. Only those in the position of XW, XH, K or L have the resources to seek (or even justify) anonymity. These decisions will rankle with the less-wealthy (but equally deserving) users of the Family Courts who cannot get this anonymity.

Whilst I do not seek to criticise the immediate outcome of this case, there has to be greater consistency in the approach of the Courts to the balancing of openness of the Court with the privacy of its users. I have written previously in relation to another high profile case (<https://www.iflg.uk.com//blog/ryan-giggs-scores-partial-privacy-victory-high-court> [3]) where anonymity was not granted, I say correctly.

We need to be able to advise our clients confidently about the more public implications of their decision to litigate. At the moment we cannot give that certainty and, it seems, must say that their privacy must come at a considerable price, moreover a price out of the reach to all but a few.

Our clients cannot be put off from exercising their Article 6 rights under threat that the public's Article 10 rights might override their Article 8 privacy. Is it now time for closer scrutiny and guidance on this dichotomy and some clear guideline given and implemented, regardless of financial resources?

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