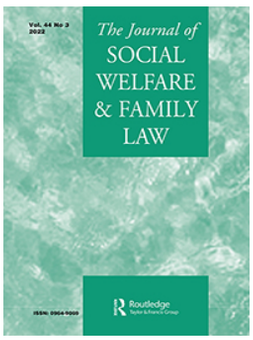

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Through a glass, darkly: *Gallagher* and transparency in the financial remedies court

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KEYWORDS Matrimonial Causes Act 1973; financial remedies; transparency; anonymity; reporting restriction order

ABSTRACT

There has been much recent debate about whether parties in family cases should be identified in published judgments and media reports. In an important contribution to the debate, Mostyn J surveys the legal position in his judgment in Gallagher v Gallagher (No.1) (Reporting Restrictions) [2022] EWFC 52 and sets out the approach that should be taken to the reporting of financial remedies proceedings.

Financial remedies proceedings are conducted in private by virtue of FPR 17.10–11. Journalists and accredited legal bloggers can attend hearings unless excluded for the reasons set out in FPR 27.11 (described by Holman J in *Fields v Fields* [2015] EWHC 1670 as 'strict and limited exceptions'). However, attendance and publication are not the same thing. Whether the hearing is in open court or in private, publication of information relating to it may be caught by s12 Administration of Justice Act 1960, which sets out the circumstances in which publication would constitute contempt. Financial remedy cases do not fall within s12′s contempt provisions unless they relate wholly or mainly to the maintenance of a minor, or because the person publishing the information is doing so contrary to a reporting restriction order or anonymity order made in that particular case. Mostyn J therefore concluded in *Xanthopoulos v Rakshina* [2022] EWFC that with the exception of these two situations, financial remedy cases could be reported and – as long as they do not misuse confidential information – freely discussed by the parties. The fact of a court sitting in private did no more than limit who could be present at the hearing. The court could make a reporting restriction order (RRO) or anonymity order, certainly, but only if the court had first, as in *Re S* [2004] UKHL 47, carefully weighed the rights engaged – Article 8′s privacy but also autonomy, including the right to tell one's own story; Article 10′s freedom of expression; and (not at issue in *Re S* itself) Article 6′s fair and public hearing.

Presumably mindful that his financial remedy proceedings were before the same judge as in *Xanthopoulos*, Mostyn J, the husband in *Gallagher* applied for a RRO or alternatively an order anonymising the parties' and their family's identities, their children's school and home address, and the companies of which the husband was a director. There are three published judgments in response to this application: *XZ v YZ* [2022] EWFC 49, an interim decision; *Gallagher v Gallagher (No.1) (Reporting Restrictions)* [2022] EWFC

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52, to which this note primarily relates; and the substantive financial remedy judgment *Gallagher v Gallagher (No.2) (Financial Remedies)* [2022] EWFC 53, with which we are not concerned.

At the interim hearing reported as *XZ v YZ*, the husband argued that Article 8 was engaged as his disclosure was compelled by the fact of the wife's application. Publication of his business information and valuation would give his competitors an advantage; may be used against him in an overseas lawsuit; and may potentially expose him to criminal prosecution.

Mostyn J considered that it was impossible to determine whether or not a RRO or anonymity order should be made. The court had not yet heard the evidence in the financial suit, and it was unclear what the husband's testimony would reveal. He therefore made an interim RRO, to be revisited once the court had sufficient information to undertake the exercise set out in *Re S* [2004] UKHL 47. The Court of Appeal had done the same thing in another 'transparency case', *Griffiths v Tickle* [2021] EWCA Civ 1882. While this meant that the media would not be able to report the proceedings live, this was considered a minor prejudice compared to the harm to the husband and the media of an order made on the basis of incorrect evidence.

In *Gallagher (No. 1)*, the court revisits the order with fuller information, having heard the husband's testimony, and with the benefit of representations by Brian Farmer of PA Media (formerly the Press Association) who was notified of the application. This judgment is, says Mostyn J, his 'last judgment of substance on this subject', with subsequent cases before him to be determined using the principles it sets out. He begins by outlining the principle of open justice, its origins in common law and its importance, including the conclusion of the House of Lords in *Scott v Scott* [1913] AC 417 that the divorce courts were no different to other courts in relation to publicity. He then turns to the ECHR, noting that Article 6.1 'incorporated the common law rule of open justice' and marches 'hand-in-hand' with English procedural common law. The starting point, therefore, was that the applications by the husband involved a derogation from the principle of open justice and, as such, the correct question was not why should the parties be named, but rather why should they not.

Every derogation, he continues, 'must be considered with great care', especially where the proposed derogation 'is advanced by consent' (this presumably is the thinking behind the requirement to serve representatives of the media with an application for a RRO). As a decision to derogate from open justice required 'strict justification' (the phrase used by Dame Victoria Sharp P in *Griffiths v Tickle* [35]), when it undertakes the *Re S* balancing exercise the court must comply with the requirements set out by Lord Steyn in that case: that it should have

> an intense focus on the comparative importance of the specific rights being claimed in the individual case … 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 [17].

Only if the balancing exercise in a given case leads to a conclusion that the privacy right 'overreaches' the rights contained in Articles 6 and 10 and the common law principle, should the court make an order limiting what can be reported.

The outcome of the *Re S* test is thus case specific. Nevertheless, in *Gallagher* Mostyn J expresses the view that while the outcome of the test would normally result in an order preventing the naming of the children, publication of their photos, or the addresses of

their home and school, that did not preclude naming the adult parties to financial remedy proceedings, even though that would indirectly identify the children. If it did,

> then swathes of cases of manifold types would have to made secret, because many, if not most, adults have children. It would mean, for example, that many, perhaps most, TOLATA and Inheritance (Provision for Family and Dependants) Act 1975 cases would require to be held in secret [43ff].

Only exceptionally, Mostyn J concludes, might the Article 8 privacy rights of the children be sufficient to justify complete anonymity for the parties by outweighing the other rights involved, including the children's own contrary rights.

Mostyn J then considers whether anonymity or pseudonymity would achieve 'sufficient transparency'. The husband argued that this would enable a greater degree of financial detail to be included in the judgment than redaction, and so better aid the public in understanding the decision. Mostyn J rejects this: the public has the right to know who is in court unless countervailing rights weigh more heavily, and Article 8′s privacy rights, including a party's strong wish to avoid exposure, would be weighed in the balance. He rejects too the submission that a litigant may be pressured to settle at disadvantage by the prospect of publication, on the basis that were this common the courts would be empty. Moreover, while open justice can result in distress and embarrassment, this was 'the price that has to be paid in order to guarantee civil liberty and to give effect to the rule of law'. That disclosure was extracted under compulsion put Mr Gallagher in no different position to any litigant in the civil courts. Indeed, financial remedy disclosure may be less 'extensive, personal, and detailed' than the evidence in a TOLATA case or an Inheritance Act case. 'Strictly necessary' redactions of commercially sensitive information could be made or that material contained in a confidential annexe, but these must not obscure the public's ability to understand the decision made. In Mr Gallagher's case, the valuation of the company could partly be determined from publicly available accounts, and there was no evidence that a competitor reading the court's summary and analysis of the expert evidence in the judgment would gain an advantage. Certainly, Mostyn J concludes, such arguments would 'cut no ice in the Companies Court, or in the Court of Appeal'. He does, however, issue a time-limited RRO covering the prospects of success of Mr Gallagher's foreign litigation and legal advice about the prospect of HMRC action against him. In relation to those issues, the balancing exercise clearly favoured an order being made.

To Mostyn J, therefore, practices of secrecy have arisen within financial remedy proceedings that are at odds with the binding precedent of *Scott v Scott* and with his view that FPR 27.10–11 simply affects attendance at the hearing. The court may only make a RRO or anonymisation order on application, and only after a full *Re S* balancing exercise. The family courts' 'almost ineradicable adherence to . . . desert island syndrome, where the rules about open justice operating in the rest of the legal universe just do not apply because we have always done it this way' cannot, he argues, create a mantle of inviolable secrecy.

Disclosure statement

The author is a trustee of the Transparency Project. Her views do not necessarily reflect those of the other trustees or contributors.