



## Transparency in the Family Courts: *Griffiths v Tickle* [2021] EWCA Civ 1882

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### Introduction

1. Transparency within the family justice system is an important issue for practitioners and the judiciary. On 29 October 2021 the President published his report on Transparency in the Family Court and shortly afterwards the Court of Appeal gave its decision in ***Griffiths v Tickle* [2021] EWCA Civ 1882**<sup>1</sup> which provides clarity as to how Courts should approach the decision about whether to publish judgments of the Family Court. It also, and perhaps most importantly, offers an important re-statement of the principles of open justice and the approach to be taken when conducting the ultimate balancing test between Articles 8 and 10 ECHR in cases involving children.

### The Factual Background

2. At their most basic level, the circumstances of the case will be familiar to private law practitioners. Following the separation of the parties, the applicant Father initiated proceedings in the Family Court for orders under section 8 of the Children Act 1989 to spend time with the child. The Mother opposed the application, raising allegations of domestic abuse. In light of the allegations, a fact-finding hearing was held.
3. What makes the circumstances of this case of particular interest is the identity of the parties involved. The Father, Andrew Griffiths, a former conservative MP; the Mother, Kate Griffiths, a current MP. Readers may be familiar with the 'sexting' scandal surrounding Andrew Griffiths in 2018, in which Mr Griffiths was exposed by newspapers as having 'sexted' two female constituents. Around that time, Mr Griffiths took part in a media interview in which he stated that his conduct was an isolated incident, flowing from child abuse he had historically been subjected to and took place within the context of a mental

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<sup>1</sup> <https://www.judiciary.uk/wp-content/uploads/2021/12/Griffiths-v-Tickle-judgment-court-of-appeal-101221.pdf>

breakdown. In 2019, Mr Griffiths was not selected as a Parliamentary candidate; instead Mrs Griffiths was selected as candidate for the same constituency and was subsequently elected.

4. The fact-finding hearing was heard by HHJ Williscroft, the Designated Family Judge at the Family Court at Derby. Judgment was handed down on 26 November 2020. HHJ Williscroft made extensive findings against the Father. The findings were summarised in the judgment of the Court of Appeal as follows:

*The judgment contains findings that Mr Griffiths engaged in various kinds of behaviour towards his wife that were abusive. He had been abusive to her verbally and hurt her physically when drunk. He had undermined Mrs Griffiths' self-esteem in a number of ways. When his career was threatened by his own behaviour, he had used threats that she would be made homeless and left without money as a way of getting her to go along with a photograph designed to show she was "standing by him". He had pressurised her to engage in sexual activity by making clear he would be angry and hostile if she did not. He had insisted on some sexual acts which she found unpleasant. These matters were part of a pattern of controlling and coercive behaviour. The judge accepted Mrs Griffiths' evidence that Mr Griffiths "rape[d] her when sexual intercourse took place when he had already penetrated her when she was asleep". The judge said that although the distinction between submission and consent can be complex, "unconscious the question of consent cannot arise". The judge accepted the evidence of Mrs Griffiths that when she complained of his behaviour he had told her she would not be believed as he was an MP*

5. No appeal was made against these findings.

### **The Procedural Background**

6. The fact-finding hearing and judgment were held in private, but were open to accredited media under Rule 27.11(2)(f) of the Family Procedure Rules ("FPR"). No media were present. However, following judgment being given, applications for authorisation to publish the judgment were made by journalists, Louise Tickle and Brian Farmer.

7. The applications were heard in the High Court by Lieven J in July 2021. The organisation, Rights of Women (“RoW”) were given permission to intervene.
8. The application was supported by the Mother. Having initially opposed the publication, the Guardian supported the application by the time of the hearing. The application was also supported by RoW. The Father did not oppose the publication of the factual content of the judgment, however he did oppose publication of matters that would lead to identification of him, the Mother or the child and certain factual findings. Importantly, he opposed publication on the basis of the rights and interests of the child only and did not advance any privacy or other countervailing rights of his own.
9. By order dated 30 July 2021, Lieven J directed publication of the fact-finding judgment, save that the judgment should be redacted so that the child could not be identified by name, sex, or date of birth.

### **The Appeal**

10. The Father applied for permission to appeal the decision of Lieven J, advancing five main grounds of appeal. Permission to appeal was granted on the basis that, although the appeal had limited prospects of success, there were compelling reasons for the appeal to be heard.
11. The Father’s grounds of appeal were reduced to two main points by the Court of Appeal:
  - (1) The decision was wrong in law, as Lieven J had misinterpreted and misapplied section 97 of the Children Act 1989; the welfare of the child should outweigh any other consideration.
  - (2) The **Re S** analysis conducted by Lieven J was legally flawed.
12. RoW, as well as the Association of Lawyers for Children, were given permission to intervene, on appeal.

## **The Applicable Law**

13. In order to place the Court of Appeal's decision into context, it is important to consider a brief summary of the applicable law.
14. Notably, the Father did not advance arguments relating to his own privacy or other countervailing rights. In those circumstances, the case involved the interplay between Article 8, the right of the child to a private and family life, and Article 10, the right to freedom of expression. Of course, Article 8 and Article 10 are not absolute rights and must be balanced against one another.
15. In the case of **In Re S (A Child) (Identification: Restrictions on Publication) (2004) UKHL 47, [2005] 1 AC 593**, the House of Lords determined the applicable legal principles in cases involving a conflict between Article 8 and Article 10. Lord Steyn famously set out the following four principles:

*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. [17]*

16. This analysis is inherently fact-specific. As stated by Sir Mark Potter, P, in **A Local Authority v W [2005] EWHC 1564 (Fam), [2006] 1 FLR** the **Re S** approach is not "a mechanical exercise to be decided on the basis of rival generalities."
17. The confidentiality of children during the course of family proceedings is placed on a specific statutory footing by section 97 of the Children Act 1989. The relevant parts of section 97 provide as follows:

*(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—*

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

...

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

18. Similar provisions are contained within section 12 of the Administration of Justice Act 1960. Section 12 applies both during and after the proceedings have concluded.
19. The correct interpretation of section 97(4) was considered by Munby J in **Re Webster [2006] EWHC 2733, [2007] 1 FLR 1146**. Munby J (as he then was) concluded that the correct approach was that identified in **Re S**. Further, it was made clear that within the **Re S** analysis, the interests of the child were a "major factor" and were "very important" but were not paramount.

(1) The Interpretation of Section 97 of the Children Act 1989

20. At first instance, Lieven J proceeded on the agreed basis that it was not appropriate to give paramountcy to the welfare of the child, as per the decision in *Re Webster*. As such, in seeking to advance the argument that the interests of the child should have outweighed any other factor and that section 97(4) had been wrongly interpreted in **Re Webster** to be compliant with the Convention (a route taken in **Clayton v Clayton** in respect of section 97(2)) the Father had fundamentally changed his position on appeal by advancing a point that not only was not argued in the court below but which was conceded. The Father accepted that he would therefore need to first persuade the Court that he should be given permission to rely on this new argument. Having heard the Father's arguments on the merits *de bene esse*, the Court refused to allow the Father to rely on this ground of appeal.

21. In light of this, the Court of Appeal's judgment with respect to this limb of the Father's argument is focused on the reasoning for the decision to refuse permission to advance this argument. However, the Court of Appeal did note that the "*substantive and procedural law that applies to this particular case is clear, and was correctly applied by Lieven J.*" [77]. The Court of Appeal further noted that this legal position had been the basis of "*an increasingly sophisticated regime of transparency in the Family Courts*", including the **Practice Guidance (Family Courts: Transparency) [2014] 1 WLR 230** and the **Practice Guidance on Anonymisation, Practice Guidance: Family Court - Anonymisation Guidance (December 2018)**[50].
22. Whilst the law at present appears to be settled, the Court of Appeal noted that there would be a further opportunity for guidance to be given, insofar as it is appropriate, in the Family Division's Transparency Review, which is currently underway [77].

(2) The **Re S** Analysis

23. The Court of Appeal dismissed the Father's arguments that Lieven J's approach at first instance was legally flawed or was wrong. In fact, the Court of Appeal can be seen largely to endorse the judgment of Lieven J at first instance. It is on this aspect of the Father's argument on appeal that the judgment provides extensive guidance to family law practitioners.
24. Although the judgment is not necessarily framed according to these headers, guidance on the following key themes can be drawn from the Court of Appeal's decision:
- (1) The Court's approach to the **Re S** analysis;
  - (2) The factors that will be considered within the **Re S** analysis;
  - (3) The Court's approach to assessing the impact of publication on the child; and
  - (4) Matters relevant to the public interest and the principle of open justice.

(a) The Court's Approach to the **Re S** Analysis

25. The following principles can be drawn from the Court of Appeal's reasoning with respect to how the Courts will approach the **Re S** analysis:
- (1) The Court of Appeal reaffirmed that the **Re S** analysis is fundamentally fact-sensitive [14];
  - (2) Courts would be reluctant to interfere with the decision of a lower Court on appeal, unless the judge erred in principle or reached a conclusion that was wrong [13]; and
  - (3) It is not sufficient to rely on "sweeping assertions" with respect to the impact of publication on the child. The nature and extent of the impact of publication needs to be carefully assessed on the basis of the evidence. Similarly, it was not sufficient for the Father to simply disagree with the conclusions of the Guardian. In order to challenge the Guardian's assessment, the Father would have to challenge specific aspects of the Guardian's reasoning. [66].
26. It is therefore clear that in approaching its task of conducting the **Re S** analysis, Courts will conduct a fact-sensitive analysis considering all of the factors of a case. It is not sufficient to rely on generalisations, but rather arguments should be rooted in the facts of the case and, importantly, evidence.

(b) Factors Relevant to the **Re S** Analysis

27. The decision can also provide us with guidance on the types of factors that will be relevant to the Court's **Re S** analysis:
- (1) The views of those with parental responsibility are clearly relevant. In this case, the Mother unusually supported publication. However it was made clear by the Court of Appeal that, whilst weight should be given to the views of those holding parental responsibility, "*parental responsibility is not a trump card*";
  - (2) The Guardian's assessment of the impact on the child's privacy was of considerable importance. It was recognised that the Guardian was uniquely placed in that they, "*had professional responsibility to safeguard the welfare of the child, who provided an*

*expert social-work assessment, to which the court were bound to attach real weight*" [66]; and

(3) The Court also recognised the Mother's own "*right to tell her story*" as a relevant factor that was grounded in principle and authority [70]. Notably, at first instance Lieven J concluded that, "*the court should be slow in cases to be used as a means by which one parent seeks further control over the other, and particularly so where there have already been findings of coercive control.*"

28. The impact of publication on the child and the public interests were also clearly relevant. These factors are considered in further detail below.

### (c) Assessing the Impact of Publication on the Child

29. The Court of Appeal endorsed the view of the lower Court that the impact on the child could be appropriately managed in the present case. In reaching this conclusion, the following factors were considered:

(1) Whilst media and social media coverage may effect the impact of publication, practically speaking the effect of media and social media on this child would be minimal due to their very young age; the child had no access to social media;

(2) As a matter of course, the findings would need to be explained in an age-appropriate way in any event; and

(3) The contents of the judgment would inevitably impact upon the future contact arrangements and the child's relationship with the Father. Notably, Lieven J drew a distinction that this was a "*consequence of the behaviour, not publication.*"

30. Considering these themes, it is clear that the Court endorsed a highly pragmatic approach, which focused on the realities of the impact of publication upon the child. However, it is important to be reminded that the individual analysis of the Guardian will be considered to be extremely important in assessing the impact of publication on the a child.

(d) The Public Interest

31. Article 10 and the wider public interest are clearly relevant to the Court's ultimate balancing exercising under **Re S**. However, in particular, the Court of Appeal endorsed the various facets of the public interest identified by Lieven J as being relevant and important.
32. Some of these factors related specifically to the Father's role as a former MP. For instance, the Father's position as an elected official and Minister itself gave rise to a strong public interest in publication. Although it was recognised that politicians would retain Article 8 rights, the Father did not seek to rely on these. Further, there was a clear inconsistency between the Father's interviews regarding the 2018 sexting scandal and the findings of HHJ Williscroft. As such, there was considered to be a public interest in correcting the public record.
33. These factors are relatively fact specific and are unlikely to be directly applicable to other cases, however the Court also highlighted other facets of the public interest that will be relevant to a broader range of cases.
34. First, the Court of Appeal reaffirmed the importance of the principle of open justice, noting that there is a significant public interest in fully informed and opened discussion and debate about domestic abuse and the way in which it is dealt with in the Family Court.
35. However, a more unusual feature, that has perhaps not previously been given as great attention, is that the decision of HHJ Williscroft provided a positive example of how Courts deal with domestic abuse in a particularly difficult context [69]; *"a powerful man is held to account in respect of abuse of his female partner."* It was noted that often only negative examples of how the Courts deal with issues concerning domestic abuse are published. This inevitably contributes to *"the problem of the erosion of public confidence in the family justice system."*
36. As such, the judgment of the Court of Appeal provides a spotlight on the workings of the family justice system. The judgment is likely to pave the way for more judgments to be published, with a focus on providing positive examples and restoring, or maintaining,

public faith in the family justice system. This is in keeping with the conclusions in the President's Transparency Review.

## **Conclusions**

37. This case provides an important insight for family law practitioners not only to the Court's approach to publication of judgments, but also more broadly the issue of transparency within family proceedings.
38. The guidance of the court, particularly in relation to the importance of fact-specific and evidence-based arguments, will be of particular importance in framing arguments concerning publication. Practitioners will also note the court's pragmatic approach to the impact of the child and the importance of the views of the Guardian.
39. However, perhaps most importantly, the case shines a light on the importance of open justice and particularly, the need for family court decisions to be accessible to the public as per the President's Transparency Review.



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Law is correct as at 4 January 2022

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