JURISDICTION	**:**	FAMILY COURT OF WESTERN AUSTRALIA
ACT	**:**	FAMILY LAW ACT 1975
LOCATION	**:**	PERTH
CITATION	**:**	NATIONWIDE NEWS PTY LTD and MENAGLIO [2019] FCWA 266
CORAM	**:**	SUTHERLAND CJ
HEARD	**:**	9 DECEMBER 2019
DELIVERED	**:**	9 DECEMBER 2019
FILE NO/S	**:**	PTW 3762 of 2011
BETWEEN	**:**	NATIONWIDE NEWS PTY LTD Applicant AND DR DARRYL MENAGLIO First Respondent AND MR CAPE Second Respondent AND MRS CAPE Third Respondent

Catchwords:

PUBLICATION ORDER – Application to publish accounts concerning Family Court of Western Australia proceedings identifying single expert witness – Consideration of s 121 of the Family Law Act 1975 (Cth) – Held in the public interest for publication order to be made – Redacted version of the judgment to be published

Legislation:

Family Law Act 1975 (Cth)

Representation:

Counsel:

Applicant	:	Mr MacLaurin SC
First Respondent	:	Self Represented Litigant
Second Respondent	:	Self Represented Litigant
Third Respondent	:	Self Represented Litigant

Solicitors:

Applicant	:	Macpherson Kelley
First Respondent	:	Self Represented Litigant
Second Respondent	:	Self Represented Litigant
Third Respondent	:	Self Represented Litigant

Case(s) referred to in decision(s):

AH v SS (2005) 194 FLR 111.
Cape & Cape [2014] HCASL 12.
Cape & Cape [No 1] [2012] FCWA 59.
Cape & Cape [No 2] [2013] FamCAFC 178.
Cape & Cape [No 2] [2013] FCWA 35.
Farnell & Anor & Chanbua (2016) FLC 93-700.
O'Callaghan & Cape [2011] FCWA 111.
Sedgwick & Rickards [2013] FCWA 52.
Seven News (Operations) Limited & Cockman (2018) FLC 93-842.
Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens (2016) FLC 93-690.

WORDS IN SQUARE BRACKETS REPLACE WORDS USED IN THE ORIGINAL JUDGMENT – CERTAIN PARTIES' NAMES AND IDENTIFYING DETAILS HAVE BEEN CHANGED

IT IS NOTED that publication of this judgment by this Court under the name *Nationwide News Pty Ltd & Menaglio & Ors* has been approved by the Chief Judge pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Introduction:

1 Nationwide News Pty Ltd, the publisher of the Australian newspaper, ("the applicant") seeks permission to publish accounts: (1) of this proceeding that name the Australian and Dr Darryl Menaglio; and (2) of proceeding number PTW 3762 of 2011 that name Dr Menaglio. The primary proceedings relate to completed parenting proceedings between Mr and Mrs Cape concerning their child D. I refer to Mr and Mrs Cape and D by the pseudonyms previously ascribed to them in the primary proceedings and in later appellate proceedings.

Brief history of the family law proceedings:

2 The Cape proceedings have a long and complex history. The child D was born in Australia in 2002 and predominantly lived in Australia with the parties. Between May 2010 and April 2011, with the father's consent, D and the mother lived in the mother's home country of Germany. In April 2011, without the mother's consent, the father brought D back to Australia. In May 2011, the Australian Central Authority commenced proceedings under the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) against the father for the return of D to the care of the mother in Germany. That application proceeded to trial in October 2011 and was unsuccessful.[1]

3 The mother then commenced proceedings in this court in November 2011, seeking that the child live with her and she be permitted to relocate with D to Germany. The father opposed the application and sought that D live in Australia in a shared-care arrangement. In or about January 2012, pending the trial, the parties agreed to an interim arrangement for D to live with each party on a week about basis.

[1] See *O'Callaghan & Cape* [2011] FCWA 111.

4 Much of the interlocutory proceedings were managed and/or determined by Martin J, including the appointment of Dr Menaglio as the single expert witness. In her interlocutory judgment delivered on 3 July 2012,[2] Martin J observed at [18]:

> Unfortunately, it is an understatement to say that Mr Cape and Dr Menaglio did not hit it off and that there were disagreements about arranging appointment times … Mr Cape had even taken steps to report Dr Menaglio to his professional body, before the report had even been published.

5 Dr Menaglio's report was made available to the court in May 2012. In summary, Dr Menaglio raised significant concerns about the father's "psychopathic" personality style and potential to pose a significant risk of harm to himself and D. Dr Menaglio recommended various steps be taken in relation to the release to the parties of the report, including that it only be released to the parties with the assistance of a family consultant and at a time when D was in the care of the mother. The court released the report to the parties on that basis.

6 After the publication of the report, the mother retained D in her care and did not send D to school, pending the making of further orders. On 1 June 2012, Martin J made an order suspending the week about arrangement. The father applied to stay those orders. On 20 June 2012, Martin J heard and determined the father's stay application, and observed at [31] – [33] as follows:

> … while, on the evidence presently before me, I do not necessarily presently share many of Dr Menaglio's concerns for D's physical safety, I am concerned that D genuinely is very trepidatious about seeing [the] father on [his/her] own, at least in the short term, and feels very much subject to pressure from him.
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> This is in accord with D's statement to the Independent Children's Lawyer, and her submissions to me.
>
> In these circumstances, I am satisfied that D's time spent with [the] father should be supervised at least at this point, but as I have made clear from the terms of my orders of 20 June 2012, I am hopeful that the position can return to a less artificial and controlled arrangement in the very near future.[3]

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[2] *Cape & Cape [No 1]* [2012] FCWA 59.

[3] *Cape & Cape [No 1]* [2012] FCWA 59, [31]-[33].

7 The trial was held over 13 days in late 2012 and early 2013 before Crisford J. At trial, in addition to Dr Menaglio, three other psychologists involved with the family gave evidence. Crisford J handed down her reasons for decision on 11 April 2013.[4] Her Honour found that:

a) Since the publication of Dr Menaglio's report in May 2012, the relationship between D and the father had gone from being an equal shared arrangement to one that was non-existent and fractured. Supervision of their time together and family therapy had proved fruitless

b) As a consequence of orders made by Martin J on 10 July 2012, Dr Menaglio and the three psychologists liaised to discuss issues in relation to D's welfare. A conference of the four experts took place in September 2012, after the first part of the trial. A joint report was then prepared and was available for the second part of the trial. The three psychologists did not consider that the father was a psychopath. They agreed that Dr Menaglio was not intending to communicate that the father was a psychopath, but was instead attempting to highlight patterns of behaviour which were of concern to Dr Menaglio.

c) Crisford J was not satisfied that there was any basis upon which the label "psychopath" could be accurately used to describe the father. At [58] – [60] of the judgment, Crisford J said:

> 58. Suffice it to say here, the father did not want Dr Menaglio appointed as the single expert witness. It was never going to be easy for Dr Menaglio. However, Dr Menaglio's response to a situation which is certainly not unknown in the context of familial disputes was unhelpful. I consider that Dr Menaglio's evidence, especially as contained in his report dated 14 May 2012 and other written material he forwarded to the court, has been coloured by the animosity between himself and the father. A reading of the report makes this glaringly obvious. I accept some parts of his evidence are useful, essentially where there is common ground between him and the other experts, including the father's own psychologist. I have not relied on his evidence except where specifically referred to.
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> 59. Although at trial, Dr Menaglio modified his views, considerable damage had already been done. He initially reported:

[4] *Cape & Cape [No 2]* [2013] FCWA 35.

> 98. I formed the opinion that the father's personality style, particularly when he begins to decompensate, is consistent with psychopathy, but in the absence of clear evidence of the anti-societal facet concerning criminal behaviour, does not meet the criteria for a personality disorder. Despite not achieving a personality disorder, the father's personality style would cause considerable distress and dysfunction in his relationships.

> 60. By itself, this does not say the father is a psychopath. However the tenor of the whole report and the manner in which Dr Menaglio wanted it released gave the impression that he viewed the father as having a potentially dangerous personality.

8 In her judgment, Crisford J referred extensively to the evidence of the three psychologists and the joint report which was prepared after their conferral with Dr Menaglio. In particular, she stated that the four experts identified and agreed that both parents may pose a risk of emotional harm to D and that the interaction between the parents posed a serious risk to D's psychological development. In their closing statement, the four experts agreed that D was caught in the middle of intense conflict between the parties.

9 Crisford J ultimately found that D should live with the mother and she should be able to relocate with the child to Germany. The father unsuccessfully appealed that decision to the Full Court of the Family Court of Australia.[5] The father's application for special leave to the High Court of Australia was also dismissed.[6]

10 The Psychology Board of Australia ("the Board") subsequently commenced disciplinary proceedings in the State Administrative Tribunal ("the Tribunal") against Dr Menaglio in relation to his role as the single expert witness in the family law proceedings. The Board and Dr Menaglio attended mediation in October 2019 and agreed the terms upon which the disciplinary proceedings could be settled. On 18 October 2019, the Tribunal made orders, including that:

a) Dr Menaglio was guilty of professional misconduct.

b) Dr Menaglio pay a fine of $20,000.

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[5] *Cape & Cape [No 2]* [2013] FamCAFC 178.
[6] *Cape & Cape* [2014] HCASL 12.

c) Dr Menaglio's registration be subject to the condition that he may not act as a single expert or court appointed expert in proceedings in the Family Court of Western Australia or the Family Court of Australia, such condition to be subject to a review period of 12 months.

11 The Tribunal declined to make an order for the suppression of Dr Menaglio's details. Details of the orders made by the Tribunal and a summary of the agreed facts are freely available to the public on the Tribunal's website.

Preliminary issues arising in relation to the Nationwide News Pty Ltd application:

12 The current application was filed on 17 October 2019. Although, on its face, the application was made by Nationwide News Pty Ltd, it appears that it was in fact prepared, filed and continued by a journalist who also swore an affidavit in support of it. The affidavit annexed a letter from the father indicating that he was strongly supportive of the application.

13 The court listed the application for hearing on 18 November 2019. Directions were also made requiring service of the application on the mother and Dr Menaglio. If they opposed the application, then they were required to file and serve responding documents no later than 7 days prior to the hearing.

14 At the first return date of the application on 18 November 2019:

a) The journalist appeared by telephone and stated that she "guessed" she appeared on behalf of the applicant;

b) The father appeared by telephone;

c) Dr Menaglio attended the court and was represented by a solicitor; and

d) The mother did not attend, as she had not been served.

15 I made various procedural orders, including for substituted service on the mother, for the respondents to have an opportunity to file documents, and listing the matter for further hearing on 9 December 2019. During the hearing, I raised with the journalist the question of the provision to the court of a draft of the article it was proposed should be published. After some discussions, the journalist told me that she would be "very happy" to provide the draft article which she had already written, to give me "a flavour" of what the applicant was seeking to publish, and that she could do so within as very short period of time. I accordingly made an order that within 48 hours, the applicant file and serve a draft of the account proposed to be published.

16 During the hearing, the journalist raised the issue of whether the applicant could subsequently make amendments to the draft article, if approved. Whilst I expressed a preliminary view that an article submitted for approval could not be subsequently amended and published on the basis of that approval, I made it clear that I had not formed a concluded view and the applicant would be able to make further submissions about the issue at the next hearing, by which time: (1) the mother should also have been served; and (2) all parties would have the opportunity to be heard if they so wished.

17 On 21 November 2019, I directed that the Principal Registrar write to the applicant, referring to the application ostensibly made by it and noting that at the directions hearing on 18 November 2019, the basis upon which the journalist appeared for the applicant was not entirely clear. The letter drew to the applicant's attention Rule 8.01 of the Family Law Rules 2004 (Cth), which provides that a corporation or authority that is entitled to be heard in a case may be represented by a lawyer, or an officer of the corporation or authority.

18 On 28 November 2019, the applicant's solicitor emailed the court advising that the applicant had now instructed him in relation to the application made by the journalist. In the same email, the applicant's solicitor contended that the applicant "was not represented when the application was made for permission to identify Dr Menaglio." At the same time, the applicant filed written submissions and the draft article it proposed to publish.

19 The draft article referred to the disciplinary proceedings in relation to Dr Menaglio. The draft article also gave a lengthy account of the primary proceedings and subsequent events, almost entirely from the father's perspective. This included the father commenting on his view of the mother's actions after she and D returned to her home country, as well as highly personal details concerning D's health and wellbeing.

20 The applicant's submissions were divided into two Parts. **Firstly**, the applicant submitted that it was not represented at the hearing on 18 November 2019, at which the journalist agreed to the provision to the court of the draft article. If it had been, it would have made submissions that s 121(9)(g) does not require the court to review a proposed article containing an account of proceedings before considering an application for approval to publish. For the assistance of the court, the applicant provided an outline of submissions it would have made on 18 November 2019.

21 The circumstances in which the journalist commenced and prosecuted the proceeding in the name of the applicant, and acquiesced to the making of an order which (had it been represented) the applicant would have opposed, self-evidently gives rises to a number of concerns. I consider there is no utility in the court enquiring further into these concerns at this point or dealing further with the submissions in Part 1.

22 **Secondly**, the applicant submitted, in summary, that:

a) There was significant public interest in the proceedings, in relation to: (1) Dr Menaglio's misconduct in the context of the primary proceedings and the delay in the disciplinary process that followed; (2) shining a light on Dr Menaglio's misconduct and the salutary lessons it may have in compelling single expert witnesses to exercise proper care and skill; and (3) in facilitating greater public discourse regarding the oversight of expert witnesses in family law proceedings.

b) It may be necessary for the preservation of the reputation of the court to correct any misunderstandings in the public arena that the court may have relied upon Dr Menaglio's report at trial.

c) But for s 121 of the Act, the media would be able to freely report on Dr Menaglio's disciplinary proceedings in the Tribunal, including identifying Dr Menaglio.

d) Dr Menaglio's identity was already in the public domain. The Tribunal declined Dr Menaglio's application for his name to be suppressed and the orders and agreed facts have been published on the Tribunal's website.

e) Publication would not conflict with the best interests of the child, who is now 17 years old. The applicant did not intend to identify the child or the parties in its account of the primary proceedings.

23 The father strongly supported the application and as already indicated, provided a letter of support to the journalist, which was annexed to her affidavit.

24 On 4 December 2019, Dr Menaglio filed a Form 2A Response, seeking that the application be dismissed. He also filed an affidavit, in particular raising concerns about the potential harmful psychological impact on D of the publication of the draft article.

25 The mother filed a written statement to the court on 5 December 2019. The mother raised a number of matters, including: (1) her concerns about the potential harmful impact of further publicity on D; (2) that the draft article was inaccurate in relation to its commentary on D's health and wellbeing; and (3) that the draft article was very selective, unbalanced and biased in its reporting of the issues concerning the family and in the manner in which it portrayed the father as the "victim". By way of one striking example, the mother maintained that after the proceedings in this court were over, there were subsequent proceedings in Germany in which: (a) the father was convicted for child abduction and sentenced to a term of imprisonment; (b) the father's rights of access to D were suspended; and (c) the father failed to comply with orders made in Germany to pay child support for D.

26 In his response today, the father maintained that he was not fully aware of the proceedings in Germany, but did not dispute that some sort of proceedings in Germany did take place.

27 None of those matters were mentioned in the draft article submitted to the court. The tenor of the draft article, sympathetic as it is to the father in circumstances where he has a justified grievance against Dr Menaglio, is nevertheless not balanced as a result.

Applicable law:

28 Section 121(1) of the Act restricts the publication of court proceedings in the following terms:

> 1. A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
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> a) a party to the proceedings;
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> b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
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> c) a witness in the proceedings;
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> commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

29 In ***AH v SS*** (2005) 194 FLR 111 Bryant CJ at [26] observed that s 121 was placed in the Act to overcome prurient reporting that had occurred prior to the passing of the Family Law Act in relation to parties who were involved in divorce proceedings.

30 The restriction imposed by section 121(1) is tempered by section 121(9), which sets out a number of circumstances in which the restriction will not apply.

31 Relevantly to this application, s 121(9) provides that the restriction in s 121(1) does not apply to or in relation to: at sub-paragraph (d): the publishing of a notice or report in pursuance of a direction of a court; and at sub-paragraph (g): publication of accounts of proceedings, where those accounts have been approved by the court.

32 Sub-paragraph (g) was inserted into s 121 (9) by the Family Law Amendment Act 2003. The Explanatory Memorandum described its purpose in the following terms:

> [Sub-paragraph (g)] clarifies that the publication of accounts of proceedings, which have been approved by the court, does not contravene the general restriction on publication of court proceedings in section 121. This means, for example, that the court may approve that accounts of proceedings can be published on the courts' internet sites, on other internet sites, or in the courts' annual reports.

33 Aside from instances where the courts approve the publication of accounts of proceedings on their own websites, there have been occasions where media organisations and / or parties have applied under sub-paragraph (g) seeking the court's approval to publish their own accounts of proceedings.

34 In ***Sedgwick & Rickards*** [2013] FCWA 52, Duncanson J dealt with an application by the parties to a surrogacy arrangement, to publish an account of the proceedings pursuant to s 243(8)(g) of the Family Court Act 1997 (WA), the equivalent statutory provision of s 121(9)(g) of the Act. At [34] – [44] of her reasons, Duncanson J discussed the relevant legal principles to be applied by the court in considering an application under s 243. I respectfully agree with her Honour's statement of the law.

35 Duncanson J was provided with, and approved, the proposed article prior to its publication.[7] Her Honour also made an order to facilitate the possibility of a follow-up article, by making a further order that the relevant media organisation be permitted to publish an account of the proceedings from time to time, where those accounts had been approved by the court.[8]

36 In ***Western Australian Newspapers Ltd and Channel 7 Perth Pty Ltd and Cuzens*** (2016) FLC 93-690, Thackray CJ dealt with an application by the relevant media organisations to publish a letter from a child, the subject of family law proceedings, and an account of proceedings before the Coroner concerning the child's siblings, who had been murdered by their mother, who then took her own life. Thackray CJ made orders granting the media organisations leave to publish an account of the proceedings in this court, comprising a fair and accurate report: (a) of the inquest by the Coroner and (b) of his

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[7] *Sedgwick & Rickards* [2013] FCWA 52 at [49].
[8] *Sedgwick & Rickards* [2013] FCWA 52 at [50] – [51].

Honour's judgment; on condition that the media reports indicated that the full judgment can be found on the court's website.

37 I concur with his Honour's observations in ***Cuzens*** at [26] - [27] that:

> Section 243 [of the Family Court Act 1997 (WA), being the equivalent statutory provision of section 121] is an exception of the principle of open justice. It is a restriction imposed by Parliament and not by the Family Court. The underlying policy is to ensure that people do not feel discouraged from coming to the court for fear of having their private life made public. The law is also designed to ensure that children are not held up to ridicule, curiosity or notoriety. The law has been clearly explained by Duncanson J in Sedgwick & Rickards [2013] FCWA 52.
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> As the Chief Judge of the court, I would much prefer that the public be given full information concerning what actually happens in the Family Court day-in, day-out. This would help to dispel the many myths and misunderstandings about the work of the court. It would also expose the blatant lies of a small number of litigants who use social media and other means to give their side of their experience in the court and to blacken the name of their ex-partner.

38 In ***Farnell & Anor & Chanbua*** (2016) FLC 93-700, amongst other things, Thackray CJ considered whether permission should be given for the media to publish an account of his judgment, noting the court's power to do so under s 243(8)(d) and (g) of the *Family Court Act 1997* (WA). This was in the context that there was no specific application before the court, and no draft article for which permission to publish was sought. However, there had been intense media scrutiny of the case, including some elements of the media invading the family's privacy, causing them great anxiety and anguish and leading them to move out of their home during the height of the "media frenzy".

39 His Honour permitted publication of the judgment on the basis that: (1) the story was already in the public domain; (2) an account had been permitted of what had occurred at an interim stage of the proceedings; (3) there was significant public interest in the case; (4) the public had a legitimate interest in knowing how Australian law dealt with the complex issues that arose in that case; (5) it would be impossible to publish an account in a way that did not link the story to the notorious "baby Gammy" case; and (6) if the parents were to

receive the vindication they wanted, it would be of limited value, unless published in the way the earlier inaccurate story was published.[9]

40 Thackray CJ made orders granting permission: (1) to the parties, the interveners and their legal advisors to disseminate, as they saw fit, unedited copies of the court's judgment and orders (in the redacted form authorised by the Principal Registrar); and (2) for publication, in all forms of media, of a fair and accurate report of the judgment of the court (in the redacted form authorised by the Principal Registrar), provided that any media organisation wishing to publish such a report, be subject to a number of conditions, including that it is encouraged but not otherwise obliged to state in the report that the full judgment of the court can be found on the court's website.

41 I also concur with Thackray CJ's observation at [531] of ***Farnell*** that:

> Once the court gives permission for an account to be published, it is open to any official or citizen to comment [on it] as they see fit.

42 In ***Seven News (Operations) Limited & Cockman*** (2018) FLC 93-842, Thackray CJ dealt with an application by the media organisation to publish an account of proceedings in the court relating to members of a family who were murdered by another family member (who was not a party to the family court proceedings). The family court proceedings between the parents had been settled by the making of consent orders some years beforehand, following the publication of a single expert report. In particular, the media organisation sought to refer to very selective excerpts from the single expert report and a court order. In that case, the media organisation initially provided the court with a heavily redacted script of the proposed television program, and later, the full script. At [50] Thackray CJ stated that his "task is to balance the public benefit in publishing the relevant material against the public benefit which underpins the general prohibition contained in s 121."

43 His Honour declined to grant permission, and in so doing, provided some guidance as to circumstances that may mitigate against the granting of leave to publish, including:

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[9] *Farnell & Anor & Chanbua* (2016) FLC 93-700, [528].

a) Where an official investigation (including by the police or the Coroner's Court) is incomplete, or is yet to commence, and the proposed publication would serve to speculate on matters relevant to the investigation;[10]

b) Where the report sought to be published is overly selective, such that there is a risk that the report will be rendered inaccurate by omission;[11]

c) Where the report sought to be published cannot be regarded as fair and accurate,[12] including where the report sensationalises certain matters;[13]

d) Where the report identifies extended family members, the potential impact on those family members, and any desire for privacy expressed by those family members.[14]

44 I concur with Thackray CJ's observations in ***Cockman*** at [49] that:

> I approach these applications with a desire to allow the public an insight into the workings of their family law system and with nothing to hide from viewers/readers who rely upon the applicants to keep them informed. That said, my judicial oath requires me to administer the law by reference to the word and spirit of a carefully considered statute, and not by my own preferences as a court administrator exasperated by the ill-informed commentary that often passes for public debate in this area. Instead, I must keep firmly in mind that my wishes as an administrator cannot prevail over the interests of litigants who come before the judges confident in the expectation that their private lives will not be laid bare to the general public.

45 In ***Sedgwick***, ***Cuzens***[15] and ***Cockman***, the applicant media organisations were specific in what account they sought to publish, and in two of the cases provided the draft of the article and/or of the television script that they sought to publish. In ***Cuzens*** the media organisation sought to publish the letter of the child, and the media organisation was otherwise granted liberty to report on the coronial enquiry, without being required to provide a draft of the article. It was in fact the selective and sensational nature of the draft account that was

[10] *Seven News (Operations) Limited & Cockman* (2018) FLC 93-842, [51(1)].
[11] *Seven News (Operations) Limited & Cockman* (2018) FLC 93-842, [51(2)].
[12] *Seven News (Operations) Limited & Cockman* (2018) FLC 93-842, [51(3)-(4) and (6)-(7)].
[13] *Seven News (Operations) Limited & Cockman* (2018) FLC 93-842, [50(4)].
[14] *Seven News (Operations) Limited & Cockman* (2018) FLC 93-842, [51(9)].
[15] The media organisation sought to publish the letter by the child. It was otherwise granted liberty to report on the coronial enquiry, without being required to provide a draft of the article. However, the orders for publication were made without specific reference to s 243(8)(d) or (g).

proposed to be published in ***Cockman*** that mitigated against leave being granted in that case.

Discussion and conclusions:

46 The central issue for determination is whether the applicant should be permitted to identify Dr Menaglio in accounts of the primary proceedings and this proceeding. To a degree, the determination of that central issue has been distracted by the question of whether a draft of the proposed article or articles requires court approval prior to publication. However, the reality is that if it were not for the fact that the applicant wishes to identify Dr Menaglio, the applicant would not have needed to seek approval for publication of the draft article at all. Provided the applicant does not breach s 121, it is free to publish accounts of family law proceedings as it chooses.

47 I am satisfied that the applicant should be permitted to publish accounts of the primary proceedings and of this proceeding, that name and/or otherwise identify Dr Menaglio, provided that: (1) they are fair and accurate reports; and (2) indicate that the relevant judgments of this court, including this judgment delivered today, can be found on the Family Court of Western Australia's website.

48 I make this determination for the following reasons. I am satisfied that there is a public interest in the proceedings, including **firstly**, to appropriately "shine a light" on Dr Menaglio's misconduct as a single expert in the proceedings as found by the Tribunal; and **secondly**, to facilitate greater public awareness and discussion of significant issues facing the family law system highlighted by this case, including issues surrounding the professional oversight of expert witnesses involved in family law proceedings.

49 Although not determinative, I am also satisfied that there is little utility in suppressing information which is already in the public domain. The Tribunal declined to make a final order for the suppression of Dr Menaglio's identity. Details of the orders and agreed facts in relation to Dr Menaglio are publicly available on the Tribunal's website. A number of media organisations have already published articles in relation to the disciplinary proceedings. But for s 121(1), media organisations would be free to identify Dr Menaglio in the context of those disciplinary proceedings.

50 I am not satisfied that publication of Dr Menaglio's identity would conflict with the interests of the parties and D. The applicant maintains it does not intend to disclose the identities of the father or the mother or D. To that extent, the parties and most importantly the child continue to have the benefit of the protection of s 121(1).

51 Given my findings above, it is not necessary for me to approve the text of the report to be published prior to publication, as self-evidently, the applicant will be in breach of the orders I propose to make if the eventual reports are not fair and balanced. In my view, reputable media organisations and journalists should be familiar with the principles of fair and balanced reporting, and therefore of the obligations to be imposed by the order.

52 To assist the applicant, I record that the draft article, which I do not propose to reproduce in these reasons, cannot be regarded as fair and balanced by any measure for the following reasons:

53 Firstly, there is considerable doubt as to whether the draft article is accurate in its reporting of the primary proceedings. In particular, comments regarding the three psychologists "taking the highly unusual step" of signing a joint statement after the litigation ended may simply not be correct. There is no doubt that the three psychologists and Dr Menaglio took part in a conference of experts, as ordered by the court. Their joint report was available to the court and the parties during the trial and referred to and relied upon by Crisford J extensively in her judgment. However, there are significant doubts that have been raised about the authenticity of any document or joint statement that has allegedly been created or released since the litigation ended

54 Secondly, the draft article is unfair and not balanced and largely reflects the father's perspective. It selectively reports on and sensationalises a very limited number of the findings of Crisford J, particularly as they concern the mother, whilst ignoring relevant adverse findings concerning the father. In addition, it selectively reports on and sensationalises matters related to D's health and wellbeing that are highly personal to him, which may not be accurate, and the reporting of which may well cause him psychological distress, as and when he eventually becomes aware of the article. Finally, it is arguable that the draft article was not balanced in that it failed to give due acknowledgement to the highly detrimental impact on D caused by the parties' intense conflict with each other, which was an important factor in Crisford J's overall decision.

55 If the applicant published the draft article in its current flawed state, then not only will the public not be provided with a balanced account, but tragically for the Cape family, the publication may well simply further feed the conflict between the parties and the psychological harm to D.

Orders:

56 For these reasons, I make the following orders:

1. Leave is granted to the applicant to publish accounts, being fair and accurate reports of (1) this proceeding or part of this proceeding that name the Australian Newspaper and Dr Darryl Menaglio; and (2) proceeding number PTW 3762 of 2011 or part of that proceeding that name Dr Menaglio.

2. This order is made on condition that any reports so published indicate that the judgments of the court in proceeding number PTW 3762 of 2011 and the judgment delivered today (in a redacted form as approved by the Principal Registrar) can be found at the Family Court of Western Australia's website

3. The application be otherwise dismissed.

These reasons are the reasons for decision delivered on 9 December 2019, edited in places to correct grammatical errors, to include the correct citations of case law referred to, and/or for ease of reading, without variation to the substance thereof.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Family Court of Western Australia.

KV
Associate

9 DECEMBER 2019