Re E (A Child) (Mediation Privilege) (Rev 1) [2020] EWHC 3379
Family Division, 7 December 2020, Mr L Samuels QC (sitting as a deputy High Court judge)
C Baker, instructed by Freemans Solicitors, for the mother; A Gilmore, instructed by Buchanans Solicitors, for the father.

The parents were both British citizens, as was their child. The parents separated in 2014 and divorced in 2017. Following the parties' separation, the mother formed a relationship with a US citizen.

In early 2019, the parents entered into mediation, in an attempt to reach agreement about arrangements for the child. They each signed a mediation agreement in the form proposed by the mediator's professional membership organisation, the Family Mediators Association (FMA), including the following:
"*Mediation is Confidential*
... 13. Discussions in mediation about proposals and possible terms of settlement are 'without prejudice', which means they cannot be disclosed to the court, except as explained below at para 16.
16. This confidentiality protects the content of mediation and its outcome from disclosure to the court (except where you give your joint written consent; you must take legal advice before you give such consent.)...
Exceptions to confidentiality
17. Whenever an allegation is made within a mediation that someone (particularly a child) is at risk of harm we have a duty to contact the appropriate authorities with or without your permission."

During the 2019 mediation the parents agreed a detailed parenting plan for the child. This was signed by both parties and was dated 18 February 2019. It recorded the father's agreement to the child living with the mother in the USA for 2 years from the summer of 2019, returning to the UK in the summer of 2021. It also recorded that the child was to spend period of time with the father, both in the USA and in the UK.

The mother and child duly moved to the USA in July 2019, to live with the mother's new partner. On 28 June 2020, the father collected the child from the USA, on the basis that he and the child would spend the summer together in the UK. Shortly after this there were some serious disputes between the parents. The father alleged that the mother was in breach of the parenting plan in various respects, for example by restricting both the amount of time he was able to spend with the child and his involvement in decision making. On 27 July 2020, the mother wrote to the father's solicitors to seek changes to the parenting plan.

In August 2020, the parents again entered into family mediation, with the same mediator as in 2019. The mediation was again held on terms set out in the standard FMA agreement. On this occasion the parents were unable to reach agreement, but continued to negotiate directly with each other outside the mediation process (this negotiation was not on a

'without prejudice' basis). According to the father a new agreement was in fact reached on 3 September 2020. Negotiations continued about the wording of a proposed Child Arrangements Order but the terms of that order could not ultimately be agreed. The father then issued a C100 application in the Family Court at Reading on 2 October 2020. The mother responded on 19 October by issuing proceedings for the summary return of the child to the USA under the Hague Convention. The father denied that the child was habitually resident in the USA, and also raised defences of consent and acquiescence. The mother's application was listed for final hearing on 17 December 2020, with a time estimate of 2 days. The child was now 7 years old.

The father's written evidence included references to the discussions between the parties in the August 2020 mediation, to the subsequent correspondence between the parties, and to the terms of the 2019 parenting plan.

Two separate issues arose for determination before the final hearing. The mother sought to exclude from the material to be put before the trial judge the references in the father's written statements and other documents to discussions that had taken place in the course of the family mediation. The father sought an order for disclosure of the mediator's notes and, if necessary, permission to file a witness statement from the mediator as to the discussions that had taken place between the parties. The mediator had indicated that she would provide the mediation notes if that was agreed by the parties or by order of the court.

The leading authority concerning the 'without prejudice' privilege was a patent case, *Unilever plc v The Proctor & Gamble* [2000] 1 WLR 2436; this referred to a number of exceptions to the without prejudice privilege, including where the court needed to examine communications to decide whether a concluded agreement had been reached, the different rules that applied to an offer made 'without prejudice as to costs'; and 'a hybrid species of privilege' in cases involving 'matrimonial conciliation', identified in *In re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231.

In re D referred to "the special regard which the law has for the interests of children" stating that: *"In our judgment, the law is that evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well-being of a child."* The judgment continued: *"Even in the rare case which falls within the narrow exception we have defined, the trial judge will still have to exercise a discretion whether or not to admit the evidence. He will admit it only if, in his judgment, the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation."*

More recently a High Court judge had commented in *Re D (A Child) (Hague Convention: Mediation)* [2017] EWHC 3363 (Fam) that: "*I would say that I consider there is a strong*

argument for holding that mediation in the context of 1980 Hague Convention proceedings, with the international dimension that it contains, with the peculiar intensity of the post-abduction environment, and where the cloak of confidentiality arises not simply from inference but from express terms, will not necessarily attract the Unilever plc v The Procter & Gamble Co *[2000] 1 WLR 2436 exceptions but rather would be immune from disclosure in all circumstances, save for those identified in* In re D (Minors) (Conciliation: Disclosure of Information) *[1993] Fam 231 and accepted within the mediation framework itself, namely disclosure might be justified where there was a risk of significant harm to a child. In so far as I can, in this limited context, I would want to reassure mediators that the cloak of confidentiality remains as securely fastened as ever it was.*"

PD12B FPR 2010 para 5.11, under the heading 'Non-court resolution of disputed arrangements for children' stated that: "*Mediation is a confidential process; none of the parties to the mediation may provide information to the court as to the content of any discussions held in mediation and/or the reasons why agreement was not reached. Similarly, the mediator may not provide such information, unless the mediator considers that a safeguarding issue arises.*"

The deputy High Court judge granted the mother's application in part and dismissed the father's application.

It was clear from dicta in *Unilever plc v The Proctor & Gamble* [2000] 1 WLR 2436 that the reference to a special or hybrid privilege in negotiations concerning arrangements for children was well recognised. It fell within and not outside the analysis in that case. It was not an exception, as such, to the more general protection offered to 'without prejudice' communications. It operated to extend the protection offered to such communications, not to restrict it. It provided not only a 'narrow exception' requiring that disclosure be necessary because that communication clearly indicated that a person had caused or was likely in the future to cause serious harm to a child, but then an overriding discretion to be exercised, in any individual case, by balancing the interests of the child against the public interest in preserving the confidentiality of mediation.

The analysis in the authorities and in PD12B FPR 2010 para 5.11 fitted entirely with the terms of the written agreement signed by these parents on entering into mediation.

The public interest in promoting and supporting mediation to enable parents to resolve disputes about their children, without recourse to the court and contested litigation, was at least as strong today as it was when *In re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231 had been determined. That public interest had been reinforced in *Re D (A Child) (Hague Convention: Mediation)* [2017] EWHC 3363 (Fam), specifically in the context of a dispute under the Hague Convention.

The father did not seek to argue that disclosure of discussions between these parties within mediation was justified by reason of a significant risk of harm to the child. Nor did he suggest that one of the other *Unilever* exceptions did or should apply. Instead, he proposed

that mediation privilege or the 'without prejudice rule' should give way to the wider interests of justice, his right to a fair trial and a simple test of relevance. There was undoubtedly a public interest in the court being able to "get at the truth", quoting *Re A (A Child) (Family Proceedings: Disclosure of Information)* [2013] 2 AC 66. However, the pathway to the truth was unlikely to lie through disclosure of the otherwise privileged discussions within mediation. Parties must be free to discuss candidly all options for settlement and 'think the unthinkable' without fearing that their words would be used against them in any subsequent litigation. Mediators must be free to perform their valuable role without fearing that they would be dragged into that litigation, either by court orders for provision of their notes or to be called to give evidence for one parent and against the other. Otherwise, to paraphrase what had been said in *In re D (Minors) (Conciliation: Disclosure of Information)* in 1993, the mediation process was likely to fail.

Parties could, of course, agree to waive the without prejudice privilege. In *Farm Assist Limited (in Liquidation) v The Secretary of State for the Environment Food and Rural Affairs (No. 2)* [2009] EWHC 1102, the parties had agreed to waive any mediation or 'without prejudice' privilege, so the issue had turned on the more limited issue of confidentiality as it applied to the mediator's application to set aside a witness summons. The stance taken by the mediator was of little or no relevance to the determination of the dispute between the parties. The 'without prejudice' nature of the discussions was as between them and only their waiver or consent could operate to remove the attached privilege.

It followed that the mother's application to exclude reference to the discussions within mediation from the evidence in this case must succeed. Equally, it followed that the father's application for disclosure of the mediator's notes and permission to file a statement from her must fail.

Correspondence between the parties that was not conducted on a 'without prejudice' basis could be relied upon by each of them and references to this would not be excluded. Passages referring back to the terms of the parenting plan and, to a very limited extent, the inferences that could be drawn from those terms would not be excluded. Whether those inferences could properly be drawn would be a matter for the trial judge.