This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

IN THE HIGH COURT OF JUSTICE NEUTRAL CITATION: [2020] EWHC 3379 (Fam)

FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985 INCORPORATING THE 1980 HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

23 NOVEMBER AND 7 DECEMBER 2020

Before:
MR L. SAMUELS QC
(Sitting as a Deputy High Court Judge)
(In Private)

BETWEEN:

SG

Applicant

and

SW

Respondent

____

Ms C. BAKER (instructed by Freemans Solicitors) appeared on behalf of the Applicant.
Ms A. GILMORE (instructed by Buchanans Solicitors) appeared on behalf of the Respondent.

____

Re E (A Child) (Mediation Privilege)

JUDGMENT

---

1. These are proceedings under the Hague Convention 1980 concerning E who is 7 years of age. Her mother is SG ('the mother') and her father is SW ('the father').

2. By an application dated 19 October 2020 the mother seeks E's summary return to the USA. The father denies that E was habitually resident in the USA. In the alternative, he raises the defences of consent and acquiescence. The mother's application is listed for final hearing on 17 December 2020 with a time estimate of 2 days.

3. The issues before me for determination are as follows:
   (1) The mother seeks to exclude from the material to be put before the trial judge references in the father's written statements and other documents to discussions that took place in the course of family mediation between the parties; and
   (2) The father seeks 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 took place between the parties.

4. I heard submissions on these issues from Ms Baker on behalf of the mother and Ms Gilmore on behalf of the father, at a remote hearing conducted by way of MS Teams on 23 November 2020. I am grateful to both counsel for their written skeleton arguments and their succinct and helpful submissions. I reserved judgment and sent this written judgment out in draft on 26 November 2020.

Background

5. Both the mother and the father are British citizens and were married at the time of E's birth. E is also a British citizen. The parents were each serving police officers during their relationship. They separated in 2014 and divorced in 2017. The father continues to reside in England.

6. Following the parties' separation, the mother formed a relationship with LG who is a US citizen.

7. In early 2019 the mother and father entered into mediation in an attempt to reach agreement as to the child arrangements for E. They each signed a mediation agreement in the form proposed by the mediator's professional membership organisation, in this case the Family Mediators Association ('the FMA'). The relevant sections of that agreement are as follows:

"***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."

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

9. Following that agreement, the mother and E moved to the USA in July 2019 to live with LG. The mother now proposes that the legal effect of the parenting agreement is that E became habitually resident in the USA. The mother is silent as to whether the consequence of that proposition is that she would be entitled to retain E in the USA beyond the summer of 2021, subject to any contrary order of the US Court.

10. On 28 June 2020 the father collected E from the USA with the agreed intention that she would spend the summer in the UK with the father. Shortly thereafter issues arose between the parents. The father alleged that the mother had been acting in breach of the parenting plan, for example by restricting the time he had been able to spend with E and his involvement in decision making for her. On 27 July 2020 the mother wrote to the father's solicitors to seek changes to the parenting plan, in essence a new agreement.

11. In August 2020 the parties again entered into family mediation, with the same mediator as in 2019. The mediation was again held on the terms set out in the standard FMA agreement. On this occasion, unfortunately, the parties were not able to reach any agreement, but they continued to negotiate directly with each other outside the mediation process. The father alleges that a new agreement was reached on 3 September 2020. Negotiations continued on the wording of a proposed Child Arrangements Order but the terms of that order could not be agreed. The father then issued a C100 application in the Family Court at Reading on 2 October 2020. As I have said, the mother initiated these summary return proceedings on 19 October 2020.

The Mother's Position

12. Ms Baker on behalf of the mother invites the Court to adopt the test as set out by Williams J in his *obiter* comments in the case of *Re D (A Child) (Hague Convention: Mediation)* [2017] EWHC 3363 (Fam) [2018] 4 WLR 45, namely that mediation is such a vital part of the first aid kit used in the context of Hague Convention 1980 proceedings, that the protection from disclosure of the discussions that took place should only be lifted where there is a risk of significant harm to a child. Alternatively, she says that if the conventional test under *Unilever plc v The Proctor & Gamble co* [2000] 1 WLR 2436 applies, nonetheless this situation does not fall within any of the exceptions identified in the dicta of Robert Walker LJ.

13. Ms Baker asserts that passages of the father's evidence, and other documents produced by him, refer to mediation discussions. These discussions cannot be referred to in these proceedings both as a matter of law and under the agreement of the parties as set out in the mediation agreement. The only material arising from the mediation that the father is entitled to refer to is the agreed parenting plan signed on 18 February 2019, which forms the concluded agreement between the parties. To the extent that the father seeks to rely on matters discussed within mediation, but which did not form part of the agreement, he should be prohibited from doing so. She seeks a direction that the offending documents be refiled with specific identified references to the mediation discussions removed.

14. The mother opposes the father's application for disclosure of the mediator's notes or for permission to file a witness statement from her. Again, it is said that such evidence is protected from disclosure under the mediation umbrella.

The Father's Position

15. Ms Gilmore on behalf of the father argues that the discussions between the parties during mediation are relevant to the defences that he raises under the Hague Convention. In the absence of an ability to rely on the detail of those discussions he may be inhibited in establishing his defence and in his ability to establish that factual matters advanced by the mother in her evidence are, in fact, untrue.

16. She draws the Court's attention to the decision of the House of Lords *In Re H and others (Minors) (Abduction: Acquiescence)* [1997] 2 WLR 563 where Lord Wilkinson summarised the applicable principles relevant to establishing the defence of acquiescence. Although acquiescence is a subjective state of mind, Lord Wilkinson said, at 576, that

> *"where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced".*

She asserts that reference to the discussions within mediation may well, in these circumstances, be the only way that a parent can establish the necessary evidence to found their defence. As such, it would not be in the interests of justice or in the interests of the particular child to prevent him from doing so. Excluding this material would, she says, deny the father a fair trial. It might also lead to a risk of harm to E's wellbeing and her ongoing relationship with her father should the consequence be that she is returned to the USA, when otherwise she would have remained in England.

17. Ms Gilmore refers me to the case of *Farm Assist Limited (in Liquidation) v The Secretary of State for the Environment Food and Rural Affairs (No. 2)* [2009] EWHC 1102 as authority for the proposition that evidence may be given of matters arising in the context of mediation *"if the court considers that it is in the interests of justice to do so."* She relies on the case of *BCG Brokers LP v Traditions (UK) Ltd* [2019] EWCA Civ 1937 as authority for the proposition that the court that the court should not only consider a concluded agreement reached between the parties but also the negotiations leading up to that agreement. In the context of proceedings relating to children she relies on the case of *Re A (A Child) (Family Proceedings: Disclosure of Information)* [2013] 2 AC 66 and Baroness Hale's observation, at paragraph 36 of her judgment, that *"The court's only concern in family proceedings is to get at the truth".* Essentially, she suggests that the only real test is one of relevance, that all relevant material should be before the court in order to enable it properly to perform its function of determining the application for summary return under the Hague Convention.

18. By way of extension of the same principles the father asks me to direct disclosure of the mediator's notes. Recognising that the notes may not provide a complete record of the mediation, he goes further and suggests it may be necessary to obtain witness evidence from the mediator as to her "recollection of [the] sessions".

<u>The Law</u>

19. There is some complexity to this area of law. There is also overlapping terminology through the use of phrases such as 'mediation privilege', 'the without prejudice rule' and 'confidentiality', which appear on occasions to be used interchangeably but can refer to different legal principles.

20. The leading authority remains the case of *Unilever plc v The Proctor & Gamble co* [2000] 1 WLR 2436. That case involved assertions said to have been made in a

'without prejudice' meeting concerning a patent dispute. I note that the composition of the Court of Appeal included Wilson J, as he then was.

21. In his leading judgment, Robert Walker LJ referred to the well-known passage from the House of Lords decision in *Rush & Tompkins Ltd. v. Greater London Council* [1989] A.C. 1280, 1299, where Lord Griffiths had said

> *"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish... The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence."*

22. As Robert Walker LJ identified, the rule rests firmly on the public interest in encouraging parties to negotiate and settle their disputes out of court. However, he made a separate point, at p.2444, where the 'without prejudice' communications consist not of letters but of *"wide-ranging unscripted discussions during a meeting which may have lasted several hours":*

> "*At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities. As Simon Brown L.J. put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt L.J. put it in Mulkr v. Linsley & Mortimer [1996] P.N.L.R. 74, 81, a concept as implausible as the curate's egg (which was good in parts)."*

23. It is this reality, as raised in the course of argument in the present case, which no doubt underpins Ms Gilmore's suggestion that it may well be necessary to obtain a witness statement from the mediator as well as disclosure of her notes.

24. Robert Walker LJ identified in *Unilever* at p.2444 to 2446 a number of exceptions to the 'without prejudice rule'. These include, for example, where the court needs to examine the communications to decide whether a concluded agreement has been reached and the different rule that applies to an offer made 'without prejudice as to costs'.

25. A further exception to the 'without prejudice rule' identified by Robert Walker LJ is what he termed to be 'a hybrid species of privilege' in cases involving 'matrimonial conciliation'.

> *"In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation: see In re D. (Minors) (Conciliation: Disclosure of Information) [1993] Fam. 231, 238, where Sir Thomas Bingham M.R. thought it not "fruitful to debate the relationship of this privilege with the more familiar head of 'without prejudice' privilege. That its underlying rationale is similar, and that it developed by way of analogy with 'without prejudice' privilege, seem clear. But both Lord Hailsham of St. Marylebone and Lord Simon of Glaisdale in D. v. National Society for the Prevention of Cruelty to Children [1978] A.C. 171, 226, 236 regarded it as having developed into a new category of privilege based on the public interest in the stability of marriage."*

26. *In re D. (Minors) (Conciliation: Disclosure of Information)* [1993] Fam. 231 was a case concerning a statement made by a conciliator (a mediator) about meetings held with the mother and father in proceedings under the Children Act 1989. The judge at first instance decided that the statement should be excluded from evidence and the mother appealed. The Court of Appeal upheld the decision of the judge. Sir Thomas Bingham MR emphasised the strong public policy imperative that lies behind the exclusion of such evidence when parties are negotiating arrangements for their children, "*unless parties can speak freely and uninhibitedly, without worries about weakening their position in contested litigation if that becomes necessary, the conciliation will be doomed to fail"* (at p.239).

27. In his conclusions, at p.241, Sir Thomas Bingham MR made reference to *"the special regard which the law has for the interests of children"*. He said,

> *"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."*

28. He then emphasised a further safeguard to protect the sanctity of conciliation or mediation,

> *"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."*

29. It is therefore clear from the dicta of Robert Walker LJ in *Unilever* that the reference to a special or hybrid privilege in negotiations concerning arrangements for children is well recognised. It falls within and not outside the analysis in that case. It is not an exception, as such, to the more general protection offered to 'without prejudice' communications. It operates to extend the protection offered to such communications, not to restrict it. It provides not only a 'narrow exception' requiring that disclosure be necessary because that communication clearly indicates that a person has caused or is 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.

30. The *obiter* observations of Williams J in *Re D (A Child) (Hague Convention: Mediation)* [2017] EWHC 3363 (Fam) [2018] 4 WLR 45 fit neatly within this analysis. At paragraph 8 of his judgment Williams J said:

> *"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."*

31. Further support for this analysis is to be found in PD12B FPR 2010 para 5.11, under the heading 'Non-court resolution of disputed arrangements for children' where it is said 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."*

32. Such an analysis also fits entirely with the terms of the written agreement signed by these parties on entering into mediation.

<u>Discussion</u>

33. 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, is at least as strong today as it was when *In Re D* was determined in 1993. That public interest was reinforced by Williams J in the 2017 *Re D*, specifically in the context of a dispute under the Hague Convention.

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

35. In my judgment, the authorities relied upon by Ms Gilmore in support of that proposition are not really on point. There is undoubtedly a public interest in the court being able to *"get at the truth"* in the words of Baroness Hale in *Re A*. However, the pathway to the truth is 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 will be used against them in any subsequent litigation. Mediators must be free to perform their valuable role without fearing they will 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 Lord Bingham MR, the mediation process is likely to fail.

36. There is undoubtedly a substantial body of civil law jurisprudence on the 'without prejudice rule', its scope and the exceptions that may apply. Parties may, of course, agree to waive the 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 turned on the more limited issue of confidentiality as it applied to the mediator's application to set aside a witness summons. That much is clear from paragraph 22 of the judgment of Ramsey J where he said:

> *"the general rule is that without prejudice privilege is the privilege of the parties to the dispute which can be waived by those parties. It is not a privilege of the Mediator. As the parties in this case have clearly waived without prejudice privilege, the without prejudice exception to confidentiality no longer applies but this raises the question as to whether there is any other aspect of confidentiality which applies to a mediation."*

Ramsey J's comments about the wider interests of justice have to be seen in that context. No issue in this case has been raised or pursued about waiver or consent.

37. Ms Gilmore raises the point that the mediator has not herself objected to disclosure of her notes. She has agreed to provide them on the agreement of the parties or by order of the court. However, the stance taken by the mediator is of little or no relevance to the determination of the dispute between the parties. The 'without prejudice' nature of the discussions is as between them and only their waiver or consent could operate to remove the attached privilege.

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

39. Ms Baker has helpfully identified the passages of evidence relied on by the father that she would seek to exclude. Parts of these relate to the discussions between the parties in the August 2020 mediation, as set out at paragraph 6(a) of her skeleton argument, the second part of 6(b) and the second part of 6(c). This was not a mediation that led to any concluded agreement, although there was subsequent correspondence between the parties which was not conducted on a 'without prejudice' basis and can, therefore, be relied upon by each of them. However, the passages referred to by Ms Baker clearly refer to discussions within the mediation itself and must therefore be excluded from the evidence to be put before the court at the final hearing.

40. The other passages referred to by Ms Baker concern the 2019 mediation. That mediation did, as I have said, give rise to a concluded agreement as set out in the parenting plan signed by the parties on 18 February 2019. The passages identified by Ms Baker do not in fact refer back to the discussions within the mediation. They refer to the terms of the parenting plan and, to a very limited extent, the inferences that can be drawn from it. Whether those inferences can properly be drawn will be a matter for the trial judge. However, there is nothing objectionable in the material that I have seen and do not consider that this part of the evidence should be excluded.

41. Accordingly, I grant in part the mother's application and dismiss the father's application.

7 December 2020

L. Samuels QC