

PRACTICE DIRECTION – HEARINGS

This practice direction supplements Part 13 of the Court of Protection Rules 2007

PRACTICE DIRECTION A – HEARINGS (INCLUDING REPORTING RESTRICTIONS)

General

1. Hearings before the court will generally be in private¹ but the court may order that the whole or part of any hearing is to be held in public.² The court also has power to:
 - (a) authorise the publication of information about a private hearing;³
 - (b) authorise persons to attend a private hearing;⁴
 - (c) exclude persons from attending either a private or public hearing;⁵ or
 - (d) restrict or prohibit the publication of information about a private or public hearing.⁶
2. Part 1 of this practice direction applies to any application for an order under rules 90 to 92.
3. Part 2 of the practice direction makes additional provision in relation to orders founded on Convention rights which would restrict the publication of information.

(Section 1 of the Human Rights Act 1998 defines “the Convention rights”.)

PART 1

Applications under rules 90, 91 or 92

4. An application for an order under rule 90, 91 or 92 must be commenced by filing an application notice form using COP9 in accordance with Part 10.

¹ Rule 90.

² Rule 92.

³ Rule 91.

⁴ Rule 90(3)(a).

⁵ Rules 90(3)(b) and 92(1)(c).

⁶ Rules 91(3) and 92(2).

5. For the purposes of rules 90 to 92, a statement of truth in an application notice may be made by a person who is not a party.⁷
6. For an application commenced under rules 90, 91 or 92, the court should consider whether to direct that the application should be dealt with as a discrete issue.⁸

PART 2

Powers of the court to impose reporting restrictions

Court sitting in private

7. Section 12(1) of the Administration of Justice Act 1960⁹ provides that, in any proceedings brought under the Mental Capacity Act 2005 before a court which is sitting in private, publication of information about the proceedings will generally be contempt of court. However, rule 91(1) makes it clear that there will be no contempt where the court has authorised the publication of the information under rule 91. Where the court makes such an order, it may (at the same time or subsequently) restrict or prohibit the publication of information relating to a person's identity. Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.¹⁰
8. The general rule is that hearings will be in private and that there can be no lawful publication of information unless the court has authorised it. Where reporting restrictions are imposed as part of the order authorising publication, they will simply set out what can be published and there will be no need to comply with the requirements as to notice which are set out in Part 2 of this practice direction. But if the restrictions are subsequent to the order authorising publication, then the requirements of Part 2 should be complied with.

⁷ See rule 11(6)(a).

⁸ Rule 25(2)(h) sets out the court's case management power to do so.

⁹ Section 12(1)(b) was amended by paragraph 10 of Schedule 6 the Mental Capacity Act 2005.

¹⁰ Rule 93(1)(c).

Court sitting in public

9. Where a hearing is to be held in public as a result of a court order under rule 92, the court may restrict or prohibit the publication of information about the proceedings.¹¹ Such restrictions may be imposed either on an application made by any person (usually a party to the proceedings) or of the court's own initiative.¹²

Notification in relation to reporting restrictions

10. In connection with the imposition of reporting restrictions, attention is drawn to section 12(2) of the Human Rights Act 1998. This means that where an application has been made for an order restricting the exercise of the right to freedom of expression, the order must not be made where the person against whom the application is made is neither present nor represented unless the court is satisfied:

- (a) that the applicant has taken all practicable steps to notify the respondent; or
- (b) that there are compelling reasons why the respondent should not be notified.

11. The need to ensure that P's Convention rights are protected may be at issue when the court is considering whether to make an order that a public hearing should be held. In particular, there is a general duty under section 1 of the Mental Capacity Act 2005 to ensure that things done for or on behalf of P are done in his best interests. Part 2 of this practice direction should therefore be complied with where the court is considering making an order under rule 92(2) of its own initiative.

12. In summary, the requirements to notify in accordance with the requirements of Part 2 of this practice direction will apply in any case where:

- (a) the court has made an order for the publication of information about proceedings which are conducted in private and, after the order has been made:

¹¹ Rule 92(2).

¹² Rules 93(1)(c).

- (i) an application founded on P's Convention rights is made to the court for an order under rule 91(3) which would impose restrictions (or further restrictions) on the information that may be published, or
 - (ii) of its own initiative, the court is considering whether to impose such restrictions on the basis of P's Convention rights; or
- (b) the court has already made an order for a hearing to be held in public and:
- (i) an application founded on Convention rights is made to the court for an order under rule 92(2) which would impose restrictions (or further restrictions) on the information that may be published, or
 - (ii) of its own initiative, the court is considering whether to vary or impose further such restrictions.

Notice of reporting restrictions to be given to national news media

13. Notice of the possibility that reporting restrictions may be imposed can be effected via the Press Association's CopyDirect service, to which national newspapers and broadcasters subscribe as a means of receiving notice of such applications. Such service should be the norm. The court retains the power to make orders without notice (whether in response to an application or of its own initiative) but such cases will be exceptional.

14. CopyDirect will be responsible for notifying the individual media organisations. Where the order would affect the world at large this is sufficient service for the purposes of advance notice. The website:

<http://www.medialawyer.press.net/courtapplications>

gives details of the organisations represented and instructions for service of the application.

Notice of an application to be given by applicant

15. A person who has made an application founded on Convention rights should give advance notice of the application to the national media via the Press Association's CopyDirect service. He should first telephone CopyDirect (tel. no 0870 837 6429). Unless an order pursuant to rule 19 has been made, a copy of the following documents should be sent either by fax (fax no 0870 830 6949) or to the e-mail address provided by CopyDirect:

- (a) the application form or application notice seeking the restriction order;

- (b) the witness statement filed in support;
- (c) any legal submissions in support; and
- (d) an explanatory note setting out the nature of the proceedings in the form set out in the Annex to this practice direction.

16. It is helpful if applications are accompanied by an explanatory note from which persons served can readily understand the nature of the case (though care should be taken that the information does not breach any rule or order of the court in relation to the use or publication of information). In any case where notice of an application has not been given, the explanatory note should explain why.

17. Unless there is a particular reason not to do so, copies of all the documents referred to above should be served. If there is a reason for not serving some or all of the documents (or parts of them), the applicant should ensure sufficient detail is given to enable the media to make an informed decision as to whether it wishes to attend a hearing or be legally represented.

18. The CopyDirect service does not extend to local or regional media or magazines. If service of the application on any specific organisation or person not covered is required, it should be effected directly.

19. The court may dispense with any of the requirements set out in paragraphs 15 to 18.

Notice of own-initiative order to be given by court

20. In any case where the court will give advance notice of an own-initiative order to the national media, it will send such of the information listed in paragraph 15 as it considers necessary.

Responding to a notice

21. Where a media organisation or any other person has been notified of an application or own-initiative order, they may decide that they wish to participate in any hearing to determine whether reporting restrictions should be imposed. In order to take part, the person must file an acknowledgment of service (“the

acknowledgment”) using form COP5 within 21 days beginning with the date on which the notice of the reporting restrictions was given to him by CopyDirect.

22. The acknowledgment must be filed in accordance with rule 75.

23. A person who has filed an acknowledgment will not become a party to the substantive proceedings (ie. the proceedings in relation to which an application form was filed) except to such extent (if any) as the court may direct.

The hearing

24. Any application or own-initiative order which invokes Convention rights will involve a balancing of rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). There is no automatic precedence as between these Articles, and both are subject to qualification where (among other considerations) the rights of others are engaged.

25. In the case of an application, section 12(4) of the Human Rights Act 1998 requires the court to have particular regard to the importance of freedom of expression. It must also have regard to the extent to which material has or is about to become available to the public, the extent of the public interest in such material being published and the terms of any relevant privacy code (such as those of the Press Complaints Commission).

26. The same approach will be taken where the court is considering an own-initiative order imposing reporting restrictions.

Scope of order

Persons protected

27. The aim should be to protect P rather than to confer anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors or organisations or other persons as the court directs in cases where the absence of such restriction is likely to prejudice their ability to care for P, or where identification of such persons might lead to identification of P and defeat the purpose of the order. In cases where the court receives expert evidence the

identity of the experts (as opposed to treating clinicians) is not normally subject to restriction, unless evidence in support is provided for such a restriction.

Information already in the public domain

28. Orders will not usually be made prohibiting publication of material which is already in the public domain, other than in exceptional cases.

Duration of order

29. Orders should last for no longer than is necessary to achieve the purpose for which they are made. The order may need to last until P's death. In some cases a later date may be necessary to maintain the anonymity of doctors or carers after the death of a patient.

ANNEX

Application for a Reporting Restriction Order

EXPLANATORY NOTE

- 1 AB is in a permanent vegetative state. An application has been made by the NHS Hospital Trust responsible for his care for the Court of Protection to make a decision on the question of withdrawing artificial nutrition and hydration. This course is supported by AB's family.
- 2 On [date] the application will be heard by the Court of Protection [in public].
- 3 A Reporting Restriction Order has been [made/applied for] to protect AB's right to confidentiality in respect of his medical treatment. This does not restrict publication of information or discussion about the treatment of patients in a permanent vegetative state, provided that such publication is not likely to lead to the identification of AB, those caring for him, the NHS Trust concerned or the establishment at which he is being cared for.