

TRANSPARENCY IN THE COURT OF PROTECTION

PUBLICATION OF JUDGMENTS

PRACTICE GUIDANCE

issued on 16 January 2014 by

SIR JAMES MUNBY, PRESIDENT OF THE COURT OF PROTECTION

The purpose of this Guidance

1 This Guidance (together with similar Guidance issued at the same time for the family courts) is intended to bring about an immediate and significant change in practice in relation to the publication of judgments in family courts and the Court of Protection.

2 In both courts there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name. The Guidance will have the effect of increasing the number of judgments available for publication (even if they will often need to be published in appropriately anonymised form).

3 In July 2011 Sir Nicholas Wall P issued, jointly with Bob Satchwell, Executive Director of the Society of Editors, a paper, *The Family Courts: Media Access & Reporting* (Media Access & Reporting), setting out a statement of the current state of the law. In their preface they recognised that the debate on increased transparency and public confidence in the family courts would move forward and that future consideration of this difficult and sensitive area would need to include the questions of access to and reporting of proceedings by the media, whilst maintaining the privacy of the families involved. The paper is to be found at:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/family-courts-media-july2011.pdf>

4 In April 2013 I issued a statement, *View from the President's Chambers: the Process of Reform*, [2013] Fam Law 548, in which I identified transparency as one of the three strands in the reforms which the family justice system is currently undergoing. I said:

“I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice. Work, commenced by my predecessor, is well underway. I hope to be in a position to make important announcements in the near future.”

5 That applies just as much to the issue of transparency in the Court of Protection.

6 Very similar issues arise in both the Family Court (as it will be from April 2014) and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults. The applicable rules differ, however, and this is something that needs attention. My starting point is that so far as possible the same rules and principles should apply in both the family courts (in due course the Family Court) and the Court of Protection.

7 I propose to adopt an incremental approach. Initially I am issuing this Guidance. This will be followed by further Guidance and in due course more formal Practice Directions and changes to the Rules (the Court of Protection Rules 2007 and the Family Procedure Rules 2010). Changes to primary legislation are unlikely in the near future.

8 As provided in paragraph 14 below, this Guidance applies only to judgments delivered by certain judges. In due course consideration will be given to extending it to judgments delivered by other judges.

The legal framework

9 The effect of section 12 of the Administration of Justice Act 1960 is that it is a contempt of court to publish a judgment in a Court of Protection case unless either the judgment has been delivered in public or, where delivered in private, the judge has authorised publication. In the latter case, the judge normally gives permission for the judgment to be published on condition that the published version protects the anonymity of the person who is subject of the proceedings and members of their family.

10 In every case the terms on which publication is permitted are a matter for the judge and will be set out by the judge in a rubric at the start of the judgment.

11 The normal terms as described in paragraph 9 may be appropriate in a case where no-one wishes to discuss the proceedings otherwise than anonymously. But they may be inappropriate, for example, where family members wish to discuss their experiences in public, identifying themselves and making use of the judgment. Equally, they may be inappropriate in cases where findings have been made against a person and someone else contends and/or the court concludes that it is in the public interest for that person to be identified in any published version of the judgment.

12 If any party wishes to identify himself or herself, or any other party or person, as being a person referred to in any published version of the judgment, their remedy is to seek an order of the court and a suitable modification of the rubric: *Media Access & Reporting*, para 82; *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, paras [17], [19].

13 Nothing in this Guidance affects the exercise by the judge in any particular case of whatever powers would otherwise be available to regulate the publication of material relating to the proceedings. For example, where a judgment is likely to be used in a way that would defeat the purpose of any anonymisation, it is open to the judge to refuse to publish the judgment or to make an order restricting its use.

Guidance

14 This Guidance takes effect from 3 February 2014. It applies to all judgments in the Court of Protection delivered by the Senior Judge, nominated Circuit Judges and High Court Judges.

15 The following paragraphs of this Guidance distinguish between two classes of judgment:

- (i) those that the judge *must* ordinarily allow to be published (paragraphs 16 and 17); and
- (ii) those that *may* be published (paragraph 18).

16 Permission to publish a judgment should always be given whenever the judge concludes that publication would be in the public interest and whether or not a request has been made by a party or the media.

17 Where a judgment relates to matters set out in the Schedule below and a written judgment already exists in a publishable form or the judge has already ordered that the judgment be transcribed, the starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published.

SCHEDULE

Judgments arising from:

- (i) any application for an order involving the giving or withholding of serious medical treatment and any other hearing held in public;
- (ii) any application for a declaration or order involving a deprivation or possible deprivation of liberty;
- (iii) any case where there is a dispute as to who should act as an attorney or a deputy;
- (iv) any case where the issues include whether a person should be restrained from acting as an attorney or a deputy or that an appointment should be revoked or his or her powers should be reduced;
- (v) any application for an order that an incapacitated adult (P) be moved into or out of a residential establishment or other institution;
- (vi) any case where the sale of P's home is in issue
- (vii) any case where a property and affairs application relates to assets (including P's home) of £1 million or more or to damages awarded by a court sitting in public;

- (viii) any application for a declaration as to capacity to marry or to consent to sexual relations;
- (ix) any application for an order involving a restraint on publication of information relating to the proceedings.

18 In all other cases, the starting point is that permission may be given for the judgment to be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that permission for the judgment to be published should be given.

19 In deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings.

20 In all cases where a judge gives permission for a judgment to be published:

- (i) public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;
- (ii) the person who is the subject of proceedings in the Court of Protection and other members of their family should not normally be named in the judgment approved for publication unless the judge otherwise orders;
- (iii) anonymity in the judgment as published should not normally extend beyond protecting the privacy of the adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.

21 Unless the judgment is already in anonymised form, any necessary anonymisation of the judgment shall be carried out as the judge orders. The version approved for publication will contain such rubric as the judge specifies. Unless the rubric specified by the judge provides expressly to the contrary every published judgment shall be deemed to contain the following rubric:

“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 incapacitated person 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.”

22 The judge will need to consider who should be ordered to bear the cost of transcribing the judgment. Unless the judge otherwise orders:

- (i) in cases falling under paragraph 18, the cost of transcribing the judgment shall be borne by the party or person applying for publication of the judgment;
- (ii) in other cases, the cost of transcribing the judgment shall be at public expense.

23 In all cases where permission is given for a judgment to be published, the version of the judgment approved for publication shall be made available, upon payment of any appropriate charge that may be required, to any person who requests a copy. Where a judgment to which paragraph 16 or 17 applies is approved for publication, it shall as soon as reasonably practicable be placed by the court on the BAILII website. Where a judgment to which paragraph 18 applies is approved for publication, the judge shall consider whether it should be placed on the BAILII website and, if so, it shall as soon as reasonably practicable be placed by the court on the BAILII website.