

The Family Courts: Media Access & Reporting
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Preface

There is no more difficult issue in family justice than the reporting of cases. There is a tension between concerns about “secret justice” and legitimate expectations of privacy and confidentiality for the family. Both standpoints are valid, and the question is whether they are irreconcilable.

Against this background, and under the wise tutelage of the Lord Chief Justice, a group of lawyers and journalists, including representatives from both the print and broadcast media, have got together to talk to each other. As part of these discussions, they commissioned a paper which would set out a statement of the current state of the law in this most complex area.

The result is the document which follows this Preface. It has been drafted by two members of the bar, Adam Wolanski and Kate Wilson. It is an analysis of where we are at the moment: what we can and what we cannot do. It is, in our view, a substantial and very important piece of work. Its publication is all the more timely as the debate on increased transparency and public confidence in the family courts moves forward. It will serve to inform future consideration of this difficult and sensitive area, including the questions of access to and reporting of proceedings by the media, whilst maintaining the privacy of the families involved.

We are all very grateful to Adam and Kate for the enormous amount of hard work which has gone into the document and to Eddie Craven for proof reading it. We are confident it will be of practical use to journalists, judges and practitioners alike.

We commend it to you.

Sir Nicholas Wall
President of the Family Division
and Head of Family Justice

Bob Satchwell
Executive Director
Society of Editors

THE FAMILY COURTS: MEDIA ACCESS & REPORTING

ADAM WOLANSKI AND KATE WILSON

Assumptions

1. This paper seeks to draw together a number of interlocking and overlapping statutes, rules and common law principles which affect the ability of the media to inform the public about family proceedings. It does not address proposals which have not been enacted, specifically those in the Children, Schools and Families Act 2010.
2. The law is stated as of July 2011.

INTRODUCTION – PRINCIPLES

Open justice

3. The starting point for consideration of publicity in the family courts, as in all courts, is open justice.
4. Open justice promotes the rule of law¹. It also promotes public confidence in the legal system². The principle of open justice has two aspects:
 - 4.1. Proceedings should be held in open court to which the public and the media are admitted; and
 - 4.2. Nothing should be done to discourage the publication to the wider public of fair and accurate reports of proceedings that have taken place in court³.
5. Since the enactment of the Human Rights Act 1998, the common law principle of open justice has been reinforced, in different terms, by Art. 6 and Art. 10 of the European Convention on Human Rights and Fundamental Freedoms.

¹ *Scott v Scott* [1913] AC 417; *Ex p. Guardian Newspapers Ltd* [1999] 1 WLR 2130 at [25] & [39]; and see *R(Binyam Mohamed) v SoS for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65; [2011] QB 218 at [38]-[42] per Lord Judge CJ for a wide-ranging statement of the role of open justice and the principles it promotes

² *Re. Webster (A Child)* [2006] EWHC 2733; [2007] EMLR 7; [2007] 1 FLR 1146 at [24]-[25]

³ *Attorney General v Leveller Magazine Ltd* [1979] AC 440 per Lord Diplock at 450

6. It has been held that the principle of open justice is to be derogated from only to the extent that it is strictly necessary to do so⁴. Applications for orders which amount to derogations must be supported by proper and convincing evidence; assertions or evidence of a generalised nature will not suffice⁵.

Derogations from open justice in family courts

7. In *Scott v Scott*⁶, the House of Lords recognized three exceptions to the principle of open justice, which justified hearings being held “in camera”⁷. The exceptions were founded in the nature of those proceedings. Two of the exceptions, wardship cases and cases dealing with the affairs of those suffering from mental incapacity, were founded in the jurisdiction being exercised⁸. The matters being dealt with were “truly domestic affairs”⁹. The court is not so much deciding contested questions as exercising what may be described as a paternalistic, parental, quasi-domestic and essentially administrative jurisdiction¹⁰.
8. Statutory provisions have expanded the scope of the derogations from open justice. In addition to the specific class of cases involving children and cases of mental incapacity, ancillary relief proceedings, in which the parties’ financial affairs are scrutinised, are also considered to concern private matters¹¹.

⁴ *Scott v Scott* (See fn.1) at 438; *Attorney General v Leveller Magazine* (See fn.3) at 450. Note however that article 10 ECHR (freedom of expression) cannot be given a presumptive priority over other Convention rights: *Campbell v MGN* [2004] 2 AC 457 per Lord Hope at paragraph [111]; *Re S (A Child) (Identification: Restrictions on publication)* [2004] UKHL 47; [2005] 1 AC 593; [2005] EMLR 2; [2005] 1 FLR 591 per Lord Steyn at [17]. See also *Re Guardian News & Media* [2010] UKSC 1; [2010] 2 AC 697; [2010] EMLR 15 at [43]-[52]

⁵ *Kelly v BBC* [2001] Fam. 59 at 70, 85; See also *Re X (A Child) (Injunctions Restraining Publication)* [2001] 1 FCR 541

⁶ See fn.1

⁷ *Ibid.* at 436-439, per Viscount Haldane LC. *Scott v Scott* was concerned with the final adjudication of a matter which had taken place in camera. Earl Loreburn observed that it was not concerned with “what may be done in chambers, which is a distinct and by no means short subject” (at 445)

⁸ The third exception was cases where publicity would defeat the very purpose of the case and would therefore amount to a denial of justice: see para 28 below

⁹ See fn.1 at 482-483 per Lord Shaw. However, it has been recognized that not all cases involving children or those suffering from mental incapacity are “truly domestic affairs”. For example, in care proceedings the intrusion (or potential intrusion) into the family life of those concerned is a serious interference by the state with family life: *Re L (Care: Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), [2002] 2 FLR 730 at [150]; a point reiterated by Munby J, as he then was, in *Re. Webster (A Child)* (See fn. 2) at [74]-[75]. This position contrasts with *Re P-B (A Minor)* [1996] EWCA Civ 510; [1996] 2 FLR 765 at 60 & 63 in which all Children Act 1989 proceedings were considered to be analogous to wardship proceedings. Similarly, where a miscarriage of justice is alleged, the matter is not a purely domestic affair, even if the proceedings concern the welfare of a child: *Re Webster (A Child)* at [110]

¹⁰ See fn 1 at 437 per Viscount Haldane

¹¹ See, for example, *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315; [2011] 1 FLR 1427 at [79]

9. There are therefore restrictions upon *access to* family proceedings and upon the *publication of information from* family proceedings.

SOURCES OF LAW

10. The sources of the restrictions upon access to proceedings and reporting of proceedings are:

10.1. Statute law and rules of court made under statute:

10.1.1. Access to hearings is governed by a variety of statutory provisions and rules of court depending on the court. These include the Family Procedure Rules 2010 (for the High Court, County Court and Family Proceedings Courts¹²), the Magistrates' Courts Act 1980 for Family Proceedings Courts¹³, the Court of Protection Rules 2007 for that court and the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s1 for appellate courts.

10.1.2. The principal statutory provisions affecting the reporting of family proceedings are the Administration of Justice Act 1960 s12, the Children Act 1989 s97(2) and the Judicial Proceedings (Regulation of Reports) Act 1926 s1.

10.2. Common law

10.3. The European Convention on Human Rights and Fundamental Freedoms: Articles 6, 8 and 10. Under s6 of the Human Rights Act¹⁴ the courts have an obligation to give effect to Convention rights. This has particular significance in respect of those Convention rights which impose a positive obligation on the Convention States to give effect to them¹⁵.

10.4. The High Court has jurisdiction, by virtue of s6 of the Human Rights Act and/or the inherent jurisdiction, to strengthen or relax the default position in terms of access to the court, to documents and to reporting of cases (the disclosure and

¹² FPR 2010 r.2.1

¹³ Although the Family Proceedings Courts (Children Act 1989) Rules 1991 have not been revoked, their provisions have been replaced by FPR 2010. It appears that other than where the transitional provisions are relevant, these rules, while technically still in force, can be ignored.

¹⁴ See, for example, *Re Guardian News & Media* (fn. 4) at [28]

¹⁵ *Marckx v Belgium* (1979) 2 EHRR 330; See, for example, in respect of Article 8 *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73; [2007] EMLR 4 at [9]

restraint jurisdictions)¹⁶. When considering whether to make such an order, it must consider the competing Convention rights and undertake the “ultimate balancing exercise” mandated by the House of Lords in *Re. S (A Child)*¹⁷. This encompasses the jurisdiction to grant injunctions *contra mundum* (against the world) including orders providing anonymity to anyone involved in proceedings¹⁸.

ACCESS TO COURT HEARINGS – AN OVERVIEW

11. Courts which hear family cases

- 11.1. A specially constituted magistrates’ court, the Family Proceedings Court, has jurisdiction in respect of a wide variety of matters relating to families and children¹⁹.
- 11.2. County Court, at first instance and on appeals from the Family Proceedings Courts.
- 11.3. High Court (Family Division) for difficult cases and on appeal.
- 11.4. High Court (QBD Administrative Court) for cases giving rise to mainly public law questions.
- 11.5. Court of Appeal and Supreme Court on appeal.

Hearings: introduction

12. Public access to hearings of family matters in the Family Proceedings Court, County Court and High Court (Family Division) is restricted (see below) whereas the default position in the High Court (QBD Administrative Court), Court of Appeal and Supreme Court is for hearings to be held in open court. As a matter of practice most family proceedings are heard in private²⁰.

Hearings in open court

¹⁶ *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam); [2004] 2 FLR 142

¹⁷ *Re. Webster (A Child)*, (See fn2), at [53]-[55]; *Re S (A Child) (Identification: Restrictions on Publication)* (See fn. 4)

¹⁸ See paras 83-87 below

¹⁹ Magistrates’ Court Act 1980, s65 definition of “family proceedings”

²⁰ For consideration by the ECtHR of the regime for excluding the public from certain classes of case see *B v United Kingdom* [2001] 2 FLR 261; [2002] 34 EHRR 19

13. The media and members of the public may attend family proceedings held in open court.

Hearings in private

14. Most applications in the Family Proceedings Court, the County Court and the Family Division are heard “in private”, as provided for by the relevant parts of FPR 2010²¹. The new rules, in force from 6 April 2011, have adopted the terminology of “in private” where the previous rules referred to hearings taking place “in chambers”²². Members of the public are not permitted to attend hearings held “in private”.

Media attendance at family proceedings held “in private”

15. Duly accredited members of the media are entitled to attend hearings of family proceedings held in private in the Family Division, the County Court and Family Proceedings Courts, subject to the power to exclude them on specified grounds²³.

County Court, High Court (Family Division) and Family Proceedings Courts

16. FPR 2010 r.27.11(2) provides “duly accredited representatives of news gathering and reporting organisations” with a right to attend private hearings in “family proceedings”²⁴.

17. “Family proceedings” encompass, prima facie, all business conducted in the Family Division²⁵. However, there is no right to attend (i) judicially assisted conciliation or negotiation, including financial dispute resolution hearings²⁶ and First Hearing Dispute Resolution hearings in Children Act cases to the extent that the judge plays an active

²¹ FPR 2010 r.27.10 provides for hearings under those rules to be in private unless any enactment provides otherwise or the court directs otherwise.

²² This, it would appear, has disposed of the confusion arising from the contrast between the practice in the Family Division, where the public were not permitted to attend hearings “in chambers”, and that adopted in other divisions of the High Court, where the principle is that the public should be admitted to hearings in chambers if they ask to attend: *Hodgson and Others v Imperial Tobacco and Others* [1998] 1 WLR 1056 per Lord Woolf at 1071G. It was held in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] Fam 261; [2002] 1 FLR 565 at [21], [50] that *Hodgson* did not apply to the Family Division. See also Senior Courts Act 1981 s67 and *Re. Webster (A Child)* (See fn.2). The use of the term “in private” corresponds to CPR r.39.2.

²³ FPR 2010 r.27.11(2)(f) (re-enacting the provisions introduced by the Family Proceedings (Amendment) (No.2) Rules 2009/85).

²⁴ See generally *Practice Direction (Family Proceedings: Media Representatives)* [2009] 1 WLR 1111 on the previous provision in FPR 1991 r.10.28 in the same terms as FPR 2010 r.27.11(2)

²⁵ Matrimonial and Family Proceedings Act 1984, s32 and Senior Courts Act 1981, s61

²⁶ r.27.11(1)(a)

part; (ii) parental order applications²⁷; (iii) hearings in adoption cases²⁸; (iv) hearings in the Court of Protection, which is subject to its own rules. Practice Directions may provide for other types of hearings from which the media may be excluded²⁹.

18. A media representative is accredited if s/he carries a press card issued by the UK Press Card Authority³⁰.

19. The media may be excluded from all or part of the proceedings if it is necessary on one of the three grounds specified in r.27.11(3)(a) or justice will otherwise be impeded or prejudiced (r.27.11(3)(b)). The three grounds are that it is necessary (a) in the interests of any child concerned in, or connected with, the proceedings; (b) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (c) for the orderly conduct of the proceedings.

20. In determining whether the test of necessity is satisfied, the court should consider whether lesser measures would suffice³¹. If the applicant can satisfy one of the grounds for exclusion, then the court must carry out a balancing exercise and reach a value judgment about where the balance between the competing Convention rights lies (including, where relevant, of parties or witnesses and not just the child concerned)³². Ground (b) also enables the court to exclude the media to protect the article 8 rights of the parties where outrageous or intimate allegations were being made³³.

21. The court may exclude the media to protect the welfare of a vulnerable adult or child who is unrepresented, even if that party does not itself seek exclusion³⁴.

22. A person wishing to exclude the media must satisfy the court of the necessity of exclusion; it is not for the media to justify their attendance³⁵.

²⁷ r.27.11(1)(b)(i)

²⁸ r.27.11(1)(b)(ii). Hearings under the Adoption and Children Act 2002 are also governed by the Family Procedure (Adoption) Rules 2005

²⁹ r.27.11(1)(b)(iii)

³⁰ *Practice Direction* (See fn. 24) at para 4.2. Journalists from outside the jurisdiction are able to obtain UK Press Cards, but they may be beyond the court's contempt jurisdiction. The reporting risk arising from the presence of foreign reporters in court was a concern in *Re Child X (Residence and Contact: Rights of Media Attendance)* [2009] EWHC 1728; [2009] EMLR 26; [2009] 2 FLR 1467 at [66]

³¹ *Practice Direction* (See fn.24) para 5.2

³² *Re. Child X* (See fn. 30)

³³ *Ibid* at [45]

³⁴ *Practice Direction* (See fn.24) at para 5.2

³⁵ *Spencer v Spencer* [2009] EWHC 1529 (Fam); [2009] EMLR 25 at [35]; [2009] 2 FLR 1416

23. If a party seeks to exclude the media he should give advance notice of his intention to make his application to the court, to the other parties, to any representative of the child³⁶ and to the media by the Press Association's CopyDirect service³⁷. The obligation to notify the media only arises when the application is made at the outset of the proceedings³⁸.
24. When the rules on media access were introduced (previously as FPR 1991 r.10.28 on 6 April 2009), the Practice Direction gave guidance that where contentious matters about media access arose in the Family Proceedings Courts or County Court, the matter should be transferred to the Family Division for consideration (Practice Direction of 22 April 2009, para 20). Despite the limited judicial scrutiny of the rules on media attendance, it is suggested that it will only be "necessary and appropriate" to transfer the matter to the High Court, where there are novel, difficult or important issues at stake.
25. If members of the public (as opposed to accredited media) wish to attend a hearing, then they must apply to the court to disapply FPR 2010 r.27.10(1) (or equivalent provision for particular proceedings). The court should upon such an application undertake a balancing exercise of the competing Convention rights engaged³⁹.

Hearings in secret ('in camera')

26. Neither media representatives nor members of the public may attend hearings which take place *in camera* (in secret)⁴⁰.
27. Hearings of family cases take place in secret only rarely. However:

27.1. The court has the power to direct that the whole or part of any proceedings for a declaration of legitimacy shall be heard *in camera*⁴¹; and

³⁶ Practice Direction (See fn.24) at para 6.3. Use of this service enables an applicant to comply with the notification requirement of s12(2) of the Human Rights Act. See <http://www.medialawyer.press.net/courtapplications/> where applicants can find a copy of the Practice Direction, the accompanying Practice Note explaining how to use the service and the Application for Reporting Restriction Orders Checklist which applicants should complete for the court before the hearing

³⁷ *Re Child X* (See fn. 30) at [86]

³⁸ On a decision to exclude the media, it is unclear what they can, or should, do if they wish to challenge that decision (i.e. seek judicial review or to appeal): see *Borrie & Lowe: The Law of Contempt* 4th ed at §9.13

³⁹ On an application under the old rules to disapply FPR 1991 r.4.16(7), which provided for hearings to take place in chambers, this was the approach which Munby J adopted, *Re Webster (A Child)* (See fn.2) at [77]

⁴⁰ The provisions addressed in this section for media attendance at hearings only apply to hearings "in private"

⁴¹ Family Law Act 1986, s60(4)

- 27.2. Evidence of sexual capacity in the course of nullity proceedings is heard *in camera*, although the judge has a discretion to hear it in open court where the interests of justice so require⁴².
28. The court has an inherent power to regulate its own proceedings and may hear cases *in camera* in exceptional circumstances. At common law a hearing may be held *in camera* where the hearing of the case in public would frustrate or render impracticable the administration of justice⁴³. The test is one of necessity. In cases of abduction (of a child or a vulnerable adult) the Court will sit *in camera* when determining issues which are directed towards locating the abducted person (despite the fact that the orders being made are likely to be draconian e.g. freezing orders, orders compelling disclosure from anyone who may have knowledge of the persons whereabouts). To do otherwise would defeat the object of the hearing by alerting the abductor to the measures being taken⁴⁴.
29. Circumstances which may justify hearing a case *in camera* include situations where the evidence, if made public, would cause harm to national security. If the court can adopt a lesser measure it should do so.
30. The court has no power to direct that a court sit *in camera* because hearing the case in public may be painful, humiliating or a deterrent to parties or witnesses or because the evidence is of an unsavoury character⁴⁵.

MEDIA ACCESS TO COURT DOCUMENTS – GENERAL CONSIDERATIONS

31. In most family proceedings, media representatives have no entitlement to receive or peruse court documents referred to in the course of evidence, submissions, or judgment.
32. The communication of information relating to proceedings held in private (whether or not contained in a document filed with the court) is governed by chapter 7 of Part 12 of FPR 2010 and Practice Direction (PD) 12G. Nothing in FPR, however, permits the communication to the public at large, or any section of the public, of any information

⁴² Matrimonial Causes Act 1973, s48(2)

⁴³ *AG v Levens Magazine* (See fn.3) *per* Lord Diplock p. 450

⁴⁴ See the discussion of this “this small, discrete and necessarily discreet part of the Family Division’s jurisdiction” in *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam); [2010] 2 FLR 1057 at [37].

⁴⁵ *Scott v Scott* (See fn.1) at 463

relating to the proceedings⁴⁶, and nothing in FPR 12.75 (Communication of information for purposes connected with the proceedings) permits the disclosure of an unapproved draft judgment handed down by any court⁴⁷.

33. The provisions in the FPR and PD 12G, which concern the disclosure of information from family proceedings generally (i.e. not only to the media), are described in detail at paragraphs 135-145 below.

34. If media representatives wish to see documents referred to in family proceedings, they may apply to the judge or, in some types of cases, may request the documents from a party. An exception is that in matrimonial and partnership proceedings under Part 7 of the Family Procedure Rules 2010 witness statements which stand as evidence in chief are available for public inspection⁴⁸.

35. The position is to be contrasted with that in proceedings governed by the CPR (which do not apply to most family proceedings). In such cases, where hearings take place in open court, there is what may be described as a presumption in favour of providing to third parties documents which were relied upon by the court in reaching its decision⁴⁹, though not the entire court file⁵⁰.

36. In family proceedings, if a media representative applies to the judge to see documents referred to during proceedings, the judge may exercise the disclosure jurisdiction to grant the application⁵¹. This involves considering the competing Convention rights and undertaking the “ultimate balancing exercise” mandated by the House of Lords in *Re. S*

⁴⁶ FPR 12.73(2). In other words, AJA 1960 s.12 continues to apply unless the court grants permission for disclosure to be made.

⁴⁷ FPR r.12.73(3)

⁴⁸ FPR 2010 r.22.19

⁴⁹ *Dain AO v Davis Frankel and Mead* [2004] EWHC 2662 (Comm); [2005] 1 WLR 2951; *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Limited* [2005] EWHC 2101 (TCC)

⁵⁰ Third parties must apply for permission to access the court file (save for the statements of case and orders: CPR r.5.4C). Skeleton arguments should also be made available in the Court of Appeal as a matter of course and also in other hearings where they are a substitute for oral submissions: Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments) [1999] 1 WLR 2; *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd* [1999] 1 WLR 984

⁵¹ Recent ECHR authority supports the proposition that Article 10 provides the media with a protected right of access to official records: see *Tarsasag a Szabadsagjogokert v Hungary* (No 37374/05) considered by the Court of Appeal in *Independent News and Media Ltd v A* [2010] EWCA Civ 343; [2010] EMLR 22; [2010] 2 FLR 1290 and in *Sugar v BBC* [2010] EWCA Civ 715; [2010] 1 WLR 2278; [2010] EMLR 24 at [76]

(*A Child*)⁵². A highly relevant factor will be the extent to which provision of the documents will assist the media representatives in following the proceedings⁵³.

37. In *Re X, Y, Z (Morgan v A Local Authority)*⁵⁴, Sir Nicholas Wall P said he would like to see a practice develop whereby expert reports are routinely disclosed to media representatives, and media representatives made able to comment both on the reports and on the use to which they were put in the proceedings as long as this did not undermine the child's anonymity.

38. An order permitting media representatives to see documents referred to during proceedings does not, in itself, entitle the contents of those documents to be published to the world at large. The contents may be published in so far as this is not prohibited by section 12 of the Administration of Justice Act 1960, or that provision is disapplied, (see paras 47-54 below), section 97(2) of the Children Act 1997 (see paras 55-59 below) or by the restrictions applicable to information disclosed during proceedings for ancillary relief (see paras 71-75 below).

39. A party may provide documents or information from proceedings to representatives of the media in so far as this is not prohibited by the restrictions set out in the above paragraph, the general law of breach of confidence and misuse of private information or applicable rules of court, including FPR 2010 r.12.73 (proceedings relating to children). This rule permits the communication of information about the private proceedings to specified persons, but prohibits communication of information about the Children Act 1989 proceedings to the public generally⁵⁵.

40. FPR 2010 r.12.73 does not permit disclosure of documents or information to members of the media and to do so remains a contempt. However, a party may, because of r.12.75, be able to make disclosures to a journalist if this is necessary to enable that party to make a complaint against a person or body concerned in the proceedings or regarding the law, policy or procedure relating to private family proceedings. A journalist who

⁵² *Re. Webster (A Child)* (See fn.2) at [53]-[55]; *Re S (A Child) (Identification: Restrictions on Publication)* (See fn.4)

⁵³ *Norfolk County Council v Webster* [2006] EWHC 2898 (Fam); [2007] 2 FLR 415 per Munby J at [40] to [43]

⁵⁴ [2011] EWHC 1157 (Fam)

⁵⁵ FPR 2010 r.12.73 lists persons to whom the communication of information about proceedings in private would not be a contempt, these include legal advisors, experts and a professional engaged in child protection (see paras 135-145 below)

receives such disclosures is, however, forbidden from putting that information into the public domain without the permission of the court⁵⁶.

The implied undertaking: information disclosed under compulsion

41. Where a party has disclosed information during proceedings under compulsion, rights of confidentiality in that information are preserved until that information is deployed in open court⁵⁷.
42. The implied undertaking operates to prevent a party from supplying to any third party, including a journalist, documents or information provided to him by another party under compulsion. This includes, by way of example, information about a party's means provided in Form E Affidavits during proceedings for ancillary relief and information provided in answer to questions before or after orders of the court⁵⁸.
43. The implied undertaking does not extend to information which a party chose to include in an affidavit, but which he was not compelled to provide⁵⁹. Neither does it prevent a party from providing his own documents, or information about his own confidential affairs, to third parties, including journalists.

REPORTING THE COURTS – OVERVIEW

44. Unless restricted by statute or by court order, it is possible to report what happens in open court and, more importantly for the purposes of family law proceedings, what occurs in private. Subject to any statutory restrictions or court orders, the fact that a case is heard in private does not, in itself, mean it cannot be reported⁶⁰, except if it is accompanied by comment which substantially prejudices the administration of justice⁶¹. However, information put before a court sitting in private which is derived from compulsory disclosure cannot be reported unless that information is put into the public domain⁶².

⁵⁶ *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam); [2009] 2 FLR 1152 *per* Munby J at [52] to [81].

⁵⁷ *Home Office v Harman* [1983] 1 AC 280. For proceedings governed by the CPR, see CPR r.31.22

⁵⁸ *A v A, B v B* [2000] 1 FLR 701 *per* Charles J at 717

⁵⁹ *Clibbery v Allan* (See fn. 22) at [98].

⁶⁰ *AF Noonan (Architectural Practice) Ltd v Bournemouth and Boscombe Athletic Community Football Club Ltd* [2007] EWCA Civ 848; 1 WLR 2614

⁶¹ *Hodgson* (See fn. 22) at 1072A; *Dobson v Hastings* [1992] Ch 394

⁶² See paragraphs 42-43 above and 71-75 below

45. The law on reporting family proceedings is said to have been “unaffected” by the new rules on media access⁶³. However, there is doubt as to whether a hearing with media representatives in attendance can properly said to be held ‘in private’. In *Re Webster (A Child)*⁶⁴, a case decided before the implementation of the new rules on media access, Munby J held that a hearing with media representatives in attendance (but with the public excluded) was not “in private” within the meaning of s.12 of the AJA 1960 s.12, so that section did not apply. The ‘premise’ of the new rules that proceedings remain in private even when media representatives are present⁶⁵ has not been subjected to judicial scrutiny.

46. The following provides an overview of statutory restrictions which affect the reporting of family courts.

Administration of Justice Act 1960, s12(1)

47. The effect of section 12(1) is to prohibit publication of information about proceedings in private which relate to the High Court’s exercise of the inherent jurisdiction, are under the Children Act 1989, the Adoption and Children Act 2002 or relate wholly or mainly to the maintenance or upbringing of a minor. Section 12 also applies where the proceedings are brought under the Mental Health Act 1983 authorising an application or reference to be made to a First Tier Tribunal or to a county court and under the Mental Capacity Act 2005. The prohibition is without time limit⁶⁶.

48. In addition to pure ‘children cases’, AJA 1960 s12 may apply to other proceedings, for example applications for an occupation order under Part IV of the Family Law Act 1996 because, on the facts of the particular case, the welfare of a child is a major issue⁶⁷.

⁶³ *Practice Direction* (See fn. 24) at para 2.4. Note that in *MNB v News Group Newspapers Limited* [2011] EWHC 528 (QB) at [14], Sharp J contrasted the position in the QB with that in the Family Division. In the latter “*the jurisdictional basis for the attendance of accredited media representatives at hearings which are private and which are not open to the general public in the family courts is statutory: the relevant FPR (10.28) was inserted into the FPR by statutory instrument.*” There was, she held, no such statutory basis for such a distinction in the QB.

⁶⁴ See fn. 2

⁶⁵ See President’s Guidance Note 22 April 2009

⁶⁶ *Re E (A Minor) (Child Abuse: Evidence)* [1991] 1 FLR 420 concerning AJA s12(1)(a)(i)

⁶⁷ *Clibbery v Allan* (See fn. 22) at [79]; Likewise, it is possible that ancillary relief proceedings could relate “wholly or mainly to the maintenance or upbringing of a minor”, although this is “unlikely”, and the usual issues, like the accommodation needs of a child to the relationship, would not bring ancillary relief proceedings within s12, *Spencer v Spencer* (See fn. 35) at [12]-[15].

49. Section 12 does not operate to prohibit the reporting of the identity (name, address and photograph) of those involved in proceedings, whether as the child concerned or as a party or witness; it does not prohibit the identification of expert witnesses; nor does it prohibit reporting of the fact of that person's involvement in proceedings, including, in the case of witnesses, the party on whose behalf they gave evidence; the dates, times and places of hearings, what is observed by those lawfully in the open areas of the court building; the nature of the dispute; and the order or a summary of it.

50. Instead, it operates to prohibit dissemination of what went on in front of the judge and the documents filed for the proceedings, including written evidence, reports and written submissions. It also prohibits notes or transcripts of evidence and submissions, extracts from documents filed and summaries of them. The prohibition operates even if the documents are anonymised⁶⁸.

51. The question of what amounts to the 'nature of the dispute' is best illustrated by example, although each case will invariably turn on its own facts. In *Re B*, Munby J observed that it would not have been a contempt under section 12 for the media to report that the issues in that case included "whether the mother suffered from Munchausen's Syndrome by Proxy and whether she had killed (or attempted to kill) her child(ren) by, for instance, smothering or poisoning"⁶⁹. While not expressing a final view, he indicated that the information which had in fact been published by a newspaper, namely that in evidence it had been suggested that the mother had injected her child with dirty water, was likely to be a contempt. In the earlier case of *X v Dempster*⁷⁰ (which Munby J expressly agreed with in *Re B*), it was held that the publication of the information, that in the proceedings the mother had been portrayed as a bad mother who was unfit to look after her children, went beyond a description of the nature of the dispute and was a discussion of the substance of the matters before the court; it was therefore not permissible.

52. Importantly, it is not a contempt for a person to communicate information or to disseminate documents which he or she could have done if there had never been any legal proceedings, so long as that information (or those documents) is not linked to those

⁶⁸ *Re B (A Child) (Disclosure)* (See fn. 16)

⁶⁹ *Ibid* at [80]

⁷⁰ [1999] 1 FLR 894

proceedings⁷¹. Section 12 does not does not operate to prohibit publication of the contents of documents which are lodged at court, or used in the proceedings, which already existed (e.g. many exhibits to witness statements) or information of an analogous quality. Therefore information in witness statements will not automatically fall within s12 merely because it is included in a witness statement.

53. Section 12(2) provides that the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not be a contempt of court unless prohibited by the court.

54. The court may disapply s12 where the balance of the competing private and public interests favours disclosure, as opposed to continued confidentiality. In *Re Ward (A Child)*⁷², Munby J ordered that the s12 restrictions be relaxed. In that case, the information which would otherwise have been restricted did not engage the private interests of anyone other than the Ward family, who were the party seeking permission to publish the information. It is worth noting, however, that the Judge dealt with the anonymity of witnesses as a discrete issue. In that case there was an application for anonymity by some witnesses, but even in circumstances where the only application before the court is one to disapply s12, it may be necessary to consider whether other orders are necessary to protect legitimate interests in the event that the application is granted. In *Re X, Y, Z (Morgan v A Local Authority)*⁷³, Sir Nicholas Wall P relaxed s12 to permit reporting and discussion of an expert's report prepared by a doctor for the purpose of care proceedings.

Children Act 1989, s97(2)

55. The Children Act 1989, s97(2) prohibits the publication of material which identifies, or is likely to identify, a child involved in proceedings in which any power under the Children Act 1989, or the Adoption and Children Act 2002, may be exercised.

⁷¹ *Re Ward (A Child)* [2010] EWHC 16 (Fam); [2010] 1 FLR 1497 at [105]-[114]. "Information relating to proceedings" within the meaning of AJA 1960 s12 distinguishes between documents and information which "relate to the proceedings" and documents and information which were merely deployed in proceedings. "Information relating to proceedings" includes documents prepared for that purpose (e.g. witness statements and position statements) and information (whether or not reduced to writing) which came to light as part of the information gathering process during, and for the purpose of, the proceedings.

⁷² *Ibid.*

⁷³ See fn. 54

56. The prohibition only lasts for the duration of proceedings⁷⁴.

57. The Court has the power to dispense with the restriction where the “welfare of the child requires it”, s97(4). However, s97(4) does not provide the only basis on which the restriction in s97(2) can be relaxed and it must be read in broad (i.e. Convention compliant) terms. Therefore it is not exercisable only when the welfare of the child requires it, but also when it is necessary and proportionate to do so to give effect to rights under Art.10 (or other Convention rights)⁷⁵.

58. At the conclusion of proceedings in which the identity of the child concerned has been protected by the operation of s97(2), the court should consider whether it is necessary to continue such protection, although an injunction is unlikely to be justified in most cases⁷⁶.

59. The prohibition in s97(2) does not apply in the Court of Appeal⁷⁷.

Judicial Proceedings (Restriction on Reports) Act 1926

60. The Judicial Proceedings (Regulation of Reports) Act 1926 s(1)(b) imposes restrictions in the following types of proceedings:

60.1. Any judicial proceedings for the dissolution or nullity of marriage or for judicial separation, or for the dissolution, annulment or order for separation of a civil partnership;

60.2. Proceedings under s27 of the Matrimonial Causes Act 1973 (proceedings by a wife against her husband, or by a husband against his wife, for financial provision)⁷⁸ and proceedings under the Civil Partnership Act 2004 Part 9 Sch 5;

60.3. Proceedings under the Family Law Act 1986 Part III (declarations of marital status, parentage and legitimacy)⁷⁹ and under the Civil Partnership Act 2004, s58 (declarations of subsistence of a civil partnership)⁸⁰.

⁷⁴ *Clayton v Clayton* [2006] Fam 83; [2007] EMLR 3; [2007] 1 FLR 11

⁷⁵ *Re Webster (A Child)* (See fn2) at [57]-[62] (For the balancing exercise, see para 10.4 above)

⁷⁶ *Pelling v Bruce-Williams* [2004] EWCA Civ 845; [2004] Fam 155; [2004] 2 FLR 823 at [51]; *Clayton v Clayton* (See fn.74) at [77] per Potter P and at [145] per Wall LJ

⁷⁷ *Ibid*

⁷⁸ Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 s2

⁷⁹ Inserted by Family Law Act 1996 s68(1) Sch 1 para 9b

⁸⁰ Civil Partnership Act 2004 Sch 27 para 29(2)

61. In the above cases, it is unlawful to publish anything except the following:

- 61.1. the names, addresses and occupations of the parties and witnesses;
- 61.2. a concise statement of the charges, defences and countercharges in support of which evidence has been given (or equivalent);
- 61.3. submissions on any point of law arising in the course of the proceedings and the decision of the court thereon;
- 61.4. the summing-up of the judge and the findings of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment.

Does the 1926 Act restrict reports of hearings in applications for ancillary relief?

62. Munby J in *Clibbery v Allan* at first instance expressed the opinion that the 1926 Act applied to hearings in applications for ancillary relief⁸¹.

63. However, upon appeal in *Clibbery*, Thorpe LJ said it was “self evident that the 1926 Act no longer bites on the business of the courts in our modern family justice system”⁸². Thorpe LJ also described as “inherently unsound” the proposition that the 1926 Act applied to applications for ancillary relief, but emphasised that his opinion on the matter was “provisional”⁸³.

64. There remains doubt over the issue⁸⁴.

Magistrates’ Courts Act 1980

65. In respect of Family Proceedings Courts, MCA 1980 s71 prescribes the matters which may be reported, namely: the names, addresses and occupations of the parties and witnesses; the grounds of the application, and a concise statement of the charges,

⁸¹ *Clibbery v Allan* [2001] 2 FLR 819

⁸² *Clibbery v Allan* (See fn. 22) at [91]

⁸³ *Ibid* at [108] and [109]

⁸⁴ In *Spencer v Spencer* (See fn.35) Munby J declined to make any ruling as to whether the 1926 Act applied to reports of the ancillary relief application before the court. He pointed out that what he had said on the point in *Clibbery* had been *obiter*, since that had not been a claim for ancillary relief.

defences and counter-charges in support of which evidence has been given; submissions on any point of law arising in the course of proceedings and the decision of the court on the submissions; the decision of the court, and any observations made by the court in giving it⁸⁵.

Children and Young Persons Act 1933, s39

66. Although in practice the power to make orders under section 39 is not used much in family proceedings, it is of general application to all courts. It provides the court with the jurisdiction to restrain the publication in newspaper reports of matters, including photographs, which would lead to the identification of a child “concerned in the proceedings” (whether as a party, subject or witness)⁸⁶. In *Harris v Harris*⁸⁷ Munby J held that, when possible, s39 orders should be made in preference to orders which imposed wider or greater restrictions.

Contempt of Court Act 1981, s11

67. Section 11 provides that in any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.

68. Section 11 can only be invoked where the court allows a name or matter to be withheld from being mentioned in open court in the proceedings. It follows that it does not provide the court with a power to prohibit publication of any name or other matter which has been given in open court in the proceedings⁸⁸.

The jurisdiction to grant injunctions to give effect to a party’s Convention rights

69. In addition to its powers under statute, the High Court has power to grant injunctions to restrain reporting of matters in order to give effect to the rights of both children and

⁸⁵ It is arguable that the provision, which is limited to “*newspapers, periodicals and programmes within the Broadcasting Act 1990*” does not apply to online publications and webcasts, save to the extent that newspapers’ websites may be caught by s71(1B)(a)

⁸⁶ Extended to cover reports on television and sound broadcasting by the Children and Young Persons Act 1963, ss 57(1) and 64(3) and Schedule 5.

⁸⁷ [2001] 2 FLR 895 at [341].

⁸⁸ *Re Trinity Mirror plc* [2008] EWCA Crim 50; [2008] QB 770; [2009] EMLR 3

adults under the ECHR. This encompasses the power to restrain reporting of family cases. In *Spencer v Spencer* Munby J held that the court has jurisdiction to restrain reporting of hearings of applications for ancillary relief⁸⁹.

70. There has been no judicial consideration given to the circumstances in which the power to injunct the reporting of proceedings should be exercised. The general approach must, it is suggested, be in accordance with that applying to the restraint jurisdiction in general: see paragraph 10.4 above.

The implied undertaking: a further limitation upon reporting

71. In *Clibbery v Allan*, Butler Sloss LJ said, “information disclosed under the compulsion of ancillary relief proceedings is, in my judgment, protected by the implied undertaking before, during and after the proceedings are completed”⁹⁰.

72. Given the extent to which information disclosed under compulsion is referred to in proceedings for ancillary relief, Butler Sloss LJ concluded that “all cases involving issues of ancillary relief are also protected from publication by anyone without the leave of the court”⁹¹.

73. Similarly, in *Lykiardopulo v Lykiardopulo* Stanley Burnton LJ said: “Parties to a matrimonial dispute who bring before the court the facts and documents relating to their financial affairs may in general be assured that the confidentiality of that information will be respected. They are required by the court to produce the information and documents, and it is a general principle, applicable to both civil and family proceedings, that confidential information produced by those who are compelled to do so will remain so unless and until it passes into the public domain”⁹².

74. The position therefore is that the media will have considerable difficulty in reporting proceedings for ancillary relief and other cases in which reference is made to information disclosed under compulsion *unless the information passes into the public domain*.

⁸⁹ See fn. 35 at [25] to [28]. See also *D v D* [2009] EWHC 946 (Fam); [2009] 2 FLR 324

⁹⁰ See fn. 22 at [72]

⁹¹ *Ibid* at [75]. See also Thorpe LJ at [106]

⁹² *Ibid* at [76]

75. A question arises as to whether information put before a court sitting in private with media representatives lawfully in attendance has entered the public domain. If so, the implied undertaking ceases to have effect in respect of that information. This is not a matter which has received judicial consideration.

REPORTING THE COURTS – JUDGMENTS

76. There is no general statutory requirement for all judgments to be recorded in writing. FPR 2010 r.27.2(3) requires Family Proceedings Courts to give written reasons.

77. Whether or not a judgment is handed down in private or public (and if so, in what form) is primarily a matter for the judge's discretion. Although it remains a matter for the judge, senior members of the judiciary have encouraged the making of public judgments⁹³. Furthermore judges should consider providing short written summaries in cases which have attracted media attention to assist the reporting of them⁹⁴.

78. These judgments may identify the parties and witnesses or may be anonymised and/or redacted so as to exclude sensitive material⁹⁵.

79. If parties are in the public eye anonymisation may achieve nothing, and for this reason judgments in financial cases involving celebrities have been released in unanonymised form in recent years⁹⁶.

80. Where a party has attempted to perpetrate a fraud by giving perjured evidence there may be strong reasons for releasing an unanonymised judgment, although publication of a judgment should not be used as an aid to enforcement of a judgment award⁹⁷.

81. A public judgment may be reported. A judgment handed down in private is however subject to the restrictions applicable to reporting cases in general. In particular, the effect of s12 of the Administration of Justice Act 1960 is to prohibit the publication of much of the contents of the judgment in cases to which that section applies⁹⁸.

⁹³ *Re H (Freeing Orders: Publicity)* [2005] EWCA Civ 1325; [2006] 1 FLR 815 at [26] per Wall LJ

⁹⁴ *Ibid* at [30]-[32]

⁹⁵ *Lykiardopulo v Lykiardopulo* (See fn. 11) at [52]

⁹⁶ For example *Mills McCartney v McCartney* [2008] EWHC 401 (Fam); [2008] 1 FLR 1508

⁹⁷ *Lykiardopulo v Lykiardopulo* (See fn. 11) at [73] [79] – [80]

⁹⁸ *Re B (A Child) (Disclosure)* (See fn.16) at [66]

The meaning and effect of rubrics

82. Anonymised public judgments generally contain a rubric prohibiting the identification of some or all of those involved in the proceedings. Since these rubrics permit the reporting of judgments (which would otherwise be prohibited by s.12 AJA 1960) *subject to* compliance with the rubric, publications which fail to comply with the rubric may contravene s12 AJA 1960 and be a contempt⁹⁹. However such rubrics are not enforceable as injunctions¹⁰⁰.

ORDERS CONTRA MUNDUM

83. An order *contra mundum* is an injunction which effectively binds everyone with knowledge of the order. Such orders are founded on Convention rights, and in particular the right to a private and family right under ECHR article 8: *In Re S (A Child)*¹⁰¹. Applications for such orders should be made in the Family Division of the High Court¹⁰².

84. The media must be served with applications for *contra mundum* orders in accordance with the President's Practice Direction¹⁰³. Service on the media should be effected by the Press Association's CopyDirect service (and other means where appropriate)¹⁰⁴, in order to ensure compliance with s12(2) of the Human Rights Act.

85. Applications for *contra mundum* orders should only be made where other statutory restrictions are inadequate¹⁰⁵.

86. Public agencies (local authorities and hospital trusts for example) and professional witnesses (experts, treating clinicians and social workers) cannot expect to obtain injunctions *contra mundum* to restrain publication of the fact they have been involved in proceedings¹⁰⁶.

⁹⁹ See, for example, *Re B* [2007] EWHC 1622 (Fam); [2008] 1 FLR 482 *per* Munby J at [12] and *Re B* [2008] EWHC 270 (Fam) [2008] 1 FLR 1460 *per* Munby J at [12].

¹⁰⁰ *Re HM, (A Vulnerable Adult: Abduction)* [2010] EWHC 1579 (Fam); [2011] 1 FLR 97 at [12]–[23]

¹⁰¹ See fn. 4

¹⁰² President's Practice Direction [2005] 2 FLR 120

¹⁰³ *Ward v CAFCASS* [2007] EWHC 616 (Fam); [2007] 2 FLR 765; [2007] Fam Law 704 at [44]

¹⁰⁴ *Ibid*; *Harris v Harris* (See fn. 87) at 341. See <http://www.medialawyer.press.net/courtapplications/> where applicants can find a copy of the Practice Direction, the accompanying Practice Note explaining how to use the service and the Application for Reporting Restriction Orders Checklist which applicants should complete for the court before the hearing

¹⁰⁵ Practice Note [2005] Fam Law 398, para 2

¹⁰⁶ *Re Ward (A Child)* (See fn 71). See, in a different context, *In re Guardian News and Media* (See fn. 4) at [52] *per* Lord Rogers: the test for whether to grant anonymity to a party is "whether there is sufficient general, public

87. In most cases it will be appropriate to include in an order *contra mundum* a public domain proviso, (and this will be consistent with s12(4) of the Human Rights Act), permitting the publication of information already in the public domain, although it is possible that on the facts of certain cases the balance of the rights will come down in favour of not including one¹⁰⁷.

interest in publishing a report of the proceedings which identifies [the party] to justify any resulting curtailment of his right and his family's right to respect for their private and family life".

¹⁰⁷ *Re Stedman* [2009] EWHC 935 (Fam); [2009] 2 FLR 852 at [90]-[91], considering *Re X, Y Children* [2004] EWHC 762 (Fam); [2004] EMLR 29 and *A v M* [2000] 1 FLR 562, which were, respectively, cases where "the public domain material was old and had been published only in local newspapers" or "was information from court proceedings ... held in private" and "the injunction was capable of enforcement".

TYPES OF CASE

CHILDREN: PUBLIC LAW CASES

Family Proceedings Court

Access to the court

88. In proceedings in which powers under the Children Act 1989 may be exercised, the only persons who may attend a hearing are those directly concerned in the case and “representatives of newspapers and news agencies”¹⁰⁸; and/or “duly accredited representatives of news gathering and reporting organisations”¹⁰⁹.

89. The above default position can be varied and the media (and others) excluded if it is “necessary in the interest of the administration of justice or of public decency”¹¹⁰; and/or it is necessary “in the interests of any child concerned in or connected with proceedings”, for the safety of a person or for the orderly conduct of proceedings or justice will otherwise be impeded or prejudiced¹¹¹.

Access to documents

90. The Family Proceedings Courts are governed by FPR 2010 r.12.73 (see para 39 above). However, if an order is made in open court, any person may obtain a copy on payment of the prescribed fee (FPR 2010 r.29.12).

Reporting

91. The following restrictions will automatically apply, unless varied by the magistrates

- 91.1. MCA 1980 s71 (see para 65 above).
- 91.2. AJA 1960 s12(1) applies (see paras 47-54 above)
- 91.3. Children Act 1989, s97(2) (see paras 55-59 above)

¹⁰⁸ Magistrates' Courts Act 1980, s69(2)

¹⁰⁹ FPR 2010 r.27.11(2)

¹¹⁰ Magistrates' Courts Act 1980, s69(4)

¹¹¹ FPR 2010 r.27.11(3)

Judgments

92. In Children Act proceedings, magistrates are required to record written reasons for decisions following a hearing^{112 113}.

County Court and High Court (Family Division)

Access to the court

93. Hearings in proceedings under the Children Act 1989 are in private unless the court directs otherwise, FPR 2010 r.27.10. But FPR 2010 r.27.11(2) gives a right to “duly accredited representatives of news gathering and reporting organisations” to attend private hearings in children proceedings (see paras 15-25 above).

Access to documents

94. “Information relating to proceedings held in private (whether or not contained in a document filed with the court)” may not be communicated to the public or any section of the public; FPR 2010 r.12.73 (See paras 31-40 above). It would therefore seem that, except with permission of the court, the public/media may not gain access to, or copy, any document on the court file (although query whether there could be a document on the court file which did not contain “information relating to proceedings” and which could, therefore, be obtained). However, it appears that an equivalent to FPR 1991 r.10.20(3) has not been enacted in FPR 2010. The change in the statutory language appears to have no practical effect, but the new rule has not been subject to judicial scrutiny. There is a limited exception to the restriction on access to documents in respect of any order made in open court; any person may obtain a copy of such an order on payment of the prescribed fee (FPR 2010 r.29.12).

Reporting

95. The following provisions will automatically apply, unless varied by the court:

¹¹² FPR 2010 r.27.2(3)

¹¹³ In 2009-2010, a one year pilot scheme was conducted in the magistrates’ courts in Leeds, Cardiff and Wolverhampton in which anonymised judgments in certain types of public law children cases, including applications for care and supervision orders, were made available to the public: <http://www.justice.gov.uk/news/newsrelease021109b.htm>. A total of 99 judgments were published on the bailli website.

- 95.1. AJA 1960 s12(1) applies (see paras 47-54 above)
- 95.2. Children Act 1989, s97(2) (see paras 55-59 above).

Judgments

96. It is a matter for each judge whether or not to make his or her judgment publicly available (whether or not in anonymised form)¹¹⁴. There is no specific rule (such as there was under FPR 1991 r.10.20(3)) that judgments are not available to the public without permission.

CHILDREN: PRIVATE LAW CASES

Family Proceedings Court

97. The same rules govern private law Children Act 1989 proceedings as public law proceedings within that Act (see above).

County Court and High Court (Family Division)

98. See paras 93-96 above. In terms of media access to the courts, on an application to exclude the media in private law proceedings, although governed by the same rules as public law cases, there may be more compelling reasons to exclude the media¹¹⁵.

CHILDREN: ADOPTION CASES

(Proceedings under the Adoption and Children Act 2002)

Family Proceedings Court

Access to the court

99. In proceedings under the Adoption and Children Act 2002, “no person shall be present” at the hearing other than those directly concerned in the case¹¹⁶. The default position is that the public and the media are excluded.

¹¹⁴ The pilot scheme referred to in footnote 113 above included the County Courts in Cardiff and Wolverhampton. Under the scheme, bailli has published 64 judgments.

¹¹⁵ See observations about residence and contact proceedings in *Re Child X* (See fn. 30)

¹¹⁶ Magistrates' Courts Act 1980, s69(3)

Access to documents

100. The public has no right to inspect or copy documents or orders on the court file¹¹⁷. Furthermore, those involved in proceedings are restricted from communicating “information relating to proceedings held in private” to the public and media¹¹⁸.

Reporting

101. The following restrictions will automatically apply, unless varied by the court:

- 101.1. The media is restricted to publishing submissions on any point of law which arises and the decision of court: Magistrates’ Courts Act 1980, s71(2)
- 101.2. AJA 1960 s12(1) applies (see paras 47-54 above)
- 101.3. Children Act 1989, s97(2) (see paras 55-58 above)

Judgments

102. The default position is that judgments are not available to the public¹¹⁹.

County Court and High Court (Family Division)

Access to the court

103. Proceedings under the Adoption and Children Act 2002 “may” be heard and determined in private¹²⁰, although it is unlikely that court would exercise its discretion to permit the media to attend¹²¹.

104. It may be appropriate to allow the media to attend hearings for placement orders¹²². The fact that an application for a placement order is being heard together with care

¹¹⁷ Family Procedure (Adoption) Rules 2005, r.83; See also FPR 2010 r.14.24

¹¹⁸ Family Procedure (Adoption) Rules 2005, r.78; See also FPR 2010 r.14.14

¹¹⁹ Family Procedure (Adoption) Rules 2005, r.83

¹²⁰ Adoption and Children Act 2002, s101; But see also FPR 2010 r.27.10

¹²¹ *President’s Guidance Note: Care Proceedings involving placement order applications – Attendance of the Media*, April 30, 2009, paras 5-6.

¹²² *Ibid.*

proceedings is not, of itself, a reason to exclude the media when they would otherwise be entitled to attend the care proceedings hearing¹²³.

Access to documents

105. See para 100 above

Reporting

106. The following restrictions will automatically apply, unless varied by the court:

106.1. AJA 1960 s12(1) applies (see paras 47-54 above)

106.2. Children Act 1989, s97(2) (see paras 55-58 above)

Judgments

107. See para 102 above. However, as part of the above mentioned pilot scheme, courts were encouraged to provide anonymised judgments in contested adoption applications and on applications to make and revoke placement orders.

PARENTAL ORDER APPLICATIONS (under Human Fertilisation and Embryology Act 2008)

Family Proceedings Courts, County Court and High Court (Family Division)

Access to the court

108. Hearings are in private¹²⁴. The media have no presumptive right of access¹²⁵.

Access to documents

109. The public has no right to inspect documents or orders on the court file¹²⁶, and anyone who obtains any information in the course of, or relating to, parental order proceedings shall treat that information as confidential¹²⁷.

¹²³ *Ibid.* at para 7

¹²⁴ FPR 2010 r.27.10.

¹²⁵ FPR 2010 r.27.11(1)(b)

Reporting & Judgments

110. Judgments and orders are private and in light of access restrictions and the reporting restrictions of AJA s12 and the Children Act s97, there are almost no prospects of reporting such proceedings.

MATRIMONIAL AND CIVIL PARTNERSHIP CAUSES (DIVORCE, ANNULMENT, JUDICIAL SEPARATIONS AND CIVIL PARTNERSHIP DISSOLUTION)

County Court and High Court (Family Division)

Access

111. Contested divorce proceedings are rare. However, the rules provide that the substantive hearing of petitions for divorce or civil partnership orders takes place “in public”¹²⁸, subject to a discretion to sit in private on a number of grounds including that the hearing will damage the confidentiality of information or is necessary to protect the interests of any child¹²⁹. These rules are also still subject to the exception that evidence of sexual capacity in the course of nullity proceedings is heard *in camera* unless the judge orders otherwise¹³⁰. In practical terms undefended cases are more common and are referred to the district judge for making the decree (FPR 2010 r.7.20). This means that little takes place in open court, except the announcement of the divorce decree or the Civil Partnership Order.

Access to court file

112. Where there is a final hearing, then, during the course of it, a witness statement which stands as evidence-in-chief is open to inspection, subject to a discretion to order otherwise¹³¹. The public has a right to inspect and copy any order or decree made in

¹²⁶ FPR 2010 r.13.19

¹²⁷ FPR 2010 r.13.18(3)

¹²⁸ FPR 2010 r.7.16(1)

¹²⁹ FPR 2010 r.7.16(3)

¹³⁰ See para 27.2 above

¹³¹ FPR 2010 r.22.19

open court¹³². There is also a specific right to obtain a copy of any decree absolute or final order from the central registry^{133,134}.

Reporting

113. Although contested petitions are heard in open court, the Judicial Proceedings (Regulation of Reports) Act 1926 s1(1)(b) restricts what may be reported (see paras 60-61 above).

114. In addition, there is a power to grant anonymity to a party or witness if that is necessary “to protect the interests” of that party or witness (FPR 2010 r.7.16(5)). The nature of the legitimate interests which can be protected is not elaborated upon.

APPLICATIONS FOR ANCILLARY RELIEF AND RELATED MATTERS¹³⁵

Family Proceedings Court, County Court and High Court (Family Division)

Access to the court

115. Ancillary relief hearings and other proceedings for financial relief generally take place “in private”¹³⁶, but the media has a presumptive right of access, FPR 2010 r.27.11(2) (see above).

Access to documents

116. It appears that the public has no right of access to the court file, although there is no specific provision to that effect in FPR 2010¹³⁷.

117. See paragraphs 71-75 above for discussion of the effect of the implied undertaking on media access to documents¹³⁸.

¹³² FPR 2010 r.29.12

¹³³ FPR 2010 r.7.36

¹³⁴ It appears that the new FPR 2010 has removed the right, in matrimonial and civil partnership cases (except in nullity proceedings), of the public to inspect not only the certificate but also the evidence in support for a period of 14 days after the decree or civil partnership order was made (FPR 1991 r.2.36(4))

¹³⁵ Causes falling within FPR 2010 Part 9, applications for financial remedies (as defined in r.2.3)

¹³⁶ FPR 2010 r.27.10

¹³⁷ There does not appear to be an equivalent to FPR 1991 r.10.20(3) See discussion in para 94

¹³⁸ *Clibbery v Allan*, (See fn. 22) per Butler-Sloss P. at [72]: “Information disclosed under compulsion of the ancillary relief proceedings is, in my judgment, protected by the implied undertaking, before during and after the

Reporting¹³⁹

118. See the discussion at paragraphs 62-64 above. It is possible that a case for ancillary relief would be concerned “mainly with the maintenance or upbringing of a minor” and thereby engage AJA 1960 s12(1)(a)(iii), though such cases will be rare¹⁴⁰.

APPLICATIONS UNDER PART IV OF THE FAMILY LAW ACT 1996 (e.g. NON-MOLESTATION ORDERS, OCCUPATION ORDERS)

Family Proceedings Courts, County Court & High Court (Family Division)

Access to the court

119. Applications under Part IV of the Family Law Act 1996 are heard in private, unless the court directs otherwise¹⁴¹, This is subject to the media's right of access under FPR 2010 r.27.11(2).

Access to documents

120. It appears that the public has no right of access to the court file although there is no specific provision to that effect in FPR 2010. (See the discussion in para 94 above)

Reporting

121. Proceedings under Part IV of the Family Law Act 1996 may raise issues concerning children and could therefore fall within the prohibitions of AJA 1960 s12(1). Reporting may also be constrained by the prohibition upon reporting material disclosed under compulsion¹⁴².

VULNERABLE AND INCAPACITATED ADULTS: INHERENT JURISDICTION

proceedings are completed”. Furthermore the implied undertaking was held to apply to cases analogous to ancillary relief (e.g. failure to provide maintenance) (at [73]).

¹³⁹ The interaction of the operation of rules which restrict the ability of parties to give information to third parties (see for example under the Child Support Act 1991, (FPR r.10.21A)) and the ability of the media to report what they hear in chambers hearings appears to create the potential for anomalies.

¹⁴⁰ *Spencer v Spencer* (See fn. 35) at [12]-[15]

¹⁴¹ FPR 2010 r.10.5

¹⁴² see paragraphs 41-43 & 71-75 above

High Court (Family Division)

Access to the court

122. As the exercise of the inherent jurisdiction arises in a variety of circumstances, the fact that an application is being made under that jurisdiction does not, of itself, dictate whether a hearing should be in public or private. The starting point is open justice. However, the court retains a wide range of powers and may make any order unless limited by statute or case law. It is suggested that the question of whether or not to sit in public or private must be decided by the court in each case, by reference to the principles set out above, namely the importance of open justice, the principles to be applied to derogations from that principle and the interests of the vulnerable adult and others involved in the proceedings. Note that there is no statutory regime in place (equivalent to FPR r.27.11(3)) under which the media, but not the public, may attend hearings. It may be possible for the court to make an order which has this effect, as was done in *Webster* (see paragraph 45 above). The power to sit in secret in cases involving the abduction of a vulnerable adult is addressed in para 28 above¹⁴³.

Reporting

123. It appears that the restrictions in AJA 1960 s12(1) do not apply. Section 12(1)(b) refers to the Mental Capacity Act 2005 and therefore applies to proceedings in the Court of Protection. It also covers proceedings brought under the Mental Health Act 1983, but makes no reference to proceedings concerning adults under the inherent jurisdiction. In the absence of an injunction there would appear to be no restraint upon reporting¹⁴⁴.

INCAPACITATED ADULTS: THE COURT OF PROTECTION

¹⁴³ *Re HM (Vulnerable Adult: Abduction)* (See fn.44)

¹⁴⁴ In cases where the adult concerned lacks capacity in certain issues but not in others, the matter is likely to take place in the High Court (Family Division) and not the Court of Protection because the former can make orders under the inherent jurisdiction as well as the Mental Capacity Act 2005. However, this illustrates a potentially anomalous position of someone in such proceedings, vis-a-vis a person who lacks mental capacity, in terms of automatic reporting restrictions.

124. The statutory regime governing the Court of Protection¹⁴⁵ “mirror and re-articulate one long-standing common law exception to the principle that justice must be done in open court.”¹⁴⁶ The applicable rules are the Court of Protection Rules 2007.

Access to the court

125. The “general rule” is that the Court of Protection sits “in private”¹⁴⁷. The meaning of a “private hearing” and persons entitled to attend are set out in r.90(2).

126. The media (or any person) may be permitted to attend a private hearing or part of it, r.90(3)(a). Furthermore, the court may order a hearing or part of a hearing to take place in open court, r.92(1), but if it does so it retains wide statutory powers to order reporting restrictions to protect identities and/or restrict publication of information (r.92(2)).

127. On an application to admit the media or conduct proceedings in public pursuant to r.93, the court should undertake a two-stage approach: (i) is there a “good reason” for permitting the media’s attendance; and, if so (ii) where does the balance lie between the competing Convention rights engaged (namely the article 8 rights of the individual who is the subject of the proceedings and, where relevant, the article 8 rights of his family and the article 10 rights of the media)¹⁴⁸.

Access to documents for non-parties

128. A non-party may inspect or copy a judgment or order given or made in public (r.17(1), subject to rr.20 and 92(2)). A non-party may apply to inspect other documents on the court file and the court must consider editing them before allowing such an application (r.17(2)-(4)).

129. A party is bound by a collateral obligation in respect of documents disclosed to it for the purpose of proceedings, r.18(1), save where it has been read/referred to at a public hearing or the court gives permission.

¹⁴⁵ The Rules were made under the Mental Capacity Act 2005, s51. Of particular relevance is s51(2)(h) which provides that rules may provide for “ *for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public*”.

¹⁴⁶ *Independent News and Media Ltd and others v A* (See fn.51) at [19]

¹⁴⁷ Court of Protection Rules 2007, r.90(1); *Independent News and Media Ltd v A* (See fn.51) at [10]-[11]

¹⁴⁸ *Independent News and Media Ltd v A* (See fn.51) at [10]-[11]. See also *London Borough of Hillingdon v Neary* [2011] EWHC 413

Reporting

130. The default position is that the restrictions of AJA 1960, s12(1) apply (see paras 47-54 above)¹⁴⁹.

131. However, the Court may authorise the publication of information relating to the proceedings, r.91(2)(a), or impose restrictions on publication, r.91(3). The approach to be taken by the court on an application to relax reporting restrictions is the same as for applications under r.90 and r.92 (see above). Parties may be named, however, parties should not be named at the outset where there is a real possibility that the balance in terms of reporting restrictions/permission may change, because once the name is public the court's ability to control that information is lost¹⁵⁰.

APPEALS

Access to the court

132. A court hearing an appeal or an application for permission to appeal may sit in private (meaning in chambers or in camera) if the court whose decision is being appealed had the power to sit in private during those proceedings. But the appellate court must give its decision in public “unless there are good and sufficient grounds” for giving it in private (in which case the court must state those grounds in public)¹⁵¹. It appears that FPR 2010 r.27.10 applies equally to appeals as to first instance hearings.

Court of Appeal

Access to the court

133. Hearings in the Court of Appeal are open to the public, save where the court orders otherwise.

Reporting

¹⁴⁹ AJA 1960 s12(1)(b) includes “proceedings are brought under the Mental Capacity Act 2005” (Amendment introduced by Mental Capacity Act 2005, s67(1), Sch 6, para 10).

¹⁵⁰ *London Borough of Hillingdon v Neary* (See fn. 148) at [16]

¹⁵¹ Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968, s1

134. Reporting is prima facie not restricted unless the Court of Appeal makes an order in the proceedings¹⁵². It may do so under the inherent jurisdiction or the Children and Young Persons Act 1933 s39, if applicable. In the Court of Appeal, there was a standing practice for the court to make an order prohibiting the identification of a child concerned in a case, where the case has been heard in chambers below pursuant to FPR 1991, r.4.16(7)¹⁵³. The Court of Appeal has since observed that it is necessary to consider whether, on the consideration of the competing rights in each case, anonymisation of proceedings and judgment is necessary¹⁵⁴. Therefore merely because the case was heard in private (FPR 2010 r.27.10) does not mean that the Court of Appeal should automatically do so.

DISCLOSURE FROM FAMILY PROCEEDINGS

135. This section deals with the communication of information relating to proceedings held in private (whether or not contained in a document filed with the court).

136. The position is governed by chapter 7 of Part 12 of FPR 2010 and Practice Direction (PD) 12G.

137. Nothing in FPR, however, permits the communication to the public at large, or any section of the public, of any information relating to the proceedings¹⁵⁵, and nothing in FPR r.12.75 (Communication of information for purposes connected with the proceedings) permits the disclosure of an unapproved draft judgment handed down by any court¹⁵⁶.

138. A party (or his or her legal representative acting on instructions) is permitted to communicate information relating to the proceedings to a limited category of people. These comprise any person: where such communication is necessary to enable the party in question to obtain confidential legal advice or assistance¹⁵⁷, to engage in

¹⁵² In children cases, Children Act 1989 s97(2) does not apply in the Court of Appeal, *Pelling v Bruce Williams* (See fn. 76) at [53])

¹⁵³ *In re R (Court of Appeal: Order against Identification)* [1999] 2 FLR 145

¹⁵⁴ *Pelling v Bruce-Williams* (See fn.76) at [49]

¹⁵⁵ FPR 2010 r.12.73(2). In other words, AJA 1960 s12 continues to apply unless the court grants permission for disclosure to be made.

¹⁵⁶ FPR 2010 r.12.73(3)

¹⁵⁷ *Ibid.* r.12.75(1)(a)

mediation or ADR¹⁵⁸, to make and pursue a complaint against a person or body concerned in the proceedings,¹⁵⁹ and “to make and pursue a complaint regarding the law, policy or procedure relating to a category of proceedings” to which Part 12 of the Rules applies¹⁶⁰.

139. Where information is communicated by a party for the purposes of support, advice or assistance in the context of the proceedings, no further communication is permitted.¹⁶¹ In any other case the recipient may pass the information on provided that the person who initially communicated the information consents¹⁶² and the further communication is made only for the purpose or purposes for which the party made the initial communication¹⁶³. Successive communication of the information is then permitted on the same terms.¹⁶⁴

140. However, information can be communicated to a party, the legal representative of a party, a professional legal adviser, a CAFCASS¹⁶⁵ or CAFCASS Cymru¹⁶⁶ Officer, a welfare officer, the Legal Services Commission, a court authorised expert, a child protection professional or an IRO¹⁶⁷, either where the court gives permission¹⁶⁸ or otherwise in accordance with the Rules or the Practice Direction¹⁶⁹. Each of course owes a duty of confidentiality in the proceedings to the court and the information goes no further.

141. Unique to proceedings relating to children is the rule that nobody can instruct an expert for any purpose relating to the proceedings without the court’s permission¹⁷⁰, and where an unauthorised expert is instructed, no evidence from that expert may be introduced without the court’s permission¹⁷¹.

¹⁵⁸ Alternative dispute resolution: FPR 2010 r.12.75(1)(b)

¹⁵⁹ *Ibid* r.12.75(1)(c)

¹⁶⁰ *Ibid* r.12.75(1)(d)

¹⁶¹ *Ibid* r.12.75(2)

¹⁶² *Ibid* r.12.75(3)(a)(i)

¹⁶³ *Ibid* r.12.75(3)(a)(ii)

¹⁶⁴ *Ibid* r.12.75(3)(b)

¹⁶⁵ Children and Family Court Advisory and Support Service

¹⁶⁶ Its Welsh counterpart

¹⁶⁷ An Independent Reviewing Officer, provided he or she has been appointed in respect of a child who is or has been the subject of proceedings

¹⁶⁸ FPR 2010 r.12.73(1)(a)

¹⁶⁹ *Ibid* r.12.73(1)(b)

¹⁷⁰ *Ibid* r.12.74(1)

¹⁷¹ *Ibid* r.12.74(2).

142. The Practice Direction lists in tabular form what information may be communicated by a party, to whom and for what purpose. It also lists information which may be communicated by a CAFCASS Officer or an officer of CAFCASS Cymru and it also deals with communications to and by a Minister of the Crown and Welsh Ministers.

143. It is to be noted that none of the communications listed in the Practice Direction is designed to breach the essential confidentiality of the court. The communications are either related directly to the proceedings, or designed to enable the recipient of the information to fulfil his or her statutory function.

144. There is no right given to any party to communicate information relating to proceedings to the media without the court's permission¹⁷². To do so remains a contempt of court, although see paragraph 40 above¹⁷³.

145. Parties may, however, for example communicate without fear of contempt with their Member of Parliament about the way they perceive they have been treated in proceedings under the Act, but the MP is not at liberty to publish the information to the world at large¹⁷⁴.

¹⁷² See paragraphs 47 to 54 above

¹⁷³ Note, however, that FPR 2010 r.12.75(1)(d) uses the phrase "to make and pursue a complaint...." In *Re N (Family Proceedings: Disclosure)* (See fn. 56) at [58] to [62], Munby J (as he then was) suggested that the word "complaint" might have a wider meaning and be sufficiently broad as not to be confined to complaints made to disciplinary or regulatory bodies. The case itself concerned a "complaint" to the GMC, which was plainly within the rule, and the judge was at pains to say that the meaning of the crucial word "complaint" would have to be elucidated on a case by case basis.

¹⁷⁴ See FPR 2010 r.12.75(3) and *Re X, Y, Z (Morgan v A Local Authority)* (See fn.54)