D R A F T

TRANSPARENCY IN THE FAMILY COURTS AND THE COURT OF PROTECTION

PUBLICATION OF JUDGMENTS

DRAFT PRACTICE GUIDANCE issued on 12 July 2013 by SIR JAMES MUNBY, PRESIDENT OF THE FAMILY DIVISION and PRESIDENT OF THE COURT OF PROTECTION AS A DRAFT FOR COMMENT AND DISCUSSION

The purpose of this Guidance

1 This Guidance 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. 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).

2 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

3 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."

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

4 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.

5 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.

The legal framework

6 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 family court case involving children or a judgment in a Court of Protection case unless either the judgment has been delivered in public or the judge has authorised publication. As a matter of practice, judgments are prepared using templates which, when the judge has authorised publication, usually contain the following rubric on the front page:

> "This judgment is being handed down in private on … The judge hereby gives leave for it to be reported.
>
> The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved."

7 The rubric is in two parts and serves two distinct functions: *Re B (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, para [16].

(i) The first part, "the judge hereby gives leave for it to be reported" has the effect of disapplying section 12 and immunising the publisher or reporter from proceedings for contempt.

(ii) But the second part, "the judgment is being distributed on the strict understanding that … " makes that permission conditional. A person publishing or reporting the judgment cannot take advantage of the judicial permission contained in the first part of the rubric, and will not be immunised from the penal consequences of section 12, unless he has complied with the requirements of the second part of the rubric.

8 Section 12 does not of itself prevent the publication of the name of the child or adult who is the subject of the proceedings, nor of anyone else who is involved in the proceedings: Media Access & Reporting, para 49. The anonymity of children in family cases is protected by section 97 of the Children Act 1989, but that ceases to apply when the proceedings come to an end: Media Access & Reporting, para 56.

There is no corresponding provision in relation to the Court of Protection, though orders for anonymity can be made, and often are, under rule 91 of the Court of Protection Rules 2007.

9 There is an issue as to whether section 12 applies to proceedings in a family court where representatives of the media are present (or entitled to be present) in accordance with rule 27.11 of the Family Procedure Rules 2010: Media Access & Reporting, para 45. Until this issue has been definitively resolved, it would be prudent for everyone to proceed on the basis that section 12 continues to apply even where representatives of the media are present.

10 The effect of what is set out in paragraphs 6-8 above is that, if children proceedings have come to an end but the judgment as authorised to be published contains the usual rubric,

(i) there is, subject to compliance with the rubric, nothing to prevent the parents identifying themselves and their children in public as people involved in the proceedings;

(ii) there is nothing to prevent the parents publishing any other material the publication of which is not caught by section 12: Media Access & Reporting, paras 49-53;

(iii) nor is there anything to prevent the parents, subject to compliance with the rubric, making use of the judgment *in the anonymised form in which leave has been given for it to be reported.*

11 This outcome may be appropriate in a case where no-one wishes to discuss the proceedings otherwise than anonymously. But it may be difficult to justify, for example, where parents who have been exonerated in care proceedings wish to discuss their experiences in public, identifying themselves and making use of the judgment.

12 If the parents wish to link themselves and their children with the judgment by name, their remedy is to seek a suitable modification of the rubric: Media Access & Reporting, para 82; *Re B (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, paras [17], [19].

13 Nothing in this Guidance affects the exercise by the court in any particular case of whatever powers it would otherwise have to regulate the publication of material relating to the proceedings before it. 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 court to refuse to publish the judgment or to make an order restricting its use.

Guidance

14 This Guidance takes immediate effect. It applies in the family courts and in the Court of Protection to all judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court.

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

(i) those that the court *must* ordinarily allow to be published (paragraph 16); and

(ii) those that *may* be published (paragraph 17).

16 In cases brought by local authorities under Part 4 of the Children Act 1989 or under the Adoption and Children Act 2002 and cases involving the personal welfare jurisdiction of either the High Court or the Court of Protection, where the judgment relates to the making or refusal of:

(i) any emergency protection order, contested interim supervision order, contested interim care order, supervision order, care order, placement order or adoption order or any order for the discharge of any such order;

(ii) any order authorising a change of the placement of an adult from one with a family member to a home;

(iii) any order arguably involving a deprivation of liberty;

(iv) any order involving the giving or withholding of significant medical treatment; or

(v) any order involving a restraint on publication of information relating to the proceedings,

the starting point from now on is that the judgment should be published unless there are compelling reasons why it should not.

17 In all other cases heard in the family courts or Court of Protection by Circuit Judges, High Court judges and persons sitting as judges of the High Court, the starting point from now on is that a judgment (where available) may be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that the judgment may be published taking account of 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).

18 A judgment should in any event be published whenever the court considers that publication is in the public interest, whether or not a request is made by a party or the media.

19 When considering in accordance with paragraphs 16 or 17 whether a judgment should be published, either at the time the judgment is delivered or on subsequent request, the judge should address the following questions whether or not anyone has raised them:

(i) (in the case of an extempore judgment) whether the judgment should be ordered to be transcribed, and if so how the cost of transcription should be met;

(ii) (in cases where a reserved judgment has been handed down or an extempore judgment is to be transcribed):

a. whether the judgment may be published;

b. the extent of any anonymisation;

c. the identity of the person(s) to be responsible for carrying out such anonymisation; and

d. the form of the rubric on the front page of the judgment.

20 Before making a decision on these matters, the judge should invite representations from the parties and, if present, any accredited members of the media. The decision of the judge on each of these matters should be set out in the order and if the decision is that the judgment may not be published or should be anonymised the reasons should be set out in the judgment.

21 In all cases where a judge authorises publication of a judgment:

(i) public authorities and expert witnesses should be named in the judgment as published, unless there are compelling reasons not to;

(ii) anonymity in the judgment as published should not extend beyond protecting the privacy of the families involved, unless there are good reasons to do so.

22 Where a judgment to which paragraph 16 applies is approved for publication it shall as soon as reasonably practicable be placed by the court on the BAILII website by sending it to publish@bailii.org.

23 Where a judgment to which paragraph 17 applies is approved for publication it shall be made available, upon payment of any appropriate charge that may be required, to any person who requests a copy.

24 Every judgment referred to in paragraphs 22 and 23 shall, unless it contains an express statement to the contrary, be deemed to contain a rubric in the following terms:

> "This judgment was delivered in private. The judge has given leave for it to be reported on the strict understanding that (irrespective of what is contained in the judgment) in any report no person other than the advocates or the solicitors instructing them may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved."

All persons, including representatives of the media, must ensure that this requirement is strictly complied with. Failure to do so will be a contempt of court: paragraph 6 above.

25 Judges should take the initiative in facilitating and ensuring this change of practice.