

Transparency through publication of family court judgments

An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people

Julie Doughty, Alice Twaite and Paul Magrath

This is an abridged version of the full report available at: <http://orca.cf.ac.uk/99141/>

BACKGROUND AND AIMS OF THE RESEARCH

Guidance was issued by the President of the Family Division to family court judges in January 2014, intended to bring about an immediate and significant change in practice in relation to the publication of judgments in family courts. The President explained the need for greater transparency to improve public understanding of court processes and confidence in the system. In his view, too few judgments were made available to the public, who had a legitimate interest in being able to read what was being done by judges in its name. The guidance stated that certain types of family court judgment should be sent (in anonymised form) to the British and Irish Legal Information Institute (BAILII) for publication, unless there were compelling reasons not to. BAILII is a searchable database of online legal resources, which makes court judgments freely available to the public.

Following the implementation of the guidance, concerns were expressed about the effectiveness of anonymisation; the risks of jigsaw identification; and intrusion on the privacy of children and young people involved in family court proceedings. Although more judgments were appearing on BAILII than previously, not all courts appeared to be following the guidance. Families and practitioners in some localities might therefore be more likely to be affected than others, and only a partial picture of family court practice was available.

This study, funded by the Nuffield Foundation, aimed to evaluate the responses to the guidance by the courts, other stakeholders in the family justice system, and the media – and what this contributed to public legal education. The research team compiled a database of judgments that had been published under the 2014 guidance for two years after it was issued; finding a total of **837 judgments** that appeared to fit the criteria. The study also considered mainstream media coverage of these cases, and the views of journalists on their use of BAILII. The views and experiences of family court judges and representatives of other stakeholders in the family justice system about the effects of the 2014 guidance and publication were also sought.

FINDINGS

Some judges, especially those in the High Court, saw the 2014 guidance as simply reinforcing their existing responsibility to balance rights of privacy and rights to freedom of expression (Articles 8 and 10 of the European Convention on Human Rights) to arrive at a decision about whether or not to publish in every case. However, some circuit judges did not regularly publish their judgments, or published none at all. Only 27 judges, including 17 circuit judge and ten High Court judges, published more than ten judgments in the two-year period. There were significant variations in the numbers of judgments published from different courts. How busy a court was, and how many cases it dealt with, did not necessarily relate to the number of judgments publicly available.

Despite the 2014 guidance emphasis on children's anonymity, some judgments had not been effectively redacted and there was a high incidence of possible jigsaw identification from the amount of factual detail in many judgments.

A survey of judges, to which 17 responded, revealed serious concerns about the risk of identification of children, with most judges saying that circuit judges did not have the necessary resources to ensure safe anonymisation. Other reasons given by some judges who avoided publication was simply lack of time, or not seeing the relevance of the guidance to them.

Some journalists found BAILII very useful and there was some indication that media coverage has become better informed, but views on this were mixed amongst the judges, journalists, and representative groups consulted.

CONCLUSIONS

The 2014 guidance has led to large numbers of family court judgments being available to the public and the media that would not otherwise be in the public domain. These are potentially a valuable resource for public legal education. Allegations of secrecy in the court system may have lessened in the mainstream media. Publishing on BAILII generally works well at High Court level, where most cases of interest to the media will be heard.

However, patchy understanding of and adherence to the 2014 guidance over the country means that the aim of presenting a holistic picture of the system is not being achieved. The burden of preparing judgments for publication, with all the associated concerns about identification of children, families and practitioners, is falling inequitably on judges and practitioners. The rate of publication on BAILII is falling and the demands of the publication process may make it unsustainable in the current resource-starved environment.

THE OPTIONS

The 2014 guidance could be left in place as it is. This would mean that inconsistencies would continue; the rate of publication might continue to fall and progress would halt. Reversing the guidance would ease the workload of local judges and reduce concerns about the effects on children - but some judges believe that more judgments should be publicly accessible. This might lead to concerns about Article 8 taking precedence over Article 10, and be seen as a retrograde step. Trying to enforce a version of the guidance by incorporating it into the court procedure rules might impose a stronger obligation on the judiciary and the parties, but will not be effective without investment in extra staff and more judicial appointments. Another option is to hold hearings in public (as in the current Court of Protection pilot) but the task of imposing reporting restrictions and redacting documents would be onerous; attendance would have to be carefully managed. The risks to children, especially through social media, would probably be greater than to adults in the Court of Protection. Hearings in public would not necessarily stop the demand for published judgments, as few journalists or others will be able to attend routinely. We do not recommend a similar pilot in the Family Court before full consideration of robust research on the impact of the Court of Protection pilot.

A WAY FORWARD

The current situation is unsatisfactory and does not achieve the original aim of the guidance to make public the work of the Family Court throughout the jurisdiction. A way forward might be to modify the guidance to require every court and every judge to arrange publication of a small and manageable representative sample of cases that fall within the guidance. This selection process would mean that not all judgments are available, but neither are they now.

To supplement publication, courts could lodge audio recordings of all judgments with a central register where they would remain as an archive for accredited researchers or members of the media to apply to access. This would enable scrutiny, subject to controls that protect privacy. Judgments might be made available more widely at a point in the future, especially for a child in the proceedings who wants to read the decision in adult life.

Such a scheme should be introduced over a reasonable timescale, with support provided by the Ministry of Justice and the senior judiciary by way of training and guidelines. It should be piloted and evaluated, on the basis of publishing cases that are genuinely in the public interest, including consultation with all relevant stakeholders. Readers of BAILII could be asked for feedback. This approach would be fairer and would more accurately reflect the work of the courts than at present.

Some short term recommendations in the report are summarised here:

- ⇒ The existing Court Service leaflet on media attendance should be updated, and made widely available, to provide accurate information. The Media Law guide published in 2011 should also be updated, to include more detailed practical information for journalists.
- ⇒ The presumption contained in the 2014 guidance, that certain types of cases will be published, subject to the judicial balancing exercise between competing rights, should be restated to clarify that publication is the starting point. A new practice direction could set out best practice on effective anonymisation, and how this will be undertaken in each case in accordance with the reasons for publication. This could also provide guidance on using publication for the purpose of calling public bodies and professionals to account.
- ⇒ The correct status of the judgment as precedent, or not, should be made plain by the court; publication should explain whether it is a Family Court case published for the purposes of transparency or a High Court case which may be an authority for wider application.
- ⇒ The form of published judgments should clearly show the individual dates of the hearing; the approved judgment; and when sent for publication. Any reasons for deliberate delay, or other directions about publication should be set out.
- ⇒ The standard Case Management Order form drafted by parties' lawyers in care cases should include a section on the 2014 guidance, as an opportunity for it to be considered on a case by case basis.
- ⇒ Online publishers of news items about a published judgment should be encouraged to link it to BAILII. Ways to make BAILII more navigable, together with alternative methods of public legal education, including for litigants in person, should be investigated.
- ⇒ Research on the impact of local press and radio on identifying children, families and others, and how this might be managed, would inform good practice.
- ⇒ Training and guidance based on sharing good practice amongst judges could help achieve more consistency and more confidence in safe publishing. Consultation and agreement with professional bodies on the purposes of publication, to inform decision making about naming and accountability could achieve fairer treatment. The input of professional groups and organisations that represent children and families would help to achieve a common purpose in the process of improving transparency.

March 2017

This project is funded by the Nuffield Foundation

