

TRANSPARENCY IN THE FAMILY COURTS

PUBLICATION OF JUDGMENTS

PRACTICE GUIDANCE

issued on 16 January 2014 by

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The purpose of this Guidance

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

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

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

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

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

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

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

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

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

8 As provided in paragraph 14 below, this Guidance applies only to judgments delivered by certain judges. In due course, following the introduction of the Family Court, consideration will be given to extending it to judgments delivered by other judges (including lay justices).

The legal framework

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

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

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

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

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

Guidance

- 14 This Guidance takes effect from 3 February 2014. It applies
- (i) in the family courts (and in due course in the Family Court), to judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court; and
 - (ii) to all judgments delivered by High Court Judges (and persons sitting as judges of the High Court) exercising the inherent jurisdiction to make orders in respect of children and incapacitated or vulnerable adults.
- 15 The following paragraphs of this Guidance distinguish between two classes of judgment:
- (i) those that the judge *must* ordinarily allow to be published (paragraphs 16 and 17); and
 - (ii) those that *may* be published (paragraph 18).
- 16 Permission to publish a judgment should always be given whenever the judge concludes that publication would be in the public interest and whether or not a request has been made by a party or the media.
- 17 Where a judgment relates to matters set out in Schedule 1 or 2 below and a written judgment already exists in a publishable form or the judge has already ordered that the judgment be transcribed, the starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published.

SCHEDULE 1

In the family courts (and in due course in the Family Court), including in proceedings under the inherent jurisdiction of the High Court relating to children, judgments arising from:

- (i) a substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm, have been determined;
- (ii) the making or refusal of a final care order or supervision order under Part 4 of the Children Act 1989, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;
- (iii) the making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;

- (iv) the making or refusal of any declaration or order authorising a deprivation of liberty, including an order for a secure accommodation order under section 25 of the Children Act 1989;
- (v) any application for an order involving the giving or withholding of serious medical treatment;
- (vi) any application for an order involving a restraint on publication of information relating to the proceedings.

SCHEDULE 2

In proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, judgments arising from:

- (i) any application for a declaration or order involving a deprivation or possible deprivation of liberty;
- (ii) any application for an order involving the giving or withholding of serious medical treatment;
- (iii) any application for an order that an incapacitated or vulnerable adult be moved into or out of a residential establishment or other institution;
- (iv) any application for a declaration as to capacity to marry or to consent to sexual relations;
- (v) any application for an order involving a restraint on publication of information relating to the proceedings.

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

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

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

- (i) public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;
- (ii) the children who are the subject of the proceedings in the family courts, and other members of their family, and the person who is the

subject of proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, and other members of their family, should not normally be named in the judgment approved for publication unless the judge otherwise orders;

- (iii) anonymity in the judgment as published should not normally extend beyond protecting the privacy of the children and adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.

21 Unless the judgment is already in anonymised form or the judge otherwise orders, any necessary anonymisation of the judgment shall be carried out, in the case of judgments being published pursuant to paragraphs 16 and 17 above, by the solicitor for the applicant in the proceedings and, in the case of a judgment being published pursuant to paragraph 18 above, by the solicitor for the party or person applying for publication of the judgment. The anonymised version of the judgment must be submitted to the judge within a period specified by the judge for approval. The version approved for publication will contain such rubric as the judge specifies. Unless the rubric specified by the judge provides expressly to the contrary every published judgment shall be deemed to contain the following rubric:

“This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.”

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

- (i) in cases falling under paragraph 16 the cost of transcribing the judgment is to be at public expense;
- (ii) subject to (i), in cases falling under paragraph 17 the cost of transcribing the judgment shall be borne equally by the parties to the proceedings;
- (iii) in cases falling under paragraph 18, the cost of transcribing the judgment shall be borne by the party or person applying for publication of the judgment.

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

website and, if so, it shall as soon as reasonably practicable be placed by the court on the BAILII website.