

**PRESIDENT'S GUIDANCE IN RELATION TO APPLICATIONS CONSEQUENT UPON THE ATTENDANCE OF THE MEDIA IN FAMILY PROCEEDINGS**

1. The Government's announcement about the attendance of the media at hearings in family proceedings (see *Family Justice in View* Cm 7502, December 2008) has been implemented by a change to the Family Proceedings Rules made by *The Family Proceedings (Amendment)(No 2) Rules 2009* SI 2009 No 857 (county court and High Court ) and *The Family Proceedings Courts (Miscellaneous Amendments) Rules 2009* SI 2009 No 858 (magistrates' courts) and two Practice Directions *Attendance of Media Representatives at Hearings in Family Proceedings* dated 20<sup>th</sup> April 2009 made by the President to support the rule changes in the respective courts.
2. In the county court and High Court media attendance is implemented by the change to FPR Rule 10.28. (to which the Practice Direction applies). Change regarding media attendance in the family proceedings courts is introduced through amendment to the Family Proceedings Courts (Children Act 1989) Rules 1991, with the insertion of rule 16A.
3. In broad terms the changes for the county court and the High Court relating to media attendance permit duly accredited representatives of news gathering and reporting organisations, and any other unaccredited person whom the court permits, to be present at hearings of all family proceedings (defined by s. 32 Matrimonial and Family Proceedings Act 1984) except hearings conducted for the purposes of judicially assisted conciliation or negotiation. They also provide that the court can exclude media representatives

4. For the county court and the High Court, the change relates to most of the proceedings which are for the time being heard in private. It therefore covers a wide range of proceedings including for example public and private law proceedings under the Children Act 1989 and claims for ancillary relief under the Matrimonial Causes Act 1973.
5. Representatives of newspapers or news agencies are admitted to the family proceedings courts under section 69 (2) Magistrates' Courts Act 1980. Media attendance will now be regulated by the insertion of rule "16A Restrictions on presence of persons at directions appointment and hearing". Duly accredited representatives of news gathering and reporting organisations are not entitled to be present at hearings conducted for the purposes of judicially assisted conciliation or negotiation. They may also be excluded for reasons set out in rule 16A(3).
6. In respect of the county court and the High Court the new Part 11 of the FPR, and in respect of the family proceedings court the new Part 11C of the Family Proceedings Courts (Children Act 1989) Rules 1991 as amended, regarding communication of information only apply to proceedings concerning children. In particular, they do not apply to proceedings for ancillary relief. Nor do they expressly cover communication of information to representatives of the media.
7. As appears from the Practice Direction governing the county court and High Court, it is a premise of the change for these courts that the proceedings remain proceedings held in private and that therefore the existing position relating to the publication of matters relating to proceedings which are so

heard continues to apply, both whilst the proceedings continue and when they have ended (see the Practice Direction paras 2.4 and 2.5 )

8. Useful summaries of the position relating to the publication of matters relating to proceedings heard in private can be found in: *Clayton v Clayton* [2006] EWCA Civ 878 [2007] 1 FLR 11 (in particular at paragraphs 23 to 60, 82 to 85, 92 to 104 and 118 to 136 and *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 142 (in particular at paragraphs 62 to 82 (on s. 12 AJA 1960) and 83 to 107 (on the jurisdiction to relax or increase the statutory restrictions on publication). Other useful cases are listed in the footnote to this paragraph.<sup>1</sup>
  
9. It is to be noted that the above decisions all concern the interests and welfare of children and that the approach in ancillary relief proceedings (which are also likely to be productive of media applications) has not been the subject of similar judicial consideration and guidance.

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<sup>1</sup> *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593

*Pelling v Bruce-Williams (Secretary of State for Constitutional Affairs Intervening)* [2004] EWCA Civ 845, [2004] Fam 155, [2004] 2 FLR 823

*Re Webster; Norfolk County Council v Webster and Others (No 1)* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146

*Re Webster; Norfolk County Council v Webster and Others (No 2)* [2006] EWHC 2898 (Fam), [2007] 2 FLR 415

*Re B; X Council v B* [2007] EWHC 1622 (Fam), [2008] 1 FLR 482

*Re B; X Council v B (No 2)* [2008] EWHC 270 (Fam), [2008] 1 FLR 1460

*BBC v Cafcass* [2007] EWHC 616 (Fam), [2007] 2 FLR 765

*Oldham Metropolitan Borough Council v GW & PW* [2007] EWHC 136 (Fam), [2007] 2 FLR 597

10. The new Rules and the Practice Directions include provisions relating to the exclusion of media representatives but are silent on the approach to be taken by the courts to the exercise of their discretion in respect of other issues which may well arise as a consequence of the attendance of media representatives at hearings in family proceedings. In this respect the Government declined to adopt the recommendation of the High Court judges to address the detail of such issues when introducing the change. It is therefore left to the courts to determine how such issues are to be approached and decided. It is clear that a principled approach to such issues should be applied by the courts and that this can only properly be developed by the courts with the benefit of full argument from the interested parties.
  
11. The change to admit media representatives to hearings in family proceedings in county courts and the High Court is likely to give rise to a number of issues relating to the exercise of discretion by all levels of court. In particular it is likely that courts will quickly be faced with applications for the provision of documents to media representatives present in court to enable them the better to follow the substance of the proceedings. If minded to grant such application, the court will need to consider the terms of any restriction relating to the use (and in particular the publication) of information contained in any such documents provided to media representatives as a condition of their being so provided.
  
12. In cases involving children, applications, whether by the media or the parties, are also likely to raise issues as to

- (i) The proper application of the existing statutory provisions restricting the publication of the identity of children and information relating to proceedings heard in private;
- (ii) the adequacy of the protection afforded in children cases by Section 12 of the Administration of Justice Act 1960 ('AJA 1960') which, inter alia, does not extend to the identity of the parties or witnesses;
- (iii) the effect of the publication of any anonymised judgment;

and whether or not injunctive relief may be required upon a wider basis.

13. In relation to the need for injunctive relief in cases affecting children, particularly in local courts, it may be necessary to consider how far it is appropriate to protect from identification not only the children and the parties, but also witnesses and others whose identities will be known locally as associated with the child or his family.
14. Finally, there will be issues over the need on child welfare grounds for protection to extend beyond the end of the hearing (see paragraph 2.5 of the respective Practice Directions).
15. No doubt the basic opposing arguments in relation to the question of access to documents will be, on the one hand, that the Government has sought to retain the basic structure and rationale of the long standing policy of privacy in relation to children proceedings, while at the same time admitting the press, to avoid charges of "secret justice" and to promote better understanding of the working of the family courts. For these purposes, however, access to court

documents is not generally necessary or desirable having regard to their confidential nature.

16. On the other hand, the media may argue that, particularly in those cases where there is not a formal oral opening, they should be enabled to see statements and documents filed in order fully to understand the nature and progress of the proceedings, and so as to be able to publish articles, within appropriate reporting constraints, about the cases which they attend. In this connection, it is likely, if not inevitable, that in individual cases of high interest to the media, courts at all levels and all over the country will be faced with detailed legal argument relating to rival Convention Rights, public and private interests, the welfare of children, and the construction and application of the primary and secondary legislation.
17. Inconsistency of approach in children cases as to the principles to be applied to the determination of such issues on the part of the courts, parties, witnesses, other persons involved in the relevant events (e.g. social workers and doctors) and the media could well give rise to justified criticism on grounds of uncertainty. It would not promote the public interest in the proper administration of justice and could be damaging to children.
18. So far as ancillary relief proceedings are concerned, policy, privacy and Convention issues may also arise for decision, albeit the interests of children may not be engaged.
19. The purpose of this guidance is therefore to try to avoid, or at least to minimise, inconsistency by providing that decisions are made by the High Court (and the

Appellate Courts) as soon as possible as to the principled approach to be taken. Its purpose is also to provide that, until that is done, delay in decision making in individual cases, (particularly those concerning children) should be avoided. It is to be hoped that the media will co-operate in these aims.

20. Pending the availability of formal judicial guidance from the High Court or Court of Appeal as to the principled approach to be adopted, all County Courts and Magistrates' Courts hearing family proceedings should carefully consider adopting the following course:

i) The court should deal in accordance with the Rules and Practice Directions with any application made for exclusion of the media from the proceedings or any part of them on any of the grounds set out in the Practice Directions.

ii) Where a representative of the media in attendance at the proceedings applies to be shown court documents, the court should seek the consent of the parties to such representative being permitted (subject to appropriate conditions as to anonymity and restrictions upon onward disclosure) to see such summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case.

iii) If the objection of any of the parties is maintained, then in any case where the objecting party demonstrates reasonably arguable grounds for resisting disclosure of the document or documents sought, no order for disclosure should be made, but the following course of action should be considered.

iv) If considered necessary or appropriate the court should transfer (or, in the case of a family proceedings court, take the first step to bring about an urgent transfer of) the proceedings to the High Court for the determination of any disclosure and/or reporting issues.

v) Alternatively, in order to avoid delay in decision making on the substantive issues in the case, the court should adjourn determination of any disclosure and/or reporting issues pending a decision by the High Court (or the Appellate Courts) on the principled approach to be taken to them and should make any necessary interim orders in accordance with the argument mentioned in paragraph 15 above in order to secure the position meanwhile.

vi) Similarly, if a representative of the media applies for reporting restrictions to be lifted during the currency of a case, in the absence of agreement between the parties the court should consider following one or the other of the alternative steps set out in sub-paragraphs iv) –v) above.

vii) If injunctive relief is sought restraining publication based on Convention rights rather than statutory provisions, the matter should in any event be transferred to the High Court to be dealt with under the *President's Practice Direction (Applications for Reporting Restriction Orders)* 18 March 2005 and the *Practice Note (Official Solicitor: Deputy Director of Legal Services CAFCASS: Applications for Reporting Restriction Orders [2005] 2 FLR 111* and, if interim injunctive relief appears necessary under threat of publication before such application can be dealt with by a High Court judge, the county court should comply with s.12(2) of Human Rights Act 1998.

21 The underlying aim of this guidance is to seek to ensure that the principled approach to be taken is determined by the High Court (and the Appellate Courts) as soon as possible and that in the interim changes of practice do not take place which may not accord with that principled approach. Though this may result in delayed rulings on some early contested applications involving arguments such as those mentioned in paragraphs 15 and 16 above, it may be considered desirable, in the absence of legislative guidance, that such rulings should only be made on the basis of authoritative judicial guidance following proper determination, with the benefit of full argument, of the relevant principled approach for the longer term.

22 To assist in the early determination of the principled approach:

- i) Arrangements will be made in the High Court to identify appropriate test cases and for their early determination, and
- ii) Arrangements will be made to seek to ensure that directions are given as soon as is practicable in any proceedings that are transferred to the High Court because they raise substantial issues arising from the attendance of media representatives
- iii) Proceedings which are transferred to the High Court other than in the PRFD should be put before a family High Court Judge on circuit or, failing the presence on circuit of a High Court Judge, before the Family

Division Liaison Judge as an urgent application for  
directions.

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