

## **A short guide to the law of Transparency**

### **What are child proceedings?**

Child proceedings consist of proceedings in Wardship under the High Court's Inherent Jurisdiction, proceedings under Children Act 1989 and Adoption and Children Act 2002. For the purposes of the reporting provisions, child proceedings means any proceedings under the forementioned provisions before the family court or the High Court, before magistrates and judges.

### **Publication of information – the default position**

Child proceedings, and the information within them, are subject to strict rules of privacy and anonymity. The law operates to make non-publication the default. Unauthorised publication of information from children proceedings is a contempt of court: Section 12 Administration of Justice Act 1960. The court has a discretion to allow publication of any information for proceedings.

In Re Webster [2007] 1 FLR 1146, Munby J (as he then was) considered the effect of Section 12 AJA:

*There is no need on this occasion for any detailed exegesis of section 12. It suffices for present purposes to note that the effect of section 12 is to prohibit the publication of accounts of what has gone on in front of the judge sitting in private, as also the publication of documents (or extracts or quotations from documents) such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment. On the other hand, section 12 does not of itself prohibit publication of the fact that a child is the subject of proceedings under the Children Act 1989; of the dates, times and places of past or future hearings; of the nature of the dispute in the proceedings; of anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place; or of the text or summary of any order made in such proceedings. Importantly, it is also to be noted that section 12 does not prohibit the identification or publication of photographs of the child, the other parties, or the witnesses, nor the identification of the party on whose behalf a witness is giving or has given evidence.*

If a child is subject to live proceedings, the provisions of s.97 Children Act 1989 also apply, serving to criminalise the publication of names, addresses, photographs and school information of children, their families, or their foster carers.

### **Attendance by press and legal bloggers**

Child proceedings are generally heard in private: FPR2010, r27.10. They are therefore not open to the public. There are limits on whom may attend child proceedings, however accredited journalists and legal bloggers may attend as of right: FPR2010, r.27.11(2)(f)-(ff). Under PD12R and PD14G, accredited journalists and legal bloggers are allowed to report if the court makes a 'Transparency Order'. This is an order giving a reporter the ability to report on what they see and hear in court, subject to a strict injunction protecting the sensitive details in the case which may lead to identification of the child/ren.

Accredited media is any holder of a card issued by the UK Press Card Authority: PD27B, para 4.2. The Court retains a discretion to allow a media representative who does not hold a card to attend a hearing.

A 'legal blogger' has a strict definition. A blogger is a 'duly authorised lawyer' within the definition of PD27B, para 4A.1:

- a. A solicitor, barrister or CILEX;
- b. A person who has completed the CPE, GDL, SQE or has a postgraduate legal qualification
- c. An academic lawyer working for a law school, faculty or department of a higher education institution;
- d. A lawyer attending on behalf of a registered educational charity approved by the President of the Family Division.

### **The Reporting Provisions**

The Transparency Order (TO) relaxes the restriction on publication in s.12 AJA1960. The TO contains an injunction against any person aware of the contents of the order, preventing reporting of certain details about the case. The standard TO may be tailored to the requirements of a case.

## **Discussions between parties and the media, and documents**

The sharing of documents, and discussions between parties and the media, is generally prohibited.

The TO will make provision for certain documents to be shared (case summaries, advocates notes) but not for quotes from otherwise prohibited documents to be referenced. This will be the responsibility of the advocate or litigant drafting the document.

The general rule under the TO is that a reporter must attend a hearing to obtain the documents referenced above. The standard TO contains suggested directions for cases with a large amount of press interest where the court may permit the sharing of documents amongst accredited journalists and legal bloggers, so long as the TO is served on them, and they confirm to the court in writing that they have been served.

The TO will also make provision for a party or litigant to speak to a pilot reporter who attends the hearing about their case. Any reporting is subject to the injunction within the TO and this is not presently covered by the situations contemplated in PD12G. The TO will permit any discussions prior to the order retrospectively.

## **Exercising discretion**

The court will always retain a discretion over the information which may be published. If a pilot reporter wishes to report something outside of that permitted by the TO, the court must exercise its discretion to determine the application.

Two competing rights are engaged:

- ECHR Article 10, the right of the press, public (and sometimes parties) to freedom of expression.
- ECHR Article 8, the right of the parties and child(ren) to a private and family life.

In Griffiths v Tickle [2021] EWCA Civ 1882, the Court of Appeal described the Court's task thus:

*“The critical question, therefore, is whether the best interests of the child, treated as a primary consideration, are weighty enough to justify maintaining that fetter, during the course of the proceedings under s 97(2) Children Act, and indefinitely as a consequence of s 12 AJA. Put another way, do the child's best interests make it necessary and proportionate to impose those restrictions on the Article 8 and 10 rights relied on by the applicants and the mother?”*

Deciding what may be reported will therefore involve balancing these two competing rights. There is a litany of case law about this. The key principles are set out by Mrs Justice Lieven in the Manchester appeal: Louise Tickle v Father and Others [2023] EWHC 2446:

*Firstly, although Family Court proceedings are normally held in private the press and legal bloggers are entitled to attend under FPR27.11(2)(f).*

*Secondly, such a person can be excluded, but only where it is “necessary” in the interests of the child, the safety or protection of parties or others, or the orderly conduct of proceedings, FPR27.11(3).*

*Thirdly, I agree that in approaching the test of “necessity”, what was said in Re H-L (a child), albeit in a different legal context, is a useful guide.*

*Fourthly, it will rarely, but not never, be appropriate for the Court to inquire as to why the journalist is seeking to report, or how s/he became aware of the hearing. In general, as Mr Barnes submits, this will be a matter for the journalist who would not be expected to reveal a “source”. However, if the Judge becomes concerned that one party is seeking to use reporting as a litigation strategy, particularly in the context of issues around coercive control, the Judge may wish to inquire into the background to the application to report. This can only be considered on a case specific basis.*

*Fifthly, in determining whether a reporter can report on what they see and hear in a Family Court, the Judge will have to apply a balance between Article 8 and Article 10. The approach to such a balancing exercise was considered in detail by the Court of Appeal in Griffiths v Tickle [2021] EWCA Civ 1882 at [27]-[40]. The Court will have to apply an “intense focus” on the “comparative importance of the specific rights being claimed in the individual case ...”, see Griffiths [37] and Lord Steyn in the House of Lords in Re S at [17].*

*Sixthly, the child’s best interest will be critical, Griffiths at [71], although they will still have to be balanced against the other rights asserted. In practice, in most cases in the Family Court, it will be of great importance to preserve the anonymity of the child, so far as is reasonably practicable. I note this caveat because there will be cases, such as Griffiths itself or cases concerning a high profile criminal case, where anonymity can only be preserved in reality to a certain degree. There*

*may be an important distinction between cases such as the present, where the reporter is seeking to report wholly generic and systemic matters, and where the reporting is of the facts and evidence in the case, where the risk of identification of the child is much greater. The experience of the Transparency Pilot currently under way is that anonymity of the child can be effectively preserved by the use of a detailed Transparency Order.*

*Seventhly, there is a public interest in the reporting of cases in the Family Courts. This is made clear in the report of the President of the Family Division (Sir Andrew McFarlane) in his report Confidence and Confidentiality: Transparency in the Family Courts (21 October 2021). At paragraph 22 the President said:*

*“The level of legitimate media and public concern about the workings of the Family Court is now such that it is necessary for the court to regard openness as the new norm. I have, therefore, reached the clear conclusion that there needs to be a major shift in culture and process to increase the transparency of the system in a number of respects. In short, the reasons for this conclusion are as follows: ...”*

*The Report goes on to refer to the genuine and legitimate public interest in the Family Justice System for the purposes of gaining public confidence in the system, and greater knowledge and understanding of issues such as domestic abuse, see [30]. In my view it is relevant that because most Family Court cases are held in private and with no reporting, there is less knowledge or understanding of the challenges facing the Family Justice System than those facing the Criminal Justice System. There is a very real public interest in there being greater understanding of the work done by the Family Courts.*

*Eighthly, there may well be cases where it is appropriate to adjourn a decision about whether a case can be reported on until the final hearing. However, whether that is justified must be considered on the facts of the individual case. Adjourning the decision is itself an interference with the reporter’s Article 10 rights, and as such is different from a more normal case management decision. The Court must bear in mind that the resources of media outlets and reporters are finite, and a reporter may not be able to return on a future occasion.*

*Ninthly, in deciding whether to allow reporting, the views of the parties, including the child, are of great significance. However, they are not determinative, so no party holds a veto against reporting. As in Griffiths there will be cases where one party wants to be allowed to “tell their story”, and to prevent them doing so will be an interference, albeit potentially justified, in their Article 8 rights. There may therefore be cases where there are competing Article 8 rights which need to be considered.*

When giving a decision about transparency within the pilot, a pilot judge may wish to refer expressly to the principles above.