

## Extended material

### Chapter 14: Family courts

#### Chapter summary

*Family law, a branch of civil law, includes many cases involving disputes between estranged parents after marital breakdown - for example, about contact with a child, or those brought by local authorities seeking to protect children. A court can remove a child from his/her parents because of suspected abuse or neglect. Reporting restrictions and contempt of court law severely limit what the media can publish about most family cases, to protect those involved, particularly children, who in most instances cannot be identified in media reports. Critics say the family justice system is over-secretive. This chapter examines the main restrictions, including those covering divorce cases.*

#### 14.1 Introduction

The term 'family cases' covers a range of matters in civil law. They have in the past been dealt with by magistrates' courts, county courts, or the High Court Family Division, with cases transferred between these courts. But a new Family Court began operating in April 2014, amalgamating this system into one, unified court. It operates from existing courthouses, with a role for magistrates and with judges continuing to preside in the most complex cases.

The family justice system has critics. Groups such as Families Need Fathers claim that judges are biased in favour of mothers in disputes over contact with children. Other groups say these courts do not do enough to protect mothers and children from coercive, violent fathers. And there is concern that miscarriages of justice could occur when courts approve the removal of children from their parents, such as when there is disputed medical evidence of abuse. The increase in children involved in care proceedings has put the family justice system under great strain as regards workload.

The media is criticised too – some judges complain that much coverage of family cases is based on partial accounts by aggrieved parents rather than a complete view of the case.

But it is difficult for the media to present a complete view of any story involving family law because of reporting restrictions intended to protect children and others involved in cases, and the serious risk of committing contempt by publishing certain information, particularly if it was given at a hearing in private.

The Labour Government began in 2009 to change the law to allow journalists to attend private hearings. The idea was to increase transparency of the family courts because of concerns that public confidence in them has declined. But the reform was never completed, leaving the existing complex sets of reporting restrictions in place. These are explained below.

#### 14.2 Types of cases in family courts

Family cases fall into two main categories, 'private law' and 'public law'.

**Private law cases include:**

- Matrimonial cases - proceedings for divorce, judicial separation, or nullity, or to end a civil partnership. Judicial separation is legal recognition that a couple will no longer cohabit, but are not divorced. Nullity proceedings are brought by someone wanting their marriage annulled (declared invalid) because, for example, their spouse turned out to be already married (bigamous). Civil partnerships were intended to be legally recognised relationships between gay people. But in June 2018 the Supreme Court ruled that restricting civil partnerships to gay people breached the European Convention on Human Rights because it discriminated against heterosexuals. Civil partnerships, like marriages, can be dissolved, or subject to judicial separation. Reporting restrictions in matrimonial cases are explained below. Cases concerning dissolution of marriages or civil partnerships may also involve what are called “ancillary proceedings”, in which the courts decide financial and property disputes between estranged couples.
- Enforcement of financial arrangements between estranged couples, including unmarried couples. The Child Maintenance Service, which began work in 2013, replacing the Child Support Agency, is assuming a main role in securing maintenance for children, which usually involves a father paying money to the mother. But the courts still hear such cases.
- Other disputes between estranged parents about their children – for example, about which parent the children should live with, or an absent parent’s rights to contact with them, leading to the courts making orders under the Children Act 1989. The Children and Families Act 2014 amended the 1989 Act, abolishing ‘residence’ and ‘contact’ orders and replacing them with ‘child arrangement orders’. Note – the term ‘custody’ is no longer used for children’s residence arrangements.
- Applications for court orders to enforce the return of child abducted, for example, by one parent in defiance of the other parent’s rights.
- Paternity disputes.
- Applications in domestic violence cases for ‘non-molestation’ orders – for example, a court can ban someone from approaching an estranged spouse or partner or entering his/her home.
- Applications to protect a person from a ‘forced marriage’ – see the Additional Material for ch. 11 on [www.mcnaes.com](http://www.mcnaes.com) for reporting restrictions which bestow anonymity in such cases

**‘Public law’ cases include:**

- Child protection applications, mainly made by local authorities, for court orders allowing social workers to intervene to protect a child – for example, if there is suspected neglect or abuse within a family. Such orders are made under the Children Act 1989, mainly by magistrates or district judges. They include assessment orders, to ensure parents co-operate with social workers assessing the family; supervision orders, to ensure that parents co-operate with a supervision regime; and care orders removing children from the family home to be cared for by foster parents or in a children’s home. A court can make an emergency protection order allowing police or social workers to remove a child from the parental home if there is immediate concern for his/her safety.
- Applications for a court to order that a child should be taken into local authority care if his/her behaviour is beyond parental control – for example, it is criminal and/or putting the child or the public at risk.

A case beginning as a private law dispute between parents may become a public law case if, for example, a mother makes allegations of child abuse against the father when arguing that he should not be allowed to have contact with the child.

**Adoption cases** - a court can sanction permanent adoption by non-relatives – for example, an approved couple adopting a child removed from his/her birth parents by a local authority. In other circumstances adoption cases may formalise existing relationships, such as a stepfather becoming the adoptive father.

### CAFCASS

Staff employed by the Children and Family Court Advisory and Support Service (CAFCASS) assist the courts in family cases. They can advise adults involved, and ensure that a child has his/her own lawyer if necessary or that the court appoints a Children's Guardian (someone experienced in social work) to prepare an independent report on a child. It is unusual for children themselves to attend family cases.

### Remember!

The Editors' Code of Practice and the Ofcom Broadcasting Code state that normally journalists should not interview children aged under 16 on matters concerning their welfare (Editors' Code) or privacy (Ofcom code) without the consent of a parent or responsible adult. See 4.13 in *McNae's* and below: 'Ethical considerations in stories involving children'.

## 14.3 Reporting family law cases

Rules usually bar the public from family cases involving children but allow journalists to attend these and most types of family case. Family proceedings are defined in section 75 of the Courts Act 2003 and include the types of cases listed above under the 'private law' and 'public law'. The rules are currently the Family Procedure Rules 2010 (SI 2010/2955) - see Useful Websites, below. These Rules have been updated a number of times. For their detail see the heading below: **Journalists' rights under rules to attend family cases**.

Although the rules allow journalists access to family cases involving children, reporting them is fraught with difficulties because of anonymity provisions under the Children Act 1989, the contempt of court provisions in section 12 of the Administration of Justice Act 1960, and other extremely tight restrictions. A result is that much of what reporting there is consists of anonymised articles involving, for example, parents' claims that they have suffered a miscarriage of justice at the hands of social workers, medical experts, or the courts. Parental disputes over where a child will live are almost invariably shrouded in anonymity almost as soon as they arise because of the 1989 Act's restrictions.

This complex net of restrictions has led to the criticism that family courts operate in 'secret'.

To help journalists, courts and lawyers, in 2011 the then President of the Family Division, Sir Nicholas Wall, the Society of Editors, and the Judicial College issued a detailed guide to reporting family proceedings – see Useful Websites below.

### 14.3.1 Reforms

Sir James Munby, who became President of the Family Division in 2013, and retired in the summer of 2018, pledged to make family courts more transparent by changes to 'improve access to and reporting of' cases, while preserving the privacy of families involved. In January 2014 he issued guidance – 'Transparency in the Family Courts' – saying judges should increase the number of judgments published by family courts. See Useful Websites, below. He also said that court rules would be changed, but that

changes to primary legislation were unlikely 'in the near future.' In August the same year he launched a consultation on transparency, and suggested that journalists covering cases in the Family Division of the High Court could be allowed access to documents prepared by lawyers for the parties, such as skeleton arguments, case summaries and position statements. Sir James also suggested that it could be possible to open more family court hearings to the public - at present, they are almost invariably held in private, with the public excluded but with journalists allowed to attend, although with no automatic right to report on what they see and hear. Sir Andrew McFarlane succeeded Sir James as President of the Family Division at the end of July 2018.

## 14.4 Anonymity under the Children Act 1989

Section 97 of the Children Act 1989 restricts media coverage of family court cases by making it an offence to publish:

- a name or other material which is intended or likely to identify any child as being involved in any current case in the High Court or the Family Court in which any power under the Act has or may be exercised with respect to that or any other child;
- an address, or school, as being that of a child involved in such an ongoing case.

The term 'current' is not in the Act, but this is the effect of the judgment in *Clayton v Clayton*, as explained below. A child is defined in the Act as a person aged under 18.

Section 97 anonymity automatically applies to children in unresolved residence and contact disputes between parents, and those who are the subject of intervention by social workers. It applies to any report of what is said in court or of any written judgment, as well as to any wider feature about a child who is involved in an ongoing case. It also means, naturally, that the child's family cannot be identified either. Jigsaw identification – a danger explained in 10.11 in *McNae's* - must be avoided. A journalist unsure if a case involves the 1989 Act should check with the court or lawyers involved.

- Breaching section 97 by publishing material identifying a child covered is punishable by a fine of up to £2,500. It is a defence for an accused person to prove that he/she did not know, and had no reason to suspect, that the published material was intended or likely to identify the child.

### 14.4.1 Adoptions

Section 97 also bans reports of adoption proceedings from identifying the child concerned while he/she is under the age of 18.

#### Remember!

Section 123 of the Adoption and Children Act 2002 makes it an offence – punishable by up to three months in jail or a fine – for anyone other than an officially recognised adoption agency, or someone acting on its behalf, to publish information, or an advertisement, that a child is available for adoption. It also bans publication of information about how to arrange an adoption without legal authority.

### 14.4.2 When does anonymity under the Children Act 1989 cease?

- Section 97 (4) of the Children Act 1989 says that, if a child's welfare requires it, a court or the Lord Chancellor, with the agreement of the Lord Chief Justice, can waive to any specified extent the anonymity otherwise automatically bestowed on a child.

Judges have waived the anonymity to allow the media to help trace a missing child by publishing his/her name, photo, and other details, in the hope that the public will provide information about the child's whereabouts – for example, if a child has been abducted by one parent because of a dispute with the other or to avoid the child being taken into care.

As explained below, on rare occasions judges have lifted the anonymity for other reasons.

### 14.4.3 Anonymity ends when the case concludes

Section 97 anonymity only applies while Children Act proceedings are going on. It ends with the case. The Court of Appeal made this clear in 2006 in *Clayton v Clayton* ([2006] EWCA Civ 878). Sir Mark Potter, then President of the Family Division, said that if a court felt that anonymity should continue beyond a case's conclusion to protect a child's welfare or privacy under Article 8 of the European Convention on Human Rights, it should issue an injunction to continue it. For explanation of the Convention's general effect, see 1.3 in *McNae's*. The High Court or the Family Court can order that the anonymity should continue until the child is 18. The court has common law power to make such an order under Article 8 – see the heading below: **Anti-publicity injunctions in family cases**.

#### Remember!

A consequence of *Clayton v Clayton* is that a journalist who wants to identify a child as having been involved in a case under the 1989 Act – for example in a 'true life' story about a mother's battle with social workers, or a celebrity's account of the break-up of his/her marriage – should be sure that the proceedings have ended and that no order has been made to continue a child's anonymity. Long adjournments can occur in such cases – for example, a local authority may seek several interim care orders before a case ends.

#### 14.4.3.1 Wards of court and other '*parens patriae*' cases

A child who has been made a ward of court by the High Court, or who is subject to proceedings seeking to make him/her a ward, or who is involved in any other form of '*parens patriae*' case, is automatically protected by section 97 anonymity while the case is ongoing (*Kelly v British Broadcasting Corporation* [2001] Fam 59). A child may be made a ward if, for example, his/her parents are dead or deemed to be unfit to raise him/her. The High Court has an inherent jurisdiction at common law to act in a parental capacity to approve important decisions about the child – for example, about education or medical treatment. These powers are based on centuries-old case law originally derived from the role of the monarch, who was regarded as the 'parent' of the whole nation (in Latin, *parens patriae*). A child can also be made a ward at the request of his/her family, for example, if he/she runs away or is abducted. Wardship means the High Court can order anyone to tell it of the child's whereabouts – disobedience is punishable as contempt of court. Punishment could be a jail term – see 19.1 in *McNae's*.

**Case study:** In 2001 Bobby Kelly, aged 16, ran away from home and joined the 'Jesus Christians' cult. His worried family made him a ward of court. After a BBC reporter traced him, Mr Justice Munby ruled in the High Court that the media did not require the leave of the court to interview a ward of court or to publish the interview. But he warned that the media should take care to avoid any breach of reporting restrictions (*Kelly v British Broadcasting Corporation* [2001] Fam 59). For example, anonymity might apply, and a published interview should not breach contempt law in respect of matter heard by a court in private. The BBC was allowed to identify Bobby. He said he was homesick but 'it says in the Bible that you have to give everything up to work for God.' See Useful Websites, below, for the Bobby Kelly story.

## 14.5 Anonymised judgments

A family case judgment, if made public, is usually anonymised by the court to prevent a child or adult being identified. A media organisation would commit an offence if it reported an anonymised judgment in a way which identified the protected person, by adding their name or giving any other identifying detail. See also below on the risk of contempt in publishing judgments without a court's consent.

In July 2016 Sir James Munby made clear the importance of the rubric which generally appears at the top of judgments being published by the Family Court or the Family Division of the High Court, and the Court of Protection – see *In the Matter of X (A Child) (No 2)* ([2016] EWHC 1668 (Fam)). The rubric, he said, was generally in two parts – each of which served a distinct function. The first part, saying that the judge gave leave for the judgment to be reported, had the effect of disapplying section 12 of the Administration of Justice Act 1960 to a certain extent, and so protecting the publisher or reporter from proceedings for contempt. But the second part, saying that the judgment was 'being distributed on the strict understanding that...' made that permission conditional. A person publishing or reporting the judgment could not take advantage of the judicial permission in the first part of the rubric, and would not be protected from the penal consequences of section 12 of 1960 Act unless he complied with the requirements of the second part of the rubric. So someone who published or reported such a judgment in a way which did not comply with the second part of the rubric would, in principle, be guilty of a contempt of court in accordance with section 12.

For the law in section 12, see 14.6 of this chapter.

## Legal disputes about lifting of children's anonymity

In recent years there has been an increase in cases in which courts have had to resolve disputes about whether a child should be identified in media coverage.

**Case study:** In 2003 Mr Justice Munby ruled in the High Court that a girl, then aged 16, who had given birth when she was 12, should be allowed to tell her story to a newspaper and be identified in it. In the story she told how when she was 14 she had unsuccessfully opposed a court order that her baby should be adopted by another family, and said that she was badly treated – and raped – while in local authority care. Mr Justice Munby said it was in the public interest that her story should be published. Torbay Borough Council had previously secured an injunction banning the media from identifying the girl, her child, or the child's father. The judge varied it to allow the girl

to be identified (*Re Roddy (A Child); Torbay Borough Council v News Group Newspapers* [2003] EWHC 2927 (Fam)).

**Case study:** In 2006 Mr Justice Munby let the media identify Nicola and Mark Webster and their baby son Brandon, despite ongoing care proceedings and objections by Norfolk County Council and a lawyer representing Brandon. See Useful Websites, below, for media coverage of this case. In 2004 the council had removed the couple's three older children, who were later adopted by other families, after one was found to have suffered several fractured bones. The Websters denied that this was caused by physical abuse. Mr Justice Munby said he was not in a position to assess whether the Websters 'may not be the martyrs they claim to be', but that was not a reason to deny them the right to speak to and be identified by the media. 'It is, after all, the underdog who is often most in need of the help afforded by a fearless, questioning and sceptical press.' He made clear that, apart from his acknowledgement of the rights of the Websters and the media under the European Convention's Article 10, he authorised publicity about the case because, after the Websters alleged that they had suffered a miscarriage of justice, there was a pressing need for public confidence in the courts system to be restored by a 'public and convincing demonstration' either that no such miscarriage had occurred or by acknowledgement that it had (*Re Brandon Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam) and [2006] EWHC 2898 (Fam)). Norfolk County Council later withdrew the care proceedings concerning Brandon, saying it was satisfied that the Websters were 'fit and able' to care for him. It was argued for the Websters that the child who had been diagnosed in 2004 as having bone fractures had suffered them because of scurvy and/or iron deficiency, and not from any abuse. But the Court of Appeal ruled in 2009 that it was too late to consider returning these children from the adoptive parents (*Nicola and Mark Webster v Norfolk County Council* [2009] EWCA Civ 59).

Lifting a child's anonymity need not involve the expense of briefing barristers. In 2008 Mr Justice Munby agreed with a mother's e-mailed request to him that she and two of her children could be identified in media reports of how a local authority took the children into care but returned them to the mother 10 months later, after it agreed that was best for them. Mr Justice Munby said that since the care proceedings were concluded, no anonymity applied under section 97 of the Children Act 1989, and that section 12 of the Administration of Justice Act 1960 permitted, within certain bounds, reference to the nature of the dispute with the local authority in the care proceedings (*Re B: X Council v B (No 2)* [2008] EWHC 270 (Fam)).

### Remember!

Section 12 of the Administration of Justice Act 1960, which bans publication of matter aired in private hearings, will – unless a judge orders otherwise – apply permanently, even though anonymity under section 97 of The Children Act 1989 may have ceased. See 14.6 in this chapter.

### Legal disputes about reports identifying a local authority

Sometimes a council may argue that it should not be identified in media reports of a family case. If such an application is successful, the judgment in the case will not identify that council, and any reporting of the case - for example, of the judgment - which does identify the council could be punished for contempt of court.

The ground argued may be that if media reporting identifies the council this would identify the general location of where the family in the case live, in that a council's name reveals what city, district or county is involved. Therefore, the council may argue, such reference to a generalised location could - in 'jigsaw' combination with other case detail - make it more likely that the family's anonymity will be breached. Any such claim by a council about this risk of the family being identified should be closely scrutinised by the court, which should balance such risk against the public interest in open justice which is normally best served by the council being identified. In particular, if the council has been criticised – for example by an expert witness in the proceedings or by the judge - in respect of how it carried out child protection duties, any media organisation interested in the case can argue that there is an increased public interest that the council should be identified in coverage, so local electors can hold it to account, in that public scrutiny can encourage the council to improve procedures. In a decision on whether a council should be identified, a judge will pay heed to the case's particular nature and detail.

**Case study:** In the High Court in 2010 Judge Clifford Bellamy ruled that Coventry city council could be named in media coverage of the outcome of care proceedings. The council had sought the removal of three children from their parents on the basis that the children had been subject to unnecessary hospital admissions, medical examinations and tests, and that this had been caused by the parents lying about or exaggerating the children's symptoms. However, at a late stage the council withdrew this application for care orders after re-considering its evidence. In his judgment, Judge Bellamy was critical of the council's earlier decisions in the case, and also criticised a consultant paediatrician for producing a 'deeply flawed' report, on which £35,000 had been spent. The judge said that by the time the council withdrew the care proceedings legal representation for the children and parents had cost the public purse around £400,000, which came on top of the council's costs. He ordered the council to pay £100,000 towards the parents' costs (*Re X, Y and Z (children)* [2010] EWHC B12 (Fam)). The BBC later successfully applied to the judge for permission to name the council, which he had not identified in that judgment. The parents supported the BBC's application, saying that allowing the media to name the council would not identify their children. The father said too that many of the people with whom the family engaged on a regular basis were already aware that the children had been the subject of care proceedings and that it was only people who were not significant to the family who may conceivably be better able to identify them if the council was named, and the father did not regard that as a problem. Judge Bellamy said: 'So far as concerns the population served by this local authority, there is a legitimate public interest in the local authority being identified...When weighed in the balance against the potential breach of the children's Article 8 rights and the risks that flow from such a breach, is it a proportionate restriction on the Article 10 rights of this BBC to restrain the identification of this local authority? I have come to the conclusion that it is not.' Judge Bellamy noted that it was increasingly the case that local authorities were being identified in judgments on care proceedings so that they can be held publicly accountable, and that the arguments in favour of public accountability are particularly compelling in the context of care proceedings (*BBC v Coventry City Council (care proceedings: costs: identification of local authority)* [2010] EWHC B22 (Fam)).

**Case study:** In 2018 Mr Justice Keehan in Nottingham family court rejected an application by Herefordshire council that it should not be identified in respect of two cases in which he severely criticised its use of section 20 of the Children Act 1989. This section gives councils an interim power to arrange accommodation for a child to live away from his or her family for a short period – for example, for short term fostering for ‘respite care’ or because the family has an unexpected domestic crisis. The power should not be used to delay or avoid use of care proceedings in court, in which councils’ applications for permanent or long-term removal of a child from the family can be considered deeply, and in which the court - to justify removal - has to be satisfied that the child is suffering or at risk of significant harm in the family home. But Herefordshire had been using section 20 powers in some children’s cases continuously over a period of years, which meant their cases had not been considered in care proceedings and so they had been deprived of safeguards in law in decisions about their future – for example, they had not been legally represented or had a ‘children’s guardian’ appointed to be their voice. The judge said the cases before him represented ‘two of the most egregious abuses of section 20 accommodation it has yet been my misfortune to encounter as a judge’. One of the children had been subject to section 20 arrangements for eight years and the other for nine years, his whole life. There were another 14 children for which the council had ‘wrongly and abusively’ used section 20 arrangements for inappropriately lengthy periods and/or when they should have been the subject of legal planning meetings and/or care proceedings at a much earlier time, the judge said. The council’s recently-appointed ‘director for children’s wellbeing’ requested it should not be identified, because adverse publicity about its past failings would aggravate its ‘struggle’ to recruit solicitors and social workers. The judge said he had confidence in the sincerity and commitment of the director to improve very significantly the council’s work with children. But, the judge said, a public judgment which named the council in respect of the section 20 abuses was necessary for the following reasons: the President of the Family Division had repeatedly emphasised the importance of transparency and openness in the conduct of cases; the public have a real and legitimate interest in knowing what public bodies do, or - as in the cases of these particular children - do not do in the public’s name and on their behalf; the council’s failure to plan and take action as regards both children in the case was ‘extremely serious’; and there had been repeated flagrant breaches by the council of guidance from judges. He said that other reasons justifying identification of Herefordshire council were that not to identify it would unfairly run the risk of other councils covered by the Midlands court ‘circuit’ coming under suspicion, in that it would be obvious his judgment was from that circuit; and that the President and judges had always previously taken a robust approach on the identification of local authorities, experts and professionals whose approach or working practices are found to be below an acceptable standard (*Herefordshire Council v AB and CD; Herefordshire Council v EF and GH* [2018] EWFC 10).

See too below: **No automatic anonymity for witnesses giving evidence in a professional capacity**

## 14.6 Contempt danger in reporting on private hearings

Section 12 of the Administration of Justice Act 1960 makes it a contempt of court to publish, without a court’s permission, a report of a private hearing if the case falls into certain categories, including proceedings which:

- relate to the exercise of the inherent jurisdiction of the High Court with respect to children;
- are under the Children Act 1989 or the Adoption and Children Act 2002 or otherwise relate wholly or mainly to a child's maintenance or upbringing;
- are under the Mental Capacity Act 2005, or any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-Tier Tribunal, the Mental Health Review Tribunal for Wales – see 18.2 in *McNae's* - or to a county court;
- are of any kind, where the court expressly bans the publication of all or specified information relating to the private hearing.

The section 12 prohibition, which is explained generally in 12.7 in *McNae's*, applies broadly across family cases heard in private. The definition of 'private' includes some cases which journalists may attend. See also 'The definition of 'private'', below. It could also be a contempt to publish information from a document prepared for use in a private hearing (*Re F (A Minor) (Publication of Information)* [1977] Fam 58; [1977] 1 All ER 114). This would include a witness statement in a dispute between parents over contact arrangements regarding children, or a social worker's report for a court about a child taken into local authority care. Mr Justice Munby said in 2004 that the ban on publishing documents such as witness statements, reports, transcripts or notes made of the judgment, or quotations extracted from them, applied irrespective of whether the information being published was anonymised (*Re B (A Child)* [2004] EWHC 411 (Fam)). It might also be a contempt to publish any of the judgment, unless the judge has agreed to publication – in such cases the published judgment is usually anonymised to protect the privacy of children and others.

- But section 12 does allow publication of any order a court makes in private proceedings, unless the court specifically bans publication of the order.

Also, section 12 does not stop the media making basic reference to a case being heard in private, or, in itself, prevent the media identifying those involved. In *Re B (A Child)*, Mr Justice Munby said section 12 did not ban publication of 'the nature of the dispute' being heard in the private proceedings, or the fact that it concerned wardship proceedings or proceedings under the Children Act 1989 or was otherwise concerned with a child's maintenance or upbringing. He said information which could be published without breaching section 12 included:

- the names, addresses, or photographs of the child and of adult parties involved in the private proceedings;
- and of witnesses involved;
- the date, time, or place of hearings in the case;
- and 'anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court';
- the text or summary of any order made in such a private hearing (unless the court has specifically banned its publication).

As an example of what information could be legally published under section 12 on 'the nature of the dispute', he said it would not prohibit publication that the proceedings concerned whether a mother had

tried to smother or poison her children. But he also noted that anonymity for a child under the Children Act 1989, or any other restriction imposed by the court, would further limit what could be published.

**Case study:** In 1998 the *Daily Mail* was fined £10,000 and the columnist Nigel Dempster £1,000 for contempt after an article revealed that a woman had been portrayed 'as a bad mother who is unfit to look after her children' in case documents prepared for use in proceedings *in chambers*. A High Court judge said the article's reference to this portrayal went 'far beyond a description of the nature of the dispute', which concerned residence arrangements for children after marital breakdown (*X v Dempster* [1999] 1 FLR 894).

The Court of Appeal ruled in 1977 that for there to be a contempt in reporting child cases heard in private, it had to be shown that the publisher knew he/she was publishing information relating to private proceedings, or published the information recklessly, not caring whether or not publication was banned (*Re F (A Minor) (Publication of Information)*).

The punishment for contempt is an unlimited fine and/or up to two years in jail.

**Case study:** In 2007 the Attorney General considered a prosecution for contempt after the *Coventry Times* published quotations from a CAFCASS report prepared for a family court hearing held in private and involving claims that a father had sexually assaulted a child. The published story, airing the mother's complaint that the claims were not properly investigated, preserved anonymity for the child and adults. In the event, there was no contempt prosecution – the Attorney General decided that the public interest would be served by giving the newspaper a chance to highlight in the trade press the contempt danger in such circumstances (*Media Lawyer*, 18 June 2007).

See 14.7, below, for a case study about a judge agreeing that the section 12 restrictions should be relaxed to allow a journalist to write an in-depth report on a family case.

### 14.6.1 The definition of 'private'

The reporting restrictions in section 12 of the Administration of Justice Act 1960 apply if a family case is heard in private.

The current position is that if the Family Court – whether magistrates or a judge preside - excludes the public from a case it is classed as private, even if journalists are allowed to attend under the Family Procedure Rules 2010 (SI 2010/2955) which are explained below. The section 12 restrictions apply unless the court lifts them. If they are not lifted, a journalist can only report limited detail about the hearing, as set out above.

The repeal of section 69 of the Magistrates' Courts Act 1980, which gave journalists an automatic right under to attend family cases which had taken place in magistrates' courts, means that there is now no doubt that Part 27.11 of the Family Proceedings Rules class such hearings at magistrates' courthouses as private - even if journalists attend - so that the restrictions in section 12 of the 1960 Act definitely apply to coverage of such hearings.

### Remember!

There is a particular risk of defamation when publishing a report of court proceedings held in private, because no privilege applies. See also 22.5 - 22.7.3 in *McNae's* on privilege.

## 14.7 Disclosure Restrictions

Part 12.73 of the Family Procedure Rules, reflecting section 12 of the 1960 Act, says no information 'relating to' court proceedings concerning children and held in private, whether or not the information is in documents filed with the court, may be communicated to the public, or to anyone other than lawyers, officials or other specified categories of people, without the court's permission. Part 14.14 contains a similar ban for adoption cases. These Parts therefore implicitly forbid, for example, a parent of a child taken into local authority care, or a lawyer, giving a journalist information about the proceedings (other than the few details permitted by section 12 of the 1960 Act itself), unless the court authorises it. The ban applies whether or not journalists attend the private hearing. A contempt can be committed by communicating such information, even when it is not published. The disclosure ban relates to what is said in the proceedings or information from documents prepared for the proceedings. It does not stop a parent telling in general terms how they feel about the court case or of the wider experience of, for example, a child being removed from them – though any anonymity applying under the Children Act 1989 must be preserved in any report. Even if the case has been heard in public, common law contempt can apply to unauthorised disclosure of documents. See also below, 'Can journalists see documents?' on courts' power to allow journalists at a hearing to see documents to enable them to report it. See also 12.8 in *McNae's*, on the danger of common law contempt in citing from court documents without permission.

**Case study:** A judgment issued in 2015 can serve as a useful model for court orders to lift disclosure restrictions in rules and those in section 12 of the 1960 Act in family cases involving children. The judgment by Mr Justice Bodey approved a draft order produced in detailed negotiations involving journalist Louise Tickle, her barrister Lucy Reed and North Tyneside council about what could be published about care proceedings. The judgment enabled Ms Tickle to research and publish a 5,000 word in-depth report on a mother's experience of the family court system, without Ms Tickle or the mother incurring the risk of committing a contempt of court when making references to case material or to what was said in the private, court hearings. The judgment preserved anonymity for the children and mother involved - Ms Tickle did not want the report to identify them. The mother, who blogs on family court matters, wanted to help Ms Tickle publish it. The judgment meant she could disclose information about the care proceedings to Ms Tickle. It permitted Ms Tickle to be shown case documents to inform the report, provided she did not publish them in full or distribute them. Mr Justice Bodey said that the mother's life had been blighted by serious mental health problems which at times had made it unsafe for her to care for her children, and she and her children had come into and through the care system on a number of occasions. 'Happily those times appear to be behind her'. The mother had shared this experience in 'balanced and reasonable' articles on social media, including references to her own failings and in particular how she fought for her youngest child (who had been removed from her at birth) and how she eventually succeeded in having that child live with her, the judge said. He added that the mother's articles were in some respects critical of some professionals in the care system but 'over-archingly' are written to help others in the system by 'sensible, practical and sensitive advice'. The judge said a reading of what the mother had written did not support an assertion by the council that they

constituted 'complete criticism' of the council. He said that Ms Tickle was an experienced freelance journalist who had written responsible articles and made sensible 'concessions' about how she would prepare her report of the mother's experiences – for example, to preserve anonymisation and as to how Ms Tickle would deal with the ages of the children to avoid 'jigsaw identification'. He had 'no hesitation' in approving the order, which lifted the disclosure and section 12 restrictions as agreed between the parties. He said it appropriately balanced the public interest in the media being able to report care proceedings as against the interest of the privacy of those whose lives are intimately involved (*Tickle v the Council of the Borough of North Tyneside, G (a mother) and H, I and J (children, by the Children's Guardian)* [2015] EWHC 2991 (Fam)).

A journalist wishing to negotiate with a council about the lifting of reporting restrictions covering care proceedings may not find the process easy. In the judgment referred to above, Mr Justice Bodey noted that Ms Tickle's barrister Lucy Reed had calculated she had probably spent eight days all told *pro bono* resolving issues with the council which, she said, would not have been necessary had the council adopted 'a more collaborative approach'. He said that as the council had not had adequate opportunity to respond to this criticism, it would not be appropriate for him to launch into a judgment critical of it in this regard. But, he said, Ms Tickle's application for restrictions to be relaxed showed how such applications require 'time, effort, research and expense on what is essentially a satellite issue'. He said that it is important that in such negotiations local authorities and the media should have 'sensible and responsible dialogue as soon as possible, with a view to finding an early *modus vivendi*', and that even if complete consensus could not be reached (on what order the judge in those proceedings should be asked to make) it should be possible to 'considerably narrow the issues'.

Ms Reed is chair of the Transparency Project which campaigns for greater transparency in family cases. See Useful Websites, below for its website. This charity also helpfully critiques media coverage of such cases.

See too the heading below: **Can journalists see case documents?**

## **Journalists' rights under rules to attend family cases**

Changes in 2009 to procedural rules – consolidated in 2010 as Part 27 of the Family Procedure Rules – gave journalists a presumptive right to attend family cases. But, as explained below, the rules also give courts a variety of reasons for excluding journalists from all or part of a hearing.

**Remember!** The presumption in the rules is that journalists should only be excluded in exceptional circumstances, not as a matter of routine. A journalist arguing against exclusion can, in addition to making points about the particular case, use general arguments about the societal benefits of open justice – see 15.1.1 in *McNae's* – as regards any relevant to a family case.

A general rule in Part 27.10 states that family proceedings involving children will be held in private, except where the 2010 rules or other law provide otherwise, or the court directs otherwise. The definition of 'private', set out in Part 27.11, is that the public cannot attend but 'duly accredited representatives of news gathering and reporting organisations' can attend, and any other person whom the court permits to be present. A journalist is 'accredited' if he/she has a press card from the scheme operated by the UK

Press Card Authority. See Useful Websites, below, for Part 27 in full and about the scheme. A journalist without such a card could be admitted at the court's discretion, if for example, he/she had some other form of identification, such as a letter on a news organisation's headed stationery.

Part 27.11 states that at any stage of the proceedings the court can decide to exclude the media

- if satisfied this is necessary –
  - in the interests of any child concerned in, or connected with, the proceedings;
  - or the safety or protection of a party, a witness, or a person connected with a party or witness;  
or
  - or for the orderly conduct of the proceedings;
- or is satisfied that justice will be impeded or prejudiced if the media attend.

Part 27.11 adds that, at any stage of a case, the following people may make representations to the court to object to the media attending a private hearing: a party; any witness; a Children's Guardian; an officer of CAFCASS or a Welsh family proceedings officer, on behalf of the child who is the subject of proceedings; the child, if of 'sufficient age and understanding'. The court must give the journalist(s) 'an opportunity to make representations'.

The court can decide to exclude the journalist(s), on a ground set out in Part 27.11, even if there has been no objection to media attendance.

These rules were described in 2009 by the then Justice Secretary as helping 'to make family proceedings more open and transparent'. But these rules – compared to those which existed before 2009 - increase the specific grounds on which courts can exclude journalists.

The media cannot attend any private hearing at which the court tries to resolve a case by assisting in 'conciliation or negotiation'.

There are separate rules on access to court hearings on a spouse's right to occupy his/her home after marital breakdown or involving applications for 'non-molestation' orders after allegations of domestic violence. See to the heading below: **Other rules on private hearings.**

### **Practice direction on journalists' attendance at family proceedings**

Practice Direction 27B guides courts on how to interpret Part 27.11 of the rules on journalists attending family cases. See also Useful Websites, below, for the Direction. It says that a court, when considering whether a ground in Part 27.11 justifies a journalist being excluded, should consider whether the 'risk' – for example, to a child's interests, or to the safety of a party or witness – is already avoided because of reporting or disclosure restrictions. See also above: **Disclosure Restrictions.**

As this advice anticipates, a reporter arguing to be allowed to attend such a hearing can point to the protective effect, for those involved in it, of reporting restrictions which apply – for example, anonymity under the Children Act 1989 – unless he/she is also arguing for these restrictions to be lifted.

The Practice Direction indicates that if a witness says he/she will not give evidence in front of journalists, 'credible reasons' must be given for this to be sufficient reason to exclude them.

It also requires a court to state 'brief reasons' for deciding to exclude journalists. The Direction says what notice should be given to the media that argument will be made to exclude journalists.

### **Remember!**

These Part 27.11 rules only apply to hearings from which the public has or will be excluded. They provide no grounds for excluding the media from cases which the public is permitted to attend. Again, a journalist opposing exclusion from a court can argue for the societal benefits of open justice – see 15.1.1 in *McNae's*.

### **Legal bloggers gain right to attend in pilot project**

In 2018 the Family Rules Procedure Committee agreed to a pilot scheme to run from 1 October 2018 until 30 June 2019 to permit practising lawyers, academic lawyers and lawyers working with approved educational charities to attend family courts to blog about their cases. The normal reporting restrictions will apply unless lifted in particular cases by the court. For details of procedures which must be followed by those eligible to attend in the pilot, see Practice Direction 36J and information – in Useful Websites, below – from the Transparency Project charity which proposed the pilot.

The pilot was enabled by modification to Part 27.11 rules to allow the attendance of 'duly authorised lawyers attending for journalistic, research or public legal educational purposes'.

## **14.8 Other reporting restrictions in family proceedings**

Other reporting restrictions - as well as those under the Children Act 1989 and, if the hearing is private, under section 12 of the Administration of Justice Act 1960 - may apply to hearings.

### **Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968**

Some types of family case – for example, about not paying maintenance, or for declarations about parentage, legitimacy or marital status – are covered by automatic reporting restrictions under section 2 of the Domestic and Appellate Proceedings (Restriction of Publicity) Act 1968 in any court which hears such a case or an appeal. The section lists the types of cases it covers. The Act applies the restrictions set out in section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926 – see below – with the same liability in the event of breach.

These restrictions limit the reporting of evidence to what the magistrate or judge says, and any accompanying observations made, in giving the court's decision. In relevant cases 'the particulars of the declaration sought' can be published, instead of a 'concise statement of charges, defences, and counter-charges in support of which evidence has been given'.

**Remember!** If any current case involves use or potential use of powers under the Children Act 1989, the anonymity provisions of that Act apply – see 14.4, above.

### **Other restrictions**

All civil courts have discretion to make an order under section 39 of the Children and Young Persons Act 1933 to prevent media reports of a case identifying a child aged under 18. But there must be a good reason to make a section 39 order, and the child must be 'concerned in the proceedings', as explained in 10.9 and 16.7.5 in *McNae's*.

Any child or adult alleged to be the victim of a sexual offence has lifetime anonymity under the Sexual Offences (Amendment) Act 1992 in respect of that allegation - see 11.1 - 11.3, 11.5 and 11.7 - 11.8 in *McNae's*.

NB: Domestic violence proceedings under Part IV of the Family Law Act 1996, including applications for non-molestation orders and occupation orders, are not covered by any automatic reporting restrictions. But if the proceedings are held in private they will be covered by the restrictions in section 12 of the Administration of Justice Act 1960 – see 14.6. above.

For reporting restrictions in divorce and other matrimonial cases and in High Court injunctions, see below.

### **Other rules on private hearings**

Parts 8.11 and 8.27 of the Family Procedure Rules provide for some, but not all, types of hearing about maintenance and financial provision to be heard in private.

Part 10.5 says an application under Part 4 of the Family Law Act 1996 for an occupation order or a non-molestation order will be heard in private unless the court directs otherwise. These types of hearing involve the right of spouse or partner to occupy a matrimonial or civil partnership home, or application by one person for another – for example, an estranged partner - to be ordered to desist from harassment or other 'molestation' when domestic violence has occurred or is alleged.

For these Part 8 and Part 10 rules the default position is that when the hearing is private neither members of the public nor journalists can attend.

Different rules cover divorce, nullity, judicial separation and civil partnership cases – see below.

**Remember!** A reporter barred from a court should ask what rule is being applied – see too 15.10 in *McNae's*. For general advice on how to challenge a court decision, see 16.4.1 in *McNae's*.

Section 101 of the Adoption and Children Act 2002 gives courts discretion to hear adoption cases in private.

### **General rule – committal hearings to be in public**

Part 37.25(5) of the Family Procedure Rules says that if the High Court is considering jailing someone for contempt of court the hearing will be heard in public, but may be in private for cases involving children or mental patients. There is similar provision in rule 6 of the Rules of the Supreme Court Order 52 for a private hearing in these circumstances. See Useful Websites, below for the Family Procedure Rules. In March 2015 the Lord Chief Justice, Lord Thomas, issued a Practice Direction making clear that all committals, in any court, must be heard in public, and, whenever possible, be properly listed in advance

of the hearing. Any court considering holding a committal hearing in private is also required to notify the national media through the Press Association's Injunctions Alerts Service. In all cases, whether heard in public or in private, a court which finds that someone has committed a contempt of court, must, at the end of the hearing sit in public and state the person's name, the nature of the contempt – in general terms – for which he or she is being committed to jail, or being given a suspended committal order, and any other punishment being imposed. See Useful Websites at the end of this chapter.

### The higher courts

The Court of Appeal and the House of Lords almost invariably hear appeals in family cases in open court, but may impose reporting restrictions.

### Can journalists see case documents?

Journalists covering family case hearings are likely to need to read case documents in order to report the case coherently. The magistrates or judge, parties, lawyers and officials will have read the papers beforehand, so few are read aloud in the proceedings. The documents may well refer to very private matters, and parties may object to them being shown to journalists.

Practice Direction 27B says that Part 27 of the Family Procedure Rules does not automatically permit a journalist, if allowed to attend a hearing, 'to receive or peruse court documents referred to in the course of evidence, submissions' or the 'written reasons' for decisions made or the judgment. The Direction says journalists should only be given access to such documents if the court allows, or 'otherwise in accordance' with rules relating to disclosure to 'third parties'. As explained below, the usual effect of these rules is to ban parties from showing such documents to journalists (who would be 'third parties'). See also the heading, above: **Disclosure Restrictions**.

The then President of the Family Division, Sir Mark Potter, said in guidance issued in 2009 that when a journalist applied to be shown court documents, the court should ask the parties for their consent for the journalist (subject to appropriate conditions as to anonymity and restrictions on 'onward disclosure') to see 'summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case'. If any party demonstrated 'reasonably arguable grounds' for resisting such disclosure, a county court or magistrates court should transfer the proceedings to the High Court for determination of the issue. See Useful Websites, below, for the Direction and guidance.

**Case study:** In October 2014, a Press Association reporter obtained access to some of the written submissions handed in during Family Division proceedings in a legal battle between a multi-millionaire boss of the Laura Ashley business and his estranged wife. The reporter, who was at a hearing being held in public, asked Mr Justice Bodey if he could see the documents so that he could understand and report the case fully. Mr Justice Bodey said that journalists could be given some of the written papers prepared by lawyers. The case involved a battle over assets between former beauty queen Pauline Chai, 67, and her estranged husband, 75-year-old Khoo Kay Peng, non-executive chairman of Laura Ashley Holdings. The couple, who were both from Malaysia, were embroiled in a long legal battle over money and litigation over where a final trial should be held. For more detail of that case, see below: **Hearings about financial orders**.

See too the case study in 14.7, above, on how a journalist was granted access to documents from care proceedings, to inform an in-depth report.

## 14.9 Anti-publicity injunctions in family cases

The High Court has *inherent jurisdiction* to order that a person must be anonymous in published reports of its proceedings and judgments, if statute law does not already provide such anonymity. To ignore such an injunction is to commit a contempt of court. Injunctions can be issued to protect children, and mentally or physically incapacitated adults in cases in which the court is ruling on their care, medical treatment, or whether they should be kept alive. The House of Lords made clear in *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47 that the scope of this inherent jurisdiction to restrict reporting derives, since the Human Rights Act 1998 incorporated the European Convention on Human Rights fully into UK law, from privacy rights in the Convention's Article 8, and no longer relies on earlier case law. For detail on Article 8, see 1.3 in *McNae's*.

### Alerts for the media

In 2005 the then President of the High Court Family Division issued a Practice Direction that a party applying for such an injunction should give national media organisations advance notice by using the Injunctions Alert Service operated by the Press Association in order to comply with section 12 of the Human Rights Act 1998 (*President's Practice Direction Application for Reporting Restriction Orders* [2005] 2 FLR 120). Section 12 of the 1998 Act is explained in 27.1 in *McNae's*. Practice Direction 12I of the Family Procedure Rules 2010, which mirrors that requirement, also points to guidance in *Practice Note: Official Solicitor: Deputy Director of Legal Services: CAFCASS: Applications for Reporting Restriction Orders* [2005] 2 FLR 111), which was issued at the same time as the original Practice Direction. See Useful Website, below, for Practice Direction 12I.

The Practice Note warns that the Press Association's injunction alerts service does not extend to local or regional media or magazines, and that if service of the application on any specific organisation or person not covered by the alerts service was required, it should be 'effected directly'.

In 2005 in *A Local Authority v W and L and W and T & R*, (By the Children's Guardian) [2005] EWHC 1564 (Fam), Sir Mark Potter said that 'it will almost invariably be practicable and appropriate to give notice, however short, to the local press in a case of high public interest'. He added: 'It is necessary to emphasise, as the Direction provides, that, whereas the court retains the power to make *without notice* orders, such cases should be exceptional. In this connection, local authorities and others concerned with an application of the instant kind should be astute to plan in advance for such an application to be heard and so to avoid placing the judge to whom the application is made in a position of urgency whereby the judge may feel obliged to make an order which, if fully argued on notice, might not have been made.'

Sir Mark repeated his warning about the need for proper notice to be given in a number of cases, for example *Re Child X (Residence and Contact - Reporting Restrictions)* [2009] EWHC 1728 (Fam).

Judges have also stressed the need for notice. In one case Mr Justice Holman issued an injunction which bound only those news organisations which were given advance notice of the application, saying that the

law prohibited him from issuing the order against those which were not notified – including the local press – because the local authority involved did not have any compelling reason for not having notified them (*Re Jane [A fictitious name] (A Child)* [2010] EWHC 3221 (Fam)).

Notification should also include the identities of the parties involved. In *A Healthcare NHS Trust v P (by his litigation friend, the Official Solicitor) and Q* ([2015] EWCOP 15) Mr Justice Newton, sitting in the Court of Protection, ordered that the Press Association's injunctions alerts service should be supplied with the names of the parties, including the patient who was the subject of the application, so that the media organisations being notified would be able to make an informed decision about whether they wished to object to any application for anonymity or other reporting restrictions. Publishing details given in any notification would itself be a contempt of court at common law, he said.

### **Newsgathering activity can be banned**

A High Court injunction can forbid news-gathering or other activity which, irrespective of what has been or may be published, is deemed likely to jeopardise a person's welfare or privacy, or could lead to the subjects feeling harassed.

**Case study:** In 2008 Mr Justice McKinnon banned media organisations from approaching two women whose father was jailed at Sheffield Crown court for life for having repeatedly raped them in their childhood and adulthood, and fathered children by them. The order also banned the media from 'attending at or remaining in the vicinity' of any address at which the daughters and/or any of their children lived or had lived, in circumstances in which media activity would make it likely that the daughters or their children could be identified 'directly or indirectly' to the public in connection with the rape case. To comply with the automatic statutory anonymity for rape victims media reports of the rape trial had not named the father, the daughters, or any of their children. But lawyers for the daughters argued that detail in some reports meant that news-gathering activities could lead to local communities realising where the women and their children had lived, which would identify them. Again, the law on anonymity for sexual offence victims is explained in 11.1 – 11.3, 11.5 and 11.7 - 11.8 in *McNae's* (and for associated ethical considerations, see 11.9 in *McNae's*).

### **No automatic anonymity for witnesses giving evidence in a professional capacity**

Judges have been in the habit of giving social workers and expert witnesses such as doctors or psychiatrists anonymity in published judgments in child protection cases heard in private. But senior judges have made clear that social workers and expert witnesses should not normally be given anonymity under Article 8 for evidence given in court.

**Case study:** In 2005 the High Court agreed that the BBC, in a documentary about discredited allegations of 'satanic' abuse in Rochdale in 1991, could identify two social workers involved in that case. They were criticised in an anonymised judgment in 1991 and wanted their anonymity maintained (*British Broadcasting Company v Rochdale Metropolitan Borough Council and X and Y* [2005] EWHC 2862 (Fam)).

**Case study:** In 2010 the High Court ruled that a couple could name witnesses, including experts, clinicians and social workers, when speaking publicly about their son William Ward having been made the subject of care proceedings when three months old. Those proceedings had begun after fractures of William's right tibia were discovered, but ended when a judge found in favour of the parents because there was no evidence of ill-treatment or poor parenting. Lord Justice Munby rejected argument that the witnesses needed anonymity as a general protection from people with grievances against the family justice system. He said that in this case no real risk to such witnesses had been established (*A v Ward* [2010] EWHC 16 (Fam)). See also 16.6.3 in *McNae's* on whether anonymity is justified because of risk of attack.

## Family law injunctions restricting reports of criminal and inquest proceedings

In some instances, High Court injunctions made in family law cases have restricted media reports of criminal or inquest cases.

In the 2004 case of *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, the House of Lords ruled that the media's freedom to report a criminal trial should not be restricted to protect the privacy of a child who was not involved in it. A mother was accused of murdering her nine-year-old son by poisoning him with salt. Her younger son, aged eight, was subject to care proceedings brought by a local authority, which applied to the High Court for an injunction to stop the media naming the mother or the dead son in reports of the pending murder trial, or publishing photographs of them, or identifying the surviving son. In the House of Lords, Lord Steyn said the publicity impact on the surviving son would be essentially indirect. He added that if such an injunction was granted the process of piling exception upon exception to the principle of open justice would thus be encouraged and would gain momentum, to the detriment of the media's role in reporting criminal cases. The spectre of being involved in costly legal proceedings to oppose such injunctions was bound to have 'a chilling effect' on local newspapers, which did not have the financial resources of national newspapers, he said

But in 2005, the High Court Family Division banned the media from identifying a defendant in a criminal trial, in order to protect her children from publicity, although they were not involved in the criminal case. The mother was awaiting sentence after admitting knowingly infecting a man with the HIV virus. He was the father of one of the children. The local authority argued that if media reports identified the mother, the placement of her children with foster parents would be prejudiced because of the stigma of HIV, and the children were likely to face continued ostracism in the community (*Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Fam)).

In 2007 the High Court banned the media from referring, in coverage of an inquest, to the existence of a five-year-old girl (*Re LM (Reporting Restrictions: Coroner's Inquest)* [2008] 1 FLR 1360). The inquest was into the death of her older sister. The surviving child had been removed from the parents after a family court concluded that the mother caused the sibling's death through ill-treatment. But the High Court refused an application by the five-year-old's legal guardian to block media reports of the inquest from identifying the dead child and parents. It had been argued that publicity naming them would undermine the surviving girl's therapy and jeopardise efforts to get her adopted.

## 14.10 Coverage of divorce, nullity, judicial separation and civil partnership cases

Divorce, judicial separation, or nullity cases, or proceedings to end a civil partnership, are dealt with by the county courts, with some being transferred to the High Court.

Divorce proceedings, the most common action in this type of case, begin with either the wife or the husband – the petitioner – lodging a petition for a divorce at a county court. The petition is served on the other spouse, the respondent, who is required to state whether he/she intends to contest the petition – that is, whether he/she wants to stay married. Most cases are uncontested. Lists of petitioners granted a decree nisi – the first stage of a divorce – are read out in open court. The decree is later made absolute (usually after six weeks), which means the parties are then free to marry someone else. In a contested case, the husband, wife and possibly other witnesses may attend court to give evidence.

Reporting restrictions, see below, apply to divorce, judicial separation and nullity cases, and proceedings to end a civil partnership – whether the report is of a hearing in a contested case or of case documents.

**Case study:** In 2010 a district judge decided that the hearing for the uncontested divorce between footballer Ashley Cole and estranged wife Cheryl should be listed only by their initials, not their names, after an application by solicitors representing the pair. Journalists criticised what they believed was an attempt to avoid publicity about the case. A spokeswoman for the Judicial Communications Office said the decision had regard to 'the proper balance between the parties' rights under Article 8 European Convention on Human Rights and the right of the press under Article 10, in the circumstances of the particular case.' The court had not made any order restricting, or imposing anonymity in, any publication, the spokesman added. Solicitor Mark Stephens, a media specialist partner at what is now law firm Howard Kennedy, said the decision was open to appeal, and that it was 'a scandalous abuse of process' for the application to have been made without notice to the media. He added: 'This was a cynical and pre-meditated attempt to prevent the media from reporting something which would otherwise be in open and public court' (*Media Lawyer*, 15 October 2010).

In these cases there may be hearings on financial orders (previously known as 'ancillary relief') – that is, the division of property and other financial arrangements between estranged couples. Reporting restrictions may apply too to this type of hearing. See below.

### Can journalists attend?

Part 7.16 of the Family Procedure Rules 2010 state that as a general rule matrimonial and civil partnership proceedings are heard in public. But Part 7.16 also says a hearing, or any part of it, may be in private if publicity would defeat the object of the hearing; it involves matters relating to national security; it involves confidential information (including information relating to personal financial matters ) and publicity would damage that confidentiality; a private hearing is necessary to protect the interests of any child or protected party; it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; or the court considers a private hearing to be necessary in the interests of justice.

**Case study:** In June 2009 the High Court Mr Justice Munby, as he was then, rejected an application by Earl Spencer and his former wife Caroline for reporters to be excluded from an ancillary relief (financial orders) hearing arising from their divorce. Their lawyers had suggested the media's interest in the case arose not from any profound point of principle at stake in it, but because the public had an insatiable appetite for reading about the affairs of the famous. But, the judge said 'there may well be, and on the face of it there plainly is, a public interest... in the media being able to attend proceedings in court, acting, as it were, as the eyes and ears of the public and as the watchdog of the public. There is, in that sense, an important public interest which transcends the subject matter of the litigation' (*Countess Spencer v Earl Spencer* [2009] EWHC 1529 (Fam)). Again, 15.1.1 in *McNae's* explains the societal benefits of open justice.

### Hearings about financial orders

In the matrimonial and civil partnership proceedings there may be hearings on financial orders – known as 'ancillary relief' – that is, the division of property and other financial arrangements between estranged couples. There is considerable confusion as to whether such hearings are public or private. Two judges in the Family Division of the High Court take contrasting attitudes to the issue. Mr Justice Holman, who generally deals with the issues at public hearings, has said there is a 'pressing need' for more openness. But Mr Justice Mostyn, who generally deals with such cases in private, has described couple's cash disputes as 'quintessentially private business'. In February 2016 a third Family Division judge, Mr Justice Moor, called for the Court of Appeal to tackle the question. He told a Press Association reporter during a public hearing: 'Presumably, sooner or later, somebody is going to appeal. It is overdue. It just seems to me that this difference of opinion between the other judges and Mr Justice Holman needs to be dealt with.'

**Case study:** In 2008 Mr Justice Bennett ruled that Heather Mills should get £24.3 million in ancillary relief after her divorce from ex-Beatle Paul McCartney. She failed to persuade the Court of Appeal that this High Court judgment, which contained criticism of her, should be kept private (*Media Lawyer*, 25 March 2008).

**Case study:** In February 2016 Mr Justice Bodey ordered the non-executive chairman of the Laura Ashley group to make his wife an offer in their 'Titanic' battle over ancillary relief. The couple had run up costs of £6.1 million or more during a long legal battle following the collapse of their marriage. The judge gave 77-year-old multi-millionaire Khoo Kay Peng, just 21 days to comply with a direction to 'lay out his stall', and possibly save further massive costs. Dr Khoo's former beauty queen wife Pauline Chai, 69, would then have seven days to say what offer she is willing to accept to achieve a 'clean break'. The bulk of the battle between the pair was fought out in public hearings (*Press Association*, 12 February 2016).

Again, reporting restrictions may well apply to ancillary relief hearings even when reporters are allowed to attend, see below.

### 14.10.1 Inspection of evidence and copy of decree

Part 7.20 of the Family Procedure Rules 2010 permits anyone, within a period of 14 days after the decree nisi is made, and if it has not been contested, to inspect and make copies of an evidential statement which Part 17.19 requires the petitioner to supply before the decree can be made. This statement must tell the court if there have been any changes in the information given in the application for the divorce. The reporting restrictions covering divorce proceedings, explained below, may limit what can be published from the statement.

Part 7.36 allows anyone to obtain from the court a copy of the decree absolute. Representations by the Newspaper Society (now replaced by the News Media Association) ensured that journalists can still make 'on-the-day' inspection searches for decrees absolute if they attend the Principal Registry of the Family Division, but reorganisation there means that members of the public, even when they attend in person, may now have to wait up to two weeks to see these decrees.

In the very rare cases in which a divorce case or the ending of a civil partnership is contested by one of the parties, Part 22.19 of the rules may be of use to journalists. This says that a witness statement which stands as evidence in chief is 'open to inspection' during the course of the final hearing unless the court directs otherwise. This rule says too that the court will not make such a direction (order) unless it is satisfied that the witness statement should not be open to inspection because of the interests of justice; the public interest; the nature of any expert medical evidence in the statement; the nature of any confidential information (including information relating to personal financial matters) in the statement; or the need to protect the interests of any child or protected party. The rule says too that the court may exclude from inspection words or passages in the witness statement. Again, the reporting restrictions covering divorce proceedings apply to what can be published from witness statements. Note the 'concise statement' requirement, referred to below.

### Reporting restrictions in matrimonial and civil partnership cases

Media reports of matrimonial proceedings – that is, divorce, nullity and judicial separation cases - or proceedings to end a civil partnership are restricted by section 1(1)(b) of the Judicial Proceedings (Regulation of Reports) Act 1926, which limits them to the following information:

- the names, addresses, and occupations of parties and witnesses;
- the grounds of the application and a concise statement of the charges, defences, and counter-charges in support of which evidence has been given;
- submissions on any point of law arising in the proceedings and the decision of the court on the submissions;
- the summing up of the judge, the judgment, and any observations made by the judge in giving it.

Parliament enacted the legislation in 1926 to curb the practice by some newspapers of reporting salacious evidence from divorce cases – the most newsworthy of which involved the upper classes – at great length.

In a divorce case, the 'charges' made by the petitioner are the grounds for seeking a divorce, for example, the spouse's adultery, desertion, or unreasonable behaviour. The restrictions mean that media reports of

contested divorce actions are primarily based on what is said by the judge in judgment, though this may well provide a lengthy account of the case's issues. The safest course for a journalist at a hearing in a contested divorce is to wait until all evidence in the case has been given, to guard against the withdrawal of key elements, because of the stipulation that charges, defences, and counter-charges can only be reported if evidence is given in support of them. The restrictions also apply to reports of case documents. If these restrictions are breached, 'a proprietor, editor, master printer or publisher' is liable for a jail term of four months and/or a fine. The Attorney General must give consent for a prosecution for breach of the restrictions.

In *Countess Spencer v Earl Spencer* Mr Justice Munby declined to express any view on whether the reporting restrictions in the Judicial Proceedings (Regulation of Reports) Act 1926 applied to hearings on financial orders.

Part 7.16 of the Family Procedure Rules 2010 says a court hearing matrimonial and civil partnership cases may order that the identity of any party or witness must not be disclosed if it considers this necessary to protect the interests of that party or witness.

### **Disputes over financial provision for children**

As explained above in 14.4, if a legal dispute, before or after divorce proceedings, between a couple about a child involves proceedings under the Children Act 1989 – for example, about financial, residence or contact arrangements – the Act bans identification of any such child (and therefore also of his/her parents) in media reports. But hearings about 'financial orders' (formerly known as ancillary relief) arising from divorce proceedings do not necessarily involve the 1989 Act.

Also, Mr Justice Munby said in *Countess Spencer v Earl Spencer* that it would be 'very unusual' for the reporting restrictions of section 12 of the Administration of Justice Act 1960, which are explained in 14.6 above, to apply to any ancillary relief hearing held in private. He said that even when points were made in such hearings in relation to children – for example, on how big a house was needed for them, or whether they needed a nanny – the focus would be on the financial affairs of the parties, not the children's welfare, which was why section 12 was unlikely to apply. Similarly, the disclosure restrictions under Part 12.73 of the Family Procedure Rules 2010 do not necessarily apply to private hearings about financial orders arising from divorce proceedings but may apply if the 1989 Act is involved, for example, financial compensation for breach of a contact order. See also the heading, above: **Disclosure Restrictions**.

### **Ethical considerations when covering stories involving children**

Journalists covering family cases may wish to interview, photograph or film the parents and children involved. Laws outlined above may restrict what can be published. Ethical considerations also apply.

Practice 8.21 of the Ofcom Broadcasting Code says: 'Where a programme features an individual under sixteen or a vulnerable person in a way that infringes privacy, consent must be obtained from:

- a parent, guardian or other person of eighteen or over in loco parentis; and
- wherever possible, the individual concerned;

- unless the subject matter is trivial or uncontroversial and the participation minor, or it is warranted to proceed without consent.'

Clause 6 of the Editors' Code of Practice overseen by the Independent Press Standards Organisation (Ips0) says: 'A child under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.'

However, even when a parent consents to a child being interviewed, photographed or filmed, journalists must still decide if such activity is in the child's best interests, even if what is published preserves his or her anonymity.

For example, clause 6 of the Editors' Code also says: 'Children under 16 must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.' In 2009 the PCC issued guidance on this part of clause 6 after controversial coverage in the media of claims that Alfie Patten, aged 12, was a father – see Useful Websites, below. The High Court used its powers to restrict media coverage in this case, to protect the welfare of children involved (*Re Stedman and others* [2009] EWHC 935 (Fam)).

Note that 4.13 in *McNae's* explains provision in the codes for protection of children, and there are case studies featuring the codes in the Additional Material for ch. 4 on [www.mcnaes.com](http://www.mcnaes.com).

## 14.11 The Court of Protection

The Court of Protection, which is part of the Family Division of the High Court, is a specialist court which deals with issues which arise under the Mental Capacity Act 2005, which sets out a legal framework empowering the court to act for and make decisions on behalf of adults who lack the capacity to make particular decisions for themselves. Typical issues which arise include questions of whether medical treatment for someone in a persistent vegetative state should be continued or withdrawn, or whether it would be lawful for doctors to perform life-saving surgery on an individual with serious mental health problems who refuses to consent to the operation. The court also deals with issues such as the care and treatment of people with dementia or Alzheimer's disease, and with arrangements for their financial affairs, for example approving lasting powers of attorney for a relative to run their financial affairs.

The Court of Protection, which was established by the Mental Capacity Act, established a reputation for secrecy because its rules stated that its hearings were to be held in private. They included provision for the media to be able to apply for access, but any media organisation which managed to get a journalist into a hearing then faced the problem of having to argue about what might or might not be reported. The result was that the media had to fight a long and expensive battle – in which *The Independent* played a major part – to prise open the doors of the court.

**Case study:** A judge in the Court of Protection allowed the media to report most of the proceedings in a case involving a claim that a local authority acted unlawfully when it kept an autistic man with learning difficulties in a council support unit and away from his family home. Mr Justice Peter Jackson imposed only minimal restrictions, and said journalists could report his full judgment in the case of disabled Steven Neary, 21, as well as what happened at hearings which took place between

23 and 27 May 2011. But he did order that they could not report 'details of individual incidents' involving Steven Neary, or identify individual social workers, care assistants, support workers or specific social services facilities or other leisure facilities which Steven used. The judge's order followed an application by a group of media organisations headed by *The Independent*, supported by Guardian News and Media Ltd, Times Newspapers Ltd, the BBC and the Press Association. The case - the first in which journalists were able to attend proceedings held in private and report on them to the extent allowed - arose after Hillingdon Council took Steven Neary into a support unit for two weeks' respite care to give his father Mark Neary, his main carer, a break – then decided that he should remain in its care. It then planned to move to a residential home from way from the borough. Mark Neary fought a year-long battle to get his son home, and finally the council applied to the Court of Protection for an order confirming its right to keep Steven Neary in its care - and was instead ordered to return him to his father.

Since 2016 the Court of Protection has been conducting a 'Transparency Pilot Scheme' in which sittings were generally being held in public, but with reporting restrictions being imposed to protect the privacy of families and individuals involved in cases. This pilot scheme was continuing as the 24th edition of *McNae's* was published. The general result of the scheme, according to journalists, is that it has greatly decreased transparency and their ability to report on Court of Protection cases. Judges in the Court of Protection have themselves said that they believed it was in the public interest that the media should be able to report on cases.

In September 2011 Mr Justice Baker said it was in the public interest that cases such as that involving a woman in a minimally conscious state whose family wanted her to be allowed to die should be 'reported as widely and freely as possible'. His declaration came in a judgment in which he ruled that life-supporting treatment should not be withdrawn from the patient, a brain-damaged 52-year-old former hairdresser, who could be referred to only as M. The judge said an English court had never before been asked to consider whether life-supporting treatment should be withdrawn from a patient who was not in a persistent vegetative state but was minimally conscious. Mr Justice Baker said when he handed down his final judgment that the decision to hold the hearing in public had been vindicated, and went on: 'Provided that the privacy of the individuals involved is fully respected, it is imperative that the press should be as free as possible to report cases of this sort. The issues involved are of fundamental importance to all of us, both collectively and individually. For society as a whole, they touch upon the very challenging issues, currently the subject of much public debate, about the treatment of those suffering from severe disability, and those nearing the end of their lives. For each of us as individuals, they draw attention to the question of how we would wish to be treated should we find ourselves in a vegetative or minimally conscious state. The public needs to be informed about how such questions are resolved, be it under the advance decision procedure in sections 24 to 26 of the Mental Capacity Act or by application to the Court of Protection. It is therefore in the public interest for such cases to be reported as widely and freely as possible, provided that due respect is paid to the wishes of the family to protect their privacy.'

### **Access to the Court of Protection**

The Court of Protection rules in force in 2016 were temporarily been superseded by the transparency Pilot, under which all hearings are in public unless the court decides to hear a case in private.

Rule 90 of the Court of Protection Rules 2007 states: 'The general rule is that a hearing is to be held in private.' But the court does have power, under Rules 90, 91 and 92, to order that a hearing will be in public – as it does in cases involving applications for the withdrawal of medical treatment, for example – or that while the hearing remains in private, certain classes of people, such as journalists, may be allowed to attend, as well as to authorise or ban the publication of information, such as the judgment in the case.

Rule 93 (1) (a) says orders under Rules 90, 91 or 92 may be made 'only where it appears to the court that there is a good reason for making the order'. This means, in effect, the any journalist or media organisation wishing to attend a Court of Protection hearing must first persuade the court that there is a good reason for allowing him or her to do so.

Having overcome the hurdle of getting into the court, the journalist or media organisation then faces having to persuade the court to allow reporting of the proceedings. This can be problematic, as many families of those whose cases get to the Court of Protection may be against any form of publicity, often in the belief that even anonymous reporting will identify them. There is, however, little if any evidence to show that any individual whose participation in Court of Protection proceedings has been reported anonymously has been identified to members of the public as a result of that reporting.

Any journalist considering trying to cover a Court of Protection case would be wise, before doing so, to make to make him or herself familiar with Rules 90-93 of the Court's rules. See Useful Websites, below.

## **Recap of major points**

- Family courts are difficult to report, because reporting restrictions apply in many cases.
- But the cases in these courts contain newsworthy stories, some of great public interest.
- A child involved in ongoing proceedings under the Children Act 1989 should not be identified in media reports of such cases, unless the court authorises it. The same anonymity applies to any wider feature referring to the child's involvement in such a case.
- The High Court has wide-ranging powers to protect the welfare of children and others, including by making anonymity orders.

## **Useful Websites**

**<https://www.judiciary.uk/publications/the-family-courts-media-access-and-reporting/>**

An official guide for journalists, judges and practitioners explaining the law on reporting family courts, issued in 2011 by the then President of the Family Division Sir Nicholas Wall, the Society of Editors, and the Judicial College.

**<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/transparency-in-the-family-courts-jan2014.pdf>**

Transparency in the Family Courts

**<http://www.family-solicitors.co.uk>**

Online guide to family law

<https://www.gov.uk/child-maintenance>

Child Maintenance Service and Child Support Agency

<http://www.cafcass.gov.uk>

Children and Family Court Advisory and Support Service

<http://news.bbc.co.uk/1/hi/uk/852109.stm>

BBC reports on Bobby Kelly, when he was a ward of court.

<http://www.guardian.co.uk/society/2006/nov/04/childrenservices.uknews?INTCMP=SRCH>

Part of *The Guardian's* coverage of the Brandon Webster case

[http://www.justice.gov.uk/courts/procedure-rules/family/rules\\_pd\\_menu](http://www.justice.gov.uk/courts/procedure-rules/family/rules_pd_menu)

Family Procedure Rules 2010

[http://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_27b](http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_27b)

Practice Direction 27B

<http://www.transparencyproject.org.uk/>

Transparency Project

<http://www.transparencyproject.org.uk/legal-bloggers-pilot-announced/>

Transparency Project information on legal bloggers pilot

<http://www.transparencyproject.org.uk/press/wp-content/uploads/Media-Guide-Mar-17.pdf>

Transparency Project guide to reporting family courts

[https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/practice-direction-36j-pilot-scheme-transparency-attendance-at-hearings-in-private](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-36j-pilot-scheme-transparency-attendance-at-hearings-in-private)

Practice Direction 36J

<http://www.medialawyer.press.net/courtapplications>

Press Association Injunctions Alerts Service

[http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12i.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/family/practice_directions/pd_part_12i.htm)

Practice Direction 12I

<https://www.judiciary.uk/wp-content/uploads/2015/03/practice-direction-committals-for-contempt.pdf>

Practice Direction on Committal Hearings for Contempt of Court

<https://www.theguardian.com/media/2009/jul/02/pcc-drops-alfie-patten-investigation>

Guardian report on PCC response in Alfie Patten