

PRACTICE NOTE

OFFICIAL SOLICITOR: DEPUTY DIRECTOR OF LEGAL SERVICES CAFCASS

APPLICATIONS FOR REPORTING RESTRICTION ORDERS

1 This Note sets out recommended practice in relation to any application in the Family Division founded on Convention rights for an order which restricts freedom of expression. It is issued in conjunction with the President's Practice Direction "Applications For Reporting Restriction Orders" dated 18 March 2005 and is subject to decisions of the courts. It applies directly to any proceedings in which CAFCASS or the Official Solicitor represent a child or incapacitated adult, and follows discussions between the Official Solicitor, the Deputy Director of Legal Services CAFCASS, and representatives of media interests.

2 **Statutory Provisions**

An application founded on Convention rights need only be made where statutory provisions cannot provide adequate protection. Relevant provisions are Administration of Justice Act 1960, s.12(1); Children and Young Persons Act 1933, s.39; Contempt of Court Act 1981, s.11; Children Act 1989, s.8 (prohibited steps order preventing disclosure of information by parental figure) and s.97(2). While the President's Practice Direction is not aimed at applications under these provisions, s.12(2) of the Human Rights Act 1998 applies to any application for relief which might affect the exercise of the Convention right to freedom of expression and the procedures set out in this Note, including the arrangements for advance notification, can be used to secure compliance with this section in relation to any such application under these provisions.

An order founded on Convention rights may be required, for example, because:

- the need for protection is not linked to particular court proceedings
- the statutory provisions do not prevent publication of all kinds of information
- an injunction is needed to prevent approaches to family, doctors or carers.

3 **Application and Evidence**

The application may be a freestanding claim brought under the Part 8 procedure in the Civil Procedure Rules 1998 or it may be made within existing proceedings to which either the CPR or Family Proceedings Rules 1991 apply. It may be appropriate to seek a direction under CPR 39.2(4), where it applies, that the identity of a party or witness should not be disclosed, and for documents to be drafted identifying individuals by initials.

The applicant should prepare (a) the application/claim form (b) a witness statement justifying the need for an order (c) any legal submissions (d) a draft order and (e) an explanatory note.

Model Forms of Order and an example of an explanatory note are attached to this Practice Note and can be downloaded from the websites of either the Official Solicitor (www.offsol.demon.co.uk) or CAFCASS (www.cafcass.gov.uk).

In the rare event that it is not possible to draft such documentation in the time available before the hearing, the court is likely to require the applicant to file a statement at the earliest opportunity, setting out the information placed orally before the Court.

Subject to any contrary direction of the court, this material should be made available on request to any person who is affected by the order. See *W–v-H (Family Division: Without Notice Orders)* [2001] 2 WLR 253; [2001] 2 FLR 927.

4 **Service of Application**

As required by the Practice Direction, advance notice should normally be given to the national media via the Press Association's CopyDirect service. Applicants should first telephone CopyDirect (tel. no 0870 837 6429). Documentation should be sent either by fax (fax no 0870 837 6429) or to the e-mail address provided by CopyDirect. CopyDirect will be responsible for notifying the individual media organisations. In the case of an application against the world at large this is sufficient service for the purposes of advance notice. The website:- <http://www.medialawyer.press.net/courtapplications>

gives details of the organisations represented and instructions for service of the application. Unless there is a particular reason not to do so, copies of all the documents referred to above should be served. If there is a reason for not serving some or all of the documents (or parts of them), the applicant should ensure sufficient detail is given to enable the media to make an informed decision as to whether it wishes to attend or be legally represented.

The CopyDirect service does not extend to local or regional media or magazines. If service of the application on any specific organisation or person not covered is required it should be effected directly. The Official Solicitor and CAFCASS Legal hold lists of contact details for many national and some regional news organisations, and these are posted on their websites.

5 **The Hearing**

Any application invoking Convention rights will involve a balancing of rights under Article 8 (right to respect for private and family life) and Article 10 (freedom of expression). There is no automatic precedence as between these Articles, and both are subject to qualification where (among other considerations) the rights of others are engaged. Section 12(4) of the Act requires the court to have particular regard to the importance of freedom of expression. It must also have regard to the extent to which material has or is about to become available to the public, the extent of the public interest in such material being published and the terms of any relevant privacy code (such as those of the Press Complaints Commission).

The court's approach is laid down in *Re S (a child)(identification: restriction on publication)* [2004] EWCA Civ 963, [2004], Fam 43(CA) and [2004] UKHL 47, 3 FCR 407(HL) and *Campbell-v-Mirror Group Newspapers Ltd.* [2004] UKHL 22. Guidance on the application of s12(3) is now also provided in *Cream Holdings Ltd v Bannerjee* [2004] UKHL 44.

6 **Scope of Order**

Persons protected

The aim should be to protect the child or incapacitated adult, rather than to confer anonymity on other individuals or organisations. However, the order may include restrictions on identifying or approaching specified family members, carers, doctors or organisations in cases where the absence of such restriction is likely to prejudice their ability to care for the child or patient, or where identification of such persons might lead to identification of the child or patient and defeat the purpose of the order. In cases where the court receives expert evidence the identity of the experts (as opposed to treating clinicians) is not normally subject to restriction.

Identifying persons protected

Once an order has been made, the details of those protected by the order should normally be contained in the Schedule. In exceptional cases (for example *Leeds NHS Trust-v-A & B* [2003] 1 FLR 1091) where it is not appropriate for details to be given, a description by reference to the facts of the case should be contained in the Schedule to enable those reading the order to identify whether a person is likely to be the subject of the order.

Information already in the public domain

Orders will not usually prohibit publication of material which is already in the public domain, other than in exceptional cases such as *Venables and Thompson-v-News Group Newspapers Ltd* [2001] Fam 430.

Duration of Order

Orders should last for no longer than is necessary to achieve the purpose for which they are made. The maximum extent of an order in a child case will usually be the child's 18th birthday. In the case of an incapacitated adult the order will normally end on death. In some cases a later date may be necessary, to protect safety or welfare, or the anonymity of other children who are named in the order and who are still under age, or to maintain the anonymity of doctors or carers after the death of a patient. See for example:

Re C (Adult Patient: Publicity) [1996] 2 FLR 251

Venables and Thompson-v-News Group Newspapers Ltd [2001] Fam 430

X (formerly known as Mary Bell)-v-Y and others [2003] EWHC QB 1101.

7 **Service of Orders**

Service of orders should be effected in the usual way, ie by fax or by post. Contact details for the national press and broadcasters can be found at <http://www.medialawyer.press.net/courtapplications>.

8 **Undertakings in Damages**

The court will consider whether it is appropriate to require an applicant to give such an undertaking in an individual case, particularly when an order is made without notice, and will bear in mind the applicant's capacity to fulfil any such undertaking.

9 **Explanatory Notes**

It is helpful if applications and orders are accompanied by an explanatory note, from which persons served can readily understand the nature of the case. In any case where notice of an application has not been given, the explanatory note should explain why.

10 **Advice and assistance**

— Applicants or respondents are welcome to consult

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18 March 2005

Attached:

- (1) *Model Order*
- (2) *Example of Explanatory Note*

BEFORE [JUDGE] IN PRIVATE

IN THE MATTER OF THE COURT'S INHERENT JURISDICTION

BETWEEN

[]

and

[]

REPORTING RESTRICTION ORDER

IMPORTANT

If you disobey this order you may be found guilty of contempt of court and may be sent to prison or be fined or have your assets seized. You should read the order carefully and are advised to consult a solicitor as soon as possible. You have the right to ask the Court to vary or discharge the order.

EXPLANATION

- A On [date] the Court considered an application for a reporting restriction order.
- B The following persons and/or organisations were represented before the Court:
[describe parties and their advocates]
- C The Court read the following documents: [list the documents]
and/or
The Court directed the [Applicant/Claimant] to file a statement no later than [date] setting out the information presented to the court at the hearing.
and/or
The Court directed that copies of the attached Explanatory Note and [list any other documents] be made available by the [Applicant/Claimant] to any person affected by this Order.
- [D *In a case where an undertaking in damages is required by the Court:*
The Applicant gave an undertaking that if the Court later finds that this Order was obtained as a result of any deliberate or careless misrepresentation by the Applicant, and that this has caused loss to any person served with the Order, and that that person should be compensated, the Applicant will comply with any order the Court may make.]
- E *In the case of an order made without notice:*
This order was made without notice to those affected by it, the Court having considered section 12(2) Human Rights Act 1998 and being satisfied (i) that the [Applicant/Claimant] has taken all practicable steps to notify persons affected and/or (ii) that there are compelling reasons for notice not being given, namely: [set out the Court's reasons for making the order without notice]
- [F *In the case of an application by a local authority:*
The Court granted permission to the Applicant to apply for the exercise of the Court's inherent jurisdiction]

ORDER

1. Duration

Subject to any different order made in the meantime, this order shall have effect [*in the case of an adult*] during the lifetime of the [Defendant], whose details are set out in Schedule 1 to this order.

[*in the case of a child*] until [date], the 18th birthday of the child whose details are set out in Schedule 1 to this order ("the Child").

2. Who is bound

This order binds all persons and all companies (whether acting by their directors, employees or agents or in any other way) who know that the order has been made.

3. Publishing restrictions

This order prohibits the publishing or broadcasting in any newspaper, magazine, public computer network, internet website, sound or television broadcast or cable or satellite programme service of:

(a) the name and address of

(i) the [Defendant/Child];

(ii) [*in the case of a child*] the Child's parents ("the parents"), whose details are set out in Schedule 2 to this order;

(iii) any individual having day-to-day care of or medical responsibility for the [Defendant/Child] ("a carer"), whose details are set out in Schedule 3 to this Order;

(iv) any residential home or hospital, or other establishment in which the [Defendant/Child] is residing or being treated ("an establishment");

(b) any picture being or including a picture of either the [Defendant/Child], a carer or an establishment;

(c) any other particulars or information relating to the [Defendant/Child];

IF, BUT ONLY IF, such publication is likely to lead to the identification of the [Defendant/ Child] as being [*set out the feature of the situation which has led to the granting of the order*].

4. No publication of the text or a summary of this order (except for service of the order under paragraph 7 below) shall include any of the matters referred to in paragraph 3 above.

[5. Restriction on seeking information

This Order prohibits any person from seeking any information relating to the [Defendant/Child] [or the parents] or a carer from any of the following:

(a) the [Defendant/Child];

[(b) the parents];

(c) a carer;

(d) the staff or residents of an establishment.]

6. What is not restricted by this Order

Nothing in this Order shall prevent any person from:

(a) publishing information relating to any part of a hearing in a court in England and Wales (including a coroner's court) in which the court was sitting in public and did not itself make any order restricting publication.

(b) seeking or publishing information which is not restricted by Paragraph 3 above.

- (c) inquiring whether a person or place falls within paragraph 3(a) above.
- (d) seeking information relating to the [Defendant/Child] while acting in a manner authorised by statute or by any court in England and Wales.
- (e) seeking information from the responsible solicitor acting for any of the parties or any appointed press officer, whose details are set out in Schedule 4 to this order.
- (f) seeking or receiving information from anyone who before the making of this order had previously approached that person with the purpose of volunteering information (but this paragraph will not make lawful the provision or receipt of private information which would otherwise be unlawful).
- (g) publishing information which before the service on that person of this order was already in the public domain in England and Wales as a result of publication by another person in any newspaper, magazine, sound or television broadcast or cable or satellite programme service, or on the internet website of a media organisation operating within England and Wales.

7. Service

Copies of this Order endorsed with a notice warning of the consequences of disobedience shall be served by the [Applicant/Claimant] (and may be served by any other party to the proceedings)

- (a) by service on such newspaper and sound or television broadcasting or cable or satellite or programme services as they think fit, by fax or first class post addressed to the editor (in the case of a newspaper) or senior news editor (in the case of a broadcasting or cable or satellite programme service) or website administrator (in the case of an internet website) and/or to their respective legal departments; and/or
- (b) on such other persons as the parties may think fit, by personal service.

8. Further applications about this Order

The parties and any person affected by any of the restrictions in paragraphs 3-5 above may make application to vary or discharge it to a Judge of the High Court on not less than [48 hours] notice to the parties.

SCHEDULE 1

[The [Defendant/Child]'s Full Name:

Born:

Address:]

or

[Information enabling those affected by order to identify the Defendant/Child]

SCHEDULE 2

[Similar details of parents]

SCHEDULE 3

[Similar details of carers or other persons protected]

SCHEDULE 4

[Contact details of responsible solicitor and/or press officer]

Date of Order:[]

NHS TRUST X v AB

Application for a Reporting Restriction Order

EXPLANATORY NOTE

- 1 AB is in a permanent vegetative state. An application has been made by the NHS Hospital Trust responsible for his care for the Court's approval of the withdrawal of artificial nutrition and hydration. This course is supported by AB's family.
- 2 On [date] the application will be heard by the President of the Family Division, who will give judgment in open court.
- 3 A Reporting Restriction Order has been [made/applied for] to protect AB's right to confidentiality in respect of his medical treatment. This does not restrict publication of information or discussion about the treatment of patients in a permanent vegetative state, provided that such publication is not likely to lead to the identification of AB, those caring for him, the NHS Trust concerned or the establishment at which he is being cared for.