What to do when a reporter attends (or wants to attend) your hearing

A guidance note for judges & professionals

This guide is designed to assist professionals involved in family court cases to think through issues around the attendance of reporters in those cases. Nothing written here should be treated as legal advice on individual cases or circumstances. The Transparency Project does not give legal advice.

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WHAT TO DO WHEN A REPORTER ATTENDS (OR WANTS TO ATTEND) YOUR HEARING

Firstly, don't panic. Identify the relevant parts of the Family Procedure Rules ('FPR') and applicable statute.

Next, consider the following key principles and then work through the practical points below.

1. Reporters are generally allowed to attend hearings – they do not need to 'apply' or give notice

a. FPR 27.11 gives a general right of attendance to journalists and legal bloggers to most (but not all) private hearings. Notable exceptions are part 14 (adoption etc) and hearings involving judicially assisted conciliation (or at any rate those parts of hearings involving judicially assisted conciliation) typically FDR or FHDRA hearings.

b. This right of attendance applies to accredited media representatives (journalists with a press card) and duly authorised lawyers (qualified lawyers attending for journalistic, research or public legal educational purposes – colloquially known as legal bloggers). For convenience the collective term 'reporters' is useful to cover both. You should check the credentials of a reporter, unless they are known to the court. A legal blogger should provide form FP301 (this is not required for a journalist).

c. FPR 27.11(3) defines the limited circumstances in which the court may (of its own motion or on application) exclude a reporter from all or part of a hearing.

d. If there is an issue with the attendance of a reporter the court should hear briefly what the nature of the objection is, and allow the reporter to respond. The court should consider FPR 27.11(3) in deciding whether to exclude the reporter. FPR 27.11(3) requires something more than the fact that the nature of the proceedings is 'private' or that one or more parties would prefer them not to attend. Concerns about potential reporting are not a basis for excluding a reporter from attending. In some cases automatic restraints on publication will apply, in others it may be appropriate for the court to impose them. But a need to restrict publication of information does not necessarily mean a reporter should be excluded from observing.

e. Although it is obviously helpful if a reporter does give notice that they intend to attend, it is not a requirement. In reality, for various reasons, this will not always be possible. A reporter should not be criticised for not giving notice or 'sufficient' notice.

2. **What a reporter is permitted to report will depend upon the nature of the hearing / proceedings.**

   a. In private Children Act 1989 proceedings, s12 Administration of Justice Act 1960 ('AJA 1960') will generally significantly curtail what can be published. A reporter may attend but report very little without the permission of the court. In those cases a reporter may wish to make an application to report, and this is usually best dealt with at the end of the hearing.

   b. NB The President's Reporting Pilot operating from 30 January 2023 in Carlisle, Leeds and Cardiff is an exception to this, in that the court will usually make a transparency order in such cases in those courts which reverses the presumption against publication and permits anonymised reporting of most of the detail of such cases.

   c. S97 Children Act 1989 precludes the identification of a child as the subject of proceedings during the life of the case.

   d. In Financial Remedy cases s1 of the Judicial Proceedings (Regulation of Reports) Act 1926 (arguably) applies. There is an apparent divergence of view at High Court level as to whether the implied undertaking of confidentiality arising from the compelled disclosure requirements / duty of full and frank disclosure or the general 'private' nature of hearings precludes the publication of information by reporters (or parties) in circumstances where privacy is attenuated (or destroyed) by the right of attendance by reporters (see *Gallagher (No 1) (Reporting Restrictions)* [2022] EWFC 52). On one view (per Mostyn J in *Gallagher*) there is no *de facto* restriction on the reporting of information gathered / heard by a reporter at a FR hearing, and if there is to be any such restriction it must be the subject of an on notice reporting restriction order application (on notice to the press via the Media Injunctions Alert Service (aka Copydirect). NB, it has recently been suggested that contrary to PD27B and in accordance with *A v BBC* [2015] AC 588 the media need not be given notice in advance of a *contra mundum anonymity* order (as opposed to a particular respondent) is not required. However, *A v BBC* suggests that steps

must be taken to ensure the media are aware after the fact that the order has been made (in civil cases the anonymity order is published on judiciary.uk).

e. Whilst this topic remains controversial, judges may wish to canvas the parties and media/ reporters' positions on these issues at the outset of a hearing attended by the media, in order that a pragmatic and lawful way forward can be found. For example, reporters may not wish to report anything until the conclusion of the hearing, or may be content to agree not to include specific information in their reports, at least for the time being. If necessary and proportionate, the court may make an interim order pending a full *Re* analysis (*Re S (A Child)* [2004] UKHL 47) at the conclusion of the proceedings / substantive hearing – but whether this is appropriate will depend on the circumstances. *Re S* applies and judges should have regard to paragraph 17, per Lord Steyn:

> *'The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.'*

f. By PD30B appeals are presumptively to be heard in public, but may be taken in private. In cases involving children anonymity orders may be made. Subject to any anonymity or reporting restriction order matters referred to in a public appeal (or other) hearing may be reported (s12 AJA will not apply).

3. A reporter should not be asked to reveal their source

a. A reporter may become aware of or interested in attending a hearing for a number of reasons. It is not appropriate for a judge or legal representative to ask a reporter who told them about the hearing or who invited them to attend. Where a reporter is entitled to attend a hearing they are not required to justify

or explain their attendance, and they may decline to respond to such an enquiry. A journalist's duty of confidentiality and professional code of conduct will usually require them to do so and legal bloggers attending for a journalistic purpose are likely to hold to similar standards. Reporters should not be placed under pressure to reveal sources or criticised for not doing so.

b. Judges and legal professionals should remember that journalists attending a family court hearing are outsiders and such requests may have a 'chilling' or intimidating effect upon reporters.

4. Editorial control of reporting is no part of the court's function

a. The court should not engage in enquiries that amount to editorial control or approval or disapproval of proposed journalistic material. Providing material is lawfully obtained and lawfully reported a reporter / publisher is at liberty to publish on their own terms. Such reporting may contain material that a party would prefer not to be included, it may exclude material a party considers highly relevant, it may offer comment or opinion that is contrary to the view of the court or the parties. Concern that any of these things may happen is neither a proper basis upon which to exclude a reporter from a hearing nor to restrict reporting which would otherwise be permitted. The court should have regard to *Re S* in considering whether to relax or restrict any existing constraint on reporting in the individual case. This will usually involve close scrutiny of any competing Article 8 or 10 ECHR rights, analysis of the specific facts of the case and any arguments about public interest, privacy, welfare etc and a careful balancing of those factors to reach a conclusion which interferes with each of those rights only insofar as is necessary and proportionate.

b. It is not appropriate for the court or parties to require or request sight of a proposed report prior to publication for approval. Most journalists will refuse this as contrary to their journalistic independence.

5. Communication is key

Reporters may in some respects be the outsiders in the room (though a small number have made attendance at Family Court hearings their speciality), but they are generally skilled at thinking creatively about how the balance between privacy and public interest in the reporting of court proceedings can lawfully be achieved. If lawyers and judges engage reporters in discussions / submissions about these issues reporters may come up with a pragmatic proposal that will enable matters

to move forwards on an agreed basis, or at least to narrow the issues. What a journalist wants and needs to report will depend upon whether they are a news journalist or are carrying out broader investigative or long form journalism work. What a legal blogger wants and needs to report will differ again.

6. A reporter will need to be able to share information with their editorial team

Any reporter (unless self-publishing) will need to be able to share sufficient information with their editorial and any in house legal team in order to facilitate publication, and to ensure that publication is in compliance with the law and any court orders. Most reporters will assume this is permitted. It is probably helpful to make it explicit to avoid any confusion.

7. Practical steps:

(NB some of these steps may not be applicable or may need some adjustment in Reporting Pilot cases)

<u>Before the hearing (if it is known a reporter is attending) –</u>

- Court to let the parties and their legal representatives know that a reporter is intending to attend

- Court to make arrangements for the reporter to be provided with a link (see Practice Guidance Issued by the LCJ in June 2022 'Open Justice – Remote Observation of Hearings – New Powers, which sets out that 'Remote observation should be allowed if and to the extent it is in the interests of justice; it should not be allowed to jeopardise the administration of justice in the case before the court', and makes clear that this may include remote attendance by a reporter of an otherwise fully attended hearing).

- Check reporter's credentials – for journalists this is a UK press card; for legal bloggers practising certificate or letter from their academic institution or Registered Educational Charity such as The Transparency Project, and form FP301.

- Check the hearing is one which reporters are permitted to attend (FPR 27.11)

- Consider whether a reporter should be provided with key documents to aid understanding (on terms) – e.g. case outline, ES1, skeleton argument, etc, and if so on what terms (see for e.g. *President's Guidance: Attendance of the Media* [2009] 2

FLR 167 "Where a representative of the media in attendance at the proceedings applies to be shown court documents, the court should seek the consent of the parties to such representative being permitted (subject to appropriate conditions as to anonymity and restrictions upon onward disclosure) to see such summaries, position statements and other documents as appear reasonably necessary to a broad understanding of the issues in the case", and *Newman v Southampton City Council & Ors* [2021] EWCA Civ 437 in which it was confirmed that the *Re S* exercise should be utilised in connection with issues relating to reporters' access to documents).

At the outset of the hearing –

- Deal with any objections to attendance in the presence of the reporter (brief submissions from parties with reference to 27.11(3), with an opportunity to the reporter to respond)

- If not already done, consider whether a reporter should be provided with key documents to aid understanding– e.g. case outline, ES1, skeleton argument, etc. Documents can be provided on terms such as no further distribution / publication pending further order, no reporting of identifying details etc as appropriate.

- Canvas any potential issues regarding reporting – ensure all parties and reporters are on the same page in terms of what can be reported (in a Reporting Pilot case ensure all have the pilot guidance and deal with the terms of the Transparency Order)

- Consider setting time aside at the end of the hearing to deal with such issues. Many reporters will invite the court to deal with this at the end of the hearing when they understand more about the case and can make more informed proposals as to what should and should not be reportable and what (if anything) could be justifiably withheld in order to facilitate the reporting of more editorially important facts (e.g. in a children case a reporter may make sensible concessions / suggestions about specific facts that might be identifying but which are not journalistically essential).

- Remember to deal with any issues / set ground rules about live reporting if requested and permitted / reporting of an ongoing hearing.

- In an FR case where it is clear a reporter will wish to report and a party objects to that the court will need to decide whether an on notice RRO application is

necessary / appropriate (depending on its interpretation of the law) and if so how to deal with matters in the interim. It may be appropriate to refer the case to the Lead FR Judge (see Peel J guidance 'Financial Remedies Court Practice Guidance, 13 May 2022').

At the end of the hearing -

- Check back in to see if the reporter wishes to make an oral application for permission to report (if required) or if a party wishes to make representations. In most cases this can be dealt with by brief oral submissions. If not consider adjourning to another hearing, in complex cases this may need to be adjourned to a High Court Judge (See PD27B and President of the Family Division's Reporting Guidance 2018. NB This guidance implicitly relates primarily to children cases, but may nonetheless contain useful pointers for financial remedies cases. It is likely to be revised as part of the work of the President's Transparency Implementation Group).

- Ensure that any order regarding reporting (permissive or restrictive, or in a pilot case a Transparency Order) is drawn clearly and provided to the reporter. The reporter should be copied into the draft order before approval to ensure that all are in agreement that the drafting corresponds with what was ordered by the court / conceded by the reporter.

- Make arrangements for the reporter to be able to communicate with a point of contact about next hearing / hand down of any judgment (whether the court or a legal representative).

- If you are directing that documents should be shared with a reporter ensure this is reduced to writing and a date for compliance by the party is provided.

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