

# Courts and jurisdiction

## A focus on privacy and confidentiality



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This table considers the courts, jurisdiction and privacy of proceedings which concern children, young people and vulnerable adults, where decisions are being taken about their health, care and welfare. Such cases might include decisions about where they live, who they live with or have contact with, their care arrangements, their sexual relationships, their access to and use of the internet and social media and their health care/medical treatment.

For its purposes:

- children are those aged 0 – 15 years old
- young people are those aged 16 – 17 years old
- adults are those aged 18+ years old

It considers whether the court's jurisdiction is dependent upon the competence or capacity of the subject of the proceedings to take the decision themselves. For children, this is assessed by whether the child has Gillick competence (whether the child has sufficient maturity and understanding to take a decision of the seriousness in question).<sup>1</sup>

For young people and adults, the test is whether they have capacity to make the decision in question. I.e. (1) can they:

- a understand the information relevant to the decision?
- b retain the relevant information?
- c use or weigh that relevant information in the balance?
- d communicate their decision?

and

(2) if they cannot do one or more of those things, is this because of a temporary or permanent impairment or disturbance in the functioning of their mind or brain?<sup>2</sup>

This table identifies which court(s) has jurisdiction to determine the issue(s), and what the underlying legislation is that governs the court's decision-making on the issue. It addresses which procedural rules apply to the conduct of the proceedings and what application form(s) is/are used to commence proceedings.

Finally, it addresses the starting point in relation to whether or not the proceedings will be heard in private or in public. It considers who is able to be present at hearings and to receive information about the matter. It addresses whether the court has the power to grant injunctions prohibiting or restricting reporting on the matter. In the Court of Protection (and in the reporting pilot being conducted in the Family Court) these are Transparency Orders ("TOs") – otherwise, these are Reporting Restriction Orders ("RROs").

<sup>1</sup> Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112

<sup>2</sup> Sections 2-3 Mental Capacity Act 2005

The privacy or confidentiality of court proceedings involving decisions impacting fundamental human rights engages a number of core principles and fundamental human rights<sup>3</sup> in and of itself:

- **Open justice** – this is the principle that court proceedings should be conducted openly and in public – that our judicial system is transparent, so that the decision-making can be properly scrutinised to be assured that it is “pure”, impartial, balanced and a system that the public can have confidence in. It embodies the belief that justice must be seen to be done. It is a fundamental tenet of our legal system; not to be departed from absent good and cogent reason.
- **Right to private life** – under Article 8 European Convention on Human Rights (“ECHR”) everyone has the right to respect for his private and family life, his home and his correspondence. It is a qualified right in that the ECHR makes clear there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
  - the issues being determined in these cases often involve some of the most sensitive, intimate and private matters for an individual and their family – confidentiality about our medical data is another fundamental principle in our society;
  - in the age of social media and internet reporting, it is not only the privacy of the subject of proceedings that can be impacted by these cases. The health and social care professionals engaged in the care and support of the person can also have their views, actions and decisions publicly scrutinised.

- **Right to freedom of expression** – under Article 10 of the ECHR everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Again, it is a qualified right, in that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Practically, open justice is most effectively met by the allowing of media reporting of cases and the publication of judgments (setting out the background facts, summarising the arguments put to the court and the rationale of the judge’s decision). However, the question for the courts is often whether such reporting or publication needs to go further to give the names of those involved.

Decisions as to whether proceedings should be in private or in public – and the extent, scope and duration of any reporting restrictions involves the balancing of the competing rights and principles:

- Article 8 and 10 rights;<sup>4</sup>
- open justice and the need to ensure the effective administration of justice.

<sup>3</sup> The Human Rights Act 1998 makes the European Convention on Human Rights (“ECHR”) directly applicable in England & Wales so public bodies have to comply with the ECHR, and it is possible to rely upon the ECHR before the English courts.

<sup>4</sup> Key cases being *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593; *Griffiths v Tickle* [2021] EWCA Civ 1882; and *Abbasi & Anor v Newcastle Upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331.

## What is the difference between private and public proceedings? What is the impact of an RRO or TO?

Proceedings can be in private, in public or in public with an RRO or TO in place.

| Private proceedings   | Public proceedings   | The impact of an RRO/TO  |
|---|--|--|
| <ul style="list-style-type: none"> <li>Only parties and their representatives can attend hearings and receive information about and documentation from the proceedings unless the court grants permission for a non-party to attend or the relevant procedure rules provide for the attendance of non-parties.</li> <li>The Administration of Justice Act (the "<b>AJA</b>") 1960 applies:</li> <li>S.12 prohibits the "publication" of "information relating to proceedings before any court <b>sitting in private</b>: <ul style="list-style-type: none"> <li>where the proceedings relate to the inherent jurisdiction for minors or under the Children Act 1989;</li> <li>where the proceedings are brought under the Mental Capacity Act 2005; or</li> <li>where the Court expressly prohibits the publication of all information relating to proceedings or of information of the description which is published.</li> </ul> </li> <li>Publication of such information, if the person doing the publishing is aware that the proceedings were in private – is contempt of court (which is punishable by fine, seizure of assets or imprisonment).</li> <li>"Publication" – includes communication/dissemination (whether oral or written) (save for communication of information by someone to a professional, each acting in furtherance of the protection of child/young person/vulnerable adult). But "in furtherance of the protection of children" is construed quite narrowly.</li> <li>S.12 AJA does not prohibit, and therefore the following <b>can be published</b>:<sup>1</sup> <ul style="list-style-type: none"> <li>The fact that the child/person is the subject of such proceedings;</li> <li>The name, address or photograph of such a child/person;</li> <li>The nature of the dispute;</li> <li>The date, time or place of a past or future hearing;</li> <li>Anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public parts outside of the court;</li> <li>The name, address or photograph of the witnesses – and the party for which they've given evidence; and</li> <li>The text/summary of the whole or part of any order made.</li> </ul> </li> <li>S.12 AJA does prohibit, and therefore the following <b>cannot be published</b>: <ul style="list-style-type: none"> <li>Summaries of the evidence or what was said in Court;</li> <li>Accounts of what has gone on in front of the judge sitting in private;</li> <li>Documents filed in the proceedings (e.g. witness statements, position statements);</li> <li>Transcripts or notes of the evidence, submissions or judgement; and</li> <li>Extracts or quotes or summaries from the above documents.</li> </ul> </li> </ul> <p>There is a risk, therefore, in private proceedings – that if there is no RRO or TO in place – that significant amounts of information can be "published". In some cases, the courts have adopted a practice of publishing "anonymised" judgments in cases involving children / incapacitated adults. Absent an RRO / TO, there would be nothing preventing a person/organisation publishing the identifying information about an anonymised judgment if they became aware of it.</p> | <ul style="list-style-type: none"> <li>No limitations/restrictions on who may attend hearings and receive information about and documentation from the proceedings (subject to relevant applications being made for receipt of documents).</li> <li>Members of the public and the press can attend hearings.</li> <li>Any and all information about the proceedings can be shared with any person/organisation via any format (verbally or in writing) – including, for example in private communications (telephone/video call, letter, email, text message or WhatsApp) or on public platforms.</li> </ul> | <ul style="list-style-type: none"> <li>Non-parties (including members of the public and the press) can attend hearings and (subject to relevant applications being made) receive information about and documentation from the proceedings.</li> <li>However, there are prohibitions on anyone in receipt of "confidential" information about the proceedings sharing that information.</li> <li>Breaching these restrictions is contempt of court (which is punishable by fine, seizure of assets or imprisonment).</li> <li>What is captured in the "confidential" information changes on a case by case basis, but usually includes: <ul style="list-style-type: none"> <li>the identity of the subject of the proceedings, their family, any person involved in providing care for the subject of the proceedings, or involved in the decision-making about the care for the subject of the proceedings;<sup>2</sup></li> <li>the address/contact details of any of the above;</li> <li>any photograph/picture of any of the above.</li> </ul> </li> <li>Sometimes, the "confidential" information includes the identity of any organisation providing care/making decisions about care for the subject of proceedings and/or the placement/unit/location (such as the name of a hospital) where care is delivered. This is usually only the case where identification of that information would lead to the "jigsaw" identification of the subject of the proceedings.</li> <li>These orders apply "to the world". They bind any person/organisation that knows (by whatever means) the "confidential" information and who: <ul style="list-style-type: none"> <li>knows that the restriction order has been made; or</li> <li>reasonably ought to have known about the restriction order; or</li> <li>has unreasonably failed to find out whether the restriction order has been made.</li> </ul> </li> <li>These orders prevent any person who knows (or reasonably ought to know) the "confidential" information doing anything that would allow any other person/organisation to identify (or could reasonably lead to them doing so) any of the "confidential" information as being linked to the proceedings. This is a broad prohibition – it includes: <ul style="list-style-type: none"> <li>"telling" any other person/organisation (including verbally, in writing (this could include by email, text message or WhatsApp) or in photos/pictures);</li> <li>"publishing or broadcasting" the "confidential" information – this includes by putting it in/on any newspaper, magazine, public computer network, internet site, sound (radio) or television broadcast, or podcast or blog, or on any social media platform (for e.g. Twitter, Facebook, Instagram, TikTok, Linked-In)</li> </ul> </li> <li>The orders provide for what can be said about the proceedings, and to whom.</li> <li>These orders are usually limited in time (often for the lifetime of the subject of the proceedings) – but can be indefinite (i.e. where they apply until a further order is made to vary them).</li> </ul> |

1 This was clarified in Re B (A Child) [2004] EWHC 411 (Fam) in relation to proceedings concerning children. We suggest that the principles would equally apply to health and welfare matters concerning young people and vulnerable adults.

2 Following Abbasi & Anor v Newcastle Upon Tyne Hospitals NHS Foundation Trust [2023] EWCA Civ 331 the scope to anonymise professionals engaged in caring for the subject of proceedings is perhaps more limited than had been understood to be the case, requiring specific evidence of risk to those professionals from being named; anonymisation is also likely to only apply to the duration of the proceedings. The Trusts in question have sought permission to appeal the decision to the Supreme Court.

Courts, jurisdiction and the starting point for privacy of proceedings

| Type of Matter   | Age of the Subject of Proceedings | Subject's Gillick Competence |   | Subject's Capacity  |   | Court   | Principal Legislation  | Procedural Rules                        | Application Form                                    | Privacy (Starting Point)  | RRO/TO  |
|--|-----------------------------------|------------------------------|---|---|---|---|--|---|---|---|---|
| Care Proceedings   | 0-17                              | Y                            | N | Y   | N | Family Court  | <ul style="list-style-type: none"> <li>Children Act 1989</li> <li>Matrimonial and Family Proceedings Act 1984</li> <li>Administration of Justice Act 1960</li> </ul>   | Family Procedure Rules 2010 ("FPR")     | Form C110A <sup>1</sup>                             | <ul style="list-style-type: none"> <li>Private (FPR 27.10)</li> <li>*Duly accredited representative from news gathering/reporting organisations" permitted (FPR 27.11(f)) (but cannot report without permission)</li> <li>Child cannot be identified during the currency of any case exercising power under Children Act 1989 (s.97 CA 1989)</li> </ul> | <ul style="list-style-type: none"> <li>No power to make RRO in the Family Court (see PD121 para 2.1: RROs can only be made in High Court).</li> <li>But the proceedings can be transferred to the High Court for the limited purpose of making an RRO and then be transferred back to the Family Court to be determined.</li> <li>Common practice for judgments to be published in an anonymised format - see:                             <ul style="list-style-type: none"> <li><a href="#">2014 Guidance</a> – anonymised judgments</li> <li><a href="#">2018 Guidance</a> – on identifying aspects in judgments</li> </ul> </li> <li>There is a Transparency Reporting Pilot in the Family Court being held in Leeds, Cardiff and Carlisle between 30 January 2023 – 30 January 2024 whereby duly authorised accredited journalists and 'legal bloggers' (FPR.27.11) are allowed to report certain classes of case, subject to reporting restrictions, and are also given access to specific documents. The details can be found <a href="#">here</a>.</li> </ul> |
|  | 0-17                              | Y                            | N | Y   | N | High Court (Family Division)<br><i>NB: Care proceedings cannot be commenced in the High Court but can be transferred there.</i> | <ul style="list-style-type: none"> <li>Children Act 1989</li> <li>Matrimonial and Family Proceedings Act 1984</li> <li>Administration of Justice Act 1960</li> <li>Senior Courts Act 1981</li> </ul>                           | FPR                                     | N/A   | <ul style="list-style-type: none"> <li>Private (FPR 27.10)</li> <li>*Duly accredited representative from news gathering/reporting organisations" permitted (FPR 27.11(f)) (but cannot report without permission)</li> <li>Child cannot be identified during the currency of any case exercising power under Children Act 1989 (s.97 CA 1989)</li> </ul> | <ul style="list-style-type: none"> <li>High Court has the power to make an RRO in an individual case (PD12D (Para 1.2(a)))</li> <li>PD121 governs the procedural requirements for service of such an RRO.<sup>2</sup></li> </ul>  |
| Medical Treatment for children/young person (via a Specific Issue Order <sup>3</sup> ) | 0-17 <sup>4</sup>                 | Y                            | N | Y   | N | Family Court  | <ul style="list-style-type: none"> <li>Children Act 1989</li> <li>Matrimonial and Family Proceedings Act 1984</li> <li>Administration of Justice Act 1960</li> </ul>   | FPR                                     | Form C100 <sup>5</sup> / Form C2 <sup>6</sup>       | <ul style="list-style-type: none"> <li>Private (FPR 27.10)</li> <li>*Duly accredited representative from news gathering/reporting organisations" permitted (FPR 27.11(f)) (but cannot report without permission)</li> <li>Child cannot be identified during the currency of any case exercising power under Children Act 1989 (s.97 CA 1989)</li> </ul> | <ul style="list-style-type: none"> <li>No power to make RRO in the Family Court (see PD121 para 2.1: RROs can only be made in High Court).</li> <li>But the proceedings can be transferred to the High Court for the limited purpose of making an RRO and then be transferred back to the Family Court to be determined.</li> <li>Common practice for judgments to be published in an anonymised format - see:                             <ul style="list-style-type: none"> <li><a href="#">2014 Guidance</a> – anonymised judgments</li> <li><a href="#">2018 Guidance</a> – on identifying aspects in judgments</li> </ul> </li> <li>There is a Transparency Reporting Pilot in the Family Court being held in Leeds, Cardiff and Carlisle between 30 January 2023 – 30 January 2024 whereby duly authorised accredited journalists and 'legal bloggers' (FPR.27.11) are allowed to report certain classes of case, subject to reporting restrictions, and are also given access to specific documents. The details can be found <a href="#">here</a>.</li> </ul> |
|  | 0-17 <sup>8</sup>                 | Y                            | N | Y   | N | High Court (Family Division)  | <ul style="list-style-type: none"> <li>Children Act 1989<sup>9</sup></li> <li>Matrimonial and Family Proceedings Act 1984</li> <li>Administration of Justice Act 1960</li> <li>Senior Courts Act 1981</li> </ul>               | FPR                                     | Form C100 <sup>10</sup> / Form C2 <sup>11</sup>     |   | <ul style="list-style-type: none"> <li>High Court has the power to make an RRO in an individual case (PD12D (Para 1.2(a)))</li> <li>PD121 governs the procedural requirements for service of such an RRO.</li> </ul>  |
|  | 0-17                              | Y                            | N | Y   | N | High Court (Family Division)  | <ul style="list-style-type: none"> <li>Inherent jurisdiction (common law)</li> <li>Administration of Justice Act 1960</li> <li>Senior Courts Act 1981</li> </ul>   | FPR                                     | Form C66 <sup>12</sup> / Form C2 <sup>13</sup>      |   | <ul style="list-style-type: none"> <li>High Court has the power to make an RRO in an individual case (PD12D (Para 1.2(a)))</li> <li>PD121 governs the procedural requirements for service of such an RRO.<sup>14</sup></li> </ul>   |
| Deprivation of Liberty for children and young people                                   | 0-17                              | Y                            | N | Y   | N | High Court (Family Division) District Registry <sup>15</sup> and the National DoL Court – High Court (Family Division)          | <ul style="list-style-type: none"> <li>Inherent jurisdiction (common law)</li> <li>Administration of Justice Act 1960</li> <li>Senior Courts Act 1981</li> </ul>   | FPR                                     | Form C66 <sup>16</sup> / Form C2 <sup>17</sup>      | <ul style="list-style-type: none"> <li>Private (FPR 27.10)</li> <li>*Duly accredited representative from news gathering/reporting organisations" permitted (FPR 27.11(f)) (but cannot report without permission)</li> <li>Child cannot be identified during the currency of any case exercising power under Children Act 1989 (s.97 CA 1989)</li> </ul> | <ul style="list-style-type: none"> <li>High Court has the power to make an RRO in an individual case (PD12D (Para 1.2(a)))</li> <li>PD121 governs the procedural requirements for service of such an RRO.</li> </ul>  |
| Personal Welfare (residence, care, contact etc.) for young people and adults           | 16+                               | N/A                          |   | Y   | N | Court of Protection <sup>18</sup>   | <ul style="list-style-type: none"> <li>Mental Capacity Act 2005</li> <li>Administration of Justice Act 1960<sup>19</sup></li> </ul> <p><i>NB: the Senior Courts Act 1981 does not apply to the Court of Protection.</i></p>    | Court of Protection Rules 2017 ("COPR") | CoP1  | <ul style="list-style-type: none"> <li>Private (COPR 4.1)</li> <li>Power to order hearing in public (COPR 4.3(1))</li> <li>PD4C (Transparency) – court will usually make an order for hearing to be in public</li> </ul>  | <ul style="list-style-type: none"> <li>Power to order restrictions on reporting (COPR 4.3(2))</li> <li>PD4C (Transparency) make provision and sets out the process for TOs.</li> </ul>  |
| Serious Medical Treatment for young people and adults                                  | 16+                               | N/A                          |   | Y   | N | Court of Protection <sup>20</sup>   |  | COPR                                    | CoP1  |   |   |
| Deprivation of Liberty for young people and adults                                     | 16+                               | N/A                          |   | Y   | N | Court of Protection   |  | COPR                                    | CoP1 / CoPDLA <sup>21</sup> / CoPDOL1 <sup>22</sup> |   |   |
| Personal Welfare (incl. (?) Deprivation of Liberty) <sup>23</sup>                      | 18+                               | N/A                          |   | N/A<br><i>N.B. "vulnerable" adult, i.e. 18+ with capacity to make the relevant decisions but in some way vulnerable</i> |   | High Court (Family Division) <sup>24</sup>  | <ul style="list-style-type: none"> <li>Inherent jurisdiction (common law)</li> <li>Senior Courts Act 1981</li> <li>Administration of Justice Act 1960<sup>25</sup></li> <li>Contempt of Court Act 1981<sup>26</sup></li> </ul> | Civil Procedure Rules                   | Form N208   | <ul style="list-style-type: none"> <li>Public (CPR 39.2(1))</li> <li>Can be private if it is necessary to protect the interests of any child or protected party (CPR 39.2(3)(d))</li> </ul>   | <ul style="list-style-type: none"> <li>Power to order restrictions on reporting (an RRO) CPR 39.2(4) as the court must order the identity of any person not be disclosed if non-disclosure is necessary to protect the interests of the person. This can be backed by an order under s.11 Contempt of Court Act making clear that breach of the RRO constitutes contempt of court.</li> <li>As an RRO is a form of interim relief, pursuant to CPR 23.7(b) notice of it should be served on the parties at least 3 clear days in advance (save in exceptional circumstances).</li> <li>The Supreme Court has indicated that there is no procedural or substantive legal reason that advance notice of an RRO must be given to the media<sup>27</sup>; however, the Courts have indicated that it would be good practice to do so<sup>28</sup>. The judgments appear to suggest that if an RRO is made, it is not necessary to then serve them on the media at large.</li> </ul>   |

Disclaimer

As is apparent from this table, the provisions are complicated. We have done our best to set them out accurately to provide general guidance, but take no responsibility for any steps taken or not taken in reliance upon it; specific legal advice should always be sought in relation to individual cases.

1 Application by a Local Authority for a care, supervision or emergency protection order under the Children Act 1989.

2 This involves giving advance notice of the intention to apply for an RRO via PA Media's CopyDirect service and then, individual service of any RRO made on each media organisation. However, the Supreme Court case of A v BBC [2014] UKSC 25, [2015] AC 588 (Paras 65-67) casts doubt on whether advance notice on the media at large followed by individual service is a substantive legal requirement (on the basis that s.12 Human Rights Act 1998 doesn't apply), although it would be considered to be good practice.

3 It is possible to apply for a specific issue order under s.8 Children Act 1989 but this is unusual in medical treatment matters.

4 S.9(2) Children Act 1989 – usually only for children up to 16 years old unless exceptional circumstances.

5 Application for a specific issue order under s.8 Children Act 1989.

6 If you need to seek permission to make the application.

7 Possible to apply for a specific issue order under s.8 Children Act 1989 but this is unusual in medical treatment matters.

8 S.9(2) Children Act 1989 – usually only for children up to 16 years old unless exceptional circumstances.

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10 Application for a specific issue order under s.8 Children Act 1989.

11 If you need to seek permission to make the application.

12 Application relating to the High Court's inherent jurisdiction in respect of children.

13 If you need to seek permission to make the application.

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15 N.B. All applications are made to the National DoL Court sitting at the Royal Courts of Justice. This is not a separate court, but an administrative allocation of cases to specific judges of the High Court (Family Division) sitting in London. Some (mainly those associated with care proceedings) are then transferred to the appropriate District Registry for hearing (with a s.9 Judge sitting as a High Court Judge)

16 Application relating to the High Court's inherent jurisdiction in respect of children.

17 If you need to seek permission to make the application.

18 The Court of Protection now operates in regions, so the application should be made to the relevant region.

19 Where the proceedings are in private.

20 Conventionally, serious medical treatment cases are listed before Tier 3 judges (i.e. judges of the High Court, sitting in the Court of Protection), and are most often heard in London in the Royal Courts of Justice (although the judges are sitting as Court of Protection judges).

21 Where challenging the validity or duration of a DoLS Standard Authorisation.

22 To authorise a DoL in a non-hospital/residential care home setting, where all are agreed the care arrangements are in P's best interests.

23 There remains considerable doubt as to whether the High Court can exercise its inherent jurisdiction to authorise the deprivation of liberty of a capacitous but vulnerable adult.

24 Conventionally, these cases are heard in the High Court (Family Division), although they are not proceedings governed by the Family Procedure Rules, but rather the Civil Procedure Rules.

25 Where the proceedings are in private.

26 The last of these is only relevant where an application is specifically made for an order under s.11 Contempt of Court Act.

27 A v BBC [2014] UKSC 25, [2015] AC 588 (Paras 65-67).

28 R (on the application of MNL) v Westminster Magistrates' Court [2023] EWHC 587 (Admin).