

Disclosure of information in family proceedings to third parties

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Introduction: new rules on disclosure

From 27th April 2009, parties in private law family proceedings may disclose information to any person, if it enables them to make or pursue a complaint against a person or body in the proceedings. The full text is found in r.11.4 of the Family Proceedings Rules:

“11.4.—(1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party— (c) to make and pursue a complaint against a person or body concerned in the proceedings”.

This subsection has been considered only once by the senior courts in A v G [2009] EWHC 1663 (Fam). Munby J (as he then was) described “a dramatic and radical change in the law... the question now – since 27th April 2009 - is not whether to order disclosure but whether to restrict the right to disclose under the new rule 11.4(1)c”.

Facts in A v G

The facts of A v G were that a father wished to rely on r.11.4(1)c to make a complaint to the General Medical Council about an expert witness in the proceedings. The father took issue with the expert, a consultant psychiatrist, on how he made his report on the mother. As a result, he wished to make a complaint about the expert to the GMC and disclose documents to them in order to pursue that complaint.

Decision in A v G

The father voluntarily undertook not to take action until the Court had decided whether it wished to make a direction under r.11.2c¹. The Court decided not to make a direction holding that the father did not require permission to make the complaint and was released from his undertaking.

¹ “For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated – subject to any direction of the court, in accordance with rules 11.4 to 11.8”.

Guidance in A v G

Munby J gave the following guidance for disclosure under r.11.4(1):

- a) **What can be disclosed:**
 - i. There is no limitation on the forms of the complaint e.g. the subject-matter or nature of complaint²;
 - ii. “Information relating to the proceedings” can be “any information”; and,
 - iii. What constitutes a “complaint” can only be decided on a case-by-case basis although there is a “powerful argument” that it should have a “wide meaning” possibly like the dictionary definition of “an utterance of grievance or injustice suffered”.
- b) **Who can disclose:** a person or body “concerned in the proceedings”, which could mean a “witness, advocate, solicitor, guardian, officer or representative of local authority, judge or whatever”;
- c) **To whom can you disclose:** there are no limits on person, body or organisation to whom the complaints can be made;
- d) **Judicial sanction:** there is no need for prior judicial sanction;
- e) **Other parties:** there is “no duty upon a complainant party to inform the court or the other parties” as “Rule 11.4(1)c neither imposes nor implies such a duty”. There is also no need to obtain their prior agreement or even canvass their views.

But there are safeguards:

- a) The information cannot be made available to the public or a section of it by the disclosing party, recipient or any further recipients (r.11.2(2));
- b) A recipient can only pass on the information with the consent of the sender and for the same purpose for which it was originally disclosed (r.11.4(3)); and,
- c) The Court retains powers to make directions under r.11.2.(1)c. Note Munby J held this should be exercised “only in limited circumstances” because otherwise it might undermine the new policy completely.

² Note r.11.4.1d allows complaints against “the law, policy or procedure relating to a category of proceedings to which this Part applies”.

Munby J qualified these observations by adding that he did not “explore all the possible ramifications” of the rule.

What about contempt of Court?

Under s.12 of the Administration of Justice Act (AJA) it is contempt to publish without leave information concerning court proceedings. What is and is not disclosable under s.12 is identified in Re B (A Child) (Disclosure) [2004] EWHC 411, at paragraphs 2 v) – vi). However, s.12.4 disapples s.12 providing the person has acted in a manner “authorised” by the rules of court. Therefore, a person who abides by the rules of procedure is exempt from contempt and so, according to Munby J, s.12 “operates as the sanction for any non-compliance with the statutory scheme in Part XI [of the FPR, which contains r.11.4]”.

What about human rights?

a) Law

Obviously, as a public authority, the Court is bound by s.6 Human Rights Act 1998. Pursuant to which it may grant an injunction protecting aspects of the child’s private life during and beyond the proceedings as held in Clayton v Clayton [2006] EWCA Civ 878 (paragraph 54). The Court must balance any such restrictions with any conflicting and competing rights, for example, of the parents or the media under Article 10. These are some of the concerns the Court must address under the new rules in exercising its power to make a direction under s.11.2(1)c.

b) Disclosure of sensitive information

In family proceedings, information will often be of a “particularly intimate and sensitive nature” (e.g. medical information that formed part of the complaint in A v G). Courts have in the past recognised the public interest in disclosing otherwise confidential information to public bodies, e.g. see Thorpe LJ in A Health Authority v X [2001] EWCA Civ 2014 at paragraph 20. The balance often came down in favour of disclosure, providing safeguards were in place, such as the confidentiality of the documents, minimum public disclosure and protection of patient’s anonymity (see Z v Finland (1998) 25 EHRR 371). Therefore, these Article 8 safeguards will continue to operate and attach on recipients of the information such as the GMC in A v G.

c) Problems – disclosing to private bodies not bound by HRA 1998

This begs the question - what safeguards will exist for disclosure to private persons or bodies unlike the GMC? The old r.10.20A, now renamed r.11.5, provides tables on what may be disclosed by whom, to whom and for what purpose but the new r.11.4 with its avenues for complaint lies outside this scheme.

One would imagine that the Court would intervene in such situations. However, Munby J disavowed an interventionist approach saying Parliament “cannot have intended the court or other parties to act like policemen, trying to monitor, impede, delay or frustrate potential complaints in advance”, or, have intended “a system of quia timet applications or own motion orders restricting disclosure to develop”.

With respect, this is an alarming position. Under the new r.11.4, the Court and other parties may not have advance warning of a complaint and disclosure to a person or body outside proceedings. Therefore, it is hard to see how the Court can uphold its obligation to protect human rights if it is unaware of what has been disclosed and to whom. In this context, it should be noted that the government has put forward more sweeping changes to the law on disclosure in family proceedings in the Children, Schools and Families Bill³.

What about other forms of disclosure?

Subsections 11.4.1a and b include “confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings” and “to engage in mediation or other forms of alternative dispute resolution”. But parties must be careful as these can be covered in the table in r.11.5.

As such, parties should beware the mistake made in A v Payne [2009] EWHC 736 (Fam) where a Guardian and her solicitor were held in contempt for disclosing documents to a third party on behalf of the parents. In that case, the parents had agreed to attend the Institute of Family Therapy for therapy and parenting classes. Thereupon the Guardian disclosed to the Institute reports on the parents by a doctor and the Guardian. Their mistake

³ For further information see “Media Access to the Family Courts: the Latest Proposals”, Family Law Week, 10/12/09, Adam Wolanski.

was – with Counsel’s advice – to interpret the then r.10.20A as allowing parties to disclose documents on behalf of other parties.