The Media in the Family Court (Under the Transparency Pilot)

Common misconceptions

- The media are not allowed in Family Court hearings
- The media cannot report *anything* relating to family proceedings
- The media are there to challenge the Court process and attempt to undermine it
- The media should not be spoken to by legal professionals in relation to ongoing cases

All of the above are completely wrong. Many legal professionals the Transparency as a negative thing, however, for reasons that will follow, it really isn't.

Reporting in the Family Court: a brief bit of background (the legal bit)

- Important that both legal practitioners and representatives of the media have a basic understanding of exactly what can and cannot be reported in light of the statutory provisions.
- A good starting point is the Judgment of Sir James Munby, now nearly 20 years old, in *Kent County Council, Re B (A Child) v the Mother & Ors* [2004] EWHC 411 (Fam).
- Case deals with the 'old' provisions of the FPR 1991 but provides a really thorough analysis of the statutory provisions.
- Para 56 onwards sets out the statutory framework relating to reporting;
- Section 12(1)(a) of the Administration of Justice Act 1960 has the effect of making it a contempt of court to publish;

  "information relating to proceedings before any court sitting in private … where the proceedings (i) relate to the exercise of the inherent jurisdiction of the High Court

with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the … upbringing of a minor."

- Sir James's summary of s.12 is as follows;

"i) Section 12(1)(a) of the Administration of Justice Act 1960 has the effect of prohibiting the publication of:

information relating to proceedings before any court sitting in private … where the proceedings (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors; (ii) are brought under the Children Act 1989; or (iii) otherwise relate wholly or mainly to the … upbringing of a minor."

ii) Subject only to proof of knowledge that the proceedings in question are of the type referred to in section 12(1)(a), the publication of such information is a contempt of court.

iii) There is a "publication" for this purpose whenever the law of defamation would treat there as being a publication. This means that most forms of dissemination, whether oral or written, will constitute a publication. The only exception is where there is a communication of information by someone to a professional, each acting in furtherance of the protection of children.

iv) Specifically, there is a "publication" for this purpose whether the dissemination of information or documents is to a journalist or to a Member of Parliament, a Minister of the Crown, a Law Officer, the Director of Public Prosecutions, the Crown Prosecution Service, the police (except when exercising child protection functions), the General Medical Council, or any other public body or public official. The Minister of State for Children is not a child protection professional. Disclosure to the Minister of State cannot therefore be justified on the footing of the exception to the general principle.

v) Section 12 does not of itself prohibit the publication of:

a) the fact, if it be the case, that a child is a ward of court and is the subject of wardship proceedings or that a child is the subject of residence or other proceedings under the Children Act 1989 or of proceedings relating wholly or mainly to his maintenance or upbringing;

b) the name, address or photograph of such a child; c) the name, address or photograph of the parties (or, if the child is a party, the other parties) to such proceedings;

d) the date, time or place of a past or future hearing of such proceedings;

e) the nature of the dispute in such proceedings;

f) anything which has been seen or heard by a person conducting himself lawfully in the public corridor or other public precincts outside the court in which the hearing in private is taking place;

g) the name, address or photograph of the witnesses who have given evidence in such proceedings;

h) the party on whose behalf such a witness has given evidence; and

i) the text or summary of the whole or part of any order made in such proceedings.
vi) Section 12 prohibits the publication of:

a) accounts of what has gone on in front of the judge sitting in private;

b) documents such as affidavits, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings, transcripts or notes of the evidence or submissions, and transcripts or notes of the judgment (this list is not necessarily exhaustive);

c) extracts or quotations from such documents;

d) summaries of such documents.

These prohibitions apply whether or not the information or the document being published has been anonymised.

vii) (By way of example of how the principles in (v) and (vi) inter-relate) in a case such as the present case section 12 ***does not*** *of itself prohibit the publication of:*

a) the issues in the case as being whether the mother suffered from Munchausen's Syndrome by Proxy and whether she had killed (or attempted to kill) her child(ren) by, for instance, smothering or poisoning;

b) the identity of the various medical experts who have given evidence in relation to those issues; and

c) which of the parties each expert has given evidence for or against.

viii) Irrespective of the ambit of section 12 of the 1960 Act, section 97(2) of the 1989 Act makes it a criminal offence to "publish any material which is intended, or likely, to identify … any child as being involved in any proceedings before [a family court] in which any power under [the 1989] Act may be exercised by the court with respect to that or any other child".

ix) This is all subject to any specific injunction or other order that a court of competent jurisdiction may have made in any particular case."

- S.12, s.97 are the 'automatic restrictions' on publication.
- The inherent jurisdiction allows for the relaxation and increase to these restrictions to be made by the High Court.
- i.e. the disclosure jurisdiction and the restraint jurisdiction.
- Pre HRA 1996, the leading authorities in the Court of Appeal were, in relation to the disclosure jurisdiction, In *re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam

76 and, in relation to the restraint jurisdiction, In *re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1.

- This involves a balancing exercise of the various Convention rights engaged; Articles 6, 8, and 10 ECHR.
- Balancing exercise described in *In re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, [2005] 1 FLR 591. This necessitates what Lord Steyn in *Re S*, para [17], called "*an intense focus on the comparative importance of the specific rights being claimed in the individual case*". There are, typically, a number of competing interests engaged, protected by Articles 6, 8 and 10 of the Convention.
- Finally, Section 97 of the Children Act 1989 prohibits the publication of "*material which is intended, or likely, to identify*" the child. But this prohibition comes to an end once the proceedings have been concluded: *Clayton v Clayton* [2006] EWCA Civ 878 , [2006] Fam 83, [2007] 1 FLR 11.
- The Court can extend anonymity of the child beyond conclusion of proceedings (*Clayton v Clayton*), however this would only be considered in extremely unusual circumstances.
- See also *Re J (A Child)* [2013] EWHC 2694 (Fam) for commentary in relation to transparency.
- Make sure you are familiar with the full provisions of FPR 2010 Part 27 and PD27B: '*ATTENDANCE OF MEDIA REPRESENTATIVES OR DULY AUTHORISED LAWYERS AT HEARINGS IN FAMILY PROCEEDINGS*'.

Transparency Orders (The Practical bit)

- The pilot scheme has accompanying guidance, which makes clear what should be included in a standard transparency order.
- The standard Transparency Order will provide that, in any reporting about the proceedings, the following must not be reported to the public at large, or a section of the public, without the express permission of the Court:

a. The name or date of birth of any subject child in the case;

b. The name of any parent or family member who is a party or who is mentioned in the case, or whose name may lead to the child(ren) being identified;

c. The name of any person who is a party to, or intervening in, the proceedings;

d. The address of any child or family member;

e. The name or address of any foster carer;

f. The school/hospital/placement name or address, or any identifying features of a school of the child;

g. Photographs or images of the child, their parents, carer or any other identifying person, or any of the locations specified above in conjunction with other information relating to the proceedings. This includes photographs of the parents or other parties leaving the Court building;

h. The names of any medical professional who is or has been treating any of the children or family member;

i. In cases involving alleged sexual abuse, the details of such alleged abuse;

j. Any other information likely to identify the child as a subject child or former subject child.

- Note- many of the above would not be prohibited by s.12 AJA, with s.98 only prohibiting material being published which is likely to identify the child subject to proceedings.
- As the guidance makes clear, through the means of the transparency order the restrictions on publication contained within s.12 are varied.
- No contempt of Court will be committed so long as the terms of the Transparency Order are complied with.

- What/who can be named by reporters in published articles;

  Unless the Court orders otherwise the following agencies or professionals may be named;
  a. The local authority/authorities involved in the proceedings;
  b. The director and assistant director of Children's Services within the LA (but usually not the social workers working directly with the family, including the Team Manager, unless the Court so orders);
  c. Senior personnel at Cafcass but not normally the reporting officer, or children's guardian named in the case;
  d. Any NHS Trust;
  e. Court appointed experts;
  f. Legal representatives and judges;
  g. Anyone else named in a published judgment.

- The Transparency Order does not prevent publication by a parent of information that they would ordinarily be permitted to publish, for example information concerning their child, if it does not relate to or refer to the proceedings, the child's involvement in those proceedings or the evidence concerning that child within the case.
- In respect of s.97 the effect of the transparency order, where made, is to extend that protection until the child's 18th birthday.
- The standard Transparency Order should provide that pilot reporters attending any hearing must be given a copy of the Transparency Order. It should also provide that, on request, pilot reporters are entitled to be provided with copies of, see, and quote from:

  a. Documents drafted by advocates or the parties if they are litigants in person: Case outlines, skeleton arguments, summaries, position statements, threshold documents, and chronologies.

  b. Any indices from the Court bundle.

- Reporters do not need to give prior notice of attendance- they can simply turn up.

Suggestions (what I do)

- My practice- reporter attends, introduce yourself, explain your role, obtain their email address, exchange phone numbers. Email the case summary and a copy of the TO to the reporter *prior to the hearing commencing*. If the reporter as any questions about the content, do your best to answer them.
- Guidance makes clear that the provision of case summary, skeletons etc- mandatory if requested- any requests for copy documents *must* be made to, and complied with, by the party who, or whose advocate, drafted the document in question.
- The copy documents must be provided to the pilot reporter at a hearing that the pilot reporter is attending in accordance with r.27.11 FPR or within a reasonable time thereafter.
- Documents should not be redacted- any quotes from them used by a reporter must fall in line with the restrictions of the TO.
- Nothing to stop legal representatives or lay parties giving reporter detailed information about the proceedings, issues, what has gone on etc- **but** any onward disclosure of that information by a reporter will be governed by the TO.
- I would suggest that in every case, the issue of the possible contents of any TO is considered at the advocates' meeting in advance, so that clients can be informed of the TP and the possible attendance of the media well in advance of any hearing.
- TO's need to be on the agenda for advocates' meetings and it would assist if parties can agree how to proceed should the media attend; i.e. which representative will take the lead in meeting and discussing matters with the media/sending documents (I would suggest the LA representative).
- We have to proceed on the basis that the media could attend any and every hearing, so if any party seeks to argue for exclusion, ideally this needs to be considered in advance of the hearing and the Court notified.
- The case summary (which as our FDLJ has reminded us, must be filed and served no later than 11am the working day prior to the hearing) should in my view set out the position in relation to any potential media attendance- i.e. is any party aware that a reporter/blogger will be attending, if there is any objection to attendance, which party is voicing this objection and what is the basic rationale?

- Exchange of email address (and I would suggest contact numbers) with representatives of the media can only be helpful- if there is a question that a reporter has or there is something they wish to check before publishing an article, it may well be that one of the legal representatives can assist (potentially preventing any mistaken inaccuracies within articles).
- In accordance with FPR r.27.11(3), the Court has a discretion to exclude pilot reporters from a particular hearing, or part of a hearing, but this should only be done for specific reasons, and these should be recorded in the case management order.
- **If** the legal representative of any party seeks exclusion of a reporter, the Court should really be notified as early as possible and ideally, I would suggest, a position statement should be lodged by any such party, articulating why exclusion is sought.
- Ideally the media need to be notified of any potential application is advance (PD27B para 6.4).
- If any party seeks to argue for exclusion, of the media or any duly authorised lawyer, then they must ensure compliance with PD27B para 6;
- Para 6.1 makes clear that '*Applications to exclude media representatives or duly authorised lawyers should normally be dealt with as they arise and by way of oral representations, unless the court directs otherwise*'.
- The media/duly authorised lawyers, present at the hearing when an application for exclusion is made, are entitled to make representations about that proposal, albeit there is no necessity to adjourn the matter to allow for representations to be made (para 6.1).
- Important to remember that under the Pilot scheme, it is going to be a very unusual case in which the media/duly authorised lawyers <u>are</u> excluded from the hearing.

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