IS IT APPROPRIATE TO ADMIT COVERT RECORDINGS OF PROFESSIONALS OR OTHERS WITHIN FAMILY PROCEEDINGS?

RESPONSE OF THE TRANSPARENCY PROJECT

1. Pursuant to an Order of HHJ Bellamy in the Leicester County Court dated the 8th January 2016, The Transparency Project was contacted by NYAS with the following invitation:

   "You are invited to share your views, if you so wish, as to the appropriateness or otherwise of using covert recordings of professionals and/or any other person within proceedings in the family Court".

2. For the purposes of responding to this question we have focused upon the scenario where a recording is made by a parent as opposed to by professionals, as this seems to be the most commonly occurring scenario in practice, although we have commented on the reverse scenario to a more limited degree.

3. The Transparency Project is a registered charity which aims to improve public understanding of the work of the family courts in England and Wales. Further information about the project, including its membership, constitution and core principles can be found at www.transparencyproject.org.uk

4. In December 2015, The Transparency Project issued a guidance note for parents and professionals, which was primarily addressed to the issue of parents recording their interactions with (social work) professionals in family proceedings. An earlier Freedom of Information Act request made to all local authorities in England and Wales had shown that the majority had no written guidance in place concerning such interactions and a minority appeared to have policies that were not lawful.

5. The most relevant part of that guidance note for the purposes of the court's invitation, is set out at page 13. A copy of the guidance note is attached.

6. To expand upon the issues raised within the guidance note, The Transparency Project suggest that the issue of recordings being made and relied upon in family proceedings is primarily a practical and evidential issue – and ordinary evidential principles apply to these as to any specific category of potential evidence. The 'covert' nature of such recordings is not *of itself* a reason to disregard them without further consideration. Of course, it is always preferable for people to know that they are being recorded and to consent to it; but a parent who covertly records his or her conversation with another person, be they professional or not, is not likely to be acting unlawfully by simply recording. There are more likely to be issues relating to the lawfulness of a recording (and consequently potentially to its admissibility) where a recording is made by the State, whose actions as against private individuals are constrained by various statutes, in circumstances where a private individuals are not (for example the Data Protection Act 1998 and Regulation of Investigatory Powers Act 2000).

7. We consider that the issues that ought to be considered by the court fall into two categories. The first is entirely practical – is the evidence able to be presented in a way that can be understood and agreed as accurate? The second relates to the evidential weight of what was recorded.

8. The guidance note is not intended to be a legal document and as such does not address the questions of admissibility and the rules of evidence. However, we set out the position as we understand it here, with particular reference to the Family Court Practice 2015 ("FCP") and Civil Procedure 2015 ("the White Book").

    a. The Civil Evidence Act 1995 applies to family proceedings, meaning that hearsay evidence is admissible, but the weight to be given to it falls to be considered by the court (FCP at 2028-9).

    b. Parts 22 and 23 Family Procedure Rules 2010 deal with evidence. By FPR 22.1 the court has a general power to control evidence, including the nature of the evidence and the way in which it is to be placed before the court. The power includes a power both to admit "non-compliant" evidence (22.1(3)) and to exclude "admissible" evidence (22.1(2)). As per the notes to the FCP at p2009 :

    "it is a serious matter for the court to exclude relevant evidence. To do so, the court will need to balance

    (1) both parties' rights to a fair trial against

    (2) a party's right to respect for family life and privacy."

    c. It is trite that the exercise of the court's power must be consistent with the overriding objective to deal with cases justly.

    d. The FCP also refers to Lifely v Lifely [2008] EWCA Civ 904, where

    "the Court of Appeal permitted illegally obtained evidence (a diary), which should have been disclosed by its author, and re-opened proceedings on the basis of the evidence contained in the diary".

9. As to relevance – the editors of the FCP suggest that :

    "the main rule governing the relevance and admissibility of evidence is that "all evidence that is sufficiently relevant to an issue before the court is admissible and all that is irrelevant, or insufficiently relevant, should be excluded". The importance of defining the issues for trial as part of case management is clear from r 1.4."

10. We agree with the view taken by the editors of the FCP and consider that the rules and principles above are equally applicable to audio or video recordings, covert or not.

11. The White Book is also a useful reference point, not least because the notes to CPR 32 deal with the admission of covertly recording video evidence in the case of allegedly fraudulent personal injury claims.

a. CPR rule 32.1 is in identical terms to FPR 22.1 (see White Book 1046 onwards).

b. The editors of this volume suggest that the power to control evidence extends only to the control of evidence which, prior to the CPR, would have been inadmissible) (p1047).

c. *"In Jones v University of Warwick [2003] EWCA Civ 151; [2003] 1 WLR 954 CA, the question arose whether the court had exercised its discretion correctly under r 32.1 in a PI case in directing that video evidence covertly obtained by the defendant's insurers through the trespass of their agents should not be excluded on the ground that the claimant's rights under art8(1) of the convention were infringed. The Court of Appeal rejected the argument that unless it was necessary for the defendants to take the action they did, in the circumstances of this case the evidence must inevitably be held inadmissible. The court held that the conduct of the defendants was not so outrageous that the defence should be struck out. However, it was important to make clear that their conduct was improper and not justified. Accordingly, the defendants should be penalised in costs."* (p1048)

d. At p 1051 : "*In a PI case, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that it would substantially reduce the award of damages, it will usually be in the overall interests of justice to require that the proponent should be permitted to cross examine the claimant and their expert advisers upon it*" (Rall v Hume [2001] EWCA Civ 146; [2001] 3 All ER 248 CA)

e. At p 1051 the editors suggest that advance warning of the wish to adduce film or video to attack an opponent's case is subject to the general rules of disclosure and inspection, and should be raised in early case management. In O'Leary v Tunnelcraft Ltd [2009] EWHC 3438 QC, Nov 10 2011, unrep (Swift J) an application to adduce surveillance evidence was refused where it was made a month before trial and amounted to an "ambush", but in Douglas v O'Neill [2011] EWHC 601 QB Feb 9 2011 unrep (Judge Andew Collender QC) a similar application was allowed where the recording had been made shortly before trial but was disclosed at the first reasonable opportunity after the C's signed witness statement.

f. There is a useful summary at the foot of p 1048 of the applicable ECHR authorities on the Article 6 points – in essence it is for the national court to determine admissibility and relevance, subject to the overriding duty to ensure that the proceedings as a whole are fair. The court should exercise care before refusing to look at documents a party wishes it to consider.

12. See also Documentary Evidence (11th Edn, Charles Hollander QC) at 26-06 and 26-07 for a discussion of "Surveillance evidence taken in breach of art 8 rights" and "Other Unlawfully Taken Evidence", where Tchenguiz v Imerman [2010] EWCA Civ 908 is discussed, although we respectfully suggest it in fact has little direct relevance to the scenario that this note addresses.

13. With regard to the presentation of the recorded evidence, we suggest the court will be assisted by considering the following practical issues:

    a. Is it audible?

    b. Is it complete? Or has it been edited for any reason? (and can this be verified)

    c. Is there an agreed summary/transcript of what is said?

    d. If not, can one be produced reasonably quickly and without too much expense?

    e. Can the recording be played on equipment accessible to the court/other parties?

    f. Are copies of the recording available? Should they be?

14. Assuming that the evidence is capable of being understood and there is no objection raised to it on the basis of unfair editing or other incompleteness, we suggest the court would then be assisted by considering its relevance to the identified issues in the case. Clearly, if it is of little or no relevance to the issues currently before the court, it is not a sensible use of court time and resources to consider it further. There may also be situations where it is clear that a parent has 'engineered' a situation to present the other person in a bad light; for example by provoking the other person into aggressive behaviour or words. The evidential weight of such a recording would thus decrease.

15. Although the covert surveillance or recording of a parent *by a local authority* might be unlawful, we do not think that the recording of a meeting *by parents* is likely to be unlawful - even if covert, particularly if the recording is of a meeting of which all participants are already aware a record will be made in the form of minutes. Although the Jones v Warwick case is therefore instructive, we do not think it is directly analogous – in that case there was clearly unlawful conduct. In cases where material has been obtained unlawfully or covertly this may be a relevant factor and may give rise to Article 6 fairness issues, but since the court is usually engaged in ensuring the Article 6 rights of both adults and children this is unlikely to be determinative in many instances.

Examples of the use of recordings in other cases.

16. An example of a case where recorded evidence was very relevant involved a parent who had accused a foster carer of abusive behaviour; she was not believed until she was able to play the recordings of her interactions with the foster carer. See *Medway Council v A & Ors (Learning Disability: Foster Placement*) [2015] EWFC B66 (http://www.bailii.org/ew/cases/EWFC/OJ/2015/B66.html).

17. However, in the case of *H v Dent and Others* [2015] EWHC 2090 (Fam) (http://www.bailii.org/ew/cases/EWHC/Fam/2015/2090.html) the father was keen to rely on recordings of his conversations between various professionals as evidence of their wrong doing – but the recordings were not evidence of that and did not assist the court.

Conclusions

18. In summary, The Transparency Project understands that the issue of recording interactions between parents and professionals or other individuals has historically caused considerable disquiet; probably because it is seen by many as a hostile act, particularly if it is done without the knowledge of the person being recorded. There are also (legitimate) fears that the recordings may be made for an unlawful purpose; for example to unlawfully publish material on line, or to use as part of campaign of harassment.

19. The positive response that our guidance received from professional social work bodies (See British Association of Social Workers here : https://www.basw.co.uk/news/article/?id=1093 and National IRO Managers Partnership here : http://nirop.org/2015/12/29/parents-who-record-child-protection-meetings-what-social-workers-need-to-know/), along with the helpful CAFCASS policy on this issue referred to in our guidance, suggests that practitioners accept that requests to record meetings should be dealt with constructively. However, there may still be reasons that parents did not feel able to make an open request.

20. However, it is suggested that these are not issues which should take prominence for the court when deciding whether or not to admit recorded evidence and, having admitted it, the weight that should then attach.

21. There may be occasions when the exercise of gathering the evidence is worthy of particular judicial disapproval – for example, individual members of The Transparency Project are aware of recordings being achieved after recording devices were 'planted' on children, which is clearly highly inappropriate and potentially emotionally damaging for a child. No doubt activities of that kind would leave a parent open to negative comment about their own parenting capacity.

22. However, if the evidence gathered is accessible and relevant for the determination of a particular issue in the proceedings, The Transparency Project cannot discern any reasonable objection to that evidence being relied upon.

23. This document has been prepared for the purposes of family proceedings, and therefore technically falls within the restrictions on publication in the FPR. However it contains no case specific or private information. The authors respectfully request the court's permission to publish this document on The Transparency Project website.

Lucy Reed, Sarah Phillimore, Dr Julie Doughty

The Transparency Project

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