Openness in family justice – where should the balance fall?

The family courts became open to the press from the 27th April of this year. The provisions for the attendance of the media at hearings in family proceedings has been implemented by a change to the Family Proceedings Rules made by The Family Proceedings (Amendment) (No 2) Rules 2009 SI 2009 No 857 (county court and High Court) and The Family Proceedings Courts (Miscellaneous Amendments) Rules 2009 SI 2009 No 858 (magistrates' courts) and two Practice Directions *Attendance of Media Representatives at Hearings in Family Proceedings* dated 20th April 2009 made by the President, Sir Mark Potter, to support the rule changes in the respective courts. Change regarding media attendance in the family proceedings courts is introduced through amendment to the Family Proceedings Courts (Children Act 1989) Rules 1991 with the insertion of Rule 16A. Effectively duly accredited representatives of news gathering and reporting organisations, and any other unaccredited person whom the court permits, are now allowed to be present at hearings of all family proceedings in the High Court and county court, except adoption and placement hearings (although the Government intends to consult on legislation to move this forward).

The judge has a power to restrict the presence of the media in the interests of children, for the safety and protection of parties or witnesses (or persons connected with them), for the orderly conduct of proceedings, or where justice would otherwise be prejudiced (for example, where there is a risk that a witness will not give full or frank evidence because the media is present).

There is currently no change to the existing law on what can be reported in family cases. What the media can report depends on the type of case. In matrimonial cases, generally speaking, the media can report names and addresses of parties, an outline of the grounds and

defences in the case, legal points, and the judge's rulings. In matrimonial finance cases, such as maintenance and property adjustment orders on divorce, the media can usually: publish names, addresses and occupations of parties and witnesses; a concise statement of the grounds of the application and defences raised; submissions on any point of law; and the judgment. They cannot report what has occurred in the proceedings nor information and evidence disclosed in relation to the case by the parties orally or contained in documents filed in the case, unless the court has given specific permission.

In children cases, reporting is much more limited. In general, the court needs to give permission for anyone to publish: any details which could identify the child as being the subject of the proceedings including the name of the local authority and the school the child attends; any information about what has taken place, or been said, in court; and any information contained in documents in the proceedings. In domestic violence cases, the rules on what can be reported vary, depending on the facts of the case. If a child is involved in the case, reporting is likely to be much more restricted.

It is a criminal offence to publish: (1) Information about a child such as their name, their school or their home address that might enable the identification of the child; and (2) Details of any parties or witnesses that could also enable the identification of a child as being involved in the proceedings. It would also be a contempt of court to publish details of what has happened in court in a case involving a child's welfare or maintenance (this includes details of what was said by lawyers, the judge, the parties and witnesses, as well as the content of any documents) unless specific permission has been given..

In some cases, the judge is able to place additional restrictions on reporting. They can also decide to relax some, or all, of the restrictions.

Openness is one of the basic principals of natural justice; the idea that justice is not only done, but seen to be done. Openness brings accountability and transparency and ideally confidence and an understanding of the justice system. Prior to April 2009 the balance fell in favour of protecting the privacy of the individuals involved in family cases. However the balance has shifted and the media have been granted access to the family courts. The Ministry of Justice states "The challenge we face is to improve confidence by raising public understanding of how decisions are made, and at the same time, protect the privacy of children and families involved in family court cases".

Undoubtedly the main reason for the shift was the lobbying of father's groups like Fathers4Justice. Father's groups made a mockery of the family justice system in giving the public the impression that the family courts are biased in favour of mothers and powerless to enforce contact order [The Government responded by implementing the new provisions on enforcement contained within sections 11A-11P of the Children Act 1989]. What the majority of the public will not know is that a number of the campaigners for these groups were refused contact by the court for reasons such as an inability to put the past behind them, using the child as a route to the mother, constantly criticising the mother during contact sessions, and the children refusing to see their fathers, because of their father's behaviour. In the cases I have seen over the years as an outdoor clerk, mini-pupil, pupil and now as a tenant, I can honestly say I have never witnessed a father refused contact without very good reason. This is for the simple reason a child has a right to contact with their father and there must be very good reasons for limiting contact or refusing contact.

I am often approached by friends and friends of friends to give them some preliminary advice on issues of contact and division of assets upon separation. I am astounded by the number of fathers who believe the court would not order contact despite their being no welfare concerns or mothers who think it is reasonable to use the children as a weapon after separation and believing the court will uphold their stance. Also the number of wives who think they should get everything out of the matrimonial pot and expect husbands to pay for the lifestyle they enjoyed during the marriage to the end of their days (especially when the husband had an affair). Having said that I have also advised mothers who have allowed contact despite there being real welfare concerns, because they thought they would get into trouble with the courts for withholding contact. This is why there needs to be a lot more information readily available about the outcome of everyday divorce settlements and contact/residence disputes. This is what I would have liked to have seen from the opening up of the courts. This would help people to make the right decisions in the first place, give them guidelines on how judges would apply the law to their situation, avoiding litigation. This is even more important in light of the cuts to legal aid and the number of people representing themselves.

When the law changed at the end of April there were a number of reports around that time, where reporters had gone into courtrooms watching cases which courts deal with everyday. Camilla Cavendish, for *The Times* wrote on 28th April in an article called "At last, we go behind the closed doors of family courts":

> "Being able to sit in court, hear the arguments and watch the reaction of the parties is an entirely different experience to talking to aggrieved people on the phone. Without access to the court you are always conscious that you are only getting one side of the

story. In court there are more shades of grey. You learn things the parties did not want to tell you.

This does not mean that I will necessarily change my mind, in this particular case, that something has gone badly wrong. But I will feel much more confident of being able to reflect accurately the decision in all its sad complexity."

She states:

"This is what our campaign for openness was all about: to tell the public what is being done in their name. To track the social workers, judges and the expert witnesses — who can make crucial recommendations on the basis of limited information — and make them accountable. And to question decisions which seem unjust".

There was another report in *The Times* by Fiona Hamiton on 1st May "Baby was put in care even though mother "posed no risk"". This appeared to me to be an inaccurate and sensationalist headline, because later she accurately states "no immediate risk". The child had been placed on the child protection register after a psychologist inaccurately assessed the mother as having factitious illness, formerly known as Munchausen's by proxy, but later concluded she had a narcissistic personality. I wanted to know more detail, for example under what provisions the child was removed, i.e. Police Protection Order, Emergency Protection Order, Interim Care Order or a s.20 agreement to accommodation? I imagine the reason Ms Hamiton did not give such details is because she did not have sight of the case papers which in my opinion led to a skewed view and not wholly accurate report of the case. She gave the impression the children were simply removed by the Local Authority without recourse to the court which to an unknowing party would give cause for concern. In the President's Practice Direction 22 April 2009 [2009] 2 FLR 167 it states: 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. It would seem Ms Hamiton either did not make the application or it was refused.

Steve Bird, for *The Times* Central London report on 28th April 2009 attended several everyday types of cases in the Principal Registry. He talked of how couples gave withering glances to ex-partners and describes "harrowing" residency cases involving children. There were a number of other reports around the end of April, beginning of May which again report on the everyday cases. Most are concerned with public proceedings, a reaction to Baby P no doubt. However they contain little or no detail about the cases. All we have heard in the press recently about the substance of any family cases is the big money cases. However, what we need is reports on the division of assets on a needs basis and the "not enough money in the pot to go around" cases, to give the majority of people an idea on how much they can expect and how a judge decides on residency and what are genuine welfare concerns.

Months on from the change in the law it would seem the media are now only interested in the celebrity cases. Judges are applying the exact same approach to celebrity cases as non-celebrity cases This not only seems unfair on celebrities, because the change in the law to bring openness to family just is been exploited to invade their already limited privacy, but will also give a skewed view of the likely outcome of cases, especially in relation to matrimonial finance.

In the case of Spencer v Spencer [2009] EWHC 1529 (Fam), Counsel for both parties, sought to prevent media attendance. Counsel argued that, among other things that the media was only

interested in the case because of the parties' profiles. Munby J concludes that there was no sensitive information that would be revealed that needed to be protected. Munby J comments that it would be "potentially dangerous, very dangerous, territory……. to privilege one group of the community – those who attract the attention of the media – over and above another group who do not" In Child X (Residence and Contact - Rights of media attendance – FPR Rule 10.28(4)) [2009] EWHC 1728 despite the President deciding the existing order excluding the media should be upheld, he said: "First, private law family cases concerning the children of celebrities are no different in principle from those involving the children of anyone else. An application by a celebrity who happens also to be a parent who is unable to agree with a former spouse or partner over the appropriate arrangements for their child(ren) is not governed by any principle or assumption more favourable to the privacy of the celebrity than that applied to any other parent caught up in the court process."

However can we blame the press? If they cannot report on the evidence you can hardly blame them for losing interest in the non-celebrity cases. Camilla Cavendish and other reporters campaign for more. In her article "At last, we go behind the closed doors of family courts" she writes:

"The family courts no longer operate in the dark, as of yesterday. But they are still in the dark ages compared with criminal courts. It should be perfectly possible to keep children's and parents' names out of the press while reporting the evidence in full: the media does this routinely in rape cases. But in the family division, reporting restrictions are enshrined in ten statutes, some of which can only be changed by Parliament."

It was announced on 9th July 2009 that Jack Straw, the Secretary of State for Justice, is to ask the FPR Committee to consider whether rules can be made to allow journalists to report the substance of children's cases. He feels that the new rules on media attendance are of slight

effect due to the current reporting restrictions. Jack Straw plans to include proposals for reform in his Schools and Safeguarding Children Bill to be introduced in the new session of Parliament in November.

He said that he wanted to bring reporting rules in line with youth courts, so that the media would be able to report the substance of a family case and not just the "gist", unless the court rules otherwise. The Family Justice Council suggests this is misconceived. In the youth courts there are allegations of criminal behaviour while in children's cases in the family courts, children are "caught up in events not of their making". They have also expressed "grave concerns" that the latest proposals to open up the courts may drive away experts and violate children's rights to privacy. They are also "extremely concerned" that the media will have access to confidential medical and social work reports. A psychologist said that the result would be sanitised reports of less value to the court. Fears were also expressed that the move would deter people from becoming social workers and that judges would be heavily criticised by the media if they refused to lift anonymity provisions.

I think that the more people know about the running of the family courts the better. However whilst I am an advocate for more openness in the court to assist individuals in their own family disputes and to provide guidance to them when making decisions about contact/division of assets after marriage I am concerned about the individuals in the cases where the media attends. I am yet to be in a case where the media have attended, however, I can think of a number of cases where I believe the presence of the media would have hindered progress and full and frank disclosure. I can recall one case where the mother refused to tell the Local Authority about the paternity of the father. She insisted the child was conceived after a one night stand with a man whose name she could not remember. On the last day of the trial she disclosed the identity of the father. She had not previously wanted to disclose the

information, because she had been having a long term relationship with a married man and was protecting him or possibly even herself. It was difficult for her to talk about this is front of the judge, the social worker the guardian and the representatives I am sure if the media had been present that day she would not have made the disclosure.

The presence of reporters and relaxed rules on reporting will undoubtedly put fear in people that the neighbours my become aware of their business and lead to less frank disclosures. The media do not need to obtain advanced permission to attend, which will take parties by surprise and hinder full and frank disclosure simply because they will not have been afford the opportunity to consider the consequences of their attendance.

As for social workers and professionals I imagine it may deter some from the prospective professions, but if they are not confident their work will stand up to scrutiny than quite frankly should they be in that role? Although in light of the back lash on Baby P I can imagine a situation whereby a social worker has only got to look in the wrong direction in court and the report would be unfavourable.

Openness in family justice – where should the balance fall? I think the answer has to be, given the doubt cast upon it by Father's groups and the lack of confidence in Local Authority's post Baby P, and experts post the Sally Clark case, that it must fall in favour of greater openness with reporters able to report on the substance of the cases. I am also an advocate for greater openness to assist families in their disputes at an earlier stage. Unfortunately I do think in some cases media attendance could affect full and frank disclosure, although I hope the effect can be minimised by the parties been informed that their identities will remain anonymous

and judges exercising their discretion to exclude the press where their presence would prejudice justice.

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