



PRESIDENT OF THE
FAMILY DIVISION

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I have been asked to speak on two recent developments in family law, one of which, unsurprisingly, has received more publicity than the other.

The first is, “A review of the opening of the family courts to the media” and the second, is “A review of “the work of the Court of Protection”. In view of the time available I shall have to be as brief as I can in both respects, but prepare yourselves for a possibility of an over run!

In relation to the opening of the family courts to the media, I should say at the outset that following the initial flurry of interest in the first few days, things have settled into a kind of limbo of uncertainty while the government works out the next step toward a coherent scheme in final form. Ministers have still to work out and give directions to their civil servants where their priorities lie between their professions of concern for the privacy and welfare of the child and their apparent desire to satisfy the demands of the press in relation to so-called transparency.

You will recall that in 2005, the government issued a public consultation document on the issue of openness of the courts, proposing that henceforth all family proceedings should be held in public, subject only to a judicial discretion to exclude in particular cases.

The broad view of the senior judiciary in response to this consultation was that the media should be admitted to all family proceedings, except adoption proceedings, provided the court has a wide discretion to exclude the media in the interests of justice in appropriate circumstances for the whole or part of the proceedings where state power is involved.

There was recognition that the courts are there to serve the public and it is therefore vital that the public has confidence in them, particularly in the case of care proceedings. It was further recognised that dissatisfaction with the court process was building up, largely based on the one-sided complaints of aggrieved families in care proceedings which was distorting the public's perception of the legal process and damaging its confidence in it. A similar problem arose in a number of private law children cases, principally as a result of the complaints of aggrieved fathers deprived of full or equal contact with their children.

In response to the government consultation in June 2007, the views of the children and children's organisations were clear; they did not want this to happen. They felt that the media should not be allowed into family courts as of right, as they feared that their privacy and their interests would not be properly protected.

Initially the government accepted the view that, subject to requiring judges to publish and make available their judgments on Bailli on a wider basis in suitably anonymised form, the privacy rule should be maintained. However, in December last year, the government unexpectedly changed its mind in response to further media pressure, and announced its intention to introduce rule changes which confer upon "duly accredited representatives of news gathering and reporting organisations" an effective right to be present at private hearings of children proceedings, subject only to the power of the court to exclude them for specified and very limited reasons. Rule changes were rapidly (unduly rapidly) formulated and brought into force, commencing on 27th April 2009. Those changes were rushed in, despite the forceful warning of the judiciary and the concerns of the Family Procedure Rules Committee (FPRC) that a coherent package of effective change, balancing the issues of welfare and privacy against the demands for transparency, could only be implemented with changes to primary legislation, in particular, to deal with the provisions of s. 12 of the Administration of Justice Act 1960 and its surrounding jurisprudence, which inhibited disclosure and reporting of the detail of cases as permitted in criminal and civil proceedings conducted in open court.

In the event, there is of course pressure for further change because, while the press have gained the right to be admitted as 'watchdogs' of the public (as it is put), the new rules do not effect any substantial change in the right (and the real interest) of the press (once having been admitted to the proceedings) thereafter to report the evidential detail of such proceedings in newsworthy cases.

While under existing legislation in relation to children the press (once admitted) are entitled to report on the nature of the dispute in the proceedings, and to identify the issues in the case, they are not entitled to set out the content of the evidence or the details of matters investigated by the court in the kind of detail which attracts readership and increases circulation in sensitive (or so-called 'celebrity' and 'human interest') cases. It has thus been the experience of the judiciary that, after a flurry of interest in the first week, the media have no longer come to court except in so-called 'celebrity' cases.

A further and potent reason for this apparent lack of interest is that the newspapers are not immune from the recession which affects their operations across the board and they can no longer afford to send a court reporter, either from the national or local press, routinely to be present, unless they have been forewarned that a case of interest to the public will be under consideration. Public law cases, in particular, take days of court time and the press say they simply do not have the resources to have a reporter listening throughout the proceedings in order to pull together a reasoned or informed article on the case and how it was considered by the court, and they are not satisfied with the earlier proposed solution of the much wider publication of judgments subject to anonymisation.

Mike Dodd, legal editor for the Press Association, recently drew attention to another, foreseeable effect of the changes¹. The rule changes introduced in April bite upon all family hearings since then (save adoption), regardless of the date the proceedings commenced. They include ancillary relief proceedings.

Mr. Dodd said,

“We were present at Lord Earl Spencer’s divorce case in June this year when he requested a blanket ban on media. However, because the judge refused to ask the media to leave, the couple agreed to settle out of court. This is something which might happen often.... I feel we’ll see out-of-court settlements happening a lot more as people don’t want their family issues aired in public.”

That should hardly have come as a surprise! Anyone familiar with the classic exposition of these questions in *Scott v Scott* almost a century ago might well have anticipated just such an effect.

¹ Press Gazette-Journalism today August 2009. Page 22.

In July of this year, the government put yet further rule changes to the FPRC in order to go further in what government saw as an appropriate interim solution pending the changing of the legislative framework dealing with reporting restrictions, as to which there was then no timetable. The draft rule changes sought were intended to fit with existing legislation and to allow the press not merely to be present but to see the evidence in the court bundle including all statements and reports on the family in order to understand what are (through necessity) largely paper-based hearings. The media would then be allowed to publish, “the substance” of the proceedings and “tell the story” as it was put.

The FPRC (the Committee) reacted strongly against these proposals (which despite considerations of family privacy went further even than what is permitted in civil proceedings) and immediately made clear its concerns, having particular regard to the proposal to give to the press the right to see and report on information contained in the medical, welfare, and other expert reports in the court bundle. The Committee made the following key points:

- The Committee is in favour of greater transparency in family proceedings
- The Committee doubted whether the extent of reporting proposed would be within the powers of the Committee as a rule making body. In particular, there was a concern that the effect of the proposed new rules would be effectively to rob the primary legislative provisions of s.12 AJA 1960 of their intended effect. The radical revision of the reporting restrictions proposed should, as had earlier been recognised, be dealt with in primary legislation and reform should not be brought about piecemeal in the manner, or to the extent, suggested in the draft rules. (It is of course the function of rules and rule changes to further the pattern and purpose of enabling statutes and not to subvert it).
- There were also serious doubts about whether such a rule could be compliant with Article 8 of the European Convention on Human Rights. The Committee had particular concerns that the proposals insufficiently protected the welfare of children, in particular the child the subject of proceedings, but also other connected children (such as older children whose histories could be relevant to the court’s decision regarding the child subject of proceedings). The rules risked causing significant harm to children, as a result of important and very personal details of their lives, and the dispute concerning them, being published to the general public. The situation is most acute where reporting

takes place in a local community, where a judicial requirement for anonymisation is unlikely to be sufficient to protect the identity of the child².

- It is a key ethical principle that doctors and social workers concerned with children old enough to understand must, when seeing children, tell them who will see the resulting report of the interview with that child. Knowledge that these persons included media representatives would be likely in many cases to affect the willingness and ability of the child to engage properly with such professionals and the court process.
- The need for case to case consideration of the need to impose reporting restrictions and their precise scope would be likely to add very considerably to the delay and costs in such cases. In these situations, the courts have to balance the rights of the press to publish such information against those of the child and family to privacy. This requires a detailed focus on the facts of the individual case which in cases of high press interest would consume much, if not all, of the time listed for the substantive hearing.

The Committee queried whether, in the light of all these factors, the net result might be that judges might feel obliged to exclude the press altogether under the new provisions of FPR r.10.28.

I understand that, immediately following the opening of the next session of parliament, the government now intends to introduce, in a Bill sponsored by DCSF, legislative changes repealing section 12 Administration of Justice act 1960 and amending s.97(2) Children Act 1989 and Section 33 Children and Young persons Act 1933 in so far as they relate to family cases. Whilst new restrictive provisions are proposed, the precise details of the changes have not been formalised. I anticipate and would certainly earnestly hope that the concerns of the FPRC will be catered for, but the position remains unclear and so it will remain while a draft Bill is produced. It is not yet clear whether pending the introduction of legislation, the further interim measures I have just discussed will be pursued in a revised form. However, in the light of the amount of work required to bring in the legislative change against the very tight timetable that is being proposed (the government is bent on introduction in

² When issuing a press statement on 19th December 2008 condemning the original proposals for change, the Association of Lawyers for Children highlighted the experience of a children's solicitor who said, "I have been representing children for over 25 years, and for their classmates and friends to even know that they are the subject of proceedings can lead to bullying, victimisation and worse. Allowing details of intimate and sensitive issues to be published could cause untold humiliation and misery."

the Queen's Speech) it would seem to me both unrealistic and highly undesirable to continue to press ahead with the production of stop-gap rules which have received such little support and on which the FPRC might feel obliged to consult.

The issues here are conceptually complex; Case history tells us that (with the exception of Mr Justice (now I am delighted to say Lord Justice) Munby) nobody has felt able to define the scope of s.12 AJA as it is presently framed. I am concerned at the haste with which the task is being approached. As to consultation on the detail, I am told that further informal consultations have taken place with representatives of a number of so-called stakeholders, but I have no knowledge as to the views which they have expressed. So far as consultation with the press is concerned all I know is the statement in a piece by Camilla Cavendish in the Times of July 9th 2009, accompanying a report by Francis Gibb of her interview with the Lord Chancellor, that he is doing "what he promised The Times he would in response to [its] campaign to open up the family courts".

What I know for sure is that, if the new regime is not carefully thought out, the consequent burden and real cost will fall not on the media but on those judges, magistrates and advocates who will be required to consume time arguing and deciding press-related issues, rather than concentrating on the case in hand. At a time when the courts' expanding workload is increasing with no additional judges or court days, this would be a particularly regrettable development. Regrettably, also, from the point of view of the profession it would be yet another expense to be absorbed by them within any fee regime imposed upon them by the LSC and a yet further disincentive to experienced advocates to engage in children work.

I now turn to the Court of Protection (CoP), giving it no more than 'Bullet point' treatment in light of the time I have available.

The court has had more than its fair share of difficulties in its early stages, resulting from a failure, prior to the implementation of the Mental Capacity Act to appreciate the high volume of work which would flood in during the opening period of adjustment before the new fee levels came into force, and the overall burden this would place on the number of judges appointed. This has required the taking of fairly drastic administrative steps in order to work towards an improved position.

There are not enough judges in the court's central registry at Archway Tower to cope with the volume of work. It has four full-time judges whereas six are needed, and the position has been aggravated by the long-term sickness of one of them. Unfortunately the Act (probably through oversight) does not provide for deputy judges, however expert, to act in this jurisdiction. This has resulted in delays in dealing with applications.

Further, although the Act itself, in section 51(2)(d), states that court rules may make provision for the exercise of the jurisdiction of the court by its officers or other staff in such circumstances as rules may specify, the Court of Protection Rules 2007 have made no such provision. This is a serious lacuna which requires rectification, given that, prior to the implementation of the Act, nominated officers of the court (which was essentially an administrative body) made the orders in virtually all the straightforward, uncontested applications in property matters under a system which worked well and speedily.

In order to alleviate the position, the court has for a year now operated under a Regional Protocol for hearings to take place outside London which, following amendment, has eased the London burden and is now working satisfactorily. 58% of such hearings now take place outside the central registry and, in addition to all the high court judges of the Family Division and the Chancery Division (who sit ad hoc to hear appeals or deal with cases of particular difficulty), 32 District Judges and 17 Circuit Judges have been nominated to hear Court of Protection cases outside London.

Difficulties have also arisen from the fact that the budget holder responsible for the administration, staffing and funding of the Court of Protection was initially the Public Guardian. However, since 1 April 2009, the Court of Protection has become part of the RCJ group within the HMCS and the now integrated administration should constitute a substantial improvement.

Service users have complained that the Court of Protection procedures are now more bureaucratic and time consuming than prior to the implementation of the Act. I have already touched on one reason for this. In addition however people have had difficulty with the Lasting Power of Attorney forms which have proved too long and complicated, producing frequent mistakes on the part of users. New and simplified

forms have now been introduced and, with the benefit of the experience of almost 2 years since its opening, the time is now ripe for a wider review of procedures.

There is a further complaint that the procedures in the CoP are far more expensive than before the Act came in force. That is of course not a matter within my control, but setting up and administering a new court to replace what was previously a largely administrative bureau limited to property matters is an expensive business.

Turning to the main judicial business of the court, it is of course the case that the Mental Capacity Act 2005 created a new kind of Power of Attorney, a Lasting Power of Attorney (LPA) in place of the former Enduring Powers of Attorney (EPA). Unlike EPAs, by which a donor could authorise an Attorney only to make decisions regarding his/her property or affairs, a donor can now make an LPA for property and affairs and an LPA for personal welfare and it is the business of the Office of the Public Guardian (OPG) to establish and maintain a register of LPAs. In or during 31 March 2009 there were some 20,000 EPA applications registered, some 49,000 applications to register LPAs for property and affairs and some 15,000 applications to register LPAs for personal welfare.

Cases involving EPAs and LPAs only come to the court if there are questions concerning their validity or in an event of a dispute. In fact very few LPA cases have come to the attention of the court in the last two years. It would thus seem that the policy objectives of the Act have been achieved and are working well. For example, the provision whereby a donor can name 'up to five named persons' who are entitled to receive notice of application to register the LPA, not only enhances the donor's freedom of choice but reduces the number of objections from family members. Similarly, the statutory requirement that the donor's capacity to execute an LPA must be certified when the power is created, reduces the scope for later challenges to its validity.

Where a person has not made an EPA or LPA for property and affairs, the Court of Protection can appoint a deputy to make decisions relating to these property and affairs. In effect the orders appointing deputies for property and affairs purposes simply confer upon the deputy similar authority to that of an Attorney acting under an LPA, but with the added requirement (a) to provide an annual account and (b) to give security. Deputies are usually required to give security in the event that they may default in the performance of their duties. There have been some complaints of a lack of consistency among judges at Archway regarding the level of security

required. I am happy to tell you that these complaints should largely be resolved by a judgment about to be handed down (indeed it may already have been handed down) today by Her Honour Judge Hazel Marshall QC in the matter of H, Baker v H and the Official Solicitor (Case No. 11461874) which should bring greater uniformity and a reduction in the level of security required where insurance cover can be demonstrated.

In connection with the appointment of deputies for personal welfare purposes, the court has had to cope with a far higher number than expected of applications by persons for approval of their appointment as a deputy for personal welfare purposes. It was always anticipated that close relations and other persons looking after the affairs of persons with mental incapacity, whether under an EPA or otherwise, would appreciate and take advantage of the provisions of Section 5 of the NCA which provides protection from liability for anyone in providing care or treatment of a person who lacks capacity to consent to them. This is enough to cover the classic case where applications are being made in relation to an elderly spouse or relative beginning to suffer senile dementia but looked after by a relation who makes the application.

In the event permission to those applying to be appointed as deputy for personal welfare purposes has so far been refused by the court in some 75% of cases, mainly because of the provisions of section 5 and the failure of the applicant in most cases to justify the need for any appointment of a personal welfare deputy. Further, where a real need does appear to be such a need, section 16(4) of the Act provides that a decision of the court is to be preferred to the appointment of a deputy. An appropriate example of a case for appointment of a deputy is a situation where it appears that otherwise there will or may not be consensus within the family on questions of personal welfare. In this last connection, another decision of Judge Hazel Marshall QC dated 25 November 2008 (Re S & S (Protected Persons), C v - & V) is illuminating. It also gives authoritative consideration to the weight to be given to P's own wishes and feelings in relation to any best interests application. Judge Marshall held that where P is able to and does express a wish or view which is not irrational, impracticable and irresponsible, it should carry great weight and effectively give rise to a presumption in favour of implementing those wishes unless there is some potential detrimental effect upon P of not doing so.

Finally, in relation to personal welfare cases, there have been unexpectedly few applications under the Deprivation of Liberty safeguarding provision which came into force in April this year. For the time being, I have directed that, as with all applications, they should be issued at Archway, but thereafter should be transferred to be heard by High Court judges until appropriate guidance decisions become available.

While the court has now been up and running since October 2007, I am advised that some practitioners, when acting for those who lack capacity in personal welfare cases may not be asking themselves what is the appropriate course to take under the Mental Capacity Act.

If there is good reason for appointment of a deputy, applications for orders under s.16 are often not filled in with sufficient care and detail.

Although the application form is only a short one, it is the most important part of the process. It not only starts the proceedings but identifies the core issues of the case and the status of the parties. It should be used to concentrate the applicants mind as to what function or decision P cannot make and why the court needs to assist. The applicant should also anticipate the order the court is likely to provide i.e. will a general order be adequate, or are there specific matters that need to be dealt with, such as bringing proceedings or obtaining safe custody of a will? If a final order has been made, if the deputy then requires further authority from the court, a new application will have to be made with all the expense effort and delay which that will entail. Orders submitted for approval should be worded accordingly and in such cases it will not be appropriate for the court to make old style declarations.

It is right to observe, however, that there will still be cases where the court will need to exercise its inherent jurisdiction, for example where there is a question of undue influence being brought to bear on a vulnerable adult. In these cases, the interface between the inherent jurisdiction and the MCA is not absolutely clear; however, the High court retains its inherent jurisdiction to protect the vulnerable adult. The first port of call for the practitioner, however, should be to clarify whether the provisions of MCA will do.

I fear I have indeed exceeded the time allotted to me. It only remains for me to wish you all a successful conference.

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