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Inherent Jurisdiction of the High Court of Justice, Family Division- Where a child is in the care of the Local Authority-recent issues

Richard Ager

Covert Recording in Family Proceedings:

From *"the stool-pigeon, the eavesdropper and the concealed observer"* to *"the envy of yesterday's spies" – the position following Re B (A Child) [2017] EWCA Civ 1579*

Prepared by Eleanor Battie and David Reader,
delivered by Rachael Claridge

Speakers

Richard Ager was admitted as a solicitor in 1981 and transferred to the Bar in 2004. Whilst a solicitor he specialized in Family work, being a member of the Law Society's Children Panel. He was active in Resolution and sat on the national management committee of National Family Mediation.

Richard acts for Local Authorities, parents and children in care and related cases. He acts for Local Authorities, family members and the "patient" in Mental Capacity Act 2005 cases in the Court of Protection as well as in displacement of nearest relative cases in the County Court.

He is active in the local FJB being Chair of the sub group on performance tasked with reporting on and trying to achieve conclusion of Family cases within statutory time scales. Richard has provided training to Sussex and Worthing Law Societies on Court of Protection work and training on proceedings under Children Act 1989.

Rachael Claridge Over the last 20 years, Rachael has developed a practice in all aspects of family law, with particular regard to those involving child protection issues.

Rachael's experience of Public Law proceedings is extensive. She is regularly instructed on behalf of parents, intervenors, local authorities and children's Guardians. She hopes her manner with lay clients is approachable and straightforward, yet can explain complex and difficult terms in a way that can be understood. She very much values the opportunity to have an integrated working relationship with the professional client.

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Inherent Jurisdiction of the High Court of Justice, Family Division- Where a child is in the care of the Local Authority-recent issues

Richard Ager

A brief history

Pre Children Act 1989, wardship and the inherent jurisdiction of the High Court was regularly used to take children into care when there was already jurisdiction under the Children and Young Persons Act 1969 to do so. The latter had many problems:-

a) The test for bringing a child into care was non existent
b) Parents were not parties
c) The child was always a party but in order for parents to have some sort of say public funding was granted to parents to represent the child
d) The proceedings took place in the Magistrates Court and appeal was to the High Court

This state of affairs was widely recognised as not being a good thing.

In wardship, s 7 Family Law Reform Act 1969 gave the High court power to place a ward of court in the care of or under the supervision of the Local Authority. So there were two routes into care

Then A v Liverpool City Council [1981]2 FLR 222 struck. This was a decision of the House of Lords. Effectively it was ruled that where there was a statutory remedy and the child made the subject of an order under the Children and Young Persons Act 1969, wardship and the inherent jurisdiction could not be used to protect children.

Chaos ensued. At times there was an unseemly race to get a wardship application in before the Local Authority issued under CYPA 1969 as once that happened the High Court no longer had jurisdiction

So along came the Children Act 1989

s.100 Children Act 1989

Restrictions on use of wardship jurisdiction.

(1) Section 7 of the Family Law Reform Act 1969 (which gives the High Court power to place a ward of court in the care, or under the supervision, of a local authority) shall cease to have effect.

(2) No court shall exercise the High Court's inherent jurisdiction with respect to children—

(a) o as to require a child to be placed in the care, or put under the supervision, of a local authority;

(b) so as to require a child to be accommodated by or on behalf of a local authority;

(c) so as to make a child who is the subject of a care order a ward of court; or

(d) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(3) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.

(4) The court may only grant leave if it is satisfied that—

(a) the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(5) This subsection applies to any order—

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

So that appeared to be that. The Local Authority could only apply under s.31(2) Children Act 1989

Problem

As we all know a care order, whether interim or final grants the Local Authority parental responsibility for a child. And has the power to determine the extent to which a parent or holder of parental responsibility may meet his parental responsibility for a child-s.33 (3) Children Act 1989. So at face value, that appears to be that and the LA shall determine that some questions cannot be settled by a parent or holder of PR. The section though requires the LA not to cause the child to be brought up in a religious persuasion than that in which he would have been brought up had the order not been made (33(6) a) , cannot consent to adoption and cannot appoint a Guardian. The LA cannot cause the child to be known by a new surname or be removed from the United Kingdom save for a period of less than one month. So there are restrictions on the LA on exercising PR.

How though can issues be resolved where there is a dispute between the parents and the LA regarding the exercise of parental responsibility?

Along comes s.9 Children Act 1989:-

(1) No court shall make any section 8 order, other than a child arrangements order to which subsection (6B) applies, with respect to a child who is in the care of a local authority.

(2) No application may be made by a local authority for a child arrangements order and no court shall make such an order in favour of a local authority.
So that prevents an application by a Local Authority for a Specific Issue or Prohibited Steps order under s.8 Children Act 1989 and it prevents the court from making a Specific Issue order or Prohibited Steps order whilst a child is in the care of the Local Authority

So, we turn to the High Court's magic sparkle powers under the inherent jurisdiction-these powers cannot be exercised by a High Court Judge sitting in the Family Court. It is the remaining jurisdiction of the High Court of Justice, Family Division and the President has very recently confirmed this in his guidance

JURISDICTION OF THE FAMILY COURT: ALLOCATION OF CASES WITHIN THE FAMILY COURT TO HIGH COURT JUDGE LEVEL AND TRANSFER OF CASES FROM THE FAMILY COURT TO THE HIGH COURT dated 28 February 2018.

Paragraph 27 of the Guidance seems to say that only a High Court Judge siting in the Family Court may transfer a case to the Family Division. No District Judge, Circuit Judge or Recorder (even when sitting as a s.9 Judge) may transfer a case to the Family Division. The jurisdiction rules of the Family Court (at whatever level) and the Family Division of the High Court is clearly complex and partly governed by the Matrimonial and Family Proceedings Act 1984. So, if the issue arises in existing proceedings in the Family Court then the case must be transferred to Tier 4 (a real High Court Judge-i.e. not a s.9 Judge) who may then consider transferring that part of the case that requires the use of the inherent jurisdiction to the Family Division for determination. If it is a free standing issue then the application should be on an originating summons to the High Court of Justice, Family Division. It all feels a bit like "the People's literation front of Judea and the Juadean People's Liberation Front

The powers of the High Court under the inherent jurisdiction are theoretically limitless. It also makes the idea of a seamless Family Court feel a bit lost.

<u>Some examples</u>

1. Re J (Specific Issue Order: Child's religious up bringing and circumcision) [2000] 1 FLR 571. Here the Father wanted to have his 5 year old son circumcised for religious reasons as he viewed it as an important part of his Muslim identity. There are a number of cases in private law on the issue right up to L and B (Children: Specific Issues: temporary leave to remove from the jurisdiction: Circumcision) [2016] EWHC 849 (in passing please note the cost is described as EWHC-this indicates it is an inherent jurisdiction case-a decision of a Tier 4 Judge in the Family court will be described as EWFC). In Re J, the President, Dame Elizabeth Butler-Sloss said

" There is a very small group of important decisions made on behalf of a child which, in the absence of agreement of those with parental responsibility, ought not to be carried out or arranged by a one parent carer although that person might have parental responsibility . Such a decision ought not be made without the specifics approval of the court…….The

requirement for determination by the court should also apply to a local authority with parental responsibility under the act."

You will see this is a private law case where the then President offered some very general guidance

2. Immunisation

Barnet Borough Council v AL [2017] EWHC 125 (MacDonald J) set out the applicable law as follows

*"Thus, **where there is a dispute between those holding parental responsibility (whether as between parents or between parents and a local authority holding a care order**) as to whether such a vaccination or vaccinations should take place **the court has jurisdiction to determine the dispute**. In determining the question before the court, the welfare of the child is the paramount consideration of the court. Within this context, the court must accord appropriate weight to the views of the parent or parents having assessed those views and must exercise an independent and objective judgment on the basis of the totality of the evidence before it, including, but not limited to, the expert evidence.*

*In this case the court is concerned with the issue of vaccinations in the context of children who are the subject of care orders and thus the dispute is between the local authority sharing parental responsibility for the child and the parent with parental responsibility. **In the circumstances where SL is in the care of the local authority, by virtue of section 9(1) of the Children Act 1989 the local authority cannot apply for a specific issue order with respect to the issue of vaccination.** Further, given the gravity of the issue in dispute, it is not appropriate for the local authority simply to give its consent to immunisation pursuant to the provisions of section 33(3) of the Children Act 1989 on the basis of its shared parental responsibility for SL under the interim care order (see A Local Authority v SB, AB and MB) [2010] EWHC 1744 (Fam); [2010] 2FLR 1203 and In re Jake (A Child) [2015] EWHC 2442 (Fam); [2016] 2 FCR 118).*

*In the circumstances, as in In re A (Welfare of Children: Immunisation) and whilst the C2 application made by the local authority on 21 October 2016 is for an order in existing Children Act proceedings, **the application the local authority pursues before this court***

must in fact be an application for relief under the inherent jurisdiction of the High Court. *The local authority requires leave to make such an application, which application for leave is to be considered against the criteria set out in section 100(4) of the Children Act 1989. Being satisfied that the relief sought by the local authority does not contravene section 100(2) of the Children Act 1989 and that the criteria for granting leave to the local authority to make an application under the inherent jurisdiction set out in section 100(4) of the Act are met, I granted permission for the local authority to make an application for relief under the inherent jurisdiction of the High Court."*

In this case the local authority, the child concerned being subject to an interim care order, issued a C2 seeking a Specific Issue order. The Judge however deemed the application to be one for leave to invoke the inherent jurisdiction , granted permission to them to do so and in the end decided that immunisation is in the child's best interests

3. Deprivation of Liberty of a child

The only route under Children Act 1989 to deprive a child of his liberty is under s.25- a secure accommodation order. T There are, of course specific grounds to be proved before such an order can be made as follows:-

Subject to the following provisions of this section, a child who is being looked after by a local authority in England or Wales may not be placed, and, if placed, may not be kept, in accommodation in England provided for the purpose of restricting liberty ("secure accommodation") unless it appears—
(a)
that—
(i)
he has a history of absconding and is likely to abscond from any other description of accommodation; and
(ii)
if he absconds, he is likely to suffer significant harm; or
(b)
that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

If an order is made under this section , the child can only be placed in accommodation approved under the Secure Accommodation regulations

The Mental Capacity Act 2005 applies to those over the age of 16 when making welfare decisions.

In re A-F (Children) EWHC [2018] 138 Fam the President considered a number of test cases where the confinement of the child was not in secure accommodation. The Judge found that the judicial sanction for the deprivation of liberty can only be provided by the High Court in the exercise of its inherent jurisdiction. In considering the cases he said:-

1. As stated in Re D (a child) [2017] EWCA Civ 1695 the situation of the young or very young does not involve "cofinement" for the purposes of a deprivation of liberty meaning that such a child living with foster carers in their home is not deprived of his or her liberty
2. The three principles set out by ECHR in Storck v Germany (2005) 43 EHRR 96 apply to children as anyone else when considering if there is a deprivation of liberty i.e:-

    a) the objective component of confinement in a particular restricted place for a not negligible length of time
    b) the subjective element of lack of valid consent and
    c) the attribution of responsibility to the state

See Cheshire West [2014] UKSC 19.

3. It is obvious that where a child is subject to a care order, interim or final, there is responsibility by the State satisfying Storck component c)

4. Turning to component b) there are circumstances in which consent by the "holder of parental authority will provide valid consent.However where the child is subject to a care order neither the local authority not a parent can exercise their PR in such a way as to provide a valid consent for the purposes of Storck component b)-In re AB (a child) Deprivation of Liberty:Consent) [2015] EWHC 3125 Fam. A foster carer does not have PR enabling that carer to give consent

5. So to a) of the Storck components. In Cheshire West the "acid test' was developed by Baroness Hale to see where this component is satisfied, namely

"whether the person is under complete supervision and control of those caring for her and is not free to leave the place where she lives"

6. With regard to the use of the inherent jurisdiction:-

> "i) The inherent jurisdiction can be exercised only by the High Court (in practice by the Family Division) and *not* by the Family Court (though it can be exercised in an appropriate case by a section 9 judge sitting in the Family Division).
>
> ii) As I said in ***In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)*** **[2016] EWHC 2271 (Fam)**, [2017] Fam 80, para 32, quoting what I had earlier said in ***Re PS (Incapacitated or Vulnerable Adult)*** **[2007] EWHC 623 (Fam)**, [2007] 2 FLR 1083, para 16:
>
> "It is in my judgment quite clear that a judge exercising the inherent jurisdiction of the court … with respect to children … has power to direct that the child … in question shall be placed at and remain in a specified institution such as, for example, a hospital, residential unit, care home or secure unit. It is equally clear that the court's powers extend to authorising that person's detention in such a place and the use of reasonable force (if necessary) to detain him and ensure that he remains there."
>
> iii) The exercise of the inherent jurisdiction in this way must not, but typically will not, offend the principle in *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508: see *In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80, paras 37-45.
>
> iv) The exercise of the inherent jurisdiction in this way must comply with the substantive and procedural requirements of Article 5: see *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, 197–198, *Re PS (Incapacitated or Vulnerable Adult)* [2007] EWHC 623 (Fam), [2007] 2 FLR 1083, paras 20-26, ***Re GJ, NJ and BJ (Incapacitated Adults)*** **[2008] EWHC 1097 (Fam)**, [2008] 2 FLR 1295, esp paras 15-16, 27-29, 32, 35, 39-40, ***Re BJ (IncapacitatedAdult)*** **[2009] EWHC 3310 (Fam)**, [2010] 1 FLR 1373, paras 2-5, 24, 26, and *In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80, paras 48-49."

7. As to the interface with care proceedings:

- If when care proceedings are issued there is a real likelihood that authorisation for a DOL may be required, the proceedings should be issued in the Family Court but be allocated, if at all possible, to a CJ who is also a s.9 judge.
- Where care proceedings have been allocated to a judge who is not a s.9 judge, but it has become apparent that there is a real likelihood that authoristion for a DOL may be required, steps should be taken if at all possible and without delaying the proceedings, to reallocate the proceedings (or at least the final hearing) to a CJ who is also a s.9 judge.
- The care proceedings will remain the Family Court and must not be transferred to the High Court. The s.9 CJ conducting the two sets of proceedings (care proceedings and inherent jurisdiction proceedings) can do so sitting simultaneously in both courts.
- If this is not possible steps should be taken to arrange a separate hearing in front of a s.9 judge as soon as possible (if at all possible within days at most) after the final hearing of the care proceedings.
- There should be evidence on the matters set out in the process and procedure section above, which should also be in the care plan.
- Where the proceedings have been concluded for some time, the process will be as set out within the process and procedure section above.

This decision was made by the President on 31 January 2018, i.e. before the issue of his guidance on use of inherent jurisdiction-see above

8. As to matters of process and procedure:

- An application to the court should be made where the circumstances in which the child is, or will be, living constitute, at least arguably (taking a realistic rather than a fanciful view), a DOL.
- There is no need for the court to make an order specifically authorising each element of the circumstances constituting the "confinement". It is sufficient if the order (i) authorises the child's DOL at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (ii) authorises (without the need to be more specific) medication and the use of restraint.
- The key elements of an Article 5 compliant process are in summary:

(a) If a substantive order (interim or final) is to be made authorising a DOL, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can be given on paper.

(b) The child must be a party to the proceedings and have a guardian who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary or that has already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge in person if that is what the child wants.

(c) A 'bulk application' is not lawful, though in appropriate circumstances where there is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

- The evidence in support of the substantive application (interim or final) should address the following matters and include:

  (a) The nature of the regime in which it is proposed to place the child, identifying and describing those salient features which it is said do or may involve "confinement".
  (b) The child's circumstances, identifying and describing those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis.
  (c) Why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do.
  (d) The views of the child, the parents and the IRO, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health.

9. As the typical 15 year old is not "free to leave", investigation of that part of the "acid test" will not of itself answer the question of whether they are confined for component (a). Whether the child is under "complete supervision and control", and not freedom to leave, is likely to be the central issue.

One has to proceed on a case-by-case basis having regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of the same "age", "station", "familial background" and "relative maturity" who is "free from disability". Little more than "rule of thumb" suggests:

(a) A child aged 10, even if under pretty constant supervision, is unlikely to be "confined".
(b) A child aged 11, if under constant supervision, may, in contrast be so "confined", though the court should be astute to avoid coming too readily to such a conclusion.
(c) Once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

All must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant comparator. The comparison is not with a "typical" child of the same age who is subject to a care order.

Covert Recording in Family Proceedings:

From *"the stool-pigeon, the eavesdropper and the concealed observer"* to "*the envy of yesterday's spies" – the position following Re B (A Child) [2017] EWCA Civ 1579*

Presentation prepared by Eleanor Battie and David Reader, delivered by Rachael Claridge

1. His Honour Judge Bellamy, lauded by the President of the Family Division, Sir James Munby, as "*That careful and always meticulous judge*[1]", in Re B (A child) was faced with a case in which a father made a number of covert recordings of conversations he had had with a social worker, a Cafcass officer and a solicitor.

2. In deciding whether to permit and what weight to attach, with little assistance from case law and in the absence of judicial guidance, he sought to research the views of concerned agencies/parties and offer some guidance on the topic in his own judgment.

3. In doing so he was found by the President in his appeal judgment (*Re B (A child) [2017] EWCA Civ 1579*) to have embarked upon "*an exercise [not] appropriately undertaken by a Circuit Judge*[2]" and to have devoted time and resource to something that was "*not, with respect, an appropriate objective*[3]". We therefore do not know what this guidance says as the President declined to publish it.

4. What His Honour Judge Bellamy did usefully do however (and was recognised by the President as having done), was to spark debate and focus minds upon a topic in clear need of clear judicial guidance.
5. The President demonstrated his undoubted awareness of the complexities of the issue in his judgment: he opined that the use of covert recording in family proceedings might

[1] *Re B (A child) [2017] EWCA Civ 1579, Para 2*

[2] *Ibid, Para 24*

[3] *Ibid, Para 27*

throw up a "*myriad of issues*[4]" and that whilst the courts have "*had to grapple with the legal and procedural issues generated by the stool-pigeon, the eavesdropper and the concealed observer since time immemorial… the issue has become much more pressing in recent years*[5]."

6. He opined that there were two key reasons for this:

    a. Firstly, that the striking advances made in the technologies of recording: in size; sophistication; availability; and affordability have meant that anyone with a smartphone (much less a device specifically designed for covert recording, which are of course widely available on the high street or online), can in the words he quoted of Peter Jackson J in M v F (Covert Recording of Children), "*make recordings that would be the envy of yesterday's spies*[6]".

    b. Secondly, (and he is quick to qualify this as relating to mindset rather than a general foundation in reality) he considers that the *"widespread distrust in… the competence or… integrity of the family justice system and of the professionals involved in it*[7]" plays a significant role in the increase and prevalence of the use of covert recording of professionals by parties.

7. There is, as the President identifies in his judgment in *Re B,* very little authority in either first instance or Court of Appeal decisions that goes to the development, guidance or clear position of the law as it relates to this issue.

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[4] *Ibid, Para 16*

[5] *Ibid, Para 10*

[6] *Re M v F (Covert Recording of Children) [2016] EWFC 29, [2016] 4 WLR 92, Para 1*

[7] *Re B (A child) [2017] EWCA Civ 1579, Para 11*

8. There is also an absence of any discrete guidance; hence His Honour Judge Bellamy sought to offer his own and hence the President at the end of his judgment commissioned the Family Justice Council to undertake consultation and prepare some.

9. Such authorities as there are on the subject do provide us with some insight into what is, candidly, an unclear picture.

10. Sir James Munby makes reference to six authorities in the body of his judgment in *Re B* (that in some way consider this issue) and references some fifteen further authorities in 'Note 1' at the end of his judgment, which generally do not; save that in all of which, some manner of covert recording or surveillance had taken place.

11. Within that number, there are several judgments where the use of some manner of covert recording by a party has been admitted into evidence and relied upon by a party without (it would seem) any judicial comment on the impact of the covert nature of the recording whatsoever (or at least without such comment reaching the circulated judgment). There are also a number in which comment is passed (some positive and some not so positive) on the use of such recording.

The proposition

12. His Honour Judge Bellamy proposes a general principle (para 21 of the President's judgment in *Re B*) that:

> *"The covert recording of conversations with the intention of using that material as evidence is the antithesis of transparency… as a general principle, the Family Court should deprecate and strongly discourage such making of covert recording".*

13. Contrast that (just to demonstrate the lack of unified voice that exists on this topic) with the guidance provided by Cafcass in its operating framework:[8]

> *2.27 We should have nothing to fear from covert recording. Our attitude should be, "I am doing my job and I have nothing to hide. I can explain why I said or why I did what I did" This is within the spirit of transparency in the family courts.*

[Note the contradiction in respect of transparency]

The response

14. The President disagreed with His Honour Judge Bellamy's general principle, considering it to be "*far too sweeping and, expressed in these un-nuanced terms, potentially misleading.*[9]" He points out that greater consideration is needed of the individual characteristics of a case – of "*who is doing the recording, and why, and who is being recorded*[10]"

[8] *As referred to in the Submissions of the Association of Lawyers for Children (ALC) – Covert Recording in Family Court Proceedings, dated: 23rd March 2016, Para 10*

[9] *Re B (A child) [2017] EWCA Civ 1579, Para 21*

[10] *Ibid*

The current view

15. Sir James Munby suggests that covert recording in the context of family proceedings broadly falls into (at least) three categories, each of which may produce their own issues:

I. Recording of, or involving, children;
II. Recording of one party by another; or
III. Recording of a professional or professionals. (*One might well expect to see similar distinctions in type therefore in the yet-to-be-produced guidance*).

16. The clearest position from the available authorities, and the position one might well expect to receive the strongest prohibitive guidance in due course, is the first of those three; covert recording of, or involving, children.

17. We can take as a starting point the opening words of Mr Justice Peter Jackson's judgment in *Re M and F (Covert Recording of Children),* "*It is almost always likely to be wrong for a recording device to be placed on a child for the purpose of gathering evidence in family proceedings, whether or not the child is aware of its presence*[11]".

What to do with a Recording?

Children

18. What then if such a recording is made? Can a party rely upon it? The authorities suggest that such evidence will be admissible if it is relevant, either to show an action or words of a party or professional that is in issue or alternatively and perhaps more likely, as evidence of the mindset of the party making it and in this latter state backfiring upon the party who instigated the recording.

[11] *Re M v F (Covert Recording of Children) [2016] EWFC 29, [2016] 4 WLR 92, Para 1*

19. In *Re M v F,* Mr Justice Peter Jackson found when considering the admissibility of the covert recordings made by placing recording devices in the clothing of the child, "*The manner in which they were made is directly relevant to an assessment of the parenting offered by* [in that case] *the father and his partner*[12]".

20. In her judgment in *Re A & B,* just 2 months after the judgment in *Re M v F,* Ms Justice Russell found that a father's covert placement of a tracking device in a baby's pram could and should be used as evidence of the 'extreme lengths' that he was prepared to go to in monitoring the mother[13].

21. The Association of Lawyers for Children in their submissions (as invited by His Honour Judge Bellamy) make interesting observations on the subject of covert recording of children. Their view is that covert recordings of children should "*rarely, if ever, be admitted as evidence in family proceedings*[14]".

22. They go on to provide justification for that position by reference to *s.13(4) Children and Families Act 2014* which holds that where a child has been assessed (medically, psychiatrically or otherwise) in a way contravening section 3 of the act, such evidence is inadmissible unless the court rules that it is admissible.

23. Arguably therefore the starting point is inadmissible. If arguing it should be admissible, it must be relevant to the issues in the case.

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[12] *Ibid, Para 27*

[13] *Re A and B (children: restrictions on parental responsibility extremism and radicalisation in private law) 2016 EWFC 40, mentioned at both Paras 41 and 108*

[14] *Submissions of the Association of Lawyers for Children (ALC) – Covert Recording in Family Court Proceedings, dated: 23rd March 2016, Para 13*

24. There is clear demonstration, both in those cases involving the use of children in recording (examples above) and also in others (for example in *Re C,* Lady Justice King hearing an appeal of two judgments of Ms Recorder Lister and one of District Judge Arnold found that a father's repeated recording of both a mother and child amounted to a "*form of intimidation and is abusive*[15]") that the judiciary will robustly criticise those who engage in covert recording where the process of making the recording is seen in itself as being inappropriate, damaging, abusive or amounting to intimidation.

What to do with a Recording?

Professionals

25. The position on covert recording of one party by another and/or the covert recording of professionals where there is not a question is less clear. As already mentioned there are several cases where such recordings have passed without comment.

26. From those the picture shifts; in *H v Dent & Ors*[16] the language used to describe the recordings; "*illicit*" and "*clandestinely recorded*[17]", suggests a less than charitable view of the activity, although in this case the recordings were not of probative value and so did not assist the court in any case.

[15] *Re C [2015] EWCA Civ 1096, para 59*
[16] *[2015] EWHC 2090 (Fam)*
[17] *Ibid, paras 31 & 48*

27. In *Lancashire CC and P (Injured child, welfare stage)*[18] His Honour Judge Duggan took the following view of 'A' (a female relative who it was proposed would assist the parents in looking after the children, should they be returned to them). "*However the trusted protective role offered by A is undermined by her covert recording of the session* [with a social worker] *at the instigation of critical family members*[19]". This despite identifying that the family members were upset by the approach of the social worker in the case, who the judge acknowledged was "*seeking an unrealistically high level of commitment at this time*[20]".

28. Finally, and conversely, there are cases where the use of covert recording exposed examples of the malpractice of professionals, which "*have been established only because of the covert recording of the relevant individual*[21]".

29. Cases where the party offering the recording was not believed until those recordings were brought to light. Examples such as *Medway Council v A & Ors (Learning Disability; Foster Placement)* with an abusive and racist foster carer and *Re F (Care Proceedings: Failures of Expert)*[22] with the "*lamentable shortcomings*[23]" of a consultant clinical psychologist. It is, the President says, necessary to accept this with *"honesty and candour*[24]".

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[18] *[2015] EWFC B72*

[19] *Ibid, para 9*

[20] *Ibid*

[21] *Re B (A child) [2017] EWCA Civ 1579, para 12*

Medway Council v A & Ors (Learning Disability; Foster Placement) [2015] EWFC B66 and *Re F (Care Proceedings: Failures of Expert)*[22] *[2016] EWHC 2149 (Fam) [2017] 1 FLR 1304*.

[23] *Re B (A child) [2017] EWCA Civ 1579, para 12*

[24] *Ibid*

The future?

30. It is unlikely therefore that the guidance produced will go as far as the very robust stance which His Honour Judge Bellamy appeared to propose (our snapshot into the contents of his judgment of course being limited to that which is replicated by the President in *Re B).*

31. Considering the balanced approach of The President in *Re B* and his acceptance of the value that the use of covert recording has had in some cases, I would expect that the guidance will be in terms of moderation and not deprecation.

32. It will likely urge serious caution and restraint (most notably in recordings in any way involving children) but will certainly not embargo from admission into evidence the use of covert recordings in general, thus accepting the reality of the modern era and the inevitability of the use of technology.

33. The position advanced by The Transparency Project in their submissions in response to invitation by HHJ Bellamy appears to be logical in stating that it is not the covert nature of the recording that is *itself* a reason to simply disregard the potential evidence and that "*ordinary evidential principles apply… as to any specific category of potential evidence*[25]"

34. This position is supported by judgments in the employment tribunal jurisdiction, as referenced within the submission of the ALC (association of lawyers for child) at para 8, the judgment of Underhill J (as he then was): *"The law is now established that covert recordings are not inadmissible simply because the way in which they were taken may be regarded as discreditable*[26]*" (Vaughn and London borough of Lewisham).*

[25] *Submission of the Transparency Project, dated 7th February 2016, para 6*

[26] *Vaughn v London Borough of Lewisham UKEAT/0534/12/SM*

35. Sir James Munby disagreed with the assessment of HHJ Bellamy that *"Anyone seeking to rely on such material must… apply to the court for permission*[27]". He cautioned that whilst FPR 2.1 (1) and (2) respectively give the court the powers to control evidence and exclude evidence that would otherwise be admissible, that this was "*not the same as saying that the permission of the court is required before lawful, relevant and otherwise admissible evidence can be adduced."*

36. The guidance is likely to reflect that; reinforcing the position that covert recording is simply another form of evidence to be assessed under the same principles as other potential evidence, (no doubt) restating the importance of transparency in the Family Courts and perhaps providing a checklist to assist judges in assessing the practical considerations around its use and reinforcing the judicial responsibility to determine what weight (if any) should be placed upon it.

37. At paragraph 14 of *Re B,* the President goes on to identify some of those practical issues on which guidance is required; for example:

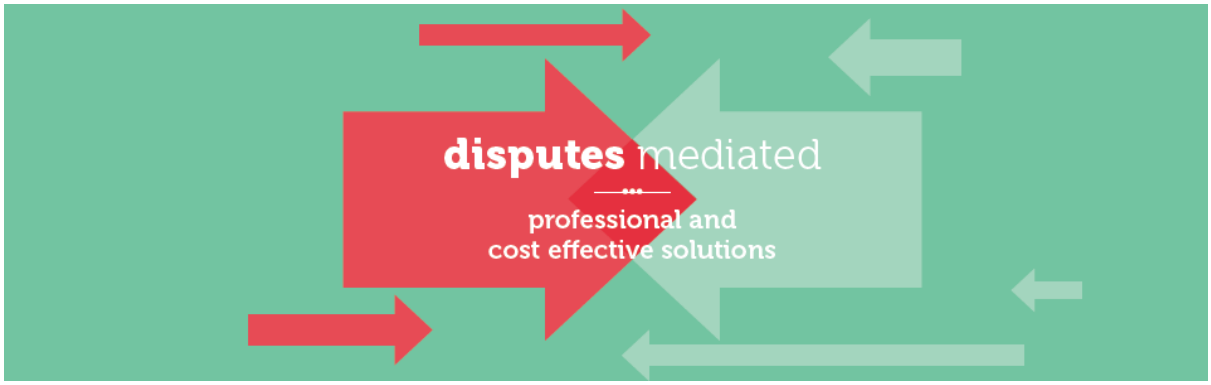
- The lawfulness of what has been done (a greater consideration if the covert recording is undertaken by a public body rather than a party),
- Best practice outside the courtroom, admissibility, and
- Evidential and practical issues around how the recording goes in to evidence,
- Issues of provenance,
- Sound and picture quality; and
- Any expert evidence required.

[27] *Ibid, para 23, referencing para 114 of the unpublished judgment of HHJ Bellamy*

Conclusion

38. The production of clear guidance from the judiciary on this topic and on the specific areas Sir James Munby identifies will provide not only an essential steer to the courts but will also (quite rightly) likely feed into the policy and advice documents of:

- Cafcass,
- Local Authorities,
- Medical professional bodies and
- Those who legally advise and represent parties in family proceedings.



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