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*Medway Council v A & Others (Learning Disability: Foster Placement) [2015] EWFC B66*

- Covert recordings of a foster carer.
- Recordings not provided to the court until just one week before the hearing.
- Parents' allegations that the foster carer had been abusive and racially insensitive had been 'treated dismissively'.
- Court relied upon the recordings when considering the allegations and findings made.

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*Medway Council v A & Others (Learning Disability: Foster Placement) [2015] EWFC B66*

HHJ Lazarus:

*"in the light of Re A 2015 and Re J 2015, and an example such as this case, it will be all the more important to consider with a sharp focus the nature of the evidence that the court needs to consider and best evidence in particular. In this case the parents allegations were frankly treated dismissively from the outset. But for this court's willingness to permit the consideration and transcription of the recordings, despite the extreme lateness that they were provided, in combination with the requirement that the foster carer tend to give evidence (which was correctly anticipated at the IRH) it would have been impossible to gain a just and proper understanding of this case."* (emphasis added)

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### Why record?

See Transparency Project December 2015 'Parents recording social workers – A guidance note for Parents and Professionals

Possible Reasons:

- Disability
- Significant amount of information to be retained
- Lack of trust
- Unreliability of minutes
- Desire to disseminate information

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### Why record?

- 'It is not the making of the recording that is problematic but the distribution of it.'
- Contempt of court?
- Meetings can be recorded by a parent but should not be used to intimidate or harass a professional.
- Transparency Project suggests if a parent wishes to record then be open and say so in advance.
- Provide appropriate reassurance that it will not be distributed or disseminated inappropriately, for example on the internet.
- Think about the quality of the recording.

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### Re F (Care Proceedings: Failures of Expert) [2016] EWHC 2149 (Fam)

M covertly recorded consultant psychologist – she alleged fabrications by expert, false reporting and inaccurate quoting

The court found:

- "[15] it was revealed that extensive parts of the report which purport, by the conventional grammatical use of quotation marks, to be direct quotations from the Mother, are in fact nothing of the kind. They are a collection of recollections and impressions compressed into phrases created by Dr Harper and attributed to the Mother."

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Re F (Care Proceedings: Failures of Expert) [2016] EWHC 2149 (Fam)

- “[24] In response to Mr Cohen Dr Harper accepted that there were 13 topics. I simply fail to see how this range of challenging and difficult material could have been covered to the extent that Dr Harper purports in such a limited time.”
- “[26]The overall impression is of an expert who is overreaching his material, in the sense that whilst much of it is rooted in genuine reliable secure evidence, it is represented in such a way that it is designed to give it its maximum forensic impact. That involves a manipulation of material which is wholly unacceptable and, at very least, falls far below the standard that any Court is entitled to expect of any expert witness.”

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Re C [2015] EWCA Civ 1096, Richards, King & MacFarlane LJ

- Father recorded child as well as handovers and discussions with the mother.
- Father agreed not to continue recording but did not adhere to the agreement.
- Recordings had been edited.
- Transcript did not match the recording.
- Court confirmed that recording can be a form of abuse (fact specific) and a party cannot simply argue that because it was covert it was not capable of causing harm or amounting to abuse.
- Injunctions can be sought to prohibit both overt and covert recordings

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Re C [2015] EWCA Civ 1096, Richards, King & MacFarlane LJ

“[59] The District Judge, having had the benefit of reading the Recorder’s finding of fact judgment and her findings in relation to the previous recordings as well as having heard the parties give evidence, was in my judgment, entitled to conclude that the use of recording equipment in the context of the case overall amounts to a form of intimidation and is abusive and is therefore capable of being the subject of an injunction. The danger of such recordings as an evidential tool can be seen in the use the father made of them in the earlier hearings.”

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M v F (Covert Recording of Children)  
[2016] EWFC 29

Peter Jackson J started his judgment:

*"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. This should hardly need saying but nowadays it is all too easy for individuals to record other people without their knowledge. Advances in technology empower anyone with a mobile phone or a tablet to make recordings that would be the envy of yesterday's spies. This judgement describes the serious consequences that have arisen for one family after a parent covertly recorded a child in this way."*

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M v F (Covert Recording of Children)  
[2016] EWFC 29

- Recordings had been made for over a year, all but one included the child.
- Father recorded the child's meetings with professionals including the guardian and the family support worker.
- Combination of bugs and devices, some sewn into clothing and worn all day including when in lessons and playing with friends as well as at home.
- Child was not aware she was bugged.

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M v F (Covert Recording of Children)  
[2016] EWFC 29

*"[27] In this case, I am in no doubt that the recordings were rightly admitted. The manner in which they were made is directly relevant to an assessment of the parenting offered by the father and his partner. They are so extensive that it would be unreal to exclude them, particularly after I had heard evidence from the father about their creation. It would be theoretically possible for the court to receive evidence of the making of the recordings but not their contents, but this would risk unbalancing the evidence if the contents were in fact of any value."*

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*M v F (Covert Recording of Children)*  
[2016] EWFC 29

"[5]...The recordings put forward were selective and were not at first professionally transcribed. In the end, the issue increased the length and cost of the hearing, yet it did not produce a single piece of useful information.

Instead:

- i) It further damaged relationships between the adults in Tara's life.
- ii) It showed the father's inability to trust professionals.
- iii) It created a secret that may well affect Tara's relationship with her father and step-mother when she comes to understand what has happened. As I said:

*"She is also at risk of harm arising from the recordings. I accept the Guardian's compelling assessment that it would be extremely damaging for Tara if the information comes to her in future in some uncontrolled way, something that is likely to cause her confusion or distress and seriously affect her ability to trust people."*

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*M v F (Covert Recording of Children)*  
[2016] EWFC 29

"[6] Anyone who is considering doing something similar should therefore first think carefully about the consequences."

"[7] This judgment does not relate to the practice of recording adults covertly for the purposes of family proceedings, or of recording children in other ways. Experience suggests that such activities normally say more about the recorder than the recorded (as in *Re C* [2015] EWCA Civ 1096), but there are so many possible circumstances that it is not possible to generalise. I note that the Cafcass Operating Framework (at 2.27) says that its officers should have nothing to fear from covert recording, but should bring it to the court's attention if they become aware of it, and ensure that it is dealt with methodically. That is no encouragement to the production of recordings, merely a reflection of situations that sometimes arise."

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*Re B (A Child)* [2017] EWCA Civ 1579

**Sir James Munby and King LJ**

- Father made allegations of alienation.
- Father made covert recordings for several years.
- Included his conversations with CAF/CASS, a social worker and a solicitor.
- HHJ Bellamy invited written submissions on the use of covert recordings from Cafcass, The Transparency Project, National Association of Guardians ad litem and the Association of Lawyers for Children.

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Re B (A Child) [2017] EWCA Civ 1579

The court observed that:

*"[12]...it needs to be accepted, with honesty and candour, that there have been in recent years in the family courts shocking examples of professional malpractice which have been established only because of the covert recording of the relevant individual. In Medway Council v A & Ors (Learning Disability; Foster Placement) [2015] EWFC B66 a mother made covert recordings of the abusive and racially insensitive foster carer who she was living with along with her baby; until the recordings were played she had been disbelieved.2 In Re F (Care Proceedings: Failures of Expert) [2016] EWHC 2149 (Fam), [2017] 1 FLR 1304, the lamentable shortcomings of an expert, a consultant clinical psychologist, were, in significant measure, laid bare only because the mother had covertly recorded her assessment sessions with him."*

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Re B (A Child) [2017] EWCA Civ 1579

*"[14] Whatever the nature of the recording, a number of issues are likely to arise. Again without any pretence to completeness it is obvious that questions may arise as to (i) the lawfulness of what has been done; (ii) best practice outside the court room as it were; (iii) the admissibility of the recording in evidence; and (iv) a variety of other evidential and practice issues (for example, as to how the recording is to be put in evidence, problems in relation to sound and picture quality, and, in particular, disputes as to authenticity – who are the people who can be heard or seen on the recording, has the recording been edited or “cut and spliced”? – which may necessitate calling expert evidence)."*

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Re B (A Child) [2017] EWCA Civ 1579

*"[23] Anyone seeking to rely on such material must... apply to the court for permission FPR 22.1 to which he refers undoubtedly empowers the court FPR 22.2(1) “control the evidence” and FPR 22.1(2) to “exclude evidence that would otherwise be admissible”. But that is not the same as saying that the permission of the court is required before lawful, relevant and otherwise admissible evidence can be adduced."*

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Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Motion: "Nothing to hide - what's wrong with covert recordings?"

Chair: Baker LJ

HHJ Lazarus:

"Culture of distrust"  
"Now, I am going to ask a quick question further. We all know that the police now record their interviews, they wear bodycams and we deal with ABE interviews on a regular basis. How many of you have dealt with a challenge to police recordings? Not the quality of their questioning or the assiduousness of their investigation but the validity of their recording, whether it's bodycam, ABE or recorded interview? Have any of you come across a challenge to a police-recorded interview? Zero hands. Okay. Why not also openly record Social Services and CAFCASS meetings with guidelines as to use, storage, management and the like? As part of that new approach, I say let's get rid of the "C" word and turn it from "covert" to "overt" and use technology to build trust and accuracy and not to undermine it."

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Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Hannah Markham QC:

- "We quite often are asked the question, "Are they illegal?" Lucy's talked a bit about that and what we aren't doing in this case is going through the legality of these covert recordings because the majority of them are private recordings and, as we've heard already and I think we may hear again, too often the parents or our clients are told that it's illegal and what they've done is commit an illegal offence when in reality they probably haven't and it's a way of trying to bat off or protect themselves from using these tape recordings."
- "The judges don't mind being recorded. They're absolutely happy to have their words brought back to life by transcripts."

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Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Hannah Markham QC:

- "I suggested that we pick the 30 minutes that we wanted the court to consider and it was on that basis the judge allowed it and that the other side could pick their best 30 minutes to try and disprove. In that case, understandably, I shall say, the judgment was that the father, being aware that he was recording, had led the mother in certain ways so it was very hard for him to prove the point he was trying to make."
- "Perhaps we should take that into every single case we put before the court. "Can I explain why I said what I said or why I did what I did without needing to listen to that covert recording?"

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PROBATION

Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Debbie Singleton (NYAS):

- "I'm going to touch on it again because I do think a lot of recording, particular by parents in private law, is about control."
- "At a substantive hearing before our involvement in the case a little while ago now, the judge heard the transcript of a Skype call recorded by the father without the mother's knowledge. The child was present because it was meant to be the child's contact but it generated into a dispute between the parents and the mother's conduct in that hearing is described by the judge as "appalling and her hatred of the father is clear." The father doesn't come away scot-free by any stretch of the imagination. He's criticised because instead of ending the call to stop the child having to listen to that dispute between the parents, he continued recording because gathering evidence for the purposes of the proceedings was more important to him than was the welfare of the child."

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**3PB**  
PROBATION

Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Debbie Singleton (NYAS):

- "...I suspect that she fell into the category there of the parent who was more concerned about gathering evidence than protecting her daughter's welfare because actually she could have stopped the call."
- "Without question both parents had lost focus on the child."
- "As I've said, overt recordings of professionals I don't think I have any particular difficulties with but overt recordings of children aren't necessarily as okay as they perhaps ought to be. I think of the situation where you've got a parent who records contact handovers."

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**3PB**  
PROBATION

Transcript of Family Justice Council  
12<sup>th</sup> Annual Debate 3<sup>rd</sup> December 2018

Debbie Singleton (NYAS):

- "I will be very slow or I will be asking an awful lot more questions before recordings or references to recordings find their way into cases where I have any input into what's in the guardian's report."
- "Even though it's out there in the open, the parent stood there with the camera, I think we might have to interrogate the reasons behind the recording and the taking of the photographs before we agree that it's okay."

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### Tips

Be prepared to:

- Why does the court need to see/hear it? Relevance?
- Explain why the recording was made.
- Confirm the date of the recording.
- Explain the way in which the recording was made (type of device etc).
- Explain the context of the recording.
- Disclose the entire recording.

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### Speaker

**Aimee Fox, Barrister**

 e: [aimee.fox@3pb.co.uk](mailto:aimee.fox@3pb.co.uk)

 t: 0330 332 2633



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