

'Here's one I made earlier!' Covert recordings in family proceedings

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Covert recordings have become an increasingly common feature of family proceedings. This article examines a number of cases in which recordings have been admitted and their impact on the proceedings.

Recordings of professionals

The first two cases involve covert recordings of professionals. *Medway Council v A and Others (Learning Disability: Foster Placement)* [2015] EWFC B66 was a public law case heard by HHJ Lazarus in which covert recordings had been made of the child's foster carer. The parents had alleged that the foster carer has been abusive and racially insensitive. The court found that their allegations had indeed been 'treated dismissively'.

The recordings made by the parents were not provided to the court until just one week before the hearing but their content was illuminating. The judgment and the description of the foster placement makes very troubling reading.

HHJ Lazarus referred to the content of the recordings including the foster carer

directing 'an astonishingly vicious barrage of repeated words of abuse at the mother followed by the door being slammed on her'. HHJ Lazarus went on to find that 'the Mother was indeed trying to record [the foster carer] following a series of such occasions of verbal abuse and mistreatment that she had tried to complain about'.

Would the parents have been able to prove their case in the absence of the covert recordings? In her judgment, HHJ Lazarus emphasised the importance of the recordings in assisting the court to make a fair determination:

'... 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 attend 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.'

In *Re F (Care Proceedings: Failures of Expert)* [2016] EWHC 2149 (Fam), [2017] 1 FLR 1304 the mother covertly recorded sessions with the consultant psychologist who was preparing an assessment of her for the purposes of proceedings. The mother alleged that the assessment produced for the court contained fabrications, false reporting and inaccurate quoting.

After admitting the recordings, the court was extremely critical of the report:

'... 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.’

‘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.’

It is clear that without the admission of these recordings the mother would have found it very difficult to prove her allegations and undermine the validity of the report.

Professionals can often express that they feel uncomfortable about recordings being made. There can also be concern about improper circulation of the material. However, there may be good reason why a parent is motivated to record a professional, such as a disability or struggling with the volume of information. They may feel that previous notes have lacked accuracy or contained errors. The 12th Annual Debate of the Family Justice Council entitled ‘Nothing to hide – what’s wrong with covert recordings?’ focused on the use of recordings. It was pointed out that the court uses recordings every day and the police routinely use bodycams as well as recording their interviews. As part of the debate, HHJ Lazarus spoke of the possibility of using overt as opposed to covert recordings to build trust and ensure accuracy.

Recording children

The covert recording of professionals is not the only type of recordings parties attempt to adduce as evidence. In *C (A Child)* (2015) [2015] EWCA Civ 1096 the father made recordings of the subject child as well as handovers and discussions with the mother. The father agreed not to continue making recordings but did not adhere to the agreement. The court made it plain that recordings of the type found in this case can be a form of abuse. Importantly, a party

cannot simply argue that because it was covert and the other side was not aware of it, it was not capable of causing harm or amounting to abuse. Emphasis was placed on the ‘danger of such recordings as an evidential tool’. Where recordings amount to abuse or intimidation, injunctions can be sought against the recorder to prohibit both overt and covert recordings.

M v F (Covert Recording of Children) [2016] EWFC 29 was an extreme example of the use of covert recordings. Recordings had been made for over a year, all but one included the child. The father recorded the child’s meetings with professionals including the guardian and the family support worker. Devices were sewed into the child’s clothes. She was not aware that she was being bugged.

The court accepted that it was right for the recordings to be admitted because they were relevant to the father’s parenting. It was also considered that it would have been ‘unreal to exclude them’ and that the court needed to hear them rather than simply ‘receive the evidence of the making of the recordings but not their contents’ as to do that would have risked ‘unbalancing the evidence’.

Peter Jackson J started his judgment with a very stark warning:

‘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 judgment describes the serious consequences that have arisen for one family after a parent covertly recorded a child in this way.’

The father probably considered that the recordings would assist his case but they had the opposite effect. The court was

critical of the use of recordings for a variety of reasons which included the damage they caused to the relationships between the adults and the creation of a secret which may well affect the child's relationship with others. The court stated:

'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.'

Jackson J concluded with another warning to those who may be tempted to record in such a way:

'Anyone who is considering doing something similar should therefore first think carefully about the consequences.'

Other recordings

There are also occasions when one party records a dispute with the other when the child is present. In that scenario, there is a real risk the court will ask why the recorder's priority was recording instead of removing the child from that situation.

Re B (A Child: Covert Recording) [2017] EWCA Civ 1579, [2018] 1 FLR 1205 is another case in which the father made

allegations of alienation and made recordings of conversations with Cafcass, a social worker and a solicitor. The court identified that covert recordings were more problematic than overt recordings.

The court did not endorse HHJ Bellamy's analysis that anyone seeking to rely upon recordings must seek permission. It was accepted that FPR, r 22.2 allows the court to control evidence and exclude evidence that would otherwise be admissible but the court said:

'... 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. This is a matter that requires more detailed analysis, including of the FPR, before one can safely conclude that what the judge said is correct.'

If covert recordings are relied upon, a party should be prepared to:

- a. Explain why the recording was made.
- b. Explain the way in which the recording was made (type of device etc).
- c. Confirm the date of the recording.
- d. Explain the context of the recording.
- e. Disclose the entire recording, if available.
- f. Consider the need for a transcript.