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# The pitfalls of using modern technology in private children proceedings

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# The pitfalls of using modern technology in private children proceedings

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1. Many family practitioners will have come across clients using modern technology to gather evidence for the purpose of their court proceedings. This could range from recording telephone conversations or skype calls, taking screen shots of Facebook pages or text messages, or filming handovers. In more extreme cases parents may make videos of their children expressing views about the other parent, making allegations of inappropriate behaviour or of their children in a highly distressed state.

2. How should we be advising our clients about what to do with this sort of 'evidence'? What will a court consider to be persuasive and what should we avoid putting before the court? What are the potential consequences for clients who seek to adduce such evidence?

3. This paper will look at some recent cases that have dealt with such issues and will examine the guidance given.

## Re C (A Child) [2015] EWCA Civ 1096

**Lady Justice King**

4. This was an appeal arising out of private children proceedings concerning a 6 year old girl who lived with her mother and spent considerable periods of time with her father.

5. Ms Recorder Lister made an order that the child should live with both parents but should spend alternate weekends with a midweek visit with her father and the holidays were to be divided equally. The father sought permission to appeal against this decision.

6. The father also sought permission to appeal against the decision to make a non-molestation order against him earlier in the Children Act proceedings

7. There was a high level of animosity between the parents. The extent to which they could not cooperate was demonstrated by the fact that the little girl ended up attending two separate schools for part of each week when she started school for the first time.

8. During a fact finding exercise the father described recording and tape recording the child. He gave an example of doing this at the school *"just in case the mother is here"*. He described the child having bad nappy rash and how he lifted her up (without a nappy on), so as to be closer to the CCTV camera in her home in order to record the nappy rash. Further, he took photographs of her private parts *"as evidence"*. However, he did not take her to a GP in relation to the nappy rash.

9. The Judge found that the father had been *"deliberately provocative towards [the mother] in his frequent recording of handovers, of [the child], and of any person, including professionals, in his mission to gather evidence for his case"*. In respect of the mother the court's finding was that although she would react to the father's behaviour she was in other respects a *"good and capable parent"*.

10. King J said of the father's behaviour:

> *"I have no doubt that M feels intimidated by F's recordings and photographing of C. He is not defending himself against an allegation that he is causing C harm, as no such allegation has been made by M, he is evidence gathering against M. F is quite unable to understand that C will say to the parent they are with, what they know that parent wishes to hear. F is quite unable to understand that his frequent recording and photographing of C is emotionally abusive of her. As C grows up, what is she to make of it? She will know, if she does not already, that F is looking all the time for the means to criticise M."*

11. At an earlier hearing the father had given his agreement/assurance to stop photographing and recording the mother and child, both inside the home and outside. This agreement was recorded on the face of the order. The father failed to honour that agreement which led to a hearing before District Judge Arnold at which a non-molestation order was made.

12. The incident which led to the non-molestation order took place on 28 May 2014 in the early evening when the child was due to be returned to the mother by her father.

13. King J said of the incident [para 51]:

> *"The mother had a work commitment and the mother, the judge was satisfied, texted the father to inform him of this and to confirm that her parents would be at home to receive C upon her return. The judge saw the text and said that the content and tone could not be regarded as other than a helpful message "intended to inform the father of the arrangements for dropping off". The father's account was that he could get no reply from the house and texted mother to say that nobody was answering the door. This culminated in one or more than one telephone call when the mother alleged, and the judge found, that the father had raised his voice in front of C. Key to the order that the judge ultimately made was the fact that the father recorded the whole event. A transcript of this recording prepared by the father was given to the judge. The transcript referred to the father as having "banged like hell" on the door. The judge, not satisfied with the contents of the transcript, listened to the CD recordings, not once but three times, and said about them:*
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> > *"What those recording suggest is that he went to the house and he knocked on the door. What he did not do, as he would suggest in the transcript, he did not, 'bang on the door like hell'. The reason I know that is because I have listened three times, once in court and twice in chambers, to the CD which contains the recording. I had to strain my ears to hear anything which approaches a knock. I am prepared to accept that he did knock, but not so loudly as he has suggested. That knock did not attract the attention of the maternal grandmother and her husband, and so the father went back to the car."*

14. It was noted that the dogs in the house had not reacted to the knocking. The Judge also found it *"quite disturbing"* that the father, who had the child with him, raised his voice and said to the grandparents something to the effect of, *"Are you both drunk like the last time I dropped her off?"* The judge's view was that this is one of the most inflammatory things the father could have said in that sort of situation. The judge found the father's suggestion that the whole of the events of that evening were some sort of conspiracy on the mother's part completely unbelievable.

15. The mother went on to obtain an ex parte non-molestation injunction a few days later. At the return date the judge found that the ex parte application had been an overreaction and had been inappropriate. It was conceded by the mother that the father's behaviour did not merit the continuation of a broad-reaching non-molestation order. However, the judge concluded that the use of recording equipment amounted to a form of intimidation and noted that the school was of the view that the child had been affected by the incident on 28 May. The judge discharged the ex parte order and instead forbade the father from recording any occasions when he meets with the mother or members of her family whether or not the child is present.

16. King J said at paragraph 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. Ms Recorder Lister said:*
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> > *"It is submitted on the part of F that against the background of this case, there is no criticism to be made of F's recording of C. It is correct that the recordings we have heard or read have not been complete. They have been topped and tailed by F, what other edits there have been we do not know. The recordings include repeat questioning of C which is leading and suggestive. M says that C has learned that F likes to hear bad things about M."*
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> *In my judgment, the District Judge's judgment was unimpeachable. He rightly observed that the obtaining of an ex parte order had been an inappropriate overreaction to the incident of 28 May, no matter how unpleasant that incident may have been. He analysed the events and the effect on C of what had happened. There was no doubt in the judge's mind that the recording had been done by the father for entirely his own ends."*

17. Permission to appeal was refused.

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

**Peter Jackson J**

18. This was a private children case involving a young child. The court was asked to decide whether the child should move to live with her mother or continue to live with her father and his partner. The court decided in the mother's favour for a number of reasons. One of those was the approach the father and his partner took in gathering 'evidence' to use in the proceedings.

19. Peter Jackson J made his views very clear at the outset of his judgment saying this at paragraph 1:

> *"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."*

20. The relationship between the parents was deeply acrimonious to the extent that the local authority had become involved the court had appointed a Children's Guardian. The proceedings lasted 18 months and during that time the child had various meeting with the social worker, a family support worker and the Guardian. The father and his partner were so determined to find out what the child, and the professionals, were saying at these meetings that they began to make covert recordings of the meetings and produced their own transcripts of what they thought was relevant. Some of the facts identified were as follows:

(a) The father produced transcripts of 16 conversations running to over a hundred pages

(b) All but one of these were conversations involving the child

(c) A significant number of recordings were not transcribed or produced

(d) The first recording was made in November 2014, the last in March 2016

(e) The proceedings had been ongoing for well over a year before the existence of the recordings was revealed

(f) At least four devices were used

(g) At least two of these were small recording devices – described as "bugs no larger than 3 x 1.5 cm and available on the internet for a few pounds

(h) The other devices were iPhones or iPads belonging to the father and his partner

(i) The bugs were bought by the partner

(j) She sewed them into to a false bottom to the breast pocket of the child's school blazer

(k) On some occasions a second bug was sewn into the child's school raincoat and used at the same time to maximise the chance of picking up conversations

(l) On a day when a meeting was happening, the partner sewed the bug(s) into the child's clothing just before she left for school (so that the battery would not run out by the time of the meeting)

(m) The bug would be running all day, recording everything that the child did

(n) The child was recorded at school, when with her teachers and friends, and at the contact centre when she went to meet her mother or speak to her on FaceTime

(o) Recordings were also made at the father's home, when the social workers / Guardian visited

(p) At the end of the day, the bug(s) would be removed and the contents downloaded

(q) The partner made transcripts of what she and the father regarded as relevant conversations

(r) Other conversations were recorded by the father using his iPhone

(s) He would leave it running in the breast pocket of his shirt or hold it, apparently innocently, in his hand

(t) At other times, when professionals were visiting the home, the father or his partner would leave an iPad or iPhone running in the top of the partner's handbag in the room where the conversation was likely to occur

(u) In February 2016, the father attended a pre-proceedings meeting with the social workers. They challenged him about his recently revealed use of recordings and he turned his phone off. He did not tell them that he had a second device running, with which he continued to record the meeting.

(v) Importantly, the father and his partner state that the child had never been aware that she has been bugged

(w) The father's motivation was to find out about abuse and to hear the child saying things to social workers that she might not say to him. He and his partner wanted to understand why the child was so reluctant to see her mother. The father also wanted to be able to show that the child was saying things to professionals that they were not reporting or acting on

21. The father had also carried out surveillance on the mother, by using a private detective and by monitoring an "*in-car tracker*" device. When he was asked questions about accessing the mother's private emails or iPad location service he answered "*no comment*". He did admit to accessing and making a screenshot of her private Facebook page when it was open on the child's iPad. He had also taken hundreds of photographs in and of her home during their financial proceedings in order to substantiate his claim that she had a live-in boyfriend.

22. The father sought to adduce all this "evidence" and crucially Peter Jackson J said the following at paragraph 24:

> *"Having heard the father's evidence, I ruled that the recordings should be admitted and deferred explanation until now, so that the possible relevance of these actions to Tara's welfare could be considered in the wider context."*

23. He went on to say at paragraphs 28 and 29:

> *"This case is a striking example of the acute difficulties that can be caused by adults recording children for the purposes of litigation. From the time the recording programme was revealed, everyone involved in these proceedings, except the father and his partner, immediately realised that it was wrong. The mother, rightly in my view, described it as "unbelievable". Even so, the full extent of the deeply concerning ramifications for Tara's welfare only became apparent as the hearing progressed. By the final day, even the father appeared to be beginning to understand the difficulties that he had created not just for his case but for his child.*
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> *This issue has also meant that the difficult question of whether Tara should be told that she has been recorded must be faced. It has also compounded the costs of the proceedings."*

24. The main reason for changing Tara's home base was the conclusion that the father and his partner could not meet her emotional needs as main carers. The recording programme was not the only indicator of this, but it was a prominent one. The mother was entitled to say that she objected to her daughter being brought up by someone who sewed recording devices into her clothing, something she described as *"really disturbing"*.

25. The Judge considered the consequences for the proceedings which were that the length and cost of the hearing was increased even though the information did not produce a single piece of useful information. Instead the Judge found that the issue had:
    (i) Further damaged relationships between the adults in Tara's life.
    (ii) Showed the father's inability to trust professionals.
    (iii) Created a secret that may affect Tara's relationship with her father and step-mother when she comes to understand what has happened. The Guardian's assessment was that it would be extremely damaging for Tara if the information comes to her in future in some uncontrolled way, and would be likely to cause her confusion or distress and seriously affect her ability to trust people. Tara should be told in the relatively near future at a time when she is surrounded by professionals who know her situation and are well placed to help her make sense of it.
    (iv) The family's standing in the community has been put at risk. It is not hard to imagine the reaction of other parents at the school if they learn that their children were being recorded as a result of talking to Tara or even being near her, and the consequences of that for the father and most of all for Tara.
    (v) It involved an enormous waste of time on the part of the father and his partner in setting up the recordings and in transcribing them.
    (vi) It significantly escalated the cost of the proceedings. The father had to pay to have the recordings transcribed (£1,500) and the proportion of the mother's costs attributable to time spent on the recordings (£9,240). There was an issue about whether the family could afford to pay Tara's school fees.

26. The Judge gave a firm warning that *"Anyone who is considering doing something similar should therefore first think carefully about the consequences."*

27. The judgment did not deal with any practice of recording adults covertly for the purposes of family proceedings, or of recording children in other ways, but the Judge said that *"experience suggests that such activities normally say more about the recorder than the recorded"* and as there are so many possible circumstances it is not possible to generalise.

28. The Court considered the Cafcass Operating Framework which say (at 2.27) 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. Clearly that is not encouragement as to the production/use of recordings, but is a reflection of situations that sometimes arise.

29. The framework also specifically mentions (at 2.29) that one form of covert recording may be the concealing of a device on a child, but makes no additional comment about that.

30. The Judge gave a firm warning that *"Anyone who is considering doing something similar should therefore first think carefully about the consequences."*

## Re T (A Child) [2017] EWFC 19

**Holman J**

31. This judgment was given at the conclusion of adoption proceedings concerning a 4 year old boy. The birth father sought and obtained leave to oppose the making of an adoption order. The birth mother had not been successfully contacted and so had not been served with notice of the application or final hearing. It was understood that she had left the UK but the relevant embassy had no information as to her whereabouts.

32. The day before the final hearing was due to start the father's partner spoke with the mother and the call recorded on the father's phone. A transcript of their conversation showed that she had no knowledge of the adoption proceedings and thought the child had been adopted a long time ago. Counsel for the father was then able to contact the mother and obtain an address for service and email address for correspondence.

33. The father's partner's evidence was that she had first made contact with the mother through Facebook following a simple search and "in a matter of clicks" had identified the mother's Facebook address. She sent a message and then called her when the mother replied with her phone number.

34. The court criticised the local authority and the guardian for not having made contact in this way some time ago. Counsel for the Guardian told the court that *"CAFCASS guardians are absolutely forbidden from making any attempt to communicate with people via Facebook. Indeed, he said this morning that it would be a significant disciplinary matter if the guardian had done so…"* That later turned out not to be the case and *"there is no rule or embargo against CAFCASS officers seeking to identify the whereabouts of persons for the purpose of proceedings such as this by a Facebook search."* Similarly there was no such rule or embargo on social workers carrying out such a search.

35. Holman J went on to say at paragraph 21:

    *"So I do wish to highlight by this short judgment that, in the modern era, Facebook may well be a route to somebody such as a birth parent whose whereabouts are unknown and who requires to be served with notice of adoption proceedings. I do not for one moment suggest that Facebook should be the first method used, but it does seem to be a useful tool in the armoury which can certainly be resorted to long before a conclusion is reached that it is impossible to locate the whereabouts of a birth parent. Of course, not everyone is on Facebook but, in this particular case, a relatively socially disadvantaged young mother in [X] has been found very rapidly by that means."*

36. The Judge, with regret, had to abandon the hearing and re-list it before another Judge, allowing sufficient time for the mother to be served.

## Conclusions

37. If one parent embarks on "evidence gathering" against the other parent that is likely to be viewed unfavourably and as intimidating.

38. Recording a child or taking photographs of a child for the purpose of gathering evidence to make allegations against the other parent may be viewed as emotionally abusive towards the child.

39. Recording handovers is likely to be seen as being deliberately provocative.

40. Any Judge listening to a recording is likely to scrutinise it and may well reach very different conclusions about what is going on than has been alleged by the person making the recording.

41. The court has the power to make non molestation orders to prevent intimidating or abusive behaviour through the use of recording devices.

42. Recording devices should not be placed on a child, whether the child knows about it or not.

43. The court may admit the recordings into evidence, but not for the purpose the person who created them wants to achieve, but to highlight how wrong/intimidating/abusive it was. Once they have been disclosed there is no going back.

44. If our clients present us this with sort of "evidence" we must be clear about how it is likely to be viewed and what the consequences are, not just for the client's case, but for future relationships, costs implications etc.

45. It is not unusual for clients to report that a child has made allegations against a parent, or behaved in a way that causes concern that a parent has mistreated them. This is when the temptation arises to record the child in distress, or 'interview' them whilst recording. Clearly this should be avoided. Similarly taking them to see a teacher/social worker/child psychologist and telling them to repeat what they said to mummy or daddy should be avoided. What sort of evidence should the clients be producing instead? Often the most effective is evidence by way of contemporaneous notes from parents/family members detailing what the child has said and how the child has presented. Any medical concerns should result in an appointment with the GP as soon as possible supported by a note as to what was seen, diagnosed and prescribed. Approaches to the school about concerns with behaviour to ask teachers if they have experienced similar behaviours and to ask them to report back about anything that concerns them. Maintain a clear paper trail with professionals so there can be no dispute as to what they were told and how they responded.

46. Finally, we should not shy away from seeking to introduce any forms of evidence obtained by modern technology. Emails, text messages, Facebook posts, and information on public websites that are created by the person against whom an allegation is made are likely to be viewed unfavourably against that person if they are intimidating or abusive. Other forms of recording device like CCTV or in-car Dashcams are often prominently displayed and run continuously so do not have a covert quality about them.

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