

NO 18 CHAMBERS QUARTERLY CHILDREN LAW UPDATE 10TH JUNE 2025

Covert Recordings in Family Proceedings

What is a Covert Recording

- Any recordings made without the express knowledge and permission of the people being recorded, whether the recordings is by video or audio. In family proceedings, this is often recording of the other parent, the child(ren) or professionals such as social workers and/or CAFCASS officers .

New Guidance from the Family Justice Council

- The Family Justice Council (FJC) has now published guidance (the “guidance”) for professionals and litigants on the use of covert recordings in family law proceedings. Appended to the guidance is further helpful information including a summary of the guidance for litigants and also guidance relating to case management of intimate images.

Reminder of the Legal Framework for Covert Recordings

- The Court retains full discretion over the admissibility of evidence under Part 22 of the Family Procedure Rules 2010. FPR r.22.1 allows the Court to control evidence by giving directions as to its nature and form. Under FPR r.22.2, evidence may be excluded even if it is otherwise admissible.
- Section 1 of the Children Act 1989 provides that the welfare of the child is the paramount consideration. As such, the Court’s discretion under FPR 22.2 must be exercised consistently with this principle.
- In DPP v Kilbourne [1973] AC 729 at [460], Lord Simon provided foundational guidance on the admissibility of evidence in both civil and criminal contexts, stating that “evidence is admissible if it is logically probative or disprobative of some matter which requires proof.”
- In C (A Child) [2015] EWCA Civ 1096 at [20] the Court affirmed that the finding of Recorder Lister that the continuous recordings of the mother and child by the father amounted abusive behaviour, which justified the making of a non-molestation injunction.
- In M v F (Covert Recordings of Children) [2016] EWFC 29 at [1], Peter Jackson J considered that covert recordings of children for the purposes of evidence gathering would “almost always be wrong” and at [5] that the consequences of the father’s actions were likely to further damage the relationship between the parties and

places the Child at a risk of harm. Peter Jackson J further noted at [7] that the covert recording of adults “normally say more about the recorder than the recorded”, citing *C (A Child)* [2015] EWCA Civ 1096.

- In *Re B (A Child)* [2017] EWCA Civ 1579 at [14] Sir James Munby noted that the natural considerations arising from covert recordings include: (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 and at [15] stipulates that it may be important to identify who is making the recording and why. 10. In *HKS v HSM* [2021] EWHC 3424 (Fam) at [23] covertly was deemed as an invasion of privacy. Sir James Munby highlighted in *Re B (A Child)* [2017] EWCA Civ 1579 AT [15] that it is important to take into account who has taken the recording and what their intentions may be.

Family Justice Council Guidance

- The guidance sets out that the court will be required to engage in focussed case management before the admissibility of a covert recording, and its probative value, can be established. Issues relating to covert recordings should be identified at the earliest opportunity. Directions made by the court will need to cover:
 - a. The method of disclosure of the recordings to the other parties, including whether transcripts are required.
 - b. Establishing the full scope of the recordings, how they came about, and which recordings fall to be considered.
 - c. Establishing authenticity if in dispute, including any issues relating to editing.
 - d. Establishing the probative value of the recordings to relevant issues in dispute.
 - e. Consideration of implications for the welfare of the parties, and in particular the child if having been the subject of covert recordings.
 - f. Consideration of costs arising from the application.
 - g. Any further hearing to determine the issue of admissibility
- When considering admissibility, the guidance details that almost all covert recordings will be hearsay evidence and for that hearsay to fall within the parameters of the Children (Admissibility of Hearsay Evidence) Order 1993 (SI 1993/621) - and so fall outside any other rule of law relating to hearsay such as the Civil Evidence Act 1995 (CEA) - it must be "evidence given in connection with the upbringing, maintenance or welfare of a child". That determination will be fact and case specific and should be determined by the court.
- Ultimately, it is essential that the court is provided with the details necessary to carry out a proper determination of the factors relevant to the consideration of

whether covert recordings should be admitted into evidence, and the weight to be given to covert recordings as hearsay evidence.

- As a helpful reminder, the effect of the 1993 Order in family proceedings relating to children is that the rule against hearsay does not apply, meaning a party to such proceedings no longer has a right to challenge the admissibility of evidence connected with a child on the ground that it is hearsay so long as it falls within the parameters of the 1993 Order (which in most cases of covert recording will be likely). Nonetheless, the court will need to assess the weight to be attached to such evidence: as per Lady Justice Butler-Sloss in *R v B County Council ex parte P* [1991] 1 FLR 470 (CA), "a Court presented with hearsay evidence has to look at it anxiously and consider carefully the extent to which it can properly be relied upon".
- If the court considers that a particular covert recording falls outside the provisions of the 1993 Order, section 2 of the CEA states that a party relying on hearsay evidence should give notice and, if asked, particulars. In those circumstances, FPR 2010 rule 23 provides for applications to be made for the covert recording(s) to be determined as admissible evidence as soon as is practicable. Such application should be made on notice using Form C2 detailing as follows:
 - a. The nature of the recording – its context, whether it is edited, and the date(s) and time(s).
 - b. The method of the recording and why it was obtained covertly.
 - c. The relevance of the contents to the issues in the proceedings.
- The court will need to consider directions necessary to determine whether the recording should be admitted and the issues relevant to any weight to be given to it and ensure that this is a proportionate exercise. The relevance and probative value of the recordings will be key here.
- In terms of 'relevance', the court should be satisfied that taken at its highest the content of the covert recording is relevant to the issues that require to be determined. For the test when deciding 'relevance', the guidance reminds us of the House of Lords decision by Lord Simon of Glaisdale in *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440, [at paragraph 460J].
- Even if key content of a covert recording is not probative of an issue in a case involving children, then the fact of the making of the recording may still be relevant in so far as it relates to the conduct of the person who engaged in covert recording, and implications for the welfare and relationships of those recorded.
- Where the content of a covert recording is likely to be relevant, the guidance suggests the court should continue to consider the factors below:
 - a. Probative value.

- b. The authenticity and completeness of the recording (in some cases the instruction of a forensic expert may be necessary and proportionate)
 - c. Scope of the recording(s) to be admitted into evidence.
 - d. Admissibility as it relates to the manner in which the recording was obtained (including whether the recording was legally obtained).
- When looking at the considerations relating to the covert recording of children, the guidance makes clear that irrespective of whether the recordings can be relied on, as evidence of fact, the court must consider the degree to which the nature of the recordings is pertinent to the welfare analysis of the child. The guidance reminds us of *Re C (A Child)* [2015] EWCA Civ 1096 where the court noted covert recordings have been used to attack the other parent.
- The guidance goes on to suggest that the court may need to consider the appointment of a Children's Guardian, whether the child's welfare requires them to be informed they have been the subject of a covert recording and whether the child may be required to give evidence to evaluate the weight to be attached to the content of the recording.
- The possible consequences and issues arising from covert recordings are considered within the guidance. Costs is of one of the more obvious consequences but the guidance also lists civil actions, injunctive proceedings and harassment. Another consequence is the risk of compromising the prospects of any potential prosecution or judgment in the family court. This can be situations whereby parents may record a child talking about matters which they believe to be evidence of abuse – it happens often in family proceedings especially where a parent seeks to gather evidence in support of a particular allegation against the other parent. The guidance makes clear that it is essential for the credibility of the 'interview' that interviews of this nature are conducted in a controlled environment under the supervision of appropriately qualified professionals. If they're not, the court may attach no weight to what the child has said.

Justifying costs in Children Act Proceedings- RC v FP [2025] EWFC 124

- Practitioners will be familiar with the key principles relating to costs in family proceedings as set out within - *R v R (Costs: Child Case)* [1997] 2 FLR 95, *Re T (Order for Costs)* [2005] 2 FLR 681 and more recently in *Re E (Children: Costs)* [2025] EWCA Civ 183.
- *RC v FP* [2025] EWFC 124 is the latest case in relation to the issue of costs in family proceedings.

- Section 51 of the Senior Court Act 1981 gives the court an absolute discretion as to who should pay costs and in what sum. Rule 28.1 of the Family Procedure Rules provides that the court may make such an order as it thinks just.
- When deciding the issue of costs in family proceedings, the Civil Procedure Rules apply. Rule 44.2(4) of the Civil Procedure Rules says, so far as it is relevant, that when it considers costs, the court will have regard to all the circumstances, including the conduct of the parties and whether a party has succeeded.
- The Court has discretion as to:
 - a. whether costs are payable by one party to another;
 - b. the amount of these costs; and
 - c. when they are to be paid.
- If the court decides to make an order about costs-
 - a. the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
 - b. the court may make a different order..
- In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including -
 - a. the conduct of all the parties;
 - b. whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
 - c. any payment into court
- When considering the conduct of the parties, the Court should consider:
 - a. conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction - Pre Action Conduct or any relevant pre-action protocol;
 - b. whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - c. the manner in which a party has pursued or defended its case or a particular allegation or issue; and
 - d. whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
- The Court has the power to Order a party to:

- a. pay a proportion of another party's costs;
- b. pay a statement amount in respect of another party's costs;
- c. pay another party's costs from or until a certain date only;
- d. pay costs of another party incurred before proceedings have begun;
- e. pay costs relating to particular steps taken in the proceedings;
- f. pay costs relating only to a distinct part of the proceedings; and
- g. interest on costs from or until a certain date, including a date before judgment.

- Before the court considers making an order under paragraph f above, it will consider whether it is practicable to make an order under paragraph a or c above instead.
- Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so.
- An Order for costs in family proceedings are not awarded as standard. However Hale J in *R v R (Costs: Child Case)* [1997] 2 FLR 95 stated "Nevertheless, there clearly are, as Neil LJ pointed out, cases in which it is appropriate to make costs orders in proceedings relating to children. He pointed to one of these sorts of situation: cases where one of the parties has been guilty of unreasonable conduct..."
- **By way of reminder, the key principles in relation to costs in family proceedings as set out in *re E (Children: Costs)* [2025] EWCA Ci 183 are as follows:**
 1. That costs orders can be made in children proceedings in exceptional circumstances, including where the behaviour of one party has been unreasonable or reprehensible.
 2. That there should be no distinction, for cost purposes, between public and private law proceedings.
 3. That the previous approach of 'ring-fencing' fact-finding hearings for cost purposes (as set out in *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893) was in correct as confirmed in the Supreme Court decision of *Re T (Children) (Costs: Care Proceedings: Serious Allegation Not Proved)* [2012] UKSC 36 in relation to private law proceedings.
 4. That the decision in *A Mother v A Father* [2023] EWFC 105(B) in which the court had granted a wholly justified costs order against the father based upon his unreasonable litigation conduct so far as it related to costs was wrong.

5. That there is no basis for penalising a party in costs that fails to prove an allegation of rape.
 6. That the belief of a party is not a defence to a costs application where there has been unreasonable behaviour.
 7. That extreme allegations that transform proceedings can lead to a cost order, particularly when combined with other forms of unreasonable behaviour.
- In *RC v FP* [2025] EWFC 124 - the Judge concluded - *“This is not a straight-forward application to determine. It goes without saying that F’s conduct towards M was dishonest and reprehensible. She was grossly deceived. Parts of F’s behaviour have been rightly characterised as controlling, as by his deception he engineered M to behave in a way she would not have done otherwise. M is the victim of domestic abuse and F was the perpetrator of the same. However, this is not the question I have to determine. The applicable costs rules require me to consider whether F’s conduct within the meaning of CPR r44.2(4) justifies a costs order and where that conduct “includes” the matters set out in sub-rule (5) – and which are matters principally directed towards how a party has approached/pursued/defended the litigation (before as well as during the proceedings) and the extent to which they have succeeded in their application” (para 58 and 59).*

In summary, the parties were commenced a relationship in 2016 and separated in 2019 whilst the Mother was pregnant with the Father's child after she discovered he was in a relationship with another woman and whom he had another child with. During the proceedings, the father the father applied for child arrangements and parental responsibility orders. Contact was instigated in April 2023 following the instruction of an independent social worker with the last contact in April 2024. On 29th August 2024, the father applied for permission to withdraw his applications. The mother did not oppose the application to withdraw for parental responsibility but did in relation to the child arrangements order. Permission to withdraw was given for both.

The mother raised an application for costs. In the mother’s N260, she evidenced costs incurred of £514,115.97. It was accepted by mother’s counsel that this was an “extraordinary amount” but was a product of the unreasonable approach taken by the father, prior to and during the proceedings. The father argued his conduct was not unreasonable and that the only costs he should pay were in relation to the mother’s application for declaration of paternity.

In coming to its conclusion, the court considered the father’s conduct, including the timing of the applications, his attempts to seek confidentiality agreements, his late withdrawal of applications and his non-attendance at hearings.

The court considered that there were certain aspects of the father’s conduct which did amount to unreasonable behaviour and the departure from the

usual position of not awarding costs in private law children cases. However, such conduct did not amount to warrant an indemnity costs order.

The father was ordered to pay 75% of the mother's costs, subject to detailed assessment on the standard basis. The father was ordered to make a payment on account of £192,793.50 within 14 days.

Legal Aid Experts Fees

- The payment of any shortfall which is over and above allowed rates by the LAA relating to the costs of experts within family proceedings has been a continuous issue within proceedings for a substantial period and has resulted in delay in a number of proceedings.
- Sir Andrew McFarlane has now issued a Judgment on this issue and it set out within Re K and Re S (Legal Aid: Experts' Fees). This case clarifies that it is not the LAA's expectation, save for in exceptional circumstances, for Local Authorities to pick up any shortfall when it comes to experts' fees.
- This case involved two separate cases. They were not linked; save for they involved the same Local Authority (London Borough of Barnet). The factual matrix is not relevant save to say both cases involved alleged NAI to young children where expert reports were required. In both cases, experts were identified that were above the permitted hours and rates of the LAA. The LAA gave prior authority, but not for the full amount, which left the question of whether the Local Authority should pick up the shortfall. In Re K, "an interim solution was agreed that the Local Authority would cover the shortfall with the legally aided parties agreeing to reimburse the Local Authority in the event they received additional funding from the LAA, either as a result of reconsideration of the claim or a court order directed the LAA to pay." [6] Shortly before the main hearing, the LAA reviewed its decision and accepted a higher rate would be allowed.
- In Re S, at an interim hearing, the Court substituted one expert who would work within standard LAA rates. However, with respect to the paediatrician, the Local Authority were to pick up the shortfall on an interim basis, but the LAA were asked to review the matter [9]. After that review, the LAA did increase the number of hours and rate. Approval was given at the bottom end of the range but the LAA indicated that if the expert exceeded those hours and that work could be justified and evidenced, then the costs would be recoverable when the costs are assessed at the end of the case. In fact, the expert did take longer (by one hour) and at the main hearing, the LAA indicated that they would review the matter and the Local Authority would not be expected to pay the shortfall [10 and 11].
- Therefore, at the hearing, there were in fact no issues for the Court to determine. However, Sir Andrew McFarlane gave judgment to explain the problem and then

describe ways in which matters have been resolved following the work of the experts' group and publication of revised guidance by the LAA [12]

- It is worth noting that months before the final hearing, Sir Andrew McFarlane had invited Mr Justice Williams to convene a subgroup of the "President's Experts Working Group' to look at this particular issue. The LAA was also in the process of reviewing its guidance. Therefore, the judgment was delayed in order to encompass both [3].
- The Court set out the position of the LAA. It was stressed on behalf of the LAA that 'the LAA had not been aware of the widespread practice of legally aided parties persuading local authorities, or courts ordering local authorities, to make up the difference when there was a shortfall in the payment of the fees of an appointed expert' [19]
- By the point of the judgment, the LAA had amended its "Guidance on the Remuneration of Expert Witnesses in Family Cases'. Within that, it states" '2.4 The intention of the LAA is that once a prior authority is granted it should, other than in unusual circumstances, cover the full cost of the expert and the Local Authority should not make up shortfall in the amounts requested by experts. the possibility of local authorities' topping up fees i not a relevant consideration for the LAA prior authority decision' [23].
- That guidance also considers what is meant by 'exceptional circumstances' when looking at whether the LAA will grant prior authority [24]: "2.2 In order to be granted prior authority for fees or rates higher than those listed in the Remuneration Regulations, you will need to demonstrate that the instruction of the expert involves exceptional circumstances.

Exceptional circumstances are defined in paragraph (2) of Schedule 5 of the Regulations and are where the expert's evidence is key to the client's case and either:

1. a) the complexity of the material is such that an expert with a high level of seniority is required" or
2. b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.

2.3 Scarcity can be demonstrated by providing alternative quotes or evidence of attempts to secure alternative quotes. Complexity can be demonstrated by providing a background to the case, either within the Letter of Instruction, or as a separate document. The detail may also be set out in the court order or provided by the breakdown of their estimate. When making a decision on whether exceptional circumstances are met and higher rates should be approved, the LAA will consider, in addition to the criteria above, the total costs of the work sought, the speed at which the work has to be completed, any identified shortage of experts available at all or within the timeframes required and any other exceptional reason.'

The experts group also considered the issues. The London Borough of Barnet had proposed some general principles, and these were endorsed by the experts' group. Sir Andrew McFarlane sets those out within the judgment [29]:

'i. Those seeking to instruct an expert should make all efforts to identify an expert with the requisite experience and expertise who works within the prescribed rates and the prescribed number of hours and can report within an acceptable timeframe.

ii. If such an expert can be identified then that expert should be preferred by the court absent any exceptional reason.

iii. A local authority should not routinely be considered as a source of funds to make good any shortfall in the instruction of an expert.

iv. A local authority should only be ordered to pay for the shortfall of an expert where the court is satisfied:

a. That there has been proper exploration of other experts who may be able to complete the work within the prescribed rates and for the prescribed number of hours.

b. That the application for prior authority that has been considered by the Legal Aid Agency has been argued fully and included all material relevant to the decision making of the Legal Aid Agency.

c. That the parties (including the Local Authority) have given proper consideration to the possibility of a claim for judicial review against the Legal Aid Agency.

d. That the reason given by the Legal Aid Agency for refusing to approve the application for prior authority was full and enabled the court and the parties to understand the reason for refusal.'

- Sir Andrew McFarlane also endorsed those principles, save for he suggested "that an additional subparagraph (iv)(bb) should be inserted to ensure that full use is made of the option for informal review its decision under paragraphs 3.22 and 3.25 of the Remuneration Guidance [32]
- He went on to say that " Where any process of review may take time, and postpone the chosen expert starting work, a court should consider arranging (either by agreement or court order) for the local authority to cover any shortfall on an interim basis pending further consideration by the court once the LAA process, and any challenge, has run its course. In line with the express wording of paragraph 2.4 of the revised Guidance, the fact that the local authority may be covering the shortfall in the interim is not a relevant factor for the LAA when considering an application

for prior authority."

- The experts group also suggested a template Court order when approving the instruction of an expert where the hours or rates will exceed the LAA rates.

- The template agreed by the LAA is:

The following directions shall apply to the instruction of [name of expert]:

a. The lead for the instruction of the expert shall be [name].

b. The letter of instruction to the expert [as approved by the court today] / [to be agreed by the parties by 4.00pm on [date] and filed at court] must be sent the expert by 4.00pm on [date].

c. The issues in the proceedings to which the expert evidence relates are:

(i) [insert]

(ii)

d. The Court is of the view that the facts of the case are exceptional, as defined in paragraph 2(2) of Schedule 5 of the Regulations, and the experts instructed are essential to enable a fair and just conclusion of the proceedings because:

(i) [insert Judge's reasons].

(ii) Complexity of material justifies appointment of a senior expert.

(iii) Material of specialised and unusual nature.

(iv) Confirmation of number of experts approached and reasons why that expert should be appointed.

e. The questions to be dealt with by the expert are [as set out in the draft letter of instruction] / [as follows: [insert]].

f. Permission is [not] given for the expert to see and assess the child[ren].

g. Permission is [not] given to call [name] to give oral evidence at the [final]/ [finding of fact] hearing.'

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