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Re B: When is it Necessary to Bring a Case to the Family Court?

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Key Words

Family Court; Access to Justice; Mediation; Litigants in Person; Legal Aid

Re B concerned a mother's successful appeal against the ordered disclosure of five years' worth of medical records. However, the associated judgment is quite unconventional, in that it was released for publication 'not because of any legal point' but rather to emphasise some of the harsh realities that judges are currently facing within the family justice system. This case note is therefore equally unconventional, in that it provides a commentary on the message that has been published through the medium of this judgment.

In granting the appeal, HHJ Wildblood recognised that the Legal Advisor who originally made the order did so 'in error and, no doubt, under intense pressure from a busy court list'. He then elucidates on this pressure, lamenting the fact that judges are contending with an impossible challenge: to balance an 'unprecedented amount of work' with their obligations (and wish) to 'provide members of the public with the legal service that they deserve and need.' He concludes with a warning for parties and lawyers:

'Do not bring your private law litigation to the family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation.'

The essence of this is that people should use mediation or other dispute resolution processes to settle their private family law problems, and should avoid using court unless it is necessary. Necessary, in this context, appears to refer to disputes where out-of-court resolutions are not possible.

The deluge of cases making their way into the court system, however, must be understood within the wider political and legal landscape of family justice. Current levels of strain on the family court are unquestionable and well-documented, but so are the causes of this pressure. Decades of diminishing funding for legal aid culminated most notably in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, which removed almost all funding for state-funded legal advice and representation in private family disputes. Since then, the number of cases involving Litigants in Person (LIPs) initially increased from 43% to 74%, and since 2014 has remained steady at around 80% (Ministry of Justice 2020a, p.7, Fig. 4). While both parties in *Re B* were represented by experienced lawyers, the high proportion of LIPs in court is inextricably linked with increased work for others within

that system. Judges and opposing counsel must take additional time to guide and support LIPs who are unfamiliar with the procedural, legal and cultural requirements of the process (Moorhead and Sefton 2005, p.111-112; Trinder et al 2014, p.70; McKeever et al 2018, p.153). This often means adjourned listings and delays to other hearings, and professionals having to go above and beyond their traditional roles, all of which has an obvious and direct impact on other lawyers and lay court users, whether they are involved in LIP cases or not (Bevan 2013, p.44-48; Trinder et al 2014, p.62).

Additionally, there have already been many concerted attempts to divert people away from court. Political efforts to encourage mediation have been frequent and unsuccessful (Barlow et al 2017). Although other forms of dispute resolution exist, mediation has been promoted as a ‘one size fits all’, cheaper, quicker alternative to going to court which minimises conflict between parents. However, despite its many benefits, mediation has never been a popular option among those involved in family disputes. This may be due to the fact that mediation requires both parties to meaningfully participate, which can be impossible if parties are not yet emotionally ready to discuss the relevant issues or to reach compromises (Hitchings et al 2013; Barlow et al 2017, p.34-35).

Another explanation is that mediation-focused policies have consistently failed to recognise the important relationship between out-of-court dispute resolution and legal advice. Solicitors have historically been key facilitators in referring clients to mediation, providing an important framework of legal advice to inform negotiations, and supporting clients themselves to negotiate private settlements outside of court (Eekelaar et al 2000; Maclean and Eekelaar 2016). Without access to advice, family problems inevitably escalate, and the conflict between disputing parents becomes further entrenched. This means that the potential value of mediation may not be considered until it is too late.

Nevertheless, under LASPO, there was yet another push towards mediation but away from legal advice, as the government retained funding only for Mediation Information Assessment Meetings, mediation, and associated legal costs. Unsurprisingly, the number of people taking up publicly funded mediation fell, and the failure to divert people away from litigation and towards mediation has now been acknowledged by the government (Ministry of Justice 2019, p.142; Ministry of Justice 2020b, p.13, Fig. 8). For many, there may be no realistic dispute resolution options available, and court may be their last resort.

At this point, it is useful to return to HHJ Wildblood’s notion of when it is necessary to bring cases to the family court. It is not the purpose of this case note to undermine the understandable frustration that stems from being faced with incessant requests for ‘micro-management’. Examples of unnecessary cases given in the judgment include trivial matters such as which junction of the M4 a child should be handed over between parents. There is no question that such disputes should be able to be resolved at

an earlier stage, without the need for a court hearing. However, it is crucially important to relate these trivial disputes to the wider context of family justice, in which many parents are struggling to access and use dispute resolution options, and lawyers are also frequently overwhelmed. Considering this, several cases in which a court hearing *should* be unnecessary, are unfortunately escalating and becoming necessary due to the pressure that LASPO and preceding legal aid reforms have displaced to all corners of the family justice system.

The warning which has been published in this judgment is therefore a product of wider tensions within the post-LASPO family justice system. However, these tensions cannot simply be attributed to the problem of individual parties and lawyers choosing to progress cases to court despite the availability of other options. Rather, it directly relates to the way in which the delicate ecosystem of family law has been disrupted by budgetary constraints and austerity measures. Elsewhere, I have argued that LASPO – in exacerbating long-standing problems to such a degree – may in practice provide an opportunity to begin rethinking the structure and format of the family justice system, which are no longer sustainable within the current context of advice and support (Mant, 2020). The first step towards this is to acknowledge that there is a need for further support to realistically enable people to make use of out-of-court dispute resolution, and to avoid the current situation where the court is compelled to serve as a safety net for desperate parents.

In the meantime, what is the likely impact of *Re B*? One apprehension, raised by a lawyer writing anonymously for the Transparency Project, is that if members of the public read this message or its press coverage, they may not bring a legitimate application to the family court for fear of being criticised, or subjected to a costs order (Transparency Project, 2020). In that scenario, there would be serious concern about where disputing parents would go for help, if the current – albeit misplaced – safety net cannot intervene. It is perhaps unfortunate that the scope of this judgment was constrained to further discouraging the use of the family court, rather than amplifying the wider need to address the reasons why such unnecessary cases are becoming so necessary.

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