Articles

Press reporting of care proceedings

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In this article we consider our recent experience of applying for, and securing, permission to report the details of care proceedings in the case of *Tickle v Council of the Borough of North Tyneside & Others* [2015] EWHC 2991 (Fam) (19 October 2015), reported above at p 27. We suggest some learning points for legal representatives of all parties and for journalists who may have an interest in writing about the details of proceedings involving children.

Background

Whilst press reports of family proceedings are comparatively frequent they are rarely in depth and usually fall into one of three categories:

- News reports based upon the contents of published judgments;
- News reports of family proceedings which have for one reason or another been held in public (typically financial remedy proceedings where the parties may be named but any children must not);
- Cases where there has been a miscarriage of justice or where an aggrieved parent wishes to tell their story and where the court has allowed them to do so.

In most instances there will be provisions ensuring the anonymity of any child involved will be preserved – often, but not always, this will require the anonymity of the parents and sometimes the exclusion of certain other identifying details.

Our application, in which Lucy Reed acted on behalf of freelance journalist Louise Tickle, did not neatly fall into any of the above categories. The litigation (care proceedings) had never resulted in a contested final hearing so there were no judgments, published or otherwise (apart from an unpublished judgment in relation to an interim removal, superseded by events). The intended publication was not a news report but a substantial piece of long form journalism, requiring a level of detail and analysis not called for in a news report. And whilst this was a case involving a mother who wished to tell her story, it was not an 'exoneration' type case, nor one where the driver or focus was upon some miscarriage of justice – rather it was to be an attempt to explore how the system works, through an in-depth case study of a mother and a family who were in many ways typical and in other ways unique. Strikingly, this was a mother whose previous children had been through the care system, who acknowledged her own failings, had made sufficient change to be rehabilitated with her youngest child and was now writing a respected blog

('Surviving Safeguarding') urging parents in similar situations to engage with professionals. Rather than writing about the outcome of a set of proceedings at the point of final hearing this was an article about the process and experience of multiple care proceedings, the child protection system and the aftermath for the family.

What happened?

The application was for specific permission to report what would otherwise be prohibited pursuant to s 12 of the Administration of Justice Act 1960 – the details of the proceedings themselves. Particularly where there is a reported judgment, there is a reasonable amount which can be published without such an application being necessary but the in-depth nature of this piece of journalism made it essential to have as free a hand as possible.

The local authority resisted the application, seeking a blanket reporting restriction order which would have prevented the writing of the article because of the level of editorial compromise it would have required. They sought a prohibition of the mention of several of the children at all and of the identification of the local authority itself. After a 3-month-long process the application was granted without opposition on the basis of limited restrictions on the publication of certain potentially identifying details (which of course we cannot reveal). The expenditure of time, human resource and money on resolving this matter, was significant. Bodey J observed that:

> '… this application demonstrates how time consuming and troublesome applications like this can be; not only for the media, but also for the court and for all parties. These are not easy applications. They require time, effort, research and expense on what is essentially a satellite issue. For these reasons it is important that if and when local authorities and the media (and/or the other parties) do come to realise there is an issue between them about how much should be reportable and on what terms, there should be sensible and responsible dialogue as soon as possible, with a view to finding an early modus vivendi. With the application of give-and-take, a measure of common-sense, and the engagement of the children's guardian, it should be possible in most cases to come up with a formula based on decided authority which steers a path between (a) the need for greater transparency in the public interest, and (b) the need to respect the privacy and sensitivities of those whose lives are involved. Even if complete consensus cannot be reached through such a collaborative approach, it should be possible considerably to narrow the issues.'

We agree and argue there is the potential to do better – and that there is a collective responsibility on all participants to strive to do so. Indeed, we think that the development of efficient handling of such applications is essential to the transparent doing of family justice which we would (with all respect) characterise as fundamental rather than 'satellite'. If every such application takes 3 months, three rounds of skeletons and evidence and two hearings to resolve, the so-called 'transparency agenda' is doomed.

Collective responsibility

We do not suggest that these applications are easy, but we do suggest that they demand more than reliance upon a generic assumption that reporting will necessarily be harmful or contrary to the interests of children, or airy assertions that a journalist does not 'need' to report this or that point of detail – this is to miss the point and to misinterpret the task at hand. We acknowledge that there are tensions between the interests of a journalist and the interests of vulnerable adults and children, no matter how well-intentioned a journalist is, and that in some cases the balance may fall against reporting (or against reporting in the level of detail that the journalist feels is compatible with their brief or journalistic ethic).

The achievement of robust and thought-through anonymisation is key. All

parties need to be prepared to proactively look for creative and flexible solutions to the potential problem of jigsaw identification, to enable reporting of proceedings without compromising editorial integrity: there is far greater scope for achieving good results from both editorial and child protection perspectives where professionals work together. In our case, the sequential service of rounds of evidence did eventually lead to the emergence of a consensus and the development of solutions but, with hindsight, those solutions could and should have been drilled down to much sooner.

This proactive participation by all parties, even those for whom the risk of criticism may act as a disincentive, is essential – it has the potential to minimise not just the cost and duration of applications but also the stress and ripple effects upon the participants to the proceedings, including but not limited to the children involved. Unless and until there is proper engagement and analysis of the actual evidenced risks of reporting, and a thoughtful exploration of the possible solutions, a party has not discharged their duties to the court to further the overriding objective, and is at risk of doing a disservice to their client or the children.

The so-called 'intense focus' is not just a judicial requirement but ought also to be treated as an expectation on those representing the parties – it is not good enough to adopt a position of opposition at the outset and immediately to disengage. There is a risk that such an approach may lead a party into error through a failure to properly analyse the real risks in the light of the potential practical solutions to mitigate any such risks – because it is those practicalities specific to the case that will form a part of the judicial balancing exercise if a determination is called for, rather than vague generalities. Legal representatives and social work professionals cannot assume that reporting will be refused, and cannot assume harm will flow from the mere fact of reporting. Legal and social work

professionals who do not address the specifics of the case and address ways to mitigate potential harm are missing opportunities to find the best possible solution for the family involved if the court does ultimately approve reporting. As observed by Bodey J, the parties have far greater potential to find flexible and customised solutions to suit the particular needs of the case than can be achieved through an order that is the product of a judicial determination.

The focus must be on children and on creative ways of protecting them whilst still allowing public scrutiny. Professionals must put aside any anxiety about professional criticism or personal embarrassment – these are unlikely to be a proper basis on which to restrict reporting.

Our strong sense in our case was that the local authority's actions were at least in part driven by oversensitivity about being criticised by the mother in the case and the journalist (which in itself is to fundamentally misunderstand a journalist's role, properly carried out). The local authority criticised the article, in advance of it being written, for being inevitably 'tendentious' and based on 'accounts of aggrieved parents'. The professional anxiety about the potential tenor of any published reports of the case appears to have prevented the local authority from objectively reading the blogs of the mother which they described as containing 'complete criticism of the local authority in every respect', whilst Bodey J said in contrast that the blogs 'strike me as balanced and reasonable. They recognise [the mother's] own failings in the past. They are, in some respects, critical of some professionals in the care system but over-archingly are written to help others in the care system by sensible, practical and sensitive advice to people in times of need. A reading of what the mother has written does not support [the] assertion by the local authority.'

We acknowledge, however, that the local authority's position was that their objection to identification of the council was based upon the risk of identification of the children, both because the local authority covered a comparatively small geographical area, and because of the particular characteristics of the family – a valid concern, albeit one that was, as we always argued, quite straightforward to overcome.

We identified revised proposals in relation to anonymisation in our final statement. They were only capable of being identified once the other parties had properly articulated the detailed and specific basis upon which they objected to the application. In this case that was not spelt out until some months after issue, largely because the local authority delayed issuing a properly constituted application for a reporting restriction order with supporting evidence for over 2 months. Earlier dialogue would, we think, have resulted in earlier achievement of the position we reached to the mutual benefit of all involved.

The making of an application was an essential prerequisite to the reporting of proceedings – such matters are reserved for a High Court judge through the exercise of the restraint/relaxation jurisdiction, and even if agreed (as was ultimately the case in this instance) judicial approval was necessary. We suggest that the need for judicial determination should not act as a reason for not attempting some form of out-of-court discussion or dispute resolution. We suggest there is likely to be benefit to all parties in a meeting of relevant professionals, communications representatives, childrens' guardian, journalist and so on to explore anxieties and risks and possible editorial solutions – in our case Skype telephone conferences might have been useful given the distance. Such a meeting may be less practicable in cases where there is a 'news' element, and thus some time sensitivity, as editors will generally wish to publish material at the point of delivery of judgment.

It is worth noting that in virtually any other area, the first port of call for a journalist seeking to report matters of public interest would not be the courts: in a case involving a local authority, an early step would be a

phone call to the council press office, to request information or an interview. Reporting these care proceedings could not have progressed entirely in this manner but with hindsight, the psychological trajectory set by issuing an application to relax s 12 felt as though it was heavily influenced by the legal process. In future applications, it might ease matters enormously to approach the press office in advance of, or at least at the same time as, making a formal application to the court, so that personnel more accustomed to dealing with the press are involved at an early stage.

As with mediation or NCDR generally, parties should be willing to enter into discussion even if solutions are not immediately obvious. For instance, the issue of the identification of the local authority was a particular sticking point in our case, but once tailored solutions to the potentially identifying characteristics of the family were found the stated basis of objection to the identification of the local authority also fell away.

Conclusion

In writing this article we have reflected on a number of matters, in particular about how in our case we could have achieved the result we wanted with less court and legal resource. We are alive to the tension between the desire to report fully and the desire to protect children's privacy and whilst we suggest consideration to meetings between professionals and the media, the question of what is editorially necessary and what would compromise the journalist and the piece are no less difficult than questions about what level or nature of reporting would compromise the interests of children. We do not suggest these balances can be struck easily or always without judicial determination but we do say that such meetings would further the overriding objective to deal with the case justly, and in particular to deal with matters expeditiously, fairly and proportionately, saving expense and bearing in mind court resources; and that they are in furtherance of a legal representative's duty to her client, even where such meetings may seem counterintuitive.

At best, a matter will be capable of compromise leading to the approval of a draft order on paper; at worst a matter will not be capable of compromise but the objections and insuperable difficulties will have properly crystallised and will be capable of more particularised and focused argument before the court in advance of a decision. Social work professionals, lawyers and journalists faced with applications of this sort would do well to heed the words of the mother in this case on her Surviving Safeguarding blog: 'My advice would always be to engage as much as possible.' Whilst meant for parents feeling threatened and frightened of social workers, it is counsel we could all learn from.