



Explicit Images in Proceedings – the correct case management procedure

Sarah Fahy

Introduction

1. The issue of parties attempting to rely on explicit images has become increasingly common when allegations of domestic abuse are a live issue within proceedings and the subject of a finding of fact hearing.
2. Case law is now available which gives guidance on the correct case management approach to be taken when this issue arises.

Case Law

M (A Child) – Private Law proceedings – Case Management – Intimate Images) [2022] EWHC 986 (Fam)

3. In private law proceedings, the mother alleged that the father had raped her, along with other serious sexual misconduct. The father's case was that the mother had fabricated increasingly serious allegations against him in order to frustrate his relationship with the child.
4. At the finding of fact hearing, the judge, as part of the evidence watched and listened to a large number of explicit recordings.
5. At first instance, the judge rejected the allegations made by the mother and found that the mother had fabricated allegations to blacken the character of the father.

6. The mother appealed on the basis that 1) that she did not have the benefit of participation directions; and 2) that the judge had given insufficient consideration to the possibility that the mother may have been over-dependent on the relationship with the father or vulnerable in that relationship.

7. The court considered the definition of the term "intimate image" in the context of private law proceedings as follows:

"an image of a person, whether an adult or a child, naked or partially naked. Such an image can include part of a person's body, clothed or unclothed, such as breasts, genitalia or the anus, which are generally regarded as private. Intimate images include those of a person engaged in what is normally regarded as private behaviour such as washing, urinating, masturbating or engaged in other sexual acts either alone or with another being.... both still and moving images."

8. The court gave the following guidance for case management in a case where intimate images and recordings are sought to be relied upon.

Knowles J

"A) Sexually explicit or intimate videos and photographs should not be filed as part of evidence without a written application being made to the court in advance.

B) Any such application will require the court's adjudication, preferably at an already listed case management hearing.

C) It is for the party making such an application to persuade the court of the relevance and necessity of such material to the specific factual issues which the court is required to determine.

D) The court should carefully consider the relevance of the evidence to the issues in the case together with the likely probative value of any such evidence.

E) As part of its analysis and balancing exercise, the court will need to consider all the relevant factors including (i) any issues as to vulnerability in relation to any of the parties and the likely impact on any such parties of the admission of such evidence and the manner in which it is used in the proceedings; and (ii) if it is able to do so at a preliminary stage, whether the application/use of such images is motivated, in whole or in part, by a desire to distress or harm a party.

*F) The circumstances in which a court will permit the inclusion in evidence of sexually explicit or intimate videos or photographs of any person are likely to be **rare**, in particular, in circumstances in which that person does not consent to such material being admitted.*

G) Where the court is being asked to admit such material, the court should consider whether there may be a range of alternatives to the viewing of such material, for example but not limited to:

i) seeking an admission/partial admission in respect of the alleged conduct

ii) agreed transcripts and/or descriptions of any videos

iii) playing only the audio track of any video recordings

iv) using a still image rather than a video or a short excerpt from a longer video

v) editing images to obscure intimate parts of the body

vi) extracting meta data as to the timing and location of the evidence

vii) focused and specific cross examination on the issues

viii) *consideration of the use of other evidence to prove the particular fact in issue instead.*

H) *If the court decides to admit any sexually explicit or intimate images/videos for any purpose, care should be taken to limit the volume of such evidence to that which is necessary to fulfil the purpose for which it is admitted;*

I) *The court should determine who can view the material that is to be admitted and limit this where necessary, bearing in mind its private character and the humiliation and harm caused to those both depicted and involved in the proceedings;*

J) *If the evidence is considered relevant, a starting point should be to say that it should incorporate the lowest number of images, seen by as few people as necessary, and viewed in the least damaging way;*

K) *It would be helpful to consider how best to ensure that the evidential security of such material can be maintained (for example, by using only password protected files) both within the hearing itself and outside it, and how the material is deployed within the proceedings;*

L) *Likewise, specific consideration should be given to the protection and safeguards necessary in respect of any video evidence relied upon (for example, such evidence being made available on a single laptop and brought to court, or the distribution being limited to a core specified legal team on behalf of each party)."*

Conclusion

9. This is a notoriously difficult issue, on the one hand, the issues raised by one party may be a legitimate line of argument to place before the court to enable the court to deal with proceedings justly. However, on the other hand, the risk of subjecting one party, to what is continued abuse and distress, is a significant issue the court must be alive to.

10. Now, as a result of this decision, there can be no doubt on the correct approach to be taken in cases where a client seeks to raise the issue of reliance on such materials.

Sarah Fahy

St Ives Chambers

Law is correct as of 20th February 2023

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