



The correct procedure for mobile phone extraction in the absence of police phone disclosure:

Re P, H-L (Children) (Mobile Phone Extraction) [2023] EWCA Civ 206

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1. This case concerned an appeal heard by Lady Justice King against a case management decision granting permission to the Father to instruct Evidence Matters to conduct a mobile phone extraction exercise in respect of his daughter's phone.
2. Lady Justice King provided helpful guidance on the correct procedure to be adopted in public law proceedings in relation to mobile phone extraction, in circumstances where the police have not already done this.

Facts

3. The case concerned two children, S a girl aged 16 and J a boy aged 11.
4. The allegations made against the Father, which the local authority sought findings on, related to alleged physical abuse of J and sexual abuse of S between March 2020 and June 2023.
5. The police did not carry out a mobile phone extraction from S's phone as part of their investigations. It became clear that as of July 2021, S did not have her phone, it having been confiscated by her Father or step-Mother. S was also unable to access her social media accounts, as her passwords had been allegedly been changed by her step-Mother. It also became apparent that S's Father had begun to use the confiscated phone, but subsequently told the police he had dropped the phone, breaking it, in the week before his arrest.

6. No attempt was made thereafter by the police to access any phone or social media records, notwithstanding the fact it was known that S's first accounts of the alleged abuse were made through mobile phone messages. S had informed the police the messages would be on her phone, but she had not had her phone since February 2021.
7. Shortly before a case management hearing on 17 November 2022, S produced information from her phone including a Snapchat video of the Father and J. It was unclear how she had such information, and the Court made a direction for S to provide any further evidence should she be in possession of this. No further evidence was provided.
8. The fact-find hearing began at the end of November 2022 without any police disclosure or evidence in respect of the phone. S gave evidence and she spoke about the communications she had with her boyfriend, Father and her friends. She produced material from her phone including a video clip of her Father allegedly mistreating J.
9. This disclosure from the witness box stalled the proceedings.
10. Following her evidence, S made contact with her former boyfriend who agreed to restore S to his contacts/friends, allowing S to gain access to her communications with him which included her allegations of abuse. She was also able to gain access to messages between herself and her friends.
11. S spent many hours that evening with the Guardian screenshotting various messages, however the Court felt the results were unsatisfactory. Over the next few days, the Court was provided with a raft of evidence relating to messages between S, her former boyfriend and her friends.
12. The Father made a Part 25 application for permission to instruct Evidence Matters to carry out a forensic digital analysis of S's phone and social media platforms.

13. Father's application related to three separate tranches of material:
 - a. Communications between S and her former boyfriend – there was no opposition to this as he was taken as giving his consent;
 - b. Communications between S and Father – there was no dispute in relation to this;
 - c. Communications between S and her friends – the Guardian objected to this on the basis that:
 - i. It was a fishing expedition;
 - ii. It reversed the standard of proof resulting in S having to disprove Father's case;
 - iii. It was a gross interference with the Article 8 rights of the friends.
14. The local authority and Guardian submitted that the consent of the parents of the friends must be sought and obtained prior to any work being carried out by Evidence Matters.
15. The Court disagreed and granted permission, for a total forensic digital analysis, to include all three tranches of material. The Guardian appealed.

The Appeal

16. Lady Justice King concluded that the Court was correct to conclude that:
 - a. Mobile phone extraction was not a disproportionate interference with S's friends Article 8 rights;
 - b. It was not necessary to seek the consent of their parents;
 - c. It was right to order the full digital analysis.

17. In summarising the correct approach and relevant guidance, Lady Justice King acknowledged the limits of the FPR and looked at how the Family Court was assisted by guidance and rules from outside the family sphere:
 - a. The Information Commissioner’s 2020 Report on “Mobile Phone Data Extraction by Police Forces in England and Wales” acknowledged it would not be possible to obtain consent from all data subjects whose data may be contained on a device.
 - b. The Attorney General’s Guidance 2022 applicable to police investigations where mobile phone material is extracted, following the ICO’s report as set out above. The Court noted that generally, police do not seek consent of third parties but rely on a number of strategies including redaction and keyword search in order to limit the impact of the privacy of third parties.
18. Lady Justice King considered the general proposition that criminal law concepts had no place in family law, but concluded that this case brought into play the sort of matter of process that the President had in mind in *Re: H-N* where distinctions were drawn between the import of criminal concepts in determining allegations and procedural considerations.
19. Lady Justice King concluded that it would be “*inappropriate*” for the “*family court to adopt a radically different approach from that adopted by the police under the umbrella of the guidelines*” when dealing with extraction of mobile phone material.
20. However, she found the Court fell into error in respect of the structure she put in place in relation to the extent of the analysis and the management of material thereafter. This was due to:
 - a. The Order being for an analysis of material covering a period of 3 years, it being accepted by parties that 18 months was the correct period.
 - b. The Order requiring disclosure of the report to all parties, absent any sift for relevance or redaction.

21. Lady Justice King made the following points:
 - a. The Court's focus will be on the relevance of the material as a whole and in making orders that are proportionate but also protect 'so far as possible' the privacy rights of any third parties in the same way the police do under the AG Guidelines (65);
 - b. In common with police practice, this will not involve routinely giving notice or seeking the consent of third parties who may have been the recipient of communications from the user of the phone (65);
 - c. It will ordinarily be unnecessary for third parties to be given notice or for the consent of the parents to be sought where minors are concerned (68);
 - d. Rather, it will involve a sift of the material for relevance once the material has been obtained and careful redaction (65). Such sift and redaction should be undertaken by a lawyer appointed by the local authority;
 - e. Only relevant and appropriately redacted material will be disclosed to the Court and parties (68).
 - f. Each case will turn on its own facts, it may be that the nature of the case and content of the material exceptionally mean that following the sift, consideration does need to be given to a particular third party being put on notice to make representations should they choose to do so (70).

Conclusion

22. The Court of Appeal has now provided guidance on the correct procedure for extracting relevant mobile phone material in care proceedings, where such evidence has not been obtained by the police.
23. With a lack of specific guidance in either the FPR or CPR, Lady Justice King noted that *"a judge can, and in this case should, draw upon good practice in the criminal court in order to inform the conduct of the family court proceedings"*.



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Law is correct as at 31 July 2023

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