

# WESTGATE CHAMBERS



How should indecent/explicit images be used and controlled in family law proceedings?

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## **Re M: Private Law Children Proceedings: Case Management: Intimate Images [2022] EWHC 986 (Fam).**

The first thing to note is that although this is a private law case it is equally applicable to public law proceedings

We, as legal practitioners, have all had cases where sexually explicit photos have been relied upon by a party in our proceedings. If your experience has been anything like mine not only has these inclusion of these images served very little purpose in proving or disproving allegations made by one party but have more often than not been included as a deliberate attempt to humiliate and often in continuation of controlling and coercive behaviour which has the impact of traumatising or retraumatising the subject of the intimate image.

While there are some instruments in our practitioners toolkits, we have for example the FPR which controls and restricts the nature and volume of evidence and case law like *Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448* which has increased the legal systems understanding of DA and how to manage the same Re M: Private Law Children Proceedings: Case Management: Intimate Images [2022] EWHC 986 (Fam) has, in my view, added an important tool to this armoury.

### **Background**

The proceedings originated in the High Court when the mother removed the party's child 'M' from this jurisdiction to Romania. On 22 January 2020, Mostyn J found that M had been wrongfully removed from this jurisdiction and ordered her return. The mother returned to the UK with M by the time of the substantive hearing, which itself was borne out of the F's application for a joint lives with Order

At the first fact finding hearing in November 2020, the mother made allegations of rape, she alleged F had an obsessive sexual compulsion/disorder which he was unable or unwilling to control and had desires towards young looking girls, including school girls. Additionally, the father was said to have shown controlling, manipulative and intimidating behaviour towards the mother throughout their relationship. He was alleged to be financially controlling and

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physically violent on occasion. The mother alleged the father had behaved inappropriately with the child herself by encouraging her to suck his toes, watching him urinate and by using abusive language toward the child such as a "*whore*" and a "*cunt*". In response to the mother's allegations the father filed a 31 page statement with 158 pages of exhibits. The father exhibited 32 videos to his statement; 17 of these videos were concerned with the four occasions about which the mother had produced video material. It was submitted on the father's behalf that these 17 videos demonstrated an entirely different perspective on the couple's sexual relationship to those chosen by the mother. A further 3 videos were submitted to allegedly show the mother was either discussing in positive terms or becoming sexually aroused to the very videos which the mother claimed were abusive. 10 of the videos exhibited by the father were in fact filmed by the mother and were produced to rebut her assertion that she did not consent to being filmed and that she had only filmed sexual intimacy with the father on one occasion. The remaining video material was produced by the father to show that the sexual relationship between the parties was not characterised by coercion and control throughout as the mother had alleged. The court was not told about the nature of this intimate material before it was filed on behalf of the father.

The mother filed a fifth statement with 200 pages long with even more intimate material.

The father's counter/cross allegations were that the mother had wrongfully removed the child to Romania and had caused the child physical and emotional harm by frequently removing her from her settled home and her father. He alleged the mother was controlling of the time the father spent with the child and called the child abusive names.

At the CMH the mother alleged a further specific occasion of sexual assault in 2016, alongside multiple rapes when she was sleeping. She also alleged violent conduct by the father during sex including non-fatal strangulation. The father pursued an additional allegation that the mother had subjected the child to unnecessary surgery on her labia in Romania without the father's consent and against the advice of the child's GP. He also asserted that the mother had fabricated increasingly serious allegations of abuse in order to obstruct the father's relationship with the child

A FFH was heard and the mother appealed on two grounds; First, there was a duty on the court to ensure that a party's vulnerability was addressed by the use of 'participation directions' to enable that party to give their best evidence to the court. It was submitted the Court at first

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instance knew or ought to have known the mother had distinct frailties and concluded that this case had 'cried out' for such a hearing and that the failure to hold a ground rules hearing and make any participation directions was fatal.

The second ground was 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. The judge's analysis of that issue was found to be limited. The appeal was allowed and a rehearing was ordered.

A psychological assessment of the Mother was ordered ahead of the rehearing. The Psychologist was of the opinion that the mother was experiencing symptoms characteristic of Complex Post-Traumatic Stress Disorder and that she had a Depressive Disorder with comorbid anxiety. The Psychologist was confident the mother did not have difficulties with her cognitive functioning but opined the mother's diagnosis would impact upon her ability to provide her best evidence. The mother told the Psychologist the past proceedings "[had] *put me in a depression*", that she felt "*broken*" as a result. She described finding cross-examination regarding the intimate videos and images particularly difficult to manage. The mother said she continued to experience trauma related distress as a result of her litigation experience, including physiological symptoms such as flashbacks, nightmares, and low mood. It was evident the inclusion of the "*large number of explicit videos...several large pornographic photographs of her and several more small 'stills' exhibiting videos*" in addition to questioning which "*may not have been necessary*" including material from prior to the mother's relationship with the father had acted as a significant trauma for the mother. The mother told the Psychologist that she had been "*forever damaged*" as a result of this stating she "*didn't know how to manage*". The expert was of the opinion that subsequent inclusion of this material within a further court setting was likely to have a compounding traumatic impact on the mother and considered the exposure to the intimate images and videos or other trauma related material was likely to impact on the mother's ability to give her best evidence. The expert recommended limiting the number of people who viewed the explicit material ideally to the judge alone. Further, the expert considered the judge alone should ask the mother questions about the explicit material. If there were to be cross-examination by any of the advocates, the expert recommended that only one advocate ask the mother about the material.

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## The Law – paras 29 to 31 of the judgement

**FPR Rule 1.1(2)** states: “*Dealing with a case justly includes, so far as practicable which includes*

a) *ensuring that it is dealt with expeditiously and fairly;*

b) *dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;*

In order to give effect to the overriding objective, FPR Rule 22.1 gives the court power to control the evidence the parties may adduce in support of their respective cases.

**FPR Rule 22.1(1)** states that the court may control the evidence by giving directions as to

(a) the issues on which it requires evidence;

(b) the nature of the evidence

(c) the way in which the evidence is to be placed before the court.

**FPR Rule 22.1(2)** gives the court the power to exclude evidence that would otherwise be admissible

**FPR Rule 22.1(4)** the power to limit cross-examination

In addition to these general case management powers are the requirements of **Practice Direction 12J**, which applies in any private law proceedings where allegations of domestic abuse have been made or admitted.

With regard to intimate images specifically the Court did 2 things first it offered a tentative definition of the term “*intimate image*” and secondly providing some tentative guidance as to the use of such images in private law children proceedings.

## Definition – para 47 of the judgement

“*intimate image*” in the context of private law proceedings was described as 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

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normally regarded as private behaviour such as washing, urinating, masturbating or engaged in other sexual acts either alone or with another being. The images can be both still and moving images. The deliberately did not make reference to definitions contained in the criminal law considering they did not seem meet the needs of the family court.

## Guidance – para 77 of the judgement

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:

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- 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).

What flows from this judgement is a tale of caution not only should the inclusion of such images be admitted into evidence as the exception rather than the rule but one must give thought to the emotional and psychological harm which may be caused to the parties, and particularly to an alleged victim of abuse, by the use of this material at all let alone its indiscriminate use.

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