

WESTGATE CHAMBERS



Handout for East Sussex Resolution Seminar on
Indecent Images

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The Law

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

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;

c) ensuring that the parties are on an equal footing;

d) saving expense; and

e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

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.

2. 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 which it requires to decide those issues; and

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

3. FPR Rule 22.1(2) - the power to exclude evidence that would otherwise be admissible

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

5. Practice Direction 12J, which applies in any private law proceedings where allegations of domestic abuse have been made or admitted. Where the court has determined that a fact finding hearing is necessary to determine disputed allegations, paragraph 19 of PD12J directs the court to consider a variety of matters in order to ensure a fair and effective hearing. Of relevance to the issues in this case, those matters include:

A) identifying the key facts in dispute (paragraph 19(a));

B) what evidence is required in order to determine the existence of coercive, controlling or threatening behaviour, or of any other form of domestic abuse (paragraph 19(d)); and

C) what evidence the alleged victim of domestic abuse is able to give and what support the alleged victim may require at the fact-finding hearing in order to give that evidence (paragraph 19(j)).

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The Case Law

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

Definition

"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 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

- 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

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- 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 indiscriminate use of this material.