Privacy or transparency in the family courts – where are we now?

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CATEGORY:
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The recently reported case of Norman v Norman [2017] EWCA Civ 49 has confirmed the difficulties inherent in applications for privacy to be preserved in the appeal courts. Lord Justice Lewison referred to the 'default position' that the hearing will take place in public, the parties will be named, and the hearing and any consequential judgment may be reported unless there are cogent reasons why the court thinks it right to depart from that position.

Mrs Norman had made various applications in long running financial remedy proceedings that had lasted more than a decade. She was in the process of appealing HHJ Raeside's refusal to set aside the order made in 2005, which contained an agreement that she and her husband had reached in relation to the financial consequences of their divorce. Mrs Norman unsuccessfully argued that Mr Norman had failed to provide full and frank financial disclosure.

As part of the decision to refuse the set aside, the judge also made an order restraining Mrs Norman from making any further application in the proceedings without first obtaining the permission of HHJ Raeside or another named judge who was familiar with the case. Such orders are unusual and reflect the court's concern about the numerous applications that had been made in this case.

Mrs Norman issued her appeal out of time (there is a 21 day window after the date of the original decision) and on her application for an extension of time, the judgment was given in open court and the parties were named. This is standard practice when it comes to an appeal, but Mrs Norman may not have expected it, having secured an order at an earlier appeal hearing (in 2011) restraining any publication of the names, addresses or other details of the parties. As a result of the more recent decision being heard in public, and without reporting restrictions, the case was reported in the press and Mrs Norman became the subject of 'scathing personal criticisms' which were hurtful and distressing. Lady Justice Gloster described what ensued as a 'public shaming'. Mrs Norman made an application for an anonymity order to prevent further details being published in relation to her substantive appeal.

HUMAN RIGHTS – WHICH ONE PREVAILED?

In order to determine her application, the court had to balance the relevant competing articles under the Human Rights Act: the right to a fair trial (Article 6); the right to private and family life (Article 8); and freedom of expression (Article 10).

Interestingly, the Court of Appeal made clear that the fact that the case involved the parties' financial needs and means did not automatically engage their right to privacy. The focus of the case was the former husband's non-disclosure and so the wife's financial means were not relevant. The case did not concern the parties' children or intimate aspects of their relationship. The court concluded that any reporting of the proceedings would involve very little intrusion in, or interference with, Mrs Norman's reasonable expectations of privacy.

As to freedom of expression, Lady Justice Gloster emphasised the importance of naming parties in order to engage with the public. There were several issues in this case that were in the public interest, and in order to engender debate, it is necessary to stimulate interest. This case involved: repeated applications to court; a civil restraints order; the question of whether and to what extent a former spouse should continue to pay maintenance when the recipient is not required to go back to work; and the allegation of non disclosure (an issue that the court is always keen to shine a light on).

The court found that the countervailing interest in reporting the proceedings outweighed such rights (if any) that Mrs Norman had to privacy and confidentiality in respect of her and her former husband's financial affairs.

WHEN A CASE REACHES THE APPEAL COURT IT WILL ALMOST ALWAYS BE PUBLIC

However, it is important to remember that this was a case about a hearing in the Court of Appeal. It is extremely rare to maintain privacy once a case reaches the appeal stage. One such exceptional example was K v L [2011] EWCA Civ 550 where the wife had inherited enormous wealth but had always ensured that the family maintained a modest standard of living, as she did not want their children to be aware of the extent of the family's wealth. In that case, the court held that the children's article 8 rights outweighed the general interest in a publication of the proceedings, and that to allow the press to report on the case could be substantially damaging, perhaps even grossly damaging, to them.

The judicial inconsistency in relation to reporting of financial remedy cases in the lower courts in England, highlighted in our newsletter article in February 2016, remains, but in Norman Lady Justice King referred to the fact that this issue will be considered by the Court of Appeal in the relatively near future. Hopefully this decision, when it is reported, will provide much needed clarity. It will be interesting to see whether the Court of Appeal decides that the 'default position' should be consistent throughout the courts, or whether as Mr Justice Mostyn believes, the starting point for financial remedy proceedings in the lower courts should be that privacy is preserved. We hope that we are not being overly optimistic in

anticipating our next newsletter article will be entitled: The Transparency debate – clarity from the Court of Appeal.

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