



Shared Insights

Giving evidence before the Family Court: a practical session

Miss Recorder Henry, Specialist Children Act Barrister and Recorder deployed to the Midlands Court Circuit, sitting in the Family Court

Naomi Hickman, Solicitor, Family, Safeguarding and Education Legal Team at Derbyshire County Council

Julia Catherall, Senior Associate specialising in Court of Protection work, Browne Jacobson

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Introduction

This session was chaired by Browne Jacobson's Naomi De Silva, an Associate in the Social Care team who regularly deals with historical abuse investigations, with a specialist background in family law proceedings concerning children.

We were also lucky to be joined by three experienced speakers who shared their insights on the family court process: Recorder Henry, specialist Children Act Barrister and Recorder deployed to the Midlands Court Circuit, sitting in the Family Court; Naomi Hickman, a Solicitor in the Safeguarding and Education Legal Team at Derbyshire County Council; and Browne Jacobson's Julia Catherall, a Senior Associate specialising in Court of Protection work.

Background

This was a practical session aimed at health, education and social care providers involved in Family Court proceedings, specifically looking at the care and safeguarding of children. There is now a greater onus on health and education providers to consider taking on early advice in relation to family law proceedings, given that, as of this year, half of the Family Courts in England and Wales are open to reporting.

Providers often receive requests from the Family Court under the Children Act asking them to give evidence in some form.

However, these requests are often made with very little context as providers are not always parties to the proceedings. Having said that, providers may receive requests to be joined as a party to family proceedings in more serious cases, where harm has been caused to a child and there are allegations that staff have contributed to this harm.

The session aimed to de-mystify the Family Court, as it is recognised that despite their systems and working life interacting with the Family Court, providers do not necessarily have experience of family law. For this reason, it can be hard to know how to engage with the applicant and the Court itself.

The session also highlighted some of the difficulties that providers may face when asked to share information with the Family Court, particularly where doing so may break an established relationship of trust with the children who are the subject of family proceedings. Advice was offered as to how best to overcome some of these difficulties.



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The role of social, health and education providers in the family court

**Julia Catherall,
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Julia discussed the circumstances in which health, social and education providers can become involved in proceedings in the Family Court.

Overlap with Court of Protection and/or Inherent Jurisdiction of the High Court

Julia explained that providers can become involved in family proceedings due to the overlap between family law and the Court of Protection or the High Court's Inherent Jurisdiction.

This overlap tends to arise where there is a deprivation of liberty for the child or young person that requires approval as part of their proposed care. In these circumstances, proceedings can be issued in the Family Court but reserved to a Circuit Judge who is also a 'section 9' Judge, meaning they can hear the application in the Children Act proceedings and the application for a deprivation of liberty concurrently in the different courts.

The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 allows the transfer of proceedings directly from the Family Court to the Court of Protection where it is just and convenient to do so. Proceedings can therefore be transferred from the Family Court when a child or young person reaches the age of 16 or 18 if they are deemed to lack capacity.

What is the Court of Protection?

The Court of Protection is the Court that makes decisions in relation to people, usually over the age of 18 but sometimes aged 16 and over, who lack the mental capacity to make certain decisions.

What is the High Court's Inherent Jurisdiction?

The Inherent Jurisdiction is a framework that allows a Court to make decisions in relation to vulnerable people who require the protection of the Court but do not fit within the criteria for the Court of Protection. Its remit can therefore include children and young people under the age of 18.

Other instances in which providers can become involved in family law proceedings

Julia explained that providers can become involved in Family Court proceedings where a request is made for disclosure of a person's records; where a request is made to provide a statement concerning a party to the proceedings; and where a provider has been asked to intervene in proceedings (for example, where there are allegations that staff members have caused harm to a party). Such requests can sometimes lead to concerns arising and Julia gave suggestions as to how providers can manage these concerns.

Requests for records

Although an order of the Court for disclosure of records overrides any issue of confidentiality and any objection by the parties, requests for disclosure often give rise to legitimate safeguarding concerns and concerns about disrupting the provider's relationship with the party whose records are being disclosed.

It can sometimes be possible to argue that records should first be disclosed to the party's legal representative, who should review for relevance and redact before disclosing onwards. However, where this is not possible, providers should be supported to discuss the need for disclosure with the party in advance to preserve the relationship between the professional and the party. The Court may also be able to assist in this regard by writing to the party concerned to explain the requirement to share records. Any concerns should be brought to the attention of the subject party's legal representatives and the Local Authority as soon as possible.

The role of social, health and education providers in the family court

**Julia Catherall,
Senior Associate,
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Requests for statements

Requests for statements are most often required in relation to a parent or child who the provider has treated, cared for or had contact with. It is important that providers are supported to produce high quality, detailed statements to assist the Court and avoid reputational damage.

If concerns arise relating to safeguarding or the impact of providing a statement upon a provider's relationship with a party, these should be brought to the attention of that party's legal representative and/or the Local Authority. This will ensure that the Court is aware of any limits to the evidence the provider feels able to provide. If all else fails, it may be possible to provide a statement that explains why further information cannot be provided.

Intervenor status

Julia explained that a provider may be invited to intervene in family law proceedings, most commonly where allegations are made that staff members have caused harm to a party. This can be stressful for the provider and their employees, and it is important that immediate support is put in place for any employee affected. It is also essential that measures are put in place to ensure that witnesses do not discuss their evidence outside of proceedings to ensure that the reputation of the provider is upheld and that confidential information is not provided to people who are not party to the proceedings.



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Guidance on how to engage with the Local Authority in matters concerning children before the family court

**Naomi Hickman,
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The Local Authority as Applicant

Naomi explained that as the Applicant in family proceedings, the Local Authority issues the application on the basis it considers a child to either be at risk of, or to have suffered, significant harm. The burden of proof lies with the Local Authority to establish that it is correct in that assertion, and that its interference with the Article 8 rights of a family therefore has a legal basis and constitutes a genuine and proportionate response to the significant harm/risk of harm. It is the role of the Court to scrutinise the evidence to ensure that the parties' Article 6 right to a fair trial is upheld, and consider whether or not it agrees with the Local Authority's position.

Collating evidence

Naomi explained that the Local Authority has to collate an evidential picture to demonstrate significant harm/risk of harm to a child. As the likelihood is that several agencies, including health and education, will have had involvement in that child's life, evidence will often be required from those agencies. As such, agencies will often find themselves on the receiving end of a court order to produce records or prepare witness statements for use in proceedings.

Orders for disclosure

There are generally two types of orders that a Court will make: (1) a third party disclosure order made directly against a non-party agency or individual or (2) an order made against the Local Authority to provide documents or information from a non-party agency. If the second type of order is made, it is for the Local Authority to contact the relevant agency to ask them to provide the information that is required. It is best practice for the Local Authority to include a covering letter setting out the issues to be addressed and noting who has conduct of the case, so that the agency can get in touch with the relevant legal professional should any questions arise.

Communication between the applicant and non-party agencies is important, as orders are often redacted due to the confidential nature of family proceedings, meaning that third parties may feel they have little to no context about what they are expected to produce and why.

Communication is also key when it comes to timescales. Local Authorities are usually subject to a 26-week time limit in which to deal with a case from start to finish. This time pressure often means that timescales within which to produce evidence seem short. If, as a third party agency, you feel unable to meet a given deadline, you should not be afraid to let the relevant Local Authority contact know so that they can inform the Court that the direction cannot be complied with. Third party disclosure orders usually contain a paragraph allowing the third party agency to apply to the Court to vary the order.

Drafting statements

When drafting a statement for use in family proceedings, it is important to bear in mind why you are being asked to provide evidence. It is a good idea to look at the evidence you are being asked to give through the lens of the Court's role to uphold the parties' rights to a fair trial. Although the Local Authority is trying to establish significant harm/risk of harm, the evidence should insofar as possible aim to establish a broader picture of the wider circumstances surrounding a particular case.

When preparing a witness statement, the importance of records, logs and contemporaneous notes cannot be understated. It is wise to revisit any such documents and ensure that your statement reflects the contents of those documents. If there is a discrepancy between those documents and a witness statement, the person providing that statement is more likely to be called to give oral evidence to explore why that discrepancy arises. If there is a discrepancy, for example if a piece of information in a contemporaneous note was recorded inaccurately or a key piece of information was omitted, it is a good idea to explain that within the witness statement. This may alleviate the need to attend court.

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It is also worth noting that if you are recording that someone else (for example, a colleague) has given you a particular piece of information, that will be classed as hearsay. The Court would prefer to have an additional witness statement directly from that person to ensure it can properly explore the evidence available.

Fact versus opinion

You may be asked by the Court to be either a witness of fact or a witness of opinion. As a witness of fact, you will be asked to give a factual breakdown of events. A witness of opinion on the other hand, is an expert in a particular field and will be asked to express an opinion on relevant issues. It is possible that as a witness of fact, you may be asked to give your professional opinion on a particular issue, if that happens, Naomi explained that it is wise not to go beyond your area of expertise to avoid further questioning from other parties.

The witness template

Before a final hearing, a witness template is prepared. This is a timetable showing who the witnesses are, how long their evidence will take, and outlining the issue that the witness will address. Once it has been established that you may be required to go to court, a further timetable will be produced showing the witness order.

Should you be called to give evidence, the burden is on you to provide the Court with a window of availability to attend Court. Professional obligations will be taken into account and respected wherever possible.

Expectations of the Family Court when providers are drawn into family law proceedings

Recorder Zoe Henry, Barrister at KCH Garden Square and Recorder sitting in the Family Court

Practicalities – What happens in Court, what is the role of the Judge and of legal representatives?

Recorder Henry explained that the family Court, and in fact most Courts, bear no resemblance to what you may have seen on television! There are very few similarities with court room dramas and everyone in the court room is expected to be polite and follow court etiquette. The Judge will be responsible for making sure that the process runs smoothly. The process is often emotional, especially for the parents involved, but the Judge will ensure that the Court hearing is dealt with appropriately.

The Judge manages the evidence and the procedure in Court. It is natural to feel intimidated by the prospect of having to go to Court if you have little or no experience of the court system. Judges in the family Court do not wear wigs and nor do the barristers. Judges do not all look like the “traditional” image of a judge you might imagine. The judiciary is becoming much more diverse, and Judges will ensure everyone in the Court room is able to fully participate in the process.

Ordinarily, the parties to the hearing will be represented by either a solicitor or a barrister, although it is possible (and sometimes common) for parties to represent themselves without a legally qualified representative. Barristers often represent parties at hearings where evidence is being given by witnesses. A barrister's job description includes the need to “fiercely defend” their client's interests. They must do so thoroughly and properly, otherwise they would not be discharging their professional duties appropriately. A series of questions will be asked of the parties and witnesses in Court by the legal representatives and sometimes by the Judge. Part of that questioning is called “cross examination”. This is the process of testing the evidence and literally enabling the Judge to hear both “sides of the story” or both perspectives. This is often the part of proceedings which witnesses are most worried about. It is worth bearing in mind that this is an *essential* component of the family court process, and indeed of all Court hearings.

This is how the evidence can be considered from both sides, and how the Court can be helped to make the best decisions possible for the children it is concerned with.

Recorder Henry explained that decisions in Court have to be based on **evidence**. That is why third-party providers like health, social care, or education, are often asked to provide records of their involvement with families and children or to give witness statements. Without this information, it would be impossible for a judge to make appropriate decisions. Evidence can be written (records, witness statements, documents etc) or oral, i.e. witnesses attending court to answer questions about their statements.

Challenges in the Family Court System

Like many other public services, the court system is under some strain. Judges are often extremely busy and there can be a fair amount of time which passes between your involvement with the family, and the case eventually being resolved in Court. This can prevent a challenge for witnesses; naturally in a busy professional life it may be difficult to recall incidents which have happened some time ago. It may be that you only had a limited amount of involvement with the family or child in question. It is always helpful to read over records before completing a witness statement so that the court has the most accurate information.

If you are unfamiliar with the Court process, it may be that you anticipate your only involvement will be writing a witness statement. However, once that witness statement is prepared you might be required to come and give evidence about your involvement with the family or child later on in the court process. It can sometimes feel like the request to attend as a witness comes “out of the blue”. It may feel as though the reason for your involvement is not completely clear to you, or that you do not know why you are required to give evidence. The nature of family proceedings is largely private, and it is likely that you will not be aware of all of the wider issues in the case.

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Please be reassured that the court will have carefully considered what evidence is, and which witnesses are, relevant to the decisions the court must make. Almost everyone who gives evidence in court will feel some level of nerves about that process. That is completely normal. Giving evidence is not a memory test or a pop quiz; it is a process by which you are helping the court to make extremely important decisions for children.

How can you help?

Recorder Henry explained that there are some basic but important ways that you can help the court process runs smoothly. A few of them are as follows (this is not an exhaustive list):

- If you have been asked to provide disclosure or records of any kind, please let either the party requesting them or the court know if there is a problem in providing them within the set time limit. The amount of time it may take to obtain records from your systems is not always obvious to the lawyers involved in the case. The key is to communicate with the party requesting the documents say that the court can effectively manage the case timetable. Court orders should be complied with, but if there is any difficulty, it is crucial that the Court is made aware as soon as possible to avoid delay for the families involved in the case.
- If you have been asked to provide a statement it is really helpful to ensure that your role and what interaction (if any) you have had with the family or child is made clear at the outset. It is helpful to use straightforward language and to briefly explain any procedures, systems or processes which you deal with professionally but may not be immediately obvious to the court. If you have had very limited involvement with a family or child and cannot assist, it is important to say so. Generally, the party requesting your statement will check to make sure that all of the relevant areas of information are covered. If you are not sure what needs to be dealt with in your statement you should ask them for clarification.

- If you are asked to give evidence and you cannot attend on the day requested, it is important to promptly liaise with the party who is asking you to attend. The court process has often been ongoing for some time by the stage that you are asked to give evidence. Court hearings are difficult to rearrange, and judges are therefore always grateful to witnesses for giving their time to the process.

Being called as a witness vs being invited to “intervene”

It is important to remember that there is a significant difference between coming to court as a witness and coming to court as an intervenor.

If you are attending as a witness, you are there to tell the court what you know or what you have observed about the issues concerning the family or child in the case. Although you may have to answer cross examination questions which might be put in a robust or thorough way, you are not at court because your professional conduct is being called into question in any way which would impact on your professional role. You are there to help the court get to the bottom of the issues in the case.

The main difference if you are asked to intervene in a case is that there may be a risk that the court might make “adverse findings” (negative conclusions) about your involvement. For example, if a party to the case is making allegations against you, you may be asked to intervene in the case as an intervenor. Crucially, becoming an intervenor allows you to be legally represented in the proceedings. You will likely be given access to the papers in the case, which will not be provided to witnesses. Legal representation in the case ensures everyone's right to a fair hearing is protected. This is a right everyone enjoys, and if at any stage allegations are made against you, you will be told well in advance of any court hearing. You would not be expected to engage in the court hearing if allegations have been made against you without having the opportunity to get legal advice.

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Sometimes witnesses can feel like their professional conduct is under close scrutiny because they have to answer cross-examination questions about their role in the case. However, this type of thorough and robust questioning is not the same as there being a risk of findings being made against you or your organisation.

The nature of cross-examination

It is worth remembering that the role of barristers and other legal representatives at a contested court hearing is to properly and appropriately probe the evidence to ensure proper access to justice for their clients. Cross-examination can feel uncomfortable, but even the most robust cross-examination should not feel like you are being bullied or harangued. The Judge will ensure this does not happen and if any questions are not relevant, the barrister representing the party on whose behalf you are attending can interject and raise an objection to the line of questioning. It is important simply to listen to the questions carefully and answer them.

It is likely that in your day-to-day role you will be following guidance and acting in line with best practice. As long as you are answering questions helpfully and truthfully, there is therefore no need to feel worried or defensive if you do face tough cross-examination. Although this is quite natural, it is important to remember that the process of making decisions for children requires the court to have the best evidence available, and that can often mean delving into the details of a case thoroughly.

Support after court

As a provider, if you feel that you need support after the Court process do not be afraid to speak to your HR department. Legal professionals are very familiar with the Court process and with the nature of contested hearings. Witnesses are not expected to be familiar with the legal system, no more than lawyers would be familiar with medical procedures.

If you are concerned about giving evidence, or if there are good reasons that you would prefer some extra support in Court, speak to the party who has asked you to attend who may be able to reassure you further.

Discussion, how we can help and resources

We discussed a number of topics, including:

- How to manage safeguarding concerns when ordered by the Court to disclose records in which a vulnerable party has been disclosures
- Despite legitimate concerns about GDPR and maintaining the confidentiality of private proceedings, non-party providers are entitled to request clarification from the Local Authority applicant and/or the Court when asked to produce records or a statement as part of family proceedings
- Non-party providers are entitled to ask to see the relevant Court Order where requests for disclosure are not accompanied by an Order
- Witnesses of fact who are asked to give expert opinions will not be held to an unfair standard and should not give an opinion that they do not feel comfortable giving

How we can help

- Questions about a Court Order that you have been served we can advise you.
- Liaise between services, the Family Court, and other parties, to get more context to what is required of you.
- If you have received an order for disclosure of records and seek to understand what is required or make an application to oppose the request.
- Assist with preparing statements for Family Court Proceedings (and hopefully avoid being called to proceedings, if a factual witness).
- Advise and prepare (not coach) staff who have been called to give witness evidence in Family Court Proceedings.
- Advise and prepare applications for intervenor status ie to be made a party to the proceedings (where you also face allegations of causing harm).
- Represent you in the Family Court when joined as a party to proceedings.
- Advice on transparency orders.

Resources

- Children Act 1989, <https://www.legislation.gov.uk/ukpga/1989/41/contents>
- Mental Capacity Act 2005, <https://www.legislation.gov.uk/ukpga/2005/9/contents>
- KCH Garden Square, <https://kchgardensquare.co.uk/>

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