

## LIVE STREAMING JUSTICE



Family hearings in the Court of Appeal (CoA) are to be live streamed this year for the first time, as the government and judiciary seek to increase transparency in the family justice system.

Given that some commentators have criticised the family court in recent years for its supposed reluctance to grant access to the public, the decision to live stream will not have been taken lightly.

High-profile family judgments have always made news headlines and the past year has been no exception. Cases focusing on issues as diverse as Islamic marriage, access to fertility records and transgender identity have all attracted media attention in the past 12 months.

These matters are clearly of public interest and granting the public greater access to these types of cases is to be welcomed. However, it is also important that the initiative proceeds with caution to protect families affected by these decisions.

### **New territory**

Live broadcasting will bring both benefits and challenges for family lawyers and practitioners, as well as their clients, who will be facing unexplored legal territory: how will this unprecedented decision influence legal advice in the future? Will the pilots be able to balance the competing interests of privacy and accountability? Could this new digital landscape introduce the wider public to the life-changing decisions being made daily in the family court?

The announcement followed the success of a pilot to live stream civil cases in the CoA (with the exception of family cases) since November 2018.

Sir Andrew McFarlane, president of the family division, said: "Being open about what happens in court is critical for public confidence and understanding of the work which the judiciary undertakes. For centuries our court rooms have been open to the public. Live streaming brings the public gallery into the twenty-first century and we are delighted that we can make the difficult and important work of the Court of Appeal civil division open to the broadest possible audience."

A statutory instrument was laid on 12 March 2020 to pave the way for the project and the CoA (Recording and Broadcasting) (Amendment) Order 2020 became law on 19 June. It allows for the broadcasting of selected family law proceedings. It is anticipated that nominated cases will be broadcast from this summer and made available on the judiciary website, YouTube, Facebook and Twitter.

These reforms also follow similar measures introduced in January 2020 in the criminal courts which allowed cameras to film judges' sentencing remarks in high-profile crown court criminal trials including the Old Bailey.

Televising court hearings has been an issue that's divided the legal profession for some time. Media organisations have long campaigned for justice to be televised on the basis that allowing cameras in court would help restore public faith in the justice system.

Those against such a move highlight the importance of privacy, the risk of intimidation and the possibility that televising justice may lead to sensationalism. There's also a fear that the presence of cameras may alter the behaviour of the hearing's participants.

Common arguments in favour include the need to open the courts to public scrutiny, to educate the public on the justice system and the need for justice to be seen to be done. Advocates for broadcasting also point to research in the US showing that cameras do not negatively impact hearings.

Transparency in the family courts is a contentious issue and the decision to live stream must also be seen in the context of the current transparency review that was announced in May 2019 by the president. Since that announcement, there has been a concerted effort to grant more journalists and legal bloggers access to private family cases.

McFarlane has acknowledged that the issue of transparency and the degree to which the workings of the family court should be made public must be addressed. When announcing the review, he noted that "it is important that the family justice system is as open and transparent as is possible, whilst, at the same time, meeting the need to protect the confidentiality of the individual children and family members whose cases are before the court". The report is due to be published shortly.

## **Balance**

The family court's approach to these competing rights was neatly summarised by Sir Mark Potter in *Clayton v Clayton* [2006] EWCA Civ 878; [2007] 1 FLR. He stated that "the court is obliged in the face of the challenge to conduct a balancing exercise between the Article 8 rights of the child and the Article 10 rights of the parent asserting such right, and/or, where press or media interest is involved, the Article 10 right to report and discuss the circumstances surrounding, as well as the issues arising out of, a case of public interest."

He went on to say that after examining the justification for the interference in each right, "an intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary before the ultimate balancing test in the terms of proportionality is carried out".

The driving force behind the move seems to be the desire to increase access to justice and improve public education in the law. Although there is little data on the levels of public trust in the family justice system, there is a general acknowledgement among family practitioners that public confidence in the system is low. The explosion of social media in the last decade has certainly made matters worse.

This is partly due to the lack of understanding of how the system works, a view recently echoed by the president earlier this year. He said: "That this is so, is in part due to a general level of ignorance and misunderstanding in the public. I do not say that critically of the public, it is the way it is, and part of my pitch is that that is partly our fault. It is part of a wider point about public education of the justice system in general. The family court is even worse off because we are seen as the secret family justice system to which there is no public access."

It can only be hoped that live streaming hearings might partly fill this vacuum and provide a counterbalance to the often partial press commentary that in turn shapes public opinion.

The Supreme Court is a relative success story. It has live streamed all its hearings since its inception in 2009 and garners 20,000 views on its live stream every month. Most hearings are only watched by hundreds of viewers, but a record 300,000 viewers tuned in for the first day of the 2016 Article 50 case. Although it did not prevent the emergence of misleading headlines in the aftermath of the judgment and the subsequent attack on the judiciary, there was clearly a high level of public engagement with the case.

The CoA viewing figures are more modest. The YouTube channel has 1,170 followers and its most popular video has had 15,000 views.

The mainstream media can never provide the complete answer to issues of transparency. It is unfair to place the burden of responsibility solely on them as they often tend towards certain types of cases and headlines. The family court has a duty to offer a representative picture of the family justice system and it can only be hoped that live streaming will help bolster public trust in the judiciary.

### **Privacy and practicalities**

The impact in terms of privacy will not be as great as some expect as all CoA hearings are heard in public; but the potential audience will now be far greater than before. It is unclear how long the pilot will run for, but if it proves to be a success then it is expected to be permanent. There are no proposed changes to family hearings heard in the magistrates', family or high court where they will continue to be heard in private.

A number of restrictions will remain and it will be for CoA judges to decide which cases should be live streamed. The only information we have on the selection process is that suitable cases will be chosen by the judiciary based on public interest and cases with reporting restrictions will be excluded.

Parties will be informed prior to the hearing whether they have been selected for the pilot and given the chance to raise any objections. The camera will be directed at the judge's bench and the back of lawyers' heads might appear on screen, but not that of any party. If oral evidence is heard, the witnesses will not be filmed. There will also be a 90-second time delay and a stop feature, so that if any issues or breaches of reporting restrictions arise the recording can be stopped immediately.

So how should family lawyers prepare for these pilots? If lawyers are involved in a high-profile CoA case, they should warn their client that there is a possibility the case might be selected as part of the pilot. It is also worth noting that anonymity can be provided to a party or a witness if necessary. Ultimately, the court will retain the discretion as to whether or not to live stream the hearing.

Since the implementation of covid-19 restrictions in the vast majority of cases, family practitioners have rapidly had to familiarise themselves with remote technology and the presence of cameras in court. This has been a steep learning curve for many. The technological issues that arise, such as a loss of connection, sound or picture, are problems that should be highlighted to clients and their families if they choose to watch the case online instead of attending in person.

This new pilot will undoubtedly be a challenge for lawyers involved in these types of cases. But it does seem that the court has implemented the necessary safeguards to strike a balance between the need for confidentiality and the need to increase public confidence in the work undertaken by the courts.

Overall, the decision to broadcast family cases represents another milestone in the quest to develop a more transparent justice system. It will be interesting to see what this new decision brings not only in relation to public trust in the legal system, but for all family practitioners and their clients.

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However, respecting the privacy of vulnerable families should remain a priority and we would hope these sensitivities would be recognised in any judge's decision on broadcasting cases.

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