

# ADVOCACY

In January 2020 Master Shuttleworth wrote and asked me to write some do's and don'ts in relation to advocacy in the family courts. This was easy to agree to as deadline was on the far horizon, in early April. Little did either of us know that by April we would be amid the Covid-19 crisis, which has brought such dramatic change in all our lives.

It seems a long time ago when I attended advocacy training as a student in Gray's Inn, in the early 1980's. I recall it consisted of what was then regarded as something revolutionary, namely videoing you making a plea of mitigation and receiving some feedback from a practising barrister. I write this in April 2020, when the reality now is such hearings as are taking place, do so remotely. This has some similarity to the video training so long ago, save that through platforms such as Skype or Zoom everyone sees themselves in real time, which is a salutary experience for the judge as well as the advocates.

Thinking how I should structure this article I thought it best to make some general points, in the hope that by the time this is read, some of the current restrictions may be lifted, or at least relaxed. However, I could not ignore what may have been learnt in the last few weeks about remote hearings and, no doubt, will be learned from the important review and research that is about to be launched by the Family Justice Observatory into such hearings.

Since my appointment as a full time judge I have had the privilege of observing what are best described as 'flights of advocacy', where the individual advocate is on top of their case in every sense of the word, and that confidence shines through how they conduct the case either in their submissions or through cross-examination. Everyone should aspire to such flights and I hope what follows may be of some use in getting you off the ground.

## PREPARATION

As other writers on this topic have observed, this is key; it is easy to spot an advocate who has not done the groundwork. Preparation includes not only reading the papers and understanding the issues in the case but also being able to articulate them, as well. A good test of your understanding of the case is to ask yourself, as the judge may well do, to summarise the issues in the case and be able to readily identify the important documents relevant to each issue. If you struggle to do that you are probably not sufficiently prepared!

## UNDERSTANDING YOUR CASE

You need to have thought through what your client's case is, including what evidence needs to be adduced. In family work the court is often presented with a high level of concern about a situation but that, on its own, is not enough; an evidential foundation is required in the context of the applicable statutory or common law framework relevant to the application. For example, in care proceedings what primary evidence is there to establish the threshold criteria for state intervention in family life in accordance with section 31 of the Children Act 1989; in private law proceedings what evidence is there to support any particular part of the welfare checklist in section 1(3) of the Act.

## EMPATHY WITH YOUR CLIENT

Most lay clients involved in family litigation have a myriad of personal difficulties, often as a result of their own upbringing and/or life experiences and/or their own psychological limitations. Many will not be involved in litigation through choice and for them it is a completely overwhelming experience. A family advocate has the difficult task of needing to have empathy with their client's particular position but at the same time retaining that important detachment and objectivity, to enable them to give effective independent advice about their position, even if it is not what the lay client may want to hear. This can, at times, be easier said than done. Often the parties involved in such litigation, particularly public law care proceedings, have had such adverse life experiences even the most experienced of family advocates will tell you of cases that have deeply affected them on a human level. A feature of this type of work is that you inevitably come to know very personal details of your client's life over a relatively short period of time, which is important to keep in mind.

## EXERCISING JUDGMENT IN ORAL AND WRITTEN ADVOCACY

This really comes with experience. Everyone will have examples of times when an advocate has asked one question too many (sometimes to the detriment of their client), gone on for too long in oral submissions and lost the court or been unable to deal with points raised by the judge. So, try and avoid these pitfalls; think about whether you need to ask the question and structure your oral submissions, even if there is only time to do so in scribbled headline points, it will help you focus. Good written advocacy is a real skill; while the content is obviously critical, the presentation and structure also

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have an important role. Written submissions or a skeleton argument should lead the reader through the case and readily answer anticipated questions. Cross referencing to the bundle pagination in any written document is particularly welcome.

## KNOW AND UNDERSTAND THE STRENGTHS AND WEAKNESSES OF YOUR CASE

This again will come with experience. It includes having the confidence, in the right circumstances, of knowing when to advise your client to make concessions. Judging when to move the spotlight of the court away from parts of the case your client has had to concede and to seek to bring the focus of the case to parts that are more favourable or, at least, help mitigate other difficulties.

## BUNDLES

Anyone who has practised in family law over recent years will have Family Procedure Rules 2010 PD27A close by. This sets out the requirements for a court bundle in family cases. There is nothing more frustrating for a judge than not having the bundle in advance of a hearing (preferably with an agreed reading list) and/or more disruptive than everyone having different pagination than the judge and the witness during a hearing. My heart sinks when I hear an advocate referring me to a page number in the bundle and each time having to give a different number for everyone else. Also, if any witness is giving evidence via a video link, do not forget to think about how they will access the court bundle; it is amazing how often that is thought about for the first time after the witness has been sworn in.

## FAMILIARISE YOUR CLIENT AND ANY WITNESSES WITH THE COURT

If your client is about to give oral evidence you may want to consider before he or she does so about getting them to go and sit in the witness box (when the court is not sitting) to familiarise themselves with what it will feel like once they are giving evidence. This can help put them at ease prior to giving oral evidence. The same applies for any witnesses, particularly lay witnesses. Walking into a court room for the first time can be quite daunting, walking in and going straight into a witness box with no real idea or understanding of what role anyone has can be overwhelming.

Through agreement with the other parties and, if necessary, direction from the court there are many cases where I have seen such familiarisation done, which can improve the quality of the evidence from the individual. The need for this is obviously fact dependent in each case. Also, don't forget to explain to your client and any witness how any court bundle works – how it is divided and where the pagination is. In some cases, I ask the advocate to mark where particular key documents are (such as the witness statements) so they are easily found by the witness once they are in the witness box.

## UNDERSTANDING THE NEEDS OF UNREPRESENTED PARTIES

With the reduction in availability of legal aid in many family cases you will often find yourself against an unrepresented party. It is important to try, if you can, to explain your role and make sure any unrepresented party has copies of any documents you have produced, shared any documents they have sent to the court or wish to rely upon and have had sufficient time to access the court bundle. This will not be possible in every case, but if it can be done it will help ensure the hearing is as effective as it can be.

## THE REMOTE COURT

The skills required for this type of hearing are very much in their infancy. Having conducted several remote hearings over the last few weeks, these are very much preliminary views. Think about your background; it should be as neutral as possible. Sit a sensible distance away from the screen with consistent lighting, in some instances all I have been able to see is a silhouette. Try not to move too much as it can be very distracting and can interrupt with the sound quality.

Finally, don't forget to check when your mute button is on or off. In a recent case an advocate was expressing some forthright views about how he planned to conduct his cross-examination of a witness who was about to give evidence; the advocate's microphone was not on mute and his views were heard by everyone in the case, including the judge. You will only do that once, but better if not at all. ■