

Technology in Family Law

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1. Social media usage is a norm of our public and private lives; newer and faster technologies that allow us to connect, communicate and transact with one another across the globe are constantly being refined. Despite the fact that advances in technology permeate almost every aspect of our every day lives, the family court system is still struggling to get to grips with many of the core concepts.
2. For example, in a high profile libel case, the court had this to say about well-known social media application, **Twitter**:

“Twitter is an online news and social networking service, which is widely used and very well known. It allows people using the Twitter website or a mobile device app to post and interact with messages of not more than 140 characters, called “tweets”. This much is common knowledge. But Twitter is still a relatively new medium, and not everyone knows all the details of how it works. Where something is not a matter of common knowledge a Judge is not entitled to bring his or her own knowledge to bear. The facts normally have to be proved. In this case, however, many of the relevant facts about Twitter have been agreed, and set out in a Schedule called “How Twitter Works”, which is attached to this judgment as an Appendix.”

Warby LJ, para 5, Monroe v Hopkins [2017] EWHC 433 (QB)

3. (Apparently the court felt that an entire **agreed** schedule was required to explain what **Twitter** was in 2017!).

Alternative Methods of (Electronic) Service

Accepted Methods of Service

r.6.4 FPR 2010

An application may be served by any of the following methods –

- (a) personal service in accordance with rule 6.7;
- (b) first class post, or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A; or
- (c) where rule 6.11 applies, document exchange.

4. These are the **default** methods of service which are **always** accepted. You don't need permission for any of these methods of service.

Service on Addresses

5. There is an assumption that service on anywhere that service to an **address** and **personal** or **postal** service are always the **preferred** methods of service. It is assumed from the start that **everybody** has a home postal address to which service can be effected. (see below).

r.6.10 FPR 2010

(1) The application must be served within the jurisdiction except as provided for by Chapter 4 of this Part (service out of the jurisdiction).

(2) The applicant must include in the application an address at which the respondent may be served.

(3) Paragraph (2) does not apply where an order made by the court under rule 6.19 (service by an alternative method or at an alternative place) specifies the place or method of service of the application.

r.6.13 FPR 2010

(1) This rule applies where –

(a) rule 6.11 (service of application on solicitor); and

(b) rule 6.12 (respondent gives address at which respondent may be served),

do not apply and the applicant does not wish the application to be served personally under rule 6.7.

(2) Subject to paragraphs (3) to (5) the application must be served on the respondent at his usual or last known address.

(3) Where the applicant has reason to believe that the respondent no longer resides at his usual or last known address, the applicant must take reasonable steps to ascertain the current address of the respondent.

(4) Where, having taken the reasonable steps required by paragraph (3), the applicant –

(a) ascertains the respondent's current address, the application must be served at that address; or

(b) is unable to ascertain the respondent's current address, the applicant must consider whether there is –

(i) an alternative place where; or

(ii) an alternative method by which, service may be effected.

(5) If, under paragraph (4)(b), there is such a place where or a method by which service could be effected, the applicant must make an application under rule 6.19.

6. When discussing service by fax or e-mail (the apparently most basic forms of digital service), the starting point is that the **recipient** (or their **solicitors**) are **willing to accept service** by fax or e-mail and should have given **sufficient written indication** of that acceptance. There also has to be communication of any **limitation to the recipient's agreement to accept service by** [e-mail].

7. This principle is not applied to either **postal** or **personal service**.

PD 6A FPR 2010

4.2

Subject to the provisions of rule 6.26(6) and (7), where a document is to be served by fax or e-mail –

(a) the party who is to be served or the solicitor acting for that party must previously have indicated in writing to the court or party serving, whichever is applicable –

(i) that the party to be served or the solicitor is willing to accept service by fax or e-mail; and

- (ii) the fax number or e-mail address to which it must be sent; and
- (b) the following are to be taken as sufficient **written indications** for the purposes of paragraph 4.2(a) –
- (i) a fax number set out on the letterhead or website of the solicitor acting for the party to be served;
 - (ii) an e-mail address set out on the letterhead or website of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service;
 - (iii) a fax number or e-mail address set out on a statement of case or an answer to a claim filed with the court by the party to be served; or
 - (iv) an e-mail or other correspondence from the party to be served, to the court or party serving, confirming that they are willing to accept service by e-mail.

4.3

Where a party intends to—

- (a) serve a document by e-mail; or
- (b) request that the court serve a document by e-mail that **party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means** (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

Deemed Service

- 8. Even if the method you used was **effective service**, when can you actually determine it **did** reach the recipient? The rules of **deemed service** create a specific timeframe in which the court will conclude that the recipient **has been served**.
- 9. That can happen by either **receipt of acknowledgement of service** or specific rules which apply where there is **no acknowledgement of service**.
- 10. The responsibility once again lies with the **server** to evidence **effective** or **deemed service**.

Deemed service – receipt of acknowledgment of service

r. 6.15 FPR 2010

(1) Subject to paragraph (2), **an application is deemed to be served if the acknowledgment of service, signed by the party served or the solicitor acting on that party's behalf, is returned to the court office.**

(2) Where the signature on the acknowledgment of service purports to be that of the other party to the marriage or civil partnership, the applicant must prove that it is the signature of that party by –

- (a) giving oral evidence to that effect at the hearing; or
- (b) if the application is undefended, confirming it to be so in the statement the applicant files under rule 7.19(4).

Deemed service by post or alternative service where no acknowledgment of service filed

r. 6.16 FPR 2010

(1) Subject to paragraph (2), if –

- (a) an application has been served on a respondent by post or other service which provides for delivery on the next business day;
- (b) no acknowledgment of service has been returned to the court office; and
- (c) the court is satisfied that the respondent has received the application, the court may direct that the application is deemed to be served.

(2) Where –

- (a) the application alleges 2 years' separation and the respondent consents to a matrimonial or civil partnership order being granted; and
- (b) none of the other facts mentioned in section 1(2) of the 1973 Act or section 44(5) of the 2004 Act, as the case may be, is alleged, paragraph (1) applies only if –
 - (i) the court is satisfied that the respondent has received notice of the proceedings; and
 - (ii) the applicant produces a written statement, signed by the respondent, containing the respondent's consent to the grant of an order.

Proof of service by the court etc.

r. 6.18 FPR 2010

(1) Where a court officer serves an application by post, or other service which provides for delivery on the next business day, the court officer must note in the court records the date of –

- (a) posting; or
- (b) leaving with, delivering to or collection by the relevant service provider.

(2) A record made in accordance with paragraph (1) is evidence of the facts stated in it.

(3) This rule does not affect the operation of section 31N of the 1984 Act.

Alternative Methods of Service

r.6.19 FPR 2010

(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may direct that service is effected by an alternative method or at an alternative place.

(2) On an application under this rule, the court may direct that steps already taken to bring the application form to the attention of the respondent by an alternative method or at an alternative place is good service.

(3) A direction under this rule must specify –

- (a) the method or place of service;
- (b) the date on which the application form is deemed served; and
- (c) the period for filing an acknowledgment of service or answer.

Service via Whatsapp

11. Permission must be obtained in order to use an alternative method of service. This is not the case with the accepted methods of service in **r.6.4 FPR 2010**. Many other jurisdictions are well ahead of England & Wales in this regard.
12. Acceptance or deeming service can be helped by either **message dispatch confirmations, receipt confirmation messages** (in instant messaging services, usually date and time stamped) or even just **a communication confirming receipt form the recipient**.
13. Rules for service then are default to the recipient's advantage rather than the senders, which commonly causes delay or indeed, appears to reward the complete non-engagement of respondents.

How is Instant-Messaging Service helpful?

14. Faster than postage and less costly than personal service in many cases.
15. Deeming service can be easier, either by seeing receipt confirmations or message dispatch confirmations. However, there are many people who disable such confirmations in their e-mails or instant messaging. Other barriers include full inboxes or blocking of e-mails and inbox priorities (which would divert sent messages to Junk Folders). However, the rules for deeming service could still be applied in these instances.

Gray v Hurley [2019] EWHC 1636 (QB)

Decision of Lewison J (unreported) (2009): service of an injunction on Twitter (though this was because the true name and address of the respondent was not exactly known, though his Twitter profile was known).

AKO Capital LLP & Another v TFS Derivatives and Others (2012, unreported): Teare J, permission for service of a claim form at last known address and via Facebook.

Using Facebook to locate an abducted child

Case Study:

16. F and M live in a foreign jurisdiction with A, their child. M then relocates with A, without F's permission, and moves to England & Wales. The family has no prior connection to England & Wales. In the process she obtains new electronic devices (phone, computer etc.) which F had no record of back home.

You act for F, who tells you that M is still actively using her Facebook account. How can social media assist us in tracing M and A's location?

Norwich Pharmacal v. Customs and Excise Commissioner [1974] AC 133

17. In this case, the House of Lords recognised the **equitable jurisdiction** which enables the court to require a respondent who is "mixed up" in wrongdoing to provide "full information". This jurisdiction is now preserved by **CPR r.31.18**.
18. The jurisdiction subsequently developed to allow applicants to compel provision of a crucial and specific piece of information without which liability could not be alleged (**Axa v Natwest [1998] PNLR 433**; **Calton v VCI [2003] EWHC 616 (Ch)**) and exceptionally, information as to whether a wrong has been committed at all (**P v T [1997] 1 WLR 1309**).
19. **Norwich Pharmacal** relief is founded on the court's equitable jurisdiction. It is a flexible remedy, as the courts have repeatedly emphasised, the jurisdiction is a developing one and there is therefore a need for flexibility and discretion in considering whether the remedy should be granted.

Mitsui v Nexen Petroleum [2005] 3 All ER 511 at [21]:

20. The three conditions to be satisfied for the courts to exercise the power to order Norwich Pharmacal relief are:
- i) A **wrong** must have been carried out, or arguably carried out, by an ultimate wrongdoer.
 - ii) There must be the **need** for an order to enable action to be brought against the ultimate wrongdoer; and
 - iii) The person against whom the order is sought must a) **be mixed up in so as to have facilitated the wrongdoing**, and b) **be able or likely to be able to provide the information necessary to enable the wrongdoer to be sued**.

Wrongdoing

21. This is a broad definition; the wrong in question could be anything from a **crime**, a **tort**, a **breach contract**, **equitable wrong** or **contempt of court** (see Popplewell J in **Orb A.R.L v Fiddler [2016] EWHC 361 (Comm)** at [83] and [84]).
22. It is not necessary that the applicant intends to bring legal proceedings in respect of any wrong – any form of redress will suffice. The wrongdoing on which an applicant relies

must be clearly identified, albeit it may be identified in general terms (see Lord Woolf CJ in **Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033** at [60]).

Need

23. The applicant must demonstrate that they need the information to enable action to be brought against the ultimate wrongdoer (see Lord Woolf CJ in **Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033** at [36] and [57]).
24. The requirement for necessity is a threshold condition, and not simply a matter of the court's discretion. (**R(Omar) v Secretary of State for Foreign and Commonwealth Affairs [2014] QB 112** at [30]).
25. Where the information sought can be obtained via other practicable means, the court will not grant a **Norwich Pharmacal** order. However, the bar of necessity does not require the remedy to one of last resort.

Mixed up and able to provide information

26. A respondent can be (and usually is!) mixed up innocently in wrongdoing; there is no requirement that the respondent even needs to be aware of the wrongdoing.
27. The applicant must show a good arguable case that the respondent is involved in the wrongdoing in a way which distinguishes them from being a mere witness. The requirement of involvement in the wrongdoing is important because it distinguishes the respondent from a mere onlooker or witness, against whom disclosure will usually not be ordered.
28. While the test uses the words **facilitated**, there is some dispute whether this can be right; in **R(Omar and ors) v The Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 118**, the Court of Appeal held that it was wrong to conclude that an application for a **Norwich Pharmacal** order must establish facilitation.
29. Then again, in **NML Capital Limited v Chapman Freeman Holdings Limited [2013] EWCA Civ 589**, the Court of Appeal held that the third party must be involved in the furtherance of the transaction identified as the relevant wrong doing.

Other types of relevant disclosure orders

The **Norwich Pharmacal** order could be used to obtain information which could act as evidential basis to support other orders, for example:

- a. s. 33 FLA 1986 – disclosure of a child's whereabouts.
- b. Local Authority/Police Disclosure
- c. Alternative applications under r.21.2 FPR 2010
- d. Mobile phone data/Cell Site analysis from a telephone company to locate a particular mobile phone.
- e. Witness summons r.24.2(1)(b) FPR 2010
- f. Department of Work and Pensions Orders based on relevant information

Cryptocurrencies in Financial Remedies proceedings

Cryptocurrency Definitions

30. **Decentralised applications:** applications which allow you to offer a service not under the control of a single person, so with no central control like a Bank. In most cases, this service is the movement of assets, or documents, to another individual and this is done using a 'Blockchain'.
31. **Blockchain:** This carries whatever a person has sent within a block. It is a process which happens on the internet, and it is completely public. There are some decentralised applications which can send information anonymously but it is likely that future legislation will stop the legitimate use of these.
32. **Bitcoin:** This is a cryptographic currency. It is a reward that individuals receive for helping to carry Bitcoin over this particular decentralised application's Blockchain. Bitcoin can also be used as a store of value. These coins are held in a wallet that has a **private key** (like your PIN number) and a **public key** (like your bank account number).
33. **Miners:** These are computers being told to encrypt the blocks on the blockchain, for the benefit of the decentralised application and themselves.

Miners are rewarded for transmitting the Bitcoin as the sender incurs a small fee for sending it. The person **receiving the Bitcoin** can then spend it with their **private key**.

Valuation Issues

34. Cryptocurrencies are decentralised but the reality is that the ledger is public and changes cannot be made to a decentralised application without the agreement of all the people using that decentralised application. It is very difficult to commit fraud using such a decentralised application.
35. The main risk for people now is whether they will have to pay tax on their sold coins. Theoretically sales should incur **capital gains tax**, which would apply to the difference between what someone bought the coins for and what they sold them for.
36. HMRC guidance on this is vague. It is possible that selling coins that were not purchased will be seen as "**highly speculative**", like gambling. A transaction may be so highly speculative that it is not taxable or any losses relievable. To date, HMRC have not updated their guidance since 2014, but they will likely soon do so once they realise just how much tax they could be collecting..

Disclosure Issues

37. It is possible to track down cryptocurrency. When a wallet is created, users of this wallet are provided with an online address that enables them to receive crypto-coins. The address provided is comprised of a long list of letters and numbers where each letter and/or number is considered and regarded as unique to the wallet provided to the user.
38. The first way to trace if someone possesses and owns cryptocurrency is when a wallet owner links his/her real identity to his/her wallet. In this case, when a person sends

coins from his/her personal wallet to his/her exchange wallet, it becomes traceable. There are companies, such as *Chainalysis*, whose main scope of work revolves around identifying wallets and linking them to individuals.

39. The main way to trace if someone possesses and owns cryptocurrency is through income and expenditure. When the owner of a cryptocurrency wallet buys a product or pays for a service online, the recipient of his/her cryptocurrency is able to identify his/her address as most recipients require, for Proceeds of Crime Act 2002 obligations and otherwise, purchasers to have an identity and an address.
40. Unless the cryptocurrency comes from a source entirely unconnected to the previous asset position, then some form of trace should be left behind. The only likely scenario where no trace would be left is if a party has been paid for an asset or service in cryptocurrency into a hitherto unknown wallet. This is something for practitioners to be watchful for.
41. Most cryptocurrencies remain anonymous, identifiable only through a keychain entry into the ledger and as long as the internet does not require an online identity system, it will be possible for cryptocurrency users to continue to possess and trade in anonymity unless such transactions themselves require or inadvertently leave traces behind.

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