Unqualified but unrestricted?

When proceedings take place 'in chambers', who has the legal right of audience? This seemingly simple question lacks a clear-cut answer, explains John Gould

IN BRIEF

- The practice of unqualified representatives attending hearings in chambers is long established and ubiquitous. But is it right that a trainee solicitor can be the advocate in, for example, childcare proceedings in the Family Court just because the hearing is 'in chambers'?
- The principles governing this question are complex, and are based on the meaning of 'in chambers' and 'reserved family proceedings'.

Solicitors' unqualified employees, such as trainees and caseworkers, have customarily appeared before judges in hearings which are listed as being 'in chambers', even though they do not actually have a legal right of audience. Is it right that a trainee solicitor can be the advocate in, for example, childcare proceedings in the Family Court just because the hearing is 'in chambers'?

It might be thought that who has a right to be heard by a court would be a simple question with an easy answer based on clear and consistent principles. It is, after all, a very important question, as old as courts themselves; yet I imagine that most lawyers would struggle to give a comprehensive answer or elucidate the principles involved.

Right of audience

A right of audience is the right to appear before and address a court, including the right to call and examine witnesses. Exercising a right of audience is a reserved legal activity under the Legal Services Act 2007 (LSA 2007), s 12(1) and Sch 2, although the reservation does not apply where there were no restrictions immediately before LSA 2007 came into force.

Not all regulated lawyers are automatically entitled to appear before all courts and the extent of their right depends on the particular regulator's rules which apply to them. Solicitors, for example, must obtain a specific qualification to appear in the higher courts.

The definition of 'court' in LSA 2007 included tribunals that were 'listed tribunals' for the purposes of the Tribunals, Courts and Enforcement Act 2007, Sch 7, but the restriction does not apply to the extent that tribunal rules grant a right of audience to non-authorised persons who thereby become exempt from the LSA 2007's authorisation requirements. Such an exemption is common and exists, for example, in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976).

Schedule 3 to LSA 2007 itself also provides for rights of audience exemptions. Apart from the holders of certain offices, persons may be exempt by permission of the court or under an enactment. There is also an exemption under para 1(7) for individuals whose work includes assisting in the conduct of litigation and who are actually assisting in the particular case. They must be under the instructions and supervision of an individual authorised to conduct litigation and the proceedings must be being heard 'in chambers' in the High Court, County Court or (if in the Family Court) by a judge who is not a lay justice. The exemption does not apply if the proceedings are 'reserved family proceedings'.

The question of whether or not a trainee solicitor can exercise a right of audience in care proceedings should be easily answered, but it is not. Assuming that the other elements of para 1(7) are satisfied, what remains is the meaning of two key terms: 'reserved family proceedings' and 'chambers'.

There is a sort of statutory definition of reserved family proceedings in para 1(10):

> '"reserved family proceedings" means such category of family proceedings as the Lord Chancellor may, after consulting the President of the Law Society and with the concurrence of the President of the Family Division, by order prescribe; and any order made under section 27(9) of the Courts and Legal Services Act 1990 (c 41) before the day appointed for the coming into force of this paragraph is to have effect on and after that day as if it were an order made under this sub-paragraph.'

The reference to the Courts and Legal Services Act 1990 (CLSA 1990) is because that was the first time the concept of reserved family proceedings emerged.

An intention to make an order?

This sets us off in search of an order by the Lord Chancellor identifying the relevant proceedings. Such an order could have been made under a number of amending statutes since CLSA 1990 came into force on 1 January 1991.

From the beginning, in 1990, it was doubtful that there was an immediate intention to make such an order.

In the debate when the wording was added to the Courts and Legal Services Bill in 1990, Hansard reports the then Attorney General saying:

> 'The amendments additionally provide a power for the Lord Chancellor to prescribe, with the concurrence of the president of the family division and after consultation with the president of the Law Society, certain categories of family proceedings in which these rights of audience will not subsist as rights, but will be exercisable only at the discretion of the court in individual cases. The reason is that nearly all family business is heard in chambers. That includes family business where representation by non-legal staff may sometimes be inappropriate. It may not be necessary for the power to be used but, especially in the light of the Government's overall strategy for developing family jurisdiction, it is sensible to provide for the possibility of its exercise in future. We have consulted the senior judiciary before tabling these amendments' (Vol 177, col 589).

It doesn't appear that any order had been made at the time LSA 2007 was enacted. Halsbury's Laws volume on the *Legal Professions* (2008 edition) reports in a

footnote that at the date of its publication, no such order had been made. As late as 2020, one leading legal research provider only felt able to indicate that 'to the best of [their] knowledge no such order [had been] made'.

The *Family Court Practice 2023 (Red Book)*, at para 2.802, was more confident:

> 'Reserved family proceedings are mentioned in Sch 3, para 1(10) and would be a category of proceedings to which the exemption referred to in para 1(7) would not apply. However, the Lord Chancellor has not exercised the power to prescribe any category of family proceedings as such.'

Meaning of 'in chambers'

So having explored that cul-de-sac and established that reserved family proceedings do not actually exist, we return to the meaning of 'in chambers'.

The varying uses and meaning of 'in chambers' were discussed in the family law context in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, in which Dame Elizabeth Butler-Sloss P noted some confusion as to the meaning to be given to the words 'chambers', 'private' or 'in camera', which was not assisted by the absence of a definition in s 67 of the Supreme Court Act 1981, which again resorted to a vague reference to rules and previous practice:

> 'Business in the High Court shall be heard and disposed of in court except in so far as it may, under this or any other Act, under rules of court or in accordance with the practice of the court, be dealt with in chambers.'

Historically, proceedings in the family jurisdiction which were required to be in private were required to be 'in chambers' (see, for example, the Family Proceedings Rules 1991, rr 2.66(2) and 4.16). The best view seems to be that of Jacobs J in *Forbes v Smith* [1998] 1 All ER 973 that 'courts sit in chambers or in open court generally merely as a matter of administrative convenience'. The designation as being 'in chambers' only makes them private in the sense that the permission of the judge may be required to enter 'their' room.

Lord Woolf MR in *R v Bow County Court ex parte Pelling* [1999] EWCA Civ 2004 [at paragraph 20] thought there were three categories of hearing within the Civil Procedure Rules (CPR):

> 'First of all there are hearings in open court. Secondly, there are hearings in the judge's room or chambers to which the public have access. Thirdly there are hearings in court or in the judge's room or chambers which are in private. If the hearing is a public hearing in chambers there may be a limit on the number of members of public who can attend and the judge deals with this as appropriate as a matter of discretion.'

On this basis it is difficult to see why the exemption in Sch 3, para 1(7) framed, as it is, in terms of 'chambers' would be based simply on whether or not a room could be entered without knocking on the door. An exemption applying to hearings 'in private' or 'in camera' would produce the opposite of what might be expected and would allow trainee solicitors or paralegals rights of audience in a whole raft of important and sensitive cases in all of the higher courts. It cannot be that for this purpose 'chambers' and 'in private' are coterminous, although historically they seem to have been used interchangeably.

A ubiquitous practice

The practice of unqualified representatives attending hearings in chambers in the High Court or County Court is long established and remains ubiquitous. Although the practice has been recognised in statute from CLSA 1990 onwards, that has amounted to little more than a vague general permission to keep doing whatever it was that people were already doing without really saying what that was or why it was being allowed.

There is no definitive list of which hearings are to be held in chambers in either the CPR or LSA 2007. Older versions of rules which might identify pre-CLSA 1990 or pre-LSA 2007 practice are unreliable because they tended to use the terminology differently. The County Courts Rules 1981 referred to hearings being held 'in chambers' or 'in open court' (rather than 'in public' or 'in private').

At the County Court coalface, as it were, there has been improvisation. In *McShane v Lincoln* [2016] Lexis Citation 573, District Judge Peake adopted an historical approach and sought to identify 'whether the hearing in question falls within a broad category of the type of hearing that under the pre-1999 rules would have been expected to be heard in chambers rather than in open court'.

Going the other way, in February 2016 HHJ Clifford Bellamy (Designated Family Judge for Leicester) issued a 'Protocol: rights of audience for trainee solicitors and legal executives' in which he stated (incorrectly, in my respectful opinion) as a principle:

> 'A trainee solicitor or legal executive ("the applicant") wishing to appear in a private law matter at a hearing before the Family Court sitting at Leicester and Loughborough, requires the grant of a right of audience before the Family Court in order to gain an exemption under Sch 3, para 1(2).'

If the para 1(7) exemption applies, a grant of a right of audience is not required.

> *"There is a vague general permission to keep doing whatever it was that people were already doing without really saying what that was or why it was being allowed"*

The repealed County Court Rules 1981 did mention a number of hearings as being 'in chambers', although this may be a hangover from the previous use of 'in chambers' and 'private' as synonyms. These included: interim applications, pre-trial reviews and claims by mortgagees for possession.

Greater clarity would be provided if listings adopted a nomenclature better aligned with the law. Hearings may be 'private' or 'public'; the venue may be 'in court' or 'in chambers'. The exemption only applies where hearings are 'in chambers'. Perhaps to avoid doubt, hearings which are considered to be unsuitable for representatives without a right of audience should be listed as 'not in chambers'.

Perhaps the time has arrived for reserved family proceedings to actually be identified by order.

What would then be left are the questions of principle—when, where and why should non-qualified employees of solicitors be able to exercise a right of audience? If it is to be a case-specific approach, perhaps the designation of a hearing as being 'in chambers' or 'not in chambers', solely on the basis of considering who can appear, would be the simplest solution. NLJ

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