

# Stopping others from helping themselves

*Lisa Bray examines the current position regarding disclosure in ancillary relief proceedings and the problems faced when a client decides to adopt a self-help route*



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'In recent years, practitioners have been faced with clients with information that they have obtained not by entering their spouse's offices at home, but by obtaining the information directly from their personal computers.'

**W**e, as practitioners, are all too familiar with the phrase 'full and frank disclosure'. These are words we frequently use when advising our clients of the importance of being nothing less than completely truthful when providing financial disclosure in ancillary relief proceedings. As far back as 1985 the House of Lords was concerned with the issue of the non-disclosure of material evidence by one party. In the well-known case of *Livesey (formerly Jenkins) v Jenkins* [1985] the Lords concluded that each party owed the other a duty of full and frank disclosure, and that where that duty is breached any order made in the proceedings may be set aside. This duty is of course entrenched in every practitioner's mind when advising clients as to the disclosure process.

However, what happens when your distrustful client secretly obtains information unlawfully from their spouse's/civil partner's private documents?

## Self-help disclosure

We are all familiar with *Hildebrand v Hildebrand* [1992]. The husband started to photocopy many of his wife's personal papers when it was evident that their marriage was breaking down. He did this because he suspected that his wife would seek to hide her wealth. During the inevitable ancillary relief proceedings, the husband asked his wife to answer various questions. However, he did

not disclose to her the documents he had in his possession. The wife found out and sought an order from the court that her husband disclose all of the documents he had in his possession that he had obtained without her knowledge. The judge found that the husband's conduct was such that it was an abuse of process for him to require his wife to answer the questions he had asked of her when, of course, he already knew the answers. Mr Hildebrand was required to disclose all of the documents to Mrs Hildebrand's lawyers. However, he was not prevented from using the information obtained, and providing that he disclosed the documents he had taken he could use them in the course of the proceedings.

A lesson that all practitioners learned from the circumstances of this case was that any documents so obtained by one party must be disclosed to the other party before the answer of any questionnaires. This lesson has seemed to lead to the practice by family lawyers that as long as documents are disclosed with the originals being returned, there is nothing wrong with them being used throughout the proceedings. This practice is frequently adopted.

Indeed, this is an approach that has continued. *T v T (interception of documents)* [1994] looked at the issue of the wife obtaining copies of the husband's financial documents by reprehensible means. In this case the wife feared that the husband would

seek to understate the true extent of his resources to the court and so engaged in a number of activities that included opening and taking letters addressed to him and breaking into his office with the intention of gathering documentation to enable her to ascertain the husband's true financial position. It was submitted on behalf of the husband that it would be inequitable not to take

that she had in her possession at the discovery stage of the litigation should have been disclosed at the time of delivery of the questionnaire. Those coming into her possession at a later stage should have been disclosed forthwith. It was held that while the wife's conduct would not be brought into the reckoning of the substantive award, her reprehensible actions were relevant in respect of costs.

disclosed them when they come into our possession.

In recent years, practitioners have been faced with clients with information they have obtained not by entering their spouse's offices at home, but by obtaining the information directly from their personal computers. In the light of legislation regarding the misuse of computers, does our duty differ when the information has been obtained from another's computer?

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into account the wife's conduct during the litigation and accordingly there should be a reduction in the amount of relief awarded to her. It was held that the wife had acted reprehensibly in her use of force and in intercepting mail. The timing of the wife's production of some of the documents through the solicitors was also found to be unacceptable. The original and copied documents that she had taken were discoverable documents, and all those

As practitioners we are all very aware of our duty when a client comes to us and admits to having 'obtained' documents from their spouse without them knowing. While we may warn our client that their actions may be taken into consideration when considering the issue of litigation conduct and costs, there is nothing to prevent us from using relevant documents during the course of the proceedings, providing we have

**Self-help e-disclosure**

*L v L* [2007] involved circumstances whereby the wife had removed the hard drive of the husband's laptop computer from the family home and arranged for copies to be made without his knowledge or consent. The husband issued a claim form naming both the wife and her solicitors as defendants. The husband sought an order for delivery up to his solicitors of all copies of the hard drive obtained unlawfully by his wife. He also claimed for an injunction that the defendants should be restrained from communicating, using or disclosing any contents of the hard drive. The husband relied on Article 8 of the Human Rights Act 1998, on the basis that the wife's actions in taking the laptop were a breach of privilege and confidentiality. The wife and her solicitors gave undertakings not to communicate or to disclose the contents of the hard drive and not to take any steps whatsoever to access or read the hard drive or any copy of it.

In his judgment Tugendhat J said that it is common in matrimonial disputes for one party to suspect that the other is concealing information that may be relevant to the proceedings and that they may sometimes resort to self-help measures by copying, seizing or attempting to access digital documents. The other party does, however, have rights, including privacy, confidentiality and professional privilege, in relation to relevant documents obtained. The rights of privacy and confidentiality may be overridden by the competing public interest that any trial should be conducted on full evidence. However, unless the documents or information obtained are relevant to the actual

**Unlawful action**

- The unauthorised access to computer material is an offence under the Computer Misuse Act 1990 (the Act). Under s1 of the Act a person is guilty of an offence if:
  - (a) they cause a computer to perform any function with intent to secure access to any program or data held in any computer;
  - (b) the access they intend to secure is unauthorised; and
  - (c) they know at the time when they cause the computer to perform the function that this is the case.

A person guilty of an offence under this section shall be liable, on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory minimum, or to both.
- The Regulation of Investigatory Powers Act 2000 provides that it is an offence for a person intentionally and without lawful authority to intercept any communication in the course of its transmission by means of a public postal service or a public telecommunications system, and that it shall be an offence for a person intentionally and without lawful authority to intercept, at any place in the UK, any communication in the course of its transmission by means of private telecommunications system. A person guilty of an offence under this act shall be liable, on conviction of an indictment, to imprisonment for a term not exceeding two years, to a fine, or to both; and on summary conviction, to a fine not exceeding the statutory minimum.

proceedings, the rights of privacy and confidentiality will not be overridden at the instance of the potential claimant. These measures of self-help therefore give rise to legal difficulties. Tugendhat J went onto say that measures of self-help give rise to the danger that rights will be overridden that would not be overridden if the matter were the subject of an application for a search order, in which case various safeguards would be included to protect that party's rights. The amount of information that can be stored on a laptop is vast and the technique involved in copying the information is simple for experts in that field. The potential fruits of self-help are therefore of a different order from those of former days. Tugendhat J acknowledged that the developments of the digital age have given rise to the question of the extent to which measures of self-help are also in breach of the provisions of the law designed to protect databases contained in digital form in computers.

Tugendhat J concluded that he was satisfied that the hard drive of the husband's laptop did contain documents protected by confidentiality and legal professional privilege, and this supported an order for delivery up of the information to the husband's solicitors.

In the light of the above cases you may ask: what protection is there for clients whose information is obtained from their computers without their consent?

In light of the criminal sanctions (see box, on p6) for this digital self-help disclosure, should practitioners be advising clients as to the penalties they may face if they adopt such a course of action? The approach we may have adopted in the light of *Hildebrand* and *T v T* needs to be updated. The criminal sanctions should not be ignored, and indeed s17 of the Regulation of Investigatory Powers Act 2000 provides that any information intercepted unlawfully shall not be adduced for the purposes of or in connection with any legal proceedings. This is something that we as practitioners should be alive to, and in the case of information intercepted unlawfully we may

not be able to use this in the context of the ancillary relief proceedings.

A number of recent incidents where the other party has accessed our privileged communications with clients have led us to advise our clients as to what steps they can take to protect their information on their computers.

#### Self-help protection

There is common-sense advice that we can give to our clients at the outset of proceedings to protect the information held on their computers. For example:

- In terms of protecting passwords, ensure that your clients have up to date anti-virus, firewall and anti-spyware software. This precautionary approach should prevent most remote attempts to obtain password information.
- As simple as it sounds, it is also important to use good and different passwords for different uses. An ideal password would be more than 14 characters long and would be made up of random letters, numbers and punctuation.
- It is less easy to prevent someone obtaining information when they have physical access to the computer. Normal Windows passwords can be broken in a few minutes and the data can be copied without even needing that password. The best advice you can give to a client is to make sure that the data is safe. The easiest way is to make sure that no private files are saved on the computer. If someone buys an external hard drive then all files can be moved to that and then it can be locked away.

- Computers used with an ex-partner should never be used to communicate or store privileged information.
- When using private computers, laptops are preferable.
- Clients should consider, subject to privacy, using PCs from their workplace, which are more likely to be protected from remote access.

#### Conclusion

It would appear from the above summary of the current position regarding disclosure that self-help

*Unless the documents or information obtained are relevant to the actual proceedings, the rights of privacy and confidentiality will not be overridden at the instance of the potential claimant.*

remedies are likely to be criticised when other preservation remedies have not been attempted, for example search orders, as in *L v L*. In terms of the practicalities of the advice we should be giving to our clients, I would suggest that we should be making them aware of the criminal penalties they may face should they take part in such self-help disclosure, and that it is no longer the case that we must merely disclose any such obtained information to the other side in a timely manner. We must also continue to give our clients warnings as to the potential cost penalties they may face. If we have clients that wish to correspond by electronic mail then consideration should be given as to whether this means of corresponding is safe, and we should provide simple advice, as outlined above, as to the preventative measures they can take to stop their spouse having access to the advice we give. ■

*Hildebrand v Hildebrand*  
[1992] 1 FLR 244  
*L v L*  
[2007] EWHC 140 (QB)  
*Livesey (formerly Jenkins) v Jenkins*  
[1985] 1 All ER 106  
*T v T (interception of documents)*  
[1994] 2 FLR 1083