VIEW FROM THE PRESIDENT'S CHAMBERS (12)

The process of reform: next steps

Sir James Munby, President of the Family Division

On 22 April 2014 we saw the implementation of the final version of the revised PLO in public law cases (PLO 2014) and the implementation in private law cases of the Child Arrangements Programme (CAP 2014). What next?

Child Arrangements Programme (CAP 2014)

I do not repeat but draw attention to what I said about CAP in my speech on 29 April 2014 marking the implementation of the family justice reforms: [2014] Fam Law 820. Here I merely note the immensely valuable ongoing work of the Private Law Working Group (PLWG) chaired by Cobb J.

Following the implementation of CAP, PLWG has focused its energies on drafting guides and other materials to assist litigants in person and the judges involved in private law cases, including (a) a Guide to Urgent & Without Notice Hearings (now published by HMCTS as 'CB8'); (b) a revised Guide for the Judiciary on Mediation (prepared by the Family Mediation Council and endorsed by the Family Justice Council, facilitated by PLWG); (c) a Guide for Judges dealing with private law cases involving issues of capacity (drafted by PLWG and soon to be published by the Family Justice Council); and (d) Witness Statement Templates for use by litigants in person (to be issued by HMCTS).

Meanwhile, the Judicial College has undertaken a significant training programme on CAP for all 1,300 private-law ticketed judges (both full-time and part-time) at one-day training seminars run in regional centres. PLWG contributed to the course programme, and Cobb J gave presentations at each of the events. Separate training events have been run recently, again with PLWG input, for CAFCASS and for the FLBA.

McKenzie Friends

In my speech on 29 April 2014 I said that "We need to think anew about the appropriate roles in the court room of McKenzie friends and other lay advisers." At the instigation of the Master of the Rolls a cross-jurisdictional Committee has now been set up under the chairmanship of Asplin J to consider the role of McKenzie Friends in the light of the Legal Services Consumer Panel's April 2014 report on *Fee-charging McKenzie Friends* and to consider what changes may be required to the July 2010 *Practice Guidance: McKenzie Friends (Civil and Family Courts)* [2010] 2 FLR 962. The Family Division's representative on the Committee is Cobb J and there will be other representation on the Committee from the judiciary of the Family Court.

Money Arrangements Programme (MAP 2014)

To complement the reforms already implemented in relation to children by PLO 2014 and CAP 2014, I have invited Mostyn J and Cobb J to chair a new Financial Remedies Working Group. Their task will be two-fold: to explore ways of improving the accessibility of the system for litigants in person, and to identify ways of further improving good practice in financial remedy cases. The objective is to produce something analogous to CAP: the Money Arrangements Programme (MAP).

I emphasise that this review is confined to matters of practice and procedure. Reform of the substantive law is something for another day. I emphasise also that there is no question of any general review or reform of the procedure in such cases. The reforms of the 1990s have proved outstandingly successful. They have stood the test of time. But even the finest machinery may benefit from overhaul and fine-tuning once in a while.

There will be various strands to the Working Group's review.

First, we must adapt our processes in financial remedy cases to the new world of those who, not through choice, have to act as litigants in person. We need to think, as I have said, about the appropriate roles in the court room of McKenzie friends and other lay advisers. We will need to make our judicial processes more inquisitorial. As part of

MAP, we need to craft explanatory materials written in plain English for use by litigants in person, supplementing the excellent *Action Guide: Applying for a financial order without the help of a lawyer*, shortly to be published by Advicenow with assistance from the Family Justice Council.

Secondly, we must encourage and facilitate the use of out-of-court methods of resolving financial disputes, whether by mediation, arbitration or other appropriate techniques. There are two aspects to this which the review will consider: (1) Encouraging the use of non-court dispute resolution methods both before the commencement of proceedings and at every stage thereafter. MIAMS are now as much a part of financial remedy cases as of private law children cases. (2) Facilitating the quick and easy implementation of out-of-court agreements in financial remedy cases. Following on from my decision in *S v S* [2014] EWHC 7 (Fam), dealing with how the court should approach applications to enforce arbitral awards in financial remedy cases, I want to move forward as soon as possible on two fronts, which the review will be considering. Pending more general changes to the Family Procedure Rules in relation to arbitration and other forms of N-CDR, I wish to issue in the near future, for discussion and comment, both a draft rule change to enable relevant applications under the Arbitration Act 1996 to be made in the Family Division and not only, as at present, in the Commercial Court, and also draft Guidance dealing with a number of procedural matters not covered by *S v S*.

Thirdly, the review will explore the feasibility of uncoupling the *process* of divorce from the *process* of adjudicating claims for financial remedies following divorce. With the recent repeal of section 41 of the Matrimonial Causes Act 1973, we have finally uncoupled the process of divorce from the process of adjudicating disputes about the children following divorce. What I propose is a sensible next step. The majority of divorce petitions proceed without any financial claims. From the perspective of HMCTS it surely makes sense to have completely separate files for divorce petitions and for financial remedy claims. It will also facilitate the ongoing process, which I fully support, of reducing the number of court offices handling divorce petitions. Divorce, as a process, is in large measure administrative, albeit conducted judicially by District Judges and, for the future, also by Legal Advisers. It

is a process which lends itself to handling in a few places and perhaps, eventually, in a single national processing centre.

Fourthly, I should like to see if there is any scope for more closely aligning practice and procedure in the three major types of financial remedy cases: those following divorce (or dissolution of a civil partnership), those under Part III of the Matrimonial and Family Proceedings Act 1984, and those under Schedule 1 to the Children Act 1989. Linked to this the Working Group may wish to consider whether there is scope for introducing a shorter or more streamlined process in cases where the court is satisfied that this is appropriate. No doubt they will be closely monitoring, as I am, the recently introduced Pilot Scheme for an Accelerated First Appointment Procedure in Financial Remedy Proceedings in the Financial Remedies Unit at the Central Family Court: [2014] Fam Law 887.

Fifthly, and finally, I have asked the Working Group to review all the application and other forms used in financial remedy cases to see whether any adjustments are appropriate (I suspect that few if any will be required except to Form A) and to create a comprehensive body of standard form orders for use in such cases. This is particularly important if we are to meet the needs both of litigants in person (who cannot be expected to know, for example, what has to be included in a 'clean break' order) and of judges, District Judges in particular, handling cases where the parties are not represented.

Overall, our aim, as with every aspect of the family justice system, must be to simplify and streamline the process so as to make it more user friendly for litigants, litigants in person in particular, and quicker and cheaper for all. We need to explore whether anything more needs to be done to render even more effective in financial remedy cases the techniques which we know have been so successful in both 'money' and children cases: judicial continuity, judicial case management, robust timetabling, and rigorous control of the unnecessary use of experts and proliferation of paper.

In relation to its work on forms and orders the Working Group will no doubt wish to consult with and draw on the expertise of Resolution and of the Association of District Judges. In relation to the crafting of plain English explanatory materials the

Working Group will draw on the inter-disciplinary expertise of the Family Justice Council.

The Working Group has agreed to produce an interim report by 31 July 2014. I am particularly anxious to have its preliminary views in relation to any proposed changes to the Family Procedure Rules, so that the necessary work of the Family Procedure Rules Committee (and, if appropriate, the Civil Procedure Rules Committee) can commence as soon as possible.

In the meantime in addition to the Central Family Court initiative I have already mentioned, Mostyn J, as the judge in charge of the RCJ 'money' list, has issued with my approval a Statement on the efficient conduct of financial remedy final hearings allocated to be heard by a High Court judge whether sitting at the Royal Courts of Justice or elsewhere. The Working Group may wish to consider the extent to which the approach in that Statement might be extended to some of the smaller money cases.

The Law Commission's proposals

In its February 2014 report, *Matrimonial Property, Needs and Agreements*, the Law Commission recommended (paras 3.75-3.120) that authoritative guidance on "needs" be produced by the Family Justice Council. The Commission recommended (para 3.89) that "the guidance prepared by the Family Justice Council be addressed primarily to the courts, but … it should be produced additionally in a plain English format and made widely available to the public". The idea that the Family Justice Council undertake such work was something I had canvassed with my predecessor when I was Chairman of the Law Commission. Sir Nicholas Wall P was extremely supportive.

I am entirely supportive of the Commission's recommendations in this respect and seek their early implementation. I have asked Roberts J to chair a Family Justice Council Working Group tasked with carrying this project forward in consultation, I very much hope, with Advicenow. This project will obviously feed into the wider project being undertaken by the Financial Remedies Working Party, and the Guidance produced by the Family Justice Council will ultimately form part of MAP, but there

are practical advantages in keeping the two projects separate at this stage. Co-ordination between the two Working Groups will be achieved perhaps by some overlap in the membership but more particularly by liaison between Mostyn J, Cobb J and Roberts J.

Children and Vulnerable Witnesses

I have asked Hayden J and Russell J to chair a new Children and Vulnerable Witnesses Working Group, with input from the Family Justice Council. I envisage that there will be three strands to their work.

First, it is time to review the Family Justice Council's April 2010 *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872, particularly in the light of the Court of Appeal's recent decision in *Re KP* [2014] EWCA Civ 554.

Secondly, it is time to review the Family Justice Council's Working Party's December 2011 *Guidelines on Children Giving Evidence in Family Proceedings* [2012] Fam Law 79. Those *Guidelines* were prepared following the decision of the Supreme Court in *In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701. Since then we have had the decision of the Supreme Court in *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] 2 WLR 124.

Thirdly, there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system. This includes the inadequacy of our procedures for taking evidence from alleged victims, a matter to which Roderic Wood J drew attention as long ago as 2006: *H v L and R* [2006] EWHC 3099 (Fam), [2007] 2 FLR 162. As HHJ Wildblood QC observed in *Re B (A Child) (Private law fact finding – unrepresented father), D v K* [2014] EWHC 700 (Fam), para 6(ii), processes which we still tolerate in the Family Court are prohibited by statute in the Crown Court. We must be cautious before we rush forward to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the

criminal courts: see for example, in addition to the Criminal Procedure Rules, the Criminal Practice Directions [2013] EWCA Crim 1631, CPD 3D-3G, the Judicial College's Equal Treatment Bench Book, Lord Judge's Bar Council Annual Law Reform Lecture 2013, *The Evidence of Child Victims: the Next Stage*, the Criminal Bar Association's DVD, *A Question of Practice*, and the relevant 'toolkits' on 'The Advocate's Gateway', funded and promoted by the Advocacy Training Council: www.theadvocatesgateway.org/toolkits. We need to consider the extent to which this excellent work can be adapted for use in the Family Division and the Family Court

The Working Party will need to build on the experiences of judges in the Family Division and the Family Court who have had to deal with these issues, particularly in the more recent past. But it is also vital that the Working Party taps into and incorporates in its thinking both the highly relevant and thought-provoking views of the Family Justice Young People's Board and the inter-disciplinary expertise of the Family Justice Council.

Again, as in the case of the Financial Remedies Working Group, the Children and Vulnerable Witnesses Working Group has agreed to produce an interim report by 31 July 2014. Again, I am anxious to have its preliminary views in relation to any proposed changes to the Family Procedure Rules, so that the necessary work of the Family Procedure Rules Committee can commence as soon as possible.

Transparency

I will be issuing shortly, for discussion and comment, a consultation paper dealing with four topics.

First, I will be inviting comments on the impact and the working to date of the *Practice Guidance on Transparency in the Family Courts* which I issued on 16 January 2014, and canvassing views as to any ways in which the *Practice Guidance* can be improved and, perhaps, extended.

Secondly, I will be seeking views and suggestions as to whether any steps can be taken to enhance the listing of cases in the Family Division and the Family Court so

that court lists can, as the media have suggested, be made somewhat more informative than at present as to the subject matter of the cases (but not, I emphasise, by naming the parties).

Thirdly, I will be seeking views on further guidance which I propose to issue, dealing with the disclosure to the media of certain categories of document, subject, of course, to appropriate restrictions and safeguards.

Fourthly, I will be seeing *preliminary, pre-consultation* views about the possible hearing in public of certain types of family case.

FDAC

I have frequently expressed my enthusiastic support for FDAC – the Family Drug and Alcohol Court – both in terms of the FDAC model pioneered at Wells Street and more generally in terms of what I have called 'the FDAC approach': see my judgment in *Re S (A Child)* [2014] EWCC B44 (Fam), paras 35-38. I repeat what I said:

> "The FDAC approach is crucially important. The simple reality is that FDAC works … FDAC is, it must be, a vital component in the new Family Court."

At the President's Conference in May 2014 (this is the annual conference of the President, the FDLJs and the DFJs) I reiterated this message, giving every DFJ a copy of the Briefing Paper published by the Nuffield Foundation and Brunel University which introduced the main findings from the FDAC Evaluation Team at Brunel University: see [2014] Fam Law 907. I threw down this challenge to the DFJs: I want to see FDAC rolled out across the county in every DFJ area. I want a report from each of you at the next Conference in May 2015 telling me what progress has been achieved in your area: Is FDAC up and running? If not, are there plans for FDAC? If not, what are the problems?

Although I believe the DFJs to be crucial in galvanising FDAC locally, the DFJs alone cannot bring FDAC to fruition: so much depends on local partner agencies, in particular the local authorities and local health and mental health bodies. May I urge

all of them to do whatever needs to be done to achieve the vision. Bear in mind that, properly used, FDAC is not merely the right thing for children and their families; as both experience and research shows, it actually saves money!

Experts

No expert can now be instructed in a children case unless the court is satisfied in accordance with section 13(6) of the Children and Families Act 2014, that the expert is "necessary" to assist the court to resolve the proceedings "justly". The absence of proper funding for such experts in cases where the parties are unable to afford the cost is therefore a matter of very considerable concern to all of us: consider, for instance, the recent decision of the Court of Appeal in *JG v The Lord Chancellor and others* [2014] EWCA Civ 656 and, for concrete examples of very real problems on the ground, the judgments of Holman J in *Kinderis v Kineriene* [2013] EWHC 4139 (Fam), of HHJ Wildblood QC in *Re B (A Child) (Private law fact finding – unrepresented father), D v K* [2014] EWHC 700 (Fam) and of HHJ Bellamy in *Re R (Children: temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam). The issue is very simple: How can the court deal with a case justly if, having determined that the instruction of an expert is "necessary" to achieve that objective, the absence of funding makes what is necessary impossible?

The wider issue remains at present unresolved.

In relation to DNA and hair-strand testing for substance abuse there is good news to report. A pilot scheme is due to start in June 2014 in the Bristol and Taunton DFJ areas, testing the provision of funding for such tests by MoJ under arrangements administered by CAFCASS. The pilot, which is much to be welcomed, and which I hope will quickly demonstrate both the need for and the viability of such a scheme, has the enthusiastic support of the two DFJs, HHJ Wildblood QC and HHJ Bromilow.

There is, as many of you will be all too aware, a particular problem in relation to the experts (often practising in highly specialist disciplines) whose involvement is absolutely crucial if 'baby shaking' and similar types of case are to be determined fairly and justly. Without such experts these cases cannot be tried. The effect of the

latest reductions in the fees payable by the Legal Aid Agency has been a decline in the number of these experts willing to accept instructions in such cases. This is a matter on which I am having on-going discussions with officials and Ministers. I shall report whenever there is anything positive to report.

Interpreters / Translators

There are also, as all too many of you will be aware, ongoing problems in relation to the provision of interpreters in family cases. I had occasion to comment on this in a recent judgment: *Re J and S (Children)* [2014] EWFC 4, paras 8-12. I say nothing more for the time being. The matter remains *sub judice*.

Orders

The family orders project continues under the leadership of Mostyn J. I remain convinced of the necessity of producing a comprehensive set of forms of order for use in the Family Division and the Family Court, though conscious in the light of recent events that this is complex work which cannot be rushed. I repeat what I have said before, that this important work has not been put on hold indefinitely. There has merely been a necessary slowing of the tempo. Implementation will be staged.

Recent experiences demonstrate that in the long run this project is critically dependent upon the availability of proper up-to-date IT in the courts. FamilyMan, the system with which HMCTS continues to have to struggle, has long been obsolescent and is now obsolete. It will be some time before an adequate replacement for FamilyMan is available. In the meantime District Judge Geoff Edwards has agreed to up-date his invaluable templates, which have long been appreciated by so many judges, to provide an interim solution for some of the most immediately pressing problems. In the medium and long term, however, something more radical is surely required.

In the meantime, the work of the family orders project is being concentrated in two areas: first, the comprehensive set of financial remedy orders referred to above and, secondly, a comprehensive set of orders covering those matters within the exclusive

jurisdiction of the Family Division. I will shortly be issuing the second of these for discussion and comment.