FAMILY JUSTICE COUNCIL – 10TH ANNUAL DEBATE

'Settlement Conferences: Are they Article 6 compliant?'

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at

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The Honourable Mrs Justice Pauffley: A very warm welcome from me. I am used to projecting my voice across a crowded court without a microphone, so forgive me if I am speaking rather more loudly than is wise.

It is my very real pleasure to welcome you all here on behalf of the Family Justice Council to this our 10th annual debate and panel session.

The title of the debate is, as you all know, "Settlement Conferences: Are they Article 6 compliant?". I would suggest that there is probably no topic in the Family Justice sphere that is quite as controversial, for the moment anyway, as settlement conferences. We are very fortunate indeed to have an illustrious panel: Her Honour Judge Margaret de Haas QC for the motion; Elizabeth Isaacs QC, against; Sir David Norgrove for and Martha Cover, against. None of those individuals requires any introduction from me because they are all extremely well known to you in the audience, of that I am completely confident and their biographies have been circulated so you know their backgrounds.

Each of the speakers has been asked to confine his or her argument to 12 to 15 minutes. I know that Margaret de Haas would like just a little bit longer than that and I think that David Norgrove has very generously agreed to give over one or two minutes of his time to her, which is an excellent, I should have thought, an excellent degree of collaboration between those two speakers. So I am not going to introduce each one as we go through the evening. They will come up in order, they know which order they are to adopt and when they have presented their argument then there will be a panel discussion. So without further ado, may I welcome Margaret de Haas. *[Applause]*

Her Honour Judge Margaret de Haas QC: Madam chairman, fellow judges, ladies and gentlemen, a treat to be in London. Settlement conferences, I propose that they are Article 6 compliant.

Article 6 first of all. Article 6 provides that in the determination of any party's civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The issue for this debate is: is the process fair? Is there anything within the procedure which would put at risk a litigant's Article 6 and 8 rights either within the process itself or in any future determination of those civil rights and obligations?

The settlement conference. It is our view that the settlement conference is a natural, logical evolution of processes which already reflect problem-solving within the family courts, for example, FDAC, FHDRA, DRA, FDR, judicial-led conciliation schemes in private law. There are already a number of pilot areas, five in number. Further pilot areas, about four or five in number, are being identified. The pilot in Cheshire/Merseyside began in July 2015. We have now had about 162 cases both within the private and public law spheres, about a 70 percent rate of success, a saving of roughly 200 days. That is a conservative estimate because final hearings have not always been set down.

The process and the principle of settlement conferences as a pilot has come about because it was well established in Canada and has been for about 15 years. I am told that in Canada settlement conferences are supported by all court users. They are part of a culture and that is the model which has been adapted in the UK. Canada is, please note, party to and has signed up to the Universal Declaration of Human Rights. Canada is also bound by a number of human rights treaties.

The process in the UK for settlement conferences is constantly being refined to reflect the feedback and the experience of those involved. A protocol as to basic principles, which you have in your papers, has been drafted, thereby to provide consistency and fairness in procedure and expectations. This has also been used in the training material. There is an advisory group on settlement conferences further to develop the pilot and also to advise the President of the Family Division.

In Sir James' 14th View from the President's Chambers, as he cosily puts it, he said this was something which he supported in principle. He confirmed it is a model which needs to be potentially refined and improved but one must never compromise the fundamental principles of our public law system such as the right to legal representation, Article 6 and Article 8 rights and the paramountcy principles and the importance of ensuring that the voice of the child is heard. CAFCASS and the ADCS, amongst others, support the new initiative and consider settlement conferences to be a valuable addition to the problem-solving repertoire available to the Family Court.

As to training, all judges in the pilot areas have been trained in the procedure by seeing settlement conferences and understanding the principles, thereby to provide consistency of process. They are all judges who want to undertake the process, who having seen a settlement conference agree with the process and are enthused by the benefits it can bring to all court users.

As to the settlement conference itself, it is always recorded. It reflects a problem-solving approach. The procedure, please note, also reflects and embodies the current rules under the Family Proceedings Rules 2010, the overriding objective, rule 1.1, rule 4.1 and also the Practice Direction 12A whereby the court can take a flexible approach. Accordingly, it is my submission that this is a process which fits fully into existing procedures. It is a natural, rule-compliant development.

Ladies and gentlemen, Article 6 is a living instrument. As long as fairness in the process as a whole is fully preserved, dispute resolution and problem-solving processes should be subject to development and refinement. The settlement conference has been the subject of numerous presentations to court users. Judges and many people have not only taken part in the court process but have observed the court process. Feedback has been positive. Speaking for Cheshire and Merseyside, settlement conferences are discussed at every court-users meeting. We have produced the guidelines to show uniformity and consistency of expectation and process and I do say this: that if there is to be criticism as to the risk of prejudice to any court-user or a child, this needs to be carefully articulated and analysed. If so, one needs not only to consider that criticism but one needs to consider what steps, if any, can be taken to meet the objections. It does not mean the process should be abandoned; remembering also that it is a process which is reflected in other court processes such as FDAC, FDR and DRA.

As to the procedure, you have the Guidance. All parties consent on the basis of information which explains the process, in a simple document. Previously consent was oral but now it is written. If any party disagrees, there can be no settlement conference. Freely given consent is a prerequisite. The settlement conference judge is a judge who will never hear the final hearing, if such is required as to some of the issues or all of the issues. He or she simply does not communicate with the trial judge, as is the process with FDR. The settlement conference is put into available lists so as to provide an early disposal thereby avoiding delay. That is key.

It is also critical to the process that anything said by the parties and the judge during the settlement conference is confidential to the process. At the outset it is explained to the parties that this is critical, that they must consent to that. They are told, however, that if anything is disclosed by any party which could represent a risk as to welfare of a child, that will be shared with all the parties and with the trial judge if there is to be a trial because a child's welfare is paramount and the judge has to take appropriate steps to protect the child.

At all stages of the settlement conference a party is free to disengage. If they no longer wish to participate, it comes to an end. Parties are never seen without their legal representative. A legal representative is always free to speak or contribute in any way. A legal representative can object to any question canvassed by the judge. The legal representative can terminate the settlement conference on behalf of a client. What is most important is the settlement conference judge will never ask the legal representative his or her views as to merits as that would be to go behind legal professional privilege. Nothing must be done to embarrass the legal representative in their continued representation of a party.

At all times parties are told that they are under no pressure or duress to reach agreement. This is repeated from time to time. It is explained that there is a trial date available if they wish a judge to determine the issues as opposed to agree issues themselves. At the outset the judge will ask what issues are agreed, what is not agreed? Then, there is a flexible procedure but it is subject to consent. The judge tries to clarify information, facilitate discussion, analyse issues and promote understanding between the parties with a view to helping identify solutions, including solutions which can be addressed with the consent of the parties and not necessarily within the jurisdiction of the court process. For example, a mother who wants rehabilitation and local authority and guardian wanting an SGO in favour of a maternal grandmother. Mother has got a difficult relationship with the maternal grandmother. The settlement conference allows the judge to promote relationships, bringing both parties into court to try and promote understanding between them through meetings if appropriate. A lot of these cases are helped in that way.

Time is always given at the end of the process to consult privately with lawyers and to reflect upon whether or not the parties want resolution of some or all of the issues. If they want resolution, the consent order is drawn up by their lawyers to reflect this. If they do not want resolution, that is fine, there is a trial date. There is no restriction on the type of cases. The only prerequisite is consent with full understanding. All settlement conference judges are particularly cautious as to issues of emotional pressure, vulnerability, learning disability or mental health issues. Where there are issues as to lack of capacity, settlement conferences are generally not appropriate.

The settlement conference judge also frequently comes off the bench to engage with a litigant. The feedback on this aspect of the process is positive. Both legal representatives and litigants say that they find this to be an enabling and empowering process whereby they feel that, at long last, they can talk to a judge on their level and that at least the judge is listening to them. When one engages with a litigant in this way, one is able properly to show respect for that person. One is no longer communicating at a distance or at a height whereby communication is hindered. One can actually engage in a meaningful and appropriate way. The word "listening" is critical and particularly harmonises with the word "hearing" within Article 6. The President has made it clear that in exceptional cases, and with the consent of the parties, the judge can speak to a party with their representative on their own, with some or all of the parties present in the court room. The recording equipment is always left on.

Frequently a settlement judge is asked to provide an evaluation of the case. In those circumstances the judge can do that but must point out that another judge may disagree, that there are limitations on his or her opinion, for example you do not hear the evidence. Throughout we are conscious of the voice of the child, the wishes and feelings of the child and the need to ensure that the child is either properly represented in public law proceedings, or in private law proceedings, that the child's needs and wishes are acknowledged.

My conclusion. I submit settlement conferences are a golden opportunity for the parties, not only to resolve issues which can be resolved with clear analysis, understanding and through the promotion of discussion but also to have a better understanding of the position of other parties and reflect upon that. Frequently, in my experience, relationships are repaired. Settlement conferences are a natural evolution of the dispute resolution under Article 6. They are to be seen in the broader context of the right to a full and final hearing. That in itself is the guarantee of Article 6.

Furthermore, the flexibility of a settlement conference is such that it is the fulfilment of Article 6. Look at the conventional trial, it is a zero sum game, winners or losers with entrenched positions and fraught emotions. Settlement conferences provide for a welfare-driven dimension not available in the conventional, the traditional and the otherwise adversarial court room. It is the parties who drive the solution, not the judge. The procedure is consensual. At no stage is there risk as to fairness of any ultimate trial or a tainting of the processes required for determination of the parties' rights and obligations. Thank you. *[Applause]*

Elizabeth Isaacs QC: Once upon a time in another lifetime I studied psychology. I did not like it that much, which is why I am standing here today talking to you as a lawyer rather than as a psychologist but I do remember my very first psychology lecture and learning about two fundamental concepts in understanding human behaviour. The first is what is known as the fight or flight reaction. Put simply, that means the instinctive physiological response to a threatening situation which prepares us either to resist forcibly or to run away. I expect most of you are familiar with that concept. I know I am, not least because I have been experiencing it on an increasingly frequent basis today! *[Laughter]* The second basic concept in understanding human behaviour is the idea of learned helplessness. That is a condition in which a person suffers from a sense of powerlessness arising from a traumatic event or persistent failure to succeed and they give up. All very interesting.

But why am I talking about fight or flight and learned helplessness in a debate about care proceedings? It is because I want to invite you all to think about what goes on behind the scenes and underneath the surface when the State starts intervening in family life and particularly at the stage when families find themselves in court. Understanding the possible ways in which parents might react – by fighting, by running away, or by giving in – is fundamental when we are thinking about how we construct or how we may change the process of the wider decision-making processes involving children.

I want to invite you to consider that if we do not pay attention to the deeper, unseen but potentially highly influential forces at work surrounding and within the court room, then we run a very real risk of increasing the chances of parents agreeing to critical decisions about their children under excess pressure or with undue speed or haste, which I am assuming nobody wants, least of all family judges who are charged with making decisions in these most difficult, challenging and complex of cases. To quote that great legal thinker Spiderman, "With great power comes great responsibility".

We know that judges take that responsibility very, very seriously indeed and rightly so because, as the 18th century German poet Friedrich Schiller said, "Power is the most persuasive rhetoric" – in other words, power, knowledge, authority, can operate to persuade, motivate and influence, a proposition with which I am sure all of us would agree and, of course, it is not always a bad thing. For example, politicians, military leaders, teachers, can all hold great power perceived by their respective audiences and when used with the appropriate checks and balances, that power can be used to great effect: to bring about political change, inspire people to action, or motivate people to transform their personal aspirations.

The trouble is, of course, that when the rhetoric of power goes unchecked, it goes wrong. In some cases no real lasting harm will be done but what if a parent is persuaded to say yes in care proceedings when really she might be better saying no, or even just, no, not right now? What are the implications of that situation for the parent, for the child, now and in later life and, dare I say it, for us as a democratic civilised society?

As I hope to persuade you, the rhetoric of power is so complex and multi-faceted in public law proceedings that it deserves the very greatest care in the way we operate it and a secure and clear understanding of the checks and balances required before we contemplate any disruption to that system. Why complex and multi-faceted? Because, to quote another great legal thinker, Aristotle, "The whole is greater than the sum of its parts". Within this context, that means that the legal system of care proceedings represents more than the power of any single individual, judges included. That means that when parents go to court and meet the judge in public law proceedings relating to their children, they face the combined interrelated powers of multiple institutions at play: the local authority, the State, the legal profession and the court.

Thinking about the combined power of all those interrelated elements as a persuasive rhetoric is absolutely fundamental when we reflect on the apparent benefits of early settlement conferences as a solution to resolving disputes in care proceedings, because as those of us who regularly represent parents and children in care proceedings are well aware, there is an awful lot going on at court other than what may appear on the surface. Power is everything in court and to pretend otherwise is simplistic and disingenuous. That is why understanding the rhetoric of power is so important and that is why I am inviting you to think extremely carefully before we interrupt the existing checks and balances on that power and why we need to deconstruct the potentially disastrous effect of unchecked power by understanding the risks that we run if we get it wrong.

Parents in care proceedings, like all of us, do not operate in a social or political vacuum. Before a parent gets anywhere near the judge at an early settlement hearing, at least one of three critical things has undoubtedly happened. Firstly, that parent is highly likely to have experienced, and still to be experiencing, multiple problems and needs. Consistent evidence on the profile of parents subject to care proceedings demonstrates that many live lives that are a constant struggle. For the most part they are drawn from the poorest households in society where parents and children struggle on the lowest rung of the social and economic ladder. Over 45 percent of those parents have serious mental health problems; over a quarter have drug and alcohol problems. 50 percent have experienced domestic abuse.

Recent research by the Joseph Rowntree Foundation found that there is a core association between poverty and the prevalence of child abuse and neglect and not just in the UK. Evidence of that association is found repeatedly across developed countries, types of abuse, definitions, measures and research approaches and in different child protection systems. That is not to say that poverty is either a necessary or sufficient factor. Many children who are not from families in poverty will experience child abuse and neglect in some form and most children in families who are living in poverty will not experience child abuse and neglect. But what the groundbreaking Joseph Rowntree study has confirmed is that child abuse and neglect is caused by many interlocking factors and that the interactions between poverty and other contributory factors are complex and frequently circular.

So we see that poverty can increase the risk of mental ill-health and mental ill-health can increase the likelihood of poverty. We see that parental substance abuse accompanied by poverty is more likely to lead to contact with child protection services than substance abuse occurring where a family is in a position of affluence. If that was not enough, the other groundbreaking finding from this research is that the incidence of poverty maps across to rates of local authority intervention – in other words, the poorer the neighbourhood, the greater your chances of your child being removed from your family, in some cases as much as twelve times more likely.

Back to our list. The second thing that is likely to have happened before parents get anywhere near a judge is that they are highly unlikely to have received a consistent service from the local authority. The Joseph Rowntree study found that individual practitioners and child protection systems currently pay insufficient direct attention to the role of poverty in child abuse and neglect. A recent UK study has estimated that the total costs of late intervention in children's lives amount to £17 billion a year in England and Wales and yet despite widespread advocacy for early intervention, resources for early support services in England have decreased significantly over the last five years. While many early intervention programmes focus on parenting skills and rapid decision-making to move children out of families to alternative families where preventative interventions have been deemed to fail, there is little or no evidence of interventions that directly confront the socioeconomic difficulties faced by many families where child abuse and neglect is a concern.

Other recent research has explored the experiences and narratives of families who are the subject of State intervention and has identified two critical themes. Firstly, for families who feel overwhelmed, defeated by services and by the complexity of their lives, seeking help becomes a frustrating and disillusioning experience and, secondly, those families experience the constant reality of being disappointed by what is supposed to help. Services are too short, the threshold for entry is too high and thereafter the inability to access supposedly helpful services then becomes represented by practitioners as the family's failure to follow guidance or to implement action.

So back to our list. What is the third thing that is likely to have happened? Before a parent gets anywhere near the judge, the parent will, of course, have had to contend with the legal environment, by which I mean lawyers, the legal process and the court building and it is easy, is it not, to forget how intimidating and awe-inspiring simply coming within the precincts of a court can be for those people who are unfamiliar? Finding the court, navigating security, saying hello to court staff might be all part of the routine for the average jobbing lawyer, along with buying a triple mocha-choca cappuccino on the way to court; dull maybe, expensive probably, but undoubtedly not intimidating or difficult.

Quite different from the experience of the parent on benefits who may have had an expensive three hour trip on public transport to the centre of the big city and for whom going to court is likely to mean a completely different, unfamiliar and intimidating experience. From the outset it is not difficult, is it, to imagine how parents are likely to feel excluded or alienated? Then there is the language. For all of Lord Woolf's attempts at modernisation, lawyers still love a bit of Latin or an abbreviation when the going gets tough. Probably no need for me to ask for a show of hands from any professional in this room who has used or heard used words such as "*Re W*", "interim order", "disposal hearing", or "Lancashire finding" in the last month.

So parents do not arrive at court in a vacuum. They face the most stressful and important day imaginable and then, then they get ushered into the court room where they meet the judge, the person charged by the State with making the final decision about their child. That is when they start responding physiologically as well as cognitively and fast, by running away, by fighting back, or most worryingly of all by giving in or giving up. How likely is it that what was hardly a level playing field before getting to court is going to improve or even out by the time parents enter the court room? That is not to say that everyone is not trying their best, that is not to say we should not re-think the seating arrangements and it is not to say that individual judges cannot be trained to be more sympathetic in their approach but a level playing field means a situation in which everyone has a fair and equal chance of succeeding and can only succeed if no external interference affects the ability of the players to compete fairly. As I hope I have demonstrated, the external interferences in care proceedings are complex, wide-ranging and often structural in origin.

Added to that, there is the critical fourth dimension which is that we know that judges do not operate in a vacuum either. There is an increasing body of scientific research about how cognitive heuristics, the rules, proposed to explain how people make decisions, come to judgments and solve problems can be applied to

the way in which judges make decisions. That research reminds us increasingly of the very great potential for unconscious bias in our judges. By way of example, recent Israeli research demonstrated that parole board judges granted a greater number of applications at the start of the day and that that number increased even more so after they had eaten. So that is why we need constitutional checks and balances, is it not, to optimise the ability of parents to participate fairly in care proceedings.

As we have seen in recent weeks, constitutional law is very big news again and with good reason. The doctrine of the separation of powers operates to ensure that the power of the State should not be concentrated on one person or body but instead it should be divided between the legislature, the executive and the judiciary with each branch acting as a check and a balance on the other. The legislature makes the law, the executive administers it and the judiciary interprets and applies the law and such a separation makes each branch dependent on the others in the exercise of power, holds them to account and avoids, at best, arbitrary government and, at worst, tyranny. The doctrine of separation of powers is widely regarded as a fundamental part of a functional and fair, democratic system - except perhaps by the Daily Mail but that is another story!

That is not to say that at times there is not a cross-over or a blurring of the boundaries. That is also not necessarily a bad thing and, in fact, has been called by some the efficient secret of the UK system because it allows the cogs of the State to move more smoothly and efficiently but the fundamental principles remain and for good reason. The importance and need for the separation of powers could not be demonstrated more graphically, could it, than in care proceedings where the State seeks to persuade the judiciary to intervene in family life in the most draconian way possible. The independent judiciary exists to protect citizens from arbitrary decision-making and parents, who after all are citizens with rights, are protected by clear, transparent rules and procedure, the law of evidence and by legal representation, still thankfully available automatically to all parents and children in care proceedings. That protection is there for a reason: to protect parents and children against unnecessary or disproportionate intervention by both State and judiciary.

The role of the judge in care proceedings is to interpret the law, to develop the law and to uphold the law but is it the role of the judge to intervene in the State's decision-making or, if it is, should the judge be intervening without the State providing citizens with the proper protection from the risk of administrative abuse or without good reason? The two fundamental pillars of a fair hearing are the presence of skilled, experienced and robust legal representatives who can operate within a legal framework that is governed by clear, predictable rules of law which enable all concerned to predict the likely approach, if not the outcome, of the court. Yet, as you have heard, the early settlement conference scheme substantially weakens and strikes at the heart of both of those pillars. The need for a clear and predictable framework to judicial decision-making in care proceedings was the fundamental drive, after all, behind the introduction of the welfare checklist in section 1(3) of the Children Act and later adapted and extended in section 1(4) of the Adoption and Children Act.

This is a reminder of why the Law Commission almost 30 years ago recommended the introduction of the welfare checklist. They said the checklist was perceived as a means of providing greater consistency and clarity in the law and was welcomed as a major step towards a more systematic approach to decisions concerning children. It would help to ensure that the same basic factors were being used to implement the welfare criterion by the wide range of professionals involved, including judges and magistrates and perhaps most important of all, they said, such a list could assist both parents and children in endeavouring to understand how judicial decisions are made. At present, they said (and this was is in 1988) that there is a tendency for advisors and their clients and possibly courts to rely on rules of thumb as to what the court thinks is likely to be best in any given circumstances. That aspiration was well placed and remains a cornerstone of the judicial task almost 30 years later.

Ladies and gentlemen, early settlement conferences run the very real risk of compromising or diluting that approach and interfering with the right to a fair hearing by introducing unpredictability and subjectivity into the judicial process. Whatever success at 70 percent means, most fundamentally of all these conferences risk a very real abuse of the rhetoric of power, the power of the State and the power of the judiciary. Article 6, after all, is not a living instrument, it is an absolute right and that is why I urge you to vote wholeheartedly, decisively and passionately against this motion and to find that settlement conferences are most definitely not Article 6 compliant. *[Applause]*

Sir David Norgrove: Thank you for that passionate statement. I do not see things in quite such substantial terms and I am not going to talk about the legal aspects here, Margaret has done that more eloquently than I could. I just ask two questions really. If the pillars of the State and the judicial system totter as a result of this, why are they not tottering in Canada where this has been operated successfully for 15 years, first of all and, secondly, if this is inconsistent with Article 6, how is FDAC consistent with Article 6? We might want to come back to that in questions.

So what are we trying to change here? What is the purpose? And I would say part of it involves money. I have seen statements that a saving of money is unpleasant, it is a kind of undermining of justice to be looking to save money. This is not about saving money in itself but if it does save money, we should all welcome that. With cases rising at 23 percent a year, we should be looking to save money whenever we can. We do not know whether it will save money but it would be worthwhile, in my view, even if it does not. So why is that? We need to go back, I think, to some first principles and about the nature of family cases and how we tackle them.

Our current model follows a substantially adversarial process and with the judge as the adjudicator and that is really what we have just heard described and that adversarial process, I would argue, relies on a series of assumptions: first of all, the assumption is that disputes should be resolved according to the rights and duties that come from statute and case law; secondly, that the need is to decide who is right and who is wrong; thirdly, there is an assumption that it can all be worked through rationally; fourthly, that there is a truth that can be found and; finally, that the disputants are adversaries and that if one wins, the other loses. So a very rational, process-oriented, structured approach.

Of course, it is right in all circumstances to act within the framework of the law but there is often, as everybody in this room knows at least as well as I do, there is often no right and wrong in family cases. It is not a matter of truth or falsehood, it is not rational, it is very often highly emotional and it is also not very often a matter of winning and losing and if we see it as a matter of winning and losing, we will result, as you all know, in damage to children. The issues are substantially emotional and judgments about people where we are thinking about what is best for the child, where the parties may well have to continue to work together with the local authority and with future carers.

There is not a right answer. There is only a least worst answer and the process of getting to that answer can have a substantial effect on whether the outcome is sustainable and good for the child. This is already recognised in private law with the need to tackle the underlying conflict seen as one of the *raison d'être* of the whole process through the development of mediation, through the FHDRA and the other interventions that Margaret has mentioned. Settlement conferencing takes this further and more deeply into children matters and it introduces it to public law. We all have an instinctive feeling that this is a heavier change because people may lose their children permanently as a result and without downplaying that, I would ask you to recognise that it may not feel that much different in private law if a father gains restricted access to their child at the end of a case.

So what might be the benefits? Here, I was going to describe to you how I see them but, actually, there is an article in this month's Family Law about to appear which does it much better than I can. So the author, who is a representative in children's cases, gives a whole list and I will not go through them in detail but let me just touch on a few of them: to avoid delay; to balance the power naturally held by the judge, the child protection officer, the parents and the child in the proceeding; by demonstrating that everyone can work collaboratively; to seek to correct circumstances, for example, if the child protection office is taking an unreasonable position – I am just summarising here – for difficult cases there is value to participate in the settlement conference as it is a no risk venture; furthermore, parents rarely say they did not gain from the experience; it gives an opportunity for a parent to speak with a judge for the first time, as during court appearances the parent's voice is relayed through his or her lawyer; parents often feel the judge does not understand or appreciate their circumstances because they do not have an opportunity to speak with the judge directly and finally, it gives an opportunity for parents to speak openly and frankly with a judge during *[inaudible]* – this is the way of doing things that Margaret referred to where the parents may be seen separately – about the weaknesses of their case and whether the parenting concerns can be addressed within the statutory timeframe. Conferences often motivate parents, conferences may also relieve parents in a respectful and appropriate manner the inevitable trial finding that they are unable to safely parent their children. At the same time, parents may work

with the judge and the lawyer to secure an acceptable post-permanent care placement, access, or indirect contact or other options that may not be within the court's jurisdiction to order at the conclusion of a trial.

Those are not my statements, they are statements from somebody who has been deeply involved in this over quite a number of years and I think we should take them seriously. These are not undermining justice, these are not undermining the position of the judiciary; they are delivering much better involvement of the parents in the solutions for their case. People want to tell their stories and as Nick Crichton sitting here would no doubt say, parents want to be able to talk to the judge. This gives them that opportunity with the protection of their lawyers at all stages.

I wonder how many people here have actually sat in on a settlement conference? [A few people raise their hand.] So this is an entirely theoretical discussion. I would urge everybody here who is seriously interested in this to sit in on a settlement conference and I am sure Margaret will offer you that opportunity. How can we talk about this in such a theoretical way and criticise it when you have no experience of it? Take it seriously, for heaven's sake.

I sat in on a settlement conference not too long ago where Margaret came down off the bench to talk to the father who was sitting in the well of the court. It then became clear, and it only became clear at that stage, that the man was substantially deaf. He had sat at the back of the court, behind his advocates, unable to hear what was going on. It was only when Margaret sat down with him he was able to be involved in his case. I find that utterly disgraceful.

So what can go wrong? What are the concerns? First of all it has been said that "lawyers are expected to remain silent without the protection of professional advocacy and legally privileged advice. The client may answer a question that get into a judge's mind before the lawyer can intervene." This is a quote from the guidance that has come out. It is clearly not true and Margaret has made absolutely clear that that is not true and in the conferences that I have observed, that is not true.

"It undermines judicial continuity and the judge will not fully understand the case", the second criticism. How is that not also true of other problem-solving interventions? It is absolutely true of FDAC. If a case needs to go to a final hearing, the judge who has managed the case through FDAC is not part of that final hearing.

"The settlement conference judge may talk to the trial judge." I find that also a rather disgraceful thing to have said, showing a complete lack of trust in our judiciary.

Next, "Parties are often vulnerable and may feel pressure to agree". Of course that is a risk but why do we have judges? It depends on their training, on their aptitudes. Of course they may feel pressure to agree but that is why the lawyers are there.

"The evidence against the parents will not be properly tested." Again, that is a matter for the judge and the lawyers who are present in that settlement conference.

"It is not a proper exercise of the judicial function to come down off the bench. Judges are to be free to address any issues and ask any questions they choose, an improper and uncontrolled exercise of judicial authority." If that is the case, it is also true for FDAC.

Finally, "The voice of the child is not heard". Of all of these, that is the one that I would say is probably true but it is true in many other cases too. It is a real problem: how do we get the voice of the child properly heard?

So the mistake would be to assume that the alternative conventional process works appropriately. It does not. We all know that in many cases parents do not feel heard. We know that there are better ways of doing things. We do not know whether this is the right way to do it, we do not know whether we have it right now, we do not know what changes might need to be made but, for heaven's sake, give it a chance. Thank you. *[Applause]*

Martha Cover: You have had to take a lot in in the last 45 minutes. I was sort of thinking, oh, it is great, I am going to be last and then I realised you are all going to be completely knackered by the time I start. *[Laughter]*

I am Canadian actually – sorry. Canada is a big place though and there are versions of settlement conferences, or what they call settlement conferences, used in all sorts of different proceedings in Canada and in the States. There are ten provinces and I think three territories now in Canada. They all have provincial law relating to children and they also have federal law that relates to some aspects of child protection.

I have only been able to speak to some lawyers who practice in my home province of Ontario. They do have what they call settlement conferences in child protection cases but they are IRHs. They are conducted by lawyers, the judge never comes down off the bench. The judge may speak to the lay client, as judges always have and always will. The day after the Children Act came into force in October 1991 I was in front of Mr Justice Ward, as he then was, and in his usual way, I think maybe perhaps only Mrs Justice Pauffley may remember this, he looked over my head and said, "Is that granny?" and I said yes and he said, "Hello granny". He said, "This is a sad day for me. It is the day I lose all of my power to really help your grandchildren", because, of course, it was the end of wardship in public law proceedings. They did not like it at all.

My point is that it is wrong to suggest that there is a process which is as untrammelled and unboundaried and unclear as the one that has just been in a pretty ramshackle way unleashed on an unsuspecting profession anyway. At first we made the mistake of thinking that it was being put forward by the Ministry of Justice without any judicial or consultation or anything, we had no idea. But I am not standing here, I am a member of the Association of Lawyers for Children, I am not standing here saying I feel hurt and affronted that I personally was not consulted. The judiciary nationally was not consulted, the FLBA was not consulted, the Law Society, the Association of Lawyers, none of us were consulted and between us actually we have thousands of years of experience of how this system works but can it be made okay? I am not at all convinced that it can. They are clearly driven by the need to save public money. I am not suggesting that that is a bad thing in itself but what I am not hearing is that these settlement conferences will or could possibly, lead to a just, safe and sound decision for these children, or that they could be perceived by the parents who are part of them or the wider public as a safe, sound, fair and just procedure.

I wanted to say something about judicial independence in all of this. I think that there is a tendency, a very marked tendency, over the last few years for the Family Justice Board which was set up in 2012 to regard the judiciary as a partner in a process with other government agencies such as local authorities and CAFCASS, that they should all be seamlessly moving towards a much more efficient type of process and, in fact, they are referred to as partners or stakeholders and so on and I think that we have to be rather careful about that.

I think that, for instance, I was slightly unnerved by Sir David congratulating judges at the President's conference in May for forming closer working relationships with local authority managers. He quoted one local authority service manager as saying this:

> "Previously it was unheard of for me to phone a senior judge at court about some issues but now we're able to have a proper discussion and understand each other's issues."

Some judges, I am afraid, I think we have a few enemies of the people in the room, are not doing as well as he had hoped and he said this:

> "There are still weak and distant relationships in some areas and with some judges and local authorities. I would ask that you consider whether more effort is needed in any of your areas."

I am warning you, there may be team-building away days for some of you backsliders. You heard it here first. I should not make light of it though because I do think that there is a real possibility, I want the judges here to ask themselves. If you have informal discussions on a regular basis with your local service managers or, indeed, CAFCASS managers, will you not naturally become more sympathetic to the very real problems of the local authorities in your areas? Will this not have a rather chilling effect on you the next time someone makes an application for that manager or his or her director to attend to explain the failure of that local authority to obey a court order or to implement court ordered arrangements for the child?

One of the principal duties of the judge in family proceedings must be to hold the local authority to account. And that is a tendency that is very concerning. As Lord Justice Bingham said in his book, The Rule of Law, "judicial independence embraces all of those making decisions of a judicial character. It calls for decision-

makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties, pressure groups and their own colleagues, particularly those senior to them." I was going to make a meaningful glance at this point at Sir James Munby but he is not here. *[Laughter]*

Really, I just wanted to make five points: settlement conferences are a means of saving public money but the welfare of the children has not yet been a consideration or the quality of the decisions that might be made for those children; (2) parents in care cases are the most desperate and least able group of clients, the most in need of effective representation, professional representation and legal advice at all times. Any process which deprives them of that, even for a minute, is unfair and their "consent" to such a process is no corrective to that. I am told that in the Central Family Court lawyers sit in the row behind the lay parties so there is no chance to even whisper in their ear or touch them on the arm if they are about to say something which they do not even appreciate might be extremely damaging to their position. The executive in the form of the Ministry of Justice and the Family Justice Board is interfering too much in the exercise of judicial discretion already and putting too much pressure on judges to meet their targets for completing cases in 26 weeks whatever else needs to be done in the case.

We have, at the ALC we have set out to do some research into this but the results are not yet available. However, anecdotally, we have had some very, very concerning comments from lawyers who have been involved in these cases. Some of the messages are all right: "I got the message: we could pull out at any time; the client likes speaking to the judge directly; the judge was calm and patient; the judge was charming and sympathetic and seemed well practiced in the process; the judge was quite interventionist which was potentially helpful but not in this case".

But then there are very, very worrying comments: "the parent felt deeply upset and pushed into a corner; if I had been the parent's advisor I would have felt that my role was being usurped by the judge advising the client; you have to be able to ask for a break and seek instructions. I had to take instructions while we were in the settlement conference which did not feel right; the parent was reduced to tears; the judge was talking to the local authority and the guardian when I was out of the room with my client; the judge said to the parent, "You have to agree to a final care order"; the judge threatened the parent with an order that they might not like if the judge was obliged to make the decision." Just think about that. How many times has that happened to you as a professional advocate: if your client does not agree, you know, and I have to make this decision, it might be one they do not even like, that they like less than the decision they could make themselves. It happens more in private law but even standing there as a professional advocate, it can be a pretty shaking kind of experience. "The judge was impatient when the parent would not agree; we gave no advance consent to listing it for a settlement conference but it was one when we turned up, my client referred to the judge as bullying; the guardian felt the judge applied too much pressure; the judge told the parents they were going to lose".

So I do not understand why, if these issues were so capable of resolution they could not be resolved at the issues resolution hearing which is a very well established and very well understood protocol for resolving matters that can be resolved. It is a fundamental principle of English law that justice must not only be done but be seen to be done and where a judge has apparently made up his mind before hearing argument or evidence, that principle has undoubtedly been breached. A closed mind is incompatible with the administration of justice but in such cases it is always possible that justice itself has not been done. It is not just window-dressing having a fair trial, it is that you might actually get the wrong result.

So what is the landscape looking like? The one that we are confronted with, the one thing that is actually driving this is the great increase in the number of applications for care orders by local authorities. Why is that happening? There are a lot of factors. There are the strictures of Sir James Munby in the case of *Re N* against local authorities improperly using section 20 voluntary accommodation or misusing it, quite frankly, local authorities separating that child from its family but holding the case in pre-proceedings, sometimes for over a year, because they want to get all the evidence in order before the 26 weeks starts ticking. These are some of the things that are reported by the Department for Education in a paper called "The Impact of Family Justice Reforms on Front-line Practice":

> "As soon as we have a case that we know might meet threshold, straight away we start doing pre-proceedings work assessments, exploring family members, chronologies etc". The focus is not on helping the family, it is on getting ready for court, gearing up for court.

Another quote:

> "What is great is having legal planning meetings at the outset and discussions about what to go for and have we got the information ready?" And here is a manager "Previously we recruited people who could work with children and families. Now we're keen on people who can write and write well."

And that might explain why in the last year I have done two cases with the full panoply of the Children Act, the law, the rules, a hearing, where the social workers, both of whom had been appointed for several months, neither of them had ever met the parents or seen them in contact with the baby before filing a final care plan of adoption and a placement order application. This is becoming a very process-driven set up and we have never actually needed the impartiality and the independence of the judiciary more than we need it now.

Finally, I would like to say something about this. It is not really, what is contemplated is not really a proper use of judicial authority and I think that Elizabeth has spoken very eloquently about that. If judges begin to use their presence, their authority and their status to put pressure, and it does seem to be almost always on the parents, although I am not saying that it is not sometimes on the local authority to change their mind but it does seem to be mostly on the parents, then judges will severely undermine their authority, their authority and their status and it might prove a little more difficult to get back on that bench once you have come down off it. Why could not a mediator do it? Why could not an arbitrator do it? Why do we need judges and if we do not need judges, why do we need lawyers? That would save quite a lot of money!

I want to say this to the judges. Do not easily give up your rightful place on the bench. Do not hand over the judicial traditions of legal knowledge, impartiality, objectivity, experience and authority. The Daily Mail might call you the enemies of the people but the public actually has greater respect for judges than for any other group in our society when it comes to finding out what happened and making the big and small judgments for our society, the really tough calls. Do not undermine their respect for you by agreeing to this unfair and unjust scheme. *[Applause]*

The Honourable Mrs Justice Pauffley: Thank you very much to four impassioned speakers. I am immensely grateful to you all for the time and considerable trouble you have taken to prepare for this important discussion. We are now going to move to the question and answer session and at the back there I see that Daphna and Paula have a microphone, so fire away please but as you do so could you identify yourselves so that we know from which organisation or profession you come. Who would like to go first? Yes, Nick Crichton.

Nick Crichton: Nick Crichton, retired district judge with a passing involvement in FDAC. I would like to thank the speakers for a really interesting hour or so and I came here to learn. I am totally against adversariality in any kind of family proceedings unless we cannot get parents to work with those who seek to help them and so I take on board everything I have heard this evening and will go away and think about it but I am all for projects that do away with adversariality.

I have been troubled by the repeated comparison or linking of settlement conferences with FDAC because the problems that FDAC seek to solve are the problems that parents bring to proceedings and the court works with them over a considerable period of time to try to break the intergeneration on cycle of drug and alcohol misuse and all the associated problems and I do not think that I have learned today that settlement conferences seek to solve the problems which bring parents to court in the first place, so I do not think it is a fair comparison and just one comment about what David Norgrove said, in FDAC the judge who has seen the case through FDAC does deal with the final hearing if he possibly can and is available and in that way we can often shorten the final hearing because he already understands the family and has been through the process with the family. So, I am sorry, that was not a question, that was an observation.

The Honourable Mrs Justice Pauffley: A very valuable one, thank you very much indeed, Nick. Margaret, did you want to respond?

Her Honour Judge Margaret de Haas QC: Yes, I did. Nick, thank you very much. I know it is an FDR which was, I think, more pertinent to the point, a different judge in terms of continuity of process. There is one

point…. I see, I am so sorry. There is one point about problem-solving. The settlement conference is a very flexible tool and sometimes, not always but sometimes, there is a problem-solving process, for example, particularly in private law one tries to find a solution for a problem which you empower the parties to solve themselves, eg, as to where a child is going to live, contact issues, education and the like.

Also in public law, Nick, I have had cases, for example, where the parties all agreed that I should do a settlement case which was subject to a proposal by the local authority, agreed by the guardian, for care order and placement order. In fact, it was one observed by another two judges and I think Sir David Norgrove. I actually went into court and I spoke to all the parties and it became abundantly clear that the father in this case had not been given a proper opportunity to actually demonstrate safe parenting and all parties agreed the outcome should be that there was a further assessment.

So it can be very, and it often is, very problem-solving. It is enabling, and I say to particularly Martha, one of the rules and always has been a rule, no duress, always represented, always able to take advice, not on the hoof, you leave court, you take advice, you come back in.

Sir David Norgrove: Could I add one point to that which is that in terms of the comparison – I will stay sitting down so that I can stay near the microphone – in terms of the comparison I was making, and here I am getting into territory which is not really mine, of course both in FDAC and the settlement conference the common approach is that the judge speaks direct to the parties and in FDAC the lawyers may not even be present. So from the point of view of Article 6, that is the relevant comparison that I was making.

The Honourable Mrs Justice Pauffley: Yes, where are we going now? Yes, hand up at the back there, Frances, Frances Judd.

Frances Judd: I wanted to ask the question of those who are in favour of settlement conferences, why are they better than the IRH; and for those who are against settlement conferences, why are they worse?

The Honourable Mrs Justice Pauffley: Thank you. Thank you very much. So those in favour of the motion, why are they better than IRH, Margaret?

Her Honour Judge Margaret de Haas QC: Right, sorry, do you mind if I stand? It is just easier. Frances, thank you very much indeed. Frances, the IRH is a different dynamic and what I say to all of you and I do repeat what Sir David has already said, if you are interested and you really want to see the dynamic, come and observe then. Sorry it is the north, it is not as bad as all that, it is a little bit colder but it is okay. Come to Liverpool and you can observe, subject of course to confidentiality. But as to IRH, parties can, of course, get at IRH a neutral evaluation but because of continuity one has to be very careful how that is expressed, how there is engagement.

The settlement conference is a totally different engagement process. It has a completely different feel and, if I may say so, and Elizabeth Isaacs QC was, of course, very eloquent about the vulnerable litigant, for the emotionally torn apart litigant, the settlement conference addresses precisely that. It is the process whereby you relax, no pressure, right, let us discuss. Sometimes you do not, in fact, say what your view is. You are only going to say as a judge what your view is if there is an indication that the parties actually want it.

An IRH, and I have done so many as I was deeply involved in the PLO training process and I know you know, the IRH is a great procedure for trying to get at issues but it is not the same dynamic at all. It is not the empowering process. It is not the process which enables parties to sit, to reflect, to analyse, to reach out at solutions which are outside of the court process, the process that I described to you earlier on whereby you can actually look at repairing relationships and it is particularly useful also in private law. I do not want to, you know, forget the private law process where it has been, and I say this, magical.

The Honourable Mrs Justice Pauffley: Thank you, Margaret. Now, as between Liz and—

Elizabeth Isaacs QC: Shall I?

The Honourable Mrs Justice Pauffley: Yes, why do you not say why a settlement conference is worse than an IRH.

Elizabeth Isaacs QC: Can you hear me at the back. In summary, because the IRH has a very clear and defined function which is to define the issues in dispute between the parties and what is left will be determined by the professional decision-maker, the judge. Court, contrary to Margaret's aspirations, I am afraid is not a social work forum for empowering or making people feel lovely and fluffy. It is about judges, professional judges, making the most serious decisions it is possible to make, which is usually should this child remain in the birth family of origin, and sometimes be placed outside any family member with whom they have a relationship?

So the IRH requires in order to determine and define those issues, in my submission, professional, objective, legally skilled, robust, brave and courageous lawyers and those are members of the Family Bar and those are solicitors who have years and years of experience in representing vulnerable, frustrated, frightened and scared clients and, yes, I am sure we are all able to think of examples when perhaps issues in a case did not transpire or become completely clear until the IRH. Everyone in this room will have a story to tell but in general terms the IRH works well because the lawyers make it work, parents know what is left, what is to be litigated, sometimes cases settle, sometimes bits of cases settle but why replace that system with something that is subjective, that is arbitrary? The word "flexible" fills me with dread. I do not want flexibility for my client, I want predictability, I want structure as the Law Commission recommended and that is why they are worse.

The Honourable Mrs Justice Pauffley: Thank you. Yes, David Jockelson first and then the lady behind in row number 4.

David Jockelson: Thank you. My name is David Jockelson. I am from Miles & Partners, a high street firm in East London and I am speaking from the street, if I may say that, because I am always astonished that my clients accept the decision of the court for removal, for final removal. It is the most terrible thing that a court can do, it is unthinkable. Almost if one thinks for a second for one's own self, you get shivers and yet my clients accept it and they accept it, I believe, because they respect the legitimacy of the process. It is not a word they would use obviously but they often say, "Well, I know we lost but you put up a good fight, Mr Jockelson, the judge did it", and they accept it.

That experience of justice being experienced, not just seen but experienced and believed in by people who are not necessarily that intelligent but they can see it acted out before them, they have seen the cross-examination of the social workers, they have seen their points put visibly. They accept it and that is absolutely crucial both for their own mental health, which is important because, you know, they are human beings and the potential next parent for ongoing work with the local authority which affects the children but one thing we overlook, because we take for granted, is that they do not protest and they do not sabotage in the way that they could. We accept that, in fact, you have very, very few instances of parents, aggrieved parents, assaulting social workers, tracing social workers, how easy is that nowadays? Tracing foster carers and sabotaging foster placements, tracing one adopter and removing from a protective adopter, what would happen to your adoption recruitment then if that became known, never mind tracing judges and that has happened in other spheres?

The whole system works because of legitimacy and that may involve a certain degree of theatricality, a certain degree of it being visible even to people who do not really understand other things and I think there is a danger that if we sacrifice that rather expensive but thorough and painstaking process, you will lose legitimacy, you will lose acceptance and that will have huge knock-on effects on children, on the process, even on costs. So I think that is something that needs to be put in the balance against the efficiency of settlement conferences.

The Honourable Mrs Justice Pauffley: Margaret, I know you want to say something. I wonder whether it might be more helpful if we had some more points from the floor because David's point was that, it was a point rather than a question.

Her Honour Judge Margaret de Haas QC: Yes, it is quite all right.

The Honourable Mrs Justice Pauffley: The lady in row number 4. I am sorry to identify you in that way.

Ann Chavasse: My name is Ann Chavasse. I am a member of St Ives Chambers in Birmingham and I am a trustee of the Family Rights Group. If we are looking for a problem-solving forum, what is wrong with family group conferences properly convened with an independent – not with a social worker convening it but with an independent person convening it? I do not have a great deal of experience in other jurisdictions but I understand they are more used in other jurisdictions and that is something that we could explore a little more before we start undermining the independence of the judiciary.

The Honourable Mrs Justice Pauffley: Yes, thank you. There really is a question there. Margaret or David, would you like to tackle it?

Her Honour Judge Margaret de Haas QC: Right, can I just address the two questions, David, first of all, if I may call you that? David says do not sacrifice the independence of the judiciary and again you reflect that. Judges can do many things. Judges can empower people. Why not let them empower people? Your client, your vulnerable client, can be empowered in the right case with consent, with representation, to reach her own decision, listening to a judge, talking to a judge and feeling part of the process. Sometimes it is very much a kinder, a gentler process, particularly for the vulnerable who does not like being cross-examined in the adversarial court. People do not necessarily have to have imposed solutions. They can consent, they frequently do and when they feel empowered it is a very positive process. So that is what I say about that. It is about people taking responsibility and we should encourage them so to do.

Family group conferences, I entirely applaud. They are a useful adjunct. They are outside, or can be within, the process but that does not in any way mean that settlement conferences do not have their place in the appropriate case where there is consent, representation, no pressure and, again, empowerment.

The Honourable Mrs Justice Pauffley: June Thoburn, I saw that you were putting your hand up just there.

June Thoburn: June Thoburn. I am the chair of the Norfolk Family Justice Board but I speak as a social worker, their voices have not been terribly to the fore here. Most of the folks here see the cases that go wrong. This is particularly relevant to the debate about section 20 at the moment but a simple-minded person, I think judges are there to judge actually and I think many of my clients, as a social worker, think the same and, yes, to do that in a very kindly, and I have done expert evidence in various places and seen just the tremendous kindness that can come from the judge who is judging.

Families have had masses of conferences by the time they get to court. They have had child protection conferences, they have had child protection review conferences, they hopefully have family group conferences and I think they are absolutely great, then they might have pre-proceedings meetings where they have a solicitor or a legal representative with them.

If that has not worked, they have done conferences, they have had some very good… chairs of child protection conferences are often very good as neutral people in what they do, so by the time it is getting to court they are wanting judgment.

The Honourable Mrs Justice Pauffley: Thank you. Does anybody want to respond? Yes, David.

Sir David Norgrove: Yes, I mean you can tell I feel quite passionately about this and it is not that I feel passionately necessarily about settlement conferences, I feel passionately that we have a family justice system that needs to continue to change and evolve. There is no perfection here. We have not got a perfect system, we know that there are large numbers of weaknesses and difficulties in the way that we do things.

All we are saying here is that we need a broader range of weapons in the armoury, more ways of tackling different kinds of issues. We have here a way of doing things that has been adopted in a number of provinces in Canada that appears to offer real advantages and I have quoted evidence from or statements from a lawyer from Canada. We should try it, this is a pilot, these are pilots, these are not a decision, these are pilots to be evaluated, so what I would urge is before you condemn, before you say that this is going to undermine justice, undermine the judiciary, go and see it.

The Honourable Mrs Justice Pauffley: Thank you. Thank you very much. Anthony Douglas.

Anthony Douglas: Yes, Anthony Douglas, Cafcass. Just four quick points and then a question, probably mostly to Margaret and I say this as a member of the settlement conference group evaluating settlement conferences. The Liverpool number is one number and there are scores of conferences in Devon that have taken place and we are looking to extend the number in order to have sufficient numbers of conferences to evaluate properly to make a decision whether as a family justice system we run with them as a permanent option, so it is quite important to say that.

The second point I would make is that you have to innovate to stand still these days, not for the sake of it or to save money but to keep up and we are in, whether we like it or not, an area of greater transparency and greater needs for problem-solving and involvement in that, so I would say that.

Thirdly, it is, to me, important to ask the question not are settlement conferences Article 6 compliant but can we make sure they are Article 6 compliant in every individual case, because there are undoubtedly some cases, as Margaret said, that are totally unsuitable for settlement conferences so it is not either/or and a blanket system, it is about selection of the right case. It is also not either/or, there are parts of the country now particularly looking at having family group conferences instead of initial child protection conferences, so this is the world we are in where we are trying to find the most successful mechanisms to work with very, very difficult situations and I think a group of families particularly suitable to settlement conferences are those parents who repeatedly lose their children to the State. That represents one in four cases.

Often, certainly in the Cafcass research, the intervals between pregnancies are getting shorter and so you might be in the middle of one set of care proceedings and the parent is pregnant again and I think the responsibility we have is to help with the next child, not just the resolution of this child and therefore to keep the relationship with the parent or the parents is absolutely crucial and I think settlement conferences can play a role in trying to keep parents in the ring so they do not become, as Elizabeth and Martha said, disenfranchised, disempowered and remove themselves from the process altogether. I hope those were quick enough points.

The question is to Margaret, I think: whether having held over 150 conferences between yourself and your colleague judge, whether the model has evolved during the process to build in more safeguards or change the nature of it?

Her Honour Judge Margaret de Haas QC: It is a very fair question. We started off, by the way, in Cheshire and Merseyside with two judges, we have now increased the pool to five judges, in fact. What type of cases? Anthony, the answer to that is do the parties consent? Does the referring judge consider it appropriate? Consent by everybody is the prerequisite. In public law it is generally the case that they are referred after IRH so that the evidence is all there. In private law cases, sometimes the earlier the intervention the better.

The short point is that very often one thinks it is not going to succeed but it does. There is no way of telling whether or not there is going to be success in part or at all and I really come to the sort of litigants that have been mostly discussed: the vulnerable litigant, the emotional litigant. It is very clear to me, particularly the learning disabled litigant, that one has to start asking the question: to what extent is the adversarial process with cross-examination and it is a lonely process for that type of litigant in the witness box, sometimes supported, sometimes not, to what extent does that bring justice as a result?

One of our speakers, I think it was Martha who said we want a just, a safe, a sound decision. If you empower people, after reflection and they have full opportunity to reflect, to reach their own decisions which they want, which they want to be safe and you are right, a lot of the mothers in public law are the repeated pregnancies, you preserve relationships, you end up with them talking to social services, not shouting at social services, talking to the guardian, not sitting at different ends of the room. It is a completely different dynamic. Article 6 is the living instrument, the settlement process is the embodiment of that.

The Honourable Mrs Justice Pauffley: Liz, did you want or Martha, one or other?

Martha Cover: May I just say that the current pilot issued by the Ministry of Justice, the current evaluation form for judges only asks whether the case was suitably referred for a settlement conference in that judge's view, whether it resulted in a full resolution or a partial resolution, how long was the final hearing in the case originally listed for, how long is it now listed for, how long did you spend preparing it? The ALC—

Her Honour Judge Margaret de Haas QC: Martha, there is another box *[inaudible]* comes first.

Martha Cover: Oh, a brief outline of the case and the issues for resolution, so a brief outline of the case, was it suitable, how much time did you save? None of the questions relate to the quality of the decision made, how it was experienced by any of the parties to it, or any of those qualitative questions, none of them were mentioned at all, I am afraid, in this current pilot and the information that we have, anecdotally at least at the moment, is that it is almost always the parent who is being effectively leaned on to change their mind and to give in and there may be cases which we would regard as hopeless but, of course, we all know that the hopeless case often turns out not to be so hopeless once the evidence begins to be heard.

The Honourable Mrs Justice Pauffley: Thank you. Did you want to say something more, Liz?

Elizabeth Isaacs QC: Could I just say—

The Honourable Mrs Justice Pauffley: And David wants to speak as well.

Elizabeth Isaacs QC: I think Margaret raises a fascinating, philosophical question: what do we mean by success? Do we mean a *[inaudible]* trial, do we mean a child safely returned home after a package of intervention, do we mean a child placed with external family members but having regular, quality contact with family of origin? I do not know what success means. I think I know when I represent a parent but when I represent a local authority I have quite a different set of measures in mind.

The Honourable Mrs Justice Pauffley: Thank you. David, you wanted to say something.

Sir David Norgrove: What I have observed, and I am one of the few people here who has observed it, as I keep remarking, what I have observed is that success is when the parties, all the parties in the case, agree to the outcome. Whether that is a good outcome for the child and the family remains to be seen but actually that is also true in conventional hearings. We do not very often know whether what was decided was the right decision. So, in that sense, it is on exactly all fours.

In terms of evaluation, we have had some comments from the ALC and others about the form. The form has changed and the intention is that there will be qualitative discussions with people who have been involved in settlement conferences to feed back that kind of information into the evaluation.

The Honourable Mrs Justice Pauffley: Thank you very much. Now the gentleman in the third row with the white shirt.

Mike Shaw: My name is Mike Shaw. I am adding to the diversity in the room. I am a child psychiatrist and also associated with the FDAC programme and there seems to be, it has been a very rich discussion and it seemed to me that there is lots of things we could talk about, you know, what is a good outcome, what are we hitting for? That is a very good question. I think the whole issue of fighting is really important. In some ways from the child's perspective I think it is really important that parents fight to retain the care and the bond with their child. It is pretty crap if your parent says, 'do you know what, I think actually, you know, maybe I am not the right person to bring you up, maybe somebody else might be better'. Unfortunately, in the conventional system the only way they can fight is to fight with litigation. One of the good things, I think, about the FDAC programme is that it gives people the opportunity to fight their problems rather than to fight the local authority because it is really not the local authority who are the enemy, it is their difficulties.

However, I just want to ask Margaret a question and so I am going to now move myself into thinking about being a doctor and thinking, you know, the idea of second opinions is something that we are very familiar with in medicine, so if you have got a case that you are a bit stuck with and things do not seem to be working and maybe, I do not know, your relationship with the patient might be part of the issue as well as maybe the complexity of the case and how things should be resolved, you ask for a second opinion and this seems a bit like that, you know, seeing it from a sort of doctor-centric point of view that one judge asks another judge but it would be my worst nightmare, the idea that you go ahead and treat the patient without carrying out your own assessment, that you agree something with the patient having not really come to your own conclusion, because that is a critical thing. The critical thing about being a good doctor is, in the end, you do not carry out

the treatment that someone else recommends or whatever and anyway why are they asking for a second opinion? Why should you, you know, that seems like the worst situation where you would do that. You have to carry out your own assessment, come to your own conclusion and have your own discussion with the patient. So that would be my, as I say, maybe it is like sort of one of the things I would wake up in the middle of the night panicking, oh my goodness, I am treating somebody without ever having assessed them.

The Honourable Mrs Justice Pauffley: Margaret, how do you respond to that, the process itself does not lend to assessment by hearing evidence, hearing cross-examination, hearing all sides of the argument?

Her Honour Judge Margaret de Haas QC: Right, well can I just break down this into three points because you made a very important point, Mike, which is sometimes it is very therapeutic and it is only right that a parent should fight for their child. The settlement conference does not preclude that. The right to a trial thereafter is preserved without any hindrance whatsoever and, as I have explained, without any risk.

Also reflective of what you have just said, and I can entirely understand, parents often say, "We want our child to know we fought for them". The response will be, if you want to fight, that is fine, there is no pressure to agree anything but very often they will say to you, "Is there another way of showing our child, for example, a letter written to the child, 'we love you, we have got problems and we recognise our problems are such that we cannot look after you?'" That is the sort of thing you can explore in a very humane way in a settlement conference and it is not just about, if I may say so, parents losing. Very often it is the local authority having to change their care plan.

The next point, if a parent or the parties as a whole ask you for their opinion, as I made very clear the settlement conference judge must express the limitations on that opinion. You are not hearing evidence, you have not heard them give evidence. You have looked at the papers and you have read the file, that is the limitation. They have their own legal advice as to whether or not they want to be empowered to reach a solution. If they do not, they have the legal advice to continue to the full determination. Parties reach their own solution. It is an empowering process; the local authority, guardian, mother, father. I am not making a determination.

The Honourable Mrs Justice Pauffley: Thank you.

Her Honour Judge Margaret de Haas QC: That is the point of a settlement conference, it is essential.

The Honourable Mrs Justice Pauffley: Thank you. We have got a queue now of questions and Andrew Greensmith was next in my mind, then Dominic.

Andrew Greensmith: A question coming out of a point and it is on the question of judicial independence. I am a little concerned at the suggestion that judges lose independence by understanding the problems of local authorities. Sorry, I should have said Andrew Greensmith, district judge and member of the Family Justice Council. I frequently meet with local authorities at all sort of levels, and Cafcass, with the intention of understanding their limitations. What is the point of making an order to be complied with if with better knowledge of the resource of the local authority you know that it cannot actually be complied with? That, in my view, simply builds delay into the process and builds in an unnecessary layer of acrimony between the parties which is unnecessary and that is just a part of the process of moving forward and I see settlement conferences as part of a process of moving forward.

People, and we must not underestimate parties in care proceedings, are no different than us sitting here. If my child was going to be the subject of care proceedings, I would want a genuine say in that process. I may not have the intellectual capacity to have the say that I would like and that is what my representation is about but I would like a say in the process, I would like a say in the determination and I would like to be involved in that process at a level where I genuinely feel involved.

My question to either Elizabeth or Margaret is it is about coming down off the bench and engaging with the parent, Margaret, do you see that as being an integral part of the process and is an advantage and, Liz, where does that lead to a loss of authority? Why is it so difficult for, or why is it impossible for the judge to maintain authority in those circumstances? Do not the advantages actually outweigh the disadvantages?

Elizabeth Isaacs QC: May I just deal with that first of all. I have not argued that it is about lack of authority. You, quite rightly, make the point that parents are no different to us in this room. What I was saying is that parents in care proceedings are different. As I hope I have explained, they come from the poorest section of society, highly overrepresented in terms of mental ill-health, substance abuse and domestic violence and often they are beleaguered. As June was saying they have been round the block in terms of local authority intervention and, of course, do not forget the geographical issues that are becoming clearer and clearer by research. If you live in Blackpool, in a poor part of Blackpool, you are going to get your social worker knocking on the door more than if you live in Kingston-on-Thames and that is hard evidence that is coming out with the groundbreaking research that is going on right now.

So let us not pretend that parents in care proceedings are just like us who have been to university, who are legally qualified, who are privileged, because they are not and if we add into that the dynamic that when they walk into the court room they see the person with authority, as David was saying, who is invested by the State with making the most important decision it is possible to make, is it not really impossible to think that that parent is not going to be persuaded by the power of the office as well as the power of the individual? And that is the point of my talk tonight.

The Honourable Mrs Justice Pauffley: Margaret.

Her Honour Judge Margaret de Haas QC: It is a completely different dynamic, the settlement conference, and if you come to see it, you will see exactly what I mean. The settlement conference judge is not making a determination. The parties are consenting to problem-solving and so a settlement conference, if I can demonstrate, David, you are the father: good afternoon, David.

Sir David Norgrove: Hi.

Her Honour Judge Margaret de Haas QC: How are you?

Sir David Norgrove: Well, I've been very anxious. I've been nervous about it. Can you tell me, I do not really understand what is going on?

Her Honour Judge Margaret de Haas QC: Tell me, David, how was the contact last week? And so it is that with a settlement conference you are entering into a completely different process. In fact, it is a process which allows a party to be engaged. I am afraid it completely meets Elizabeth's objections which are it actually empowers people. Courts are frightening to people, particularly vulnerable people. Settlement conferences enable them to become engaged. For once, they are actually sitting and listening and having a judge listen to their problem. They have got their legal advisor there. You discuss the problem in a gentle way. It is analysed in their way. They can then stop. Whenever they want, they can have a break. The legal advisor can contribute. They go out, they reflect and it is actually when you are on a level with people you can actually engage with people as opposed to be sitting up there, remembering of course this is not a case where I am determining anything. All we are doing is enabling people to come to their own solutions which are welfare-driven.

The Honourable Mrs Justice Pauffley: Thank you.

Her Honour Judge Margaret de Haas QC: Does that answer the point, Andrew?

The Honourable Mrs Justice Pauffley: Thank you. There are a lot of people who want to have a say. I suspect some of them do not actually want to ask a question and what I am proposing to do in the last 15 minutes is allow some of those who have had their hands up a lot to have their say. Dominic Raeside first and then I will go towards the back of the room.

Dominic Raeside: Thank you. Dominic Raeside, head of mediation at Family Law in Partnership and I sit on the Family Justice Council. I am so grateful for your presentations but I am also, I have to tell you, sort of I am not sure because they are so impassioned but I am not really sure which way I am going.

One thing I am sure about from my 30 years in this field is that if you are talking to client determination, if you are talking to self empowerment, if you are talking about people making their own decisions, then court is not

the forum to do it and, you know, I have been encouraged and cajoled into offering mediation within court settings and I have not been persuaded. I think court is a good place for the judiciary to point people towards and to legitimise that but if you are really trying to speak to that, you need time for reflection, you need to engage other aspects and my experience many years ago as a guardian *ad litem* and court welfare officer is that, as you were saying, Elizabeth, people attending court are hugely anxious. Whether they can be put at ease by the skills of a judge perhaps to some degree but I prefer the dichotomy between if you go to court for adjudication and if you want to make your own decisions, then go and see a mediator or a plethora of other dispute resolution, we have private judging, private FDRs etc, etc.

I think the one example that sort of messes with that dichotomy is FDACs and I am persuaded by FDACs because I think with drug and alcohol issues it is such a confusing picture that to use the power, if you like, of the judge to get all the bodies there and to remind parents of the consequences and particularly given the very positive outcomes led by Nick, who we all know is really a frustrated social worker *[laughter]*, so I am persuaded of that but I just do not know where I am on this.

The Honourable Mrs Justice Pauffley: Thank you. Can I go to the audience because there are a lot of people who want to speak and so far they have not had a chance at all. The first is the lady at the very back in the far corner who did have her specs on her head and then the lady next door to her. Right, there we are.

Denise Lester: Denise Lester, Moss, Beachley, Mullem & Coleman, central London. I practice not only in the field of public law and I am also the Law Society's council member for childcare law but I am speaking directly as a practitioner. I would like to ask some open questions, if I may, picking up from some Anthony… theme of transparency. Are we going to see please the training, what training is the judiciary having in order to deal with the process and the dynamic, including any psychodynamic involving settlement conferences because in the field of public law there is the criticism by the Daily Mail and other papers that the family justice system is secret?

Secondly, the recordings of the settlement conferences, can these be actually transcribed and, if not, why not because they ought to stand on the file if consent is later withdrawn in terms of outcome? And in relation to the process itself, picking up from Dr Shaw's point of what pre-assessments there are, what training in particular do you as judges have in terms of screening, because there can be imbalance of power dynamic? For example, there has been a case of domestic abuse, linguistics in particular because the language that you may use in the normal day when attempting to engage with people who are vulnerable and whose IQ you do not know because there will not be court commissions reports during the course of the proceedings, may affect the process and in terms of the break point, you are obviously aware that there are not intermediaries in the family court system as yet, that has been put on hold but they may be of assistance in terms of this particular dynamic and also how do you deal with uniformity of training and the dynamic where ultimately each judge has a personality of their own in terms of operating in that dynamic and can affect that process in a subtle or not so subtle way?

The Honourable Mrs Justice Pauffley: Thank you. So there is a real question there about training, Margaret. Do you know the answer as to how judges are to be trained to undertake settlement conferences?

Her Honour Judge Margaret de Haas QC: Yes. The training is through the Judicial College and also through observation of the settlement process system. There are now recorded the basic principles of the settlement conference. In terms of screening, language, different processes or different dynamics of personality, that applies to judges in all types of cases. They have a consistency of training, as I have already explained.

Intermediaries, we are very careful as to the nature of the people who can come for settlement conferences. If there is an issue of capacity, it is usually no. Mental health difficulties, we will have read the file. Judges read the file, so the screening is there in terms of the sort of person you are going to have before you and, remember, as judges we are used to having different people before us and communicating with them in our different ways.

The Honourable Mrs Justice Pauffley: Thank you. Yes, the lady there.

Mary Ryan: Mary Ryan. I am part of the team who have been evaluating FDACs since it was set up so another FDAC intervention. It is around… there is a question but before I get to it, it is two points. One is Article 6 compliance of parents seeing judges on their own, there is a note always taken of those non-lawyer reviews and the lawyers get those and any issue that it seems to the judges think will need the lawyers back, they call them back for the next review.

In terms of the fairness and justice, people accepting the end results of cases, they also accept those in FDAC. In fact, they do not contest cases very much in FDAC and the reason we have found that out was of interviewing parents, interviewing their lawyers, interviewing guardians, interviewing all the professionals involved as part of that research and there was a very clear message, particularly from parents, of them seeing the process as fair, transparent, honest, they understood what was happening and they valued the relationship they made with the judge.

So my question is, I hope those similar sorts of extensive interviews have been taken with all the parents and grandparents and professionals who are involved in settlement conferences so we can hear their views directly.

The Honourable Mrs Justice Pauffley: Yes, Martha.

Martha Cover: Thank you. I have just learned from listening to Sir David that the questions for judges and the evaluation of the pilot is going to be substantially expanded to include qualitative data. One of the issues that the ALC particularly wanted to know was if it did not settle and went to trial, was there a different result from the one that was suggested to the parties or being canvassed by the judge at the settlement conference?

The other point I would like to make is I must emphasise that to describe this as a problem-solving court is a misnomer. By the time a settlement conference takes place, it is after the IRH. The guardian's report is in, the final evidence and care plan is in, the parents' final evidence is in. Everyone's positions are clear and they have not settled. The only problem that is solved is cracking the case and saving court time.

Elizabeth Isaacs QC *[?]*: Absolutely.

The Honourable Mrs Justice Pauffley: Yes, the gentleman there at the back.

James George: Hello, I am James George. I manage a team of legal advisors in the family court. Sir David made a couple of what I would call fair criticisms earlier of what can happen in family courts, for example not communicating effectively in a way that engages parents, not actually applying the overriding objective, not allocating the appropriate amount of court time for the resources and issues in the case.

My fear is that by concentrating on settlement conferences, we are really diverting from what the issue is, which is that those failures need to be expunged in all cases, not just those cases that agree to go to settlement conference.

Elizabeth Isaacs QC *[?]*: Yes, it is a really good point.

The Honourable Mrs Justice Pauffley: Any member of the panel want to respond to that?

Elizabeth Isaacs QC *[?]*: I think that is an excellent point which we had not thought of, so thank you. *[Laughter]*

Sir David Norgrove: Could I?

The Honourable Mrs Justice Pauffley: Yes, of course, David, of course.

Sir David Norgrove: In terms of the comments so far, I think Dominic Raeside's is the most apposite which is he does not know. Neither do we know and what we are trying to do is to find out. I am disappointed by the reaction that there has been to this innovation. I had hoped that family justice over the last few years had become more dynamic, more interested in trying to make changes in the interests of faster and better justice.

That does not appear to be the case and I ask you to consider why people are being so hostile to a pilot which is not a commitment, it is not an inevitability, it is a pilot that is going to be evaluated and if it shows that it is not effective, that it does not deliver justice, that it leads to pressure on parties in a way that they feel uncomfortable with, it will not go ahead.

The Honourable Mrs Justice Pauffley: Can I just say what I think may be the elephant in the room. FDAC, from its very inception was created with a view to keeping children together with their natural families. The whole drive and emphasis was on working on problems so as to reunite the family. What may have permeated out through what is known about settlement conference, the settlement conference model, is that the drive would seem to be towards splitting children from their parents. How many of your 150 cases, Margaret, has resulted in a local authority losing out and the child being rehabilitated?

Her Honour Judge Margaret de Haas QC: Anna, I cannot give you the exact statistic because, of course, they are not all public law and a growing proportion now are private law.

The Honourable Mrs Justice Pauffley: But the public law ones, I think that is what we are really interested in.

Her Honour Judge Margaret de Haas QC: I cannot give you that statistic. The MoJ are collecting those statistics and are in the process of examining that but can I just say it is not just about that, it is not about depriving parents of their children. Very often the argument is: is this a special guardianship order in favour of a kinship carer or is it re-habilitation?

The Honourable Mrs Justice Pauffley: That is—

Her Honour Judge Margaret de Haas QC: Sorry, very often the argument is: is it a care order or a supervision order in favour of a parent who is retaining, who is rehabilitated with their children? Very often it is also about should the parent be given a further chance? Has, in fact, sufficient time lapsed to give them that opportunity? So it is not, if I may put it this way, a one-way street. What I have noticed in Cheshire and Merseyside, and we seem to be the biggest pilot, is increasingly – again, I am sorry I cannot give you the statistic but I do not spend my life doing statistics, as you will imagine – what is the position is private law cases and we are frequently having huge successes with private law particularly with intractable hostility.

It is overwhelmingly clear to me, and I am sorry to sound passionate about this but I do because I know how much time is taken up in courts in a negative way with intractable hostility cases and those are the kind of cases you come off the bench and you speak to parents, you engage with them on their level instead of dictating to them from the bench. A completely different dynamic, different result.

The Honourable Mrs Justice Pauffley: Thank you.

Her Honour Judge Margaret de Haas QC: Different welfare-driven solution.

The Honourable Mrs Justice Pauffley: Katherine Gieve.

Katherine Gieve: Can I just make one quite short point and I think that if you were to ask people here what they felt about this new process in private law, you would find that they mostly supported it. What we are worried about is losing the clarity of justice when children are being taken from their parents.

The Honourable Mrs Justice Pauffley: Thank you. Yes, Hannah Penfold over there. I hope I have got your name right. Yes, no, I am not sure I have.

Hannah Perry: Hello, it is Hannah Perry from TV Edwards. I am a solicitor in London. I was wondering if there had been any consideration in the pilot to a cooling off period and whether that would ameliorate some of the concerns of those against settlement conferences and if there is confidence in those for it, whether there would be any anxiety about that to give parents time to reflect on important decisions that they are being asked to make?

Elizabeth Isaacs QC: May I make an observation? I am afraid while cooling off periods might be fantastic when we are looking at buying a washing machine, I am not sure, with the greatest of respect, that it is going to work in this process. You have lawyers already underpaid, overworked, excluded from more and more parts of the family justice system, certainly at the Bar, by virtue of fees and the fee structure. Solicitors, as I understand it, get paid almost nothing to go to a child protection conference if the local authority has not issued. The thought, quite frankly, that the government is going to find a pot of money to enable lawyers to participate in any sort of cooling off process, I think may be admirable but, frankly, is unsustainable and unrealistic, if I may say?

The Honourable Mrs Justice Pauffley: Yes, Margaret, last question.

Her Honour Judge Margaret de Haas QC: If people want an opportunity to reflect, they always go outside court, if I may say so, and reflect, they have as long as they want. Sometimes I am asked, "Can we come back at another time?" and I always say yes. That cooling off period, if I may use your expression, the cooling off period is certainly allowed if that is what they want.

As to withdrawal of consent, I have done the majority of the cases in Cheshire and Merseyside and I have not yet had a withdrawal of consent, particularly not one public law case which is where the expression of concern is coming, not one. Clarity of justice, what is wrong with people dictating their own solution after analysis? That is very clear justice to me.

The Honourable Mrs Justice Pauffley: We are going to have one more question and then I am going to draw this to a close, not least because I know that many of you have a very long journey home and it is already after half past seven. Yes.

Professor Kate Morris: Thank you. I am Professor Kate Morris from the University of Sheffield. The research *[inaudible]* is getting quite twitchy about comments about success and outcome. Those are very difficult measures, as we all know, and I think some very detailed discussion about the evaluation of this is pressing now and not least that part of that evaluation must be about the experiences of the children and of the adults and some sense of what the indicators of success are in the context of best interests of children.

The second thing I want to say is I do a great deal of work around family group conferences and we have a saying in family group conferences about not joining the dance of oppression, not joining the dance of oppression and I am intrigued as to how judges are not going to join the dance of oppression.

Elizabeth Isaacs QC *[?]*: Absolutely. *[Applause]*

The Honourable Mrs Justice Pauffley: I think, ladies and gentlemen, that is a good place to end, possibly. Thank you very much indeed all of you for coming along and taking part in this fascinating discussion.

A Female Speaker: *[Inaudible – off microphone]*

The Honourable Mrs Justice Pauffley: Sometimes we do, sometimes we do not. The debate has transmogrified slightly, I sense, from is a settlement conference Article 6 compliant to is a settlement conference a good thing and an initiative that we should be taking forward? I think that is actually the real question upon which there has been quite an impassioned debate. So hands up if you believe this is a worthwhile initiative that should be given life, should be…

A Female Speaker: *[Inaudible – off microphone]*

The Honourable Mrs Justice Pauffley: All right, public law, public law, should we be going forward with settlement conferences?

A Male Speaker: As a pilot?

The Honourable Mrs Justice Pauffley: Well, they are going ahead as a pilot.

A Male Speaker: Yes.

The Honourable Mrs Justice Pauffley: All right, in favour? And against? You were rather right, David, to sense that the—

A Female Speaker: *[Inaudible – off microphone]*

The Honourable Mrs Justice Pauffley: All right, now for private. Private settlement conference is a good thing? And against? All right, thank you. There we are. Thank you very much indeed everyone. *[Applause]*

[Ends]