Family Justice Council

Minutes of the Open meeting held on 9th July 2012

Steel House, 11 Tothill Street, London

Present:

Mark Andrews, Justices' Clerk

Professor Anne Barlow, Academic

Sue Berelowitz, Office of the Children's Commissioner for England

Annabel Burns, DfE

Bruce Clark, Cafcass

Martyn Cook, Family Magistrate

District Judge (Magistrates' Courts) Nick Crichton

Malek Wan Daud, Family Barrister

Phil Douglas, Deputy Director, Judicial Office

Dr. Elizabeth Gillett, Clinical Psychologist

Fiona Green, Cafcass

Bridget Lindley, Consumer Focus, Parent Representative

Caroline Little, Family Solicitor Public Law

HHJ Katharine Marshall

The Honourable Mrs Justice Parker

Dr. Heather Payne, Paediatrician

Alison Russell QC, Family Silk

Beverley Sayers, Family Mediator

Sara Tricka, MoJ

Alex Clark, Secretary to the Council

Tessa Okposuogu, Assistant Secretary to the Council

Paula Adshead, Local Family Justice Council Liaison

Daphna Wilson, Family Justice Council Secretariat

Andrew Shaw, President's Office

Guests:

Jan Loxley Blount, Parents protecting children

Frances Burton, Centre for Family Law

Apologies:

The Right Honourable Sir Nicholas Wall (Chair)

The Right Honourable Lord Justice Thorpe (Deputy Chair)

Nick Goodwin, MoJ

District Judge Rachel Karp
Ruth Mackay, Wikivorce (guest)
Kim Lewis, solicitor (guest)

1. Announcements

Alison Russell QC will chair the meeting today.

The Chair announced that this was the third open meeting of the Family Justice Council. She welcomed two guests who had come to observe the meeting and provided a brief background to the Council and its work. The Council wished to record its thanks to Deborah Ramsdale, who has stepped down from the Council, for her contribution to the Council's work over three years.

2. Minutes of the last meeting and matters arising

The minutes of the last meeting were approved, pending the removal of a typing error in the ADR Committee report.

Matters arising

Parents and Relatives Committee: "What the Family Courts expect from parents…" and "What parents can expect from court" have been circulated for comments and were now being formalised. Alex Clark is in discussions with HMCTS regarding the first document, looking at how it fits in with current guidance. Beverley Sayers suggested that the latter document should be issued alongside the new FM1 form. Bridget Lindley pointed out that information leaflet referred to in the Parents and Relatives Committee report was in relation to work with local authorities.

Interpreters: Malek Wan Daud expressed his frustration at the difficulties in obtaining an update on the new interpreters' scheme. He has had no communication with Paul Harris at HMCTS. From information received at the last meeting of the Diversity Committee, it would appear that the new system is experiencing difficulties, with interpreters speaking the wrong language arriving at court. The system has been in place since January 2012, but the guidance is still unavailable. Malek met with Paul Harris last September and understood that the FJC would contribute to the policy guidance. Sara Tricka will liaise with Paul Harris for an update and ensure that a response is given to Council. Malek would like the issue of quality assurance considered.

3. Questions from observers

a) Question 1 from: **Mrs Frances Burton** (Centre for Family Law – self employed Barrister at Centre for Family Law and Practice, Oxford):

"Now that we know that the government accepts the recommendation of the FJR that residence and contact orders be replaced with a child arrangements order, (or even no order if the parents have been encouraged to agree arrangements for their child (ren) informally), what is proposed, especially in obvious cross border cases, where there is a potential for international child abduction? Surely the lack of formal residence and contact orders will increase confusion unless in every case parents have a formal child arrangements order which spells out the rights recognised by the Hague Convention and which border agencies and police will recognise in helping to stop such abductions? If such orders have to be explicit would it not be best simply to keep the residence and contact orders which are already understood?

Lord Justice Thorpe's office reports a recent significant increase in such abductions. Will our apparent intention to de-formalise child arrangements and eschew court orders have undesirable side effects?"

Mrs. Justice Parker provided this answer on behalf of McFarlane LJ:

1. **The key to wrongful removal within the meaning of the Hague Convention is the concept of breach of custody rights. Those with parental responsibility have custody rights. All mothers have parental responsibility, as do fathers married to the children's mother, fathers not married to the children's mother who hold a parental responsibility agreement or order, fathers registered as such on the child's birth certificate, special guardians, step-parents, prospective adopters of a child subject to a placement order, and local authorities holding statutory orders (but not where children are accommodated).**

2. **Under the present law a residence order confers parental responsibility on fathers who would not otherwise have it, and on non parents. At the moment fathers or others such as grandparents without parental responsibility either as of right or under a residence order or SGO do not have "rights of custody" even if the child is living with them or having very substantial contact with them.**

3. **In some cases the existence of court proceedings and orders may mean that removal is in breach of custody rights attributed to the court even if the father or other carer does not have parental responsibility. This is certainly the case if the court has specifically**

prohibited removal from the jurisdiction. The removal of a ward of court is certainly in breach of the custody rights vested in the court.

4. Page 34 of the Norgrove Report provides for grandparents etc to be given PR if they are seen to require it by having the child in their care for significant periods under an agreement or under a child arrangements order. The same applies to fathers without PR but they would actually be given a s 4 order as now.

5. The Report proposed that anyone with PR should be permitted to remove the child from the jurisdiction for up to a month, subject to variation by the court, but not otherwise without agreement of all with PR or a court order: and such permission for temporary removal would not effect a change of the child's habitual residence.

6. We think that the issue of an application for a child arrangements order would probably, and in any event ought, to give rights of custody to the court in just the same way that an application for a s 8 order residence order does now. But, having given thought to this helpful and pertinent question, we think that it would be advisable for the legislation specifically to provide that the issue of an application for a child arrangements order gives rights of custody to the court within the meaning of the Hague. In that event (i) the application form should prominently refer to that consequence on the first page, and (ii) child arrangement orders should not only recite the ability to remove short term (as a s 8 order does at the moment) but should make it clear that such a short term removal does not change habitual residence, and that the order confers parental responsibility on parties who do not otherwise have it. This will require further consideration and discussion with those directly responsible for framing the legislation and rules.

7. I do not see that the concept of residence and contact orders in itself creates a failsafe safeguard under the Hague Convention. Contact orders do not confer parental responsibility. Nor do I think that the lack of a residence or contact order has the potential to increase confusion. Residence orders only confer parental responsibility where a party does not already have it. Informal arrangements exist at the moment: where a father does not have parental responsibility through one of the routes described above then prima facie removal will not be in breach of custody rights. The refinements to orders set out at paragraph 6 above should serve to dispel any potential confusion.

Furthermore, Mrs. Burton questioned whether there would be time to read out the statement on the face of the order, on the occasion of an urgent removal of a child at an airport. Mrs. Justice Parker was of the view that the statement on the face of the order is an appropriate way of dealing with what is already a difficult area.

b) Question 2 **Ruth Mackay** (contributor to Wikivorce)

'The court's first communication to a respondent in divorce is the Acknowledgement of Service pack which paraphrased says: "Your spouse is divorcing you. It's all your fault - please see detailed reasons why it's your fault. Because it's your fault you need to pay the legal costs. Also your spouse intends to take you to the cleaners - please see extensive list of financial claims being made against you. Please sign this box to confirm that you are happy to be fleeced."

Is this communication deliberately designed to antagonise the respondent and so set the couple on course for an antagonistic and expensive divorce, thereby maximising the time spent in court and the money spent on Lawyers fees?'

Beverley Sayers read out the answer on behalf of DJ Rachel Karp:

'The Notes of Guidance Form, (Form D8), to which the questioner refers, is the HMCTS form sent out with the Acknowledgement of Service of the Divorce Petition. There is nothing in that form which resembles the words:

"Your spouse is divorcing you. It's all your fault - please see detailed reasons why it's your fault. Because it's your fault you need to pay the legal costs. Also your spouse intends to take you to the cleaners - please see extensive list of financial claims being made against you. Please sign this box to confirm that you are happy to be fleeced."

I have reviewed the form, and nothing in it is inflammatory. However, as it is the first communication that the Respondent receives from the court, it could be an opportunity to advise the Respondent of the possibility of mediation. It may be that HMCTS could consider a revision in these terms.

The supplementary answer below, supplied by Adam Lennon, Jurisdictional and Operational Support Manager - Family Operations Team, Civil, Family & Tribunals Directorate, HMCTS was also read out by Beverley Sayers.

'The Government values and supports the use of mediation and believes it can be quicker, cheaper and provide better outcomes when compared to court proceedings. When it is used

appropriately and early on in the process, mediation can bring about a resolution to a dispute that is agreed and beneficial to both parties.
Mediation is a process that parties can use to settle disputes concerning finances/property and children and is an option available to divorcing couples if there is a dispute in these areas as part of their court proceedings. However, it is not compulsory for the parties in a divorce to make an application to the court regarding these areas and many couples come to arrangements between themselves. HMCTS provides the leaflet D190 "I want to apply for a financial order" for those who wish to bring their application to court for a formal order and mediation features predominantly within that leaflet:
http://hmctsformfinder.justice.gov.uk/courtfinder/forms/d190-eng.pdf.

In addition HMCTS is working with the Ministry of Justice on ways to further raise awareness among potential litigants and respondents of the current expectation to consider mediation before coming to court and on how best to provide relevant information at the earliest possible stage of the process and this question will be taken into consideration when considering our options.

That said, divorce itself is a legal process set down in law to dissolve a marriage and change the marital status of the parties. The present divorce law under the Matrimonial Causes Act 1973 and Family Procedure Rules 2010 is based upon the view that, where a marriage is proved to have irretrievably broken down, it is in the best interests of everyone that the marriage be dissolved. It follows therefore that if a spouse is able to establish that their marriage has irretrievably broken down they will, in due course, obtain a divorce.'

Beverley Sayers commented that the FJC Working group on Pre-proceedings may wish to look at this and the use of language in court documents.

c) Question 3: **Jan Loxley Blount** (Parents Protecting Children - Member at Parents Protecting Children UK)
'What safeguards are envisaged to ensure that children of Families with Autism, learning difficulties, mental health difficulties and chronic ill health including ME and metabolic disorders are not accidentally adopted before families have the time to prove their fitness to bring up their own children'.

Dr. Liz Gillett provided the answer below:

The Family Justice Council has recently considered the comprehensive Equality Impact Assessment undertaken by the Ministry of Justice with regards to the Government's response to the Family Justice Review. We are reassured by the in-depth exploration of the issues associated with both parents and children with disabilities and chronic disabling conditions.

In line with the issues raised by the Equality Impact Assessment there has been further consultation by the Ministry of Justice regarding the specific impact of the target to conclude care proceedings within 26 weeks. The Family Justice Council has robustly responded to this consultation highlighting that within the current system family's where one or more members have a disability / disabling condition may well encounter additional 'delay' owing to a range of difficulties associated with, for example, appropriate and targeted assessments and mental capacity. Suggestions were offered as to how Court's could improve their support for families in such circumstances including following existing Family Justice Council guidance and using existing resources (e.g. Parents who lack capacity to conduct public law proceedings, April 2010; The Court and Your Child – when social workers get involved – easy words and pictures) as well as ensuring all aspects of a families needs are accounted for at each stage.

It should also be noted that shorter proceedings may actually be beneficial to children and parents with a range of disabilities as it reduces the time they will be under the mental stress of being in proceedings and trying to engage with a highly complex, intellectually and emotionally demanding context – something that is also known to have a likely negative impact on the health status of individuals with a range of chronic health issues.

The shorter timeframe also puts a greater responsibility on all parties to get the right assessments done at the right time by the right professional and for the system to ensure they have the necessary tools at their disposal to do so. The Family Justice Council is actively working on ways to support this endeavour via its 'Experts' and 'Public Law and Workforce Development' working groups.

Under the Equality Act 2010 (which subsumed the Disability Discrimination Act) it is clear that all individuals with identified disabilities / conditions are subject to the principle of 'reasonable adjustment' and that this incorporates parents of children with a disability via the discrimination by association route – however this always has to be balanced against the parenting needs of the child (which may well be greater than average both in terms of the

complexity of the parental task but also of the impact of parenting falling below the 'good enough' standard). The evidence base clearly supports the notation that many children are left for too long in deeply damaging circumstances before being removed and that subsequent placements cannot compensate for earlier disadvantage.

As such the family courts and Local Authorities will have a continued obligation to ensure that such families' needs are considered holistically and if necessary consider whether the case warrants an 'exceptional' duration beyond 26 weeks.

Furthermore, Jan Loxley-Blount commented that there are many cases referred to Parents Protecting Children UK, where social workers do not appear to have identified the most appropriate type of assessment for a child with autism, and recommended the wrong assessment which has led to a child being put forward for adoption out of their families. It seems that attachment in autism is misunderstood. We need to put safeguards in place.

Dr. Liz Gillett commented that this is a problem of skilling-up our identification of what assessments we need and by whom. Some members commented that there is a need to sharpen up skills as family justice professionals and perhaps give more training to judges to identify the right expert for the right assessment.

d) Question 4: Kim Lewis (Solicitor)

'What is the Council's view on the observation made in the Family Justice Review that expert witnesses could be remunerated directly by the LSC?'

Dr. Heather Payne provided the response below:

The FJC sees the improvement of supply, quality and use of expert witnesses in the family courts as a high priority, and has been working across disciplines with the aim of achieving a situation where no case is delayed due to having to wait for an expert opinion.
Direct payment, thus avoiding potential delays in confirming fee rates, may be one of the ways that improvements can be made. The FJC is exploring this, along with other ways of reducing potential delay, including narrowing issues for the expert, focusing letters of instruction, and clarifying expected standards for experts and simplifying fee rates.

4 & 5. FJC Priorities and contribution to the Modernisation agenda

Alex Clark outlined his paper and invited comments from members. The Chair reminded members of the recent letter from the President to members of the standing sub-committees. The Chair stressed that this new structure will be the programme of work for the next few months and, therefore, not set in stone. Mrs. Justice Parker indicated that members from the Money & Property committee will provide a discrete piece of work in conjunction with the Law Commission in drafting their proposals on “needs" within section 25 of the Matrimonial Causes Act 1973. Some members expressed concerns about the lack of reference to the Voice of the Child (VoC) in the proposed work programme. It was noted that David Norgrove had praised the work of the VoC committee and highlighted the importance of the child in the FJR report. Other members raised similar concerns about the lack of reference to parents and relatives, and questioned how the role or contribution of service users would fit into the new work programme. Some members expressed the view that many of the work-streams for the FJC were generated through the sub-committees, and questioned how new projects were to be identified without the meetings of the sub-committees.

Concern was also expressed over the function of the Executive and how it would make decisions on work priorities for the FJC. Members would welcome some clarity over what the decision-making progress will be and how this will be communicated. It was noted that family cases are not just about children, but also about divorce, domestic violence and forced marriage. It was suggested that each working group should be considered against the criterion, ‘How is this work going to assist the outcomes for children?’

Members had a discussion about the existence of the Children and Young Person’s Board, to be established to give advice to the FJB on children’s issues. Some members were concerned about the credibility of the CYP will be influenced strongly by the arrangements that are put in place to support it.

With regards, to the Diversity Committee, members were reminded that the committee was set up by Thorpe LJ five years ago as a ‘forward looking’ committee, yet this is not reflected in the new work programme for the FJC. Also, members were concerned that consideration should be given to the ongoing work of the Diversity Committee, on Muslim marriage and forced marriages.

The Chair noted that the paper had been circulated to the Council for approval and the paper would be amended to reflect the discussion. It was suggested that there should be a mechanism of feeding in the cross-cutting issues of children, parents and relatives, and

diversity. Members asked to be given further information about the CYP Board. It was explained that the DfE were seeking assistance from Cafcass about the structure and function of the CYP board. It was noted that given the Office of the Children's Commissioner statutory responsibility for children, the DfE should seek assistance from the OCC also.

After the coffee break, a number of members discussed the possibility of a small working group, addressing the Voice of the Child issues that arise in the work of the FJC. The suggestion was that members would meet a few times a year with the Secretariat forwarding the issues for discussion to the group. A suggestion was made for terms of reference to be drafted for approval by the FJB. Other members commented that there may be some merit in members declaring their area of expertise with a view to reviewing the interdisciplinary background of the Council and its members.

6. Experts

Dr. Heather Payne outlined her paper which had been circulated to members. She invited members' comments, points and general critique of the paper. It was noted that there were a number of means by which an expert can be accredited, and this was an attempt at having one clear document as guidance. Some members found the appendices very helpful, and it was suggested that this list could be matched to the list of disciplines currently used by the LSC. This suggestion was welcomed, and linked to another project on which Dr. Payne is currently working.

Other members commented on the problem of lawyers at a case management conference discussing what assessments are needed when they lack the necessary specialist knowledge. Some members suggested the use of an expert triage system. Other members identified a number of other areas requiring attention, such as restricting the length of expert reports; removing the need for contact notes in bundles; maintaining the anonymity of experts' names. Some members questioned how a judge would assess how an expert had demonstrated compliance with the standards set out in paragraphs A – G on page 2 of the paper, and the amount of time this would add to the case management of a case in a court list. Other members were concerned about the extra work and responsibility being added to the Child Solicitor in cases, particularly as it will probably be the Child Solicitor's responsibility for providing this information. It was noted that Child Solicitors are under an increased amount of pressure given the current changes in the public funding of cases. Other members suggested that the guidance should extend to pre-proceedings work.

It was suggested that the expert in the case should complete a one-page proforma for the court, demonstrating how he/she meets the standards. Dr. Heather Payne pointed out that any expert in pre-proceedings undertakes the work as though he/she will be asked to prepare a court report, so they would have to demonstrate the standards in any event.

7. Litigants-in-person

Mrs. Justice Parker and Alison Russell QC have been working together on this and liaising with the Civil Justice Council. There is a 'nutshell' document guide in draft form being produced by the PSU in the RCJ, through the Civil Justice Council. This does not include family cases. Some members suggested that it may be worth liaising with groups like Wikivorce, to get views from the 'front line' and service users. Other members highlighted the difficulties faced by advocates opposing a litigant-in-person, and suggested that any guidance should assist advocates and the judiciary, as well as litigants-in-person.

8. Public Law Workforce Development

Members considered the paper drafted by Joe Murphy at MoJ. This is an initial scoping document with the aim of generating discussion among members. Dr. Liz Gillett invited comments and feedback. The chair noted that the paper referred to areas of work that were familiar to the FJC, albeit under a different heading.

9. Pre-proceedings

Members considered the paper drafted by Stuart Moore at MoJ. Beverley Sayers noted that this document was a helpful starting point and invited comments from members. It was noted that the name 'pre-proceedings' was not wholly representative of the proposed work of this group, and it may be a good idea to change the name of the group. At the outset, the focus of this group will be on private law areas. It is important not to duplicate the work of Government departments and the Family Mediation Council.

10. Cross- Jurisdictional Protocol (VoC)

District Judge Crichton gave an update on this work and highlighted a recent judgement in the Immigration Upper Chamber - Sharma DA/00062/2010. There was grave delay in the related matters in the family court and the immigration court in that case decided to wait and liaise with the family court. As a result, there is renewed interest in the protocol. District Judge Crichton will remit the draft back to the group which drafted it to see if it would be possible to shorten it whilst still retaining the essential safeguards.

11. Child Development Guidance

Dr. Liz Gillett outlined the paper circulated to members, which included the list of contents and draft first chapter. It has been a very useful collaboration and members were invited to comment. It was noted that the guidance is approximately 108 pages in length. It has been seen by the President, who will be invited to write a foreword prior to publication. It is envisaged that the guidance will be a useful tool for professionals in the family justice system, rather than a government document. The final plan for circulation is under discussion.

12. Any other business

a) In the case of *A & S (Children) v Lancashire County Council* [2012] EWHC 1689 Mr Justice Peter Jackson said a national review of cases where children remain under unsuccessful freeing orders or placement orders was necessary "to ensure that such children are not being disadvantaged as a result of their incorrect legal status". In this case the council were found to have breached the human rights of two teenagers. Sue Berelowitz updated members on this development. Some children have not had contact with their birth families, whereas they have a right to see them. This matter is being given urgent attention by the Government and it is understood that between 250 and 300 children may be affected. Some members raised the importance of bringing this work to the attention of the Welsh government.

b) Lords Select Committee on Adoption:

Bridget Lindley brought this to the attention of members. It was noted that the deadline for written submissions is the 19th July.

c) Draft legislation reforming the Children's Commissioner's role published and provisions will undergo pre-legislative scrutiny. The draft legislation can be found at:

http://www.official-documents.gov.uk/document/cm83/8390/8390.asp

The aim is to strengthen the role of the Office of the Children's Commissioner. It follows an independent review of the role, which reported in December 2010

d) Local FJBs – update

Despite the short delay, the starter packs for the locals have now been signed off by Ministers, and about half of the local FJBs have a date fixed for their first meeting. Members will be kept informed.