



JUDICIARY OF
ENGLAND AND WALES

Families Need Fathers Conference 2018

Keynote Address by Lord Justice McFarlane

25 June 2018

Thank you very much for inviting me to speak to your conference. I am very pleased to be here and to have the opportunity both to share my views with you and, almost more importantly to me, hear your views at a time when I am preparing to don the mantle of President of the Family Division.

Although I say that I am pleased to be here, in one sense I am not. In a similar manner, I suspect that each of you would rather not be here. In happier times, I suspect that you would not have contemplated the need to become a member of a group such as “Families Need Fathers”. You are in this room because something has gone wrong for each of you as individuals, in terms of relationships within your family and, further, that attempts that you have made to seek help and achieve redress for those difficulties in the Family Courts have fallen short, no doubt well short, of what you had hoped to achieve. So, you would each rather not be here, but would rather be out there being an ordinary parent to your child or children on this sunny Saturday morning.

I, for my part, would hope that family life was being lived in such a way that there was no need for recourse to the Family Courts or, if there were, the courts could, in each case, deliver an effective and speedy outcome to the satisfaction of all concerned. But that, too, is plainly not the case for every family.

In our different ways, therefore, we would all rather not be here but, because there are difficulties, possibly many difficulties, I am glad that we are here and I look forward to the next 90 minutes firstly of monologue from me, and then, hopefully fairly soon, of dialogue with you.

Families Need Fathers has an honourable history and rightly demands the respect and understanding of the senior family judiciary. I share the view of Sir James Munby that it is important for the President of the Family Division to have an ongoing relationship with easy communication with your organisation.

For my part, during my time as Family Division Liaison Judge for the Midlands, some 7 or more years ago, I valued contact with local FNF groups and learnt a good deal from individual FNF members, even though their accounts of the operation of the family system were, at times, depressing.

The knowledge and experience gained from these encounters with FNF members, and more widely from sitting as a Family judge, travelled with me into the Family Justice Review, where I was the legal member of the small review team. In that role I worked closely with Sir David Norgrove to understand the problems then inherent in the functioning of the private side of the child law jurisdiction and to develop the Review's recommendations in that regard.

A key element of those recommendations was to 'make parental responsibility work' by enabling parents to reach agreements, while ensuring that the child's welfare remains paramount. We recommended the replacement of the pejorative labels of 'residence' and 'contact' with 'child arrangement orders'. We recommended that there should be 'a coherent process of dispute resolution' starting with an online information hub to help couples resolve issues, moving mediation, MIAMS, SIPS and then, if necessary, to a tightly controlled court based resolution process conducted by the same judge throughout.

We will no doubt have some discussion this morning as to how those recommendations have worked, and I welcome constructive feedback and ideas for further change.

Having now spent 7 years in the Court of Appeal, at some distance from the day to day operation of the Family Court, I do not yet have a great feel for the detailed operation of these reforms, or of the private law programme which was developed within the rules to deliver the changes into the system. In the Autumn I will embark upon a series of visits during which it is my aim to meet every fulltime Family judge at each of the 40 or so designated Family Court centres, together with the local magistrates, local CAFCASS officers and members of the legal profession. In addition, I will develop and maintain contact with interested groups, such as FNF and Women's Aid, in order to gain a very, very, detailed understanding of the operation of the private law programme as it is experienced case by case, family by family, judge by judge on the ground. Once that process is over, possibly by the time of your conference next year, I will be in a much better position

to understand what goes well and, no doubt, what does not and what may need to be changed.

At this stage, however, from what I have been told already, it is easy to understand that the idea that every couple would be referred to and attend an introductory meeting with a mediator has not been successful. Equally, the fact that Legal Aid was withdrawn, in all but a small group of cases, at the time that the reform changes were coming in, has plainly caused additional difficulty.

In addressing this audience, I can say, as I would say in the same terms to any audience of parents, that I can understand just how difficult and daunting it is not only to come to court seeking orders about your future relationship of your own child or children, but to do so without any legal representation or other professional support. In addition, I worry greatly about those parents who, despite being presented with arrangements that adversely impact upon their relationship with their child, walk away because they simply cannot face the court process.

I have, in various sways and in various cases, given judgments designed to speak beyond the circumstances and issues of the particular case before the court so that my words may be heard by a wider audience of parents who are in conflict. In particular, in *Re W* [2012] EWCA Civ 999, I stressed the ‘responsibility’ of each parent on separation to ensure that the rights of the other parent are respected, and vice versa, for the benefit of their child and I added:

‘Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child’s needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say “no” to reasonable strategies designed to improve the situation in this regard.’

More recently in the case of *Re J* [2018] EWCA Civ 115 the Court of Appeal found itself in the unfortunate position of agreeing with a father that the lower court had failed to engage with and determine his case in accordance with established guidance and speedily. However, because so much time had gone by, both in the lower court and in bringing on the appeal, it was, despite the father’s success before the appeal court, not possible to contemplate that any alternative outcome other than no contact order would be made following a retrial. Some cases stay in a judge’s mind long after they have concluded, and *Re J* is one such for me. The clear lesson from the case was to underline the need for the

court to follow the procedure laid down in FPR 2010, PD12J when allegations of domestic abuse are made.

When domestic abuse allegations, which are sufficiently serious as to be likely to be relevant to the welfare arrangements, it does not help either parent, the children or indeed the court for the contested factual issue to be adjourned and adjourned, rather than determined at the earliest opportunity. In *Re J*, not only did the court fail to make any contact order for a period measured in years, the father was subject to a continuing non-molestation injunction preventing him from having any contact. That injunction had been based upon the untested and contested factual allegations which were never tried. But even where an injunction is not in place, the need, stated in PD12J, for the court to get on and determine the factual issues is plain. Until the factual context is clarified and determined by the court, the arrangements for the children cannot move on and develop in a way which reflect the risk, or lack of risk, arising from the facts as they are found to be.

I wish, if I may, to deal with three specific “current” issues. I have put the word “current” in inverted commas because, as you will well know, two of these issues will have been prominent at every FNF meeting at any time in the past 10 years or more.

The three issues are:

- i) Domestic abuse
- ii) Alienation
- iii) Possible future developments

As the years have gone by the understanding, first of child psychologists and child psychiatrists, then of other professionals, judges and magistrates as to the potential adverse impact of domestic abuse upon children in a family has grown and developed. At each turn, as time has gone by, the potential significance and importance of this feature in the cases where it is said to arise has grown and grown. At the same time the very label used to describe this behaviour has changed from “domestic violence” to the more widely based current label of “domestic abuse”.

Not only is the importance of this factor, where it is proved, a given in terms of the welfare evaluation undertaken by any judge in a children case, the approach of the court is actually proscribed in terms by PD12J where, in the course of a lengthy paragraph (paragraph 36) it is stated that “the court should make an order for contact only if it is satisfied the physical and emotional safety of the child and the parent with whom the child is living can, as far

as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.”

The impact of domestic abuse upon a family has recently be given additional focus by research published by Women’s Aid entitled “What about my right not to be abused? : Domestic abuse, Human Rights and the Family Courts.” This research should be, I would suggest, required reading for any active member of FNF. Such readers are unlikely to agree with every single proposition contained within the pages of the research paper. Indeed, as the authors accept, the research, which, almost of necessity, is based upon a self-selecting cohort of individuals, has limitations. It is, however, an important document and one to which all those, such as the President of the Family Division, who have to have regard to the whole picture in relation to these issues, must afford weight, just as weight is to be afforded to the evidence and arguments of the other side of the coin which are so effectively put forward by FNF.

I wish to say something now about “alienation”. For some time there has been debate as to whether or not the holy grail of “parental alienation syndrome” actually exists. For my part, I have never regarded it as important to determine definitively whether or not psychologists or psychiatrists would be justified in attributing the label “syndrome” to any particular behaviour in this regard. In time gone by, there was similar debate as to whether a diagnosis could be made of “Munchhausen’s Syndrome by Proxy” in such cases the focus of the Family Court, rightly, moved away from any psychological/psychiatric debate in order to concentrate on the particular behaviour of the particular parent in relation to the particular child in each individual case. If that behaviour was found to be abusive then action was taken, irrespective of whether or not a diagnosis of a particular personality or mental health condition in the parent could be made.

In my view, “alienation” should be approached in the same way. From my experience as a first instance judge, albeit now more than 7 years ago, I readily accept that in some cases a parent can, either deliberately or inadvertently, turn the mind of their child against the other parent so that the child holds a wholly negative view of that other parent where such a negative view cannot be justified by reason of any past behaviour or any aspect of the parent-child relationship. Further, where that state of affairs has come to pass, it is likely to be emotionally harmful for the child to grow up in circumstances which maintain an unjustified and wholly negative view of the absent parent.

The Women's Aid research describes accusations of parental alienation being used against women who raise concerns about domestic abuse to the extent that allegations of abuse are "obscured by allegations of parental alienation against the non-abusive parent."

Drawing matters together, that short quotation from the Women's Aid research neatly points to a theme in this short address which is to stress the importance of fact finding. It is, as I have already observed crucial, both to the interests of the alleged victim and, in fact, to those of the alleged perpetrator, for any significant allegations of domestic abuse to be investigated and determined as matters of fact, similarly any significant allegation of "alienation," should also be laid out before the court and, if possible, determined on the same basis.

Although I anticipate that you will understandably and rightly wish to raise the question of the enforcement of child arrangement orders with me, I would prefer to leave that to the discussion which will follow shortly rather than taking further time in addressing you on it in this more formal speech. I therefore turn, finally, to the suggestion that I first trailed in the address that I gave to the NAGALRO Annual Conference in March entitled 'Contact: A Point of View'¹. In that paper I acknowledged that the judiciary had in the past pulled back from publishing guidance on the range of outcomes that are regularly considered to be the 'norm' in the majority of cases, and I acknowledged that there may well be good reason for such reticence. I went on, however, to set out my own perspective in these terms:

'For a long time, going back to conferences chaired by Dame Margaret Booth and Dame Joyanne Bracewell 15 years ago, I have been interested in and supportive of the 'Early Intervention Project' ['EI'] promoted by Dr Hamish Cameron and others. At the core of the EI approach is the need to manage the expectations of parents as to the post-separation arrangements for their child from the earliest point. Key to this approach is the issuing of general guidance on what a court would regard a reasonable amount or pattern of contact to be (in cases where there is no safeguarding risk to the child); to be of weight, such guidance can only come from the judiciary.

In addition to a statement of norms being of benefit as a thing in itself, other jurisdictions have linked this approach with other steps, some of which are now familiar here, including:

¹ <https://www.judiciary.uk/announcements/speech-by-lord-justice-mcfarlane-contact-a-point-of-view/>

- The early agreement to, or imposition of, a ‘standing temporary order’ based on the norms for the age of the child in order to maintain some contact in the interim stages;
- Parenting Education Classes (similar to the PIPs that are currently available);
- A Parenting Conciliation Session (similar to the current FHDRA appointment);
- The making of a consent order.

Whether or not this is an idea that is taken forward and developed must be entirely a matter for the Family judiciary. For it to be authoritative, it would need to be developed and ‘owned’ by all levels of the judiciary, particularly the lay justices and district judges who hear the majority of these cases. The process of development would take time, but it is, in my view, a proposal that should now be given serious consideration by Family judges.’

We are meeting some three months after that speech. The world has, of course, not changed in that time, but neither have my views. During the in depth and nationwide ‘drains up’ tour upon which I am to embark in the autumn, I intend to canvass the family judiciary widely upon for ideas on ways in which to improve our ability to assist families to achieve a reasonable and child-focussed solution to private law disputes. If, as may or may not be the case, there is a groundswell of support for some form of judicial guidance of the type I have described then I will readily take it forward. I must stress, however, that for any such initiative to carry weight and respect it must genuinely arise from within the judiciary and carry the support of a good majority of the family judges and magistrates. Whilst I am firmly in favour of looking at this option, it will be for the family bench to decide whether to develop and deliver it.

May I conclude by thanking you again for the invitation to address you this morning. I see this as the beginning of a relationship and a dialogue that will continue throughout my time as President. Thank you.

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