Family Justice Council

Minutes of the Council Meeting
23 April 2018, Royal Courts of Justice

Present:

Mr Justice Baker, Deputy Chair – acting Chair
Christina Blacklaws, Private Law Solicitor
Melanie Carew, Cafcass
Alex Clark, Secretary to the Council
Jaime Craig, Child Mental Health Specialist
Rebecca Cobbin, HMCTS
Maud Davis, Public Law Solicitor
Elizabeth Gibby, Ministry of Justice
Andrew Greensmith, District Judge
Rosemary Hunter, Academic
Alison Kemp, Paediatrician (by phone)
Beatrice Longmore, Office of the Children's Commissioner
Sara McIlroy, Parents and Families
Matthew Pinnell, CAFCASS Cymru
Jane Probyn, Circuit Judge
Dominic Raeside, Family Mediator
Stuart Smith, Justices' Clerk
Malek Wan Daud, Barrister
Natasha Watson, Public Law Solicitor
David Williams, High Court Judge (last part of meeting)
Chanelle Wright, Department for Education
Paula Adshead, Assistant Secretary to the Council
Daphna Wilson, Secretariat

Apologies:
Colette Dutton, ADCS
David Duffett, Department for Education
Elizabeth Isaacs QC, Silk

Guests:
Jenny Birchall, Women's Aid
Peter Davies, National Association of Alienated Parents (NAAP)
Amandeep Gill, Thomson Reuters

Announcements:

The Chair informed members that Mr Justice David Williams had succeeded Mr Justice Stephen Cobb as the High Court Judge member. The Council would benefit from his knowledge and experience and was looking forward to working with him.

2. Minutes of last meeting:

The minutes were approved.

Matters arising:

FJC guidance:

Two guides (*Capacity to Litigate in Proceedings about Children* and *Financial Needs on Divorce*) would shortly be published on the FJC website and circulated to interested parties. It would also be sent to Council members who were asked to disseminate widely.

3. Business Plan

Updates were provided as follows:

Activity 1: Practice Guidance on the Use of Paediatric Expert Evidence in Family Proceedings

Alison Kemp had provided a draft for the Council's consideration. There was discussion over the wording in Section 4 in relation to written questions. It was agreed to remove the reference to ten days and Jane Probyn would redraft the paragraph accordingly. Once finalised, the guidance would be sent to the President and the RCPCH seeking their approval.

Activity 2: Lessons from Research for the Judiciary

Members were asked to note the final report and recommendations from the University of Sheffield. Professor Kate Morris was expected to attend the next meeting to provide an update on the position.

Activity 3: Support for Litigants in Person

Sara McIlroy informed the Council that she and Rosemary Hunter were currently gathering statistics on FHDRAs. The remaining tasks within Activity 3 would now be incorporated in Activity 10.

Activity 4: Judgecraft in relation to Litigants in Person

Rosemary Hunter provided an update on the first phase of the project. A meeting was scheduled at the end of May to finalise the scripts for the two videos. The Judicial College was enthusiastic about the project and had lined up actors. The videos would be available for use in the Judicial College programme next year – for formal training courses, e-learning and as points for discussion.

The second phase would see the formation of specific focus groups to identify good practice.

The videos would be aimed at the judiciary and legal advisers rather than the public.

Activity 5: Child Protection Mediation

Andrew Greensmith reported that there were no further developments following the working group's submission to the Care Crisis Review. The review was expected to report in June, following which, the new President would consider which of its recommendations to put to the Government.

Malek Wan Daud commented that he had recently attended an FRG workshop but there had been no mention of the project. Alex Clark assured members that he would check the position with the FRG.

Activity 6: Exceptional Case Funding (ECF)

Rosemary Hunter informed the Council that the first version of the Public Law Project's (PLP) *How to…* guidance had been published online - http://www.publiclawproject.org.uk/resources/277/how-to-get-legal-aid-exceptional-case-funding-ecf-in-welfare-benefits-cases
Further revisions were expected, after which the guidance would be circulated widely and an article written for Family Law.

PLP had published its research into Family Law and Access to Legal Aid, which also considered the low uptake of ECF:
http://www.publiclawproject.org.uk/data/resources/283/Family-Law-and-Access-to-Legal-Aid.pdf It found that the application process was too complicated, particularly for a lay person. Furthermore, legal advisers were reluctant to undertake applications as the process was too lengthy and the chances of getting funding, too low. PLP's recommendations included simplifying the application process and expanding the scope for legal aid.

A report was expected shortly regarding the Rights of Women project. It found that most of the cases referred to them were, in fact, in scope for legal aid and that there was a considerable lack of understanding by the referrers. Christina Blacklaws added that many solicitors lacked an understanding of financial abuse and therefore such issues were not taken as seriously as they should be. It would be helpful for the judiciary to be able to refer to a list of local firms willing to investigate the issues. The Law Society's "Find a Solicitor", and Resolution and local authority lists were useful resources.

It was important that all parties were aware that there were financial limits and that applications were not being rejected for no reason.

Rosemary Hunter also spoke about the LASPO review and asked whether the Council should respond. It was acknowledged that the interdisciplinary nature of the Council would make it difficult to provide its own evidence but there was scope for providing a perspective on published data. It was noted that the Law Society had evidence that could feed into the FJC response.

It was agreed to set up a working group to look at the issues and formulate a response. Christina Blacklaws would lead with support from Rosemary Hunter, Maud Davis, Jane Probyn, Dominic Raeside, Stuart Smith and the new DJ member, once appointed.

Activity 7: Pensions Advisory Group

Dominic Raeside informed the Council that the papers had recently been sent to the President and were also published on the Nuffield website. PAG was expected to conclude later in the year.

Rosemary Hunter added that there were specific reports for professionals but there was uncertainty over what was emerging for litigants in person. It would be important to flag up the fundamental issues and it was suggested that this could be an area of work for Advicenow.

Activity 8: Covert Recordings

Natasha Watson informed the Council that she expected to have the final draft ready in July. She added that further members had been enlisted for the working group including a representative from the Law Society, a forensic expert and a senior barrister for the CPS. Suesspicious Minds, the Young People's Board and TACT would also contribute. Melanie Carew and Maud Davis would provide a perspective from the pre-proceedings angle.

Activity 9: Pre-proceedings

Maud Davis and Melanie Carew had studied existing materials with a view to producing an updated guide. They had begun work on a first draft which would shortly be disseminated for wider consultation.

Activity 10: Communications and dissemination of FJC work

There had been no further developments.

4. Recent research and Specialist Domestic Abuse Courts (SDAC)

Rosemary Hunter spoke about Creating Paths to Family Justice: Online Dispute Resolution Processes and the Access to Justice Gap', highlighting in particular a new video "Considering Mediation?" which explained the importance of emotional and practice readiness for mediation. https://www.youtube.com/watch?v=RkTz_9AM3Mo
She also mentioned that although the criteria for an end-to-end Online Family Dispute Resolution service had been formulated, there had been no viable business model and insufficient interest in funding the project. Christina Blacklaws agreed, stating that the Relate online dispute resolution scheme was technically possible but needed funding.
http://www.mylawbc.com/paths/family/

The difficulties in getting users involved in online dispute resolution was acknowledged and members felt that this was an area which might benefit from some impetus from government.

Rosemary then spoke about an Australian report which considered ways in which the Australian family law system could better support and protect families affected by domestic abuse. One recommendation was the extension of integrated domestic violence courts (one judge, one family) to deal with all family law matters – protective injunctions, child arrangements and financial issues – for families affected by DVA.

Rosemary had circulated a paper in which she detailed a proposal for an FJC working group to consider the idea of an SDAC in England and Wales and the potential for a pilot scheme. Inspired by the successes of overseas practices and FDAC, the proposal suggested that such an approach would be more far-reaching than Practice Direction 12J.

Several members commended the proposal and Maud Davis suggested linking up with initiatives around anti-stalking. However, the Chair pointed out a number of practical difficulties including resource implications, the prevalence of domestic abuse and the fact that it can arise at various points in family cases and in different contexts. He felt that an SDAC on a national basis was unrealistic at this stage and that the focus should be on all judges and practitioners having a better understanding of domestic abuse.

Christina Blacklaws stressed that there was not a sufficient level of understanding in the legal profession. An SDAC pilot would raise awareness and provide an opportunity to improve ways of working. Natasha Watson pointed to a pilot scheme in Sussex, looking at practices around domestic abuse for Cafcass and local authority social workers – a template for Section 7 had been developed and was being trialled. Melanie Carew highlighted the Cafcass domestic abuse pathway. She felt that the working group should look at all the issues, rather than focus only on the end point being a SDAC or a pilot scheme.

It was agreed to set up the working group to be led by Rosemary Hunter with support from Jane Probyn, Sara McIlroy, Christina Blacklaws, Natasha Watson, Melanie Carew and Stuart Smith. Andrew Greensmith would be part of the working group until a new District Judge had been appointed. External members would be co-opted as necessary.

5. Consultation on domestic abuse

The Chair apprised members of a joint Home Office/MoJ consultation "Transforming the response to domestic abuse". It was agreed that the Council should respond. The points made in its response to the Prison and Courts Bill consultation last year might be reiterated and the new working group on domestic abuse should be flagged.

6. Conference planning

Members were informed that the Executive Committee had proposed amalgamating the all-day conference and the Bridget Lindley Memorial Lecture. To be held in March 2019, the focus should continue to be on a public law subject in keeping with Bridget's work. Natasha Watson suggested a theme around helping parents to help children. Jaime Craig spoke about how best to support the families of children with mental health issues. He referred to the consultation: Transforming children and young people's mental health provision: a green paper – https://www.gov.uk/government/consultations/transforming-children-and-young-peoples-mental-health-provision-a-green-paper (now closed).

It was agreed to agree the topic and finalise a list of potential speakers at the next meeting in June.

7: Any other business

i. The Chair raised the issue of new data protection laws being implemented on 25 May. A privacy notice drafted by the Civil Justice Council had been circulated for members' consideration. This set out the key points for people to know before they provided information to an organisation, explaining what constitutes personal data and how it would be used. Although the Council holds very little personal data, it should still have in place a privacy notice. It was agreed that the CJC's draft would be adapted accordingly.

ii. Elizabeth Gibby informed the Council that a new data tool was now publicly available. The Public Law Applications to Order (PLATO) presents quarterly family statistics from Cafcass, DfE and MoJ. Given the extensive amount of information held, the tool should prove an invaluable resource for stakeholders. MoJ and DFE analysts were using the material to draw out particular issues to inform future practice and training. The Local Family Justice Boards (LFJBs) have also been asked to consult PLATO to help improve performance. Figures currently showed a rise in the volume of cases as well as vast regional variations, especially in converting from first applications to care orders.

iii. David Williams raised the issue of whether the FJC should include children and young people as members. One way to achieve this might be to invite the Family Justice Young People's Board to send representatives. Members felt that there were several ways in which representation of children and young people could be improved and it was agreed that this should be discussed in more detail at the next meeting.

8: Guests' questions

The Chair invited the guests to put their questions to the Council. These can be found at annex.

Annex

Guests' questions

1. Ann Haigh- Nagalro (not present)

Is data recorded from Parental Order Applications about the nature of the surrogate mother's relationship to the commissioning parents? Ie is she a relative?

Answer from Melanie Carew:

Cafcass has data on all applications made for parental orders but records centrally only the bare data in relation to the application. We do not hold data on the relationship between the Applicants and the surrogate and to obtain it would require interrogation of each case file individually so it would be beyond the scope of the Freedom of information Act to undertake that process. However, in the course of their investigations I am confident that the issue of the relationship between the surrogate and the applicants would be part of the discussion between the Parental order reporter and the Applicants in the course of their enquires. And in most cases the parental order reported will also speak to the surrogate and any relationship would inevitably be discussed.

2. Nigel Pankhurst - Families need Fathers (not present)

Why are court orders worded in such a way that leaves the orders as unenforceable?

Answer from Andrew Greensmith

I presume this is in relation to orders made under section 8 of the Children Act which are known as live with or spend time with orders.

This is an excellent question and I can fully understand why it has been asked.

The answer to the question is in two limbs: the construction of the contact order and the means of enforcement of breach.

I think there are two points to make here to bear in mind when a spend time with order is being made:

1. No order of the court should be made unless it can be enforced.

2. The court will usually endeavour to word orders in such a way as they will promote parenting between the parents.

There is often a conflict between these two aims.

At the centre of every court order in relation to children, is a child. The court has the child's welfare as its paramount consideration. The court has a statutory obligation to assume that promoting both parents input into a child's life is in the interests of the child.

Court orders are made in a moment of time – a snap shot. A child is not frozen in that moment. It is a truism that children are aging and maturing all the time. In order for parents to develop their role as parents and in order for children to benefit from being parented by two parents, it is inevitable that there has to be flexibility and a chance for the parents to be able to communicate so that they can best meet the needs of their child.

In order to accommodate this, spend time with orders are often worded in such a way as will promote contact whilst simultaneously allowing appropriate flexibility. For example, an order might say:

"Reasonable contact"; "… and such further time as may be agreed between the parents"; for a minimum of [3days] per week; "half the summer holidays" [without specifying which weeks].

Each of these will leave the parents in a position of having to negotiate. The problem, of course, is when negotiations break down and one parent applies to enforce the order.

In order to enforce a spend time with order, the court has to be really sure the order has been broken and then that there isn't a reasonable excuse for doing so. In each of the above examples the first hurdle is going to be difficult to cross because of the subjectivity of the contact provision.

There will be times when the court considers it to be in the best interests of the child to make a rigid or defined spend time with order:

"from 4pm until 7pm each Monday"; every other weekend from 5pm Friday to 4pm Sunday"

Establishing a breach is much easier in these cases but there is still the test of reasonable breach which only need to be proved on the balance of probabilities. Unless the breach has taken place soon after the order was made, it could be the needs of the child have changed or that new developments have taken place to potentially justify a breach. In such cases it may be necessary for Cafcass to renew safeguarding checks or even to prepare a Section 7 report to ensure the terms of the original order continue to meet the needs of the child.

The best orders are those which are made as a result of an agreement reached through mediation, but even then, the passage of time may make to order not fit for purpose and so impossible to enforce.

3. Question from Liz Archer- Family Resolutions (not present)

There have been a lot of advances in the therapeutic knowledge base relating to family attachment (Dynamic Maturation Model), the resist/refuse/reject dynamic in children (Parental Alienation) and the psychological harm and emotional distress experienced by children with lifelong consequences when this happens (Adverse Childhood Experiences, Developmental Trauma and Dr Amy Baker has conducted specific research into this population).

How is the Family Justice Council updating training for the judiciary so that the best interests of children are served with the most relevant and up to date knowledge available?

Answer from Elizabeth Isaacs:

In March 2018 the Family Justice Council received the final report commissioned jointly with the Nuffield Foundation – *Exploring the lessons from dissemination of research to the judiciary involved in public family law and child care proceedings* – from an academic working group at the University of Sheffield Department of Sociological Studies.

The report included a review of the key features, strengths and shortcomings of social research dissemination arrangements targeted at and available to the judiciary

involved in child care proceedings. The study also conducted qualitative interviews with members of the judiciary (including magistrates, district judges and circuit judges made up of representatives from the six regional family court circuits in England and Wales) and senior members of the Judicial College to explore judicial perspectives and experiences in accessing, interpreting and using social research in relation to child care proceedings. Participants were keen to see developments towards a more comprehensive, coordinated and better resourced approach to research dissemination and research support.

The key themes and findings of the study emphasised the importance of in-house judicial arrangements for endorsing and disseminating research relevant to care proceedings.

Overall the study has recommended that research dissemination for the judiciary needs to be improved in the short-term, and that the judiciary could be made more aware of the range of current research resources and provided with some brief guidance about their key features.

It is planned that follow-on work based on the recommendations from this study (a briefing paper for members of the judiciary) will be considered by the FJC later in 2018.

Jaime Craig highlighted the MindEd learning resource which was available to everyone. He indicated that the Royal Colleges updated this on a regular basis and a new pathway would be created especially for the judiciary. There would also be similar pathways for practitioners.

Jane Probyn speculated as to whether the judiciary should share what they have read with parties.

Dominic Raeside pointed out that the question was more specific and related to attachment issues which was a very complex field and difficult for the judiciary to deal with. Matthew Pinnell added that Cardiff University had recently completed a literature review on parental alienation and this would be considered by the Council at its next meeting.

4. Question from Amandeep Gill - Practical Law Family, Thomson Reuters

When will the Council consider & publish guidance on the use of covert recordings in family law proceedings as requested by the President of the Family Division in Re B (A Child) [2017] EWCA Civ 1579?

Answer from Natasha Watson:

A multidisciplinary Working Party has been established to draft the guidance. It is anticipated this will be considered by the Council and published in the autumn of 2018. The working party includes a range of professions and representatives of organisations, including a mental health expert, Cafcass, the Association of Lawyers for Children, the Law Society, social workers, and a representative from the Transparency Project. The Working Party has extensive terms of reference considering a broad spectrum of covert recordings involving children, adult parties to proceedings, and professionals. Information to be considered by the working party includes existing guidance across different agencies, the input of a forensic expert, and data protection issues. Arrangements have been made for the input of young

people into creating the guidance so that their voice is understood regarding the impact and implications of covert recordings.

5. Question from Peter Davies – National Association of Alienated Parents (NAAP)

Even for seasoned advocates appearing in the family court can be a daunting experience. Professor Jo Delahunty QC recently spoke of this. For a litigant in person, that has had a parent/child relationship severed and is dealing with very difficult emotions it is even more challenging. Against this backdrop the judiciary face increasing demands and growing workloads. In this fraught environment where does robust case management end and where does judicial bullying begin and should judges and court professionals make allowances for these people in the same way that they would treat any vulnerable witness with appropriate care and compassion?

Answer from Sara McIlroy:

I think it is important for all involved with family justice to appreciate that any litigant in the family court should be approached with a quantum of care and compassion. If they are in the family court, it is usually because they are in dispute about something which has been so important to them, their family or relationship which is now at a crisis point one way or the other. However, although court staff and members of the judiciary are well aware that there is an emotional side to any family court application and appreciate this, they need to balance this with the duty to ensure a pathway to justice.

We know that when there are so many schemes to help people resolve matters through mediation and their own arrangements, people mostly only come to court when those avenues have been exhausted. From the perspective of your organisation, if a parent is being alienated, you may have felt entirely frustrated by the pathways that would lead you away from being in court. At the same time, you are correct in assessing that courts and within them members of the judiciary are facing increasing demand with less resources to meet them.

Judges and court professionals know that what parties may agree between themselves, even with the assistance of the court, can often result in a better outcome for the family members in a case than an outcome which is imposed by the court. As such, effort is put into seeing if this is possible. Ultimately, if it is not, the case may need to move to contested hearings. To get the balance right and remembering that this is a legal system, all cases, whether with LiPs or full representation need robust case management. This can often feel cold to litigants in person who are unfamiliar with the system, particularly how cases are managed and the need to get documents done well and prepared on time at the same time as grappling with interim arrangements for their children that they are not happy with.

All judges receive ongoing training from the Judicial College. The Judicial College is totally aware of the need for the judiciary at all levels to be able to assist LiPs to present their case. Every Family course has an element in it which addresses this. Some courses, like the Business of Judging course, which teaches all levels of judiciary up to High Court level, uses actors to play the part of litigants on person during role plat exercises. This is also an area in which the FJC is working.

I appreciate that we need to continue to work to support litigants in person and make the family court system more approachable for them. This is something we continue to look at and work on. We will always open to hearing your ideas on how this may be improved.

6. Question from Jenny Birchall- Women's Aid

What dissemination, training and awareness raising activities for the judiciary and other family court professionals have taken place so far around the revised Practice Direction 12J, and is the council aware of any planned future activities?

Answer from Mr Justice Baker

Rosemary Hunter's earlier proposal regarding SDAC, I hope, answers the second part of the question. As to what's happening now, the issue of domestic abuse and the changes in approach contained in PD 12J are the subject matter of specific training modules in all private law courses. Domestic abuse is also covered in public law training. Thus every judge sitting in family law cases will receive training on this issue at least once a year.

The Judicial College is fortunate in the support and input provided by researchers and academics, including, amongst others, Professor Rosemary Hunter, who has an especial interest in this subject. The Director of Family Training, Russell J, who also has a particular interest in this issue, asks me to reassure the meeting that "the college takes most seriously this pernicious and perennial form of abuse affecting families who appear before the Family Court".

I understand that training is also provided by the FLBA and Resolution on a regular basis.

Andrew Greensmith pointed to a case theatre production in which actors deliver short plays showing how domestic violence develops in relationships and how it affects children. Stuart Smith indicated that the judicial College was also delivering our, the training for magistrates and legal advisers.