

View from The President's Chambers

December 2019

The unremitting pressure of work in the Family Court

This autumn I have continued to visit Family Courts in all parts of England and Wales, from Caernarfon to Canary Wharf. On each visit I have experienced palpable proof of a system which is still being forced to work at well over its capacity. That this is so is borne out by HMCTS data which shows that nationally the average length of public law cases rose from 30.1 weeks to 32.5 weeks over the past 12 months, with the percentage achieving completion within 26 weeks falling from 50.1% this time last year to a current figure of 43%. There has been a welcome fall of around 7% nationally in the number of public law applications that have been issued, but this average figure masks quite stark regional variations with the North East region, in particular, seeing a significant rise in numbers. The number of outstanding public cases as at November 2018 was 14,845; it is now 15,804.

In relation to private law proceedings, the volume of work continues its apparently inexorable rise. Prior to July 2019 the system had never received 11,000 applications under CA 1989, s 8 in one month; since then that barrier has been breached twice. The numbers of cases received nationally in the last four months were:

July:	11,947
August:	10,447
September:	10,535
October:	11,000

Whilst, as a result of the dedicated and remorseless work of all involved, there has been a corresponding rise in the number of cases that have concluded, our ability to resolve cases has been outstripped by the volume of new applications coming in so that the number of outstanding private law cases in the system rose from 42,622 in November 2018 to 49,249 in September 2019.

From a number of perspectives, these figures are a cause for significant concern. They indicate that, despite the best efforts of everyone in the system, often working at well beyond capacity, we are not keeping pace with the volume of cases that are coming in and the backlog continues to increase. We are, in effect, running flat out up a down escalator which, despite our efforts, is outpacing us.

This is not the place to contemplate in any detail the cocktail of causes behind these developments or the steps that we may take to change the situation; that work is being undertaken in depth by the Public Law and Private Law Working Groups, whose future timetable I will explain shortly. I am, however, as I hope every reader of this 'View' will

know, acutely concerned about the impact of this unremitting burden upon all those who work within the Family Justice System, whether as lawyers, social workers, CAFCASS/CAFCASS Cymru officers, HMCTS staff, magistrates or judges. 'Wellbeing' and morale remain at the very top of my agenda. To this end, I have encouraged each of the 42 Designated Family Judges ['DFJ'] to facilitate a conversation with all those who use or work within their area to develop a simple statement of understanding as to what is, and more importantly what is not, to be expected in terms of working hours and working practices. It is my hope that all 42 of these documents will be completed by the end of January and that it may then be possible to distil the key points which, I anticipate, may be common to many of the local statements with a view to issuing national guidance.

The Public and Private Law working groups issued separate interim reports at the end of July. The consultation process that then followed was most fruitful and I am very grateful to all those who responded. Since then the two groups have been considering their final recommendations. Different circumstances dictate that the timescale for the two groups will now diverge.

The Public Law Working Group, led by Keehan J, is set to produce its final report during January 2020. The recommendations are likely to relate almost entirely to matters of professional practice and procedure, and will not involve any need for legislative change, thus allowing those who may need to implement the changes to get on with the process soon after the report is published. Indeed, it is the case that many local authorities have begun to refocus their work with families prior to issuing court proceedings and, as the modest drop in application numbers indicates, this is already having an impact. It is my hope that, following training for all involved, including judges and magistrates, we will have implemented many of the PLWG's recommendations by the summer of 2020.

The Private Law Working Group, led by Cobb J, must necessarily move forward at a slower pace. The problems in Private Law are of a different order. Change in behaviour with regard to the court process in this area needs primarily to come from the lay parties, the parents, who bring or respond to applications regarding their children; this is therefore much more difficult to predict and manage. Another impact on the timetable is the need, rightly, for the Group to await the report of the MOJ Panel on Domestic Abuse in the Family Court which is not expected until February 2020. It is likely that the PLWG will wish to proceed on a staged basis, by trialling some of its recommendations through pilot schemes before forming final conclusions. The Group is therefore likely to produce a series of further interim reports, starting with one which records the outcome of the consultation process and the impact that the consultation responses have had on its current thinking.

I remain extremely grateful for, and impressed by, the endeavour of the 60 or so individuals who make up the membership of these two groups. This is hard, but most valuable, work.

The process of implementing the recommendations of the two working groups will be led by a steering group formed by the national leaders of each of the key agencies, including the judiciary, under the umbrella of the National Family Justice Board. Locally, implementation will be coordinated and led by each Local FJB.

In order to improve the court's ability to meet the increased volume of cases, I anticipate that next year, once again, the number of CJ and DJ 'sitting days' allocated to Family work will increase. In part this increase will be delivered by expanding the cohort of available judges with the addition of a number of circuit judges who have agreed to reduce their commitment to sit in crime in order to sit for at least 25% of their time in the Family Court. In addition, five High Court judges from the Queen's Bench Division are to sit from time to time to hear specific Family cases. I am most grateful to each one of these circuit and High Court judges for the valuable contribution that they will make, which will do something to ease the pressure on their hard-pressed Family colleagues.

Before leaving the topic of the increased workload in the system, I wish to make one overarching observation. The figures for outstanding cases that are currently live before the Family Court demonstrate the preponderance of Private Law applications (49,250) as against Public Law (15,800). The importance of addressing issues in relation to our approach to these Private Law cases is not to be underestimated; this volume of work has a direct impact on our overall ability to deal with all of the cases before the Family Court.

There is currently some debate over the likely proportion of separating couples who turn to the Family Court to resolve issues regarding their children. The long-accepted figure of 10% is now seen by some to be a significant under-estimate, with the true figure being nearer to a third (for a useful description of the issue see the Transparency Project blog by Kelly Reeve¹). If, and in the absence of sound data it remains an 'if', about a third of the population of separating parents believe that they have to resort to a court so that a judge or magistrate will decide the arrangements for their child, rather than, as the child's parents, doing so themselves, this is a significant issue for society at large, rather than being simply one for the court to deal with by increasing and rearranging its resources. The Private Law Working Group and the MOJ Panel are therefore likely to signpost issues which should engage the attention of policy makers in government, in addition to the matters of process which will be the focus of the judiciary.

I have taken time to address the topic of the volume of work in the system because, in reality, its impact dwarfs all other issues and it therefore occupies a very prominent place in the 'view' that I have from my chambers. There are however a range of other topics to which I now turn, albeit in shorter terms.

Expert Witness Working Group

¹ <http://www.transparencyproject.org.uk/custody-fights-blight-four-in-ten-break-ups-a-word-of-caution/>

In November 2019 the Expert Witness Working Group that was established at my request under the chairmanship of Williams J issued a comprehensive report inviting consultation on the 22 key recommendations that have been made by this wide-ranging group². The consultation period runs to 31 January 2020. The difficulty in obtaining expert evidence has an impact on many cases and I would encourage all of you to read the report and respond to the consultation exercise.

Mini-pupillage scheme for medical experts

Some of you may remember the Mini Pupillage Scheme in which specialist medical registrars and junior consultants sit with judges to observe medical expert witnesses giving evidence in court. The purpose is to provide them with first-hand experience of what giving expert evidence involves, with a view to encouraging the next generation of medical expert witnesses. In the new year, the Family Justice Council will be relaunching this scheme to encourage doctors to become expert witnesses. The intention is that this should be available nationwide. The FJC Secretariat will be facilitating the scheme and may be contacting you in relation to cases in your area. In the meantime, if you have any queries or consider that you have a case that you consider would be suitable for this scheme please contact fjc@justice.gov.uk

Police Disclosure

Obtaining timely and effective disclosure of material held by the police for use in Family cases continues to be a major problem across the country. Where the police, as frequently is the case, levy a charge for disclosure, this may cause additional difficulties where, for example, both parties are litigants in person who lack the funds to pay.

My understanding is that many applications for police disclosure in either public or private law proceedings can be dealt with as a Subject Access Request ['SAR'] under the Data Protection Act 2018, if so, no fee will arise. In private law cases, it is likely that a court may be satisfied that all relevant information is available if both parties have made a separate SAR.

If a fee does arise (possibly because the disclosure sought is extensive), then an applicant who is eligible to do so should apply for authorisation on their Legal Aid certificate. The applicant must confirm to the LAA that the request was not a SAR. It is understood that all that is needed for LAA purposes is to provide a simple note on the invoice or receipt 'this was not requested under a SAR'.

² <https://www.judiciary.uk/publications/the-president-of-the-family-divisions-working-group-on-medical-experts-in-the-family-courts/>

The LAA has worked closely with various representative bodies to produce guidance on this point and the updated guidance was published in May 2019³

Payment for disclosure, where it cannot be dealt with as a SAR, will remain a difficulty in private law cases where there is no legally aided party.

More generally, I intend to take up the issue of disclosure with national representatives of the Police. In doing so, I am very aware of the difficulties that are experienced by police forces in modern times in dealing with disclosure issues on many fronts. This is not an easy issue to resolve, but I hope that some of the present difficulties may be resolved through informed discussion and cooperation.

Children accommodated in unregulated placements that have approved by the court

Increasingly, applications are being made by local authorities under the High Court's inherent jurisdiction to seek approval (often as a matter of urgency) for the placement of a young person in accommodation which is not at that time registered as a children's home with OFSTED and is not therefore subject to the scheme of statutory regulation. On 13 November 2019 I published Practice Guidance on this issue⁴.

Transparency Review

As trailed in the May 2019 'View', I have now gathered together a small panel to assist me in undertaking a review on the issue of transparency in the Family Court, with a view to informing my own policy, as President, on this important and sensitive issue.

The panel members are:

Dr Eia Asen (Child and Adolescent Psychiatrist)

Anthony Douglas CBE (formerly CEO of CAFCASS)

Clare Dyer (former Guardian legal editor)

Nicola Shaw CBE (Executive Director of the National Grid)

The Panel, which meets for the first time on 18th December, is likely to call for evidence from any interested parties to be submitted by the end of February 2020. Thereafter key contributors may be invited to attend an oral evidence session. The Panel may also gather evidence from other jurisdictions. It is my intention that the Panel process will enable me to publish a statement describing my concluded view on the issue of transparency by the end of May 2020.

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/830008/Civil_Finance_Electronic_Handbook_-_v2.9.pdf.

⁴ <https://www.judiciary.uk/publications/practice-guidance-placements-in-unregistered-childrens-homes-in-england-or-unregistered-care-home-services-in-wales/>

Family Justice Council

Two weeks ago, the FJC Debate drew a large audience to the Oval Cricket Ground where there was lively discussion on the question: ‘Do separating parents need the Family Court?’. Many of the contributions from the floor sought to identify other interventions, apart from going to court, which ought to be accessed by parents with the court only being used as a back-stop ... or, given our venue, a long-stop. There was considerable support for greater use of mediation (which I am keen to promote), but also for extensive public education to assist separating parents to make their own decisions about their children.

Financial Remedy Court

The FRC pilot continues to expand to additional court centres. Most recently, I have approved two documents, one describing the overall structure of the FRC and the other a good practice protocol aimed at describing the approach of the FRC in improving the delivery of financial remedies for families involved in court proceedings relating to issues arising from the dissolution of relationships⁵.

Guide to the Treatment of Pensions on Divorce

Whilst writing on the issue of financial remedies, can I bring to your attention the comprehensive ‘Guide to the Treatment of Pensions on Divorce’ that was published in July 2019 by Pension Advisory Group chaired by Mr Justice Francis⁶. The guide should be on the desk or laptop of every financial remedy judge and lawyer. Its aim is to tease out, demystify and describe all aspects relating to pensions which may figure in a financial remedy dispute. It is written in plain accessible narrative and should do much to improve our practice in this area.

Reform

The HMCTS Reform Programme continues to deliver changes that are helping to relieve the pressure on the court system and improve the way we operate. Since the summer, litigants in person have been able to start and finish their entire divorce proceedings online and almost 80% of them are choosing the use the new system over the old paper route. Following a successful pilot, including over 100 firms, the divorce service has recently been opened to up publicly for all legal professionals to use.

⁵ <https://www.judiciary.uk/announcements/financial-remedies-courts/>

⁶ <https://www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group>

The pilot under which local authorities issue public law applications on line is running well and has been expanded to additional courts. Early in the New Year it will be rolled out to all courts, DFJ area by area.

The online private law C100 application is now available to all unrepresented parents throughout England and Wales. In addition to ensuring that the form is completed accurately, the program provides ‘nudges’ towards mediation and other forms of dispute resolution, and advice on safety concerns together with sources of support and advice.

Scottish – England and Wales Protocol 2018

In July 2018, Sir James Munby P and the Head of the Scottish judiciary, Lord Carloway, issued a Protocol⁷ to provide for the direct exchange of information between judges in intra-UK cross-border cases involving children. At a recent review the Protocol was found to be working well, but the practice of courts using the formal line of communication via the International Family Justice Office, at IFJOffice@Justice.gov.uk, was not consistent. Can I urge use of the formal channels of communication via the IFJO on every occasion, even when an issue may be urgent.

Lead Judges

I am most grateful to Lieven J, Judd J, Gwynneth Knowles J and HHJ Carol Atkinson who have each recently accepted an invitation to take on the role of advising the Family judiciary on matters relating to four important areas. Lieven J will take the lead on ‘contempt and committal’, Judd J on ‘adoption’ and Gwynneth Knowles J on ‘FDAC’ (Family Drug and Alcohol Court). HHJ Carol Atkinson will advise on all issues relating to research relevant to Family Justice, and, in particular, will be a key link between the judiciary and the Nuffield Family Justice Observatory and will complement the link that the Judicial College has already established with the FJO.

Season’s Greetings!

Finally, a prominent item on ‘view’ inside the President’s Chambers is a splendid Christmas tree, its presence leads me to wish each and every person engaged in working within and supporting the Family Justice System the very best wishes for a happy, peaceful and, above all, profoundly restful time over the festive season!

Sir Andrew McFarlane

18th December 2019

⁷ <https://www.judiciary.uk/publications/new-judicial-protocol-for-childrens-cases/>