A View from the President's Chambers
18 November 2020

As I sit down to write this View from the President's Chambers, a number of key words are prominent in my mind.

Pride

The first is 'pride'. It is very clear to me that each and every person involved in the delivery of Family Justice should feel very proud of all that has been achieved during the past 7 months. At the start of 'Lockdown' few of us had any experience of fully remote hearings, many had not heard of Teams or Zoom, most had sub-optimal kit to work with at home and no formal space to do so. Against these undoubted challenges there was, across the board, an understanding of the need for the Family Court to continue to function away from its buildings and to do so immediately. From day one all involved displayed a palpable 'can do' approach to difficulties. The Family Judiciary did not pause for breath; they have sat to capacity and beyond throughout this extensive and seemingly endless period. Remote working is often more tiring and stressful than taking part in a face-to-face hearing, and technical problems have been a regular source of frustration. The increased volume of work in the system, including many urgent cases, has meant that the pressure on each individual has been unremitting, whether they are staff members, lawyers, social workers, CAFCASS officers, judges or magistrates.

Against the background that I have just briefly described (but which will be well known in full to all readers), one might have predicted that the system would collapse or otherwise prove unable to meet the needs of those who turn to it for protection or the resolution of pressing personal disputes. Having departed the field in order to undergo surgery in June, and having been totally out of touch in the interim, I was in a unique position to see how things had progressed when I returned to work a few weeks ago. Having now spoken individually to each of the 43 DFJ's, to the FDLJ's and to representatives of all the key professional groups, and having seen the statistics, I have been profoundly impressed both by the amount of hearings that have taken place and,

more particularly, by the attitude described by all which is, with only few exceptions, surprisingly up-beat and accepting that we must 'carry on carrying on'.

Having mentioned statistics, can I give you just one striking headline. This year more sitting days have taken place on Family cases than in any previous year, despite the Lockdown. This level of activity is entirely necessary as it is not possible to conduct as many cases each day as it is in normal circumstances. In addition, a backlog has grown, partly from the cases that had to be adjourned during the early days and partly from an upturn in the number of private law and domestic abuse allegations that are now coming to the court. In September, CAFCASS recorded a 7% rise in public law applications and a 14% rise in private law applications compared to September 2019. Any pride and admiration for what has been achieved thus far cannot, therefore, justify complacency; there remains much to do over the coming months in circumstances which will continue to be a challenge to one and all.

Wellbeing

These latter thoughts bring me to my second word: 'wellbeing'. It is tempting, when facing a wholly unexpected and extreme pressure of work to jettison 'no need to do that' activities, with the aim of maximising focus on getting through the additional work. The community of Family law professionals and judiciary were, in hindsight, even more justified than was realised at the time to have raised the profile of 'wellbeing' over the past three years. The need to prioritise wellbeing in our individual and collective working lives was, I hope, firmly established before any of us had even heard of Covid 19. Each court centre should have a wellbeing protocol that has been discussed and agreed. Rather than seeing wellbeing as an optional extra that might be jettisoned when times get tough, it is, I would suggest, all the more important that each of us continues to afford it high priority.

Every Designated Family Judge to whom I have spoken has described a high level of fatigue amongst the judiciary and staff at their courts. The representatives of the professions, CAFCASS and social workers, speak of a similar level of exhaustion across the board. Yet, as the system ramps up its capacity to list cases, the remorseless pressure from the volume of work is, if anything, increasing. I have heard that it is now not exceptional for lawyers to be emailing each other in the small hours of the night. I have heard more than one account of courts directing that skeleton arguments should

be filed on a Saturday or Sunday. More generally, because we can now do so remotely, additional directions hearings are, I gather, sometimes listed remotely before the start of the court day in Court X in, say, the North of England, when the advocates may be part-heard in other trials in Courts Y or Z in the West or South. Hitherto, such listings would either not have taken place, or other lawyers would have covered them; now the same lawyer can do both and therefore has to prepare for and attend both hearings – and the judge accommodates them by sitting early before the start of their ordinary list. Separately, but no less importantly, there is a physical impact to sitting for hours in front of a screen without taking a break to stand up and walk around.

These and many other examples readily demonstrate how our new-found technological facilities can easily go to increase the burden of work, and consequent stress, rather than reduce it. It is also important to have in mind at all times that these pressures, as the recent Nuffield Family Justice Observatory report demonstrates, will also have an impact upon the lay parties who are before the court.

Now is therefore the time to redouble the focus on wellbeing. I would urge each locality to revisit their agreed wellbeing protocol and use that as a basis for open discussion on the current ways of working and their impact on each individual's physical and emotional health. It is plain that the system is at present running low in terms of the personal reserves of the human beings who work within it. There is currently no light at the end of the tunnel and the current news indicates that we may have many months ahead of us working as we now are. There is a need to continue to be kind and understanding of each other. It is crucial that you should all take stock of the issue of wellbeing, both individually and collectively, and, if one or more current work practice is unsustainable, then you should speak out and say so.

Gratitude

The third key word that is in my mind is 'gratitude' and it relates to my personal circumstances over the summer. During my extended absence Mrs Justice Theis, as acting President of the Family Division, and Lady Justice King, as acting Head of Family Justice, took over the reins. They were assisted by the FDLJs, Mr Justice Hayden, Mr Justice Mostyn, Lord Justice Baker and others, and they were magnificently supported by the team in the PFD Office led by my Private Secretary, Maria Kavanagh. I am extremely grateful to each and every one of them. Despite the

many challenges, it is beyond argument that, on my return to work, I found that the system was running better than it had been when I was wheeled into the operating theatre in mid-June! This collective achievement, led by Lucy Theis, Eleanor King and Maria Kavanagh, is very impressive and is one, in fact, for which all in the system should be grateful.

Remote Hearings

Moving away from 'key words', I wish now to refer briefly to a range of other topics. The first of which centres on the recently published report from the Nuffield Family Justice Observatory on 'Remote Hearings in the Family Justice System: September 2020'[1]. It is a sign of a healthy organisation that it is prepared to have a mirror held up to its functioning from time to time and, where there is a need to do so, to learn from what the mirror shows. The FJO report is an important document. It is based upon consultation responses on the topic of remote hearings in the Family Court from around 1,150 professional, magistrates and judges and some 150 parents or relatives. Whilst the overwhelming feedback from the professional and judicial responders was positive and reported a system running relatively smoothly, the responses from and about parents and relatives was very largely negative and, in places, particularly worrying.

In quantitative/statistical terms, the tick-box answers of 150 parents who, out of the many thousands of family members whose cases have been before the court since March, chose to respond to the consultation need to be approached with caution. It is not possible, I would suggest, to say, as the *Guardian* did, that 'almost half of parents and relatives involved in remote family court hearings during the crisis said that they did not understand well what was happening'. In contrast, it is the qualitative element of the NFJO Report, where particular examples are given by parents, and by professionals and judges about parental involvement, which is of particular value and is, at times, striking in what it describes.

[1] https://www.nuffieldfjo.org.uk/resource/remote-hearings-september-2020

The NFJO Report is plainly a 'must read' for all those currently involved in conducting or taking part in hearings before the Family Court. As with the first report[2], the process of reading it should, itself, produce a corrective impetus for better practice in the system. Chapter 8 of the report sets out themed lists of possible recommendations, drawn from the evidence that has been submitted. Rather than producing a revised version of Chapter 8 and repackaging it as 'Presidential Guidance', I propose to endorse each of the NFJO recommendations and, working with HMCTS, commend the application of the advice in Chapter 8 to all courts and court users.

Going further, however, I am particularly concerned at the accounts given of parents who are still joining important court hearings over a single phone link from their homes. It should now be possible for parents to engage more fully in the court process at every hearing when an important decision about their children may be made either by physically attending court (with or without their lawyers) or by joining remotely from a location where they can be with at least one of their legal team for support. Where a parent is joining remotely to an important hearing, this should be via a video platform rather than over the phone (and the parent should be using video on the video platform rather than linking in by phone). Unless the situation is truly urgent, and there is no option but to do so, a telephone connection should not be used for a parent, who is not with her/his lawyers, to join a remote hearing which may determine an important decision about their child. More generally, telephone hearings should only be used in a child case for short (case management or consent) hearings and should only be used for more substantial hearings if a face-to-face, hybrid or video hearing cannot be established.

Coping with increased demand in Public and Private Law children cases

It is hard to think back, but prior to Covid the Family Justice system was already facing unprecedented demand and there was common ground that we needed to develop strategies to cope with the increasing workload. Two working groups, on Public Law (under Mr Justice Keehan) and Private Law (under Mr Justice Cobb), were established in 2018. Both had reached the final report stage of their work around the time that

[2] https://www.nuffieldfjo.org.uk/coronavirus-family-justice-system/family-courts

Lockdown struck but, for obvious reasons, their reports were not published at that time.

Now that life has moved on and the Family Court has become more settled in the current ways of working, and despite the recent reintroduction of Lockdown, the time is right to publish a distilled version of the recommendations of each of these two groups. Whilst I fully understand how the idea of 'yet more' guidance may be received by the many hard-pressed people to whom it will be sent, the key point is that this guidance was being developed to help to manage increased pressure and workload in the system. It is therefore all the more pressing that the fruits of the great deal of work undertaken by these two multi-professional groups is shared at this time. On that basis, the option of waiting to publish anything 'until Covid is over', only needs a moment's thought before being rejected. Publication of these reports later this month is, therefore, intended to help with, rather than to add to, the current pressures.

Court of Protection

The Court of Protection quickly discovered that, particularly at Tier 3 and 2, it was able to adapt comfortably to remote working. The challenges at Tier 1 were, in some ways, greater especially with litigants in person. Nonetheless, the judges have coped extremely well. Many CoP cases do not involve evaluating credibility and the longest hearings are rarely more than 3 days. Medical witnesses have given evidence from private rooms in hospitals (at times in scrubs and hoodies), the advocates adapted to hyperlinked e-bundles, remote hearings have also served, unexpectedly, to enhance the participation of P in the court process (attending more frequently in consequence of the opportunities provided by remote hearings). The CoP has also managed to conduct its business transparently with members of the public attending frequently (via CVP) and in significant numbers. At Tier 3, 2 and 1 there is no outstanding backlog of cases.

The CoP has been very proactive in insisting on the rights of individuals in Care Homes to have contact with family members, in particular, but also more generally. The Court has generated a large volume of reported cases throughout the pandemic.

The Financial Remedies Court

The Financial Remedies Court pilot has now been rolled out to all areas in England and Wales and is bedding down well as a regular aspect in the working of the Family Court. This is excellent news and all those involved are to be congratulated for taking up and implementing this project. In line with the Family Court generally, the FRC has been sitting remotely to a great extent since March.

In the context of financial disputes, I would particularly draw attention to the recent Court of Appeal decision in *Haley v Haley* [2020] EWCA Civ 1369 which highlighted the development of the use of arbitration in matrimonial financial remedy cases at all levels. King LJ said (at paragraph 5 of her judgment):

> 'There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of "lockdown".'

It is both clear and pleasing that the work that the Institute of Family Law Arbitrators [IFLA] has done to promote arbitration for both financial and children cases since its inception in 2012 is now gaining recognition. For the right cases, arbitration may well be the right route for dispute resolution in a family case. A broad spectrum of practitioners have been signed up and trained under the IFLA Scheme. As King LJ makes plain, there are now Family Law Arbitrators available for cases at all levels.

The Family Court: last resort, rather than first port of call?

Separately, the 'Family Solutions Group', which is a sub-group of the Private Law working group has been looking at the wider societal and cultural drivers that may lead parents to issue an application about the arrangements for their children. Although the statistics are not robust, it is now thought that about 40% of all separating parents bring issues about their children's care to the Family Court for determination, rather

than exercising parental responsibility and sorting the problems out themselves. If this figure is remotely accurate, it presents a startling and worrying picture. The number of private law applications continues to increase, which suggests that the trend is that more and more parents see lawyers and the court as the first port of call in dispute resolution, rather than as the facility of last resort as it should be in all cases where domestic abuse or child protection are not an issue.

For as long as I can recall, going back to Sir Nicholas Wall's work on 'Making Contact Work' and indeed before that to the philosophy behind the Children Act 1989, 30 years ago, concerted efforts have been made to achieve a major societal shift away from seeing issues about ordinary child care arrangements as involving 'rights' or requiring legal redress. The Family Solutions Group are to be commended for mounting a strong case for major change. The themes of their report should be of interest to all who read this 'View' and I would encourage you to read it[3].

Transparency

Unfortunately, due to the need prioritise work in response to Covid and then my time away on sick leave, the progress of the Transparency review panel had to be put on hold. Happily, we are now able to engage in the project and the panel met recently to plan how best to receive oral contributions from the key contributors who responded during the consultation exercise. One or more days of video meetings to hear from invited 'witnesses' will take place in early 2021. In addition, the panel hope to engage remotely with those in Ireland, Australia and other foreign jurisdictions with relevant experience.

FDAC

It is very pleasing to report that, despite the obvious difficulties that remote working presents for the FDAC model, our FDAC courts have continued to function as

[3] 'Reframing Support for Families following Parental Separation' – published on 12 November

effectively as possible and, indeed, the number of courts increased in September with the opening of the Black Country FDAC. Looking forward, the Welsh Government has recently made a funding commitment for the provision of FDAC in Wales; this important development is most welcome. The ultimate goal remains for FDAC courts to be available in all areas of England and Wales. This will only be achieved by the continued dedication of the growing number of individual judges, professionals and court staff who are committed to this innovative model. I am very grateful to Mrs Justice Knowles and all those involved in FDAC for all that they are doing.

Enhancing the provision of experts for Family cases

Another development which should be of interest is the publication of the final report of the Experts Working Group[4] (chaired by Mr Justice Williams) which aimed at understanding and addressing the difficulty that the Family Court has in finding experts who are willing to accept instructions in Family cases. This problem continues to be pressing and the Experts Working Group report makes for interesting and well-informed reading. The bottom line is that there are a wide-range of reasons why an expert may feel disinclined to accept instructions – and (surprisingly) the rate of remuneration, whilst being one of the reasons, is not seen as the most significant one. The good news is that the group has identified a series of modest, but important, changes that the courts, lawyers, Legal Aid Agency and the various Royal Colleges might make which are likely to have a disproportionately positive impact on the availability of experts. There is no reason why Covid should prevent us from taking these recommendations forward.

Family Justice Council

I must also thank the Family Justice Council for the relentless and tireless efforts of recent months in support of key judicial initiatives. This includes most recently the guidance on Safety from Domestic Abuse and Special Measures in Remote and Hybrid

4 https://www.judiciary.uk/publications/the-president-of-the-family-division-working-group-on-medical-experts-in-the-family-courts-final-report/

Hearings. Primarily for court staff and the judiciary, the guidance applies to all family proceedings where domestic abuse has been proven or may be an issue and it will ensure that careful consideration is given to how remote and hybrid hearings are held in order to achieve safe evidence and full participation of vulnerable parties.

FJC Events have included the recent and successful Open Meeting and we now look forward to the online discussion forum on 14 December which will explore the report and recommendations of the MoJ Expert Panel on Assessing Risk of Harm to Children and Parents in Private Law Children Cases.

As if that was not quite enough, work is now underway to set up regional sub-committees to take forward proposals from the President's Experts Working Group report as well as ongoing work in Family Procedure Rules and Child Protection Mediation.

Involving the Official Solicitor

In these unprecedented times, the Official Solicitor is experiencing a very high number of referrals. As with other parts of the system, the OS's staff are already overstretched because of the build-up in the volume of cases, which has continued to grow to the point where some cases are not able to be allocated on as timely a basis as the OS would wish. The OS and her staff are working their way through the referrals and would ask for the courts' and practitioners' patience and understanding. Before making a referral please make sure that the OS's acceptance criteria are fully addressed, to avoid any further unnecessary delay for the child who is the subject of the proceedings. (The OS Practice Note explains the acceptance criteria, that, the Official Solicitor's certificate and the litigation friend checklist are all to be found at Gov.UK[5]).

[5] https://www.gov.uk/government/publications/appointment-of-official-solicitor-in-family-proceedings-practice-note, https://www.gov.uk/government/publications/certificate-as-to-capacity-to-conduct-proceedings and https://www.gov.uk/government/publications/appointing-a-litigation-friend-checklist; the Official Solicitor's referral form is available at https://www.gov.uk/government/publications/official-solicitor-referral-form-for-children-act-public-law-proceedings.

A time to remember

Before closing this View, I, and I am sure many others, have in mind that in recent months the Family Law community has lost a number of highly valued individuals who, in their time, have made an important contribution to our professional lives and, for many, have been good friends. Prominent in my thoughts in this regard are Anne-Marie Hutchinson OBE, Hon QC, whose pioneering work in the fields of child abduction and forced marriage single-handed led the way forward during the past 30 years; His Honour Glenn Brasse, a wise, humane and kind judge; Dr Julian Farrand, Hon QC, a good friend to many family lawyers; Sir Robert Johnson, for me the very model of all that a Family judge should be, and Ian Griffin, the Family barrister who lit the blue touch-paper on Wellbeing in an article 2½ years ago.

A Busy Time

As the contents of this View demonstrate, both despite of and because of the restrictions under which we must all currently function, it is, to say the least, a busy time in the field of Family Justice.

I wish all who read this View well and I want, in closing, to stress again the need to prioritise, in all that we do, the wellbeing of ourselves, other professionals and the families who engage with the courts.

Sir Andrew McFarlane

President of the Family Division and Head of Family Justice