'Interesting Times'

Sir Andrew McFarlane President of the Family Division

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Introduction

We chance upon each other, you and I, today, some 3 years into my term as President of the Family Division and, if I am to retire at age 70, about 3 years before my retirement. Reaching this notional half-way stage has caused me to pause and consider what my priorities are to be for the remainder of my time at the helm. Being "Head of Family Justice" is a very broad and busy role and, of course, I will continue to be fully involved in all aspects of the work as I have tried to be thus far; but, within that, what are my priorities – what do I want to achieve by the time that I hang up my wig and flashy robes in 3 years' time?

I am not going to give you an exhaustive list. To do so would be to suggest that topics not on the list are not a priority, or that I am going to concentrate only on matters that are listed; when neither of those suggestions is the case.

Delivering the implementation of the long-running Digital Reform Programme for Civil, Family and Tribunals, which is now all under the national leadership of Mr Justice Stephen Cobb, is a given. As is continuing to press for and support the adoption by every single social worker, lawyer, magistrate and judge of the Public Law Working Groups recommendations which, since their roll-out in April of this year, has been a national requirement. In addition, I will maintain my aim of moving the Family Court out of a silo, so that its work is seen as being of equal importance and standing with that of the Criminal and Civil courts, in order that those working in the Family Court can benefit from co-operative and jointly developed ways of working with those who (as they themselves may do so) sit in other jurisdictions. These and other specific initiatives, together with the all embracing need to protect and enhance the well-being of everyone involved in the delivery of family justice, will always be on my 'to do' list and will not fall back during the time that remains. When I refer to 'priority', I am therefore looking at the two topics to which I intend to devote additional time, effort and resources in the remaining 3 years.

The primary, topic to which I intend to devote additional focus in the coming period is the resolution of Private Law disputes between parents with respect to the care arrangements made for their children post-separation. To this end, last week at the Jersey International Family Law Conference, I delivered a Key Note Address entitled

'Supporting Families in Conflict: There is a better way'[1]. I will not repeat what I said there and will not therefore specifically deal with Private Law this morning.

The second priority will that of 'transparency'. Namely, the processes by which the Family Court may be made more open so that the wider public may gain a greater understanding of the work that is done in the courts on their behalf. I had intended to publish the conclusions that I have reached following the 'Transparency Review' that has been undertaken during the past year or so earlier this week, and then focus on that topic in my address to you this morning. Unfortunately, but for good reason, the launch has had to be postponed until later this month and it would, therefore, be premature to speak on Transparency today.

Instead I hope that it will be of value if I deliver an overview of some of the many other issues that are of current interest or importance (or both!) in the Family Justice System.

The Future of Remote Hearings

We have now reached a stage in the playing out of the pandemic when it is possible to contemplate a gradual increase in the volume of cases that are heard in person in court, as opposed to remotely or at a hybrid hearing. Thus far, Baker LJ (as the judge overseeing 'recovery' in the Family Court and the COP) and I have decided against issuing any national guidance, let alone any Practice Direction, on this topic. It has been, and remains, our firm view that the circumstances around each case and each local court centre will vary to such a degree that any firm 'black-letter' direction or guidance would be inappropriate. The experience of the past 18 months has shown that judges and magistrates can and should be trusted to exercise their discretion on a case-by-case basis, within broad parameters, rather than being subject to unnecessarily restrictive and clunky national guidance.

It follows that, moving forward, it is not my intention to issue any formal Practice Direction or Presidential Guidance (with a capital 'D' or 'G') setting out firm categories of case that should, or should not, continue to be heard remotely.

The primary reason for not doing so is that I continue to believe that the decision as to the format for each hearing should be taken by the judge in charge of the case, unfettered by any prescriptive diktat from on high. From the start of the pandemic I have trusted the judiciary to exercise discretion in these matters. I consider that my trust has been well placed and there is no reason to change that approach now.

A second factor, amongst many others, is geographical. Whether it is necessary or proportionate to conduct an in person hearing, or a remote one, may well vary

[1] https://www.judiciary.uk/announcements/speech-by-the-president-of-the-family-division-supporting-families-in-conflict-there-is-a-better-way/

depending upon the distance from court, availability of public transport and other factors. National guidance that is unduly prescriptive might land well in the big urban conurbations, yet cause real difficulties in places such as Cornwall (where I conducted my first post-Covid court visit this week) or Cumbria.

Not issuing formal Guidance does not, however, address the desire of many involved in the work of the Family Court to have some basic understanding of what is now expected in general terms with respect to remote working. I therefore intend to use this address to set out some broad parameters within which judicial discretion will continue to be applied. What follows is NOT therefore formal 'Guidance', or, even less, a 'Direction'. My aim is to offer a steer and to describe the general direction of travel which courts should expect to follow, depending on the individual circumstances as they apply in each case and other local factors. As you would expect, I will be discussing this topic further with the DFJ's and FDLJ's when we meet next week for the President's Conference.

No one working in the Family Court or the COP now expects a return to the status quo, in terms of working practices, that existed in February 2020. Supported by enhanced IT, the courts have now become used to remote working and, for an appropriate hearing, and there will be many, this should now be the format of choice.

The central theme running through the approach that should apply is that the parties and their lawyers should normally be physically present at court on those occasions when an important decision may be taken.

There are a number of positives about remote hearings, but one clear negative is the absence of that time outside court, in the 45 minutes or so before a hearing, when the presence of 'the court door' and the proximity of the other parties and their lawyers will not infrequently lead to a focussing of issues or even settlement. That time and space simply does not exist before a remote hearing and it is important that this valuable opportunity for advice, negotiation and possible settlement is regained. Further, it is clear that, at least some lay parties afford less respect to the court process, and the outcome of it in terms of any order, when the hearing is online or by phone. The use of remote attendance is not necessarily more efficient and quicker and it is possible to process more cases at court than it is to do so remotely. More generally, the obvious benefits of an attended, in court, process before a judge or magistrate makes an important decision in a family case do not need to be stated. Remote platforms are good for undertaking transactional communications, but there is more to a Family Court hearing than simply transacting business. Much that goes on has a 'human' perspective, which can often be lost online, but is fully present in a court room.

We need to continue to embrace the technology and to use it, for the right hearings, to the full. There are clear detriments to attended hearings in terms of travel time

and the inability to attend to other cases at other centres during the extended time needed for physical attendance. There are also unwelcome collateral consequences in terms of additional expense, carbon foot-print and other factors. Part of my message is, therefore, that remote hearings, for the right case, are hear to stay.

A balance has to be struck in each case, but generally that balance should come down in favour of the parties and their lawyers attending all hearings where an important decision in the case may be taken.

In public law children cases, the hearings were an important decision may be made are likely to include the first CMH, ICO hearings, the IRH and final hearings.

In private law children cases, those hearings are likely to include the FHDRA, fact-finding and final hearings.

In the FRC, they are likely to include FDR's and final hearings.

In all three categories of work, a straight-forward directions or case management hearing is likely to be appropriate for a remote hearing.

Although the granting of an injunction is obviously an important decision, the benefit of conducting Family Law Act cases remotely, or at a hybrid hearing, are likely to outweigh the need for an attended hearing, whereas a fact-finding hearing in a FAA case is likely to require attendance.

Whilst an important decision will normally be taken at the end of an appeal hearing, the question of whether an appeal is heard remotely or in person may turn upon the issues to be raised and whether both parties are represented or in person. The format of an appeal hearing is therefore a matter for judicial discretion in each case.

More generally, there is a common view that it is beneficial (in many cases it is indeed an improvement) for expert evidence to be given remotely and, subject to individual factors in any particular case, this is now likely to be the default position.

CAFCASS and local authority social services are currently under extreme pressure in marshalling sufficient resources to cover the volume of work. I anticipate that judges and magistrates will take these matters into account when deciding whether a CAFCASS officer or local authority social worker should attend an in-person hearing remotely and, if so, whether they need to attend for all or only part of it.

When deciding whether or not to hear a case remotely, judges and magistrates should take account of health related issues raised by a party or professional. Such issues may not be determinative in the choice of format, but must be taken into account in the exercise of judicial discretion.

Earlier this year, a working group under the leadership of HHJ Stuart Farquhar produced a report on the future use of remote hearings in the FRC. I am very grateful

to Judge Farquhar and his group for this work and for agreement that it should not be published until the overall direction of travel for the Family Court as a whole was more clear. That point has now been reached and I am pleased to publish the report of the Farquhar Group today with my endorsement. The report is, obviously, not itself a Practice Direction or Presidential Guidance and is not writ in stone. It is published, alongside the words of this Address, as a broad steer to judges who will exercise their discretion in determining whether any particular hearing will be attended or remote.

Well Being

My concern for the well being of all those who work in the Family Court or the CoP remains very high. The system is currently running 'hot' and at a level above its normal capacity. The volume of work that is being undertake is well above pre-Covid levels. The number of judicial sitting days is up by about 25%. The rate at which cases are concluded is, however, down. The backlog of work in the system remains stubbornly high and, in terms of private law, is increasing. Despite the increase in judicial time, the scale of the backlog is such that delay is inevitable. Everyone, be they court staff, social workers, CAFCASS or CAFCASS Cymru officers, solicitors, barristers, magistrates or judges, is working even harder than they were when the topic of 'well being' first became prominent. Remote working allows people to take on more work. The pockets of the day that were taken up with travel, waiting outside court, communal coffee breaks or walking out to buy lunch can now be filled with on-screen work – and they are being filled in that way. We all have less 'down-time' and more 'up-time' to a significant degree.

This audience does not need me to describe these matters, you are each experiencing them every day and in saying what I have said I am sketching a picture of your own life. Working at this level is not, in the long-run, sustainable in human terms in my view. We all need down-time; in fact that is when we have time to think. It is also an important buffer in the day between work and our personal life.

I continue to urge each one of you to take your own well being seriously. I remain entirely open to any suggestions that may, on a general basis, ease the burden and it is a topic that Cyrus, Hannah and I are regularly in touch about.

In this regard, may I mention just two specific matters. The first is aimed at enhancing the well being of the judges, rather than the legal profession. I commonly hear from judges in all areas that position statements and other key documents are not delivered until the night before, or even the morning of, a hearing. Guidance that I gave some months ago about a cut-off time for sending emails in the evening, was not welcomed by some judges for fear that it prevented documents being delivered the evening or night before a hearing. My message on this is simple. The time for filing these

documents is normally fixed in a directions order and will typically set a deadline of 24 hours or more before the hearing. During the past 18 months judges have been, understandably, indulgent of the difficulties that all have been working under and adherence to this requirement has plainly been allowed to slip. Judges are, however, entitled to down-time themselves and they need to know whether, and if so what, to read in detail for each of the cases in their list well before the evening of the day before. They should not be having to check their emails at 9 or 10pm or later in the hope that a crucial document may have arrived. Judges now need, I am afraid, to reclaim the slack that has inevitably been allowed to develop in terms of adherence to filing times. You can expect that from now on courts will be more insistent on compliance, even if this means that hearings have to be adjourned when documents are delivered late. In delivering that message, I would also repeat the point that I have made before that Position Statements do not need to be long or involved documents, what the judge needs to know is the position of your client on which issues are agreed or contested with, where necessary, some limited narrative explaining why that is so.

I anticipate that part of the problem may be the late instruction of counsel, with the document only getting to the judge at bedtime because you have only received the papers that evening yourself. If that is the case then that too is a sign that solicitors' timetables have slipped over the past 18 months – and have done so in a manner which compromises your own well being. A return to a more timely and orderly process is in the interests of one and all, and I am therefore looking to the judges to be more robust on this issue from now on.

The second matter I want to raise is the drafting of orders after a hearing. A conversation with a member of the FLBA, Jacqueline Renton, in the summer confirmed my own experience which is that the task of drafting the order has now become a much more substantial and protracted process than was hitherto the case. Rather than being agreed before the parties leave the court building, it now, no doubt partly because of remote working, extends over days and may involve input not only from counsel, but also from their instructing solicitors and even the lay parties. In contrast to orders that are limited simply to recording what the judge determined, drafts are now not infrequently embellished to a Byzantine degree with recitals.

In terms of well being, instead of all involved being able to put the case into their professional 'rear-view' mirrors at the end of the day in court, they become involved in extensive email traffic and negotiation in the days that follow; at a time when they need to be focussed fully on the next case.

I am grateful to Ms Renton for raising the matter with me and then for taking up my invitation to suggest options by which this new, and to my mind unwelcome, development may be constrained. Her document is now being considered by the

Family Procedure Rules Committee and I hope that a Practice Direction may be issued early next year.

Public Law

The recommendations contained in the main report of the Public Law Working Group under the chairmanship of Mr Justice Keehan were launched by me in April 2021 with the firm expectation that they should be taken up by every local authority in England and Wales by now. The speed and commitment to training, and the full implementation of the recommendations, at present varies from region to region and court centre to court centre. It is imperative that all local authorities and all courts adopt these measures in full. The aim is to ensure that cases only come to court when they need to do so and when they are ready to do so in terms of assessments and all other necessary evidence.

Whilst in the period since the launch in April the number of s 31 applications received by the court has shown a consistent drop of around 12% month-on-month compared to last year, it is too early to say whether this drop is a direct result of the PLWG recommendations, or is consequent upon there being a drop in referrals and new cases that has been seen by most local authorities over the same period.

Meanwhile, the Public LWG Supervision Order sub-group is continuing its work. The big question of whether there is a case for the abolition, or replacement, of supervision orders has been referred to the Law Commission. The sub-group's deliberations are focussed upon making supervision orders more robust and effective. A final report on this topic, which is expected by April 2022, will include draft Best Practice Guidance.

Another sub-group on Adoption has started work with a final report expected later in 2022.

A training and implementation group, under the leadership of HHJ Kambiz Moradifar, played an important role with the FLBA in preparing training webinars in respect of the PLWG's work on Special Guardianship Orders and more generally. The webinars were available to the FLBA, the ADCS, the Judicial College and to all justices legal advisers. Delivering teaching in this format has come on leaps and bounds during the pandemic and is another positive benefit that will endure.

Family Public Law digital programme

The FPL digital programme is now fully operational in 10 of the 43 care centres. Between 10 and 12 further centres will become fully operational next week and it is envisaged that all other centres will join them before the end of the year. The benefits

of FPL have always been clear to me and I am confident that we will look back in time to come at the regime of paper-based care applications with some astonishment that it endured for so long. In the meantime taking up and implementing a substantial new software programme has not been without difficulties, which have been made no easier by doing so during the pandemic when all involved are working beyond their ordinary capacity. After a difficult time, I am heartened by positive reports from some of the trail-blazing courts and I am very appreciative of all the hard work that everyone, but particularly the team at HMCTS, have put in to make this project a success. I fully realise that for local authority lawyers and the legal profession it is an unwelcome additional burden to be expected to learn about and engage with the new digital process at a time when all are working at full stretch for other reasons. The aim of digitisation is to make life easier and more efficient for one and all in the long-run, and I am very grateful for the patience and tolerance of those who have taken up the scheme thus far for doing so.

I should also mention that HMCTS have, for some time, been developing a Video Hearings Service (VHS) for use in all family and civil courts and tribunals; this has been in production since long before the pandemic. CVP was a 'quick fix' which was devised urgently by HMCTS to meet the court's needs when the Covid struck. The VHS is being piloted in Birmingham at present; some of you may well have experience of it. The pilot is helpfully demonstrating many benefits over and above CVP and Teams but is also exposing vulnerabilities which are now being ironed out. For certain VHS still requires some refinement/improvement, and needs to demonstrate greater stability; when HMCTS and the Judiciary are satisfied that it has reached a reliable level of performance it will be rolled out more widely. It is a more sophisticated product than CVP, and in the way in which it replicates the court experience for judge, lawyer, and litigant more faithfully, it is superior to Teams. It is intended that VHS will in due course replace the use of both current systems.

Reform Programme

Looking at the Reform programme more generally, five reformed digital services have now been fully delivered:

- Divorce
- Financial Remedy Consent
- Financial Remedy Contested
- Probate
- Family Public Law

In addition some 60% of all private law applications are now made online.

Over ½ million digital applications have now been made using these services and the level of performance has been transferred:

- Divorce now takes 20 weeks from start to finish
- Financial remedy consents are dealt with in 3 weeks
- C100 applications are going to gatekeeping teams within 2 days of receipt
- The FPL provides fully digital files for the judiciary.

In the coming months work will continue to improve financial remedy contested cases, build up the private law programme and proceed further with placement and adoption cases.

Finally on the topic of Reform, the Lord Chief Justice has recently appointed Mr Justice Cobb as the Lead Reform Judge, responsible for the entire project including civil, crime and tribunals. The fact that Sir Stephen has been the lead judge on the family side of reform for the past five years means that matters relating to the specific Family projects will continue to be well to the fore.

Financial Remedies Courts

The FRCs have generally functioned well during the pandemic.

It is a key aspect of the FRC scheme that financial remedy work is now always undertaken by specialist judges. Only very rarely are cases in the FRC now undertaken by non-specialist judges.

The digitisation of the FRC process is proceeding apace. All consent orders are now dealt with online and as a result the waiting time for an approved order has been cut dramatically. The online process for contested applications has been launched. Once a few teething problems have been overcome it is expected that this too will result in much greater efficiencies.

Recent reforms requiring transparency about the costs incurred and to be incurred, as well as enforcing the duty to negotiate, have resulted in a more disciplined, efficient and fair approach to financial remedy litigation.

The very high levels of costs in some cases remain a major concern. It is to be hoped that the reforms will address this concern. If they fail to do so, further consideration will need to be given to measures which curb the levels of costs which in some cases have become exorbitant.

The judges of the FRCs encouraged parties to engage in private FDRs. Statistics show that these have a high rate of settlement. Outsourcing this work to the private sector has increased the resources available to the FRC judges to determine contested hearings.

Conclusion

I hope that what I have said gives you some useful information on the current state of affairs in Family Justice. It is a very busy time and I could have spoken at twice the length, including a dozen other topics, without repeating myself – mercifully, for all our sakes, I am not going to do so!

May I conclude by saying what I have now said on very many occasions. The record of achievement of the Family Court from the very first day of the first Lockdown has been profoundly impressive. Every single individual, be they lawyers, court staff, social workers or judges and magistrates, did their utmost to keep the system going and available for those who turn to us for protection or the resolution of intractable disputes. What has been achieved makes me proud to be part of the Family justice system and one of your number. There is still much to do and it is important not to lose sight of the need to look after yourselves as we go forward. The move towards more face-to-face hearings that this address heralds should, and I hope will, have positive benefits for all.

Sir Andrew McFarlane

President of the Family Division

16th October 2021