A View from The President's Chambers: July 2024

'Family law should always have been like this'

I am devoting the first part of this View to Private Law children cases. For many years we have tried to work with, adapt or tweak the present litigant-led model of court proceedings in order to deliver a just and timely resolution of parental disputes in a way that best meets the needs of the subject child. Many of us working in the system believe that resorting to the Family Court is not the best way for a child's welfare arrangements to be determined in the event of parental disagreement. At present the system is overloaded and inevitable delays in reaching a conclusion, which are obviously unwelcome, have the potential to make matters worse rather than better for a child. But, even if delay were not an issue, a system that pitches one parent against the other in an adversarial setting is likely to exacerbate more than it heals dysfunctional family relationships. With the rise in recent years in the number of parents acting in person, a system that is litigant-led, with the proceedings, or successive proceedings, only coming to an end when each of the parties refrains from making, or contesting, applications, has the clear potential to be harmful.

When a new approach to Private Law cases was first developed and proposed in 2021, it was received with interest and a degree of enthusiasm as something that was worth trying. Thus the 'Pathfinder' model was worked up and has been piloted over the past two years in North Wales and Dorset. As those who have experienced it will attest, Pathfinder has turned out to be more radical, and far more successful, than even its most ardent supporters would have anticipated. Pathfinder went live for all new Private Law cases in Birmingham and the Cardiff area in April/May this year. The purpose of expanding to these two centres is not to see if the model works, we know that; it is to learn what has to be done to operate it in bigger court centres. I am extremely grateful to everyone at these four courts for taking this project forward.

In essence, Pathfinder is a 'problem-solving court'. The approach that we have traditionally applied to these cases has been very much litigant-led, with the court having very little information about a case at the first hearing (apart from a CAFCASS

Safeguarding letter and the application form). At that hearing the judge or magistrate has little option but to sit back and ask the parties what they say that the issues are, before making directions for the court process to roll on to the next stage. The difference in a Pathfinder court is that, before the very first hearing, CAFCASS or CAFCASS Cymru will have spoken to the parents and to the children before compiling a substantial report describing the dispute and the children's wishes and feelings. The report is called a 'Child Impact Report'. Based on the content of the report the dynamic in the court hearing changes, the judge or magistrate may, metaphorically, lean forward and address the parties along the lines of 'do you agree that the report describes your dispute? If so, look at the *impact on your child* of what you two are doing; what are we going to do to resolve that?' Rather than being litigant-led, this problem-solving approach is much more child-led.

Judges and staff working in Pathfinder courts are supported with training to speak in a non-conflictual manner to the parties. There is, importantly, a close working relationship with local domestic abuse professionals and agencies. Where domestic abuse is an issue, any court order must aim to protect those who are vulnerable. Most cases are resolved at the first hearing, and some without a hearing where the Child Impact Report is clear, with the parties being given 'liberty to apply'. Where a further hearing is required, this will normally be a short one and, because there are fewer backlogs in Pathfinder courts, it will take place in a matter of a few weeks' time. Because both parents have been engaged, by the court, in resolving their dispute, the experience in North Wales and Dorset is that fewer cases return to court for enforcement or other reasons. The level of conflict, delay and resulting harm caused by the traditional model are much reduced in Pathfinder. It is an altogether much more satisfactory method of resolving parental disputes within court proceedings; that is so from the perspective of parents, children, CAFCASS, domestic abuse professionals and the courts. As a Pathfinder judge in Dorset said to me, 'Family Law should always have been like this'.

To roll Pathfinder out at additional courts requires an initial injection of funding in order to give CAFCASS and CAFCASS Cymru resources to work up-front on new cases, whilst undertaking its ordinary role on those cases which are already in the

system. This additional funding need reduces greatly once the older cases are no longer live. I hope to hold early discussions with ministers on the future of Pathfinder and the potential for it to be rolled out to other court areas.

Other Private Law initiatives

In the meantime, the advent of Pathfinder has stimulated initiatives in some other areas for the adoption of new ways of working. One example is the Midland Private Law Strategy, but that is by no means alone. Whilst encouraging such developments, can I offer a couple of words of caution. Firstly, the key and dynamic feature of Pathfinder is the Child Impact Report, without that element any other initiatives will fall short of providing the court with the necessary information and insight for it to lead the parties to a settlement as is the case in Pathfinder courts. Secondly, CAFCASS and CAFCASS Cymru resources are tight and, without the necessary additional funding needed to run Pathfinder at any other court centre, they will not be able to respond to individual judges ordering an early report and they should not be expected to do so.

A tighter MIAM regime

Pathfinder is for those parental disputes that find their way into the Family Court. Much more can be done to support and signpost parents to ways of resolving their difficulties without court proceedings. In that regard, the changes to the MIAM (Mediation Information and Assessment Meeting) regime in April of this year are important. Over recent years the expectation that an applicant for a Private Law order would attend a MIAM had fallen off. Litigants in person may tick one of the boxes claiming an exemption to which they are not entitled, and many do. When the case eventually gets to a hearing, courts proved reluctant to send the parties back to the MIAM stage, and instead the dispute was simply timetabled into the court process.

The revised MIAM regime is much more than a tweaking of some of the provisions; it should be seen as a radical tightening up of the whole process. There are now fewer,

more narrowly defined, exemption, for which evidence must be provided. When a party has failed to attend a MIAM when they were not exempt from doing so, the court *must* send them back. In addition, every party must file a short statement setting out their approach to options for non-court dispute resolution. Whilst the MIAM changes were introduced on their own, they should be seen as very much part of a piece with the overall direction of travel which is represented by Pathfinder and by other proposals for change (for example represented in the previous Government's policy proposals published in January 2024[1]).

Domestic Abuse

Experience in the Pathfinder courts has demonstrated the benefit of the judiciary developing and maintaining a regular working relationship with the local domestic abuse professionals in their area. I would encourage every Local Family Justice Board [LFJB] to ensure that they have a representative from their local domestic abuse services on their board, in order to promote a better understanding of domestic abuse within each Family Court centre. International Day for the Elimination of Violence Against Women is on 25 November and I also hope that each LFJB will consider how to mark this important event in their area between 25 November and 10 December, which are the 16 days set aside for action against domestic abuse.

The PLO Relaunch

Turning to Public Law, the Relaunch of the Public Law Outline [PLO], 18 months ago, consolidated the Public Law Working Group's recommendations for a thorough assessment of options prior to any court proceedings with the tried and tested procedural template of the PLO if an application for a care or supervision order is issued.

I was, and remain, extremely grateful to all those involved in Public Law children work for accepting the need to re-engage with the tight requirements of the PLO

[1] https://www.gov.uk/government/consultations/supporting-earlier-resolution-of-private-family-law-arrangements/outcome/supporting-earlier-resolution-of-private-family-law-arrangements-government-response

structure and to focus only on resolution of the key issues of threshold, the permanency plan and contact in order to conclude proceedings for the child within the statutory 26 week timeframe. In contrast to the position prior to January 2023, where the direction of travel was very much towards cases taking longer and longer, with delay becoming 'normalised' within the system, all the signs are now going in the opposite direction. But progress is slow and unacceptable backlogs remain.

It is my intention to re-invigorate the PLO Relaunch in October through national and regional webinars. These will be supported by data showing the progress that has been made and identifying lessons that have been learned, together with targets for further work. One such target is the Issue Resolution Hearing ('IRH'). I have recently visited court centres where the proportion of cases that resolve, or substantially resolve, at IRH is said to be less than 5%, with the result that 95% of cases go on to a final hearing which may be listed many months hence. I have been told of judges being listed for four or five IRH hearings in one day. This information suggests that there may be a misunderstanding (possibly widespread) around the IRH. As PD12A makes plain, the IRH is a hearing at which the court identifies the key issues (if any) to be determined, considers whether the IRH can be used as a final hearing and, crucially, resolves or narrows the issues by hearing evidence. Where issues remain, the court will determine the scope of the final hearing and give case management directions.

To undertake an IRH, a judge must be given sufficient time to prepare the case as if preparing for the final hearing and the listing should be sufficient to accommodate the hearing of short evidence if required. Not to allocate sufficient preparation and hearing time to the IRH robs the court and the parties of any real opportunity to resolve issues and effectively accepts that the IRH will be no more than a pre-trial review hearing. Not to allocate time at the IRH stage is a totally false economy given the delay that will then follow, no doubt with further hearings, and the listing of a much longer final hearing in due course if the case remains contested.

A further area of focus in the autumn will be short-notice hearings. A small working group has been established to identify what may be done to ensure such hearings are only sought when it is truly necessary to do so.

Separately, there is concern that some areas or regions may be struggling to achieve the change of local culture that is required by the PLO Relaunch. Data has consistently suggested that this is the case in all three areas of London. The recent judgment of MacDonald J, the Family Presider for London, in *London Borough of Enfield v E (Unconscionable Delay)* [2024] EWFC 183, provides startling evidence of serial failure to acknowledge the 26 week statutory deadline or the need to make every hearing count and the requirement that experts are permitted only where it is necessary to assist the court to resolve the proceedings justly. In Private Law, London is also an outlier, in national terms, in the proportion of cases in which a fact-finding hearing is held. These and other aspects in which the culture across London is at odds with that experienced elsewhere will be the focus of activity in the autumn lead by MacDonald J, with the support of the Lady Chief Justice, the London DFJs and myself, to address these issues.

The Six Family Justice Board Priorities

In April the national Family Justice Board agreed on six priorities, three in public law and three in private law, for each LFJB to achieve by 31 March 2025:

Public Law:

- No open public law case longer than 100 weeks;
- Average timeliness for care and supervision cases 32 weeks;
- At least 81% of all new cases to be completed in 26 weeks.

Private Law:

- No open private law case longer than 100 weeks;
- Reduce the number of open private law cases by 10%; and
- Improve the experience of children and survivors of domestic abuse involved in private law proceedings.

The aim in setting these objectives was to have targets which were reasonably achievable by all areas, whilst accepting that some were already very close to doing so. The significance of these six priorities is that they have been expressly agreed to by

each of the Family Justice Board's member agencies: the MOJ, DfE, HMCTS, CAFCASS, CAFCASS Cymru and the ADCS and accepted by me on behalf of the judiciary. This is a joint endeavour, and should be seen as such in each locality, just as it is at national level.

In the process of addressing the cohort of public law cases that are over 100 weeks old, it has become clear that a fair proportion of these cases have in fact concluded but are still shown as open on the HMCTS system. In general, this will be because either the local authority has failed to submit a draft final order, or the judge has not approved the draft order, or the order has not yet been entered onto the system. Steps are being taken to enhance the system's ability to chase or remind local authorities or judges where an order needs to be processed, but I hope one and all will appreciate the importance of closing cases promptly once they have concluded.

Adoption

The final report of the PLWG Adoption sub-group is in the final stages of preparation and is due to be published in September.

Disclosure between Family Justice and Criminal Justice agencies

From 1 March 2024 a revised protocol governing the disclosure of information between Family and Criminal agencies and jurisdictions has been in force[2]. The protocol replaces the 2013 *Protocol and Good Practice Model – Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (October 2013)* and applies to the exchange of information and material between criminal and family agencies and jurisdictions. It relates to all private and public family law proceedings, including contemplated Public Law proceedings, and all material held by the police. It will be reviewed by a working group comprising the judiciary, local authorities, police and CPS based on the experience of its implementation, in 2025.

[2] https://www.judiciary.uk/wp-content/uploads/2024/03/2024-Protocol.pdf

Security

Following the major breach of security at Milton Keynes in November 2023, a thorough review of security measures in non-criminal courts and tribunals has been undertaken by HMCTS and the senior judiciary. The lessons learned from that process are shortly to be made known to all relevant judicial office holders (salaried, fee-paid or magistrates) by means of training materials. Can I request in the strongest terms that everyone to whom this training is made available takes the necessary time to work through the material. This is not just for your own personal safety, it is so that each of us can have confidence that everyone else working in our courts knows what to do in terms of risk evaluation, protective measures and action in the event of an emergency. This is not an option. It is a necessary requirement in order to ensure a significantly more secure system in every Family Court.

Transparency

The process of implementing the recommendations of the October 2021 report on Transparency in the Family Court continues. The additional 16 courts that came within the Reporting Pilot in January 2024 have now extended the scheme to Private Law cases in their courts. Plans are now being developed to include all remaining Family Court centres into the Reporting Pilot from next year onwards.

Practice Guidance on the publication of Family Court judgments was issued on 19 June[3]. Its aim is to provide practical advice to judges, legal advisers, and magistrates so that all may be supported in publishing judgments on a more regular basis. Being transparent includes allowing the public to understand the range of cases in the Family Court and how they are dealt with. The publication of judgments is an essential part of that process.

[3] Publication-of-Judgments-Practice-Guidance-JUNE-2024-1.docx (live.com)

Digitisation of the Family Court processes

The rolling programme of digitisation of processes within the Family Court continues. In addition to the Financial Remedy Portal and the Public Law Portal ['FPL'], courts now have the List Assist listing system. For public law work, a small number of courts are testing the Work Allocation programme which will replace the current method of communication with judges by one-off individual emails with an electronic in-tray of all the work that is pending for their attention. The Private Law Portal remains at the testing stage in Swansea and Mid-West Wales and will be rolled out to the next stage of six 'early adopter' courts in due course. I remain extremely grateful to all those in Swansea for taking on this role for our collective benefit.

Suspected Inflicted Head Injury Service Pilot (SIHIS)

A Pilot has been launched in three NHS Foundation Trusts which has been developed by the DfE and the FJC Experts Committee (FJCEC). SIHIS involves the creation of a clinical multi-disciplinary team to deal with suspected inflicted head injury in children aged between 0-8 years old. The multi-disciplinary team [MDT] will produce a Clinical Report based on a template that will bring together in one report the results of all the clinical investigations and will contain the team's assessment of the case from the clinical perspective. This team's report will be available to social services, police, the courts and lawyers as the principal record of the clinical evaluation. It is hoped that this multi-disciplinary approach will have clinical benefits in the investigation and treatment of SIHI and that children will be the main beneficiaries. In addition, from the Family Justice perspective, the hope is that it will assist the court in determining what Part 25 medical experts are necessary and will encourage clinicians to join the pool of experts offering their services to the Family Justice system.

I should stress that this is a genuine 'pilot' intended to test out a new clinical approach. A full consultation will be undertaken as part of the evaluation process in due course. The pilot will run for a year in the following NHS trusts and so it is anticipated that the courts most likely to see the MDT reports will be in Manchester, Sheffield and Birmingham.

- Manchester University Hospitals NHS Foundation Trust
- Sheffield Children's NHS Foundation Trust
- Birmingham Women and Children's NHS Foundation Trust

However, as those trusts take referrals from a wide geographical range the MDT reports may relate to a child who is the subject of proceedings across the country. SIHIS does not alter the law or practice in relation to Part 25 experts. The hope of the FJCEC is that this approach will ensure all necessary clinical investigations are carried out prior to proceedings and that the clarity of presentation, content, and opinion that the Clinical Report will bring should assist in reducing the number of Part 25 experts the court considers it necessary to instruct.

FJC Experts Committee Symposium

The third FJC Experts Committee Symposium will take place in Cardiff on 16 October 2024. The programme will include presentations on SIHIS, Experts and transparency, Vicarious Trauma and Trauma Informed Practice. Booking will soon be available through the Family Justice Council website[4].

Bundles and PD27A

PD27A, which establishes a universal practice for court bundles in Family cases, was last revised in 2018 and is overdue for extensive revision. I am grateful to a working group of the Family Procedure Rule Committee that has produced draft revised guidance for consultation over the coming months. The layout of bundles is an important topic, and I would encourage widespread consideration of the draft guidance and participation in the consultation process.

[4] https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/family-justice-council/experts-in-the-family-justice-system-efjs/

Royal Wills

In *Re The Will of His Late Royal Highness the Prince Philip, Duke of Edinburgh* [2021] EWHC 77 (Fam), I determined that, after a period of 90 years any Royal wills that had been sealed on the order of my predecessors should be unsealed and considered in private before the court might then determine whether to make the contents public or reseal the will. In February 2023 my office published '*The Procedure for Unsealing 90-year-old Royal Wills*'[5]. In accordance with that procedure, nine wills have now been unsealed and have been surrendered to the Royal Archives for safe keeping and academic research. Whilst in no manner sensational, the wills are each of some social or historical interest. Copies of the wills have been provided to the Probate Registry and are available for access online.[6]

And finally …

I hope that all involved in the delivery of Family Justice take the opportunity over the summer for a good break!

The Rt Hon Sir Andrew McFarlane

President of the Family Division

31st July 2024

[5] https://www.judiciary.uk/guidance-and-resources/the-procedure-for-unsealing-90-year-old-royal-wills/
[6] https://www.judiciary.uk/royal-wills/