

VIEW FROM THE PRESIDENT'S CHAMBERS (7)

The process of reform: changing cultures

Sir James Munby, President of the Family Division

In my previous 'Views from the President's Chambers' I have said much about the specific reforms which are now so encouragingly so well advanced. It is time to reflect on some of the underlying changes which we need to embrace: what, for want of a better description, I refer to as changes in the cultures and practices of the family courts.

A couple of years ago I was invited by the Chancery Bar Association to give their annual lecture. I chose the teasing title, 'An unconscionable time a-dying: reports from a traveller in a foreign country'. Only slightly tongue in cheek, it referred to the fact that, even 140 years after the Judicature Act, the three Divisions of the High Court still in surprising measure follow their own distinctive practices. As I commented:

“The foreign country of which I speak is rather closer to Lincoln's Inn than the Antipodes. Not much distance may separate the Thomas More Building and the Queen's Building” – this was before the Rolls Building had opened – “but the world of the Family Division is, I suspect, almost more alien to many of you here than the jurisdictions overseas with which you are so familiar.”

And the contrary, I am sure, is also true.

Much of the time, I suspect, we do things for no better reason than because they are familiar to us. But it is no answer to the question, why do you do this? to say “because we do it”, and little better to say, when pressed, “because we have always done it”. I am not preaching iconoclasm, and much of what we learned in pupillage or articles is as sound now as it was then. But we are living through times of enormous and rapid change, and that requires us to be alert to the need to change our practices, even if they seem comfortable and familiar.

There are, even in the family courts, principles that ring down the centuries, that are as true now as ever. But mere antiquity of practice is no good reason for perpetuating what is no longer relevant or justifiable. As that great family judge Lord Scarman once

explained, the task is to identify and preserve from the past what is of enduring value whilst ruthlessly jettisoning what no longer accords with modern thinking.

This philosophy in part informs my views on transparency. But it goes much further. If the fundamentals of the court process and the oral tradition survive in large measure, we need to appreciate that much has changed. Judges pre-read the papers – hence the vital need for timely lodging of a properly prepared bundle – and the guiding principles of modern practice in the family courts are judicial continuity and robust and vigorous judicial case management. As these become an ever more familiar reality we will begin to see the old distinction between the adversarial and the inquisitorial systems increasingly breaking down. Much of our process, even in the family courts, will, inevitably remain adversarial, for that, after all is human nature. But the adversarial process will take place under the watchful and vigilant eye of a judge who, as part of her inquisitorial responsibilities, will be responsible for ‘setting the agenda’, policing the orders she has made, and ensuring that the case proceeds in accordance with the timetable and directions she has given.

Before I go any further, I must emphasise one thing. I have enormous respect for everyone involved in the family justice system. Your enthusiasm dedication and commitment, in particular to those who are amongst the most defenceless and disadvantaged in our society, needs no encomium from me. We all know – even if too many outside the family justice system, including those who ought to know better, neither know nor care – just what a good job you are doing: your endless willingness to ‘go the extra mile’, to work long hours at great pressure in the most emotionally draining cases that anybody in the entire justice system ever has to cope with, and too often with inadequate financial reward and little public recognition. And, if I may say so – and this needs saying – the advocates who practise in the family courts are, at all levels, the equal of the best that can be found in any of the other courts.

Nothing I say is intended to diminish any of that, but we can always improve – we must always strive to do better. And there are, if I may return to the culture of the family courts, things that need to improve. I make no apology for saying this quite openly. Transparency, openness, requires that we face up – and face up publicly – to what is not as it ought to be. And, despite all the good work, there are still things that need change.

In the first place we have all grown up to accept that delay is bad for children, but there is still a long way to go before we make a reality of that. The revised PLO is achieving quite remarkable things in terms of speeding up the process, but there are still too many care cases on the books whose commencement dates back years rather than months. And if you will forgive me a personal reflection, what progress have we really made over the last decade in private law cases when we compare what I said in 2004 in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, with what McFarlane LJ said only a few weeks back in *Re A (A Child)* [2013] EWCA Civ 1104? No doubt both of these cases were extreme and, I hope, far from the norm, but each stands as a shameful indictment of at least part of our system.

Next, we have to make a reality of the twin fundamentals of judicial continuity and robust and vigorous case management. It is over ten years ago that their importance was first acknowledged and emphasised and in the meantime much has been achieved, not least by the judges, who have embraced this new world with appropriate enthusiasm and determination. But the judges alone cannot eradicate the scourge of delay or themselves deliver all the benefits of their robust case management.

Court offices must ensure that orders, especially if directed to third parties not present at the hearing, are sealed and sent out promptly. There are still, unhappily, places where, despite all the loyal enthusiasm of the staff, there are wholly unacceptable delays in achieving this surely very basic requirement. Let me give a recent example that came to my attention. On 20 September 2013 a judge sitting in a County Court made an order requiring information to be sent to the court by the Home Office by 4pm on 4 October 2013. The envelope enclosing that order was posted on 1 October 2013 and, incidentally, sent to the wrong address. Comment is superfluous. Another problem, still too frequently encountered, is the repeated failure of court offices to ensure the speedy provision of transcripts required by the Court of Appeal, with consequential delays that are as distressing to the litigants as they are inimical to the speedy delivery of appellate justice. It is concerning, to use no stronger word, that this is something about which the Court of Appeal has had occasion to complain three times in the last few months: see, most recently, *Re C (Children)* [2013] EWCA Civ 1158. As I said, “Something must be done to improve practice and performance in court offices.”

What I fear is an even greater cause for concern – and it is for me a real concern – is something symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with *to the letter* and *on time*. Too often they are not. They are not preferences, requests or mere indications; they are orders. This principle applies as much to orders by way of interlocutory case management directions as to any other species of order. The court is entitled to expect – and from now on family courts will demand – strict compliance with all such orders. Both parties and non-parties to whom orders are addressed must take heed. Non-compliance with an order by anyone is bad enough. It is a particularly serious matter if the defaulter is a public body. Non-compliance with orders should be expected to have and will usually have a consequence: see *Re W (A Child)*, *Re H (Children)* [2013] EWCA Civ 1177.

Skilled advocacy has a vital role to play in the family courts as elsewhere. I stand by everything I said in *Re TG (A Child)* [2013] EWCA Civ 5. May I, however, draw to the attention of advocates in the family courts, for it is surely as applicable in family courts as in criminal courts, a point made by Lord Judge CJ in his very last judgment: *R v Farooqi and others* [2013] EWCA Crim 1649, para 113:

“What ought to be avoided is the increasing modern habit of assertion, (often in tendentious terms or incorporating comment), which is not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate. We withhold criticism of [counsel] on this particular aspect of his cross-examination because he was following a developing habit of practice which even the most experienced judges are beginning to tolerate, perhaps because to interfere might create difficulties for the advocate who has been nurtured in this way of cross-examination. Nevertheless we deprecate the increasing habit of comment or assertion whether in examination in chief, but more particularly in cross-examination. The place for comment or assertion, provided a proper

foundation has been laid or fairly arises from the evidence, is during closing submissions”.

Finally, before departing from the recent case-law may I emphasise the importance for all family practitioners, whatever their professional discipline, of the decision in *Re B-S (Children)* [2013] EWCA Civ 1146. The Court of Appeal voiced serious concerns and misgivings about how courts are approaching cases where a placement order or adoption order is made without parental consent because parental consent is dispensed with, either on the footing that the welfare of the child requires it or because the parent lacks capacity.

The recent decision of the Supreme Court in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, has compelled us to look critically at practice in such cases. And that practice, to speak plainly, has not been satisfactory. As the Court of Appeal said in *Re B-S*:

“We have real concerns, shared by other judges, about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt.

In the last ten days of July 2013 very experienced family judges in the Court of Appeal had occasion to express concerns about this in no fewer than four cases: *Re V (Children)* [2013] EWCA Civ 913 (judgment of Black LJ), *Re S, K v The London Borough of Brent* [2013] EWCA Civ 926 (Ryder LJ), *Re P (A Child)* [2013] EWCA Civ 963 (Black LJ) and *Re G (A Child)* [2013] EWCA Civ 965 (McFarlane LJ). In the last of these, McFarlane LJ was explicit (para 43):

“The concerns that I have about the process in this case are concerns which have also been evident to a greater or lesser extent in a significant number of other cases; they are concerns which are now given sharper focus following the very clear wake-up call given by the Supreme Court in *Re B*.””

We must all take heed of the teaching in *Re B*, *Re B-S* and in the even more recent decision of the Court of Appeal in *Re W (A Child)*, *Re H (Children)* [2013] EWCA Civ 1177. It is of vital importance.

Making allowance for all this, there is of course much going on deserving of unstinted praise. I referred in my last 'View', October [2013] Fam Law xxx, to the remarkable success of the Triborough Care Proceedings Pilot. It is only one of many successful attempts to improve both the process and the outcomes for those involved in care proceedings. Another is the pioneering FDAC (Family Drug and Alcohol Court) project carried forward so successfully at the Inner London and City Family Proceedings Court (Wells Street) under the inspirational leadership of District Judge (Magistrates' Court) Crichton.

What is FDAC? It is a problem solving court hearing care proceedings where children are put at risk by parental substance misuse. The aim of FDAC is to help to keep families together, where possible. It has been operating at Wells Street since January 2008. Run by the Tavistock & Portman NHS Foundation Trust and the Coram Children's charity it was initially a government funded pilot with co-funding from three local authorities. Since April 2012 the funding has come solely from the five inner London local authorities who now use FDAC. Cases in FDAC are heard by the same District Judge throughout. This allows continuity and a whole understanding of the individual case and circumstances and means the parents can build a relationship with the judge. Working with the court is a specialist, multi-disciplinary team. If parents agree to take part in FDAC an initial assessment, carried out by the team, is completed within two or three weeks of the proceedings being issued. At the same time the team formulate an intervention plan, in agreement with all the parties, which they then co-ordinate. The plan is given authority by the Court. Expectations are very clear and the task and time available is broken down into steps. The progress made by parents is monitored regularly by the team and the Judge at regular non-lawyer review hearings. The FDAC intervention plan will test whether parents can overcome their drug and alcohol problems and meet their children's needs in the child's timeframe. Timeframes vary with the age of the child. Families are given the maximum possible support overcoming their problems. Parents are expected to abstain from street drugs and alcohol, begin to address

the difficulties driving their substance misuse, strengthen their relationship with their child/ren and create a child-centred lifestyle.

The Nuffield Foundation has funded Professor Judith Harwin and a team at Brunel University to carry out an independent two stage evaluation of FDAC, comparing the outcomes of cases in FDAC with outcomes of similar cases heard at Wells Street in ordinary proceedings. A report on the first stage of the evaluation, published in May 2011, found that FDAC was delivering better outcomes for children and families when compared to conventional approaches, including higher rates of parent-child reunification, and more FDAC mothers and fathers stopping misusing substances. It found that “parents were overwhelmingly positive about the FDAC team”, while professionals valued the FDAC team for their skill, dedication, specialist knowledge, ability to engage parents and the speed of their initial assessments. They unanimously regarded FDAC as a better court experience than ordinary care proceedings because it is “more focused, less antagonistic and more informal, yet sufficiently rigorous when needed”. The report on the second stage of the evaluation is due at the end of November; details of the findings are not yet available but the indications are very promising.

The Family Justice Review was very positive about FDAC, stating that:

“Both local authorities and courts more generally could learn from FDAC’s focused approach to proceedings, including its engagement with all the parties and its use of an integrated team to provide high quality assessments to court and therapeutic support for parents.

... [It] shows considerable promise. There should be further limited roll out to continue to develop the evidence base.”

This is all very welcome, and should encourage the continuation or commencement of similar schemes elsewhere. It is good, therefore, to know that The Department for Education has commissioned the Tavistock & Portman NHS Foundation Trust to support the development of the wider use of the FDAC model and meet the challenge of the 26 week time limit and fit with the PLO.

In relation to the latter point we must see how best the PLO can accommodate the FDAC model (I put it this way, rather than the other way round). We must always remember that the PLO is a means of achieving justice and the best outcomes for children and, wherever possible, their families. It is not, and must never be allowed to become, a straightjacket, least of all if rigorous adherence to an inflexible timetable risks putting justice in jeopardy: cf *Re B-S*, para 49.

Elsewhere in this issue of Family Law (below, p xxx) you will find an important article by Bridget Lindley of the Family Rights Group, 'Engaging families early: time for a national protocol?' She and the FRG are to be thanked for raising this important issue. Their proposals and ideas merit the most careful attention.