Final Report to the President of the Family Division

of the

Private Law Working Group

Child Arrangements Programme

Resolution of 'Private Law' (children) disputes in and out of Court

Introduction

1. In November 2013, the Private Law Working Group (the 'PLWG') submitted to the President of the Family Division the draft Child Arrangements Programme ('CAP'), and supporting materials. These documents were widely circulated to the judiciary and family justice professionals, and were published in Family Law Journal (Jordans) (December 2013). There followed a period of consultation on the substantive proposals.

2. The PLWG received many responses to the consultation (a full list is available in the President's Office; altogether there were approximately 75). In the main, these were thoughtful and well-informed contributions, and we are grateful to those who responded.

3. During the period of consultation, the work of the PLWG was further considered at conferences and seminars nationally, including the Northern Circuit Family Conference (21 November 2013), the Cafcass Private Law Conference (22 November 2013), the President's Single Family Court Seminar (25 November 2013), the High Court Family Judges Seminar (3 February 2014), the Family Justice Council Interdisciplinary Conference (7 February 2014). These events also provided opportunities for feedback and constructive commentary on our work.

4. The PLWG has further met to discuss the consultation responses. Sub-committees have undertaken further homework.

5. We are now in a position to deliver the revised and finalised versions of the following:

   a. The Child Arrangements Programme;

   b. The Guidance on Allocation and Gatekeeping (and schedule);

   c. The Guidance on Judicial Continuity;

   d. The Guidance on use of Prescribed Forms;

   e. The CAP flowchart.

6. We have, further, drafted a revised PD12J FPR; we expect to be able to submit this to the President for his consideration prior to the meeting of the Family Procedure Rule Committee on 3 March 2014.

7. In this report, we briefly discuss only those aspects of our earlier work which generated the most notable (either in terms of quantity or content) responses to the consultation; specifically we identify changes to the earlier drafts, and highlight any other developments.

8. For ease of reference to our first Report we discuss the topics in the same order, and reference the paragraph numbers (§) from the first Report in the sub-headings below.

Generally (First Report §1-6)

9. The responses to the draft CAP, our First Report, and the supporting materials were almost universally positive, commending the work of the PLWG. Many commented on the sound and principled approach to welfare-based dispute resolution in the CAP, and welcomed the practical suggestions contained in our report.

10. Some respondents considered that the language of the CAP should be modified further for the 'lay' readership of Litigants in Person ('LiPs). We

have simplified the language where possible and appropriate, with the intention of making this material more accessible for LiPs.

11. It was helpfully proposed (by more than one respondent) that we should provide a Glossary/'Explanation of Terms' to support the CAP. This appears as a new Annex to the CAP (it is signposted towards the front of the CAP at §3).

12. Other minor stylistic changes have also been incorporated. For example, while we recognise that the word 'Alternative' in 'Alternative Dispute Resolution' (and the 'A' in 'ADR') is still commonly used, we have replaced this with other phraseology to refer to dispute resolution away from the courts, to underscore the mainstream nature of these services.

13. References to Cafcass now also specifically include CAFCASS Cymru, and, where relevant, references to the specific arrangements in Wales (where different from England) have now been added.

Structure of the CAP (§8-10)

14. The structure of the CAP has changed slightly. The opening four sections have been re-worked; 'Signposting Services' has been moved forward in the Programme; there is a new dedicated section on the 'child' who is the subject of the dispute. Both points are discussed below.

15. As mentioned above, there is a new Annex (Explanation of Terms).

Timetable (timeframe) for the Child (§11-13)

16. We received divided opinions on whether the CAP should incorporate a fixed timetable for the child, measured in weeks, as in the revised Public Law Outline §2.3/5.1. This issue also generated animated discussion at the conferences and seminars we attended, and at the further meeting of the PLWG. The majority of respondents supported our original position,

while others forcefully argued for a defined time-limit so that private law court process should be measured in weeks.

17. Having considered the responses carefully, and against the existing statutory requirement to avoid delay, the PLWG recommend that, as previously proposed, the court timetable for the child in private law cases should *not* be measured in weeks. We were unpersuaded that this was sensible in an environment in which:

    a. There is no pre-proceedings work (unlike public law);

    b. There is no professional applicant (unlike public law); the pace of litigation may well be affected by the active co-operation of LiPs;

    c. We envisage that a significant number of cases will be determined in 6 weeks (at FHDRA), and we did not want the 'eye' to be taken down a longer time-line;

    d. Some private law process may be suspended while the parties attempt dispute resolution away from the court.

18. We have however accepted the suggestion that the court timetable should at least be referable to key / landmark events in the child's life, in order to give the court some impetus to resolve disputes within a timeframe which has a meaning to the individual child. The language of this section of the CAP (see §15.2 CAP) is in part borrowed from PD12A, the revised Public Law Outline.

19. We received considerable support for the proposals (§13(a) and (b) First Report) that

    a. Court-ordered reviews should only be directed where 'necessary' and in the interests of the child;

    b. Cafcass should prepare stepped/phased reports.

The Child in the Dispute (The voice of the child) (§14-15)

20. All respondents to the consultation supported the emphasis which we had placed on the child in the resolution of private law disputes. Some respondents (including, notably, the Law Society and Cafcass) felt that we should develop the CAP further in this regard.

21. We have responded to this suggestion by including a new section entitled 'The child in the dispute'. This section emphasises the importance which the parties, Dispute Resolution facilitators, and the Court, should attach to the position, and views, of the child in the dispute.

22. In this regard, we have made explicit reference to the Family Justice Council Guidelines on Judges meeting children; representatives from the Family Justice Board Young Peoples Board made powerful submissions on the benefits to the child of having the opportunity of meeting Judges when they attended seminars during the consultation period.

Dispute Resolution Services / Mediation (§16-33)

23. Generally, mediators welcomed our report and the CAP. Many supported our message that mediation should not be seen as a 'once and for all' activity.

24. However, the availability of mediation services nationally remains a serious concern to mediators and others.

25. Some commentators raised concern that LiPs, and even some professionals working in family justice, still have an imperfect understanding of mediation, and what mediators do. Mediators' concerns were heightened by references in the CAP to 'in-court' mediation, and the presence of a mediator at court, which, it was said, would compound a lack of understanding and/or clarity about the role of mediation, and its interplay with court. In fact, the responses from the

judicial and other respondents indicated a wide regional variance in practice of in-court mediation: in some areas, in-court mediation is promoted and is reported to be successful, while other court centres do not support it at all. Some mediators commented that in-court mediation schemes were failing due to funding issues, notwithstanding public funding support for the same.

26. Linked to the concerns above, many mediator respondents raised anxiety that the essentially confidential nature of mediation could be compromised if mediation was (a) expected to take place in a court setting and/or (b) undertaken with an expectation of a report (even oral) to court at the conclusion of a session.

27. In response to these points:

a. We have revised the wording of the CAP to reflect the message that 'at-court' (we have substituted for this phrase for 'in-court') mediation *may* not be appropriate (though this is subject to the 'Local Good Practice' provision, so if there is a good scheme in operation, we see no reason to dismantle it). There was no material opposition (and indeed much support) for mediation *assessments* taking place at court, and *referrals* to mediation being made by the court, which we have emphasised in the new draft.

b. We are pleased to recommend the use of mediation fact-sheets for court users:

i. 'How mediation may help you' (a guide for Litigants in Person);

ii. Information Guide to Judges on mediation;

iii. Summary Information Guide to Judges, Magistrates and Legal advisers.

and

iv. 'Family mediation: Sorting out family disputes without going through court' – a leaflet prepared as a collaboration between the Ministry of Justice (MoJ) and the Family Mediation Council.

The guides for LiPs ((i) and (iv) above) are deliberately short and straightforward documents, written in plain language. They speak to the individual rather than the former couple. They are designed to give an outline summary and introduction to mediation, given that a mediator will provide the greater detail at a MIAM.

28. We recommend that these documents ((i)-(iii) in final draft at present) should be available for all private-ticketed Judges, and a supply of the fact-sheets / leaflets for LiPs should be available in every court.

29. There may be a case for the Family Mediation Council, the MoJ, the Judiciary and Cafcass developing these tools, and the relationship between court and mediation, further.

Signposting Services (§17-25)

30. Respondents to the consultation universally regarded this section of the draft CAP ('Signposting Services') as useful. Many advocated that it should be expanded.

31. The 'Signposting Services' section has been moved forward within the CAP, to emphasise its importance and (we hope) immediate relevance to separating parents, to assist them to find resources for dispute-resolution. As proposed, it has also been modestly expanded.

32. These moves were further underlined by research results (commissioned by Resolution, the organisation of family lawyers and other professionals), published during our consultation period, in Family Dispute Resolution week (25-29.11.2013). The chair of Resolution (Liz Edwards) summarised the research as indicating:

"*a worrying lack of awareness about the options available to couples who are going through break-ups. There is at best a patchy understanding about non-court based solutions that often prove less stressful and less expensive than a lengthy courtroom battle. There is also ill-founded scepticism about the legality of non-court solutions – a myth that we need to urgently bust*".

33. In this regard, we were pleased to learn that in the last few months that:

    a. DWP has taken steps to improve the structure and accessibility of 'sortingoutseparation.org.uk' (see §18 First Report); that said, we believe that more needs to be done to ensure its relevance to separating couples;

    b. MoJ is working to produce a web-based 'landing' page from which LIPs can be signposted to existing support and guidance to help them navigate the court process.

34. As CAFCASS Cymru observed, these resources need to be backed by "*a very strong marketing campaign*".

Parenting Plans (§26-28)

35. We have given greater prominence to Parenting Plans in the CAP (§26-28 First Report), and have expanded the guidance in this regard. We have further provided links to assist LiPs and others to access Parenting Plan templates and relevant advice.

36. Some mediators raised queries about whether a concluded Parenting Plan prepared in mediation would be an 'open' or a confidential/privileged document; we would expect any agreed plan to be an 'open' document. Mediation bodies may need to give guidance to providers about this.

37. Where there is a Parenting Plan in existence at the time of a court application, we propose that this document should be attached to the C100 (this was the specific recommendation of the Justices Clerks Society, which was accepted by the PLWG). We suggest that the relevance, and/or weight, of that agreement will be a matter for the court to consider in each individual case (see again §28 First Report).

MIAM (§34-38)

38. Many of those who commented on the draft CAP considered that more should be done within the programme to compel attendance of Respondents at a MIAM. The Family Mediators Association, for example, commented that the fact that respondents are not compelled to attend a MIAM dilutes the emphasis of using mediation as a means of resolving disputes outside of the court process. We considered these submissions carefully, but concluded that no step could properly be taken by the court in this regard (absent a change in the Rules) prior to the FHDRA. We have nonetheless maintained the obligation on the court at that hearing specifically to consider whether the respondent should attend a MIAM (see §14.13: MIAM (c)).

39. We have retained the proposal for three checks on MIAM compliance; no respondent argued that we should do otherwise. By way of reminder: the C100 is first checked at the point of issue to ensure that the correct basic information is provided (including completion of the sections relevant to the MIAM (see §9.1 CAP); secondly, the Gatekeepers will check MIAM compliance at the gatekeeping stage (§9.4(1) CAP), and may direct attendance before the FHDRA if there has been no attendance at the MIAM and no satisfactory explanation (the CAP01 draft Order reflects this). Thirdly, MIAM compliance will be checked again at the FHDRA (§14.3 CAP). This monitoring as the application proceeds supports and reinforces the objective of the Family Justice Review, and of the Ministry

of Justice, of ensuring that applicants for private law orders do indeed attend MIAMs, in all but excepted cases.

40. At the time of writing, we understand that the draft Rules to support Clause 10 of the Children & Families Bill, which will be considered by the Rule Committee on 3 March 2014, do not reflect the 'second' check (i.e. at the Gatekeeping stage). We urge the Rule Committee to consider favourably our proposal that at the Gatekeeping stage the judge *should* have the power to direct an applicant to attend a MIAM; there is a valuable 4-6 week window between issue of application and the FHDRA in which to divert non-excepted applicants to a MIAM.

41. We are pleased to note that our recommendation (see §36-37 First Report) for the integration of the C100 and the FM1 has been accepted by the MoJ, which is now developing the revised form.

42. Guidance is being developed regionally (we hope that this can be rolled out consistently nationally) to assist court administration and counter staff to process applications appropriately and consistently.

43. Regrettably, it appears that many applications lack key information (not just in relation to compliance with a MIAM) which is often vital if safeguarding checks are to be carried out effectively. It will be a matter for local guidance from the DFJ and HMCTS head of CFT to advise on the extent to which the counter staff actually pursue the applicant directly for this information. We suggest that if administration or counter staff have doubts about whether to issue the proceedings (e.g. if information is missing or the application is otherwise defective) they should be encouraged to seek advice from a Gatekeeper.

Without notice applications/Orders (§39-43)

44. We have added a further provision to make clear that any Order which follows an emergency 'without notice' hearing should specify:

a. the reason(s) why the Order has been made without notice to the Respondent, and

b. the outline facts alleged which have been relied on by the Court in making the order, if this is not clearly set out on the face of supporting statement.

In reality, where applications are made by LiPs we do not consider it realistic to expect that the litigant should necessarily or always provide a statement of evidence *after* the event, though a transcript could be ordered in a relevant case (see §13 & §17 of the judgment in *Re C (Child)* [2013] EWCA Civ 1412).

45. We have specifically provided guidance (at §12.5 CAP) to address a practical issue which was raised by the London Association of District Judges (and others), about the mechanism for directing applications into the mainstream process of allocation and safeguarding (and to the relevant court), *after* the urgent/without notice application has been determined.

Allocation and Gatekeeping (§44-52)

46. We received many responses on our draft Allocation and Gatekeeping Guidance; this generated further careful consideration by the PLWG. We were unable to reach a consensus on an important aspect of allocation, namely the role of the legal advisers at the FHDRA.

47. A FHDRA is a court hearing at which substantive orders can be (and often are) made. The anecdotal evidence is that a high percentage of private law applications are resolved completely at FHDRA: the research 'Outcomes of Applications to Court for contact orders after parental separation or divorce' (Hunt & others; MoJ; 2008) suggested that in approximately 37% of cases, no welfare concerns were raised by either

party; this indicates the potentially high number of cases amenable to early resolution.

48. There is a collective acknowledgment within the PLWG that the allocation of cases should promote, and not impede, the potential for a court to make a substantive/final order at the earliest opportunity (i.e. a FHDRA). This does not pose a problem if the FHDRA is undertaken by a judge or magistrate. It does however create a potential problem if the FHDRA is undertaken by a legal adviser (given that legal advisers do not have the power to make substantive Children Act 1989 Orders).

49. Differences of opinion lie (both within the PLWG and across DFJ areas in England and Wales) in the use of the legal advisers to perform the FHDRA.

50. We are conscious that in some regions, heavy reliance is currently placed on legal advisers to undertake the FHDRAs. We therefore recommend that while the arrangements for the Family Court are implemented and consolidated in those areas where legal advisers are *currently* undertaking FHDRAs, they should be able to continue to conduct these hearings (where available judicial resources locally require this) provided that:

    a. In the event of agreement being reached or order being necessary, the legal adviser can arrange for any substantive order to be made on the same day by a court;

    b. This arrangement is agreed between the DFJ, HMCTS Head of CFT, the Justices Clerk and the relevant Panel Chair(s).

51. In those areas where legal advisers do *not* commonly undertake FHDRAs, then any extension of this practice will not only need to be agreed by the DFJ, HMCTS Head of CFT, the Justices Clerk and the relevant Panel Chair(s), but also by the President of the Family Division and the HMCTS

Director for Civil, Family and Tribunals (by submission to the Family Business Authority).

52. We were conscious when finalising our proposals that the draft *Justices Clerks Rules 2014* (currently before Parliament) will specifically authorise justices clerks to carry out the functions set out in rule 12.5 FPR 2010, rule 12.12 FPR 2010 and the associated PD12B in the Family Court.

53. Our proposals reflect the fact that legal advisers will be able to perform a greater range of functions to support all judges and magistrates across the Family Court, whilst recognising that it will still be necessary for judges and magistrates to handle contested issues.

Safeguarding Checks (§56-59)

54. There are no material changes to the provisions for obtaining safeguarding checks. However, we have included a new provision for safeguarding checks to be renewed where an application for enforcement is made more than three months after the relevant order.

55. It shall be the responsibility of the Gatekeeper to identify these cases and to make the reference to the Cafcass Intake team for an updated safeguarding check.

FHDRA (§63-69)

56. Some respondents considered that we had not been more ambitious in bringing forward the timing of the FHDRA (i.e. week 5 or 6) ("*six weeks is a long time in the life of a young child where, say, no contact is taking place, or where it is clear to the court on issue that a section 7 report will be needed*": Resolution). Our proposal matches the existing regime. We were advised by Cafcass / CAFCASS Cymru, and accepted, that it was unrealistic for safeguarding checks to be completed in less than 17 working days. Arrangements for children made at a FHDRA, particularly if they are to be final arrangements, need to be safe.

Capacity of the litigants (§73-76)

57. A sub-group of the PLWG is currently working on guidance to assist Judges and magistrates in private law cases where there is reason to believe that a party may lack capacity; it is hoped that this guidance can be incorporated into the Family Justice Council publication 'Parents who lack capacity to conduct Public Law Proceedings' - currently under revision – to provide a comprehensive guide for the judiciary.

58. We hope to complete our work in this regard in time for the FJC to be able to publish this composite Guidance in April 2014.

Expert reports in Private Law Cases (§77-81)

59. We received a number of responses highlighting the ongoing difficulties for judges and magistrates in not being able to commission expert reports in cases where the parties are unrepresented, and without the means to fund expert involvement. These difficulties were further discussed at all the seminars we attended, specifically and most recently at the Family Justice Council Interdisciplinary Conference (7 February 2014).

60. Representatives of the relevant Government Departments have heard the concerns of practitioners and judges on the PLWG.

61. The Ministry of Justice would like the chance to consider evidence of any particular difficulties encountered by Judges and practitioners in cases in which expert evidence is necessary but funding issues prevent the commissioning of a report: if you have relevant information please communicate with the MoJ by e-mailing Joe Murphy on joe.murphy@justice.gsi.gov.uk.

Witness statement template and Guides for Litigants in Person (§84-85/90-95)

62. Our efforts now focus on further practical steps to assist LiPs in the Family Court.

63. We hope to be in a position to circulate relevant guides for LiPs, in liaison with the Ministry of Justice, and having received guidance from AdviceNow, in time for the launch of the Family Court.

PD12J Fact-finding hearings (§86)

64. We have prepared a revised PD12J FPR 2010 in relation to child arrangements cases involving allegations of domestic abuse and harm. The revisions reflect changes of language, court structure, and the likely amendments to the character of private law orders introduced by the Children & Families Bill, currently still before Parliament.

65. We have adopted suggestions made by Ryder LJ in his judgment in *Re C* [2013] EWCA Civ 1412. We have further absorbed into our revisions the recommendations of Professor Rosemary Hunter & Adrienne Barnett from their report 'Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Orders: Domestic Violence and Harm' (January 2013: FJC: Hunter & Barnett). The revised PD draws further on the expertise of Claire Sturge and Danya Glaser and their joint article 'Contact and Domestic Violence: The Experts' Court Report', *Family Law*, September 2000.

66. We consider that the practice and conduct of fact-finding hearings involving LiPs should be monitored carefully over the next year or so; an inter-disciplinary group could usefully then consider whether further revisions to PD12J are necessary.

Judicial Training (§95)

67. The Family Course Directors of the Judicial College have devised a practical Training Programme which is due to be rolled out regionally in April-June 2014 in one-day sessions.

68. We are grateful that this has been facilitated, and we hope that all private law ticketed judges, and magistrates, will benefit from this.

Bundles (§96-97)

69. If an application is not finally resolved at FHDRA and directions are given for a further hearing, where the parties are both LiPs, HMCTS has helpfully agreed – if directed by the court – to prepare a Litigant in Person Bundle for use by the court at subsequent hearings (see §14.13 'Orders' (j)).

70. Ideally this will be in a ring binder with the following sections and a running index at the front:

    a. Section A: Applications

    b. Section B: Orders

    c. Section C: Statements

    d. Section D: Cafcass safeguarding letter, analyses and any expert reports

    e. Section E: Police, medical, other

McKenzie Friends (§98-100)

71. We make no specific recommendation in the revised CAP in relation to McKenzie Friends. We do not pursue our initial proposal for the modification of the current Guidance (*Practice Guidance: McKenzie Friends (Civil & Family Courts) [2010]*).

72. We have specifically referenced in the revised CAP that McKenzie Friends may attend court hearings with LiPs (in accordance with the Practice Guidance: see §14.5 CAP).

73. Some of the respondents expressed concerns about the position of McKenzie Friends who are paid for their services; we understand that the Legal Services Board is due to report imminently on the use of paid McKenzie Friends. We will be assisted to see that report before commenting further.

Preparation and Service of Orders (§101-103)

74. We are pleased to report that HMCTS has confirmed that it will in the future serve C100 applications on the respondent, instead of the applicant being required to do this, as at present.

75. This change of practice will require a rule change, but should importantly remedy the current situation in which many respondents find out about the launch of proceedings from Cafcass, because the applicant has not served the application upon them.

Enforcement (§107-108)

76. The revised CAP includes the promised section on enforcement. In drafting this, we have taken into account key messages from the research published in December 2013 'Enforcing Contact Orders: problem-solving or punishment?' (Trinder, Hunt & others).

77. It is plainly important, both for the benefit of the individual child and the integrity of the family court process, that courts enforce the orders which they make effectively, when invited to do so.

78. Specifically, we endorse the recommendation that safeguarding checks should be renewed if the enforcement application is made more than three months after the order alleged to have been breached (see above).

79. There has been a clear call for District Judges to be vested with the power to order a committal for breach of one of its orders. We endorse this.

80. We continue to recommend the development of a specific E-PiP (Enforcement Parent Information Programme).

Flowchart (§5(e))

81. This has been well-reviewed in the consultation; it has been modified slightly, and. we hope, made clearer.

Conclusion

82. We approach a landmark in the evolution of Family Justice with the imminent launch of the Family Court.

83. We believe that the processes of the Court, and development of supporting services, should match this important innovation.

84. In this respect, we commend the CAP, and supporting materials, as providing a proper framework to drive cultural and professional change in the way private law disputes are resolved in the interests of children.

Mr. Justice Cobb

For and on behalf of the PLWG

25 February 2014