JUDICIARY OF
ENGLAND AND WALES

The Family Justice Modernisation Programme

Fourth update from Mr Justice Ryder

March
2012

Fourth update from Mr Justice Ryder

As a change to the format to date of my bulletins, I thought you would be interested to see the bones of a speech which I have made recently to colleagues in the Family Justice System. You will know that I intend to keep as many people informed of progress as possible, and I have taken the opportunity to do so at conferences held by and meetings of the Council of Circuit Judges' Family Committee, representatives of the Judicial College, Local Family Justice Councils, the Family Law Bar Association, the Law Society and the Association of District Judges. The President included much of this information in his March speech to Resolution and we will continue to update as many of you as possible as this work develops.

"The problem with change is the baggage we all want to bring with us. It is often comforting. May I tempt you, perhaps even encourage you to sit on that baggage for a short while and join me on a journey.

"Since the publication of the Family Justice Review Panel's report, I have had the advantage of being involved in a very significant exercise discussing key themes for change with every judicial association and practitioner interest group. I have discovered that there is a remarkable consensus not just between those groups but also with Government. It is our purpose to implement a dramatic change programme.

"During the course of the next year I expect to see the launch of a new court of record: the Family Court, to replace the Family Proceedings Court, the family jurisdiction of the County Court and the general family work heard by High Court Judges. The High Court's supervisory, inherent and international jurisdictions will remain separate as will the Court of Protection. The High Court will continue to sit both in London and on Circuit to hear cases involving the use of those jurisdictions. The new Family Court will for the first time bring together all judges and magistrates exercising family jurisdiction into one court across England and Wales.

"The court will be a 'judicially managed' court and by that I mean that the allocation of work to the judiciary and magistracy, its case management, case progression and the measurement of the success of that judicial process will be for the judiciary.

"On the 2nd April 2012 we launched a new management information system, the Case Management System, to replace the flawed materials which are presently in use. The new system will track every public law case issued from that date and will be a national pilot for the whole of the financial year 2012/13. The system is able to monitor the progress of cases which the judiciary decide can and should be completed within 26 weeks and where that is not in the interests of the child concerned it will monitor the progress of the timetable for the child which is set by the court. It will record all adjournments, use of experts and the reasons for the same.

"This is a major innovation. For the first time the family courts will have a record of baseline information so as to understand where public law cases are allocated and what is the consequence in terms of delay of the case management decisions that are made. Every reason for a case management decision made by the case management judge or case manager will be recorded in the appropriate order and logged on the new system. For the first time we will know why unplanned delay is occurring and we will be able to say so. This ought to influence better management of the overall caseload by judicial management of our own resources i.e. deployment and listing. It will also inform discussions between Designated Family Judges and local Directors of Children's Services and Cafcass service managers as well as with the judges and magistrates who sit locally and the professionals who appear before them.

"The new court will have a new emphasis on evidence based good practice. We intend to publish peer reviewed research and good practice guidance in the form of 'Pathways' It is intended that guidance be given in the form of evidence based plain language pathways which set out the expectations the court has of the parties the expectations the parties should have of the court. The pathways will describe a standard 26-week track and an exceptional track based on the timetable for the child. In support of these pathways there will be guidance given

on important case management steps or components such as:

- Local authority pre-proceedings work
- Social work evidence
- Key issue identification
- The timetable for the child
- The threshold
- Cafcass/Cafcass Cymru advice and analysis
- Use of experts
- Assistance from the Official Solicitor: mental incapacity
- Placement options and care planning.

"In addition, we intend to publish descriptions of services provided by other agencies, including but not limited to:

- In-court administration (HMCTS)
- Court social work (Cafcass/Cafcass Cymru)
- Contact services (NACCC)
- Safeguarding
- Testing by commercial organisations
- Decisions by the LSC.

"A statement of principle about inquisitorial case management is being considered.

"There is a project to identify the court's expectations of unrepresented parties and vice versa so that cases involving unrepresented parties are not unfairly prejudiced in terms of their process. This will involve the provision of significant new materials to assist both represented parties who appear against those who are unrepresented and unrepresented parties to understand the expectations of the court and to abide by its procedures and practices.

"As part of the modernisation programme we intend to pursue a separate project which looks at private law reforms. Quite apart from a careful reconsideration of the court's case management processes having regard to the number of litigants who may fall out of scope of public funding and the benefits of mediated resolutions, there are primary legislative changes proposed by Government which include the concept of shared parenting and amendments to section 8 of the 1989 Act. We will return to private law in more detail during the course of this year, when Government intentions are clear.

"To return to the 26-week pathway in public law proceedings: the pathway is likely to describe the case in which the threshold is agreed or is plain at the end of the first contested interim care order hearing by reason of the decision made at that hearing. Of necessity, the interim threshold upon which an interim care order relies must in its reasoning have identified prima facie evidence in support. The legal environment that remains is a welfare i.e. inquisitorial environment not an adversarial fact finding environment. The problem to be solved is essentially placement which may of course include the success of rehabilitation, the feasibility of kinship options and consequential contact. Even as respects "planned and purposeful delay" cases decisions can be made in principal within 26 weeks. Courts will be encouraged to identify whether in principle a parent will be in a position within the timetable for the child to resume care. If that decision is made within 26 weeks it follows that planned and purposeful delay might include the use of court based supervision under validated and research based options such as the FDAC court whose success has been clearly established.

"Within this welfare environment it is likely that the court will start from the proposition that only such expert evidence as is necessary to decide a relevant issue upon which the ultimate decision is based should be ordered. Changes to the rules and practice directions relating to experts will make provision for this approach. In standard track cases it is likely that if any expert is needed that expert will be a single expert for a party or one agreed expert. This is not a quasi-inquisitorial approach. It is a full inquisitorial approach with the court in the driving seat in relation to the issues to be tried and the evidence which is necessary for that hearing to be conducted fairly. It is anticipated that within the review of rules and practice directions,

consideration will be given to a system for urgent case management appeals.

"In order to further reduce the need for expert evidence in both standard and exceptional tracks, we will enlist the help of the Family Justice Council and join with Government in the publication of peer reviewed research as to evidence-based good practice. Not only will pathway documents be available giving guidance as to the form and content of materials for use in court, but judges will have available to them research materials which are uncontradicted i.e. generally accepted by a reasonable body of professionals. That would not of course prevent a dispute being heard relating to such materials but it will concentrate minds as to the need for the same in many cases.

"Let me return for a moment to the overall system within which this new court will work. Primary legislation will be necessary to establish the Family Court. Secondary legislative instruments will be needed to provide allocation directions so that the best use can be made of the resources of the new court. Guidance will be necessary on best practice i.e. the pathways, for unrepresented litigants, gatekeeping processes, judicial continuity and patterning, listing and enforcement and compliance. The overall programme of change is indeed significant. It will need a strongly managed and led court. The judges charged with those tasks will benefit from the inter-disciplinary discussions which have been the hallmark of the response to my work.

"The judiciary have now taken part as observers in the first planning meeting of the Family Justice Board. They will also play their part as observers in that board's performance sub-group and in local Family Justice Boards across England and Wales and the Family Justice Network in Wales. The judiciary are very pleased that an independent inter-disciplinary advisory group will be retained in the form of the Family Justice Council. The judiciary have been involved in detailed discussions with Government to agree the terms of reference and membership of these bodies and the memorandum of understanding which protects the independence of the judiciary and those judges who will be involved in the work of these bodies."