

Evidence submitted by Hon Judge Meston QC

THE LEGAL FRAMEWORK

The existing legal framework for determination of private family law questions derives from the Children Act 1989. The Act replaced the concept of parental rights with "parental responsibility". It replaced the old terminology of "custody" and "access" with "residence" and "contact". It provided a rational and useful checklist of considerations to which regard must be had when deciding the outcome of any question based on the welfare of the child. It provided a range of orders which can be made to meet the requirements of the individual case. It introduced what has come to be known as the "no order principle" which requires the court not to make any order unless it considers that doing so would be better for the child than making no order at all. It specifically provided for the court to have regard to the general principle that any delay in determining the question before it was likely to prejudice the welfare of the child. The Children Act 1989 introduced substantial changes to the law and practice which have worked well, and certainly improved on what went before. The Act has allowed for continuing developments through decisions of the higher courts. Recent developments in case law have allowed the courts to make "shared residence" orders without there necessarily having to be a history of parental co-operation or exceptional circumstances.

In contact cases the well-established case law principles are as follows:

(i) It is almost always in the interests of a child whose parents are separated to maintain personal relations, and to have regular direct contact, with the parent with whom he or she is not living. To deny a child contact with a parent is to deny that child important part of his or her upbringing.

(ii) The court is concerned with the interests of the individual child and not with those of the parents except insofar as they bear on the interests of the child.

(iii) Wherever practicable the court should maintain and encourage contact, and short-term problems should not be given undue weight.

(iv) Contact should only be denied or restricted if there are cogent reasons for so deciding, reasons which would make contact or a less restricted form of contact detrimental to the child.

Those principles are now reinforced by the application of the European Convention on Human Rights.

The operation of these principles by the courts ensure that the great majority of cases are settled with little or no involvement of the court process, and also that only a very small minority of parents are prevented from having direct contact.

Circuit judges, like family judges at all other levels, have long understood and supported the proposition in the 2004 Green Paper that the damaging effects and risks of parental conflict can and should be reduced by swift resolution of disputes or potential disputes between parents. The judiciary strive to encourage and assist the parties to reach agreed resolutions as amicably as the parties' circumstances and personalities permit. The task of the court in almost all cases is to try to provide the parties with a pragmatic and workable solution, providing arrangements which will last. If such arrangements can be achieved by

negotiation and agreement they have a better prospect of success.

It should be emphasised that whatever the perceived weaknesses of the existing court processes, the present system does operate to ensure that cases involving disputes about children which have to come before a judge for decision involve only a very small proportion of separating parents. The present system is already geared at every stage to encouraging co-operation, negotiation and agreement, intended to spare all concerned the distress of court proceedings and to minimise the burden on children who have already suffered parental conflict and separation. Contested cases will only reach a judge for decision because the parents have been unable to agree between themselves arrangements for the children, and have then still been unable to reach agreement after whatever conciliation procedures are available in the area and then after the further efforts and recommendations of CAFCASS officers. If lawyers have been instructed then almost certainly they too will have tried to negotiate a settlement. However, it is inescapable that some parents are resistant to efforts to attempt to conciliate and mediate and do not appreciate or accept the approach adopted by the professionals that there are no winners or losers apart from the children. It has to be recognised that some estranged parents do not find co-operation or communication easy, and that some find the continuation of conflict to be preferable. It is also inescapable that there are certain cases in which a judicial decision is essential to resolve important factual issues relevant to the future arrangements for the children, particularly where violence, sexual abuse, neglect or a threat of abduction is alleged. In an increasing number of cases now issues are raised about the risks to children because of alleged drug misuse by one or more adult. To try to avoid or suppress important factual disputes in an attempt to produce a compromise can, in some cases be a disservice to the parties, particularly if those issues continue to fester or are likely to re-surface.

There are other cases where a judicial decision is still required to decide unresolved disputes as to the arrangements for residence of the children (with too many still referring to "custody" despite the changes in terminology introduced by the Children Act 1989), or as to the nature and extent of contact. In these cases the court has to try hard to look realistically at the competing proposals and at the other possible options and to consider the possible consequences of all such options, particularly the effects on the child or children. Sometimes even agreed contact arrangements can impose considerable demands on children however resilient.

In the small proportion of contested cases the adversarial process is used to test evidence, but the court's function remains investigative, which enables the court to control the conduct of the hearing including the content and manner of the cross-examination of parties and witnesses. The specialist advocates who usually appear in these cases act with restraint. All judges are careful to try to keep the "temperature" down without allowing hearings to become too informal, remembering that the parties and children have to live with the decision of the court.

CONCILIATION

Court based conciliation schemes as a mandatory first stage of proceedings seem to have a high rate of success. Such schemes provide early intervention with professional help from CAFCASS in a privileged setting. Although the feelings of the parties may still be running high, particularly if a volatile relationship has just ended, experience of conciliation schemes shows that in many cases they can be encouraged to think through the realities of the situation for the children and to reach sensible agreements before positions become

more entrenched. The availability of a neutral CAFCASS officer is of particular value when one of the parents is without legal representation. When agreement is reached the court can record it, and if appropriate underpin it by converting it into a consent order. If agreement is not reached the court can make properly focused case management directions.

There is no national model for court based conciliation schemes, and so the nature and the availability of such schemes still vary from area to area. These variations seem to be largely the result of differing demand and differing local court and CAFCASS resources. There is a long established and well-regarded scheme at the Principal Registry of the Family Division (see article in Family Law, October 2004 "Conciliation is Working") and there must be a strong case for bringing together the best practices operated throughout the country to provide a national model at least at County Court level.

CASE MANAGEMENT AND DELAY

There has been firm and proactive case management since the implementation of the Children Act 1989, underpinned by the Family Proceedings Rules 1991 and Practice Directions and most recently by the President's Private Law Programme Framework Document. The major causes of delay, including unexpected adjournments, continue to be the difficulties in obtaining CAFCASS reports (even when the court has tried to confine the focus of a requested report to the essential issues) and difficulties with expert witnesses (in the small number of private law cases when outside experts are required). In these and other cases where the timetable fixed by the court starts to slip the court can only act and regain control if the slippage is brought to its attention. Many responsible practitioners will inform the court if a problem arises, giving the court the opportunity to adjust the timetable usually without delaying the overall progress to final hearing. There is otherwise a limit to the control which the court can exercise between hearings (as distinct from at hearings) in the absence of mechanisms and manpower to monitor the progress of individual cases and to chase up failures to adhere to court directions and timetables.

JUDICIAL CONTINUITY

Judicial continuity is now increasingly recognised as important to ensure effective and efficient control of cases, as well as public confidence. It can be obviously disconcerting for the parties when another (or yet another) judge becomes involved once the case has been allocated to the appropriate level of judiciary. Most judges prefer to have dealt with a case throughout so that they can gain proper familiarity with the issues and personalities and understanding of how the case has developed over time. In practice the difficulties with maintaining continuity have been and will continue to be the result of the other work commitments of full-time circuit judges, most of whom are expected to work at several court locations and in several jurisdictional fields (criminal and civil as well as family). Even those judges who concentrate mainly or wholly on family law are already heavily committed to public law cases where the new Protocol governing care cases also places a strong emphasis on judicial continuity and on early completion of legal proceedings (with a 40 week target). Continuity is also difficult to maintain when cases are allocated to Recorders (part-time judges). Given existing resources there is a continuing tension between judicial continuity and the avoidance of delay.

CONTACT CENTRES

Contact centres are an invaluable facility, particularly as a short-term measure to allow

(typically) the mother to regain confidence in the father's behaviour and attitude, to test the reliability of both parents and to allow contact to continue or resume where there have been real difficulties. The use of contact centres has certain limitations. They will normally not accept families where there is a significant history of alleged violence or abuse. With the exception of a very few specialist centres they "support" rather than supervise contact. They are staffed by volunteers who are not expected or allowed to provide reports or other evidence for court proceedings; and so any supervision or observation of contact has to involve CAFCASS workers who are not often available at weekends.

FAMILY ASSISTANCE ORDERS

This is one aspect of the Children Act 1989 which has not really lived up to expectations, mainly because of the other demands on CAFCASS and local authorities to whom such orders are addressed, and perhaps also because of uncertainty about what such orders are supposed to achieve. They can be used to try to support children who are upset or bewildered by the conflict surrounding them, or in cases where there remain unresolved problems and as a means of maintaining communication between the family, CAFCASS/the local authority and the court. However, there is quite often delay in allocating orders to the responsible officer which reduces the value of such an order which is limited by statute to six months duration.

ENFORCEMENT POWERS

This topic was fully considered by the report of Mr Justice Wall "Making Contact Work". Effective and flexible enforcement powers are a necessary part of the court's armoury in those very few cases where the court's orders are deliberately flouted. There are some cases in which the court gets involved in a form of brinkmanship with defiant parents and the court needs to be able to make meaningful threats to secure compliance with orders. The limited range of powers presently available under the Contempt of Court Act 1981 can make it really difficult to exert the authority of the court and can lead the court to prefer not to make threats which may sound empty. Committal of a parent to prison or a change of a child's residence are plainly remedies of very last resort. The only advantage the civil court has over the criminal court at present is in the power to impose a suspended prison sentence without there having to be "exceptional circumstances". The lack of powers to enforce the orders of civil courts by the type of community punishments which are available to the criminal courts has been noted for a long time, (see *R v Palmer* [1992] 1 WLR 568). The ability to impose suitable programmes of treatment on parties in contempt would be a useful addition to the court's powers, not just in cases involving children. In cases involving children such a power would provide a potentially useful vehicle for positive therapeutic work, as an alternative to merely coercive punishment.

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Bournemouth County Court

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