

Evidence submitted by Hon Mr Justice Ryder, High Court Family Division

PRIVATE LAW

Disputes involving parents and children are frequently characterised as intractable. Fortunately, for the vast majority of those involved, they are not. Most parents are willing and able to come to wholly appropriate agreements about the way they share their equal parental responsibilities so as to provide for the best interests of their children. When relationships break down, some parents and some children need help, whether that be informal assistance from a lay advisor or voluntary agency or more formal relationships with professional advisors and ultimately the family courts. Even in these circumstances a significant majority of problems are resolved without a contested court hearing.

The modern emphasis on residence and contact orders is no more than a reflection of an historic fact: prior to the Children Act 1989 there was a similar emphasis on obtaining custody, care and control and access orders. Despite the statutory intention of the "no order" principle, it remains an aspect of adult human nature to construct a defensive position by court applications and orders. For some, most particularly those who have been abused or who are at risk, there are very real safety issues that demand the earliest intervention and protection of the courts. For others, unless there be rapid, enforceable and consistent access to a humane family justice system, the very system and its use by others can become an instrument in an adversarial battle.

Modern case law and judicial commentaries, examples of which are before the Committee, have repeatedly emphasised why the family justice system fails the most needy. Until recently, the very existence of a family justice system might have been questioned (rather than simply the existence of specialist judges and courts). Some of its defects are merely structural and can be remedied by effective management of existing resources; others demand the acceptance of the need for new remedies, better enforcement, a strategy for the justice system and for each case that is heard within it and the better targeting and allocation of scarce resources.

The implementation of CASC recommendations to improve remedies, support services, education, modification and treatment options and enforcement is long overdue. This has been a constant theme of the judiciary for a number of years. The commitment to implement is welcomed but concern remains as to the timescale, the commitment to Parliamentary time (ie the priority of that commitment), the lack of engagement of the NHS (see below) and the funding of the options that should be made available.

— The draft family justice strategy identifies the earliest window as 2006—this is simply unacceptable.

— The green paper excludes the possibility of referral to a health services professional (eg a consultant psychologist or psychiatrist) on the apparently false basis that that would provide for an unethical compulsion to receive healthcare treatment. The proposal was for compulsory referral for consultation (not "treatment") with named experts who were willing and able to provide the advice services which are necessary and which are so frequently engaged much later in the court process when sadly they can be less effectively used because of the increasing entrenchment of parties over time. There is equally no proposed compulsion on a healthcare professional to provide the service—the clinicians who are able and willing to work in this field already make themselves available. It is probably the case that there are resource implications to a formal commitment by the DH/NHS which

are being avoided by the private instruction of clinicians or their funding by the Legal Services Commission.

— The Green Paper proposal should be expanded to include this option which was unnecessarily removed: the merits of funding can be determined by the judge on the facts of the individual case.

— The commitment to funding of inter-disciplinary support services needs to be clear. Just as in the case of CAF/CASS and its implementation, it would be less than helpful to give a commitment to provide support services, improved remedies and enforcement options if the burden falls on existing agencies without new money or the voluntary sector without funded service level agreements.

The judiciary are committed to identifying and implementing case management systems that provide for judicial continuity, consistency of approach and the earliest emphasis on out of court conciliation and alternative dispute resolution options. The President announced the implementation of a new Private Law Programme by the immediate introduction of a Private Law Framework (a template to enable forward planning) on 21 July this year. The details of the Framework were shared with Government during the writing of the Green Paper and have informed the proposals set out in the Green Paper. The Programme was issued on 1 November 2004 and will be implemented in all 52 family court areas by local agreements under the direction of Designated Family Judges approved by the President. The main features of the Framework/Programme are:

— Introduction of an early first hearing (a First Hearing dispute resolution appointment) for every private law application commenced in the county court by "gateway" district judges with family tickets.

— Gradual roll out of an in-court conciliation service provided at selected centres hearing family cases with the attendance of CAF/CASS Officers at the First Hearing.

— Development of locally available court directed referral opportunities for family resolution and other services, support, facilitation, treatment and therapy alternatives to court proceedings.

— Introduction of listing arrangements to provide judicial continuity and case management, urgent review by judges at short notice, monitoring and facilitating of contact orders and enforcement hearings.

The private law programme has the potential to significantly enhance the quality of outcome of private family law disputes as follows:

— By the referral of families to family resolutions pilot projects, conciliation and mediation services as an alternative and necessary precursor to the court based process.

— By the constructive use of the existing CAF/CASS services so as to facilitate the court's orders and the parties' agreements.

— By diverting scarce CAF/CASS resources from report writing to problem solving and facilitation.

— By the ability to measure the outcome against the aim.

— By the provision of judicial continuity and urgent enforcement and review to act before disputes and positions become entrenched.

— By more effective consideration of safety issues at the earliest stage to protect the vulnerable from actual and system abuse.

The concept of a "strategy for the case" identified by Wall LJ in a lecture delivered to the NAGALRO Autumn conference (entitled "Are the courts failing fathers?") is strongly supported. Likewise, a more positive emphasis on the representation of the child is recognised (see President's Practice Direction- Representation of Children in Family Proceedings [2004] 1 FLR 1188, and Munby J's paper "Making sure the child is heard" May [2004] Fam Law 338). They are two of the keys to the provision of a non-adversarial system. The private law programme gives effect to the strategy for the case by requiring the parties and the court to identify what it is that needs to be achieved as an aim (and a timescale where that can be identified) so that the parties positions and the case management and conduct of the case can be measured against the aim. The emphasis on CAFCASS and the court identifying the aim, the issues and each of the parties' positions is designed to help parents understand how their decisions and positions affect their child enabling them to construct a plan which responds to their child's needs, wishes and feelings as well as their own. The renewed emphasis on the child's wishes and feelings in private law proceedings (whether represented on paper or through an advocate) is a timely reminder of the statutory provisions and good practice principles that already exist.

It must be recognised that from the perspective of the falsely accused parent or the victim denied the truth, an adversarial approach to the facts in issue is necessary and in any event there are the essential protections in articles 6 and 8 of the ECHR. Those protections must be distinguished from the often mis-directed criticism of the family courts as being adversarial. The system is inquisitorial, it is the parties that are adversarial. What is needed is a strong(er) emphasis on mechanisms that re-inforce the inquisitorial process, such as those suggested by Wall LJ and Munby J.

The private law programme will only be able to be implemented in full if:

— The CASC recommendations are given legislative effect.

— The family resolutions pilots are extended nationwide.

— Funding is guaranteed for CAFCASS to provide support and facilitation services.

— Funding is provided for other agencies (eg for mediation and support) by way of service level agreements.

— Sufficient specialist judiciary and courtrooms in dedicated specialist family justice centres administered by family court staff are guaranteed.

PUBLIC LAW

The Public Law Children Act Protocol implemented on 1 November 2003 was a judicial initiative to dramatically improve the outcomes in public law cases, in particular by reducing delay. It built upon a previous and very successful project to change the manner in which matrimonial finance proceedings are determined. The exercise was completed in

partnership with the Court Service, CAFCASS, the LCD (as it then was) and their identified stakeholders in the family justice system. The judicially led process was undertaken by a Lord Chancellor's Advisory Committee convened at the request of the President. The report to the Lord Chancellor of the advisory committee was unanimously supported by the contributing interest groups. Not only has the Protocol and its associated Practice Direction begun to demonstrate real improvements in the quality and timeliness of family justice in public law proceedings but the essential principles upon which the exercise was based have apparently been adopted by the DCA and the Court Service to inform their development of a future justice strategy.

The principles upon which the report and subsequent Practice Direction and Protocol were based were developed by a judicial working party having regard to research and empirical analysis in this and other jurisdictions (eg Australia, New Zealand, Canada and the USA). They are the first modern re-statement of multi disciplinary non-adversarial (ie inquisitorial) good practice in a generation and warrant close examination by the Select Committee. The Practice Direction, Principles and Advisory Committee Report are to be found at pp 81 to 95 of the Protocol. While it is inadvisable to summarise further that which is already in the form of an aide memoir, the principles can be stated as follows:

— A statement of principle that is both human rights and best interest compliant known as the "overriding objective".

— Continuous and consistent judicial control of proceedings by a trained specialist judiciary (including the magistracy)—"judicial continuity".

— The identification, promotion and application of multi-disciplinary "best practice" to the family process which encourages out of court alternative dispute resolution and minimum predictable standards for in court resolution.

Despite the unanimity of approach to the production and implementation of the Protocol, the advisory committee identified what were described as "major obstacles" to the success of their endeavours, which remain very relevant one year later:

— The shortage of family court sitting days (ie both the availability and number of trained judges and courtrooms for them to sit in).

— The acute shortage of trained professionals in social services departments and CAFCASS.

— The declining pool of specialist lawyers who wish to undertake family work under the existing public funding regimes.

— The shortage of experts who wish to assist in best practice multi-disciplinary family dispute resolution.

— The need for a radical change of culture in the administration of justice so that the allocation of judges and the listing of cases (both of which are judicial not executive functions) is facilitated.

A subsequent report commissioned by Ministers and written by Mr Ernest Finch in May 2004 strongly supports the advisory committee's conclusions. It is to be hoped that the Government and Her Majesty's Court Service will continue to have regard to these

materials in their plans to improve the delivery of justice year on year. The Committee may wish to consider the detail of some of the problems that can be identified, for example:

- The continuing shortage of trained professionals who are willing to work in local authority social services departments and CAF/CASS.
- The benefits of providing and improving advocacy and support services (lay not just legal) for vulnerable people (children and adults) at the earliest opportunity.
- The lack of any effective electronic diary system for judicial listing of cases.
- The inadequacies of the existing IT resources available to the new unified administration and in particular in their production of court orders, reliable statistics and as a court record or file.
- The need to make more effective the judicial oversight of all family court resources by the local senior family judge (known as the Designated Family Judge).
- The need to co-locate family court resources to improve the use of scarce resources and their management by the DFJ.
- The need for oversight of family justice by an inter-disciplinary National body with local fora (now implemented by the creation of the Family Justice Council).

THEMES

There are coincident themes from the recent judicial analyses and proposals:

- The need to build upon the identification of a family justice strategy.
- The need to build upon the principles underlying the judicial initiatives of the Protocol and the Programme to provide a high quality and rapid inquisitorial system of family justice.
- The need to identify and fund pre-court and out of court alternative dispute resolution mechanisms.
- The need to re-emphasise the local management of family justice by the DFJs.
- The need to co-locate family justice resources.
- The need to provide sufficient specialist judges and sitting hours.
- The need to provide sufficient court rooms and associated facilities.
- The need to provide effective electronic diary, listing and court record systems.
- The need to ensure that the funding of CAF/CASS and other specialist support services is guaranteed.

Hon Mr Justice Ryder

High Court Family Division

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