

Evidence submitted by Rt Hon Dame Elizabeth Butler-Sloss DBE, President, High Court, Family Division

THE ADMINISTRATION OF FAMILY JUSTICE

The present system is open to criticism, much of it well-founded. It is, however, difficult to focus on the problems that have arisen in the private law sphere without taking in to account the administration of the entire family justice system.

PUBLIC LAW

In the field of public law, where children may be removed from their parents in care proceedings, the process requires a court hearing and a care order. The main justified criticism is in relation to delays in completing the necessary decision making process. The delays are caused by many factors, notably social work reports, appointment and reports of CAFCASS guardians, medical expert assessments and reports, and a shortage of judges to hear the more complex cases within a reasonable period. All these problems, among others, are being tackled, although not all successfully. A Public Law Protocol is now in place (since November 2003) across England and Wales, which embodies close and firm case management by the family proceedings courts, by circuit and district judges in the county court in the more difficult cases, and by High Court judges in a minority of cases of the greatest complexity or sensitivity heard in London and in different parts of the country. The Protocol requires, as far as possible, continuity of the judge in giving directions and in hearing the care applications. The effectiveness of the Protocol is being closely monitored by a Ministerial Group chaired by Baroness Ashton of which I am a member.

PRIVATE LAW

In an ideal world disputes by parents about their children ought not to be resolved in a court setting. The majority of parents, about 90%, resolve their disputes over their children without coming near to court. Some come to court and settle through alternative dispute resolution, in court conciliation, or accept the decision of the judge or magistrates. It is the minority of the total number of cases which cause the difficulties and create the tensions. Many of those generate a plethora of long reports and lengthy judgments and keep returning to court.

It has for many years been the practice of judges at all levels to encourage settlement at every suitable point in a case and to discourage the adversarial process so far as possible. The process is largely inquisitorial although it is made adversarial by the parties and their lawyers. Courts have the right to require evidence to be called or to refuse to hear irrelevant evidence which may have the effect of exacerbating the already fraught situation between the parents.

It is important to remember that certain groups of cases may not easily be susceptible to or indeed appropriate for mediation or in court conciliation. Issues of domestic violence towards the other parent, physical injury or sexual abuse of a child require resolution, unless admitted. Separate issues arise if such allegations are proved and the protection of the child and, in domestic violence cases, of the parent who was the victim, requires careful consideration.

There are good features in the way in which private law cases are dealt with but there are

a number of obvious problems. These problems have been with us to some degree for some years. They have been exacerbated by a number of factors, including lack of CAFCASS court reporters, lack of resources for the problem families to obtain mediation, counselling, anger management courses, mental health or similar help and the lack of a general follow up of cases to try to avoid a return to court. An additional factor has been the frustrations and disappointment of unsuccessful parents coming into the public domain with the emergence of a number of highly publicised organisations.

Some of the main problems as I see them are:

1. Competing pressures with public law work

The pressure of public law work and the importance of getting these cases listed for hearing have an inevitable impact on the hearing of the more difficult private law cases. The need for circuit judges to hear a raft of more difficult care cases and for High Court judges to hear the most complex cases referred up to them results in concentration of the time of High Court and circuit judges on care work. This has a knock on effect upon the availability of judges at both levels to hear the more difficult private law family disputes within the family. 20% of private law cases are heard in the family proceedings courts. This leaves 80% to be heard in the county court with a few intractable disputes heard by High Court judges or deputy High Court judges. A large proportion of child family disputes are now heard by district judges.

2. Delay

Delay at all levels, including the Family Proceedings Courts ("FPC"), contribute to the overall difficulties which arise in private law cases. There are also delays in hearing financial disputes (ancillary relief applications) in the county courts and other private law applications, since these cases are all heard by the same pool of judges. One cause of the delay is most simply a lack of enough judges (and in some areas courts) available to hear the cases.

3. Judicial continuity

Ideally the same judge should hear the case from beginning to end. However, in some places there is a significant shortage of courtrooms and the family work has to be balanced against the demands of criminal trials. The increase in the number of private law cases heard by district judges should make it easier for arrangements to be put in place for the judge to keep the case and provide continuity. However, it has been and remains difficult for circuit judges who try public law cases to be able to manage continuity in respect of private law cases (but see the Private Law Framework below). Lack of enough judges will inevitably affect judicial continuity as well.

4. Flexibility

There is a lack of flexibility in the movement of cases between the county court, particularly the district judges, and the FPC with the adverse effect on the speed with which cases can be disposed of. One strong impediment to the easy movement of family work is the different method of payment to the Bar and to solicitors by present Legal Services Commission policy and the reluctance of the LSC to permit a fee for a barrister in the FPC. I should like to see the easy movement of cases across courts under the same roof, such as Birmingham, or within walking distance, so as to use the available judges or

magistrates and the courts to the best advantage.

5. Information technology

The IT is not compatible between the county court and the FPC, a problem which will become even more obvious when more courts are placed under the same roof in new buildings such as Liverpool next year and Manchester in 2006. This increases the problems of joint listing and identifying judge or magistrates' availability and courtroom space.

6. Enforcement

There is a lack of enforcement procedures for judges in the more difficult private law cases, principally where a parent refuses contact between the non-resident parent, generally the father, and the children. These are set out in detail in the Children Act Sub-Committee Report "Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact" (2002) and in the judgments of Munby J in *Re D (Intractable Contact Dispute: Publicity)* [2004] 1 FLR 1226 and Bracewell J in *V v V* [2004] 2 FLR 851.

SOLUTIONS

I very much welcome the Green Paper, *Parental Separation: Children's Needs and Parents' Responsibilities* and the issues it has raised and seeks to address. Any starting point needs to acknowledge that the child has to come first; that they are not packages, but people. Parents must realise this and put their own power battles behind them. They must also take responsibility for their actions and decisions which affect their children. The court should be seen as the place of last resort and any improvement to the current system will require all involved to look more imaginatively at engaging parents with children who separate without going through the court process. This requires a widespread culture shift for all those engaged in the process.

I set out below, and in an annex to this paper, the new proposals which I hope will improve the situation. It is important, however, to remember that there is likely to remain a hard core of cases which may have to be resolved by the court process, some of which are beyond the power of anyone, including judges, to resolve.

The private law framework programme attempts to deal with some of the problems raised above. It is in principle agreed by the judiciary, CAFCASS, the Court Service, DCA and DFES, the Family Bar and Family solicitors. While I very much hope it will have a significant impact on the current private law climate I am certain that the framework on its own is not a solution to all the problems. Some important aspects of the framework are:

— On the first application made by a parent there should be a first directions hearing if possible within four to six weeks.

— Once proceedings have been commenced, the requirement of both parents to attend the first hearing (as well as older children if appropriate), with a view to seeking settlement with the assistance of the court at the first hearing and a CAFCASS officer.

— If conciliation fails and the matter is to be tried by a judge that the issues between the

parents are identified by the district judge at the first hearing so as focus the CAFCASS report on the essentials and to reduce the ambit (and the length) of the court hearing.

— That orders for contact are monitored by CAFCASS officers (eg by way of telephone). If handover does not take place, or if an order is breached, all efforts should be made to get the case back before a judge within a short timeframe, eg within two weeks, in order to try to avoid the parties becoming entrenched in their dispute.

— Judicial continuity of cases (all of which will be dependent on the pressures on judges who may also hear public law care work, finance work, domestic violence cases and any other cases that compete for their time).

— In the small number of cases that cannot easily be resolved more flexible and imaginative procedures used to deal with the issues with the hope that the judiciary may be provided with enforcement tools to encourage compliance with contact orders (an example is a Family Assistance Order which has not proved to be of as much benefit as it had been hoped. An amendment to the legislation to improve its application and usefulness would give considerable support in some cases to make contact between the non-residential parent and the child more successful).

It is hoped that the private law framework will have two main effects:

1. A reduction in the overall number of cases in dispute; and
2. A speedy resolution to the issues of disagreement between parents on arrangements for contact, leaving only a small number of cases requiring court intervention.

A national rollout of the framework is intended to take place over the next few months, particularly the introduction of in court conciliation in all county courts (which do not already have in court conciliation projects) which hear residence and contact cases. The successful implementation of the private law framework will of course be subject to a number of factors including the availability of CAFCASS officers and suitable court facilities.

In addition to the framework there is at present an early resolutions pilot being run at three centres. Cases are screened for the pilot either by legal advisers or judges and, once admitted to the pilot, parties are given an information pack and are expected to attend separately two facilitation groups over a period of eight weeks, with a final meeting attended by a CAFCASS officer and both parents to develop a suitable contact plan. It is hoped that this early intervention will minimise the need for contested hearings.

I see these initiatives as engaging parents to take responsibility. If we encourage conciliation and mediation both parents, and even the child, can take ownership of the problem instead of being one step removed and leaving it up to their lawyers and the judges to resolve. If we can achieve a culture shift in this direction then I can envisage invaluable progress.

Some members of the legal profession need also to be engaged to reduce the adversarial nature of family proceedings. It is important to encourage the legal profession to be facilitative in order to resolve the disputes. Members of the Solicitors Family Law Association and the Law Society Family Committee, have an excellent protocol for dealing with private law children cases which includes putting the interests of the child first and run

courses for solicitors. Members of the Family Law Bar Association run useful seminars designed to train barristers to deal with these issues. I would like to see all lawyers who work in family justice to have a set of minimum standards to enable this shift.

The judiciary who try these cases are largely specialist; are all selected to sit in family work and all receive instruction from the Judicial Studies Board when they start sitting in family cases (induction courses) and also attend specialist continuation courses.

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