

## **Evidence submitted by the Solicitors Family Law Association**

### **INTRODUCTION**

The Solicitors Family Law Association (SFLA) is an association of 5,000 family solicitors. SFLA was established by lawyers concerned that the practice of family law was too adversarial and who sought to develop a more conciliatory approach. Since its inception in 1982, SFLA has contributed to a significant change in the practice of family law. SFLA's members are committed to a Code of Practice that is designed to promote a constructive and non-adversarial approach to resolving family disputes. This Code of Practice has been widely adopted and has been incorporated into the Law Society's Family Law Protocol, which applies to all solicitors practising family law.

SFLA advocates a constructive approach to family disputes and promotes the use of alternative dispute resolution. SFLA members were involved in the development of mediation for family matters and SFLA trains and accredits lawyer mediators. SFLA has recently brought the Collaborative Family Law Group under its umbrella and will be providing training programmes on collaborative law and working to develop appropriate accreditation systems. SFLA's Collaborative Law Committee aims to develop collaborative lawyering as another resource for lawyers and their clients to resolve family disputes.

Legal aid is a vital resource to SFLA members and their clients. Over two thirds of SFLA's members provide publicly funded services, including publicly funded mediation.

### **THE CONTEXT**

The operation of the Family Justice System has been an issue of concern for some time now. The problems with the establishment of CAFCASS have been well rehearsed, and SFLA contributed to the Constitutional Affairs Committee's earlier enquiry into CAFCASS. SFLA is encouraged by the appointment of a new Board for CAFCASS as well as a new Chief Executive and by the increased emphasis on front line services.

Delays in the family courts are a matter of serious concern. It is a clear principle in the Children Act that delay is inimical to the interests of the child and this applies in both public and private law cases. The need to deal with delays is urgent.

For example, the President of the Family Division recently issued a framework document in which she said that first appointments should be issued within four to six weeks. However, delays in first appointments are currently taking 10 to 12 weeks. We are told that this is due to a lack of CAFCASS Officers and a shortage of conciliation appointments.

Another practitioner has reported to us an international contact case which was listed for final hearing on 21 July 2004 at the High Court. It was set down on 24 March and a CAFCASS report ordered. Various delays have ensued and the final hearing is now 24 November "at risk". The delay is particularly detrimental as the non resident parent lives in the US and is having very limited contact with his seven year old daughter in the UK.

We are concerned that delays are being caused by lack of resources in CAFCASS in the first instance, but are not convinced that if the CAFCASS problem is solved, that further delays in court listing will not ensue. We note that CAFCASS has dealt with the issue of delay in public law cases, but that there is still serious delay in private law cases. Delay in both aspects of children cases must be tackled—there should be no "cinderellas" in these vital services.

The operation of the Family Justice system in private law cases has been the focus of much media attention in the past 18 months due to the activities of Fathers 4 Justice. While it must be acknowledged that these activities have probably pushed the issue of resolving contact

disputes up the political agenda, SFLA is deeply concerned about the climate of that debate, which has become highly polarized and, it must be said, highly genderised. The heightened language of the current debate on contact has exaggerated differences about how to resolve difficult family cases, rather than encouraging consensus and a positive way forward.

It must now be the job of responsible commentators, the media and politicians to bring that debate back into the middle ground in the interests of the children of families which separate. SFLA is concerned that this issue is becoming a party political issue. We believe that this is not helpful to finding real solutions. SFLA believes that how private family law disputes are handled should be a matter of cross party agreement and urges the main parties to form a consensus.

The following represents SFLA's views on how best to approach the resolution of family disputes involving children.

## **PRINCIPLES AND LANGUAGE**

The existing presumption that arrangements for post-separation parenting arrangements should be based on the interests of the child should remain in force. However SFLA believes that there should also be a statutory presumption that children should have contact with both parents post-separation, unless there are reasons that militate against this, such as safety concerns. Such a presumption would reinforce the message that contact with both parents is for the benefit of the child and is not a "gift" that one parent makes to another. It would also emphasise that contact is about the well-being of the child and not about parent's "rights".

The current language used in disputes about children is unhelpful and contributes to the feeling of alienation that parents can experience on relationship breakdown. SFLA believes that the emphasis should be on co-parenting, where both parents offer physical, emotional and financial support for their children in a co-operative framework. We prefer to adopt the terms "parenting time" and "orders for parenting time" rather than the terms "contact" and "contact orders", which many non-resident parents feel removes their status as parents and demotes them to the status of visitors in their children's lives.

Parents should have a clear idea of what the Court is likely to order in a typical dispute about parenting time. Various forms of information should be available to separating parents early in the process, such as website information, information from healthcare providers, via solicitors, advice agencies and relationship counselors amongst others. The information should set out the likely orders a Court may make, but should make clear that there is not a one size fits all approach. It should also make clear that most parents arrive at suitable arrangements by themselves and do not use the courts.

SFLA believes that the aim should be for children to feel comfortable in two homes. In our experience, a typical division of parenting time post-separation is for children to have a main residence in one parent's home and to spend alternate weekends, a midweek visit, alternating festive occasions and extended time during the school holidays (including an opportunity to take the child away) with the other parent. In the absence of unusual factors, it is difficult to envisage less than this amount of parenting time being appropriate. However, such an arrangement may be unsuitable for very young children, teenagers and for parents who live a distance from one another.

## **THE DISPUTE RESOLUTION PROCESS**

Most separating couples manage to make their own arrangements for parenting post-separation without any intervention from the Courts. For those parents who cannot, there should be a swift and effective dispute resolution process, starting with early information, advice and help with resolving disputes and only moving into the Court procedure when disputes cannot be resolved through an early intervention. These cases should be identified

early referred quickly to the Court, and should be managed throughout the lifetime of the case by the same judge.

SFLA believes that before any Court application can be issued, parents must attend an early intervention appointment for information, advice and help with forming an agreement. This should be a Court based service. All parents should be required to submit and agree a parenting plan in the preliminary session or in subsequent intervention sessions. Parenting plans will replace the statement of arrangements for divorcing couples. If agreement is reached through the intervention appointments, a Court order would not normally be necessary.

There must be early means of identifying safety issues by a check box provision on the C1 or acknowledgement form and intervention appointments are not suitable for the dispute, the matter should move promptly into the Court process.

### **WE SUGGEST THE FOLLOWING TIMEFRAME FOR CASES:**

<i>Stage in process</i>	<i>Function of stage</i>	<i>Week</i>
1 Preliminary session Information/advice/ Help with agreement		2
2 Issue of application		
3	(1) Interim hearing and interim order (2) Referral for further intervention (3) Directions (4) Court reporter involved	2
4 Second appointment	(1) Final hearing  (2) Directions for hearing  (3) Court reporter report  (4) Other evidence	10
5 Final hearing		15-17

There should be two clear separate tracks, with interventions for cases that can settle. Intractable disputes or cases where there are safety issues should be diverted swiftly to the Court process. If intervention appointments are not suitable, a report from the service which provides the intervention appointments will be attached to the application to the Court, identifying this and explaining why.

There must be a consistent response in the handling of cases with continuity of input from CAFCASS officers and judges. The same CAFCASS officer should deal with each case through all appropriate stages. In the same way, each case should be assigned to a Judge, who would deal with the case through its lifetime. In our view, it is vital that there should be this consistency from those dealing with the case. This will help to reduce delay, as Judges and CAFCASS officers will not have to revisit issues and will be familiar with the case. Such continuity will also help to increase the family's confidence in the Family Justice system. We believe that these changes would help the parents, knowing that they will be dealing with officers of the court who are familiar with their circumstances, saving them from repeating their

stories, and also bringing pressure to bear on the parents, who will know that they will face the same judge who made the original order. This could help to promote a more timely determination of the issues in dispute.

## **SPECIAL CONSIDERATIONS**

### **REPRESENTATION OF CHILDREN**

Where it is desirable to ascertain the wishes and feelings of children, the children could be involved in a subsequent session, with a separate representative (a CAFCASS officer), avoiding the direct involvement of children in the parental dispute resolution process.

The CAFCASS officer should flag up where a child wants a voice in proceedings or where expert evidence may be required. At the conclusion of the report, the CAFCASS officer should meet with the child again and explain his/her reasons for any recommendations made. The CAFCASS officer should indicate to the Court where the child supports or opposes his/her recommendations, and flag up the need for the judge to consider whether the child should be heard by way of separate representation.

At further hearings, the child can be represented separately either if the judge so directs or as a result of the child's application. The child should be represented by a lawyer with special accreditation to represent children. Where the child is not separately represented, the judge should be able to appoint a guardian.

### **DOMESTIC ABUSE**

SFLA welcomes the introduction of a means for early identification of domestic abuse by a check box provision on the C1 form. There should be a further check box to indicate whether parenting time should be suspended, whether or not domestic abuse is alleged. An allegation of domestic violence or an application to suspend parenting time should lead to an accelerated first hearing, where findings of fact should be made as to domestic abuse. The Courts should also apply a mandatory risk assessment checklist, which should consider—

- the nature of the abuse and its impact on children;
- whether the abuse is likely to recur;
- the perpetrator's motive(s) for wanting parenting time;
- the perpetrator's capacity to change and comply with any conditions attached to the parenting order;
- how to address the sufferer's fears about the parenting arrangements;
- the children's wishes; and
- what safety issues might arise from any order for parenting time made at that stage.

### **ENFORCEMENT**

More effective sanctions to deal with breaches of orders are now crucial to restore public confidence in the Family Justice system. Breaches of orders for parenting time are extremely serious and must be dealt with quickly. If the Court has undertaken a full fact finding process, there is no justification for parenting time not taking place. Ideally enforcement should be dealt with by the same judge throughout the case.

The Courts should explore the possibility of using other methods of supervising compliance with orders for parenting time, for example, using family assistance orders. Where children refuse to comply with an order, there should be careful consideration of the reasons, with provision for a "children's friend", ie a CAFCASS officer, specifically designated to listen to and help deal with concerns raised by children direct.

Where there is a failure to comply with a Court order, the first steps should be preventative. In the first instance, it should be established whether a breach has occurred and an assessment made as to whether it is sufficiently serious to require immediate Court action. Once the investigative stage has been undertaken, the Court should consider a treatment model, if appropriate, including parenting classes, anger management or therapy.

In some cases, it might be necessary to move to the punitive stage, but only in intractable cases or in cases of repeated non-compliance. A range of orders should be available to the Court, including fines, community service orders and imprisonment. Change of residence and instituting care proceedings would be a final resort.

SFLA also believes that there should be educative enforcement for parents who do not apply for parenting time or who do not keep up their parenting time obligations. A frequent complaint heard by practitioners is that the non-resident parent is not meeting his or her obligations to spend time as agreed with the child. In Germany, we believe that the Courts have powers to fine absent parents. We do not believe that this approach would be helpful, but it would be useful if the Court had powers to order the non-resident parent to attend parenting classes or a similar educative programme to impress on him or her the importance of staying in regular contact (if circumstances allow) with the children of the family.

## **LEGAL AID**

Legal aid must continue to be available to those who need financial help to support them through the process of resolving family disputes. Legal aid underpins the family justice system. Many families would not have the resources or ability to resolve their disputes without the support and help of solicitors. However, many families do not have the means to pay solicitors. Increasingly SFLA is concerned that there are both insufficient numbers of solicitors prepared to undertake publicly funded family work and that the pressure on the legal aid budget is eroding the legal aid scheme with dire consequences for those who depend on it to help resolve their disputes. The lack of legal aid has resulted in many more litigants in person appearing in court and handling their own cases. This can lead to the use of valuable court resources in supporting the litigant in person; it can also run up the costs for the other side, as the other party's solicitor has to take greater time dealing with the litigant in person.

SFLA is therefore strongly opposed to the current proposals to further erode financial eligibility levels. This would leave too many people without the help that they need to resolve their family disputes, leading to longer drawn out disputes that become more difficult to settle.

However, SFLA believes there should be incentives in the legal aid scheme, as elsewhere, for cases to settle early and that perverse incentives to litigate should be removed from the legal aid scheme. Broadly we support the Legal Services Commission's intention to encourage early settlement by removing the incentives to move onto a legal aid certificate and to issue proceedings.

The legal aid scheme needs to support government policy. We have a concern that where early court intervention services exist, the appropriate level of legal aid should also be available to support ready access to those interventions, to enable legally aided parties to make use of those schemes. We would hope that the LSC's intention to make certificated legal aid more difficult to access would not create unnecessary barriers to court based conciliation and

intervention services.

SFLA also supports the LSC's intentions to reduce legal aid support for repeat and multiple applications to court in contact cases. However, it is often difficult to second guess the reasons for multiple applications. SFLA recommends that the LSC profiles firms to identify those with an apparently high rate of court proceedings and multiple applications and to then look into the reasons for any discrepancy from the norm.

Legal aid policy needs to be truly "joined up" with any changes to and developments in the operation of the family justice system and attempts to improve the resolution of family disputes. This means retaining a level of flexibility in funding decisions that would allow legal aid to be used appropriately according to the services available. SFLA believes that early access to good legal advice and other forms of intervention can help families resolve their disputes in an ordered and lasting fashion. We strongly support the FAlnS initiative which puts an experienced solicitor in the role of early diagnoser and case manager.

## **CONCLUSION**

SFLA broadly supports the thrust of the Government's proposals for the reform of the Family Justice system. We believe that these proposals are traveling in the right direction. We hope that the other political parties will give these proposals their support and not make family disputes and the interests of children into a political football.

Solicitors Family Law Association

*October 2004*

## **Annex**

### **SFLA CHILDREN COMMITTEE: POLICY ON PUBLICITY IN CASES INVOLVING CHILDREN**

In the light of recent concerns about the perceived "secrecy" of the family courts and the case of Sarah Harman being found in contempt of court for passing case details to her sister, Harriet Harman, the Solicitors General, the Children Committee were asked to review the current SFLA policy on publicity in cases involving children.

SFLA's current stance is to support the status quo. The Children Committee reviewed this and formed the view that SFLA policy should be to support more openness in family cases involving children. Case reports should be anonymised. Cases should not be heard in public, but judgements should be made in public, suitably anonymised. Currently prohibitions are so tight that there can't be any sensible debate and accusations that the family justice system favours one party or another cannot be examined. The powers of the state are so extensive in matters affecting children that cases should not be in private behind closed doors. The CAFCASS report should address the issue of whether publicity in a given case would be harmful or not to the child(ren). The Committee felt that this issue does have to be considered from the children's point of view.

A further issue is that under the current prohibitions, experts cannot be identified. This leads to a problem of identifying poor quality experts' reports. There may be some difficulties with experts not wishing to be identified, but the Committee felt that, on balance, it was in the public interest for experts to be known.

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