

4 The Court Process

The adversarial system

34. In her submission to the Committee, Dame Elizabeth Butler-Sloss, President of the Family Division, reflected the commonly held view that the adversarial court system itself leads to conflicts and is not suitable for resolving these sorts of issues; she said that "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". She emphasised the need for a culture shift:

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

Lord Justice Wall noted that "unfortunately, the cases which have to go into this adversarial system are those least likely to benefit from it... the adversarial system is adult orientated. It focuses on the position of the parents, not of the child, and thus has the tendency... to entrench attitudes rather than encouraging them to modify".

36. The West Yorkshire Family Mediation Service stated that:

As professional mediators we are well aware of how damaging adversarial court proceedings can be...[In contrast] Mediation...helps parents reach their own decisions about the future. The mediator's role is to guide them through a decision making process and ensure that the discussion is equally balanced. By owning the agreement we know that parents will honour it. It is imperative that they own it and it is a fundamental principle in mediation that the mediator does not impose her solution on the clients.

37. We summarise the main problems associated with the current usage of the adversarial system:

Delay;

Cost;

The need for parents to rake over past difficulties;

An expectation that parents will make allegations against each other and try to 'point score';

The need to involve lawyers.

38. Whilst it is easy to blame the court system, it should be recognised that only a small minority of cases reach the courts. Using the coercive powers of the court is not usually the most effective means of re-establishing parental contact, although recourse to these powers may still be necessary in some cases as a last resort.

39. The courts are not the best place to attempt to resolve complex family disputes. While their involvement will be required in some cases, particularly where there is evidence of

domestic violence or abuse or where a consensual approach (including mediation) has failed, the use of the courts should be a matter of last resort.

A presumption of contact and the issue of bias

40. A large number of witnesses made submissions in which they advocated that there should be a statutory presumption that both parents should have contact with their children. Some witnesses believed that the current system was biased against fathers. For example, the Equal Parenting Council suggested that the absence of such a presumption fuelled perceptions of gender bias:

[The] lack of a legal presumption of contact (for all fit parents) and the existence of the no order principle are aggravated by the bias that exists in the system (especially within CAFCASS) against so-called non-resident (i.e. non-custodial) parents. Because most non-resident parents are fathers, this is often perceived as gender-bias.

We also received evidence from witnesses who pointed out the risks inherent in forcing separating couples to share contact in all cases, because of the prevalence of domestic violence and the risks to children. (We deal with this issue in greater detail in Section 8 below).

41. Initially, a statutory presumption appeared to have the backing of the Solicitor's Family Law Association (SFLA), who had commented in its written evidence that it:

...believes that there should... 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.

42. During our oral evidence session with the judiciary, difficulties were identified with this particular proposal and a potential compromise was identified. Dame Elizabeth Butler-Sloss commented that:

...we can only have one presumption that the welfare of the child is paramount. If you have two presumptions, which takes precedence?[...] If you have a legal presumption, you have to apply it, except in exceptional circumstances. The legal presumption is the welfare of the child. I can see a case for something slightly less, such as that the court should have regard to the importance of a relationship between the children and a non-residential parent.

43. While Lord Justice Wall added that:

I said in terms that there is no gender bias and we decide each case under Section 1 of the Children Act, and I think we have to keep the focus on Section 1. I am quite happy to see an expansion of it, but we must be very careful in our drafting because it could be seized on.

44. In oral evidence from the legal profession it emerged that this compromise had support. Mr Christopher Goulden who appeared on behalf of the SFLA stated that:

I have to deviate slightly from the SFLA line on [the proposal for a statutory presumption]. We have had subsequent discussions about that. I do not think that that is as well put as it might have been, with all due respect to my organisation. I think a better way would be

perhaps to follow what the President said which is to have it as part of the welfare checklist and then it would get over that problem of there being, as it were, two conflicting presumptions. There is nothing wrong with having a presumption which is rebuttable, as was the recommendation in our written evidence, but as long as it came in perhaps by means of being part of the welfare check-list.

45. The measure also had the support of the Law Society and Families Need Fathers. The Government, however, was resistant to any change on the basis that it might give "false promises and false hope to people who are really distressed".

46. The United Nations Convention on the Rights of the Child declares the right of a child to have direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. We note that the present law already regards it to be in a child's best interests to sustain a full relationship with both parents, unless there are good reasons to the contrary. We consider that a clear statutory statement of this principle would encourage resident parents to assume in most cases that contact should be taking place.

47. We understand the problems which would be caused by conflicting legal presumptions. The compromise proposed by the judges, to have a strong guideline that the court should have regard to the importance of a relationship between the children and a non-residential parent, has a great deal to recommend it. The simplest way of achieving this would be to amend the 'welfare checklist' in the Children Act 1989. We recommend the insertion of a statement in s 1(3) of the Children Act 1989 (the welfare checklist) indicating that the courts should have regard to the importance of sustaining a relationship between the children and a non-residential parent.

48. Groups representing non-resident parents (mainly fathers) made a number of robust submissions which alleged that in practice there was bias against the non-resident parent. In particular, Fathers4Justice commented that "mothers have a de facto veto (known as the 'gatekeeper' role) over the father/child relationship... [and that the] burden is placed on fathers to prove why they should be involved with their children".

49. Ms Celia Conrad, a legal consultant who was formerly a family law solicitor, suggested that although there was not a direct bias against fathers:

...the perception is that it looks as if it is more biased towards fathers because generally more fathers are the non-resident parent, so that is actually something which is probably just the way it looks from the figures because there are more fathers than mothers who are non-resident parents, so one would say that it is prejudiced against the fathers, but that is not so. My argument is that it is the non-resident parent who is the one who is actually disadvantaged by the system.

50. While both lawyers and the judiciary rejected that there was any actual bias in the court system, Ms Christina Blacklaws of the Law Society accepted that:

Many, many children do live with their mothers and if that is the status quo that will often be upheld by the courts. The courts will not change that status quo unless there is good reason to do so. Hence sometimes there may be a perception that the courts are biased towards mothers in these circumstances.

She recognised that this situation creates a real dilemma if the father has left the home because if "a status quo has been established with the children living successfully perhaps

with the mother then it would be difficult for the courts to overturn that just because that is what the father wanted".

51. It was, however, also pointed out to us that whilst only a small minority of contact cases result in an absolute denial of contact, it is more usual for there to be argument over the extent or timing of contact and over the form that this should take (whether, for example, contact should be 'indirect', involving letters or phone calls, or whether overnight stay should be permitted). These applications will generally not result in outright denial of contact, but that can still leave many disappointed non-resident parents.

52. We received very divergent views on contact rights. Some groups representing those who had suffered from domestic violence (see Section 8 below for a fuller discussion of safety issues) claimed that abusive former partners were granted contact with children too easily. Ms Hilary Saunders from Women's Aid stated that:

We are frequently seeing cases where contact orders are granted where really it is unsafe to do so... Certainly, I think, if you want to have some idea of the scale of the problem, if you look at the judicial statistics they will show that last year more than 67,000 contact orders were granted and contact was refused in only 601 cases, less than 1%. The most exact... figure that we have for the number of domestic violence cases that go through the family court system where there are court welfare reports ordered was ACOP's Response to the Consultation Paper on Contact between Children and Violent Parents, where they said that domestic violence existed in almost 50% of the cases where court welfare reports were ordered. They quoted a figure of 16,000 cases a year, and I presume that will have increased simply because the number of contact applications has increased. I think, if you set that figure of 16,000 against 601 refusals, you can see that domestic violence is not considered to be a very serious problem in thousands of cases.

53. We have highlighted these issues partly because problems relating to the establishment of a 'status quo' underline the importance of avoiding delay and the consequent need for early action before a lack of contact become entrenched. In some cases delay has brought about a situation in which, because of lack of contact over a long period, the Court's judgment about whether contact is in the child's interest may be different from what it would have been when the case began, perhaps several years earlier.

54. There is a perception that non-resident parents are not fairly treated by the court system. We do not believe that the court system is consciously biased against either fathers or non-resident parents. Significant problems remain in a minority of cases following parental separation, often exacerbated by delays in the court process. We recommend the following: first, there should be a clear and unequivocal commitment to move as many cases as possible from the court system altogether; second, parents who do apply to the court should be given every encouragement and opportunity to resolve their differences through negotiation; and third, when there is no viable alternative to court resolution, the courts should be responsible for ensuring that the case is effectively managed and that delays are kept to a minimum (see paragraph 78 below).

Shared Parenting and the views of children

55. Some of the groups representing non-resident parents also advocated 'shared parenting' and complained about the limited amount of time that some non-resident parents were permitted to spend with children. Families Need Fathers supported this:

There must, however, be a proportion of parenting time that is so low that parenting can scarcely be said to be 'shared'. One could argue about at what level this applied. What seems to be the 'standard ration' that children are offered—a fortnightly visit to their non-resident parent, plus some time around holidays—cannot be said to be shared parenting. Nor can parents with so little parenting time be effectively involved in any decisions that need to be taken.

56. This view was also supported by Mr Tony Coe of the Equal Parenting Council who suggested that the UK should move to a model whereby non-resident parents were granted contact amounting to at least a third of the year. Other contributors, such as Mr Bob Geldof, argued in favour of shared parenting arrangements granting a 50/50 division of time.

57. Depending upon the circumstances of an individual case, there are a number of serious practical difficulties which can preclude arrangements of that type. These include:

Accommodation—the non-resident parent may be judged not to have adequate accommodation for the child or children, perhaps because they have voluntarily given over the family home to the resident parent or have been compelled to do so;

Financial—where the non-resident parent is unable to afford suitable accommodation, there may be difficulties for them in housing the children overnight, or for holidays;

The wishes of the children—it may be that they feel their lives become 'managed' through parenting agreements and that they are being cut off from activities and from friends if they are required to have their time divided between different homes, perhaps a long distance apart, to meet the requirements of their separated parents. This is particularly likely with older children.

58. There are difficulties where children do not wish to comply with the contact requirement, either fully or at all. The Equal Parenting Council took a forceful view on this issue, asking "what if the child says they do not want to go to school? What if the child says they do not want to go to the doctor? Fit parents are supposed to make decisions for their children". This approach was not, however, advocated by our other witnesses. Mr John Baker from Families Need Fathers noted that:

If a child does not want to see the other parent then this has to be explored, it is an issue. One of the things I would like to see is that there should be generally available and funded out of savings in Legal Aid a very widespread service which children and parents can have recourse to if there are issues. By and large it will not happen, it is a red herring. If it does happen then you need to explore why it takes place, whether that child has been abused—and some of them have been—or whether one of the parents is insufficiently child centred, things like that. It is an issue that needs addressing but preferably not in an adversarial system where one parent has used this as an argument to continue their fight against the other. There should be a child centred service to which these issues can be taken and the reasons explored and the appropriate responses made.

59. Many agreements settled outside the court amount, in effect, to shared parenting arrangements; these are usually the best course. We support agreements in which parents spell out how they will share parental responsibility.

60. The concept of a pre-determined statutory template for the division of time a child is to spend with each parent is not one that we favour. The welfare of the individual child should be the paramount consideration in each case. The application of the welfare principle means that a whole range of factors (not least the wishes and feelings of the child) must be taken into account. We have already recommended that the importance of sustaining a relationship between the child and the non-resident parent should be expressly considered as part of the welfare process. An arbitrary 'template' imposed on all families, whatever the needs of the child, would relegate the welfare of individual children to a secondary position.

61. There are significant practical objections to an automatic sharing of the time which children spend with one parent or another. In particular, an arbitrary apportionment of time does not take account of the views of children. The amount of contact a child will want with its parents will depend on a number of factors and is likely to change over the course of its childhood. Whatever arrangements are made, there has to be provision for the views of children to be taken into account, especially as they grow older.

The position of grandparents

62. An issue which appears to have been ignored by the Government is the role of grandparents and the wider family. Ms Celia Conrad gave evidence that where resident parents fail to encourage contact with the non-resident party's parents, then such contact frequently does not occur.

63. In oral evidence, Families Need Fathers agreed that grandparents should have a legal right to apply for contact without having to first ask the courts for permission. In particular, they stated that "they ought to be able to apply for contact in their own right and be treated under the same welfare and check list procedures as parents as to whether the children would benefit." Arrangements of this sort already apply in adoption cases.

64. A change should be made in the law so that grandparents are granted the right to apply to the court for contact with their grandchildren, without having to apply for permission.

Delay

65. Delays inherent in the current court system have been identified as a major problem by the vast majority of our witnesses. In evidence District Judge Nicholas Crichton put the issue in perspective: "two months is 1% of a child's childhood". In this section we examine the three major reported causes of delay: the deliberate abuse of the system by litigants or their lawyers for tactical reasons; the lack of resources in the Family Justice system; and, the delays consequent on poor case management.

Tactical delays

66. At the outset of the inquiry, it was suggested that delays were sometimes consciously used by parties as a tactic to avoid contact and that the legal profession were complicit in this abuse. As we mention above (Section 3), the Government's Green Paper suggests that on average parents who are eligible for public funding through legal aid use courts more often and for longer periods than those parents who fund their own legal representation. The paper concludes that "the availability of legal aid should not provide an

incentive to go to the courts or to defy court orders".

67. We put both arguments to the judiciary. Dame Elizabeth Butler-Sloss's response was:

I do not think that is true. So long as you have the specialist Bar and the specialist solicitors, and I am talking about the Solicitors Family Law Association, the Family Law Committee of the Law Society and those who support it, they have that protocol as to how to behave and they, by and large, obey it. The Family Law Bar Association also has very much at the forefront the welfare of the children and the needs of the parties to settle. We do get of course people in who do not belong to those associations, but if there is the slightest view by the judiciary that this is someone trying to spin it out, then if you are any good as a judge you are going to stop it, and I do hope most of us are competent to do it.

68. District Judge Crichton also denied that he saw any form of 'tactical delaying' in his courts, claiming that the quality of legal representation was very high and that practitioners were generally very committed to acting in the best interest of the children.

69. The legal profession was equally forceful, stating that "there seems to be a myth going round that these cases are unnecessarily prolonged by practitioners using public funding". Mr Christopher Goulden of the Solicitor Family Law Association added that "the delays in being paid are such that it is not good for your cash flow and therefore I do not again recognise this idea of these cases being abused simply because they have public funding".

70. Ms Christina Blacklaws of the Law Society also rejected the accusation that solicitors used delay as a tactic against non-resident parents, stating that:

We need to distinguish between what is good delay, planned and purposeful delay as we say, that perhaps enables a new regime of contact to be tried within the protective ambit of the court process or an assessment to be undertaken, and what is avoidable delay which is not in anybody's, particularly children's best interests. I think you will see that there are some clear reasons for this delay (which we all accept does occur in our family justice system) and there are ways of resolving it. One of the ways is, as we have already said, to take out of the court process those cases which can be dealt with in another dispute resolution forum, and we all support that... it does not give any of us any family practitioner any joy to try and work through a case that should be a mediation case or should be in family therapy.

On this issue there is a clear conflict of view between aggrieved parents who report experience of the use of delay and the professionals who argue that neither the court nor practitioners would countenance unnecessary delay. Given the strong animosity between the parties which is common in contested family cases, we find it hard to believe that tactical delay is not sometimes used to the advantage of resident parents. We would welcome research to clarify the situation, but such research is at present inhibited by the lack of transparency in court proceedings to which we refer below (see Section 9).

71. The courts themselves have a continuing duty to ensure that parties and their legal advisers do not unnecessarily delay proceedings. Children's interests are frequently harmed by such delay. Legal advisers have a professional obligation to avoid unnecessary delay.

Resources

72. A number of other areas were identified as causes of delay, including obtaining first court dates, the need for additional judges (often referred to as 'judge power') obtaining reports from CAFCASS, judicial continuity and returning to court when orders have been breached. Criticisms were also raised about a lack of court rooms and a shortage of CAFCASS officers.

73. Following evidence from the judiciary about resourcing, the Department provided statistics about the increase of family judges sitting in the High Court, also supplying figures on the operation and staffing of other divisions:

Number of High Court Judges

	1979	2004	% increase
Family Division	16	18	12.5%
Chancery Division	11	17	54%
Queen's Bench Division	47	74	57%

74. The Department has noted that many judges only sit part-time in family cases and that therefore sitting days are a better judge of resources allocated to family work. This comment would, however, apply to each of the other divisions, which also have a complement of part-time judges.

75. District Judge Nicholas Crichton is the only full time Family Proceedings Court district judge in England and Wales who is designated to sit 100% on family cases. Other full time district judges sit on family cases as part of their annual sitting allocation. We have already identified the need for increased judicial continuity in these cases. A primary aim of the President's Private Law Programme in the county courts is to try to ensure judicial continuity if possible. In contrast, in the magistrates' courts the great practical difficulties in assembling the same bench of lay justices to sit on a private law case each time it comes back to a Family Proceedings court (particularly if that is at short notice) are obvious. The benefit to the parties in such cases of having a full time district judge holding the case are equally plain to see. There should be recruitment or allocation of far more full time specialist 'family' district judges (magistrates court) to this work.

76. It is clear to us that there are too few family judges at all levels in the system. The problem is not just one of numbers. The way in which the work of a family judge is approached is extremely important. Applications relating to children's welfare call for a wholly distinctive approach on the part of the court. Judges have to be prepared to explore painful and difficult issues with parents. In doing this, judicial authority has to be married to sensitivity and sympathy. This suits the style of some judges, but it does not suit others. The tendency, in consequence, is to leave all the problem-solving and negotiation in these cases to CAFCASS officers. That is to waste a hugely valuable resource, namely, the authority vested in the judge. It is a mistake to imagine that this can only be brought into play at the point of a court determination. Judicial authority and wisdom can be hugely influential at every stage.

77. The Family Courts need judges whose style of work suits the difficult cases which come before them. This includes having the confidence to involve themselves in finding solutions to very difficult problems. We think that more effort should be made to recruit

specialist judges who actively want to do family work; family work should not simply be an extra burden for those who wish to become judges.

Case management

78. The approach of the family courts to the case management of public law child care cases has developed over a number of years and is now manifest in the Protocol for Judicial Case Management in Public Law Children Act Cases. Judicial witnesses were keen to point out that the culture of case management existed in the Family Division well before its introduction for civil proceedings with 'the Woolf Reforms' and the Civil Procedure Rules. It was apparent to us that, whilst case management in public law child cases may be well established, that is not the case in the field of private law.

79. Lord Justice Wall conceded the need for better case management, stating that:

Proactive judicial management is absolutely crucial. In the old days, the judges were reactive. The parties made an application, they came to the judge and they then made another application and came to the judge, but that has changed in family work. We were in fact case-managing well before Woolf [the introduction of the Civil Procedure Rules] and what is crucial is proactive case management where the judge calls the case back and that is one crucial point, but of course that has to go hand in hand with judicial continuity.

80. In July 2004, the President of the Family Courts announced a new Private Law Programme (previously known as the Private Law Framework). The judiciary shared the details of this Programme during the drafting of the Green Paper and the Programme was issued on the 18 January 2005. It only applies to County Courts.

81. The main features of the Programme include:

Introduction of an early first hearing (a first hearing dispute resolution appointment);

Gradual introduction of an in-court conciliation service with the attendance of CAFCASS officers at the first hearing;

Development of locally available court directed referral opportunities for family resolution and other alternatives to court proceedings;

Introduction of listing arrangements to provide judicial continuity and case management.

82. Delay is a major factor in breakdowns in contact since it allows positions to become entrenched and for contact arrangements to fail. We are pleased that the judiciary has clearly recognised the need for proactive case management. We welcome the President's 'Private Law Programme' as a valuable attempt to achieve early dispute resolution and, if there is no resolution, to improve the judicial case management of private law cases thereafter. It is essential that the Government provides sufficient resources to enable the Private Law Programme to succeed.

83. One major cause of delay is reliance on long reports from CAFCASS in too many cases. This may often be the result of an automatic resort to a welfare report when attempts at preliminary negotiation by the parties' lawyers and CAFCASS have failed. This report takes several months to prepare. Even after it has been submitted there can be further delay in fixing a hearing date. Then the matter is usually settled on the basis of the

CAFCASS officer's recommendation. There is scope for a much more focused CAFCASS investigation which need not culminate in an over-detailed report. Judges and CAFCASS, together, need to consider more effective and less cumbersome alternatives to the full-blown enquiry. For example, there is scope for oral presentation of the results of the CAFCASS officer's enquiries. The time taken to prepare such reports also leaves a way open for abuse of the system by legal advisers, who may encourage the preparation of such reports in circumstances where they are not strictly necessary.