‘Make Every Hearing Count’

Case Management Guidance in Public Law Children Cases: March 2022

1. There is a statutory requirement for each public law application to be concluded within 26 weeks [CA 1989, s 32(1)]. The volume of work in the system currently exceeds its capacity to meet this statutory deadline. That was so prior to March 2020 and the advent of Covid. The situation has been further compromised by the difficulties that the pandemic has imposed, despite the system allocating significantly more sitting days[1] to the Family Court during the past two years.

2. Currently, the national average for the number of hearings per public law case[2] is 6.2. In the year 2019/20 this figure was 5.8 per case. In 2016/17, it was 5.2 per case. The average length of a public law case in quarter 3 of 2021 was 45 weeks, in 2020 it was 38.5 weeks in 2017 it was 28.2 weeks . If a region has some 3,000 public law cases per year, even an increase of 0.5 hearings per case means that the system has to list an additional 1,500 hearings to complete these cases.

3. The recommendations of the Public Law Working Group, which every local authority and court centre is expected to adopt, are an intervention aimed at two goals:

    a. Reducing the volume of applications by ensuring that an application is only made by a local authority for a care order after a thorough assessment process and where it is clear that a care order is necessary in that case; and
    b. Allowing the court to engage immediately, and efficiently, with the determination of an application that has been made because of the soundness of the pre-proceedings assessment and process.

    Early signs are that, where these recommendations have been fully taken up, they are having a positive impact both in terms of reduced volume of applications and in the court’s ability to rely upon the robustness of local authority assessment and decision making. The Public Law Working Group ‘Top 10 Tips’ neatly capture what is required and should be followed in every case [see Annex to this guidance].

4. The Public Law Working Group recommendations, however, can only ever be part of the process of gaining traction on the outstanding caseload and reducing delay. As well as addressing, and reducing, the volume of new cases coming into the Family Court, it is necessary to improve the court’s efficiency in dealing with each and every case. The basic statistics in paragraph 2 bring home the need for a radical recalibration of the resources, in terms of the time and the number of hearings, that can be applied to any given case.

[1] RCJ tables (table 5.2).

[2] data is not quality assured.

5. The Children Act 1989, s 1(2) requires a court to have regard to the general principle that any delay in determining a question regarding the upbringing of a child is likely to prejudice that child's welfare. This is a cardinal principle of the legislation and must be at the forefront of judicial case management decisions. Focus must be maintained on the children's welfare, whilst of course ensuring a fair hearing for all. We have to find a way to ***"make cases smaller"*** and ***"make every hearing count"***, which means having **fewer and shorter hearings per case**.

6. There is a compelling case for reconnecting with the core principles behind the 2014 public law 'PLO' reforms that arose from the **2011 Family Justice Review** which recommended [paragraph 3.44]:

> "Courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or be removed to the care of the local authority.
> When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are:
>
> - planned return of the child to their family;
> - a plan to place (or explore placing) a child with family or friends;
> - alternative care arrangements; and
> - contact with birth family to the extent of deciding whether that should be regular, limited or none."

These recommendations were encapsulated in Children Act 1989, s 31(3A) which **requires the court to consider the 'permanence provisions'** of the care plan but **'not … to consider' the remainder of the care plan**. There is a need to get back to the key PLO messages that were transmitted so effectively by Sir James Munby P and others during the 2015 training. It is only by applying this narrow statutory focus to each case that the 26 week deadline can be met.

7. Under the PLO judges are required to let go of cases by making a decision and bringing the case to an end once the relevant evidence is in and any necessary outstanding issues have been determined. The desire of a judge to manage every element of the future care plan, and thus to think they are diminishing risk, is perfectly understandable, but to do so is to return to pre-2014 ways with the inevitable delays that are thereby generated. The PLO requires courts to be prepared to make a decision and let the case go.

8. The statutory focus of any public law case must, therefore, be confined to two issues <u>only</u>:

    i. Are the CA 1989, s 31 threshold criteria established and, if so, on what basis?
    ii. By affording paramount consideration to the child's welfare, and taking account of:
        a. 'the permanence provisions' in the child's care plan [CA 1989, s 31(3A); and
        b. arrangements for contact [CA 1989, s 34(11)]

but no other part of the care plan, what final order, if any, is to be made.

9. In addition to adopting the narrow statutory focus for the court process, there is a pressing need for all involved in public law work in the Family Court to reengage with two central requirements of the PLO:
    a. The discipline of confining each public law case to three core hearings, with every effort being made to ensure that each is effective, rather than being adjourned or repeated [PD12A]:
        i. Case Management Hearing
        ii. Issues Resolution Hearing
        iii. Final Hearing; and
    b. The need to maximise judicial continuity.

    The value of these two requirements was proved over and over again in the early years of the PLO's implementation. The current difficulties in working undoubtedly impede our ability to achieve what is required, but the need to do so should remain the lodestar of every case management decision.

10. Put another way, it remains the case that the words of paragraph 45 of the 'Road Ahead' issued in June 2020 should apply to every case so that '**parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case'**. In a public law case, those words must be read in the context of s 31(3A) and s 34 (contact) so that the 'necessary' business of the court is determination of the threshold criteria and the ultimate s 1 welfare determination conducted after consideration of the 'permanence provisions' of the care plan and contact but no more.

11. This guidance is intended to tighten up process and procedure, but that must not be at the expense of the court giving proper scrutiny to the issues that necessarily fall for determination with respect to a child's welfare in each case. Improving the process is intended to be of benefit to children and their families by avoiding unnecessary delay.

12. Turning to more specific aspects of effective case management, the following central points should be generally adopted:

    b. When issuing proceedings the LA must have a clear and properly considered **threshold**, to which the parents can then respond. Thresholds must be short and focused on what the LA seeks to prove. In the great majority of cases threshold will be crossed and long discursive threshold documents neither help the court nor the parties.

    c. The LA should also lodge **an assessment plan**, setting out assessments which have already been completed and a timetable for any other assessments, which fits into the overall timetable; this should include rigorous **kinship assessments** that are

carried out during pre-proceedings work in order they do not have to be undertaken once the application is issued.

d. **A detailed gatekeeping order** and **a comprehensive order from the CMH**, which must set out a clear and fully timetabled **route to the IRH**, are key documents which will provide the roadmap for all subsequent orders to follow in order to prevent the drift and lack of clear direction which too often enters a case and creates lengthy delay.

e. In the gatekeeping order, the parents should be asked to **nominate a certain number of family members** or close friends to care for the children (maximum of 3 per parent or 4 per child). They should be told that only in really exceptional circumstances will they be allowed to later nominate anyone else.

f. **The CMH** should be timetabled to give the parents a realistic opportunity to meet their lawyers and respond to threshold by the time of the hearing. The parent's response must be a substantive response and not just a holding response. **This is an important stage**; if the parties do not respond adequately to the threshold, then the court should require them to attend in person to explain to the judge why they have failed to do so, and how any extension will fit into the timetable.

g. **Applications for independent social workers or psychological assessments should not be necessary**. The culture should be of judges (and guardians) trusting assessments made by the local authority, unless a reason not to do so is established. The social worker is likely to know the family better than an ISW or a psychologist and many such assessments add little or nothing to what the social worker can and should be able to tell the court. The statute is clear, instruction of an ISW or a psychologist will **only be permitted if** the evidence 'is **necessary** to assist the court to resolve the proceedings justly' [CFA 2014, s 13(6)]. If such expert evidence is necessary, then the court order should limit any report to no more than 25 pages in 12 point typeface.

h. Non-compliance with orders for the filing of documents adversely impacts upon the timetabling of cases and the allocation of resources by the court and the parties. Whilst failure to comply due to sickness or other unforeseen circumstances is unavoidable, non-compliance for other reasons is not acceptable.

i. In order to conclude a greater number of cases, there is a need to:

    i. Hold **fewer hearings** per case;
    ii. **Shorten** the length of **final hearings**;
    iii. Save where there are clear reasons to the contrary, the **final hearing should be a rolled-up hearing** to determine such factual/threshold issues that must necessarily be determined together with the final welfare decision.

Each additional day allowed for a final hearing in one case, will mean other cases having to wait an additional day before they are heard. **Every day counts** and **every hearing counts**.

j. IRHs need to be more effective. At an IRH, it is the judge's role to encourage all parties to take a realistic approach. Any suggestion of adjournment or the filing of further evidence at that stage will only be justified if it is 'necessary' to determine the remaining relevant issues.

k. No case should be timetabled for a final hearing without a **fully completed witness template** – to include allocation of time (not a time estimate) for cross-examination of each witness. If advocates do not keep to their allocated time, they can expect the court to impose a 'guillotine'. Prior to any final hearing, each party's evidence will have been committed to paper. A party's witness statement stands as their evidence in chief, subject to the direction of the court [FPR 2010, r 22.6(2)] and the court has the power to limit cross-examination [r 22.1(4)].

l. A good deal of time can be wasted finding "facts" which will have little impact (if any) on the ultimate outcome of a case.

m. Cross examination of single joint experts should be the exception not the norm. There is a process for written questions and in most cases that should be sufficient, without it being necessary to call the expert (FPR r25.9).

Sir Andrew McFarlane

President of the Family Division

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Annex

Public Law Working Group : Training & Implementation

Top 10 Tips

1. Ensure a risk responsible approach is taken in each & every case: managing risk in the community whilst supporting and working with families to effect sustainable change in the care given to the children.

2. Ensure effective use of the PLO in each & every case to assess parents' and/or the wider family's abilities to afford good enough care to the children.

3. Issue public law proceedings? Ask (i) what order is being sought (ii) why and (iii) why now? When proceedings must be issued, ensure that the evidence from the PLO is relevant and fresh to avoid duplication of work in proceedings.

4. Ensure timely applications for public law orders and ensure 'urgent' applications are confined to the small number of cases where urgent applications are justified and necessary on the facts of the case.

5. Use short form orders, save for the first hearing and final hearing, and ensure the use of template case summaries & position statements to inform the court of (i) immediate past events and (ii) the issues for determination at that hearing.

6. Ensure every court hearing is as effective as reasonably possible and resolves as many issues in dispute as can be fairly achieved. The number of hearings should be reduced to those that are necessary.

7. Carefully scrutinise each & every application for the instruction of an expert. Is an expert necessary? If so, why? Why does the social worker and/or children's guardian not have the requisite expertise and experience?

8. Save in the most exceptional of circumstances, do not remove a newborn baby from its parents using the s 20/ s 76 procedure.

9. Ensure SGO assessments are comprehensive and evidence informed based on the lived experience of the identified family member(s) and the child. Ensure that SGSPs are robust and make provision for the support and services to be provided on the basis of an assessment of need, especially in relation to contact, in the short, medium & long term.

10. Save in the most exceptional of circumstances, do not (i) make a supervision order alongside a SGO or (ii) make a care order where children are to return or remain at home.