## A View from The President's Chambers: March 2022

## 'Make Every Hearing Count'

As both England and Wales begin to move out of the Omicron variant restrictions, it is timely to take stock of the state of health of the Family Justice system and to describe both the general direction of travel, and the specific initiatives aimed at easing us all along the next stages of the journey towards 'recovery'.

Describing the state of health of the system will not take long. All readers of this 'View' will know, and be living with, the reality which is that the volume of outstanding work in the Family Court is at an all-time high. Each and every one working in Family Justice is doing so at the extent of their capacity, and has been doing so, now, for nearly two years. Agencies, such as CAFCASS and NYAS, have had to ration the use of their resources as demand, at least in some areas, has exceeded their capacity to deliver. I know that the same is also true for some solicitors' firms, barristers' chambers, expert witnesses and others. In the court, despite continuing to deploy significantly more judicial resources[1] each month than was the case pre-Covid, the backlog remains stubbornly high, with a consequence that there is unacceptable delay in listing cases.

A feature of Family cases, whether relating to children or finances, is that, unlike Crime or Civil (where the primary focus is confined to evaluating a past event), the Family Court works in a dynamic context where the life of the participants continues to be lived and where it is not unusual for [1]fresh events to occur and for these then to be evaluated within the ongoing court proceedings. The longer it takes to reach a final decision, the more likely it is that the court will have to engage with some new development and for this to delay any final decision yet further. Backlog and delay in the Family Court are not, therefore, static; like dough proofing on a baker's shelf, they have the potential to feed on themselves and grow the longer cases are left without a final resolution.

I need not go into more detail, the situation is plain and known to you all. The pressing question is 'what is to be done?'. There is, of course, no single, let alone simple, answer to that question, but I hope to use this 'View' to set out the range of initiatives that are in train to bring the backlog and our individual workloads back within reasonable bounds, whilst maintaining our commitment to deliver justice in each and every case. Some of these interventions need to be taken up immediately, others will take time to develop and are more medium term.

Before turning to detail, I wish to stress that, given the variety of factors which impact in different ways and to a varying extent on each local court centre, I intend to continue

to afford a good degree of autonomy and flexibility to each DFJ in the application of any particular initiative. The delivery of Family Justice is a complicated business, and the rigid imposition of a one-size-fits-all solution is unlikely to be appropriate for all localities. Trust in the discretion of individual judges and justices, within broad national parameters, has stood the Family Court in good stead during the pandemic, and I intend to continue in the same manner.

## Make Every Hearing Count: Guidance

My primary theme for the coming months is 'Make Every Hearing Count'. Despite the increase in judicial resources that we have had for the past two years, the number of concluded cases in both private and public law has not gone down. Statistics show that the number of hearings that are held before a case is concluded has increased. It is easy to understand the potential for Covid to hijack planned hearings, either by preventing assessments or other work to be done, or because key individuals are suddenly not available for a hearing. The need to hold more hearings per case, however, obviously reduces the efficiency of the system and has a direct impact on our ability to conclude proceedings in a timely manner.

A very experienced child-care solicitor recently described to me how busy she was. The busyness was not because she had more cases, it was simply due to the fact that none of the cases that she had ever seemed to conclude. That experience, which I suspect is shared by many, fits with the 'more hearings per case' data that I have described. Whilst this may have become the common experience, it must not be accepted as the norm for the future. As restrictions and the impact of the virus reduce, now is the time for each of us to take active steps, case by case and hearing by hearing, to reverse this drift by ensuring that every hearing is effective.

Where, before a planned hearing, it becomes clear that that hearing cannot be effective, the parties should communicate with the court so that, if the judge agrees, the hearing date can be vacated and (if possible) used for another case.

More generally, and at an altogether higher level, there is, I believe, a need for us all to reconnect with the core principles behind the 2014 public law 'PLO' reforms that arose from the 2011 Family Justice Review. To this end I am today issuing guidance on case management with the aim of tightening up good practice and returning to the principles of the PLO. Preparation of the guidance has been greatly assisted by the fact that Mrs Justice Lieven and the Midlands DFJ's produced an internal document for judges to this same end in December 2021, and I am very grateful to them for that initiative.

The guidance, with its twin mantras of 'Make Every Hearing Count' and 'Keep Cases Short', speaks for itself. The aim is **not** to pile more work onto practitioners. To the contrary, the aim is to take out unnecessary time and work from each case to allow

those involved to work more efficiently on that which does need to be undertaken to achieve a final decision.

## Other Initiatives:

### (a) Public Law Working Group Recommendations

Separately from moves to increase the efficiency of the court process by making every case count, pressure in the system can be alleviated by securing a drop in demand (by a reduction in applications) and by improving the quality of evidence in support of any application that is made. It is to these twin goals that the Public Law Working Group recommendations are aimed. Since the launch last April, it is the expectation that the PLWG recommendations will be taken up by every local authority in England and Wales, and that, where a local authority does issue proceedings after a thorough assessment process, the court will be able to engage with the case efficiently and without further assessment work being directed unless that is 'necessary'. Early reports from some areas suggest that the PLWG model is having a marked and beneficial impact. A proper evaluation is to be undertaken in March to coincide with the anniversary of the launch and will be published at that stage. The PLWG recommendations are, I believe, an uncontroversial statement of good practice; I would urge everyone engaged in public law children work to ensure that they continue to be taken up and adopted.

### (b) Private Law Pathfinder Courts

In addition to the short-term initiatives generated by the Private Law Working Group's work, it was accepted that some of its more radical recommendations would require longer term development and testing before they might be accepted for universal application. In essence these initiatives involve the court working in a very different way with families in private law proceedings, to support them in the resolution of dispute, rather than applying the more traditional adversarial model. The process of developing the detail of this new model of working has proved to be both interesting and time-consuming in equal measure; the wisdom of running these new ideas through a pilot was extremely sound. The stage has now been reached when the two 'Pathfinder' court centres, in North Wales and in Dorset, will go live before the end of February. I have signed off the Pilot Practice Direction [PD36Z]. Those who work regularly in these two areas have had training in the new processes, but I would in fact recommend any of you who are intrigued by what is being tested to read PD36Z. I never thought that I would ever say such a thing, but this Practice Direction is really very exciting! It generated in me a feeling which must have been akin that felt by those close to the late DJ Nick Crichton when he was starting the first FDAC court.

These pilots will take two years to run before they can be fully evaluated, but I suspect that fairly soon we may identify some small initiatives that work and may be taken up

more generally. One inspired idea, in my view, is that all the judges sitting in the Pathfinder courts are being trained in a different way of speaking to and interacting with parents; the training is being given by those who train new FDAC judges.

### (c) Language in Private Law proceedings

Many of you will have seen the important article by Helen Adam '*Language Matters: time to reframe our national vocabulary for family breakdown*' in August's Family Law Journal[2] in which a strong case is made for a radical change in the use of language in the context of intra-familial disputes, both within the court process and in society more widely. I am very grateful to Helen Adam who has accepted my invitation to lead a small group looking at this issue, with a view to making recommendations for change.

### (d) Private Law: 'What about me?' and the Jersey speech

In October 2021, in an address given in Jersey[3], I committed myself to work to promote the ideas that had been drawn together by the Family Solutions Group in their 2020 report 'What about me'. That address accepted that there is only so much that we within the court system can do to improve our ability to support parents who are unable to resolve disagreements over the care of their children; we only know these individuals exist after they have issued a court application, and by then many are, not surprisingly, set upon resolving their dispute through a conventional court process. The wider, longer term, initiatives that might change the culture, or, more modestly, provide resources to engage with separating parents before they think of issuing court proceedings, can not be realised by the judiciary or others within the court system and must be taken up by others.

Going back to my opening question – 'what is to be done?' – in the field of Private Law children work, I believe that delivering change in line with the Family Solutions Group recommendations is the answer to that question. If taken up, the change of culture and approach is likely to be of real benefit to children and families both in the short and long term, together with more general payoffs for society and, in so far as such cases no longer come to court, for the Family Justice system. I am grateful for the interest of Government ministers in these issues.

### (e) MOJ Mediation Voucher Scheme

[2] [2021] Fam Law 1015.

[3] https://www.judiciary.uk/announcements/speech-by-the-president-of-the-family-division-supporting-families-in-conflict-there-is-a-better-way/

In January 2022, the MOJ again extended the scope of the Family Mediation Voucher scheme that was first launched last March. The 2,440 additional vouchers, each worth £500 – will bring the sum invested to more than £3m. This commitment to expand mediation is most welcome. The 4,400 vouchers that had already been issued under the scheme are reported to have had a 77% success rate in terms of achieving full or partial agreement.

### (f) Nuts and Bolts

In an attempt to tighten up practice, and in doing so relieve the profession and the judiciary from ways of working which seemed to be adding, rather than reducing pressure, I have issued three memoranda:

- Memorandum on Experts in the Family Court [11 October 2021][4]
- Memorandum on Drafting Orders [10 November 2021][5]
- Memorandum on Drafting Witness Statements [10 November 2021][6].

### (g) Position Statements:

One important step which may have direct impact on the effectiveness or otherwise of a hearing is the timely delivery of a party's Position Statement. These are typically required to be filed 24 hours prior to a hearing, but substantial drift now seemingly occurs in many cases. During the peak of the pandemic, courts were understandably accepting of the difficulties that all were working under and judges were, I suspect, grateful to receive any document no matter how late it may be. Those times have now passed. For all parties and the court to know the position of each party at least a day prior to the hearing is of mutual benefit, both professionally and personally in terms of time management for preparation, but also more widely so that the true issues (and no more) can be focussed upon. Advocates can expect courts to be insistent from now on upon prompt compliance with requirements for the filing of Position Statements.

In firming up that requirement, I am not blind to the realities of practice. It is currently difficult for solicitors to find counsel to instruct in some cases until the last minute, such is the volume of work. Advocates, who are concentrating on a case on one day, may not have capacity to engage with the demands of the next day's case until after work. Obtaining instructions from over-stretched social work teams or guardians may be difficult. These and other pressing factors are understood, but the need for the court to reclaim the 24 hour pre-hearing period is, I believe, important for all, and, if other

[4] https://www.judiciary.uk/publications/president-of-the-family-divisions-memorandum-experts-in-the-family-court/
[5] https://www.judiciary.uk/announcements/president-of-the-family-division-drafting-orders/
[6] https://www.judiciary.uk/wp-content/uploads/2021/11/PFD-memo-on-witness-statements-12112021.pdf

pressing factors have squeezed this period then, as I have said, an adjustment is needed so that it is reclaimed.

In an effort to reduce the burden, can I stress that a Position Statement does not need to be lengthy or to be finessed into a formal pleading or Skeleton Argument. In this regard, brevity is a virtue and not a vice. All that is necessary is a short statement of the party's position and the orders that are to be sought. Documents which seek to recite a narrative history of the whole proceedings, or state well known principles of law, are neither necessary nor likely to be of great utility. One or two sides of A4 should suffice.

### (h) Remote hearings

It is neither necessary to add to, nor revise, the general steer that I gave to indicate the general direction of travel towards more attended hearings in the address given to the FLBA Conference in October[7], which was that the parties and their lawyers should normally be physically present at court on those occasions when an important decision may be taken. I would add, however, that specific thought should be given to mothers of a new-born child who may not be able to attend a face-to-face hearing but should be afforded the ability to do so remotely.

For the immediate present, HMCTS will continue to apply the social distancing requirements and other measures that have been in place for many months. This is justified in part because, in contrast to visits to a shop, entertainment venue, or other gathering, which are voluntary acts, attendance at court is often a requirement and there is an enhanced responsibility to do what can be done to reduce the risk of infection.

One matter of detail that I should clarify relates to a notice that went out from the RCJ indicating that, from 1 March 2022, the default position for dates issued for first hearings before Family Division judges would be for an attended hearing. This notice has apparently caused some confusion, for which I apologise. It applies only to **future** listing dates issued by the RCJ office, after 1 March, for first hearings at **High Court judge** level in Family cases **in the RCJ**. Any application that is referred to a judge for direction before the first hearing, will be listed as attended or remote in accordance with that judge's direction, similarly, any subsequent hearings will be attended or remote as determined by the judge.

### (i) Guidance on fact-finding hearings

It is clear courts would welcome further guidance on the approach to be taken to fact-finding hearings, particularly in cases where allegations of domestic abuse have been

[7] https://www.judiciary.uk/publications/speech-by-the-president-of-the-family-division-interesting-times/

made. I propose to issue such guidance, if possible, before Easter and I have asked Lady Justice Macur to lead a small group, working in conjunction with Mrs Justice Knowles (as lead judge on domestic abuse and private law), to assist me in this task.

### (j) Family Magistrates and Legal Advisers

The ability of the Family Court to function effectively depends upon Family Panel magistrates and legal advisers being available and able to undertake the amount and type of work that was the case prior to the pandemic. It is clear to me that, whilst in some areas this is being achieved, that is by no means the norm. Lay magistrates, who are volunteers, have been truly heroic in the manner in which they were able to undertake remote hearings (often at some personal expense in terms of acquiring IT, and at inconvenience to their home-life). The return of the lay bench to court buildings has, for a range of practical reasons, lagged behind that of the salaried judiciary in some areas. Likewise, the bench in some courts are unable to hold attended hearings. Investigation has revealed a range of different reasons why this may, or may not, be so at any one location. Whilst not underestimating the difficulties, I am clear that we need to have the lay bench back up and sitting at its full capacity in Family work as soon as possible. To this end I am very grateful to Duncan Webster JP, the National Leadership Magistrate, for taking up my request to address this challenge. A national Family Magistrates Oversight Group has now been established to oversee the operation of the Family work at the magistrate level, they will be supported by circuit-based and local Family Oversight Groups.

### (k) Experts

The FJC Experts in the Family Justice System committee continues work on the implementation of the Working Group recommendations. A newsletter was published in November 2021[8]. Eight regional/national groups have been established to bring together experts, judges and lawyers and they are delivering training and providing a forum for discussion to promote better understanding of the respective functions. If you would like to get involved in your local region please get in touch via the co-chairs[9].

In order to promote the provision to experts of judgments or decisions for cases in which their reports were commissioned a standard form of direction has been approved to be included in orders which flow from such decisions. The wording to be included in standard orders is to be finalised but the following form (which mirrors the existing obligation contained within FPR 25.19 (1) and (2)) is suggested:

*The Court orders that:*

[8] https://www.judiciary.uk/wp-content/uploads/2021/12/EFJS-Newsletter-Autumn-2021.pdf
[9] email addresses at https://www.judiciary.uk/wp-content/uploads/2021/11/Regional-committee-contacts-for-website.pdf

*1 The provisions of FPR 25.19 (1) apply to the child's solicitor [or other party instructing the expert, as appropriate].*
*2 In respect of the Court's sealed order and approved [written][transcript of] judgment (or in the absence of written or transcribed judgment any written note taken by the advocate), the provisions of FPR 25.19 (2) apply. The child's solicitor [or other party instructing the expert, as appropriate] is directed to provide a copy of the sealed court order and approved [written][transcript of] judgment (or in the absence of written or transcribed judgment any written note taken by the advocate) to (the expert X) within 10 working days of these being received .*

## The Financial Remedies Court

In like manner to that in the field of child law, the FRC has seen, and is seeing, a feast of initiatives all aimed at improving the service that is offered to litigants and the overall efficiency of the system.

A new FRC Efficiency Statement and 'Primary Principles Paper' were rolled out on 12 January 2022. This was the implementation of a core recommendation of the Farquhar Committee. These documents have, I understand, been well received. They are intended to have a very significant impact on efficiency in the sense of rapidity of resolution and the saving of costs.

The memoranda on drafting orders, expert evidence, and drafting witness statements apply to finance cases and, if implemented, as also likely to have a significant beneficial impact.

The Family Procedure Rule Committee is currently considering a proposal of the Farquhar Committee to move smaller money cases (i.e assets <250k excluding pension) onto the Fast Track. Cases of this scale apparently account for around 35% of the FRC's work.

An improved enforcement process is to be piloted. The proposed change should ameliorate wastage of time in this area considerably.

A substantially revised Form D81 has been introduced. This is a major improvement in two senses. Firstly, the form is now fit for its primary purpose of providing relevant and clearly displayed information to the parties and the court. Secondly, the internal structure of the form is such that information from these forms in every case can now be harvested in an anonymous way by researchers who, for the first time, will have access to details of how the vast majority of financial disputes are being resolved in ordinary cases. The hope is that before long tables indicating broad trends indicating 'norms' for straight-forward cases may be published (along the lines of tables for PI damages) so that the profession and lay parties will be better informed, and more likely

to focus on a reasonable outcome, than at present when most reported cases deal only with the affairs of the mega-rich. In terms of 'transparency', this is obviously a most welcome innovation. In recording the safe delivery of the new D81, I would wish to record the particular thanks that are due to Amy Wilson in the MOJ for the work that she has put in to bringing this project to fruition.

## Court of Protection

The gradual return to attended hearings in COP has seemingly been welcomed by family members and lay participants. The presumption now is that all Tier 3 Serious Medical Treatment cases will be attended hearings. All the cases allocated to Judges for hearing have been heard during the course of the pandemic. There is no backlog in this respect. Unfortunately, it has to be acknowledged that there are backlogs in the property and affairs matters which are being addressed, in part, by the Property and Affairs Deputyship Pilot Scheme. The pilot scheme, which demonstrates the advantages of digitisation, has won almost universal approval from the profession and provides very strong evidential base for its continuance in a wider format in the future.

## Transparency Implementation Group

The TIG initially divided its work into four streams each with its own sub-group: media reporting pilots, anonymisation of judgments, data collection, and establishing links with the media. More recently, the issue of transparency in the FRC has been added as a 5th sub-group. Each of these groups has now met at least once, and each is moving forward with its work. Regular reports of meetings and other activity are to be found on the judiciary website[10].

## The Digital Reform Programme

The next 12 to 14 months will see the conclusion of the Reform programme, with many of the products that have been in development being made operational. Much is taking place. The national lead judge for the entire project (including crime, civil, family and tribunals) is Mr Justice Cobb and the Family lead is Mrs Justice Arbuthnot (who has had significant involvement in Reform through her previous role as Chief Magistrate).

There is not space here to do more than note the current headline points.

- The Family Public Law system (known by some as 'the portal') is now fully operational in all but two court centres. In my visits to courts round the country, I detect that the process of familiarisation with the system is moving in a positive

[10] https://www.judiciary.uk/

direction. I hope that once all are used to using it, the benefits that undoubtedly flow from digital working will be fully apparent, and any current frustrations will be a thing of the past.

- Almost all courts now have, or shortly will have, the new scheduling and listing programme ('ListAssist').
- The CVP remote hearing platform, which was a quickly developed stop-gap to cope with remote working during the pandemic, will eventually be replaced by a bespoke Video Hearing Service ('VHS'). VHS, which has been piloted for some time in Birmingham, is now to be further tested at Swansea and Teeside.
- The digital consent order programme in the FRC is now fully operational and has been well received by users. It is, by all accounts, a very significant improvement on the previous system and is a welcome example of success for the Reform programme.
- Work is continuing on the Private Law and the Adoption programmes, which are to be rolled out later in the year.

## A Final Word

I apologise for the length of this 'View', but I hope that my attempt to describe the many and various initiatives that are ongoing is helpful in demonstrating that, although there is no easy answer to the 'what is to be done?' question, we are approaching it with a range of interventions aimed at achieving real improvements in the short, medium and long term. My single aim in promoting each one of these schemes is to relieve pressure in the system, whilst continuing to deliver justice in each case, and, eventually, allow us all to work within our capacity, rather than at the top-edge of it which is currently too often the case. I am more than open to receiving yet further ideas, or feedback on what I have written about.

Sir Andrew McFarlane
The President's Chambers
9 March 2022