

VIEW FROM THE PRESIDENT'S CHAMBERS

The process of reform

Sir James Munby, President of the Family Division

Since becoming President on 11 January 2013 I have embarked upon a tour which by the end of the year will, I hope, have taken me to every care centre in the country. I started on the South Eastern Circuit in the first week in February. I was in Exeter the following week. Two weeks later I visited Newcastle, Teeside and Leeds. In the middle of March I visited Cardiff, Swansea and Newport.

Wherever I go I make a point of trying to meet everyone involved in the family justice system: judges, court staff, magistrates, justices' clerks and legal advisers, local authorities and CAF/CASS. I have been immensely cheered by the enthusiasm with which they are all working collaboratively, determined to make a reality of reforms which they have eagerly embraced. I hold open meetings for the legal professions to which everyone is invited and where everyone is free to speak their mind. Again, I have been cheered by the large numbers who have turned out and by the very positive dialogue that has been possible. I am grateful to all of them.

On 5 March 2013 I gave evidence to the House of Commons Public Bill Committee considering the Children and Families Bill.

As it will be some time before I am able to finish my tour, it may be helpful for me to summarise for a wider audience the message I am giving wherever I speak.

The reforms

We live in challenging times. The family justice system is undergoing the most radical reforms in a lifetime. The process of reform is little short of revolutionary. These reforms, in which we must all play our part, are divided into three parts.

First, there is the creation of the new single Family Court which, once the Crime and Courts Bill completes its progress through Parliament, is likely to come into existence

in April 2014. It is some forty years since such a court was recommended by Sir Morris Finer and he, alas, did not live to see his recommendations bear fruit – such is the snail-like pace of so much legal reform in this country. When it opens its doors, the Family Court will include, wherever possible sitting under the same roof, judges from every tier of the judiciary: High Courts Judges, Circuit Judges, District Judges and Magistrates. And it will benefit from unified systems of administration and listing. I need not go into further details here; they can be found in ‘The Single Family Court: A Joint Statement by the President of the Family Division and the HMCTS Family Business Authority’ issued in April 2013.

Here I should like only to emphasise two very important points. The first is the significance of the Magistracy. I do not accept, I have never accepted, that Magistrates are unsuited for family work or, in particular, for public law cases. Quite the contrary. So Magistrates will play a vitally important part as judges in the Family Court. And I must make clear that there is no agenda that Magistrates should in future concentrate only on private law cases. Given the great discrepancies at present in the balance of public and private law work being done by different Family Proceedings Courts, there is likely over time to be a rebalancing in some places between the two kinds of cases. But Magistrates are going to continue doing significant amounts of public law work. The second point relates to their legal advisers (justices’ clerks). They will have a pivotal role to play as members of the **‘gate-keeping and allocation team’** in the Family Court.

The second strand in the reform process is the product of the work done for the Family Justice Review by David Norgrove, ably assisted by McFarlane LJ. It has been carried forward as to part in the Children and Families Bill recently introduced into Parliament, as to part by Norgrove himself, who chairs the Family Justice Board, and as to part, until his very recent promotion to the Court of Appeal, under the supervision of Ryder J as Judge in Charge of Modernisation. We all owe an immense debt to Ryder LJ. Without him I simply do not know where we would be. This part of the reform process is the focus of what follows.

The third strand has to do with transparency. I am determined to take steps to improve access to and reporting of family proceedings. I am determined that the new Family

Court should not be saddled, as the family courts are at present, with the charge that we are a system of secret and unaccountable justice. Work, commenced by my predecessor, is well underway. I hope to be in a position to make important announcements in the near future.

The challenge

I know that much of this programme of reform causes concern to some of the most thoughtful and conscientious family justice professionals. But we must do the very best we can with what we have. Where battles have been fought and lost we must move on. We have to realise that public finances remain in a dire state and that asking for more money, more judges, more this, more that, is simply crying for the moon. Realistically we must steel ourselves for further cuts. Our task is to ensure that greater efficiencies in the family justice system minimise the impacts of these cuts on the families we serve.

We must not let the many difficulties we will undoubtedly face stand as obstacles in our way; instead, we must treat them as challenges to be overcome – as they can and must be.

Private law

In the field of private law the immediate concern is the likely effects we will be seeing when the restrictions on public funding imposed on 1 April 2013 begin to bite. This is a topic I shall be returning to on a future occasion.

Public law

In the field of public law, concerns focus in particular on proposed statutory principles that care cases are to be concluded within 26 weeks and that expert evidence is to be restricted to what is “necessary”. We can and must reduce the excessive length of far too many care cases. We can and must get a grip on our excessive and in many instances unnecessary use of experts.

26 weeks

A comparatively small number of exceptional cases apart, we can and must meet the 26 week limit. We *can*, because various pilots and initiatives are not merely showing us that it can be done but, even more important, showing us *how* it can be done. We *must*, because if we do not, government and society will finally lose patience with us. I believe it can be done and I am determined to do everything in my power to make sure that it is. My message is clear and uncompromising: this deadline can be met, it must be met, it will be met. And remember, 26 weeks is a deadline, not a target; it is a maximum, not an average or a mean. So many cases will need to be finished in less than 26 weeks.

The family justice system, as I have said, is undergoing the most radical reform in a lifetime. Fundamental to this is a change of culture in the way cases are managed – both public law cases and private law cases – so that we can finally get to grips with the problem of delay. Everyone involved in the family justice system has a part to play in changing the culture and reducing delay. There is no single solution. We will achieve what must be achieved, but only if *everyone* plays their part.

Case management

The role of the judges will be crucial. Robust and vigorous case management will be essential, in particular if we are to meet the new 26 week requirement. Can I remind you of what I said in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, (FLR, forthcoming).

Experts

Crucial to our meeting what the reforms demand of us is getting a grip on the expert problem. The problem does not, of course, lie with the experts themselves. It lies in the use we make of them.

Three things are needed: first, a reduction in the use of experts; second, a more focussed approach in the cases where experts are still needed; and, third, a reduction in the length of expert reports.

In January 2013, the Family Procedure Rules were amended. The old test – whether expert evidence was “reasonably required” – was replaced with a significantly stiffer test – is the expert “necessary”? That change raises the bar significantly.

In every case we must consider the reasons behind the request for an expert’s report. Why is this additional evidence necessary? How will it add to the information the court already has? Is there not already an expert in the case who can provide that information – the social workers or the children’s guardian?

Let me repeat what I said to Parliament:

“Social workers are experts. In just the same way, CAFCASS officers are experts. What has gone wrong with the system is that we have at least two experts in every care case – a social worker and a guardian – and yet we have grown up with the culture of believing that they are not really experts and we therefore need experts with a capital E. Much of the time we do not.”

The new rules, the new approach, need to be robustly enforced by case management judges. Some experts will no longer be required at all. Robust case management also requires that those experts who are needed have to deliver their reports more promptly and in a shorter and more focused fashion. The case management judge’s approach should be: ‘give me three good reasons why you say this expert is necessary’. We must encourage the other parties in their turn to state their views robustly as to whether the proposed expert evidence is necessary. They should no longer sit on the fence or adopt a position of neutrality, whether benevolent or otherwise. If in their view the expert is not necessary they should say so and explain why. The case management judge must adopt a more ‘hands on’ approach to the drafting of letters of instructions to experts and the formulating of the questions (fewer and more focused in future) they are to be asked to consider.

A revised PLO

Work is underway on a revised PLO. The new PLO is going to put a much greater emphasis than hitherto on the first hearing, which will be re-named to bring out the key fact that it is to be the effective case management hearing. The existing CMC (also to be re-named) will be held only if necessary. The new PLO will also emphasise the use that must be made of the IRH wherever possible, and if appropriate with the calling of oral evidence, to determine discrete issues and, if possible, the entire case.

Let me focus on the first hearing. If it is to be effective, as it must, four things are essential.

First, the local authority must deliver its material – the right kind of material – on day one. If that does not happen, the entire timetable will be thrown out. Let me at this point repeat something I said to Parliament:

“One of the problems is that, partly as a result of previous initiatives, local authorities have become obsessed with filing enormously voluminous materials, which are far too long – that is not their fault – and are also narrative and historical, rather than analytical. One of the things I want to do is to send out a clear message that local authority materials can be much shorter than hitherto, and should be more focused on analysis than narrative. If local authority practitioners can be confident that they can focus on what matters, rather than the vast, historical penumbra – if they can focus on analysis, rather than history and narrative – that of itself will go a significant way to giving them confidence and improving the quality of their output.”

The next thing is that CAF/CASS has to be able to deliver, and it can deliver on time only if the local authority has delivered on time. Assuming that the local authority has delivered, CAF/CASS must be in a position by the first hearing to provide an analysis of what case is about and to advise the court what evidence and assessments are, and equally important what evidence and assessments are not, necessary.

If this has all been done, the case management judge at the first hearing will be able, even at this very early stage, to embark on timetabling the case and giving comprehensive directions for the case, adopting a robust, vigorous style of case management. Vitally important as part of the process at the first hearing, the judge must implement the new arrangements in relation to experts.

Finally, and still at the first hearing, both the court and the parties' legal advisers must adopt a more robust approach with the parents. If the local authority has not delivered, then I entirely understand that advocates cannot answer questions that otherwise the judge would wish to put, such as 'Do you admit what is said by the local authority, or do you dispute it?' On the other hand, if the local authority has delivered its material in the right form at the outset, there is no reason why, as part of robust judicial case management, the parents should not be required at the first hearing to submit to orders requiring them within an appropriately short timescale, for example, to respond clearly to the local authority's case – to say yea or nay whether they agree or disagree with the local authority's case on threshold – and to identify possible family carers.

What I said to Parliament was this:

“If at any of those stages the relevant agency is not delivering, the timetable will be thrown off target ... I have confidence that the judges believe in case management and will manage [cases] robustly. The two great problems – and there are two rather than one – are the need to ensure that the local authority in the first instance, and CAFCASS in the second instance, deliver on time. If they do that, we will achieve 26 weeks. If they do not, we will not.”

I am confident that they will. The simple fact is that they must if we are to be able to comply with the timetable that Parliament is going to impose on us. *Everyone* involved must get a grip on the case at the first hearing.

Let me sum up, by repeating what I said to Parliament:

“the key to this, at the end of the day, is robust judicial case management in cases where at the first hearing, because both the local authority and

CAFCASS have delivered, the judge is able to understand what the case is about and timetable the case at that stage right through to the end.”

The price of reform?

I have focussed on two key reforms: the 26 week limit and the new approach to expert evidence. Let me absolutely clear: I do not accept that either of these reforms, in my view essential reforms, will prejudice the quality of justice or the interests of those who appear before us.

I was asked about this when I gave evidence to Parliament. I said:

“I am quite convinced that it can be done without prejudice to the welfare of children, or to a fair and just system.”

Referring to my visits around the country I added:

“I have heard many questions, and concerns and worries. The one thing that has been conspicuous by its complete absence is any suggestion from judges in those areas where the time limits are already tumbling rapidly that that is producing unfairness or injustice. I am confident that if there were any such concerns, they would have been articulated ... There is no suggestion at all from anybody whom I have talked to in those places – whether judges, CAFCASS, local authorities or anybody else – that that has in any way compromised the welfare of children or the fairness of the process.”

Conclusion

Let me conclude by repeating something I said when speaking earlier this year at the annual dinner of the Family Law Bar Association:

“We are embarked upon a great task of immense importance. My ambition is that in five or ten years’ time each of us will be able to look back and say ‘I played my part in making all this possible.’ One day when the years have

taken their toll and, like all lawyers of a certain age, you reminisce about the good old days, your pupil's pupil will listen with astonishment as you describe care cases which took 50, 60, 70 or 80 weeks. Perhaps they will even be mildly surprised at the modesty of our current ambition that care cases should take no more than 26 weeks.

Failure is not an option; I am confident that, with your assistance, we will be successful.”

For those of you who are sceptical, remember that the architects of the Children Act 1989, and they were not fools or dreamers, thought that care cases would – should – take no longer than 12 weeks.