A View from The President's Chambers

July 2023

1. This is a time of year for conferences. The annual 'President's Conference', attended by every Designation Family Judge (DFJ) and Family Division Liaison Judge (FDLJ), together with other senior Family judges and guests drawn from all areas of Family Justice, has recently taken place. The conference provides an important space in the busyness of life for these key leaders to come together to share experiences and ideas. In the past few weeks, I have attended the annual Resolution Conference in Brighton, the North East Circuit Judiciary Conference in Leeds and the Local Family Justice Board (LFJB) conferences in Milton Keynes and Manchester. In addition, I have undertaken day visits to the Family Courts in Sheffield, Leeds, Chester, Crewe, Manchester and Wrexham. There is no substitute for going out, meeting people and just listening to what they tell me. All of these experiences feed into the view that I currently have of how things are going in the world of Family Justice. It is therefore time for another 'View' in order to share some of this material more widely.

2. At a conference of Family judiciary in Berlin I had the privilege of hearing a member of the Ukraine judicial system explain how, despite the war, the courts in Ukraine are continuing to function, in part by extensive use of remote hearings or transferring cases to different parts of the country. It was very humbling indeed to hear her impressive account and to know that it had taken her 24 hours to get to Berlin to speak to us. Whilst that experience certainly put the challenges that we face in Family Justice into some perspective, my recent encounters leave me in no doubt that the huge pressures that are experienced by all those in the judiciary (at all levels), and by court staff, legal and social work professions continue as we recover from the pandemic, seek to clear the outstanding cases and work with HMCTS in the roll out of the digital Reform programme. I have long been plain that I regard judicial and professional wellbeing as a priority. Some will, and do, see the initiatives that are currently

being implemented, principally the Public Law Outline (PLO) Relaunch, as requiring more work and generally being counter to my wellbeing message. I well understand that point and it is one that can properly be made to me. My motivation, however, in promoting these various schemes is, in the medium term, to relieve the stress and burden that comes from holding a high volume of open public and private law children cases in the system. Being more focussed, having fewer hearings and, in time, reducing the number of 'live' cases, is likely to have a positive outcome on our overall wellbeing. In that way, whilst I do not doubt the pressure that any change in working brings, I do not see that the need to prioritise wellbeing is at odds with the initiatives that I am promoting.

The PLO Relaunch

3. It is now some five months since Mr Justice Keehan, and I pressed the 'start' button on the PLO Relaunch on 16 January. I have been grateful for, and impressed by, the degree to which this call for a change of culture has been taken up, seemingly, by one and all. If it can be that a relaunch 'has landed well', then that does indeed seem to be the case. There has been widespread acceptance that doing nothing, and simply letting the normalisation of delay bed yet further into our approach to case management, was not a viable option.

4. Much of the burden of delivering the PLO, both pre and post issue of proceedings, falls on local authorities. I am particularly appreciative of the very positive way that those in local authorities that I have met in recent weeks have spoken about the relaunch. Despite the hard work involved, it is seen as the way of getting on top of the caseload and focussing on the key child protection needs and required actions.

5. The overall aim in the public law field remains that proceedings should not be issued until all necessary assessments have been conducted, so that the only cases brought to court are those that need to be there. Thereafter, the court will only permit further expert assessment if it is necessary for the determination of (a) the s 31 threshold criteria, (b) the permanence provisions in the care plan, (c) contact

or (d) the final welfare assessment as to outcome. The court process will be focussed, within 26 weeks and with few hearings, only on those four issues.

6. Five months is not a long time, but there are already positive signs of change in the court data and elsewhere. One aspect, of which I have been told in a number of centres, is a coming together of the Public Law Working Group's (PLWG) recommendations on pre-commencement assessment work with the PLO structure post-commencement. I have heard of quite significant reductions in new cases being issued in some areas. The hope is that this represents a sustained change for sound reasons, and not simply a temporary bottle neck. The court data, which is always a degree behind the real picture, is beginning to show a reduction. Public law case receipts have reduced by 7.4% nationally when comparing quarter one of 2022 to quarter one of 2023. My expectation is that, once the heavy lifting has started to have an impact, with case volume and case length both reducing, it should become exponentially easier to address more and more cases in a timely manner. The next six months will demonstrate if we are, as the early signs suggest, indeed seeing a positive change. I continue to be very appreciative of the genuine efforts that are currently being made by one and all to bring about this change.

7. In addition to the PLO relaunch, recent months have seen the publication of the PLWG report and recommendations on the use of supervision orders. I have endorsed these recommendations and it is to be expected that judges, magistrates and all involved in public law work should begin to apply them in appropriate cases. For too long the option of a supervision order has been seen as either ineffective or otherwise not a viable option for a child. The reasons for this state of affairs are various, and are spelled out in the PLWG report. Sitting where it does within the overall structure of the Children Act 1989, a supervision order should be seen as a much more useful option than has been the case in recent years. The PLWG recommendation for supervision orders to be supported by a 'supervision plan', in the same way that a care order relies on a care plan, should be widely taken up. In this context it is also of note that the Court of

Appeal is soon to hand down judgment in a case concerning the appropriateness of making a full care order when the child is going to be living at home.

Private Law children cases

8. It is well recognised that improving our ability to meet the needs of the children and parents who are before the Family Court in private law disputes is a harder task, but, here too, there are signs of an altogether more positive way forward, albeit in some time to come. Firstly, the two Pathfinder pilots in North Wales and Dorset continue to encourage confidence that we have found a better way for the court to interact with separated parents in conflict, with a view to resolving disputes for the benefit of their child. On my recent visit to Wrexham, I learned in detail about this new way of working and I am now very clear that this is a model that should be taken forward in other centres. Discussions are already taking place to determine how the Pathfinder model may be extended to other (and eventually all) courts, rather than waiting for the pilots to conclude in a year's time before beginning those discussions. I am most grateful to HHJ Simmonds in Dorset and HHJ Gaynor Lloyd in North Wales and their respective teams for blazing the trail on this important project.

9. The second reason for some confidence in a better future for private law arises from the recent government consultation paper on '*Supporting earlier resolution of private family law arrangements*' [1]. The consultation period closed on 15th June, and we must await the government's response. It is, however, to be hoped that once that response is determined the clear resolve in favour of action by central government to support separating parents will be converted into action and, if necessary, legislation. Alongside these proposals, the Rule Committee has consulted on procedural changes designed to tighten up and revitalise the MIAM process, with a view to amendments to the FPR 2010 being made later in the year.

[1] https://consult.justice.gov.uk/digital-communications/private-family-law-consultation/supporting_documents/supportingearlierresolutionofprivatefamilylawarrangementsconsultationweb.pdf

10. Both the Pathfinder courts and the potential for government action are medium to long term projects, which will not have any direct impact upon cases that are currently awaiting resolution by the Family Court. In this regard, I have regularly encouraged all involved to focus on the issues that it is necessary should be determined in order for the court to meet the overriding objective of dealing with cases justly, having regard to the welfare issues involved. As FPR 2010, r 1.1 makes plain, the objective is to be achieved by ensuring cases are dealt with 'expeditiously and fairly' and 'in ways which are proportionate to the nature, importance and complexity of the issues'.

11. In a recent case[2], Mrs Justice Lieven has stressed that there is no right for a party to cross-examine a witness. FPR, r 22.1 provides that the 'court may control the evidence by giving directions as to:
    a. The issues on which it requires evidence;
    b. The nature of the evidence which it requires to decide those issues; and
    c. The way in which the evidence is to be placed before the court.'

    The court can exclude otherwise admissible evidence and may limit cross-examination.

12. In this regard I am reminded of the important words of Sir James Munby a decade ago in *Re C (Family Proceedings: Case Management)*[3], which remain as sound today as they were in 2012:

> '14. It is important to recognise the nature of the proceedings …. These were family proceedings, not ordinary civil proceedings where the function of the judge is in large part to act as the umpire determining the competing cases put before [them] by the litigants. In ordinary civil litigation the circumstances in which a judge can prematurely stop a case are limited, albeit less limited now in accordance with the Civil Procedure Rules than was once upon a time the case. But these are not ordinary civil

[2] *Mother v Father* [2022] EWHC 3107 (Fam); [2023] 1 FCR 396.
[3] [2012] EWCA Civ 1489; [2013] 1 FLR 1089.

proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, [their] duty being to further the welfare of the children which is, by statute, [their] paramount consideration. It has long been recognised -- and authority need not be quoted for this proposition -- that for this reason a judge exercising the family jurisdiction has a much broader discretion than [they] would in the civil jurisdiction to determine the way in which an application of the kind being made by the [parent] should be pursued. In an appropriate case [they] can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. [They] may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. [They] may … decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.

15. The judge in such a situation will always be concerned to ask [themselves]: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage in the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within [their] case management powers and the proper exercises of [their] discretion so to decide and to determine that the proceedings should go no further.'

13. With respect to issues of domestic abuse, last month marked the conclusion of a 14 month period during which domestic abuse training has been delivered to every salaried and fee-paid Family judge at induction or continuation training courses. This has been a remarkable achievement by the Judicial College, and I am extremely grateful to all involved, in particular the tutors and course

directors, who are most ably led by HHJ Jeremy Richards, the Director of Training for Courts.

14. In addition, I am issuing revised Practice Guidance on Non-molestation injunctions under the Family Law Act 1996 together with a template order. The guidance is the fruit of the work of a small group, co-chaired by DJ Kevin Harper and me, which undertook a consultation exercise in 2022/23. The aim of the guidance is to allow courts to deal efficiently with the growing number of such applications, whilst at the same time meeting the requirements of fairness and due process.

15. A further positive step has been the issue, in April 2023, of FPR Practice Direction 27C on the attendance of IDVA's and ISVA's at hearings in the Family Court. An IDVA is an 'Independent Domestic Violence Adviser', and an ISVA is an 'Independent Sexual Violence Adviser'. PD27C firmly establishes the default setting, which is that an IDVA or ISVA, who is providing support for a party, should attend any hearing if that party wishes them to do so. The default position may only be departed from if it is in the interests of justice to do so.

16. On a less positive note, all who have experienced cases where the circumstances either require, or cause, the court to appoint a Qualified Legal Representative (QLR) under Matrimonial and Family Proceedings Act (MFPA) 1984, s 31W(6) to cross examine a vulnerable witness in the interests of one of the parties, will know that frequent and widespread difficulties are being encountered in finding advocates to act as a QLR. The provision of a statutory alternative to the unsatisfactory remedy of the judge, magistrate or legal adviser questioning the witness in such cases is something that has long been called for. The inclusion of a new Part 4B in the 1984 Act, by the Domestic Abuse Act 2021, s 65, was widely welcomed. It is therefore both dispiriting and very concerning that the QLR scheme established by the Ministry of Justice (MoJ) to implement Part 4B seems unable to attract anything like sufficient numbers of advocates to act as a QLR in individual cases.

17. Changes to the operation of the QLR scheme are a matter for the MoJ, but the current unwelcome situation requires courts to determine how to proceed where the circumstances are such that, by s 31W(6), 'the court must appoint a qualified legal representative (chosen by the court)', yet none can be found. Where that situation is reached it will be a matter for the individual judge or magistrates to decide how to proceed in each case, but I would suggest that if no QLR is found within 28 days, the court should list the case for directions and direct that some summary information is provided by HMCTS about the difficulties that have been encountered.

18. Although there is no provision in MFPA 1984, Part 4B for the termination of a QLR appointment, PD3AB, para 8.1(b) permits termination 'when the court so orders'. No guidance is given in PD3AB as to the test to be applied. When a QLR is appointed by the court the focus is on whether it is 'in the interests of justice' to do so. A similar focus may therefore be appropriate when considering discharge. In addition, courts should apply the over-riding objective in FPR 2010, r 1.1 of 'dealing with a case justly, having regard to the welfare issues involved'. The need to do so 'expeditiously and fairly' and to ensure 'parties are on an equal footing' will be of particular importance.

19. Consideration of terminating the appointment of a QLR provides a further opportunity to canvas with the parties any other options, for example directly instructing an advocate. If a QLR is discharged, short reasons for doing so should be recorded in the court order.

20. Although courts will be mindful that PD3AB, para 5.3 provides that 'a satisfactory alternative means to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party, that guidance does not trump the over-riding objective and, where there is no alternative, courts may have to revert to asking the questions where that is the only way to deal with the case justly, expeditiously and fairly in the absence of a QLR.

Reform

21. HMCTS has confirmed, as part of its 're-set' plans, that digital reform of family processes will now be completed by March 2024.

22. Work continues to improve the presentation and functionality of the Public Law portal. The new gatekeeping and allocation design was released in March, and a new 'Case File View' will be introduced shortly, which will make easier the task of locating documents on the portal.

23. The full ('end-to-end') Private Law Portal (PrL) was introduced into the Family Court at Swansea in mid-May as the first 'early adopter' court; PrL is the first of the digitised products across all jurisdictions to be released in a state that is already integrated with List Assist and Work Allocation. The trial of the portal is being carefully monitored by HMCTS and the judiciary; when HMCTS and the judiciary are satisfied that it is operating as designed in Swansea, five additional Family Courts (Newcastle, East London, Chelmsford, Gloucester, Coventry) will be invited to use the portal as further 'early adopter' sites. The system will be rolled out nationally only when it has been shown to be operating as designed in the six early adopter courts. I am very grateful to HHJ Philip Harris-Jenkins (DFJ Swansea) for leading his judges and staff through this important phase.

24. The performance and functionality of the Financial Remedy portal for contested cases requires attention and is currently being studied by HMCTS to assess how it can be improved for users. The senior Financial Remedy judges and Reform Judges are actively involved in this process.

25. I am grateful for the continued patience and commitment of all to this major change project. Save for the release of the PrL in its final form, and the joining up of all the freestanding products through 'common components', Family now has each of its Reform elements in place. We are, therefore, at the stage of bedding them down, getting further used to working with them and addressing any continuing difficulties. The end of the programme can therefore be glimpsed for the first time.

Financial Remedies Court

26. Two rule changes came into force in April 2023:
    a. FPR 2010, r 30.3(5A) was extended to enable a nominated FRC circuit judge to dismiss on paper, on a totally without merit basis, an application for permission to appeal. When such an order is made, the applicant loses the opportunity to renew the application at an oral hearing.
    b. FPR 2010, r 33.3(3) was amended to require an alleged debtor, in an application for the enforcement of an order for payment of money, to file a financial statement and documents.

27. The consultations undertaken by the FPRC and the MoJ in connection with Non Court Dispute Resolution (NCDR) have explored, in the context of financial remedies, strengthening Mediation Information and Assessment Meetings (MIAMs), the possibility of making NCDR compulsory subject to appropriate safeguards, giving the financial remedies judge greater power to adjourn for NCDR, an addition to costs rules to include failure to attend NCDR as a factor to take into account when considering a costs order, and the Single Lawyer Model. The overall aim is to place greater emphasis on exploring NCDR in order to achieve a higher rate of settlement in financial cases at an earlier stage.

Transparency

28. The Transparency Implementation Pilots have now been running at Leeds, Cardiff and Carlisle for public law proceedings since January 2023 and for private law cases since May. The aim is to extend to the Magistrates in October. Readers of this View are likely to be aware of some accounts of court hearings, in both public and private cases, that have appeared in local and national media in the period following the two launch dates. Those reports, together with accounts from the three pilot courts, indicate that the strict ground rules for confidentiality that are established within the pilot are being followed. However, to maximise the learning from the pilot there is a need for more cases to be covered and that is being hampered by the opacity of the current lists. A

journalist's time is a precious resource (both for the individual and their employers) and journalists are understandably unwilling to attend at a Family Court regularly, or in any number, simply on the chance of observing a reportable case. At present, the daily court lists do not indicate more than the case number and that it is a Family case; no information is given about the nature or substance of the hearing. We are striving to achieve a system which does give journalists more information about the nature of listed hearings. The pilot team is working closely with HMCTS to bring forward a solution to this problem.

29. Two further elements in the implementation of the Transparency Review will be the publication of the first Annual Report of the Family Court for England and Wales which is now due to be in October and the publication (in April) of the working group ably led by HHJ Stuart Farquhar on 'Transparency in the Financial Remedy Court'. Their comprehensive report recommends that reporters (i.e. the media and accredited legal bloggers) should, as the default position, be permitted to report the contents of financial remedy proceedings, provided that the anonymity and confidentiality of the parties, and their main financial instruments, is maintained. I welcome the report which has been well received. Its conclusions will be considered by the national leadership of the Financial Remedies Court and the wider Transparency Implementation Group, to determine the way forward. I anticipate that consideration will be given to a pilot scheme, similar to that currently in operation for children cases.

The National Deprivation of Liberty (DoLs) List

30. Partly to relieve the burden of work on deputy High Court judges sitting in regional centres, and partly to establish a more orderly system for engaging with the rising number of applications by local authorities under the inherent jurisdiction of the High Court for permission to deprive a vulnerable young person of their liberty, a one year pilot commenced in July 2022. The pilot simply required all DoLs applications to be issued in the central Family Division Office at the Royal Courts of Justice (RCJ), and provided that the cases would

then be heard by deputy High Court judges sitting at the RCJ in what was then called 'the DoLs Court'.

31. I am grateful to the National Family Justice Observatory (NFJO) for collecting and publishing data on DoLs applications, to enhance our understanding of this area. They found that between July 2022 and April 2023, the national DoLs Court recorded a total of 1,139 applications. So far, there have been 76 'repeat' applications, which means that a total of 1,069 children have been subject to DoLs applications at the National DoLs Court in the first ten months.

32. Applications have been made by 151 different local authorities and 21 hospital or mental health trusts.

33. Just over a fifth (21.5%) of all applications were made by local authorities in the North West of England, followed by 17.2% of applications from local authorities in London. Local authorities in the North East have made the fewest number of applications (3.5% of the total). This pattern of regional variation has broadly remained the same since July 2022.

34. The majority of children (58.6%) involved in applications were aged 15 and above, with a small minority relating to children under the age of 13 (9.4%). The number of girls and boys subject to applications is almost equal – a pattern that has broadly remained consistent month-by-month.

35. Both the pilot and the existing guidance in support of Ofsted are in the process of being reviewed. The hope is to publish a revised scheme during July. The essential changes are likely to be:
    a. The label 'DoLs Court' will be replaced by the more accurate title of 'National DoLs List'.
    b. Applications will continue to be issued through the RCJ and initially listed for hearing in the National DoLs List.
    c. Cases which are likely to require a number of future hearings will be transferred to the relevant regional centre and allocated to one judge

there, to ensure a level of judicial continuity and to allow some contact, if required, with the young person who is the subject of the application.

d. A reduced requirement on the court with respect to monitoring or policing registration of unregistered placements.

Standard Orders

36. In May the Standard Orders Group issued updated versions of standard orders for Family cases after a lengthy and thorough review. They are intended to incorporate the blue riband orders for children cases, financial remedies cases, and other aspects of the Family Justice system. They can, of course, be adapted for any individual case but they provide for practitioners and judges alike provisions which reflect and are consistent with the essential principles of law and practice. The Standard Orders Group is conscious that some of the orders are, inevitably, lengthy, and is actively exploring producing a limited volume of short form orders for the benefit of judges who are generally required to draft the orders themselves when both parties are litigants in person.

The Pensions Advisory Group

37. The Pensions Advisory Group is in the advanced stages of preparing its second report on pensions on divorce. Recent budget changes have necessitated a re-working of some parts of the recommendations.

Retirements

38. A number of retirements have taken place, or are about to take place, of those who have played a prominent part in the Family Court judiciary. During the 2022-23 Legal Year, we have bade farewell to a number of DFJs, namely HHJ Bryony Clark, HHJ Richard Scarratt, HHJ Miranda Robertshaw, HHJ Lindsay Davies, HHJ Michael Handley and HHJ Sally Dowding.

39. I have never known a DFJ who has given anything less than total commitment to the role, often at the expense of their family lives and personal wellbeing, but

the group retiring now each had to undertake the role during Covid making the task all the more burdensome and time-consuming. It is widely acknowledged that the Family Court's ability to function from Day One and throughout the pandemic was both impressive and heroic. That was in no small part down to the local leadership and care provided by each individual DFJ. I am therefore particularly grateful to those who are now retiring for their sustained and most valuable contributions to the work and life of the court.

40. What can be said of the DFJs applies equally to Sir Roderick Newton, who retired in April, and Mr Justice Nicholas Mostyn, who retires at the end of July. Sir Roderick, as DFJ from 2008-14 variously (and often simultaneously) for Chelmsford, Cambridge and Peterborough, and then, once a High Court judge in 2014, as FDLJ of the northern half of the South-Eastern Circuit, has served this large and busy region with great distinction in each of these leadership roles. Of Sir Roderick's many positive judicial qualities, I suspect that it will be both his humanity and good humour that will be remembered most by the many who now wish him well in his retirement.

41. The time for me to attempt to encapsulate the career of Mr Justice Mostyn into a few words will occur at a Valedictory that is to be held in October. I would, however, wish to point all those who may not yet be aware of it to a 12 episode podcast that Sir Nicholas has, with other well-known fellow sufferers, taken part in about Parkinson's 'disease'. The podcast, called 'Movers and Shakers' is light-hearted, yet highly informative about this multifaceted condition.

42. Whilst on the subject of retirement, I have noticed that in recent times a growing number of people have been kind enough to ask when I am going to go! The compulsory judicial retirement age is now 75. I could therefore carry on to June 2029. I have no intention of staying in post for that long, but if you were to ask the question today, my answer would be 'not next year'.

And finally …

43. I hope that everyone who may read this View has an enjoyable summer and is able to take a very well deserved break.

Rt Hon Sir Andrew McFarlane
President of the Family Division
10 July 2023