REVIEW OF CIVIL AND FAMILY JUSTICE: THE REVIEW GROUP'S DRAFT REPORT ON FAMILY JUSTICE

AUGUST 2016

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PREFACE

"*Things alter for the worse spontaneously, if they be not altered for the better designedly*."
~ **Francis Bacon**

At the start of the new legal year on 7 September 2015, the Lord Chief Justice of Northern Ireland, the Right Honourable Sir Declan Morgan, announced that he had invited me to lead a fundamental review of the civil and family justice system in this jurisdiction.

According to the terms of reference[1], the aim of the Review of Civil and Family Justice is to look fundamentally at current procedures for the administration of civil and family justice, with a view to:

- improving access to justice;
- achieving better outcomes for court users, particularly for children and young people;
- creating a more responsive and proportionate system; and
- making better use of available resources, including through the use of new technologies and greater opportunities for digital working.

The last comprehensive review of the civil and family justice system in Northern Ireland[2] was some 16 years ago, since which time there have been dramatic changes both in the environment within which the civil and family courts operate and in the public's expectations about the services that should be available to them and how they should be delivered. Not surprisingly, therefore, there has been a great deal of ground to cover in this Review, as a consequence of which I have decided to produce two separate reports, with this first report concerning the family justice system.

It is my intention to publish a further draft report which will address a range of matters in relation to civil justice. This report will look in more depth at opportunities for digital working as well as considering the governance and organisation of the courts, the structures needed to provide for the most effective management of court business, and the respective jurisdictions of the various court tiers.

I have been very ably supported by a Review Group and a Reference Group, further details of which are contained in Appendix 1. The Review Group is practitioner focussed and so includes members of the judiciary as well as representatives of the

[1] see Appendix 1
[2] 'The Civil Justice Reform Group, Review of the Civil Justice System in Northern Ireland, Final Report', June 2000, The Right Honourable Lord Justice Campbell

legal professions and the relevant Government departments. The Reference Group was established to allow external stakeholder groups to provide their input. Members of the public have also been encouraged to contribute on the basis of their personal experiences. The Review was, therefore, substantially informed by the views of interested stakeholders.

A series of issues papers, covering key themes across the various court divisions and tiers within the family justice system, were produced by a number of sub-committees of the Review Group that I set up to aid the task, as a means of providing the basis for an informed and inclusive debate. These issues papers, which were based on the ideas put forward for members' consideration, have been amended, substituted and approved by the Review and Reference Groups. Those sub-committees have proved invaluable and I commend every member for the time and skill they have invested in this process.

Our role has not been to calculate the costs or savings which our recommendations will engender. Accordingly we have not sought figures on the current Northern Ireland Courts and Tribunals Service budget. In any event, it was already fully allocated at the time of our Review and likely to be under pressure with further cuts anticipated over the next few years. Moreover, quantifying with any accuracy the costs of our proposals, or any anticipated savings from alternative approaches, would be beyond our remit. Our role here was to identify a strategic blueprint and it will be for the relevant Department(s) to look at issues such as funding. We have endeavoured to highlight in broad terms where we see scope for efficiencies and invite them to consider a re-balancing of spend.

A further crucial component of this Review has been our determination to learn and benefit from the experience of other jurisdictions worldwide with similar legal backgrounds. Hence, we have consulted personally and via electronic platforms with judiciary, members of the legal profession and legal and non-legal experts in the family justice systems together with a wide array of distinguished papers as far afield as England, Scotland, the Republic of Ireland, Guernsey, New Zealand, Australia, Canada, the USA, South Africa, Holland and Finland. The unstinting and timeless support that we have received from all of these jurisdictions (acknowledged in detail later in this Review) is a testament to the internationalism of family justice and a monument to the concept of international cooperation. As I indicated each time I had the privilege to speak to the representatives of each nation, I fervently hope that one offshoot of this Review will be that the links now forged will remain intact as a harbinger of future relations and contacts between us for the mutual benefit of family justice in our countries.

Finally, we have been wary lest we crossed the boundary between review and policy making. It is not appropriate for me as a member of the judiciary to comment on matters of Government policy. As a judge, my role is to uphold the law in force from time to time. Nevertheless, it is an accepted convention that it is appropriate for the judiciary to comment on matters relating to the administration of justice and for

the judiciary to point to possible unintended consequences of proposed Government policy. That task we have willingly taken up.

The Review Group has now produced this interim report, which will be widely circulated and made publicly available. Views will be invited until 28 October 2016. Thereafter, those views will be considered before publishing its final report in the autumn of 2016.

This Review has placed a premium on public involvement from the outset. In many ways the public input has been the beating heart of this Review and I look forward enormously to further public contributions when this preliminary Review paper has been circulated as widely as possible. Our aim of being as inclusive as possible explains why we have set up a website and mailbox to allow members of the public to share their experiences with us as well as their ideas for how we can create a more modern and responsive system. To contact the Review team, please send an email to civilfamilyjusticereview@courtsni.gov.uk

I have chaired many committees in my legal and judicial career but none has been more assiduous and creative than the two main committees and the various sub-committees with whom I have had the privilege to serve. I make it clear from the outset that any criticisms of our outcomes and recommendations should fall entirely on my shoulders. Not everything contained in this Review has received unanimous approval during our meetings and the only person bearing full responsibility for the final content of this document is me.

The Office of Lord Chief Justice provided the secretariat for the Review. Without the informed, selfless and tireless commitment of Wendy Murray, Karen Caldwell, Julie McGrath and Maura Campbell this paper would never have been assembled much less completed.

The Right Honourable Lord Justice Gillen
August 2016

KEY RECOMMENDATIONS

This preliminary paper contains a large array of individual recommendations arising out of this far reaching and inclusive exercise to date. We regard all of them as important and they fit a pattern of prosed reform. Nonetheless, we consider it is useful to formulate at the outset the key or flagship recommendations around which the other reforms revolve. They are as follows:

- The creation of a single family court, replacing the existing Family Proceedings Court and Family Care Centre, with the jurisdiction of the High Court preserved only for the most complex or legally sensitive cases.

- The creation of a Family Justice Board, replacing the Children's Order Advisory Committee, as a strategic level forum for driving significant improvements in the performance of the family justice system.

- A fresh culture of problem solving courts within the family justice system, bringing together civil and criminal matters, including a new drug and alcohol court and a domestic violence court.

- A fresh emphasis on solutions outside the court system, with more accessible mediation and educative parenting programmes in private law cases involving children.

- The introduction of paperless courts including a pilot electronic file management system.

- Greater use of virtual reality courts with video links/Skype/telephonic communication/paper applications and a move towards digital working in the courts.

- Online dispute resolution as an alternative to court in certain types of cases, such as divorce, on a pilot basis.

- In-depth case management of public law cases involving children with the introduction of a one stop shop concept and fast-tracking of cases involving contact disputes and non-accidental injury.

- Developing the voice of the child and extending the use of special measures and support for child and vulnerable witnesses to the family courts, with pilot schemes for the use of registered intermediaries and the NSPCC's Young Witness Service.

- An information hub with improved support for personal litigants and people with additional needs.

- A new emphasis on open justice within the system.

- Mandatory judicial training, mandatory accreditation of solicitors and barristers and a requirement for practitioners to keep abreast of developments in best practice, both within the UK and internationally.

CHAPTER 1

INTRODUCTION

1.1 This is a preliminary report which will be widely circulated over the next 12 weeks and which invites comment and criticism before our final report in the autumn of 2016. It is a living document and should be regarded as work in progress pending responses to this consultation process.

1.2 Throughout history, the law has had to respond to changes in the way people conduct their personal relationships. The present struggle for law to adapt to developments in practices and beliefs concerning family law is no different from any other occasions in the past. Thus, this is a report not only for the present but for a new generation with a progressive and unfolding set of recommendations contained therein.

1.3 Law reform or review is always a complicated task, and family law reform is particularly sensitive, due to the emotional nature of the subject matter it governs. There are few areas of law that affect so many people, and in such profoundly personal ways. Any review of family justice must reflect changing social patterns, emerging research evidence and the voice of stakeholder groups. Whilst perfection in law reform is undoubtedly a misnomer, respect for the law comes in part from understanding it, and what underpins it. That, we are attempting to achieve in this Review.

1.4 However, it cannot be assumed that changing social norms and views on reform are uniform or even congruous or reconcilable. The difficulty with recommendations or reform proposals based on appeasing some and providing concessions to others is that it can end up with continuing cycles of dissatisfaction, particularly because the messages conveyed by those recommending those reforms and those received by members of the public affected by them are not necessarily the same.[3]

Single Tier system

1.5 The current transfer arrangements between the family proceedings court (FPC), the family care centre (FCC) and the High Court have been identified as a major cause of delay and inefficiency.

1.6 There is a perception that there really are too many Crown Court centres, which is detrimental to the hearing of civil and family case in terms of finding any, or consecutive, hearing days and timely hearings on the days assigned. Moreover family court judges are isolated and lacking a cohesive approach.

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[3] '*The Handling of Parental Responsibility Disputes by the Australian Family Court following a Decade of Reform*' – The Honourable Justice Victoria Bennett, the HOCELAGA Lectures 2015 in Australia

1.7 The abolition of the equivalent FPC and FCC in England and Wales and the creation of a single family court, with the jurisdiction of the High Court preserved, has been a very positive development. We recommend legislation to abolish the equivalent FPC and FCC in Northern Ireland and the creation of a single family court, with the jurisdiction of the High Court preserved only for the most complex or legally sensitive cases. There should be created three or four Civil and Family Centres to accommodate this.

Problem Solving Courts in Private Law

1.8 We have to recognise that, in some instances, the dynamics and emotions of family separation make adversarial litigation inappropriate. It is predicated on a win/lose outcome that can drag on interminably. In divorce and child custody cases, the process can increase tensions between the parties, tensions that do not go away after the court process is completed.

1.9 It is incumbent upon us to create a cultural change in Northern Ireland where access to professional support for dysfunctional parental relationships and separating parents becomes the cultural norm – indeed, even an obligatory legal norm perhaps - instead of immediate recourse to the legal process to resolve parental and family relationships. This fresh joined-up approach will begin to educate and empower parents to take responsibility for their circumstance and build their resilience and their family's resilience so that they can chart a future course which lessens the impact on the emotional and mental health well-being of their families.[4]

1.10 Our approach throughout this Review has, therefore, been outcome-based. There is less of an emphasis on structure and more on solving problems. In essence, we are moving towards problem solving justice in the family division. Our approach has led to us grappling with two fundamental issues relevant to the family justice system: to what extent should family law consist of enforceable obligations and to what extent statements of aspiration? Is the legal system always the best way of resolving the underlying issues that confront the courts?

1.11 We are wedded to the concept of a "one stop shop" whereby at the early directions stage courts will be empowered to invoke relationship counselling, parent education, debt counselling, addiction/anger management support, pre-mediation support, mediation sessions, contact centres (which we address in some detail) and the creation of specialist courts, such as a Family Drug and Alcohol Court or Domestic Violence Court.

1.12 The vexed problem of contact disputes over children requires to be prioritised and fast tracked towards a fully functioning triage system.

[4] FMNI report that the Independent Counselling Service in schools in Northern Ireland indicates that family break-ups are one of the biggest issues children are discussing in their counselling sessions.

1.13 The court process needs to be streamlined with online templates guiding swift, succinct, well informed online applications; an appointment system to make it more efficient; and invocation of modern technology, with Skype, livelink, telephone, e-mail all contributing to a new culture. Appropriate judicial training and conferencing will provide a consistent setting for this.

1.14 This leads to the question of to what extent family law should consist of enforceable obligations and to what extent statements of aspiration. Alternatively, it may be that although the law sets out legal obligations, different means could be used to enforce those obligations.[5] Ultimately, however, the right to have these issues determined by a judicial authority must remain not only intact but the right of every individual. Parties must not be permitted to wilfully obstruct court orders without consequences.

1.15 In all of this there is the real difficulty of enforcement of court orders and directions. The means of enforcement may defeat the purpose for which an order is made in the first place. Hence, we have looked at various means of enforcing court orders which may be more effective than the current methods. These innovations include regular use of penal notices, community service orders, and mandatory attendance at parenting classes in addition to the sledgehammer of imprisonment for contempt for defiance of court orders.

Solutions outside court

1.16 Family justice requires a problem solving approach that may be best served by resolution outside the court arena. Pre-proceedings counselling, family therapy or mediation could perhaps be more effective in the long-term.

1.17 We have invested some time researching other models of out of court resolution operated in England, New Zealand, Australia and some states in the USA, to which we shall shortly turn.

1.18 Mediation should be more easily accessible and funded by the Legal Services Agency as part of the court process. Consideration should be given to introducing legislation similar to section 10 of the *Children and Families Act 2014*, mandating the undertaking of mediation before issuing any private law children or financial remedy cases.

1.19 However, our preference over a section 10 approach is for an earlier educative programme similar to that of the "Parenting Through Separation" (PTS) and FDR in New Zealand (cf. similar provisions in England) where families are required to attend save in the exceptional circumstances *prior to issuing proceedings*. Thus, mediation is seen as but one possible avenue to be explored which may in the event be advised by the PTS.

[5] *Family Law: Issues, debates and policy*: edited by Jonathan Herring: Willan Publishing, p6.

1.20 Undoubtedly, the family has become more diverse and complex over the last decades, with consequent changes to the nature of disputes brought to court – that is, divorce, maintenance and contact, etc. The adults in the family must take responsibility and be supported in achieving the best outcome from a relationship breakdown. However, the courts must be ready to be engaged and take an active role, otherwise there may be a lack of willingness by the parties to agree or mediate a sensible agreement. Support mechanisms, mediation, court proceedings and negotiation must be complementary in aiding the parties to achieve resolution.

1.21 Into this pattern falls our recommendations concerning a family drug and alcohol court, undertaking a "parenting through separation" type course prior to court hearings, mediation, firm case management hearings in public law cases, fewer court hearings with the advent of paperless courts and online dispute resolution, all of which are set in a single tier system in which the voice of the child will be a key component.

1.22 By enhancing parental and family well-being the service will help to reduce loss of parental working hours, litigation costs, the pressure on health services and household budgets and the behavioural problems that impact on children and help improve their attendance rates at school. The one stop shop concept could be a classic example of the new co-operative, joined-up approach that this Review invites between courts and all the governmental and non-governmental multidisciplinary bodies, acting in tandem in the best interests of children, with huge potential saving in terms of eliminating the current waste of public funds in interminable court hearings.

Divorce

1.23 The complexity of the public/private divide in family law finds no better illustration than in the concept of marriage in the sense that it is "an institution" which politicians seek to promote and support but it is also the "ultimate" private arrangement. There is a potential for the contractualisation of marriage whereby couples are encouraged to reach their own agreement which then forms the basis of law governing their marriage. Such a move can be regarded as part of the shift in the nature of marriage towards being more of a private than a public matter.

1.24 For some time now the courts, through the law, have adopted the concept of "no fault" divorce exclusively or as an option compared to traditional fault grounded divorce. No fault divorce should have become a quick and inexpensive means of ending a marriage in which the court examines the condition of the marriage rather than the question of whether either party is at fault. It should eliminate the need for one party to accuse the other of a traditional ground for divorce. We have examined whether that conceptual change should not evolve into a less costly, more efficient, swifter and technologically friendly approach in an online manner, always bearing in mind the need to keep any children to the fore of a couple's thinking.

1.25 Accordingly, it is our view that divorces sought on the basis of two year separation with consent or five year separation without consent must be dealt with as online paper exercises without the need for a court attendance. The granting of the decree nisi ought still to be made by a judge or Master ("the adjudicator") albeit they will determine the matter on the papers before them with the discretion to invoke an oral hearing if it is deemed appropriate in the public interest to do so (for example, where fraud is suspected).

1.26 Fault divorces (for example, on grounds of adultery, desertion, unreasonable behaviour, etc.) and nullity should be dealt with as paper exercises online if they are undefended, the grant of a decree again being determined by the adjudicator (that is, a judge or Master on the papers).

1.27 We are not persuaded that we should fully adopt the system in New Zealand and Australia where there is, of course, a strictly no fault approach to divorce and all divorces are dealt with online. We do not consider that that is currently the way forward in Northern Ireland. Whilst, of course, the majority of divorces will be based on two year or five year separation or otherwise undefended, and fought divorces in the main seem a waste of costs, emotional stress and productive achievement, nonetheless there are some instances where fault divorce – and, for that matter, contested divorces - are acceptable as part of the traditional oral hearing concept before a judge.

Ancillary Relief

1.28 Ancillary relief is a key component of relationship breakdown and that process has captured our attention, not only in the modern context of a digital era, but more importantly in an attempt to introduce less rancorous and more measured early neutral evaluation or early resolution than perhaps has hitherto been the case. It is a complex area which may or may not lend itself to easy online remedies, depending on the wishes of the stakeholders involved.

Public Law

1.29 Particularly in the public law sphere, the nature of court hearings needs to be reassessed. They should:

- Wherever possible, embrace the concept of a one-stop shop where the fundamental issues are gripped and addressed at an early stage with appropriate services there to shorten the cases and address the basic problems.

- Deal with cases in a more timely, closely case managed, multi-disciplinary, transparent and accountable fashion.

- Be heard before properly trained and well informed judges, emphasising at all stages early crystallisation of the issues.

- Be addressed by fully accredited, adequately recompensed and properly instructed lawyers, in appropriate instances, from the outset.

- Be serviced by social workers and other experts who understand their role, are well versed and trained in the requirements of a modern family justice system, who attend court only when necessary and where modern means of communication, such as live link, Skype, telephonic communication, email and other modern means of technological communication, are regularly invoked.

- Be using modern methods of technology where paperless courts, online solutions and virtual reality courts become part of the norm in appropriate instances.

- Be set in a single family justice system.

- Be a forum where all litigants, including personal litigants, obtain a fair hearing with a renewed emphasis on methods of ensuring they have real access to our system of justice.

Secure Accommodation Orders

1.30 In the interest of the safety and welfare of such children and those escorting them, together with considerations of expense and efficiency, we recommend that in exceptional circumstances the child should not be brought to court but judges should hear the case by live link, albeit the lawyers and other professionals involved shall be present with the child.

Specialist courts

1.31 Into this pattern of self-help, problem solving courts falls our recommendations concerning the setting up of a family drug and alcohol court and domestic violence court.

International Child Abduction

1.32 Increasingly, within the rich tapestry of diverse racial cultures which Northern Ireland enjoys, family justice has an international context and we have spent some time considering the ramifications of the Hague Convention and other international abduction issues with the aim of simplifying the process and invoking international mediation as a source of resolution.

Modernising the court – the paperless court

1.33 Our communications technology and online commitment is developing rapidly, changing our lives in respect of both work and leisure. Courts packed with lever arch files - the contents of which are often poorly paginated, incomplete, indecipherable and not looked at - has been the bane of an outdated court system. Hence the concepts of the paperless or "paper light" court system, embracing online systems with e-files, e-briefs and e-bundles, have been core recommendations. Following on from this we have recommended fewer court hearings in straightforward simple applications and the invocation of modern methods of communication such as Skype, live link or telephone to ensure the time and finances of witnesses are not wasted.

Disclosure

1.34 The extent of disclosure and the need to restrain its reach are also matters that have commanded the attention of courts elsewhere and have been an important part of our deliberations.

Voice of the Child and Vulnerable Adults

1.35 Of course, in all our deliberations, not least when considering public law measures, the most important ingredient throughout, and a leitmotif of most of our recommendations, has been the interests of the children involved in family relations. Hence, we have devoted time to the importance of the concept of the voice of the child and of the vulnerable, who need to be given fresh emphasis with appropriate help and assistance.

The court setting

1.36 Whilst we have remained faithful to the current family court setting and nomenclature of the judiciary, we have emphasised the pressing need for plain and simple language to be used throughout court processes which should be conducted in an inclusive manner.

Open Justice

1.37 That complex interplay between private and public law needs to find expression in transparency and accountability in both arenas. Accordingly, in the context of media access to the courts, we have recommended changes to ensure more openness and transparency whilst at the same time rigorously protecting the identity of children.

Personal Litigants

1.38 Improving access to justice is the underlying theme of this entire Review. Hence, not only in the context of the paperless court and online resolution but

throughout the entire family system, we have been particularly conscious of the need to accommodate personal litigants in an era when the realignment of legal aid will inevitably increase the number of such litigants coming before all courts. This shall be dealt with conceptually and practically in a comprehensive manner in our civil justice report but we have also ventured some recommendations specifically in the family justice context.

Lay Magistrates

1.39 We consider that lay magistrates play an important role in Northern Ireland, not only in introducing a fresh mind and experience to judicial thinking in the family justice system, but also more generally in ensuring that the public continue to play a frontline role in dispensing justice.

Family Justice Board

1.40 Such is the pace of potential change in our family justice system and the new thinking which has emerged that we need an overarching supervisory body, independently led by a person of proven distinction, to creatively research, marshal and synthesise a modern, well informed approach to family justice in the future. The current Children Order Advisory Committee has provided sterling service but perhaps with the passage of time has outlived its intended purpose and needs appropriate replacement. Hence, we have recommended the creation of a new overarching Family Justice Board with an independent, paid chair.

Family Justice elsewhere

1.41 Our recommendations include fundamental changes to the structure of the family courts. The process of determining our outcome-based concepts has borrowed heavily from our direct discussions with colleagues from across the world and research into methods successfully invoked by those jurisdictions. They should remain a permanent part of our family justice tapestry.

1.42 Our approach echoes that being developed in a wide array of other jurisdictions in the UK and Ireland. A review of family justice in England and Wales, led by Sir David Norgrove, in 2010 considered issues in the family justice system. The current President of the Family Division, Lord Justice Munby, has been at the forefront of continuing innovative changes there. The Scottish Civil Justice Review in 2010 looked in detail at the family justice system in Scotland. In the Republic of Ireland, the Child Care Law Reporting Project was set up in November 2012 under freshly made regulations arising out of the *Child's Care (Amendment) Act 2007* providing for the reporting of the proceedings of child care courts.

1.43 In Northern Ireland, much is already happening. The family justice system is governed by a number of departments. The Department of Finance carries the overall civil justice policy lead. The Department of Health has a lead role on the

family public law side. The Northern Ireland Courts and Tribunals Service has responsibility for operational administration.

1.44 A number of initiatives have been introduced and these include:

- The Guide to Case Management in Public Law Proceedings (2009).

- "Practice Guidance and the Use of Experts in Public Cases" in 2014, drafted by Northern Ireland Guardian Ad Litem Agency and the Health & Social Care NI.

- The Access to Justice Review Report (2011), which highlighted a number of systemic and policy issues in the family field impacting on the quality and costs of access to justice and recommended a fundamental review of family justice in Northern Ireland.

- A scoping exercise undertaken jointly by the Department of Justice and the (then) Department of Health, Social Services and Public Safety, in response to the 2011 Review, has looked critically at the findings of the Norgrove Review in England and Wales.

- The Northern Ireland Care Proceedings Pilot for improving children's lives, which will test information gathered in for the purpose of tackling undue delay in public law proceedings. The aspiration is that many of the recommendations set out in this paper will be treated as reasonably practicable in the course of the pilot scheme. This scheme is only in its infancy and the research carried out together with the conclusions may have a profound effect on public law matters. Hopefully, the work will be considered by the recommended new Family Justice Board which this Review is hoping to bring forward.

- A Strategy for Access to Justice ("the Stutt Report") of September 2015, which devoted a considerable part of its findings to the Family Division. Whilst this report viewed matters from a more cost driven aspect than this Review, nonetheless we have found the comments helpful.

1.45 Hence, this Review is another important step in the welcome development of multi-disciplinary approaches which envisage outcome-focussed approaches to ensure all the bodies involved in family justice work corporately and collectively, exploiting new technologies and online access to services along the way.

1.46 Family justice, and for that matter civil justice, have both received less attention than criminal justice for a variety of reasons, including perhaps the fact that responsibilities are dispersed across a number of departments. The purpose of this Review is to create an evidence-based blueprint for transformative change, promoting better joined-up working between departments.

The Elephant in the Room

1.47 A final note by way of introduction. Coursing through this whole Review is the elephant in the room: namely, that the present political climate places a high value on efficiency and cost analysis. The legal system, it is said, should always be low cost and high quality. Reform proposals of family law nowadays, inevitably, involve an assessment of the cost implications. We have been conscious of the almost Malthusian gap ever widening between the need for better support services and the capability of government to deliver them all, free and on demand. Doubtless, some of the recommendations proposed in this Review will cost money. It is crucial, however, to appreciate the difference between investment to save and pure expenditure. Whilst some of these recommendations may involve short term expenditure, they should and must be seen as investment which, in the medium and longer term, will secure untold public savings in terms of current wasted expenditure and, more importantly, human misery. Most importantly, they will profoundly enhance the welfare of children.

CHAPTER 2

THE CURRENT CONTEXT

2.1 This Review has not been undertaken in isolation. Our intention has always been that it should take account of other initiatives that are planned or already underway by the Northern Ireland Executive within the civil and family justice sphere and elsewhere. The recommendations from this Review should complement these initiatives as far as possible, thereby acknowledging the respective roles of the Executive and the Judiciary.

2.2 Lord Justice Gillen has also met with senior judicial colleagues involved in a number of reviews that have taken place recently in England & Wales, Scotland and the Republic of Ireland, including the "Report of the Scottish Civil Courts Review" published in 2009, the Review of Family Justice in England and Wales led by Sir David Norgrove which considered issues in the family justice system in 2010, the ongoing Civil Courts Structure Review being led by Lord Briggs, the Civil Justice Council's report on online dispute resolution for low value civil claims and Sir Brian Leveson's "Review of Efficiency in Criminal Proceedings". In the Republic of Ireland, the Child Care Law Reporting project in the Republic of Ireland was set up in November 2012 under newly made regulations arising out of *The Child Care (Amendment) Act 2007* which provided for the reporting of the proceedings of child care courts, subject to maintaining the anonymity of the families and children concerned, and has recently reported. He was grateful to them for being so generous with their time and for their willingness to share the thinking behind their conclusions with him.

2.3 Lord Justice Gillen took the opportunity at an early stage to discuss the terms of reference for the Review with the Ministers in the Northern Ireland Executive whose portfolios included family justice responsibilities and he found those discussions to be extremely constructive. He invited Ministers to put forward senior officials to represent their departments on the Review Group and their nominees' contributions have proved to be invaluable.

2.4 There are three Executive departments with civil or family justice functions:

- Within the Department of Finance, the Civil Law Reform Division of the Departmental Solicitors Office is responsible for certain aspects of civil law reform, most notably with regard to private family law, trusts and property law, tort, contract law and private international law. Civil Law Reform Division also provides a Northern Ireland input into UK-wide primary and secondary legislative initiatives in the civil law field; contributes to the UK response to developments in international law; contributes to progress reports in respect of international conventions and treaties; provides for the regulation of the legal professions; and monitors civil case law.

- The Department of Health (DoH) has policy responsibility for public family law – that is, for cases involving children in care. This includes dealing with issues such as parental contact and adoption. The Department also has responsibilities relevant to this Review in respect of policy on mental health and mental capacity and on the safeguarding of children and vulnerable adults.

- The Department of Justice (DoJ) has a range of responsibilities in relation to the administration of civil justice, such as the jurisdiction of the courts and allocation of proceedings, access to civil legal aid and civil orders. The Northern Ireland Courts & Tribunals Service, which is an agency of the DoJ, supports the independent Judiciary by providing administrative support for Northern Ireland's courts and tribunals and maintaining the court estate.

2.5 The local initiatives that the Review Group and the Reference Group have considered to be of particular relevance to this Review are as follows:

- The Guide to Case Management in Public Law Proceedings (2009).

- "Practice Guidance and the Use of Experts in Public Cases" in 2014, drafted by Northern Ireland Guardian Ad Litem Agency and the Health & Social Care NI.

- The Access to Justice Review Report (2011), which highlighted a number of systemic and policy issues in the family field impacting on the quality and costs of access to justice and recommended a fundamental review of family justice in Northern Ireland.

- A scoping exercise undertaken jointly by the DoJ and DoH in response to the 2011 Review, which has looked critically at the findings of the Norgrove Review in England and Wales.

- The Northern Ireland Care Proceedings Pilot for improving children's lives, which will test information gathered in for the purpose of tackling undue delay in public law proceedings. The aspiration is that many of the recommendations set out in this Report will be treated as reasonably practicable in the course of the pilot scheme. This scheme is only in its infancy and the research carried out together with the conclusions may have a profound effect on public law matters. Hopefully, the work will be considered by the recommended new Family Justice Board which this Review is hoping to bring forward[6].

[6] See Chapter 20.

- A Small Claims Mediation Pilot which was under development before this Review was launched. The aim of the pilot was to test the concept of a supported mediation facility in the family courts. However, it was agreed to defer the pilot and look for the potential in mediation in the small claims court as part of the Civil and Family Justice Review.

- A Strategy for Access to Justice ("the Stutt Report") of September 2015, which devoted a considerable part of its findings to the Family Division. Whilst this Report viewed matters from a more cost driven aspect than this Review, nonetheless we have found the comments helpful.

- The Adoption and Children Bill which DoH is planning to bring forward in the current mandate and which is intended to modernise and reform adoption policy. As noted in the Preface to this Report, the Review Group has been careful to respect the boundary between operational matters within the purview of the judiciary and departmental policy responsibilities, and this Report does not, therefore, make any recommendations in respect of adoption policy.

- In addition, we have looked at comparable reforms which have been delivered in recent years within the criminal justice system since we believe that some of the learning from these reforms is equally applicable to the civil and family justice system, in particular the provision of information to the public, additional support for vulnerable individuals and the greater use of technology.

- We also welcomed the Innovation Series organised by the Committee for Justice, which was both timely and instructive and which has considered innovative practice in other jurisdictions and their applicability in a Northern Ireland context.

2.6 An important theme running through this Review has been the need to take full account of the duties placed on the state by relevant international human rights instruments, such as the European Convention on Human Rights, the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. The discussions within both the Review Group and the Reference Group have been well attuned to these considerations and the Review has been embraced as a positive opportunity to promote the rights of those who engage with the civil and family justice system, with a particular focus on those who are most vulnerable.

2.7 We are aware that The Executive Office is in the process of developing a new Programme for Government. It is our hope that this Review will inform the future strategic direction of the implementation of reforms to the civil and family justice system by the relevant departments, by creating a shared blueprint for the future

delivery of civil and family justice, and that it will facilitate a more joined-up approach to the provision of services to the citizen, supported by a common vision.

The legislative context

2.8 Any reforms to family justice in Northern Ireland must be seen in the statutory context of *The Children (Northern Ireland) Order 1995*. It followed *The Children Act 1989* in reforming child law. When the Children Act was introduced it was described by the then Lord Chancellor as 'the most comprehensive and far reaching reform of child law which has come before Parliament in living memory.'[7]

2.9 This law swept away the main sources of child law previously applied. It also introduced some new concepts such as 'parental responsibility' as the core parental right with attendant responsibility. The guiding principles in Article 3 of the new Children Order were clear in their emphasis, namely that the child's welfare shall be the paramount consideration.

2.10 A checklist of considerations was also introduced to guide decision making in what is known as the welfare checklist (art. 3(3) refers). Further, in art. 3(2), the 'no delay' principle found a specific statutory voice in that the legislation clearly set out that the court shall have regard to the principle that any delay in determining a child question is likely to prejudice the welfare of the child. Art. 3(5) also made clear that the court should not make an order unless it considers that doing so would be better for the child than making no order at all.

2.11 The Order set out a new menu of private law orders, namely residence and contact orders, specific issue orders and prohibited steps orders. These are all described in article 8.

2.12 Further important provisions are found in article 13 dealing with change of a child's name and removal from the jurisdiction. Orders for financial relief were introduced in article 15 and contained in Schedule 1 of the Order.

2.13 It was clear with welfare as the paramount consideration in the legislation, that the voice of the child would be raised. This sentiment echoes international conventions such as the United Nations Convention on the Rights of the Child, which was adopted in 1989, and the Human Rights Convention, which was enacted by the *Human Rights Act 1998*. These pieces of legislation have led to a development of the law where the child is placed centrally and where the voice of the child must be heard in deciding disputes. *The Human Rights Act 1998* has also allowed parents and others with rights to family life to assert their rights within a court setting and hence there has been an increase in litigation.

2.14 The Children Order also saw the advent of case management within proceedings in an effort to streamline the increasing numbers of cases before the

[7] Hansard (HL) Vol 502 Col 488.

courts. This is an issue which the Review will address with an eye to further managing cases across court tiers in an effective and consistent manner. The Review will look at how the more effective use of technology can remedy some of the problems in this area.

2.15 The issue of repeat applications, particularly for contact, is also something which is addressed. Finally, the issue of no order within the legislation reminds us that solutions found among families should be preferred and that leads to a consideration of mediation and other alternative dispute resolution prior to litigation.

2.16 The Children Order is not the only source of children's law in Northern Ireland. In dealing with divorce and separation there are other statutes which govern proceedings, such as *The Matrimonial Causes (NI) Order 1978*. Children are obviously affected by divorce and ancillary relief (resolution of financial issues after divorce) and so this Review looks at these areas under the private law heading.

2.17 In particular, consideration is given to whether some non-fault divorces could be dealt with more simply and also whether there is any scope for changing the system dealing with ancillary relief to make it more efficient. In this regard, consideration is given to alternative dispute resolution and the use of technology, including online technology.

2.18 A root and branch consideration of the Children Order has been outside the remit of this Review but clearly some of the changes we recommend will require statutory change. It is perhaps time, however, for a government based multidisciplinary body to be set up to consider the workings of this Order given that it is now over 20 years old.

CHAPTER 3

THE CURRENT SYSTEM

3.1 The family justice system is currently made up of the Family Proceedings Court (FPC), the Family Care Centre (FCC) and High Court. Most proceedings begin in the FPC, unless a higher court has previously made decisions in the case. Large numbers of cases are listed daily in both the FPC and FCC. These are mixed lists which include private and public law cases involving first directions hearings, interlocutory hearings, reviews and evidential hearings. The most recent statistics are available at Appendix 2.

3.2 Repeated review hearings are the norm and reasons for adjournments are not recorded. Social workers and guardians frequently attend review hearings, and may spend large amounts of time waiting for their case to begin. They rarely - if at all - appear by live link, telephone link or Skype and often travel long distances for what may turn out to be brief hearings. The decision to transfer a case to a higher tier on grounds of complexity may be made after proceedings have been continuing for many months.

3.3 A new legal aid process begins if a case is transferred to a different tier. Proceedings are generally adversarial rather than inquisitorial in nature. The lawyers take the lead in deciding the issues and the judge assumes the role of "referee". It may take many months for the real issues in a case to be apparent and appropriate assessments to be undertaken. Where experts are required, the legal aid procedures can be perceived as bureaucratic and lacking in transparency. Parallel planning is generally not undertaken by Trusts.

3.4 There is no cohesion between the three judicial tiers. There is no formal communication structure for family judges, nor is there any training structure in place. There is no reliable management information available to the judiciary to enable effective case management. However, there is, generally, judicial continuity throughout the system.

3.5 It is acknowledged that proceedings relating to children take too long and that the system is riddled with avoidable delay at every stage.

3.6 Proceedings are often convened in the same building and on the same occasions as criminal trials are ongoing. Such trials at times take priority over family justice cases.

CHAPTER 4

THE INTERNATIONAL CONTEXT

Current Developments

4.1 We have made it a central tenet of this Review not only to recognise our international obligations but also to explore and hopefully learn from the experience of family justice courts outside Northern Ireland. Hence, as outlined in the Preface to this Review, not only did we visit or make contact with our near neighbours in England and Wales, Scotland, Guernsey and the Republic of Ireland, but we set up and engaged in live link conferences with colleagues from the judiciary, the legal professions and legal services communities. Hence we have consulted legal and non-legal experts and papers as far afield as New Zealand, Australia, Canada, the USA, South Africa, Holland and Finland. These experiences have been invaluable. Family justice problems are fundamentally the same worldwide and such collaboration, so willingly and generously given in every instance, provide a harbinger of the international contacts we recommend are maintained in the future.

4.2 We have included in Appendix 3 a document headed "Family Bar Association, Civil Justice Review Research Paper" which considers in some detail aspects of the family justice systems in Scotland, Guernsey, Holland, New Zealand, Australia and Canada. A short summary now follows.

4.3 New Zealand: The Family Court has become a last resort when people cannot agree on care of children issues. This is because the court is now part of a wider family justice system that puts more emphasis on people sorting out disputes about caring for children. More out of court services will be available to help them do this, including parenting courses and dispute resolution. This has been achieved whilst maintaining many aspects of the family justice system precisely the same as ours - including, for example, adoption, care and protection, child abduction, mental health, paternity, separation and dissolution (divorce) applications, and powers to act on behalf of others. A similar approach is adopted in Australia.

4.4 British Columbia, Canada: British Columbia has been a leading light in initiating online tools for providing dispute resolution to citizens with most success in small property, zoning disputes and consumer protection cases. Empirical research carried out in British Columbia found that people in family law disputes have an appetite for on-line tools in their disputes. Seeking solutions on-line has been driven by a desire to achieve efficiencies and deal with growing resource pressures. Particular use has been found in divorce settlements and dividing up joint property. A February 2012 Green Paper, entitled "Modernising British Columbia's Justice State", identified tribunals as a simple and less expensive solution to easing delays in the court system.

4.5 Holland (the Dutch Rechtwijzer Programme): The Dutch Legal Aid Board came forward in 2006 with a on line dispute resolution project, which became the

Rechtwijzer (law signpost). This has undergone several transformations in its short life and is very much a work in progress, constantly being developed and enhanced in terms of the services and supports on offer to service-users.[8]

4.6 Version 2.0 is now launched. It has a particular resonance for online resolutions in divorce and ancillary relief. It purports to be far less costly compared to a regular divorce. The platform guides parties to a "high-quality separation covenant" by offering a "dialogue space" which provides information on legal, financial and practical issues and tools, such as calculators and checklists.

4.7 The parties can select a model solution, adjust one, or a combination of options, to fit their specific system, or draft one themselves. Once they reach an agreement, the solution will automatically be transferred to the covenant section. If people get stuck they can either call in the help of an online mediator who will facilitate a problem-solving process, or call in an online adjudicator who will give a binding decision on the specific issue. For now, Rechtwijzer only offers mediation and adjudication services. Later on it will offer other services such as financial expertise, psychological help and children support.

4.8 Once the parties have worked through the tasks and have the draft covenant ready, they are obliged to submit it to the 'reviewer'. This mandatory step aims to guarantee the quality of the covenant. The online review is done by a lawyer specialised in divorce cases who will take the case to court – in case of marriages and registered partnerships with minor children – or draft the final contract if the separation does not have to go to court. Currently 900 family cases are being processed, with 300 having been completed.

4.9 Scotland and Guernsey: The law in relation to children in Northern Ireland mirrors that applied in England and Wales as *The Children (Northern Ireland) Order 1995* and *The Children Act 1989* are largely the same. The same system operates throughout much of the United Kingdom and a large body of case law has developed. The jurisdiction in Scotland is different and it has been adopted in Guernsey.

4.10 Thus, for example, the law in Guernsey comes from *The Children (Guernsey and Alderney) Law 2008*.The most significant difference from our system is in relation to care proceedings. The new law set up a system whereby a Children's Convenor (CC) is appointed. He or she is a public appointment who has the responsibility of deciding whether there are grounds in law for legal measures to be taken. This is called the 'care requirement'. The case may then be referred to the Child Youth and Community Tribunal (CYCT). Anyone can refer a child's case to the CYCT but most referrals come from social services or the police.

[8] Professor Roger Smith OBE *"Online Dispute Resolution: ten lessons on access to justice"* and a research paper dated March 2015 by Bickel, van Disk and Giebels, University of Twente.

4.11 The CC can request reports and he or she decides if no action is needed, if the child should be referred for voluntary services or if there should be a referral to the CYCT. The CYCT is a tribunal made up of three law members who are chosen from the community and who appear voluntarily. A Safeguarder can be appointed to protect the child's interests. The CYCT proceeds to decide if the parents, or carers and the child have accepted the grounds for the referral. Any disputed facts are referred to a court and judges also retain powers to make emergency orders. As the CYCT does not deal with disputes of fact, legal aid is not available for legal representation at hearings. The CYCT may make a Care Requirement upon approving a plan. This is an order that places a child or young person under the supervisory care of the State. The Care Requirement lasts for 12 months, but can be renewed. It ceases to have effect once a child reaches the age of 18 or can be terminated when the CYCT decides that compulsory measures are no longer necessary. Appeals may be lodged from the decision within 21 days.

Discussion

4.12. The remit of this Review did not permit an in depth investigation and analysis of all or any of these systems in other jurisdictions. As this Review will reveal, however, they did trigger a number of ideas which have influenced our thought processes on a wide range of issues. This all serves to illustrate that if we are to provide the best system possible for families and children our horizons must be broadened and our understanding of other jurisdictions deepened. There is no reason why we should be merely late followers of that which emerges in our nearest neighbours.

4.13 Thus, for example, whilst we currently favour the judge led approach to family justice, that should not exclude a body such as the newly formed Family Justice Board commissioning an in-depth study of the system that operates in Scotland and Guernsey to establish the pros and cons of their CYCT care system.

4.14 In particular, we feel there is much to be said for the view expressed to us by Professor Roger Smith OBE[9], freelance researcher and writer, that we should monitor closely developments in the Rechtwijzer and British Columbia systems of online dispute resolution. It is still relatively early days in its development in the family justice arena. It needs careful peer reviewing and informed critical analysis, perhaps, before we would adopt it wholescale into our family justice system, save in

[9] "Roger Smith is an expert in domestic and international aspects of legal aid, human rights and access to justice. He writes regularly in the specialist legal press in England and Wales, with regular op-ed pieces in the *Law Society Gazette* and the *New Law Journal*. He edits the newsletter of the International Legal Aid Group (see http://www.ilagnet.org) on international developments in legal aid, on which he has researched, written and spoken widely, both in this country and overseas. Roger is a visiting professor of law at London South Bank University and an honorary professor at the University of Kent. He is a solicitor and has been director of the Legal Action Group, JUSTICE and West Hampstead Community Law Centre as well as director of policy and legal education at the Law Society, London, and solicitor to the Child Poverty Action Group. He is now working freelance as a researcher and writer."

no fault divorce - a task which could be well researched and crystallized by the Family Justice Board[10].

4.15 Similarly, we recommend that the concept of total immersion should be adopted with regard to the cutting edge developments in the new world countries of New Zealand and Australia. Hence, we should investigate the possibilities of funding a family judge from Northern Ireland to spend, say, three months in New Zealand or Australia attached to their Family Division to witness at first hand exactly how their system works and what lessons can be learned and practices adopted from that experience which would cause our courts to perform in a more efficient, less costly and fairer manner.

4.16. We recommend that the newly appointed Family Justice Board should appoint someone with specific responsibility for keeping the judiciary and the legal profession up to date with family justice developments throughout the world, building, for example, on the contacts made during the course of this Review.

4.17 We also recommend that the family judiciary and the legal profession be strongly encouraged to remain *au fait* with case law and developments in these wider jurisdictions, where appropriate. Arguably, our researches for legal cases can be too constrained and parochial, bereft of international input. Long gone are the days when a member of the judiciary could express the view that "there is no law in family cases". The introduction of legal assistants for the judiciary recommended later in this Review and in the Civil Justice Report would readily enhance this development.

Recommendations

1. The relevant Executive department or the new Family Justice Board to commission an in-depth study of the systems that operate in Scotland and Guernsey to establish the pros and cons of their Child Youth and Community Tribunal care system. **[FJ1]**

2. Close monitoring of developments in the Rechtwijzer system of online dispute resolution in Holland and British Columbia relevant to the family justice system, supervised by the Family Justice Board. **[FJ2]**

3. Close monitoring of the "court of last resort" approach to problem solving courts in New Zealand and Australia. **[FJ3]**

4. Liaison arrangements to be initiated whereby a family judge from Northern Ireland will spend, say, three months in New Zealand or Australia attached to their Family Division and, thereafter, to report on what lessons can be learned and practices introduced into the family system in Northern Ireland. **[FJ4]**

[10] See Chapter 20.

5. The Lord Chief Justice to appoint a family judge with specific responsibility for keeping the judiciary and the legal profession up to date with family justice developments throughout the world. **[FJ5]**

6. The family judiciary and the legal profession to be strongly encouraged to keep abreast of family justice case law and developments in other jurisdictions. **[FJ6]**

CHAPTER 5

A SINGLE TIER SYSTEM

Current Position

5.1 The current Family Court divisions and the transfer arrangements between the various family courts have been identified as a major cause of delay and inefficiency. It has, for example, surfaced as a source of complaint by the public on the website which we have set up for this Review and by the legal profession, with allegations made of numerous court sittings in lower courts before a decision is eventually made to apply to transfer the case upwards where the whole process starts anew.

5.2 The initial allocation decision is now made on paper by an allocation judge with a right of oral reconsideration before the same judge, or another allocation judge. A case management appeal will lie from an allocation decision made after oral reconsideration, and provision is expected to be made for case management appeals to be heard quickly. Designated family judges, with a specific management and leadership role, are responsible for the overall allocation policy in the family court centre. Thereafter, decisions to transfer cases on grounds of complexity are dealt with informally within the Family Court Centre[4].

5.3 Currently there is a perception that there really are too many Crown Court centres. In most cases Crown Court hearings take up the vast majority of the hearing time of county court judges. The high profile accorded to criminal cases in the county courts is detrimental to the hearing of civil and family cases in terms of finding any, or consecutive, hearing days and timely hearings on the days assigned.

5.4 A single entry system has been implemented in the family courts in England and for the reasons set out in this Report we consider that it is appropriate in the Family Division. Applicants now send their applications to their nearest Family Court point of entry. There is no longer a separate jurisdiction for magistrates' courts and county courts to hear family cases. The new 'Single Family Court' deals with all family proceedings, except for a limited number of matters, which are exclusively reserved to the High Court. The suggestion was that the High Court Judges would lead by example, providing precedent on the ground and thereby impressing good practice on all levels of judges and magistrates in the new Family Court[11].

5.5 The change is intended to create a simpler court system, allowing cases to be allocated to the judge with the relevant level of seniority to hear the case, with the help of a 'gate keeping team'. Their function is to review and allocate each new case to an appropriate level of judge (including magistrates), at an appropriate hearing centre. This means that practitioners are no longer able to select the venue or tier of

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11 *"The Modernisation of the Family Justice System"*, Charles Hyde QC, P.C.B. 2013, 3, 121-125.

judge. The changes have only recently been implemented, but are intended to reduce delays and ensure judicial continuity. This abolition of the equivalent FPC and FCC in England and Wales and the creation of a single family court, with the jurisdiction of the High Court preserved, to date has been a very positive development.

Discussion

5.6 We are strongly in favour of such a development in Northern Ireland. In our view, there is no downside to such a step and it is replete with advantages in a system where all family judges are extremely experienced, namely:

- It supports the notion of family judges working side by side, preferably in one building, allocating cases for determination immediately they are into the system.

- It aids flexible transfers/allocations and removes the need for time consuming physical transfers from one division to another in different locations, with attendant rights of appeal against transfers, etc.

- In the event the case is of sufficient complexity, it permits a swift informal transfer to the High Court whereas under the present system of allocation this can take perhaps eight weeks.

- A single judge will be responsible for allocation once the case enters the system, allowing for a speedy first hearing. The High Court, probably confined to only one family judge since it would be the receptacle only for those rare cases deemed to be exceptionally complex or with an international aspect, would have the power to reallocate in the event of an unsuitable case having been referred to it.

- It will end the current delay endemic in a system where belatedly one tier decides to transfer a case to another tier long after it has first been processed.

5.7 This proposal would also have the added advantage of elevating the civil and family work from what is now regarded as "second class relations", with cases regularly being adjourned or part-heard extending over lengthy periods because of the pressures of criminal trials. The problems may arise in terms of the court estate. There are very few multi-courtroom venues and facilities are poor. It should be possible to solve these problems with a degree of rationalisation of how they are to be heard and some structural alterations.

5.8 The concept of civil and family centres may also be a boost to recruitment to the county and district judges tiers in that, currently, civil practitioners may be deflected from applying for these posts because of the over-concentration on criminal cases, which is currently eighty per cent or thereabouts of county court

work. A single tier system would be accompanied by judges specially assigned to civil and family work for, perhaps, renewable periods of three years.

5.9 One way of implementing this would be the establishment of three or four Civil and Family Centres. It could coincide with the proposed new three administrative court divisions: North Eastern, South Eastern and Western. On the other hand, there is a lot to be said in attempting to marry up our FCCs with health and social care (HSC) trust boundaries, not only in public law cases, but also in private law cases with CCOs based in trust areas (although it is less critical in private law cases). The Dungannon FPC and FCC is a good example of problems as the Division is split between the Northern and Southern HSC Trusts. Other problems exist in the family system, such as the movement of Limavady into Causeway Coast and Glens Borough Council means that the FCC is Belfast, as opposed to Derry or Coleraine. (Limavady starts on the western edge of Eglinton.)

5.10 The problems might be solved using the trust areas: Laganside (Belfast and South Eastern), Coleraine (Northern), Craigavon (Southern) and Omagh or Derry (Western). However, we must always be conscious of access to justice and remember that outside of Greater Belfast public transport is not always very good. Careful thought and consideration, with wide consultation, would be necessary before designating the respective locations.

5.11 In Belfast, the Old Townhall building would have the potential to develop as a Civil and Family Justice Centre and, indeed, we understand this is being considered as an option in the context of the wider DoJ Estate Strategy.

Recommendations

1. The abolition of the equivalent Family Proceedings Court and Family Care Centre in Northern Ireland and the creation of a single family court, with the jurisdiction of the High Court preserved only for the most complex or legally sensitive cases. This will require legislation. **[FJ7]**

2. Careful consideration must be given to the location of such venues, after wide consultation, to ensure true access to justice is maintained in terms of ability to travel to court. **[FJ8]**

CHAPTER 6

PRIVATE LAW PROCEEDINGS

Support Services and the "One Stop Shop"

Current Position

6.1 We have to recognise that in some instances the dynamics and emotions of family separation make the current system of adversarial litigation inappropriate. It is predicated on a win/lose outcome that can drag on interminably. In, for example, child custody and divorce cases, the process can increase tensions between the parties, tensions that do not go away after the court process is completed. At the first directions hearing, practitioners often identify issues to be resolved which require support services but currently these simply are not readily available within the system.

Discussion

6.2 It is incumbent upon us to create a paradigm shift in Northern Ireland, where access to professional support for dysfunctional parental relationships and separating parents becomes the cultural norm instead of immediate recourse to the full, lengthy legal process to resolve parental and family relationships. We need a new joined-up approach which will begin to educate and empower parents to take responsibility for their circumstance and build their resilience and their family's resilience, so that they can chart a future course which lessens the impact on the emotional and mental health well-being of their families.[12]

6.3 A key component of such a novel approach is the robust introduction of a "one stop shop" concept at first directions hearings, where the judge is both resourced and empowered to consider invoking the assistance of:

- available and adequately resourced Court Children's Officers (CCOs),
- relationship counselling,
- parent education,
- debt counselling,
- addiction or anger management support,
- drug and alcohol testing,
- pre-mediation support ,

[12] FMNI report that the Independent Counselling Service in schools in Northern Ireland indicates that family breakups are one of the biggest issues children are discussing in their counselling sessions.

- mediation sessions,
- contact centre referrals, and
- the use of specialist courts such as a Family Drug and Alcohol Court[13].

6.4 If the case has reached court, a judge at an early stage - and preferably at a first directions hearing - should identify the relevant problems in the case before them and have available (for online contact or physically in court) these services to enable them to direct resolutions to the individual problems. This is manifestly the optimum solution for many family justice problems if we are genuinely to embrace the concept of problem solving courts.

6.5 Research undertaken by Relate in 2015 found that 23% of the Northern Ireland public have experienced a breakdown of their parents' relationship. By enhancing parental and family well-being, the service will help to reduce:

- loss of parental working hours,
- litigation costs,
- court hearings,
- the pressure on health services and household budgets,
- behavioural problems that impact on children, and
- poor attendance rates at school.

6.6 The one stop shop concept could be a classic example of the new co-operative, joined-up approach that this Review invites between courts and all the governmental and non-governmental multi-disciplinary bodies, acting in tandem in the best interests of children, with huge potential saving in terms of eliminating the current waste of public funds in interminable court hearings.

6.7 If there were dedicated services with set fees, consideration could be given to automatic legal aid authority if the court so directed. This would avoid delay in sourcing the appropriate provider and obtaining legal aid authority. It would allow early directions to be swiftly and efficiently implemented.

6.8 We recognise that "automatic" entitlement to legal aid, with or without the court's direction, does present problems. Financial eligibility needs to be considered. Moreover, therapeutic services such as anger management are not covered by legal aid. Legal aid does, on occasions, cover some diagnostic work by anger managers but does not cover the therapy. In truth, if a one stop shop is to be established, then proper funding arrangements need to be put in place which will include, but are not limited to, legal aid. Funding from DoH would be required to cover some aspects of the work and trusts would, therefore, have to liaise with the legal aid authorities to

[13] See Chapter 12.

arrive at a fixed fee or set fee approach. With goodwill, this should not be a massive hurdle given the endless long term benefits and savings it would bring about. We note, for example, the funding which the Legal Services Agency (LSA) provides to the Housing Rights Service based on an assumed instance of assistance and both the Legal Services Agency and the Trusts should approach the matter on a similar basis.

6.9 At present, knowledge of services available continues to be poor amongst professionals despite the Government's family support website. A fully independent, early intervention "one stop shop" funded across departments and legal aid will begin the process of changing the way we think about parenting in the family justice system. The cultural norms of Northern Ireland require to be challenged and supports put in place to cope with modern 21st century family life. The CCOs, Official Solicitor, the client's legal representative and Social Services are all experts who can map the best way forward, sourcing other support services so as to best assist the judge to grip and solve the issues from the outset.

6.10 The proposed early intervention "one stop shop" courts would chime with and, by implication, contribute significantly to:

- the DoH "Families Matter Strategy",
- The Executive Office's ten year strategy for children and young people,
- the five health and social care trusts' core business of keeping children safe,
- the key themes contained in both the Health and Social Service Board's and local commissioning groups' plans,
- the new Early Intervention Transformation Programme (EITP),
- the DoJ's aims to provide appropriate alternatives to court and protect vulnerable families,
- the Stutt recommendation of "Early Resolution Certificates" which could include mediation.[14] Whilst the Stutt recommendation does not articulate a one stop shop concept, nonetheless his recommendation may actually work within the spirit of the one stop shop concept, subject to appropriate funding mechanisms for assistance not covered by legal aid,

[14] Stutt at 18.44-18.52 and 18.10 *'A Strategy for Access to Justice, The Report of Access to Justice (2)'*, September 2015.

- The approach currently adopted by the European Court of Human Rights in a recent decision[15] dealing with the obligations on the State to take steps to allow children to live with their parents.

6.11 None of this should underestimate the current work of the Child Court Officers. It is invaluable. District judges to whom we spoke were at pains to emphasise how critical are the services of a properly resourced CCO service to the early resolution of private law cases. It is necessary to be conscious of the pressure on CCOs and the need for more in the system. If the CCOs are not available, cases will often commence the drift through adjournments. That needs the CCO to be properly available to the court, rather than to just the lawyers. We consider that so important is their role that there should be at least one available in every Family Court Centre. This should also apply in the High Court – possibly seconded from the Family Care Centre (FCC) or Family Proceedings Court (FPC) now sitting in Laganside, when necessary.

Contact breakdown

Current Position

6.12 Problems arising out of contact with children play a major role in the private law system. If difficulties occur over contact for a parent with a child, the current system requires the parent to file an application with their local FPC in hard copy with the original birth certificates. The application must be served by a summons server and listed by the court.

6.13 This process serves to delay access to justice in non-emergency situations. For example, there is currently four to six weeks delay in receiving a first directions date from the date of lodging an application in Belfast FPC. In a case where contact with a child has been stopped by one parent, this could result in eight to twelve weeks with no contact, taking into account the time it takes for service, obtaining legal advice, sending pre-proceedings correspondence and applying for Legal Aid, if eligible.

[15] Soares de Melo v Portugal Application No 72850/14: The Court found there to be a breach of the family's Article 8 rights when seven (of 10) children were removed from the mother's care with a view to adoption on the grounds of the mother's poverty and refusal to undergo sterilisation. There was no evidence of any neglect, or of physical, emotional or sexual abuse of the children by their mother. The Court observed that the state authorities had not offered any financial support to meet the children's basic needs in terms of food, electricity and running water, or to cover childcare costs so that Ms Soares de Melo could take up paid employment. The Court considered that the authorities should first have taken practical steps to allow the children to live with their mother before it had placed them in care, especially as there were no signs of violent conduct, mistreatment or sexual abuse noted, the parents had not been found to have any health or mental health concerns and the Family Court had observed a particularly strong emotional bond between the children and their mother. The Court ordered an award of 15,000 Euro for non-pecuniary damage.

Discussion

6.14 With our emphasis on outcomes based approaches and problem solving courts, we recommend more, or more efficient, sittings with a triage system where a case in which contact had been taking place and has stopped is immediately identified, fast tracked and given priority. Rigorous observation and enforcement of this system would reduce the time it is currently taking for the case to reach court. For it to succeed, of course, it would be necessary that corresponding arrangements be made with the LSA to ensure priority is given to minimising processing times. It would also be necessary to ensure that every contact case did not fall into this category, which would defeat the purpose of the accelerated exercise and delay the hearing of first applications. Accordingly, as in emergency applications during vacations, counsel or solicitor would have to certify it as an emergency or early resolution case.

6.15 Assertions have surfaced through our website that the family courts are too "mother" or female orientated and that fathers are at a disadvantage, particularly in applications for contact or residence .

6.16 Statistics available to us from the Court Service seem to refute this assertion in the case of contact applications and do not cause us to make any recommendation to address the matter. These statistics are as follows:

> Contact applications (68 by females and 248 by males) which were dealt with in 2014 were sampled:
>
> - 29 (9%) were found in favour of a female
> - 184 (58%) were found in favour of a male
> - 2 (1%) resulted in a joint contact order
> - 101 (32%) were withdrawn, dismissed or struck out
>
> Of the 68 female applicants –
>
> - 20 were found in favour of the female applicant (29%)
> - 24 were found in favour of the male respondent (35%)
> - 1 resulted in no contact order being made, but a joint residence order was made (1%)
> - 23 were withdrawn, dismissed or struck out (34%)
>
> Of the 248 male applicants –
>
> - 160 were found in favour of the male applicant (65%)
> - 9 were found in favour of the female respondent (4%)
> - 79 were withdrawn, dismissed or struck out (32%)

Contact centres

Current Position

6.17 There are 22 contact centres in Northern Ireland, with 15 main centres and seven satellite. Thirteen centres are funded by DoH, with funds channelled through health and social care trusts. Each centre is autonomous and is a member of both the Northern Ireland Network of Child Contact Centres (NINCCC) and the National Association of Child Contact Centres, through which they are accredited.

6.18 The main channel of referral for users of the service is through the court system. Centres offer a range of sessions per week in line with their service level agreement with the relevant trust. Centres can host a varying number of families based on service requirements and resource availability.

6.19 In order to avoid the explosive dynamics of warring parents confronting each other at handovers, typical court orders are as follows:

> "Contact shall take place at … Child Contact Centre each Saturday morning from 10 am until 12 noon.
> The Applicant father shall arrive at 10 am and shall leave at 12 noon.
> The Respondent mother shall arrive with the child at 9.50 am and shall leave with the child at 12.10 pm.
> On arrival at the Child Contact Centre, the Respondent mother shall leave the child in the care of the Centre Co-ordinator and shall leave the premises as soon as the child is settled.
> The Centre Co-Ordinator is requested to hand over the care of the child to the Applicant father as soon as the father arrives at the Centre.
> At 12 noon, the Applicant father shall leave the child with the Centre Co-ordinator and leave the premises at once.
> On the return of the Respondent mother to the centre at 12.10 pm the centre Co-Ordinator shall hand over the care of the child to the mother.
> The case shall be reviewed on… in the presence of the parties."

Discussion

6.20 Human values are stressed in the contact centres. Relationships can be rekindled. The children are able to identify with and connect to both parents. The centres can deal with cases of implacable hostility and have an effect on children well into later life. In some contact centres, rooms are set aside for supervision by

social workers if supervised contact has been the order of court. Otherwise, there is a simple monitoring system to ensure maintenance of a safe, neutral and secure environment for contact to take place. CCOs can attend sessions to observe contact as and when required.

6.21 The provision of information on the ultimate success of such contact is often a problem. The objective of contact centres is that they be used as a staging post rather than as an end. The recommended period for attendance is three months, although in some instances use of the centre can last much longer. If confidence and trust can be built, then the object is to move contact into the community. The centres seek to help promote parental responsibility by enabling parents to understand the value for the child in having contact with their absent parent and to build a bond of trust between the parents, resulting in contact occurring in the community. This is a key measure of success.

6.22 Whilst contact centres do not provide reports to courts or other statutory bodies on details of contact, other than in cases where there is perceived risk to the child, or to provide times and attendance at contact, the contact centre co-ordinator will from time to time liaise with the Children Court Welfare Officer providing basic feedback on how the process is continuing. To ensure neutrality and avoid coordinators being used in family disputes, it is essential that they are not expected to attend court or give evidence other than in exceptional circumstances.

6.23 Centres are neutral environments outside and independent of the court system. It is critical that referrers and parents understand that centres have no obligation to accept referrals where the referral presents a risk to other centre users, co-ordinators or volunteers. It is also essential that it is clearly understood that the order issued by the court applies to the parents and, whilst centres will facilitate the implementation of the order by providing supportive contact facilities, the order has no authority beyond that – that is, the centre still has the right to refuse the referral where the parents are unwilling to comply with the contact centre's procedures. Where a final order is issued, it often leads referrers and parents incorrectly believing that the centre has no choice but to provide the facility for as long as they wish to remain.

6.24 A protocol be drawn up to address the lack of understanding as to the precise role of contact centres by the parents and referrers whereby they think this is a final order. The courts should probably not be involved in this because contact centres need to be seen as truly independent of the courts and not an arm of the state. The protocol should make clear to the parents of the children and referrers the following matters:

- The purpose of the contact centre.
- The emphasis on this being a staging post rather than an end.
- The role of the court in this matter where appropriate.
- The independence of the contact centres from the courts.

- The need for referrers to advise centres of the existence of a final order.
- The role of final orders and the expectation as to how long the contact should typically remain in the centre.
- Volunteers at the Centre are not to be obliged to attend court to give evidence of what is being said and done.
- All parents will be asked to sign for receipt of such protocol.
- A copy of the relevant court order will be sent to the relevant Contact Centre in all instances.

Streamlining the system

Current Position

6.25 We are in the era of online communication. Our later chapter on paperless courts[16] underlines this. Submissions of applications using an online template, which would ensure full information is submitted, would furnish the information to the court more quickly, albeit hard copy service might still be necessary where the respondent did not have online access.

6.26 Too much time and attendant expense is wasted at court hearings, with parents, legal representatives and witnesses waiting around interminably for their case to be called. Consideration should be given to individual appointments for first directions hearings, albeit past experience with district judges has shown that if the parties do not attend or are late there is too much "downtime" which is an unproductive use of court time. Moreover, in family cases, frequently parties can only attend in the mornings due to child care difficulties.

Discussion

6.27 There is a need for a change of culture amongst parents, the general public, support services and legal representatives in relation to the public's right to access court services. With rights comes responsibilities. What is required is reinforcement of exactly what is required of those wishing to access justice through the courts: that is, prompt attendance and adherence to court orders. Perhaps a public awareness campaign – cost of "downtime" and non-attendance as per DoH documentation on appointments not attended - would begin to focus the minds of those seeking to use services. An idea might be a series of leaflets posted in each family centre highlighting this in the same manner that leafleting of broken consultations appears in general practitioners' surgeries. The appointment system could be piloted in Belfast and rolled out if proven effective.

6.28 There needs to be more efficient use of existing first directions hearings – for example, all parties must appear before the court for the judge to outline the obligation on the parties to work in the best interests of the children and for

[16] See Chapter 14.

comprehensive directions to be handed down by the court with express time limits for compliance.

6.29 The use of the current Children's Order Advisory Committee (COAC) private law case management guidelines must become more of an imperative than currently is the position. They are comprehensive but not widely used in many court areas. They outline six steps:

- Pre-proceedings correspondence, with an emphasis on alternative dispute resolution. Our perception is that such correspondence, with an emphasis on alternative dispute resolution and the protocols, is not viewed as constituting a priority for a significant number of solicitors' practices. This culture has to change.
- Commencement of proceedings using form C1, which should include comprehensive answers to all questions and attach pre-proceedings correspondence.
- First directions hearings to encourage alternative dispute resolution (ADR) and identify issues to be determined. This is the essence of a problem solving approach to family justice.
- Case management review to take place not more than 40 days after the first directions hearing and to timetable the case to hearing.
- Pre-hearing review.
- Final hearing.

6.30 We recognise that there are instances where these directions cannot be slavishly followed due to the flexible nature of the cases. At times, there will be a need to encourage parties to work together in order to build confidence, trust and commitment between all concerned, perhaps before listing the case. Nonetheless, we are satisfied that normally adherence to these guidelines in a manner that is outcome-focused is the most productive way forward.

6.31 A strong argument exists for C1 and C1AA forms being required to be processed through an interactive online template, in order to enhance stricter compliance as per the Guide. It would not necessarily solve all problems, such as the omission of some or all previous proceedings from Q.3 (very common). On the other hand, it would put an end to prolix and provocative responses to Q.12 (reasons for application). Among other things, it would prompt inclusion of pre-proceedings correspondence and any relevant report; it would even force the applicant to disclose a telephone contact number. Court staff are not qualified to vet paperwork. The embedded guidance notes in Form C1 are frequently removed and full answers are not given. Properly/ conscientiously answered Form C1AAs are rare in practice. An interactive online programme would go a long way to address the problem.

6.32 There is also much to be said in pending proceedings for greater use by lawyers of C2 applications in the private law sector. In particular, to address the situation where the parties have the case adjourned for 2/3 months to test a contact arrangement only to return after all that time to report a breakdown occurring at an early stage. Aggrieved parents need to ask the court more often than at present to list such cases sooner. It is natural to expect this request to be in writing and with reasons stated to enable the judge to make an informed decision administratively and the panel can appreciate the background from their reading of papers in advance of the new date. That still means the issues have to be brought before the court, with the parents willing to attend, in order to begin addressing the issue. Much could be achieved if the issue was seen as a problem solving concept and Court Children Officer or perhaps preferably the relevant social worker were available to visit the care parent and children to see whether the problem could be resolved informally, pending the scheduled court appearance.

Judicial inconsistency of approach

Current Position

6.33 Unlike other jurisdictions, judicial continuity is not a problem in Northern Ireland. Great care is taken, where practicable, to ensure continuity. For example, the FPCs sit all year round and, subject to leave and illness, FPC judges ensure that, despite the number of cases involved, continuity is achieved. Similarly, in the FCCs and the High Court the fewer number of cases makes it all the easier to ensure continuity. We emphasise, therefore, that this is not a problem that has been the source of criticism in our enquiry.

6.34 General inconsistency of approach across the entire Bench, especially where at times deputies are dealing with cases, has been raised with us and was the source of adverse comment. This lack of consistency also embraces differences in procedures - for example, in respect of the lodging of court applications.

Discussion

6.35 A key component in resolving this problem is the issue of judicial training. As we will deal with in some more detail under the public law area, the essential, indeed the only, way to ensure a consistency of approach is by proper joint training and meeting of judges in the family justice system. In an area where family judges are currently at times isolated and, therefore, potentially out of touch with the developments unfolding in other courts, these issues need to be addressed.

6.36 The advent of a single family justice system will be another crucial component in ensuring consistency of approach. The vast majority of private law Children Order applications are made in the Family Proceedings Courts. If there is an introduction of a single tier system, then this emphasis will shift and these recommendations will apply across the tiers.

Enforcement

Current Position

6.37 Repeat applications as a result of breaches of orders are a recurring problem and suggest that the current system encourages parties to return to court rather than resolve issues through other methods. Often this is because the relationship between the parties is so fractured that dialogue between them to resolve anything is impossible. For many fathers especially - although for some mothers less usually - the problem of ensuring that a contact order is enforced raises a major difficulty. Although the statistics earlier set out in this chapter reveal that contact orders in favour of fathers are regularly successfully made, perhaps they do not reveal just how many of these relate to breaches of a contact order or how many applications by fathers are withdrawn through sheer frustration in the face of implacable hostility by the other party and the apparent ineffectiveness of the court in enforcing the orders. The court should not make orders which are ineffective. If the courts buckle every time their orders meet disobedience or defiance, such orders will be worthless. That would mean the Rule of Law being replaced by the law of the defiant.

6.38 Experience has revealed that the current process of contempt proceedings is both cumbersome and ineffective. Statistics show that between 2011 and 2014 inclusive, there were only 22 defendants convicted at all of one charge relating to a breach of a children or family order. Solicitors seem to be reluctant to issue contempt proceedings because the penalties have proved ineffective and do not result in compliance with orders. Penal notices are necessary to spell out clearly that any party wishing to stop contact must apply to the court first, unless there are genuine children welfare concerns, and even then they must apply to redefine the order.

Discussion

6.39 The fact of the matter is that courts tend to be reluctant to imprison those who have breached, for example, contact orders because it means children being taken into care where, partly through parental intransigence, they refuse to go with the other partner, and where the imprisoned parent becomes a martyr who uses the imprisonment as a further stick with which to beat the non-resident parent. Accordingly, we recognise that whilst in a final analysis imprisonment for a short sharp period may not be ruled out, it does not provide a regular solution to the problem.

6.40 In a system where there is a single family justice process it should be possible to fast track such matters more quickly than currently is the case and they can be dealt with by, if necessary, a different judge who will rigorously enforce the orders made. This would be strengthened by the implementation of "stop contact" notices which require to be served before contact is stopped. Such a requirement, which should be firmly enforced, should be included in any penal notice.

6.41 To emphasise the importance of these orders, it is also felt that penal notices should be attached to them so that recalcitrant parties will be left in no doubt whatsoever of the dire consequences that will attend upon refusal to obey orders. There was a difference of opinion in our deliberations as to the stage when this penal notice should be attached - some thought to do so initially before defiance had been illustrated would be counterproductive whereas others opined it was necessary to lay down a line in the sand from the outset - but this is a matter that could be left to the discretion of the individual judge, depending on his or her feel for the circumstances of the case.

6.42 Such a penal notice, for example, would spell out clearly that any party wishing to stop contact must apply to the court first unless there are genuine child welfare concerns and even then they must apply to redefine the order.

6.43 Moreover, the powers of the court should, by legislation, be extended to impose community service orders and parental attendance orders which, if breached, would likely of course result in imprisonment.

6.44 We have observed that in various areas of the law (for example, drink driving offences, speeding offences, etc.) offenders are obliged to attend compulsory classes where videos and other aids are provided to illustrate the grave dangers of the offences. If the relevant department were to set up and establish a similar process illustrating the profound damage to children which can be caused by warring parents and deprivation of contact with the other - attendance at which would be compulsory - this would have the potential to transform attitudes. This - that is, a community service order combined with parenting education accompanied by the right investment to provide child care to ensure that the care of children is not used to avoid penalties - could potentially provide the kind of understanding which courts currently are failing to afford. Failure to attend such a class would, of course, constitute a contempt.

6.45 We note the recommendations contained in paragraph 15.50 of the Stutt Report[17] which illustrate some similar thinking.

Recommendations

One Stop Shops

1. The introduction up of a "one stop shop" process at first directions hearings before Family Courts. **[FJ9]**

2. The Department of Health and the Legal Services Agency to combine to fund dedicated services, with set fees, enabling the court to make

[17] *'A Strategy for Access to Justice, The Report of Access to Justice (2)'*, September 2015.

referrals to services such as Children's Court Officer, mediation, and anger management service, drug and alcohol testing, housing and debt problems, contact centres, etc. **[FJ10]**

3. All Family Justice practitioners, judiciary and court officers be given training in what services are thus at the court's disposal. **[FJ11]**

4. Wherever possible, representatives of such services to be available for court hearing days, either online physically in court. **[FJ12]**

5. Such dedicated services to agree set fees for this work (in liaison with the LSA and the trusts) and consideration could be given to automatic legal aid or trust authority if the court so directs. **[FJ13]**

6. Steps to be taken to recognise the real value of CCOs and to ensure they are adequately resourced. **[FJ14]**

Contact Breakdown

7. The introduction of a fast track, priority driven triage system for cases where contact has broken down. **[FJ15]**

8. The Legal Services Agency (LSA) to introduce appropriate arrangements to facilitate this prioritisation. **[FJ16]**

9. Such applications to be available with an online template, albeit hard copy service might still be necessary where the respondent did not have online access. **[FJ17]**

Contact Centres

10. A protocol be drawn up to address the lack of understanding as to the precise role of contact centres by the parents and referrers whereby they think this is a final order. **[FJ18]**

Streamlining the system

11. Individual appointments, perhaps in clusters, for first directions hearings to be introduced for at least trial periods across the family justice system. **[FJ19]**

12. A Practice Direction emanating from the Senior Family Judge directing the implementation of the Children Order Advisory Committee (COAC) guidelines, subject to the right of a judge to preclude or vary their use in an individual case. **[FJ20]**

13. The attention of the profession to be expressly drawn to the preferred use of the C2 system in pending applications. **[FJ21]**

14. C1 and C1AA forms to be processed through an interactive online template in order to enhance stricter compliance with the COAC guidelines. **[FJ22]**

Judicial Consistency

15. Training sessions, where family judges are expected to attend as a group, to be introduced by a way of a formal and regular system. **[FJ23]**

16. In both private and family law, a tutor judge to be nominated to be responsible for ensuring that family judiciary are kept up-to-date with current literature dealing with developments in family law. **[FJ24]**

Enforcement

17. The implementation of "stop contact" notices which require to be served before contact is stopped. This should be included in any penal notice. **[FJ25]**

18. The invocation of penal notices in all relevant court orders subject to the discretion of the judge to postpone such a notice. **[FJ26]**

19. The creation by the relevant department, probably the DoJ, of relevant classes to which offenders compulsorily must attend in the event of breaches of orders. Failure to attend would constitute contempt of court punishable by imprisonment. **[FJ27]**

20. The introduction of community service orders for offenders who breach family court orders. **[FJ28]**

21. An emphasis on swift, priority driven references back to court when breaches are observed. **[FJ29]**

22. The inclusion of these recommendations in appropriate legislation at the earliest possible opportunity. **[FJ30]**

CHAPTER 7

RESOLUTIONS OUTSIDE COURT

Current Position

7.1 Family obligations involve the most intimate aspects of a person's life. For a court to compel a person to act in a particular way in one of the most private areas of their life requires the strongest justification. Most family obligations take place in private. That means that such an obligation is difficult to police. In essence, the problem is that parties resort to court application in the first instance to resolve problems without trying to resolve the matters outside the court process.

7.2 Yet the court process itself is not at present adequately resourced to invoke meaningfully and adequately a primary source of problem solving outside court, namely mediation. Even if there are effective ways of enforcing a court order, it may be that the legal system is not the best way of resolving the underlying issues.

7.3 Family Justice requires a problem solving approach that may be best served by resolution outside the court arena. Family therapy or mediation could perhaps be more effective in the long-term.

7.4 The need for a fundamental reassessment of this issue – court or alternative dispute resolution - is well illustrated by some Northern Ireland Family Proceedings Court statistics. In 2013, almost 6,000 children were subject to contact and residency orders. In the same year, 42% of births in Northern Ireland were to unmarried parents. Divorce statistics, therefore, may not reflect current 21st century family life. 4,100 children were affected by 2,403 divorces finalised in 2013 in Northern Ireland. Moreover, after five years of separation, UK figures indicate a third of fathers lose contact with their children. The United Nations Convention on the Rights of the Child emphasises the child's right to maintain a healthy relationship with both parents.

7.5 The Northern Ireland Courts & Tribunals Service statistics for Article 8 Contact Orders in 2014 revealed that 8,443 children were affected by contact and residence orders. Of these, 3,383 were aged under four; 2,468 were aged 5-8; 1,683 were aged 9-12 and 90 were 16-18 years old.

7.6 Mediation is conventionally the classic medium for resolving family problems outside the court context. It should potentially be an early port of call for such cases. However, our experience is that mediation in its classic sense is not widely used in the family justice system. If we are to progress towards the concept of a problem solving approach to family justice, this must be addressed.

7.7 Experience shows that some courts are directing mediation but a number of these cases will be unsuitable for a variety of reasons – for example, lack of

commitment to the process or high conflict over a long period of time in the adversarial system. Contra indicators are capacity, addiction, proven domestic abuse, mental health or not wishing to engage. Where judges take the view that an attempted mediation must be proven before hearing will be considered, waiting lists are growing.

7.8 On the other hand, advantages of early referral to mediation are currently recognised and include:

- More parents benefiting from a process they would not otherwise have considered.
- More soft outcomes, together with mediated agreements.
- Learned new means of communication post-relationship breakdown.
- A draft parenting plan that mops up all the minutiae of family life post relationship breakdown (for example, schools, parenting arrangements, methods of communications, medical information, child surname, involvement of extended families, holiday arrangements, after school activities, child's diet, etc.).
- Engaging in mediation may diffuse a potential drift into more conflict and stalemate.
- Mediators reporting that when the emphasis is focused at all times on the future well-being and needs of the child and not the conflict between the adults, and if that focus can be maintained over 3 to 4 appointments, agreement is more likely in some if not all of the issues presented on the parental agenda.

7.9 Family Mediation Northern Ireland (FMNI) in 2015 concluded that the current approach to mediation is inadequate because:

- Only 11% of work was directed from the courts in 2015.

- There are not the resources to follow the progress of families, although evaluation forms about once a month are sent out after they complete their sessions. Cases cannot be tracked indefinitely to check if they go to court due to a breakdown of the mediated agreement.

- Court referred cases are mostly legally aided and, therefore, pose a problem – that is, they wait months and in some instances years for payment. A major problem here is that there is not effective legislation to enable the Legal Services Agency (LSA) to make interim payments and this is a matter that we recommend is dealt with by the relevant department as a matter of urgency.

- There is also an inadequacy of Government investment to steer parents away from the court system. FMNI expressed the view that mediation in Northern Ireland is underfunded, under-estimated and

misunderstood and that mediators are in general not afforded the respect from other professionals that is certainly due.

- The Health and Social Care Board contract only covers 150 families annually on average, based on all the parents attending to individual 'intake' appointments and four one and a half hour sessions, which is not always the case as, given the personal and particular needs of parents, this may be less or more to achieve a mediate agreement. In some cases, the process starts and stops and parents may not be ready but may return later in the year.

- Given the figures for children being the subject of contact and residency orders, there is a dilemma: with limited funding being directed to the developing mediation services in Northern Ireland (unlike the rest of Europe), and making it more accessible how can a percentage of these families be diverted from court?

- FMNI is the only independent, specialist family mediator provider and family mediator training provider in Northern Ireland. It has a number of specialist mediators experienced in Direct Child Consultation. All mediators are vetted and trained in child and vulnerable adults.

- There is limited public knowledge of such services and resistance by some solicitors' practices to referring clients out.

Discussion

7.10 Free mediation information sessions can help by dispelling misconceptions about mediation as a process. It is quite distinct from counselling. When separated parents become aware of the empowerment element, this can be powerful in itself. They set the agenda, not the mediator. The entire process belongs to the parents, not the mediator. The responsibility lies with them to generate options, to think from their child's perspective and perhaps even agree to the child spending time with a specialist mediator to feed into the decision-making.

7.11 It has to be recognised that solicitors routinely practice a form of mediation between the parties in Northern Ireland through pre-proceedings correspondence and at court. Arguably, lawyers do not and are not trained to deliver this type of service. Lawyers are not mediators managing high emotion in the wider family context (child development, child consultation, parenting skills, etc.). Legal mediation, putting forth options and encouraging parties to agree, is very different from sitting with both parents and assisting them to draft a parenting plan based on the knowledge that the parents have of the child's needs and of the wider extended family. They are two distinct professions with completely different training pathways and a continuous challenge of learning and gaining experience in almost

opposite approaches. The conceptual difference between mediators and lawyers may have a highly significant effect on outcomes in the family context.

7.12 The LSA could, of course, apply a stricter test requiring proof of an attempt to negotiate a way forward before accepting an application for funding. But the danger here is that this may only serve to occasion further delay, particularly with unwilling parties, and such a system might be open to manipulation by one party deliberately attempting to delay progress. Compulsory mediation may also create its own problems. People compelled to mediate may become reluctant to engage productively.

Other Jurisdictions

England and Wales

7.13 All litigants in England are now bound by s.10 of *The Children and Families Act 2014* to consider undertaking mediation before issuing any private law children or financial remedy cases. It is an absolute requirement for the party wishing to issue an application that they attend a Mediation Information and Assessment Meeting (MIAM), unless one of the MIAM exceptions applies. The MIAM exceptions are set out in Practice Direction 3A of the Family Procedure Rules 2010.[18]

7.14 Legal aid is available to fund the MIAM and the first mediation session, even if only one party meets the eligibility criteria. Funding is available for both parties, regardless of whether the eligible, or ineligible, party attends first. It is possible that an individual will become eligible for legal aid funding at a later date than the service was provided by virtue of the other party attending the MIAM and qualifying for legal aid according to the means test. The UK Government sees this as part of its encouragement to separating couples to resolve their disputes outside of the courts where mediation offers a faster, effective and more suitable route to resolution in many cases.

7.15 Even if the parties are not deemed to be appropriate for mediation before the issue of proceedings, the court will continue to review whether this would assist throughout the proceedings and it is possible to adjourn to facilitate this (although, in practice, once proceedings are before the court, they are likely to stay there).

7.16 There is also a "Separated Parents Information Programme" which has a statutory basis in the Rules.[19] The court often mandates that the parties shall attend the Separated Parents Information Programme once the case is before it at an early stage. Her Honour Judge Newton, a Family Judge in Manchester with whom we have spoken, has indicated that invocation of the "Separated Parents Information Programme" works well in England.

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[18] We attach the link to Practice Direction 3A - http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a

[19] s 11A-P of the Children Act 1989 inserted by the Children and Families Act 2014

7.17 Relate in England are trialling an "Online Family Dispute Resolution" platform which will give separating or separated couples the tools to work through their decisions around the breakdown of their relationship. Users can take advantage of a free "Assess" tool, before registering to take the next step in formulating their agreement. The "Assess" section provides them with good information and referral points (for example, legal aid, reconciliation counselling or domestic abuse support).

7.18 Beyond registration, the tool is designed to ask carefully constructed questions of each partner, with a view to reaching a separation agreement in areas of communication, children, living arrangements, assets and finance. The questions are answered separately within the online tool and when both parties have completed their questions a draft agreement is shown to both.

7.19 At this stage, while the agreement has not been reached – for instance, on the ongoing education of children - negotiation can take place between the couple using online messaging functionality. The negotiations can take place over several weeks and although communication is managed through the online tool, it does not prevent other kinds of communication between the separated partners.

7.20 Where no agreement is possible on a topic or situation, the individuals can click to "mediate" and once they have completed all sections this will activate the user's selection of a Relate mediator, who will contact the couple to set up online video conferencing mediation sessions.

7.21 Users need to upload supporting documents and complete financial checklists to support the agreements that they have made. Users can take up the option of a neutral review by a lawyer/mediator who will check the whole agreement and support documents for completeness. At any point users can access legal and financial experts for guidance and issues and how they are seen in the eyes of the law so that they can complete their agreements within the tool.

7.22 Payment points in the user journey are currently being modelled. This will include options and the packages that are aimed at reducing the overall cost of separation and divorce for couples, and ultimately keeping the need for court settlements fewer and cheaper.

7.23 The climate in England, therefore, is of moving, where possible and feasible, to service delivery online and focus on "iteration" – "basing decisions as much as possible on observation not prediction"[20].

[20] Matt Hancock MP Cabinet Office June 2015.

Scotland

7.24 The Scottish model allows the court to refer to mediation and, as in this jurisdiction, identifies concerns about the availability and funding of providers. The Scottish Civil Court Review[21] does not recommend compulsory mediation, concluding that mediation is more likely to be successful if the parties want to engage. It recommends that the better approach is to have mediation easily accessible and funded as part of the court process.

7.25. We observe that the Stutt Report[22] at Chapter 17 addresses this matter and broadly follows the thinking in Scotland.

New Zealand

7.26 We have spoken to Judge Ryan the President of the Family Court in New Zealand, and Judge Peter Boshier, formerly the president of that distinguished court. They explained that they have a system of "Parenting Through Separation" (PTS), funded by the Ministry of Justice, and which has been in operation since April 2014, originally operated on a voluntary basis prior to that date (see also Appendix 4). It obliges parents of children intending to separate in any non-urgent application to attend free sessions conducted by a counsellor or psychologist over three evenings. The purpose of the mandatory meetings is to ensure that the full consequences of the effect on children of the process of separating is understood and that the parties learn to resolve their disputes without conflict, if possible, outside the court arena. The family is encouraged to keep children at the forefront when trying to resolve all issues, including where the children reside, ancillary relief and divorce, etc. This is, therefore, an obligatory process before court proceedings are issued unless there are "escape routes" where more urgent attention is needed, such as where these is a domestic violence background, or abuse of children has occurred.

7.27 These steps are extremely well publicised and the parties attend without their lawyers being present, albeit they may well be represented by lawyers who will have drawn this mandatory obligation to their attention.

7.28 Parties can also use a Family Dispute Resolution Service (FDR) which is often recommended by the PTS. This is again enshrined in legislation. A trained mediator will try and help parents reach their own arrangements for their children. Parties may need to pay for this if they can afford it and funding is available for those who are eligible for it. Eligible parents can also get counselling prior to FDR if the FDR provider believes it is necessary for further effective engagement. This is more formalised mediation conducted by mediators who have been accredited and approved by the Ministry of Justice.

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[21] Report of the Scottish Civil Courts Review, 15 September 2009

[22] *'A Strategy for Access to Justice', The Report of Access to Justice (2)*, Colin Stutt, September 2015

7.29 An analysis of this FDR is to be carried out by the University of Otago, the Ministry of Justice and the law of foundation in New Zealand. It will take a further two years to assess this project.

7.30 If parties cannot agree the way forward they can apply to the family court for the case to be determined. In most cases, however, they will have had to have attempted both PTS and FDR first.

7.31 Judge Ryan was enthusiastic about the results of this process. Whilst it is enshrined in legislation, it has not yet been analysed or evaluated since it was made mandatory. However, there has been evaluation of the *voluntary* process which existed prior to April 2014 and such was the success that the government of New Zealand enshrined this into legislation. The Ministry of Justice in New Zealand carried out an evaluation of the voluntary nature of PTS in July 2009 and the following points arose from that evaluation:

- The evaluation used information both from overseas and New Zealand programmes to assess the focus and content of the programme.

- It recorded that "in the United States most parent education programmes are mandatory for couples filing for divorce, separation, child custody and/or visitations". Evaluations of these programmes have shown them to be effective and some have described their mandatory nature as "mandating an opportunity". Surveys of attending parents have found that they also believe that the programme should be mandatory (e.g. University of Vermont "Coping with Separation and Divorce Parenting Seminar, 2006").

- Mandated attendance has been seen as a way of ensuring parents attend the course early in the separation process. Benefits are greater for those who have recently separated compared to those who have separated for some time.

- Of those who attended, over 90% agreed with statements that the course helped them understand how separation affects children and almost as many thought the course would help them work out a parenting plan, would help reduce conflict with their ex-partner and help them talk to their children.

- Uptake was very much reduced where the attendance was voluntary.

- At follow up, it was found that there was a significant reduction in reported parental conflict, with significant increases in parents satisfied with child care arrangements, and knowledge of issues related to separation and an increase in parents' and children's adjustment in relation to separation. There was also a reported improvement in children's behaviour explicable by a change in their parents' perceptions of the behaviour rather than the behaviour itself. Having attended the course, parents were able to place their children's behaviour in the context of that which is normal for children experiencing

separation. Children's day to day contact with parents increased and children were also having more contact with their extended family.

- Almost all participants and informants in the evaluation agreed that there is a need for a parent education programme for separating parents.

7.32 If the matter cannot be resolved and a formal hearing is required, the parties will be able to have lawyers to represent their views.

7.33 A note of caution needs to be added. A recent assessment of the New Zealand model has served to illustrate that the absence of lawyers in the PTS or FDR stage has been counterproductive and it remains our view that provision for the presence of legal advice, at least in the background, even at this stage, remains necessary if success is to be achieved.

Australia

7.34 We have also spoken to Chief Justice Bryant and Justice Bennett of the family division in Australia. They similarly employ the use of a mandatory Family Relations Centre which the parties must attend before the issuing of proceedings to discuss resolution of the issues. There is a certificate of attendance at such centres without which proceedings cannot be filed. The Government have set up 65 of such centres across the entire country and it is regarded as very successful in that it has reduced the number of cases in which parties found it necessary to file proceedings.

USA

7.35 A further alternative is that operated in the USA. In California the Judiciary Branch of California self–help centre website provides legal information and free low costs legal help in the area of divorce and separation. Whilst the site does not give legal advice, it provides legal information on a host of family related topics – adoption, child custody, child support, divorce, domestic violence, eviction on housing, medication, etc.[23]

Discussion

7.36 We have considered the possibility of the English system, under s.10 of *The Children and Families Act 2014,* binding litigants to consider undertaking mediation before issuing any private law children or financial remedy cases.

7.37 Provided that controls were in place so that a fee structure could be developed which did not simply increase the overall costs in instances where there

[23] See http://www.courts.ca.gov/selfhelp.htm

was merely lip service to mediation, this has attractions and the mediation was only available through quality assured providers, this approach has its attractions.

7.38 Our own thinking is that compulsory mediation is not likely to succeed. In any event, grave concerns have surfaced from FMNI about the availability of an appropriate infrastructure for compulsory mediation in light of the issues raised above by FMNI, including a paucity of providers, provision of reports and funding. The average costs for 8-10 sessions of court-directed mediation is approximately £800. Who is to pay for this if it is compulsory?

7.39 However, an obligation to at least *consider* it, with the onus on professional advisors to explain it to the parties before issuing proceedings, could be a fair compromise. We note proposed legislation in the Republic of Ireland requiring solicitors and barristers to advise any person intending to commence legal proceedings to give consideration to using mediation as an alternative means of resolving disputes. Solicitors will be required to provide the client with information concerning mediation services together with an estimate of legal costs should they proceed with the litigation, including an estimate of costs if the client is unsuccessful in those proceedings.

7.40 However, we are more attracted by the "Parenting through Separation Scheme" (PTS) which operates in private law for parents of children in New Zealand and Australia.

7.41 We recognise that many litigants do require time to adapt to their new status of separation and the move through the current process may give them that time to come to terms with the changes in their lives and the lives of their children. Nonetheless, early resolution processes can be useful, not only for those who have separated some years ago and have adjusted to their new circumstances, but also more particularly to those who are now about to embark upon a potentially treacherous path which can be at times at the expense of children.

7.42 We have considered concerns about mandatory processes. The New Zealand FDR experience reveals that a substantial number of parents refuse to engage, make appointments and then do not keep them or alternatively do not even pay. In that case, the mediator files a certificate that the mediation process has failed and the matter then proceeds to the court. However, for those who do engage, Judge Ryan indicates that 70%-75% resolve their problems without access to the courts.

7.43 We believe that the relevant statistics on contact/residence orders made by the courts in Northern Ireland set out in paragraphs 7.4 and 7.5 above lend measurable weight to the introduction of such a system here. They support the view espoused by FMNI that if there was the will to begin the work to change this culture by funding the services that can support, educate and assist parents to continue parenting post-separation, many of the lengthy and costly court applications could be resolved without recourse to courts, with an enormous attendant saving of costs

to the public purse. Parents would be empowered to take responsibility for the future wellbeing of their children.

7.44 We conclude with these comments. Undoubtedly, the family has become more diverse and complex over the last decades with consequent changes to the nature of disputes brought to court, such as divorce, maintenance and contact. The adults in the family have to take responsibility and be supported in achieving the best outcome from a relationship breakdown. However, the courts must be ready to be engaged and take an active role, otherwise there may be a lack of willingness by the parties to agree or mediate a sensible agreement. Support mechanisms, mediation, court proceedings and negotiation must be complementary in aiding the parties to achieve resolution.

Recommendations

1. Mediation or some similar system to be more widely available within the family justice system. **[FJ31]**

2. Mediation to be more easily accessible and funded by legal aid as part of the court process. Consideration should be given to introducing legislation similar to s.10 of *The Children and Families Act 2014*, mandating the undertaking of mediation before issuing any private law children or financial remedy cases. **[FJ32]**

3. Mediators to have some experience in child protection and adult safeguarding. **[FJ33]**

4. However, our preferred recommendation is for an earlier educative programme similar to that of the Parenting Through Separation, or Separated Parents Information programme in New Zealand and England respectively, where families are required to attend, save in exceptional circumstances, *prior to issuing proceedings*. Thus, mediation is seen as but one possible avenue to be explored which may in the event be advised by the programme. **[FJ34]**

5. Close liaison between the DoJ in Northern Ireland and the New Zealand family justice system would be the first step, for instance, on the legislative change that would be required to introduce a formalised programme along the lines now operating in New Zealand and elsewhere. **[FJ35]**

6. Certain cases should be exempt from immediate referral to a parenting programme and these would include:

    - Where a party or their children have been subject to domestic violence.

    - Where there are allegations of sexual abuse.

- Where there are allegations of drug or alcohol misuse.

- If a party is unable to take part (for example, if they live outside the jurisdiction, are in custody or refused to take part).

- If there is an existing order which has been breached. **[FJ36]**

CHAPTER 8

DIVORCE PROCEEDINGS IN NORTHERN IRELAND

8.1 Cases involving divorce and ancillary relief differ from most other cases which come before the family court. These cases do not deal with a single incident episode where opposing protagonists who win or lose are unlikely to have future contact with or impact on each other. Instead, in divorce and ancillary relief cases, the parties' lives are interconnected through relationships with children, family and friends. The challenge is to find the best method of resolution in the most cost effective way, bearing in mind that the aim of this Review is primarily to consider the high human cost of the system rather than a financial one.

Current system

8.2 Under the present system, proceedings are issued by filing hard copy documentation in the court office. Forms are available to download from the Northern Ireland Courts & Tribunals (NICTS) website and there is guidance on filling in the forms and checklists available to be downloaded from the website.

8.3 As with many of the websites currently in use, not only here but elsewhere, they are often based on "fact sheets". Professor Smith OBE of JUSTICE, with whom we have spoken, has said:

> "The best sites, like the Dutch one, are turning themselves around so they ask questions of the user and identify exactly what the user wants. Airline websites do not give you a suite of timetables, they ask you where you want to go".

8.4 The party issues a petition for divorce (at least two years after the date of their marriage), judicial separation or nullity. In the prayer of the petition, the petitioner may claim ancillary relief and thereafter a summons for ancillary relief issues. The summons (with supporting affidavit) for ancillary relief is normally issued after the *decree nisi* has been granted. The website currently in use is based on providing forms and advice checklists.

8.5 Consequently, proceedings are thereafter issued in hard copy "over the counter" or by post. There is a remarkable lack of technology invoked in the process.

8.6 Divorce proceedings are served personally or by post on every respondent or co-respondent[24]. Consequently, there is exclusive reliance on personal service or service by post. No provision is made for electronic service.

[24] Rule 2.9 of the Family Proceedings Rules (NI) 1996

8.7 In undefended divorces, petitioners come to court, usually with a solicitor and barrister, they give sworn evidence before a judge and the court decides whether or not to grant the divorce.

8.8 In defended divorces, petitioners and respondents come to court prepared to give oral evidence, with the usual adversarial system, and the court then adjudicates.

8.9 In divorces where there are children under the age of 18 years (16 if not in education or training), a Statement of Arrangements is filed and signed by each of the parties to the divorce. In 2014, 41% (930) of the divorce petitions received in the court office were as a result of 2 years' separation with consent, similar to the 40% in 2013. There were 898 *decrees nisi* granted in the High Court during 2014, 454 of which were on the "no fault" grounds of 2 years' separation with consent or 5 years' separation.

8.10 There is delay endemic in the system. The average time interval in 2014 between divorce petitions being issued and decrees being granted was 43 weeks. This is too long a time lapse between divorce petitions being issued and the decrees being granted.

Discussion

8.11 The necessity of a court hearing before a High Court judge or a county court judge in every divorce, even when there are no issues of contention between the parties, seems wasteful of time, money and resources. Parties can become focussed on the grounds for divorce, seeking a fault ground in an effort to influence the ancillary relief proceedings.

8.12 A defended divorce can create bitterness and resentment, which is the worst possible environment for enabling the parties to achieve an agreed resolution in relation to their financial matters and can impact adversely on the children. Parties may try to use care or residence of the children to gain an advantage in ancillary relief.

8.13 Parties may also sometimes seek maintenance pending suit, which can continue for a substantial period if the *decree nisi* is defended. Apart from the financial costs, this can create resentment when the parties come to deal with ancillary relief. Similarly, the party who has not sought maintenance pending suit, but has a much reduced income whilst proceedings go on for longer than expected, also can nurse a sense of grievance, justified or otherwise.

8.14 We have already considered the notion of a pre-action protocol and the "Parenting through Separation" programme and Family Dispute Resolution Service which operate in private law for parents of children in New Zealand in chapter 7 of this Review. The concept is eminently suitable in the context of divorce, where children can be a casualty of the process.

Adjudication of Divorces

Applications on line

Discussion

8.15 We are satisfied that there should be a website based on providing forms and advice checklists. The current website should be revisited to ensure that a site asks questions of the user identifying what the user wants rather than providing merely a fact sheet. A Question and Answer approach should be considered.

8.16 The establishment of an online information hub to give information and support for couples to help them resolve issues following divorce or separation outside court should be contemplated, in keeping with the Norgrove recommendations in England. We consider that NICTS should invest in and establish an online information hub, advice line and centre which would be available remotely and there would be a central information hub located in specified court buildings - in Laganside Court in Belfast, for instance, which would be staffed by NICTS to assist service users.

8.17 We see no reason why there should not be a requirement that all divorce applications are made online with identifiable triggers, which would permit a paper application (for instance, for a foreign marriage where no marriage certificate exists). In this context, a link with the office of the Registrar for Births, Deaths and Marriages to guard against inauthentic certificates being filed online would be of value.

8.18 One aim must be to ensure the process is much cheaper and, therefore, more accessible than at present.[25]

8.19 For a fixed fee, a meeting with court staff could be provided to litigants in person and the completed forms checked in anticipation of readiness for issue.

8.20 Automated telephone responses for standard queries, including a response directing callers to the online information, would also be useful. This would potentially reduce unnecessary or unwarranted disruption to staff working in operations.

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[25] However, we note with some measure of concern the comments of the President of the family court in England and Wales when addressing the Justice Committee in London in January 2015. It was reported he said one of the first legal functions to go online was likely to be divorce.
"It won't take long to work out that the cost of administering it online is a fiction.
Making it possible to process a divorce online was fairly straightforward compared with other types of cases. If it can't be done we are in very big trouble. I have been discussing online divorce with [MoJ] officials for several months now. It won't take long to work out that the cost of administering it online is a fiction. I am becoming increasingly concerned and the current position is that the ability to deliver it is a question on which the jury is out. I'm disappointed about where we have got to after many months of work. I still have no clear answers to such basic questions as what is the overall timeline for this process."

8.21 Crucially, NICTS would have to invest in the technology to enable the online issue of all divorce proceedings.

8.22 It would also require amendment of the Family Proceedings Rules (Northern Ireland) 1996 to allow for the online issue of all divorce proceedings.

8.23 Amendment of the Family Proceedings Rules (Northern Ireland) 1996 would also be necessary to permit electronic service. However, not all service users may have an email address and/or the petitioner may not know the email address. There is the additional problem of proving service by email. Although the petition may be sent by email, it does not necessarily follow that the email has been received and/or read by the recipient.

8.24 This problem of service can partly be met by amendment of the rules to allow for the acknowledgement of service to be filed online. This would meet the problem which arises with the increase in possibility for travel where people tend to relocate and effecting service becomes more costly and expensive both in terms of time and money. A further refinement could be that on occasions an application can be made to deem service good/substituted service supported by a summons and affidavit, providing for emailing correspondence and confirming receipt of the divorce petition by email.

8.25 All that said, there would still have to remain the fall back situation of the current service conditions in the event that the email service was not acknowledged in any form which would inevitably occur where the other party did not have an email address or the email address was incorrect, etc. The situation would be resolved presumably by an amendment of the Family Proceedings Rules to permit electronic service whilst retaining the option of service by post.

The hearing

8.26 We note, as did the Stutt Report at paragraph 15.41, that "the court process itself [has] the potential to drive up costs or encourage adversarial behaviour, including the requirement in Northern Ireland for petitioners to attend court in person".

8.27 We are also acutely conscious of the high importance in Northern Ireland attached to marriage and the significance of its dissolution. However, we are an increasingly diverse society and one of our aims must be to remove the emotional and financial pain that attends upon such a process as presently constituted.

8.28 For some time now the courts through the law has adopted the concept of "no fault" divorce, exclusively or as an option to traditional fault-grounded divorce. In short, the court examines the condition of the marriage rather than the question of whether either party is at fault. No fault divorce was intended to and should have

become a quick and inexpensive means of ending a marriage, especially when a couple has no children and moderate property assets. We have concluded that such a conceptual change should evolve into an online, technologically friendly, less costly, more efficient and swifter process whilst always bearing in mind the need to keep any children to the fore of a couple's thinking.

8.29 Accordingly, it is our view that divorces sought on the basis of two year separation with consent or five year separation without consent must be dealt with as online paper exercises without the need for a court attendance. The granting of the *decree nisi* ought still to be made by a judge or Master ("the adjudicator"), albeit they will determine the matter on the papers before them with the discretion to invoke an oral hearing if it is deemed appropriate in the public interest to do so (for example, where fraud is suspected).

8.30 Fault divorces – for instance, on grounds of adultery, desertion, unreasonable behaviour, etc. - and nullity should be dealt with as paper exercises online if they are undefended, the grant of a decree again being determined by the adjudicator (that is, a judge or Master) "on the papers".

8.31 We are not persuaded that we should fully adopt the system in New Zealand and Australia where there is, of course, a strictly no fault approach to divorce and all divorces are dealt with online. We do not consider that that is currently the way forward in Northern Ireland. Whilst of course the majority of divorces will be based on 2 year or 5 year separation or otherwise undefended, and fought divorces in the main seem a waste of costs, emotional stress and productive achievement, nonetheless there are some instances where fault divorce – and, for that matter, contested divorces - are acceptable as part of the traditional oral hearing concept before a judge.

8.32 The classic example is where one party, usually but not inevitably female, has suffered years of domestic violence and abuse and wishes, perhaps for the first time, the right to a public hearing of what they have suffered. That is an instance where a judge, in their discretion, might well determine that a public hearing was entirely justified.

8.33 Secondly, there may be two possible circumstances, albeit rare, where it may be important for the court to adjudicate on the particulars in a divorce based on unreasonable behaviour. First, where one party has behaved so badly that in considering ancillary relief under art. 27(2)(c) of *The Matrimonial Causes (Northern Ireland) Order 1978*, conduct is one of the factors to be considered by the court. Secondly, if the conduct has caused significant financial hardship (for example, excessive gambling), it is a matter that should be taken into consideration when determining any financial division. Whilst of course these matters could be determined before the Master, hearing on a divorce case where one party wishes the evidence to be made public may be of assistance.

8.34 It should also be recognised that domestic and sexual violence and abuse should not be ignored, not least because the evidence shows that the behaviour is often repeated in subsequent relationships. The family justice system should give a consistent message and may risk undermining the work on those issues if, in certain contexts, such behaviour in a petition based on unreasonable behaviour is simply ignored. Moreover, we go further. In our view, the court's intervention in such matters can become more meaningful by providing that, if there is a finding of violent behaviour, the court can recommend interventions to address that behaviour. We understand, of course, that there is a danger that if we attach a financial consequence to certain behaviour, we risk incentivising people to cite such behaviour. If we are to focus on the concept of financial loss, we can envisage long arguments about who has been the more profligate and will only encourage couples to dwell on the past, rather than look to how they can work together in the future. Courts can be relied on to actively discourage such attempts.

8.35 Finally, but perhaps most importantly, the interests of children must not be overlooked in the process. The adjudicator must always have a discretion to insist on an oral hearing where the Statement of Arrangements for Children (which would still be a necessity in all divorces where children under the age of 18 are present) caused them to consider an oral hearing to be in the children's best interests. That is analogous to the current situation where on a divorce hearing the judge reads the Statement of Arrangements. The fact of the matter is that parents daily make decisions concerning children without intervention of the court and, subject to what we say below, it is difficult to see why separating parents cannot also make such decisions. As happens currently, judges give very careful scrutiny to the arrangements for children. On occasions, thankfully rare, the judge may adjourn the proceedings until more suitable arrangements have been made.

8.36 Finally, Article 15 of *The Family Law (Northern Ireland) Order 1993* provides for the amendment of Article 3(4) of *The Matrimonial Causes (Northern Ireland) Order 1978* (oral testimony not required in certain divorce cases). However, that provision has never been commenced. Power to commence it rests with the Department of Finance. Technically, only a commencement order is required. However, it might be regarded as controversial, in which event Northern Ireland Executive approval would be needed.

Recommendations

1. The responsible government department to take steps to make the operation of the divorce process in Northern Ireland more administrative and less court–based, thereby reducing cost, time and, most importantly, emotional stress and strain. **[FJ37]**

2. Administrative and online adjudication of divorces in non-fault and undefended applications to be introduced. There is no reason why such adjudication cannot be processed online. **[FJ38]**

3. Administrative adjudication to be available for all divorce applications that are grounded upon 2 years' separation with consent and 5 years' without consent, subject to the hardship test. **[FJ39]**

4. Administrative/online adjudication only to be used in divorce applications grounded on one of the fault grounds – adultery, desertion, unreasonable behaviour – when the respondent/co-respondent has admitted the ground and does not wish to defend the application. **[FJ40]**

5. Administrative/online adjudication to include divorce applications in which there were minor children of the family. However, a Statement of Arrangements would still be required and should be approved by the judge. **[FJ41]**

6. Northern Ireland Courts & Tribunals Service (NICTS) to establish an online information hub, including a telephone helpline, providing information and support for couples following divorce or separation outside court. The information hub/advice line and centre would be located in specified court buildings staffed by NICTS to assist service users. **[FJ42]**

7. NICTS to invest in technology to enable the online issue of all such divorce proceedings. **[FJ43]**

8. Amendment of the Family Proceedings Rules (Northern Ireland) 1996 to allow for online issue of all divorce proceedings, electronic service and acknowledgement of service. **[FJ44]**

9. Online service to be supplemented by the option of service by post in circumstances where online service was not feasible or possible. **[FJ45]**

10. The adjudicator to be a member of the judiciary (that is, a Master of the High Court or a family judge). **[FJ46]**

11. Commencement of Article 15 of *The Family Law (Northern Ireland) Order 1993.*

8.37 To these recommendations we add these fundamentally important riders:

- Firstly, in the case of children, the adjudicator would always have a discretion to insist on an oral hearing where the Statement of Arrangements for Children (which would still be a necessity in all divorces where children under the age of 18 are present) caused them to consider an oral hearing to be in the children's best interests.

- Secondly, contested divorces should still be accorded an oral hearing before a judge or Master.

- Thirdly, in the case of fault petitions, where one party wished to have an oral hearing, the adjudicator should retain the discretion to grant such an application in circumstances where they consider that it would be in the interests of justice to do so.

- Where for other good reason, in the interests of justice and at the discretion of the adjudicator, there should be an oral hearing, the adjudicator shall so order.

CHAPTER 9

ANCILLARY RELIEF (AR)

Current Position

9.1 It is acknowledged that the current ancillary relief process is a much improved and streamlined process since the introduction of the financial dispute resolution (FDR) system (see below), albeit that this system applies only in the High Court and not in the county court jurisdiction. Consideration will be given to extending it to the county court jurisdiction albeit that with different district judges sitting in different jurisdictions or locations it may not be such an easy fit. That may all change, of course, with the introduction of a single tier system (see Chapter 5).

9.2 It is also noteworthy that with the appointment of a new matrimonial Master in 2015, there has already been a reduction in the number of orders made and an increase in cases resolving at an earlier stage.

9.3 Turning to the actual hearings themselves, there were 1,178 matrimonial applications disposed of during 2014 and 574 (49%) were for ancillary relief. The corresponding number of matrimonial applications disposed of in 2013 was 1,297, of which 543 (42%) were for ancillary relief.

9.4 In 2014, a judge heard only six of the ancillary relief applications and 568 were heard by the Master. It seems, therefore, that only the most complex cases are transferred to the judge. This should remain the situation.

9.5 The average time interval in 2014 between ancillary relief applications being issued and disposal was 55 weeks. For 43 weeks of that period, the ancillary relief was before the court (judicial statistics 2014[26]). With the appointment of Master Sweeney, matters have improved. For cases received after 1 April 2015 (looking at the statistics for disposal timings for the period 1 October 2015 – 31 March 2016), the average time in weeks from receipt to disposal is 17 weeks. In relation to all ancillary relief cases, the average time is 71 weeks, which reflects historic delay with old cases and, hopefully, also indicates the improvements which have been made. The challenge will be to maintain the momentum.

9.6 Proceedings are issued by filing hard copy in the court office. Guidance is available to download from a Northern Ireland Courts & Tribunals (NICTS) website and that guidance is currently under reconsideration. Affidavit evidence is a corner-stone of the current system. The ancillary relief (AR) application is, therefore, supported by an affidavit of means and assets which is responded to by an affidavit

[26] https://www.courtsni.gov.uk/en-GB/Publications/Targets_and_Performance/Documents/Judicial%20Statistics%202014/Judicial%20Statistics%202014.pdf

of the responding party's means and assets. A separate summons and affidavit can be issued seeking maintenance pending suit, although the current thinking is that with the increasing practice of issuing AR proceedings at the earliest opportunity, it will be the case that a combined single summons will be appropriate rather than two separate summonses.

9.7 Proceedings are served by post or in person.

9.8 The parties, or the legal representatives on their behalf, then attend a first direction hearing (FDH) when directions are made setting out the time for filing any further or outstanding affidavits, the time for the party to file outstanding discovery including valuations etc. Parties are also directed to make financial service enquiries, where appropriate, and time is given for the case to be listed for first review or, if possible, the case will be listed for FDR hearing.

9.9 Under guidance, parties are encouraged to endeavour to agree the estate agent to value a property and the accountant in relation to a business or a pension expert. Where agreement has not been possible, experts are encouraged to meet to try to reach agreement, reduce disagreement, identify the areas of dispute and keep an agreed minute of the meeting.

9.10 As soon as possible, a case will be listed for FDR hearing, which will proceed when such discovery has been provided to enable each party to file a statement of core issues. The statement of core issues ought to include each party's proposal for resolution and reference to any offers made. In the event of a failure to resolve, an FDR hearing takes place, when the Master, in possession of all of the papers, assists the parties to achieve a resolution. The Master gives an indication "on the papers" and sets out their advice in a sealed envelope. If one party does not agree to resolve on the basis of the indication or otherwise, the case is referred for hearing before a different Master. In the event that a party does not improve on the indication at hearing, they may run the risk of being penalised in costs.

9.11 Applications for a Mareva injunction in relation to the disposal of assets are usually made to the judge, although such an application can be made to the Master under the avoidance of disposition/set aside provisions pursuant to art. 39 of *The Matrimonial Causes (Northern Ireland) Order 1978*. There have been a few concerns raised based on the premise that one party—usually the husband—can dissipate assets with impunity. However, the fact of the matter is that the dissipation or transfer of assets will normally be addressed by:

- Compensating the other party from remaining assets,
- Setting aside the transfer,
- Injunctive relief to preserve assets, or

- Ongoing maintenance until the offending party makes good the loss, albeit this may impede the clean break principle which the innocent party may wish to invoke.

9.12 One discrete matter does currently concern us. This arises where, before issue of proceedings or early after issue of proceedings, a sale of property is lost because one party refuses to sell. Currently, there is no provision for a sale in isolation without hearing the whole case, which may have been delayed by issues of discovery.

9.13 In terms of enforcement of court orders, many cases return to court for enforcement on foot of a summons and affidavit for further directions pursuant to a court order being made or under the "liberty to apply" provisions contained in the court order.

Discussion

Maintenance Pending Suit

9.14 Parties sometimes seek maintenance pending suit, which can continue for a substantial period if the *decree nisi* is defended. Apart from the financial costs, this can create resentment when the parties come to deal with ancillary relief.

9.15 Similarly, the party who has not sought maintenance pending suit but has a much reduced income whilst proceedings go on for longer than expected also feels aggrieved.

9.16 One possibility would be to reverse the current process and address the ancillary relief/financial matters after the separation and before the *decree nisi* issues. Our understanding of the position in the Republic of Ireland is that the judge dealing with the divorce must declare that proper provision has been made and, therefore, AR/financial matters are dealt with prior to the grant of divorce.

Pre-proceeding steps

9.17 Alternatively, a pre-action protocol could be devised. This would require the parties to attend an assessment for a mediation appointment before any proceedings are issued. The benefits of mediation would be explained at this appointment and the family would be encouraged to keep children at the forefront when trying to resolve all issues, including where the children reside, ancillary relief and divorce/judicial separation nullity. This would be along similar lines to the New Zealand principle of "Parenting Through Separation". We note that Sir David Norgrove's Family Justice Review in England and Wales[27] recommended that people in dispute about money and property should be required to be assessed for mediation.

[27] Family Justice Review, Sir David Norgrove, November 2011

9.18 The appointment could be conducted by the district judge or Master or by an accredited mediator funded by NICTS. If the parties agreed, the matter could be referred on for mediation. Alternatively, it could be stated that the case is not suitable for mediation. At the very least, it would create the potential to bring the parties together to contemplate a plan to resolve all issues. We recognise that many litigants require time to adapt to their new status and the move through the current process may give them time to come to terms with the changes in their lives and the lives of their children. Nonetheless, an early resolution process could well be useful in terms of time, cost and final outcome in many cases.

9.19 Ideally, both parties would be represented. This is not a mediation process. It is a facility for pre-action resolution. Discovery would need to be exchanged in advance so that it can be an informed meeting. Both parties would need to be confident that all assets had been disclosed. It might not, therefore, be a suitable process for more complex cases, where expert evidence (in terms of accountants, etc.) would need to be obtained or where there was an evident lack of cooperation in the discovery process.

9.20 Logistically, it could throw up problems. In what format is the raw material presented before the Master? This could be solved by the filing of a document similar to a court issues paper. Would the Master deal with all matters, including relating to children? Much would depend on what had been agreed between the parties in this regard.

9.21 Parties would also need to be given firm guidance on the resolution of ancillary relief issues pre-proceedings and the consequences of settling a case when a *decree absolute* is not on the horizon at that stage.

9.22 The introduction of a similar system to that in New Zealand, as refined by our own courts, would probably require legislative change similar to that enacted in that country.

Concurrent issue

9.23 As a substitute for this, a practice has developed whereby a summons and affidavit seeking ancillary relief will issue at the same time as the divorce petition is issued and efforts will be made to resolve the case up until or at the FDR hearing. Any agreement reached will be made an order of court after the *decree nisi* has issued.

The existing website

9.24 Turning to the process for ancillary relief itself, the current website which produces guidance and checklists needs to be revisited (see paragraph 8.15) in this

context to make it less of a fact sheet and more of a question and answer approach so that the user can identify what they want.

9.25 Naturally, a balance needs to be struck between providing online assistance about the processes and at the same time making it clear that the court and the staff do not act in place of a lawyer, do not give legal advice, do not address matters which ordinarily be attended to by a legal adviser and do not engage in trial by correspondence. Nonetheless, the establishment of an efficient, user friendly on-line information hub and centre to give information and support for couples to help them resolve issues during the process is needed. Such an information centre would of necessity refer to the advisability of legal advice in considering appropriate settlement terms, especially where an issue requiring expert advice (such as actuarial advice on pension adjustment) surfaces.

Online steps

9.26 There is clearly a need to employ and invest in technology to enable online issue of all applications for ancillary relief. For example, the Land Registry facilitates online applications. There is no reason why this cannot be done in the family division. As an incentive for practitioners utilising this service, the fees for online applications should be cheaper than those made by post as in the case of the Land Registry. Considerable training was made available to practitioners to encourage them to utilise this service and the same would apply to the Law Society in this case. Consideration might also be given to pre-recorded telephone replies to standard questions about procedures.

9.27 Similarly, payment for the lodgement of papers could be made using the solicitors' ICOS account system, which is already in place.

9.28 Core issue documents now filed in hard copy could instead be filed and shared using an electronic mail system, which might enable a more timely receipt of the document.

9.29 Orders and corrected orders might also be issued online, provided there is a secure electronic mail system. Such a system should also provide access to the barristers involved in order to check such orders.

9.30 All of this would require amendment of the Family Proceedings Rules (Northern Ireland) 1996 to allow for online issue of ancillary and relief proceedings. Once again, the NICTS would have to promote the use of the online information hub and centre to assist service users.

Online service

9.31 Technology should also be invoked in the question of service. There is no need for exclusive reliance, as is currently the case, on personal service or service by

post. There should be amendment to the court rules to permit service by email. We recognise service of proceedings electronically could present difficulties given the confidential nature of the application itself. The respondent's email address may be defunct, not checked, accessed by third parties or be subject to corruption. Careful consideration would need to be given to this. However, it would be particularly helpful if the other involved parties were already represented by a solicitor, in which case there is usually no issue regarding service. The facility for electronic service, whilst retaining the option of service by post, should be introduced. There could also be a requirement that a respondent who had been served with ancillary relief proceedings by post would file an affidavit on line within a specified timeframe. The rules would have to be amended to provide for proof of electronic service.

Online issue

9.32 We also consider that the NICTS should invest in technology to enable the online issue of all ancillary relief proceedings. This would require amendment of the court rules to allow for the online issue of ancillary proceedings. A more complicated issue arises in considering the establishment of a streamlined system for simple and standard cases. The suggestion of a pre-proceedings meeting or assessment for mediation would go a long way to resolving simple standard cases and reduce the delay. However, we do not support compulsory mediation in ancillary relief cases. This is in keeping with the conclusion of the Scottish Civil Law Review[28].

The affidavit of means and assets

a) Maintenance pending suit

9.33 However, once the proceedings are issued, consideration has to be given to the fact that ancillary relief applications are supported by an affidavit of means and assets supported by an affidavit of the responding party's means and assets. A separate summons and affidavit can, of course, be issued seeking maintenance pending suit, although we encourage the current trend to issue maintenance pending suit and AR proceedings in one summons where sufficient material is available. The parties or their legal representatives attend a first directions hearing when directions are made setting out the time for filing any further or outstanding affidavits, and for the parties to file outstanding discovery including valuations, etc.

9.34 The maintenance pending suit application can be subject to abuse in that it can be used to seek maintenance when there is no interim hardship and there are sufficient assets to provide for both parties. Although there is provision for maintenance pending suit cases to be determined following oral submissions, a practice has developed where there have been affidavits and discovery requests in a separate hearing which, in effect, can represent a duplication of the process and, rather than alleviate hardship, can increase acrimony.

[28] Report of the Scottish Court Civil Justice Review, Chapter 7 paragraph 24 page 171.

9.35 At this stage, some applications travel in hope rather than contemplating from the outset the actual assets and income in dispute. Some affidavits contain matters and allegations which are unhelpful and are irrelevant. This can result in an already injured or embittered party having an unrealistic expectation. Training for the professions and the judiciary on the existing guidance and the need to regulate content of affidavits would be helpful to obviate the current abuses.

9.36 It is our experience that cases are listed for FDR hearing before they are ready. Often, this will be a consequence of trying to work towards an early FDR date, which of course is to be welcomed in order to reduce delay but if the FDR date is not used, it can mean that an opportunity for FDR is wasted.

9.37 Moreover, applications for injunctions are often made to the judge in relation to cases being dealt with by the Master. We consider that strong consideration should be given to increasing the power of Masters and district judges to grant injunctions in order to streamline the process and reduce delay.

9.38 It seems to us that, where possible, parties should be encouraged to address any interim hardship issues to enable a potential maintenance pending suit application to be considered alongside the ancillary relief application itself. Maintenance pending suits should be adjudicated upon following submissions and oral evidence should only be heard at that stage if deemed necessary by the Master.

b) The ancillary relief affidavit

9.39 A Practice Direction should issue indicating that the ancillary relief grounding affidavit should be filed within an accompanying A4 page which gives the following "at a glance" detail:

(a) the length of the marriage;

(b) the length of the separation;

(c) the ages of any children;

(d) any other dependants;

(e) the ages of the parties;

(f) whether any of the parties or the children have a disability;

(g) any previous court orders;

(h) the occupations of the parties and last known income, where appropriate;

(i) the principal assets;

(j) the nature of any assets required to be valued by independent experts;

(k) the nature of estimated attendant borrowings;

(l) the area of expertise of any expert who might be required;

(m) whether there are any pensions and the likelihood of a pension report being required from an actuary;

(n) if any agreement has been sought/reached in relation to valuers/experts/valuations;

(o) whether there are any "special" considerations;

(p) issues which are anticipated as likely to require some time; and

(q) issues which are likely to require further clarification.

9.40 Such a template, if it becomes the norm, will result in a more effective timetabling of the case and give focus to the application. The responding affidavit should, of course, be accompanied by a similar form.

Timetabling and sanctions

9.41 We should abandon the conventional approach of unquestioning tolerance of breach of timetables set by the court, especially in the case of disclosure. Such disclosure timetables should be enforced by a greater use of cost penalties albeit, of course, there should be flexibility for good reason. We strongly recommend a stricter adherence to timetables, the breach of which is a substantial cause of delay.

Reserve lists

9.42 Reserve lists for FDR should be introduced. Lists of cases operate in every other division. Core issues are directed to be filed at least one week in advance. In practice, they are often filed closer to the FDR date itself. This is another area where unquestioning tolerance should be abandoned. If a standby FDR system was introduced, then where core issue statements were not filed 7 days in advance, they could be overtaken by a stand-by case where core issues had been filed 7 days in advance. This would mean that FDR hearing time allocations are not squandered.

9.43 At present, where core issues cannot be filed in a timely manner as an important piece of discovery is not available until the FDR hearing date, parties are encouraged to attend court to negotiate, with the assistance of the court where

appropriate, and the system operates with some success. It is proposed that this system should be continued.

Online technology for applications

9.44 The use of online technology to allow for the filing of applications, questionnaires, statements of core issues and agreed adjournment applications should all be implemented.

Discovery

9.45 A more difficult issue arises in relation to all discoverable documentation. Currently, this has to be disclosed in hard copy. The argument is that given its sensitive nature and the fact of the practical benefits of easy access to a hard copy, which is not usually so voluminous as to represent a saving by filing online, the current situation should remain unaltered in this regard only.

9.46 However, with the increasing importance of security in online applications and documentation, we recommend that use of online discovery should be explored with the appropriate server to guarantee that there can be security of such documentation and, if so, we see no reason why there should not be another step towards the paperless court concept.

Adjudication of Ancillary Relief Applications

9.47 The system of reviews culminating in a hearing before the Master carries out FDR as an integral part of that system. It embraces a procedure for transfer to the judge in certain circumstances with the right of appeal from the Master.

9.48 Ancillary relief is a complex and specialist area of private family law that requires knowledge and application of statute and case law and full disclosure of income and assets by the parties. A standardised "one size fits all" approach is not appropriate. Affidavit evidence should be preserved to ensure that the solemnity and gravity of what is being revealed is maintained.

9.49 Naturally, we do not close our mind to the possibility of online dispute resolution along the lines of the Rechtwijzer system (see paragraph 4.5), where parties opt to demand this on consent. Indeed, to date the system has processed 900 cases, of which 300 have been successfully completed. However, the danger is that in a complex area such as this, a little knowledge can be a dangerous thing and there is concern that one party or other will be misled through ignorance or otherwise into an incautious and binding arrangement.

9.50 We consider that the Rechtwijzer system with on-line dispute resolution in ancillary relief cases has been in being for perhaps too short a time to allow yet for full analysis and assessment. It may prove a breakthrough but we consider it is something that should be reviewed with the passage of time by, for example, the

Family Justice Board[29] when a more reasoned analysis can be made by those in Northern Ireland. At the moment, we err on the side of caution and take the view that the oral hearing of ancillary relief applications should continue.

Valuations in ancillary relief

9.51 Currently, guidance from the Master encourages joint valuations. In most cases, joint valuers are instructed. Practitioners will know that often in cases where separate valuers are appointed, different valuations (sometimes depending on which party seeks to retain a particular property) simply add another layer of costs. Valuers will be then encouraged to meet to try to address their differences and, as a last resort, a Valuation hearing will take place.

9.52 In those cases, it may be useful for the Master or judge to have power to refer the matter to the Lands Tribunal, particularly in higher value cases where the Lands Tribunal's experience and expertise can be utilized.

9.53 Such a referral may potentially cause a delay in the resolution of the case and may dilute the benefit in having the entire case before the one ancillary relief court. On the other hand, valuations can be extremely complex issues for the uninitiated and, once the valuation matter is resolved, the court can quickly move on to clarify which outstanding matters require resolution. For that reason, we consider that the power of referral, to be used sparingly, should be introduced.

Recommendations

1. A Practice Direction making available a mechanism for parties to attend with legal representatives, or alone if unrepresented, before the Master before proceedings have been issued. **[FJ47]**

2. Online filing of questionnaires, statements of core issues, adjournment applications, skeleton arguments and, provided proper assurance about security is obtained, discoverable documentation. **[FJ48]**

3. All applications for ancillary relief to be made on-line. **[FJ49]**

4. Payment for lodgement of papers using solicitors' ICOS account system. **[FJ50]**

5. Orders/Amended orders issued online. **[FJ51]**

6. Service of documents to be permitted by email as an option. The option of service by post should remain. **[FJ52]**

7. Option of serving affidavit evidence online. **[FJ53]**

[29] See Chapter 20.

8. Amendment of the Family Proceedings Rules (Northern Ireland) 1996 (FPR) to allow for such online steps. **[FJ54]**

9. A system whereby the parties should be encouraged to address interim hardship issues for maintenance pending suit alongside the ancillary relief application. **[FJ55]**

10. Maintenance pending suit applications to be adjudicated following written submissions. Oral evidence only to be heard at that stage if deemed necessary by the district judge or Master. **[FJ56]**

11. Legislation to be introduced to empower the court to provide for a sale of property in isolation at any stage of the proceedings without hearing the whole case. **[FJ57]**

12. Affidavits in ancillary relief to follow the format set out in paragraph 9.39 above. **[FJ58]**

13. Directions and timetabling, especially in relation to discovery to be enforced by a greater use of cost penalties. **[FJ59]**

14. The implementation of reserve lists for family dispute resolution. **[FJ60]**

15. Penal notices to be attached to court orders (save where the judge or Master deems it unnecessary or inappropriate) with the specified provision of clearer consequences, including costs, interest, immediate property sale, transfer of assets, access to/injunction of bank accounts to secure implementation and immediate referral to the judge to address the issue of contempt. This provision could also serve to invoke FPR rule 2.64 (5) ordering discovery and information from third parties and, therefore, a warning to such third parties may also be included. **[FJ61]**

16. A protocol requiring the offending parties to notify the other as soon as they are aware that they will be unable to perfect the court order. **[FJ62]**

17. The oral hearing of ancillary relief applications to continue pending further consideration of the Rechtwijzer system. **[FJ63]**

18. The power of referral of valuation matters to the Lands Tribunal. **[FJ64]**

19. In the arena of ancillary relief, early neutral evaluation to be encouraged by the professions. It would lead to a different Master hearing the case if the matter were not to resolve. Minutiae such as what documentation or raw material would be available for such early evaluation (for example, a statement of core issues) would also have to be contemplated. **[FJ65]**

CHAPTER 10

THE PUBLIC LAW SYSTEM

Current Position

10.1 In Northern Ireland, responsibility for the well-being and care of 'looked after' children and young people is vested in the Department of Health (DoH), which delegates this responsibility to the Health and Social Care Board (HSCB). The HSCB in turn delegates this responsibility to the five health and social care trusts (the trusts).

10.2 Under Article 50 of *The Children (Northern Ireland) Order 1995,* a child can be placed in the care of the state if a court concludes that the child is suffering, or likely to suffer, 'significant harm' as a result of 'the care given to the child … not being what it would be reasonable to expect a parent to give' or the child being 'beyond parental control'. Compulsory measures of care or supervision lead to the state assuming parental responsibility for the child through the local trust.

Current statistics for children in care

10.3 The majority of children requiring alternative care are accommodated by family members or foster carers. Of the 2,875 children in care on 31 March 2015, 76% were in foster care, 41% in kinship foster care with relatives or friends and 35% in non-kinship foster care[30]. The proportion in residential care was just 7% (ibid, p31). On 30 June 2015, Northern Ireland had 49 residential children's homes - 41 were statutory (that is, managed by the five trusts), with 8 owned and managed by the independent sector. Some residential children's homes provide short term care, some deliver long term care, some provide specialist care for young people needing intensive support, while others offer respite care to children with disabilities. One is registered to provide secure accommodation.

10.4 12% of children were placed with a parent and 5% in an 'other' type of placement[31]. 'Other' placements have been described as including independent living, the Juvenile Justice Centre, an assessment centre, a community placement or a boarding school[32].

10.5 Almost 2,500 children were in care in Northern Ireland in 2003. 11% of children in care in Northern Ireland achieved five GCSEs compared to 59% of all children in 2003. Over 50% of care leavers left school with no educational qualifications compared to 5% for all school children. A high proportion of children in care have diagnosable mental health conditions or disorders. More recent figures

[30] DoH, 2015a, p37-38
[31] DoH, 2015a, p31
[32] DoH, 2014, p36

contained in "Children in Care in NI, 2013-14" reveal that 29% of Looked After Children achieved five GCSEs compared to 82% of all children in Northern Ireland in the same year.

10.6 Fewer than 1% of all children in England are in care[33], but looked after children make up 33% of boys and 61% of girls in custody[34].

10.7 The ex-Prime Minister recently reported that one in four prisoners have been in care, along with a shocking 70% of Britain's sex workers. And a third even become homeless in the two years immediately after they leave care.

10.8 The costs of foster care alone for children in Northern Ireland are extremely high.

> *'All foster carers receive a weekly fostering allowance which is designed to cover the cost of caring for a fostered child. This includes food, clothes, toiletries, travel and all other expenses incurred in looking after a fostered child. Fee payments may be made on top of allowances to recognise a foster carer's time, skills and experience. While all foster carers receive an allowance, there is no requirement for fee payments to be made.*
>
> *Allowances are set at local level and vary widely across the UK, and according to the age and needs of a child, but in England, Northern Ireland and Wales, foster carers should receive at least the national recommended rates.'*

Foster Care Allowances in Northern Ireland - From 1 April 2015

Age group	Per week	Per four weeks	Per annum
0 - 4	£121.51	£486.04	£6318.52
5 - 10	£134.26	£537.04	£6981.52
11 - 15	£154.55	£618.20	£8036.60
16+	£179.02	£716.08	£9309.04

10.9 These allowances include provision for food (including school meals), household costs (heating, electricity, general wear and tear), clothing and footwear, pocket money and travel costs. These figures are subject to change. Foster/kinship carers are free to spend the allowance on food, household and travel expenses as they feel benefit the child most. In addition, carers receive additional payments for other essential items for birthdays and Christmas.

[33] Department for Education (2013) Children looked after in England year ending 31 March 2013, London: DoE, Stats Wales website, and Office for National Statistics (2013) Population Estimates Total Persons for England and Wales and Regions - Mid-1971 to Mid-2012, London: ONS

[34] Kennedy, E. (2013) Children and Young People in Custody 2012–13, London: HM Inspectorate of Prisons and Youth Justice Board

10.10 In addition, there is an array of additional costs for children in care including the costs of health conditions, high welfare benefits instead of income tax from employment, etc.

10.11 We have not yet been able to ascertain the cost of care in Northern Ireland and whilst we have costs of care for children in England, following a report from the National Audit Office and the Department of Education on 27 November 2014, we recognise that the costs in England may be very different to those in Northern Ireland. Nonetheless, the scale of the costs is indicative of the need to venture down other avenues to avoid, where possible, children being taken into care.

10.12 There must be a better way to deal with children. There were 68,110 children in care in March 2013 in England and Wales with £2.5 billion spent supporting children in foster and residential care. 62% of those children in care were there because of abuse and neglect. The cost of fostering services for 2012/2013 was £1.5 billion and the cost of residential care for the same period was £1 billion. £29,000/£33,000 was the average annual spend on a foster place for a child and £131,000/£135,000 on average was spent on a residential place for a child.

10.13 This emphasises the need to look at alternative means of attempting to ensure that children can remain with their natural families and receive specialised help to do so. Careful analysis of possible court models need to be conducted. There should be an element of cherry picking to benefit from the experience of the English courts and fit it within our system.

10.14 Elsewhere the final report of the Child Care Law Reporting project in the Republic of Ireland 2015 analysed over 12,000 cases and found that over a quarter of all families in care proceedings involved an immigrant parent, that mental health and cognitive disabilities are common among parents involved in such cases, and that one in three children in care cases had special needs.

10.15 Whilst we recognise - and indeed salute - the tireless commitment and utter professionalism of those engaged in the care system, these troubling figures reveal the deep set problems of children in care, which are not materially abating with the passage of time, and demand that we review in depth the system that places children in care.

The current process

10.16 A key problem in the current legal process is that the judge, particularly at Family Proceedings Court (FPC) level, often does not have sufficient information and/or the time to read and prepare the case to ensure an effective first directions hearing, which involves the identification of issues, evidence and options.

10.17 Often counsel receive instructions a very short time before the first directions hearings, which means that there is insufficient time for effective preparation. This may not be due to the legal aid system, where the Chief Executive of the Legal Services Agency (LSA) informs us that 95% of cases are processed and granted within three days and 99% within eight days of the applications.

10.18 Court lists do not permit effective case management because there is insufficient time to allow the judge to be fully engaged in the process.

10.19 Currently, the court is asked to determine *all* issues of disagreement in the course of proceedings. This leads to multiple hearings in the course of one case, which in turn increases the length of proceedings, and adds to the cost to the public purse.

10.20 As we noted in Chapter 5, the current transfer system from FPC and the Family Care Centre (FCC) to higher courts causes delay in progressing cases. Whilst it was envisaged that allocation to the appropriate tier would be based on complexity or public interest considerations, factors such as judicial resources and workload are often determinative of the issue. Decisions on allocation are inconsistent and cases are often transferred many months after proceedings have commenced. This causes delay, as the new judge cannot effectively progress the case until he or she has considered all of the material, which by that stage is often voluminous.

10.21 The present legal aid arrangements can lead to a situation where an inappropriate level of representation may be granted when proceedings are commenced. This means that inexperienced lawyers may not be able to identify the issues correctly at the earliest stage. We immediately recognise that this is an area of complexity because it can be very difficult to determine at an early stage what level of legal representation is required.

10.22 Since changes to the legal aid scheme were introduced in April 2015, the LSA has confirmed that only 1% of cases in the FPC are certified for counsel. Concern has been raised about the certification criteria. The lack of certification for specialist family barristers is likely to lead to delay in identifying the core issues, late transfer of cases to the appropriate tier and a higher incidence of appeals. These are factors which lead to delay in resolving the child's situation. The legal complexity of many family law cases is rooted in the factual matrix, and the expertise that the family Bar contributes is recognised by the judiciary as an important factor in resolving cases expeditiously.

10.23 As we highlighted in Chapter 6, there is a need for greater access to training for family judges, which should include rigorous case management and workload management. There has been perhaps a failure to recognise that this is an area that demands acquired expertise and training. The provision of judicial training for family judges would achieve greater consistency in approach and encourage judges to adopt new and effective work practices.

10.24 There is an inconsistent use of the Public Law Outline between court tiers regionally.

10.25 The lack of training and support generally within the family judiciary, has led to isolated judges struggling to deal with increased workloads with inadequate administrative assistance.

10.26 We consider elsewhere in this report[35] the need for a dedicated court with expertise in dealing with parents struggling with addiction. This represents an opportunity to embrace innovative methods of achieving reunification of families.

10.27 There is unacceptable delay in determining appeals, particularly in the High Court, albeit this is a matter that is currently being addressed. It was not uncommon for appeals to be heard many months after the initial judicial decision. This fails to take account of the timetable for the child and the effect of uncertainty on the child's welfare.

10.28 The delay in determining cases involving allegations of non-accidental injury (NAI) at all judicial tiers has caused particular injustice because a child may be removed from the care of her parents in circumstances where parental care may prove to have been faultless.

10.29 The PSNI regularly fails to adhere to the protocol for the provision of relevant documentation in NAI cases. These cases are often delayed because of a failure on the part of PSNI, either to provide relevant information, or to progress the investigation.

10.30 There is no reliable management information available to the judiciary to enable informed decisions to be made about workload, or to identify the causes of delay as cases are progressing through the system.

10.31 There is no dedicated family judicial leadership role at FPC or FCC level with a direct link to the senior Family Judge, to ensure that problems are quickly identified and resolved throughout the system.

10.32 The failure of trusts to undertake parallel planning, and to progress kinship viability and other assessments at an early stage, has been a significant cause of delay in effective case management. There is no consistency between trusts regarding practice and procedure. Even when the court has deemed an assessment necessary, some trusts require authorisation from a resource panel before putting arrangements in place, and some FCCs will not undertake an assessment in the absence of a psychological assessment(s) of the parents. Such an assessment is likely to require legal aid approval, which builds in an extra layer of delay.

10.33 Social workers and guardians often attend hearings unnecessarily, thus reducing their effectiveness in child protection. The time spent travelling to and from court, and waiting for cases to be dealt with, means that valuable resources are lost. Social workers need time and space to do social work. If social workers and guardians are to improve the quality of analysis on which the court depends, and thereby reduce the number of time consuming and expensive experts' reports, there needs to be a significant change of culture.

10.34 Court staff are often required to draft complex court orders. While it is usual for legal representatives to provide a draft of proposed directions, they may need

[35] See Chapter 12.

substantial amendment in light of the case management discussion. This places an unfair burden on staff and increases the possibility of error. The Family Court Office in Belfast reports that 95% of orders are drafted by clerical staff with no legal qualifications (albeit checked by office managers) and a similar situation exists in the FCC and FPC. However, this does have the advantage that orders are issued within five days and on the same day in emergency cases (for example, under arts. 4 or 56 of the Children Order).

10.35 Social workers and guardians are not able to access ICOS in order to download court orders. It is understood that currently only members of the legal profession can do so, if appropriately trained.

10.36 The expectations of the judiciary and the legal profession are not sufficiently appreciated by the social work profession. This has led to a lowering of morale amongst social workers, which is undesirable.

10.37 The Children's Order Advisory Committee (COAC) is widely regarded as somewhat cumbersome, less effective than it should be and arguably conceptually outdated.

Discussion

Case Management

10.38 Effective case management is directly linked to the information contained in the initial trust application and throughout the proceedings. It is also directly linked to the availability of appropriate levels of legal representation at the outset of proceedings. Unless the judge is *enabled* to identify the key issues to be resolved, effective case management is impossible. A new listing policy designed to ensure that judges have time to read essential information, and identify the issues, the evidence and the options at the earliest stage, must be based on the premise that *all* relevant assessments will be completed before proceedings are commenced, save in an emergency.

10.39 It should be expected that legal representatives will have been instructed, and legal aid granted, in sufficient time to allow a proper consideration of the issues *in advance of* the first directions hearing. A rigorous focus on the quality of evidence and analysis should result in the requirement for fewer court hearings. The savings for trusts in legal costs and the costs of professionals spending time unnecessarily attending court should mean resources are available for faster and better assessments, which in turn should reduce the number of expert reports required.

10.40 There needs to be a change in culture, so that the judge decides what issues are *key* to resolving the child's situation and the evidence which is needed to achieve that. Currently, valuable court time, which is a finite resource, is spent resolving marginal disputes by way of C2 applications. This causes delay in finalising cases, which is the priority.

10.41 The current transfer arrangements have been identified as a major cause of delay. As we set have out in more detail in Chapter 5 of this Report, we are strongly in favour of the abolition of the FPC and FCC and the creation of a single family court with the jurisdiction of the High Court preserved. Decisions on allocations will be based on the most appropriate judge available for the case, taking into account deployment of information and guidance relating to complexity. It will end the current delay endemic in a system, where belatedly one tier decides to transfer a case to another tier long after it has first been processed and dealt with.

10.42 The level of legal representation should be directly linked to the complexity of the issues instead of the tier of judge who is allocated to hear the case. This would represent an acknowledgement of the current artificiality of the allocation process, and would also allow for the most appropriate deployment of judicial resources.

10.43 The unnecessary attendance of professionals at review and directions hearings is due to a failure to take instructions in advance, and also because those involved in the case often wish to be present. There is an obvious solution to this problem, namely in the form of technology. Video link facilities, telephonic links or Skype should be available at social service and Guardian Ad Litem Northern Ireland (NIGALA) premises, so that those who wish to hear the representations, or indeed to give evidence, can do so in a way that least impacts on their professional effectiveness. This would ensure that valuable, professional time is spent in the primary child protection role.

10.44 Legal representatives should also be able to avail of technology so that their professional time is used appropriately. Video link, telephonic links and Skype need again to be available, although it is understood that there are concerns surrounding secure communication with Skype. There is also a professional conduct matter regarding the appropriateness of direct communication between the Bar and other professionals for the purposes of taking instructions, in the absence of a solicitor. Whilst this may avoid the necessity of a social worker or guardian attending court, there may be other issues which will need further consideration but are clearly not insoluble.

10.45 Regarding technology generally, it should not be forgotten that justice must take place in public, and technology must ensure consistency with this principle. This is particularly important within the family justice system, where public confidence requires transparency and accountability. What we should seek to achieve by technology is increased access to justice, due process and the right to be heard in a reasonable time. It is, of course, possible to achieve this by hearings in public, whereby parties give evidence or make representations by video link, telephone conferencing, Skype or other means.

10.46 There is an important caveat: experience has taught us that technology works well if it is of an appropriate quality and, sadly, that is often not the case within the current court system.

10.47 Clearly, however, there is enormous scope for digital improvements in court documentation, particularly during the pre-trial process. Cases should be capable of being filed online and, as the cases progresses, documents should be added online. The current voluminous court bundles are labour intensive, and inefficient to access. Consideration should be given to e-filing, virtual bundles, accessible to all, with a standard index which all parties can add to as the case progresses. We deal with the concept of the paperless court in more detail in Chapter 14.

Court orders

10.48 After each hearing, at least in the High Court and FCC (or the new one tier system recommended previously[36]), the legal representative for the applicant should be responsible for e-mailing an agreed interim court order to the judge for approval, and onward transmission to the clerk. This would reduce the burden on staff and eliminate the possibility of error. Currently in the FCC and High Court, counsel and/or solicitors for the applicant, including the Directorate of Legal Services, do draft interim court orders for anything more complicated than simple adjournments. Representatives for the Directorate of Legal Services (who most frequently appear for applicants in public law proceedings) have indicated a wish to record that the Directorate do not agree with this proposal, specifically in relation to the FPC, where the volume is a major problem as this has traditionally been the role of the court clerk.

Judicial Training and Leadership

10.49 Judges need to be trained in proactive case management. Training should focus on leadership skills to ensure an inquisitorial rather than an adversarial approach, whilst engaging collaboratively with the parties and other professionals. A formal communication and JSB training structure should be developed for family judges, and a collegiate approach should be encouraged to provide support and encouragement.

10.50 Family court judges at all levels, whilst meeting together on disparate occasions, lack a total family justice immersion conference to discuss detailed topics relevant to family justice, such as the voice of the child or the approach to personal litigants. In England, the President's Conference convenes once per year when all the family judges get together for a meeting at Highgate. Without exception, every family judge in England to whom we have spoken has found this invaluable.

10.51 The concept of "away days", where family judges convene jointly at a venue outside the courts to debate and discuss current issues, is vital and is followed in most other jurisdictions. The isolation of family judges needs to be addressed urgently. One solution might be to have dedicated family hearing centres – for example, three in total where judges at all tiers can work together and informally share ideas and difficulties (see also Chapter 5 on this development in a single tier system).

[36] See Chapter 5.

Appeals

10.52 The delay in hearing appeals is a major cause for concern. All appeals should be fast-tracked and determined within a strict time period. It may be appropriate to allocate specific responsibility for appeals to a particular judge or judges, so that appeals do not interfere with cases already listed. The LSA should also fast-track legal aid decisions in appeals. The Court of Appeal has a system whereby every family justice appeal is brought to the attention of the Lord Chief Justice upon it reaching the Court Office and is listed for review and date fixing within seven days. A similar system should be developed in the lower courts.

Judgments

10.53 All written judicial decisions in public law cases at each tier should be published to ensure transparency and accountability. Where a written judgement is not available, a transcript of the decision and the reasons should be made available, which can be understood by those not directly connected with the case. In this way, public confidence in the family justice system can be maintained. Identifying information should obviously be redacted. Clearly, if this objective is to be achieved, judges at all tiers need time for judgment writing, which currently is not made available.

10.54 In Chapter 18 (Open Justice), we have referred to the implementation in this jurisdiction of the Practice Guidance issued on 16 January 2014 by Sir James Munby, the President of the Family Division, which was issued with the intention of bringing about an immediate change in practice in relation to the publication of judgments in family courts.

Family drug and alcohol court

10.55 Improving the chances for parents struggling with addiction needs a fresh approach. Consideration should be given to establishing a new Family Drug and Alcohol Court based on the English model as adverted to in Chapter 12 of this Review.

Non Accidental Injuries/Experts

10.56 The particular problems with delay in cases involving allegations of non-accidental injury must be addressed. This is a key area requiring expert evidence, yet the unavailability of suitably qualified experts is a major cause of concern. Consideration has been given to the recommendations of Sir Liam Donaldson, the Chief Medical Officer for England, in 2006, in his report, "*Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases*" and the responses to the public consultation which followed.

10.57 The main proposals were the establishment of multidisciplinary teams within NHS trusts to provide expert evidence to the family courts. It was envisaged that the NHS would be fully reimbursed for taking on this additional work by local authorities and the Legal Services Commission. Service contracts or service level

agreements would be entered into with local NHS providers, representing a public investment in the assurance that these services would be available without delay, and with the authority that courts require.

10.58 The vision was that individual solicitors would decide which NHS team they wanted to approach, depending on expertise. Each team would be led by a named medical consultant, who would take responsibility for co-ordinating the initial response to the instructions given and for ensuring that the appropriate health experts contributed to the report and were ready to give oral evidence on their aspect of the report.

10.59 The responses to the consultation identified a number of concerns with these proposals. As well as concerns about time constraints and possible conflict between a requirement to assist the courts and the team's clinical responsibilities, there was a fear that team working might lead to "*cosy consensus*" restricting scope for divergences of view or opinion. The possibility of junior team members adopting the views of the team leader was raised. On consideration, the recommendations are unlikely to solve the problem of expert availability whilst ensuring the necessary independence of opinion. The potential for miscarriages of justice in this type of case is particularly concerning and there must be no compromise in the quality of expert opinion obtained.

10.60 However, improvements in timescale could be achieved by particularly robust case management in these cases. They should be fast-tracked by the courts and trusts should be required to have all medical notes and records available when proceedings are lodged. It is not uncommon for notes and records of treating clinicians to be unavailable even a number of weeks after proceedings have commenced. Given that we have an integrated health and social care system in Northern Ireland, it should be relatively easy to put arrangements in place so that this problem (the timely availability of medical notes or records) can be resolved. This should ensure that the most appropriate experts are identified at the earliest stage.

10.61 The whole climate has changed regarding experts in Northern Ireland, with judges only permitting papers to be released where an expert is really necessary and it is expected that the issue of experts is addressed at the earliest possible stage. Hence, it is rare for more than one expert report to be allowed in any discipline. This is now so well established that there are hardly even any applications for a second expert. Thus a single expert is usually instructed.

10.62 The key is early identification of experts with sufficient information being provided to the court at the outset. The Care Proceedings Pilot is working on a new format for court reports as part of its remit.

10.63 Agreement on the identity of the expert can usually be achieved without much difficulty, and if there is disagreement the judge will decide which expert has

the most appropriate expertise; delay in providing a report is always a factor taken into account.

10.64 However, what frequently happens is that the parents will refuse to join in the instruction, not because they disagree with the choice of expert, but on the basis that they want to "keep their powder dry" in the event that the expert's opinion is unfavourable.

10.65 Judges regularly make it clear that the fact that an expert's opinion is unfavourable is not a ground for allowing papers to be released to another expert, unless some factual error was apparent or the methodology was questionable.

10.66 Led by Mr Justice O'Hara, the senior Family Judge, along with the other judges at different tiers, consideration is being given to looking more closely at limiting the volume of documentation which is forwarded to experts and the number and range of questions which they are instructed to answer. All of this is aimed at focusing and reducing their work and, therefore, the delay and cost involved in engaging them. This is an issue of particular importance in family cases in which it is virtually inevitable that the reports will be publicly rather than privately funded.

10.67 Close scrutiny is also currently being given to the length and format of social work reports to try to reduce duplication. In particular, we are looking at Understanding the Needs of Children in Northern Ireland (UNOCINI) reports which were intended to contain all relevant issues but which are often quite impenetrable. Anecdotally, it has emerged that social workers find completing them cumbersome, time consuming and wasteful of resources. Meetings between some of the judges at different levels and the principal practitioners from each trust are soon to occur to address some of these points and to discuss a fresh format.

10.68 The senior Family Judge has also indicated the introduction of a limit on the length of expert reports, which as a matter of routine can often exceed 100 pages. The limit will be 50 pages (which is still arguably excessive) unless there are exceptional circumstances. This echoes the approach adopted by Munby LJ in England and Wales.

10.69 The system for remunerating experts from the public purse is unnecessarily bureaucratic, lacks transparency and is a significant cause of delay. Consequently, the small pool of available experts has diminished further, with experts unwilling to undertake publicly funded work, to the detriment of parents in particular. The judiciary has already made specific recommendations for reform of the legal aid system as part of the public consultation on the use of expert witnesses. We favour a system of accreditation of experts with the LSA – accredited, for example, with the professional academy of experts - together with the implementation of regulations similar to those that exist in England fixing an hourly rate (which must be struck at a comparable level to the rates paid by the trusts to avoid allegations of second rate

experts for non-trust experts) and standard number of hours. This would serve to avoid in most instances the present system whereby the LSA demands the time consuming exercise of requiring three quotations before authorising the choice of expert.

Multidisciplinary Training

10.70 It is essential that consideration is given to a structured, multi-disciplinary approach to training for the judiciary, social workers and the legal professions. Judges need to be kept informed of peer-reviewed and accepted research into outcomes for children to ensure good judicial practice. Social workers and guardians need to have the confidence to come to court and explain the analysis on which their recommendations are based. A specific training program for social workers in particular, which involves court practice and the involvement of the legal profession and the judiciary, may help to break down barriers and create better mutual understanding. This may also raise the morale of the social work profession, and ensure a more effective justice system.

Accreditation

10.71 The law relating to children is a specialised area requiring special skills. The direction of travel must be towards more specialisation and expertise in the representation they receive. It occurs in other aspects of the law. Thus, for example, there is a requirement that a solicitor who undertakes a conveyancing transaction in a calendar year, for monetary consideration or not, must devote three of the requisite 10 hours group study CPD to conveyancing courses. Every solicitor must certify each year that they have or have not undertaken a conveyancing transaction. *The Legal Complaints and Regulation Act (Northern Ireland) 2016* recognises this development. We recommend that the Law Society introduce a compulsory accreditation system for those solicitors accepting instructions in cases under the Children Order. There is currently an approved list held by the Law Society for practitioners taking on such cases but inclusion on this list is not an obligatory requirement for accepting such instructions. This should change as soon as possible. Equally so, there should be accreditation for members of the Bar in such cases. Appropriate steps should be taken by the Bar in advance of the implementation of the provisions of the Act to set up a system of accreditation in such cases.

Freeing for Adoption

10.72 Freeing for Adoption is an area that requires special consideration. The current positon is that one of the proofs in a freeing for adoption application is that there is a likely placement within a year of such an order. This is for placement only and not that the child has to be adopted within the year.

10.73 Art. 19 (1) of *The Adoption (Northern Ireland) Order 1987* requires the trust to notify the former parent "within 14 days following the date 12 months after the

making of the order freeing the child for adoption" if an adoption order has been made or if the child has been placed for adoption. Birth parents can opt out of this notification if they declare that they prefer not to be involved in future questions regarding the adoption of the child.

10.74 It then rests with the prospective adopters to apply for the adoption order. Usually, this is the first and only time they are parties to any application regarding the child. The trust can place the child within a year but cannot force the prospective adopters to make their application.

10.75 The current system works tolerably well in the majority of cases. However, occasionally difficulties arise. Sometimes these are due to the children who are hard to place either through their age or complex needs or there are significant developments in the prospective adopters' lives.

10.76 Improved procedures are required to minimise drift in these difficult cases.

10.77 One suggestion is to maintain the presence of the Guardian Ad Litem (GAL) in the case from freeing to adoption.

10.78 A less expensive option is to set up a measure of formal notification from the trust to the court one year and 14 days after the freeing order is granted, either in addition to or replacing the current requirement to notify birth parents.

10.79 This could take the form of a copy of the notification to the birth parents (if that requirement remains) and/or a "progress report" for the Court. The judge then could make appropriate directions for each individual case on a case by case basis, including requesting more detailed information, re-appointing the GAL, joining the birth parents and/or prospective adopters and holding a formal review. The court could timetable for an early revocation of the freeing in appropriate cases. This system would have the advantage of giving some formal mechanism for the children whose birth parents have opted not to receive any further details.

10.80 Practically, the Trusts might agree to do this voluntarily and, if so, it could quickly get up and running.

10.81 Legislative change will be required for implementation.

Time Limits

10.82 We mention one final discrete area. The Care Proceedings Pilot is looking at the question of statutory time limits for care proceedings.

10.83 There is a 26 week limit introduced in England for Care Proceedings - enshrined in s.14 of *The Children and Families Act 2014*, which amends s.32 of *The Children Act 1989*. This applies to all cases. If it becomes apparent that there is a

possibility that the case may exceed 26 weeks, all parties are under an obligation to apply to the court to ask for an extension of the time limit. Extensions have to be strongly justified - it has to be a complex case and/or the interests of justice must require the extension to be granted. It is not an easy application to make. The court may only grant extensions of up to eight weeks at a time. A further extension requires a further application to the court and further justification. Even if it is apparent at the hearing of the first extension request application that the matter will require more than eight weeks to be ready for final hearing, the court can still only grant an eight week extension but there is discretion to then deal with the further extension application as a paper/administrative exercise. There is case law which confirms that "justice must never be sacrificed at the altar of speed" and sets out examples (from the President) of circumstances in which it will be appropriate to grant extensions albeit this is not an exhaustive list.[37]

10.84 Her Honour Judge Newton in Manchester family court informs us that she has found this time limit invaluable and it has transformed the position where very often there were cases taking 60 weeks or more. However a further problem arises with the delay in pre-proceedings. There is no control over what is happening here. She favours a limit of, perhaps, three months for pre-proceedings.

10.85 Regulations and Guidance in Scotland sets timescales for specific parts of the supervision, permanence order and adoption order processes. However, there is no overall time limit similar to that set in England. Currently there is no statutory time limit for care proceedings in place in the Republic of Ireland.

10.86 The issue of mandatory time limits for care proceedings had been discussed in Northern Ireland and two contrasting views have emerged, one in favour and the other strongly opposed. So as not to replicate the work being done by others, it was agreed that no decision or recommendation should be made until the Care Proceedings Pilot has finished and that COAC (or its replacement with a FJB) had been afforded a full opportunity to examine the outcomes and research carried out here in Norther Ireland.

Recommendations

Case Management

1. A new model for providing information to the court at initial application stage to be developed. **[FJ66]**

2. Judges to be given specific time to read essential documentation and prepare for each hearing. Case listing should make provision for this. **[FJ67]**

3. Court lists to reflect the need for in-depth case management, particularly at first directions stage. **[FJ68]**

[37] http://www.familylawweek.co.uk/site.aspx?i=ed127643
http://www.familylawweek.co.uk/site.aspx?i=ed129038

4. Judges to determine only the key issues which will affect the ultimate outcome of the case. Peripheral disagreements should be resolved between the parties without the intervention of the court wherever possible. **[FJ69]**

5. Social workers and guardians routinely to take part in directions and review hearings by video link, telephone or Skype. **[FJ70]**

6. Technology and virtual reality courts to be extended to appearances by legal representatives. **[FJ71]**

Court Orders

7. After each hearing in the High Court and Family Care Centres (or of the new one tier family court, if set up), the trust representative to e-mail an agreed court order to the judge for approval, and onwards transmission to the clerk. **[FJ72]**

8. Any order made by a family court to remain in force until the conclusion of the proceedings, or until further order. **[FJ73]**

Appeals

9. All appeals to be determined within 21 days of the initial decision, save in exceptional circumstances. Such circumstances do not include legal aid difficulties, unavailability of counsel, or unavailability of judicial resources. **[FJ74]**

Non Accidental Injuries

10. Cases involving alleged non-accidental injury to be fast-tracked at all stages. **[FJ75]**

11. Arrangements to be agreed between social services and the health and social care trusts to ensure the timely provision of medical information in non-accidental injury cases. **[FJ76]**

Judgments

12. All written judgments to be published to ensure transparency and public accountability, subject to appropriate steps regarding anonymisation. Steps need to be taken to ensure that there is a recording made of every court where family proceedings are heard so that, if necessary, at least a CD of the hearing can be made available upon reasonable request. **[FJ77]**

Judicial training and leadership

13. The Judicial Studies Board (JSB) to develop a dedicated family training team tasked with the delivery of on-going, quality training. Attendance at training events should be mandatory. **[FJ78]**

- A multi-disciplinary training team should be developed, resourced under the auspices of a new Family Justice Board[38].

- There should be a specific leadership role(s), with management responsibilities in a new family court, accountable to the High Court family judge.

- There should be regular meetings of all family judges arranged by the designated High Court Family Judge.

- The proposed management information system, which has been developed by the Northern Ireland judiciary, and modelled on the English CMS system, should be progressed by the Northern Ireland Courts & Tribunals Service (NICTS). This will inform those judges with management responsibilities regarding workload and the effectiveness of current practices, and will enable problems within the system to be quickly identified and resolved.

Experts

14. Trusts to be required to have all medical notes and records available when proceedings are lodged. This should ensure that the most appropriate experts are identified at the earliest stage. **[FJ79]**

15. Judges only to permit papers to be released where an expert is really necessary. Serious consideration must always be given as to whether more than one expert report is to be allowed in any discipline. **[FJ80]**

16. Judges to make it clear that the fact that an expert's opinion is unfavourable is not necessarily a ground for allowing papers to be released to another expert, unless some factual error was apparent or the methodology was questionable. **[FJ81]**

17. Limits to be placed on the volume of documentation which is forwarded to experts and the number and range of questions which they are instructed to answer. **[FJ82]**

18. Judges to be encouraged to place limits on the length of expert reports. **[FJ83]**

19. A new attitude to expert evidence to be implemented. **[FJ84]**

Accreditation

20. The Law Society to introduce a compulsory accreditation system for those solicitors accepting instructions in cases under *The Children Order (Northern Ireland) 1995*. Equally so, there should be accreditation for members of the Bar in this type of case. **[FJ85]**

[38] See Chapter 20.

21. The Legal Services Agency to set up a system of accredited experts with a scale set of fees. **[FJ86]**

Single Tier System (See Chapter 5)

22. The abolition of the FPC and FCC and the creation of a new family court. The High Court will remain as a separate entity hearing only those cases designated as being of sufficient complexity or containing novel points as to justify hearing by a High Court Judge. **[FJ87]**

Regional models of best practice

23. All trusts should have regionally agreed, streamlined procedures relating to the family law system, and a regional model of best practice in this area should be developed. **[FJ88]**

Role of Guardian Ad Litem in Freeing Orders

24. The court should have the power in exceptional circumstances to reintroduce the Guardian Ad Litem after a freeing order is made and before an application for adoption has been mounted. This is a matter that requires urgent consideration when the long overdue new Northern Ireland adoption legislation finally is introduced. **[FJ89]**

CHAPTER 11

SECURE ACCOMODATION ORDERS

Current Position

11.1 There are limited circumstances within which the liberty of a child in the care of the State may be restricted. Under art. 44(2) of *The Children (Northern Ireland) Order 1995*, a health and social care trust may apply to a magistrate's court to admit a child to secure care if the child meets one or all of the following criteria:

- they have a history of absconding and are likely to abscond from any other description of accommodation; and, if
- they abscond, are likely to suffer significant harm, or if kept in any other description of accommodation
- they are likely to injure themselves or other persons. Guidance and regulations accompanying the Order[39] state: 'restricting the liberty of children is a serious step which must be taken only when there is no appropriate alternative. It must be a "last resort" in the sense that all else must first have been comprehensively considered and rejected – never because no other placement was available at a relevant time, because of inadequacies in staffing, because the child is simply being a nuisance or runs away from [his] accommodation and is not likely to suffer significant harm in doing so, and never as a form of punishment'.

11.2 In considering the possibility of a secure placement, the guidance and regulations emphasise the importance of 'a clear understanding of the aims and objectives of such a placement and that those providing the accommodation can fully meet those aims and objectives' They specify that the trusts have a duty under this Order 'to take reasonable steps designed to avoid the need for children within their area to be placed in secure accommodation'[40]. It is expected that careful consideration will be given to the existing range of alternative facilities and services available locally, with trusts identifying any gaps or inadequacies in such provision and how these might best be addressed by the trust itself or in co-operation with other agencies.

11.3 The Children (Secure Accommodation) Regulations (Northern Ireland) 1996 provide the statutory framework for restriction of liberty in a facility that can be physically secured. No child under the age of 13 may be placed in secure accommodation without the prior approval of the Department of Health (DoH)[41]. Without court authority, the maximum period for the restriction of a child's liberty is 72 hours, either consecutively or in aggregate in any period of 28 days[42]. Thereafter,

[39] Volume 4, para 15.5
[40] ibid, para 15.6
[41] Regulation 2
[42] Regulation 6

the trust has to apply to the magistrate's court for a secure accommodation order (SAO) under art. 44 of the Children Order. The maximum period for which a court may authorise a child to be kept in secure accommodation is three months in the first instance[43], although on subsequent applications the court may authorise secure accommodation for a period not exceeding six months at any one time. Art. 44 does not apply to a child detained under the provisions of *The Mental Health (Northern Ireland) Order 1988.*

11.4 During 2014/15, there were 50 admissions of 46 children from across Northern Ireland to Lakewood Regional Secure Care Centre. The average length of placement in Lakewood is 16 weeks. As a significant number of children are admitted in advance of a formal court application for an SAO, young people are transported to and from Lakewood and the court for SAO application hearings.

11.5 Each journey is subject to a risk assessment and those young people considered too high a risk to be safely transported to and from court can have their hearing at Lakewood. Between January 2014 and March 2015, there had been 29 court sittings at Lakewood involving 16 young people.

11.6 The exclusion of Live Link for art. 44 SAO applications has been the subject of discussion at the Children Order Advisory Committee (COAC) in the past. Arguments for include the risks posed by and to children in the transportation to and from court; arguments against include the possible dilution of the child's rights if they are not physically present at the court hearing.

11.7 In 2012, the Department of Justice consulted on a number of proposals to extend the use of Live Link in courts, including the extension to breach proceedings at the Juvenile Justice Centre. The consultation document cited reducing delay and security risks associated with bringing a person to court as two reasons for its extension. It did acknowledge, under "equality considerations", the impact on young people under 18 but emphasised that children would be able to participate in proceedings whilst remaining in a safe and controlled environment. It also proposed that legislation would provide for a requirement of consent from the young person.

11.8 The DoH position is that, where possible, a child should be physically present in a court when an SAO application is being made. It is accepted that it may not always be possible to eradicate the risks associated with transporting a young person to court and, for that reason, we have to explore whether it is possible to introduce changes which are efficient and, at the same time, promote the rights of children and young people. A DoH options paper on extending the use of live link in art. 44 (secure care) applications was submitted to COAC members on 28 November 2015 to consider whether they wished to further explore arrangements on use of Live Link for SAO applications. It was noted that, of responses received, there was a variation in the choice of options but the preferred option appeared to be that of a designated judge to conduct all such hearings at Lakewood.

[43] Regulation 7

The current legal position

11.9 In Sakhnovskiy v Russia 2010, at paragraph 98, the European Court of Human Rights (ECtHR) held in a Live Links case concerning an adult 'that this form of proceedings is not, as such, incompatible with the notion of a fair and public hearing, but it must be ensured that the applicant is able to follow the proceedings and to be heard without technical impediments, and that effective and confidential communication with a lawyer is provided for'.

11.10 Moreover, the use of Live Links must not impact on the ability of a person to effectively participate in proceedings. In SC v UK[44], a case concerning a criminal trial of an 11 year old, the ECtHR set out at paragraph 29 that 'Effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed. It means that he or she, if necessary with the assistance of, for example, an interpreter, lawyer, social worker, or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence' and 'it is essential that he be tried in a specialist tribunal which is able to give full consideration to make a proper allowances for the handicaps under which he labours and adapts its procedures accordingly' (paragraph 35).

11.11 In Manchester, there are instances where Live Link is used in the processing of SAOs where, for example, a child had to travel from a centre at Southampton. The experience of Live Link has been a successful one. Discussion does take place with the representatives of the child to ascertain if this is acceptable. Judge Newton, the presiding family judge, informs us however, that the sheer costs involved in having a number of escorts taking a child from Southampton to Manchester is simply not acceptable.

Discussion

11.12 We were clear throughout our discussions that the Live Links option should only be contemplated in exceptional circumstances and that the presence of lawyers and other representatives alongside other safeguards for the child must always be in place.

11.13 Views that emerged varied. The use of Live Links in Woodlands was raised with the Youth Justice Review Team[45] by the Children's Law Centre and the latter were opposed to the concept. They feel each child needs to have their voice heard in court and video-link prevents that. The Children's Commissioner shared that view.

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[44] 10 Nov 2004

[45] 'A Review of the Youth Justice System in Northern Ireland', DoJ, September 2011

11.14 However, the experience of the Youth Justice Review Team was the opposite – their youth court experiences were chaotic and those cases which were heard via video-link were the only time the room was sufficiently quiet to hear a child communicating and engaging (rather than being talked at, or talked over) for those in the room. From their perspective, the use of Live Links has been found to be beneficial in a number of ways. Not having to bring the young person to court greatly reduces many risks, including escaping in transit, or absconding from court, as well as safety issues while they are detained in court cells, access to prohibited items while at court, etc.

11.15 Their view was that the travel and arrangements to ensure attendance at court meant disruption to the young person's routine, attendance at school and adjusting to residential life. Young people had also expressed a view to them that the Live Link is much less intimidating than being in the court room as staff are beside them in video-link and can clarify and explain issues they do not understand.

11.16 An evaluation study appears to have been commissioned by the Northern Ireland Office in 2008. Entitled "An Evaluation of the Woodlands Juvenile Justice Youth Court Video link", it looked closely at the technical, financial and administrative arrangements required to enable the system to work, but also compared findings and costings of escorting young people between the Juvenile Justice Centre and courts. General findings were that the video-link system and arrangements were secure, efficient, well organised and effectively staffed.

11.17 The study demonstrated that the use of video-link reduces considerably the amount of time involved in a court visit, and highlighted that the costs involved, as compared with the costs of transporting young people to courts across Northern Ireland, are significantly reduced. Obviously, however the cost factor is not the primary consideration in determining what is best for a young person. Discrete issues arise in the context of use of technology in SAOs.

11.18 A further option was to hold all court hearings at Lakewood – with a nominated judge - rather than have any young person travelling to and from court for SAO applications. This had the advantage that the child would have a personal connection to a familiar judge, particularly where they are appearing for multiple hearings. There would be effective determination of the child's competency to give instructions and understand proceedings. Judicial familiarity with cases, patterns and trends might reduce delays and improve logistics. It could reduce costs for judges travelling longer distances for hearings. On the other hand, over-reliance on one judge to hear SAO applications and hold timetabling hearings at Lakewood fails to taking account of a family judge's other court work and could be a challenging task for an already overstretched family judiciary. For that reason, we do not favour it.

11.19 The argument <u>in favour of</u> Live Link with Lakewood in the context of use of modern technology in exceptional circumstances can be summarised as follows.

11.20 Firstly, consideration should be given to allowing the courts the power to conduct hearings by way of Live Link on those rare occasions when there is evidence before the court that it is in the interests of both those accompanying the children to the courts and the interests of the safety of the children themselves.

11.21 Secondly, regularly when the court is notified that it is too dangerous to transport the young person to court because they will abscond, the court ends up setting up a court at Lakewood. This is expensive and very inconvenient because lay magistrates and the district judge have to vacate their court sitting, progress to Lakewood and then subsequently return back to the original court for the rest of the court list. If it is a case from one of the country courts, a different district judge and additional lay magistrates have to be used as it would not be possible to get back in time for an ordinary court list. Such a system cannot be in the interests of efficient, timely or cost saving justice in a modern context, where these are important factors throughout the justice process. Increased number of hearings at Lakewood may require some capital costs associated with the reconfiguring of the Lakewood hearing room to ensure it is of a high standard.

11.22 Thirdly, in 2014, the South Eastern Health and Social Care Trust installed IT equipment to facilitate video conferencing in order to create more effective communication among its staff across the region. Whilst not intended for use by the young people during court proceedings, this could potentially be used for Live Link purposes, thereby reducing the extent of capital investment. However, as engagement with the young person is central to the process, effective visual and sound quality is of paramount importance.

11.23 Fourthly, hearings would take place in a safe, controlled and familiar environment. Children are well used to links by Skype and Facebook and would readily feel at home under the new system on the rare occasions it was implemented.

11.24 The arguments <u>against</u> a live link system can be summarised as follows.

11.25 Firstly, the common law rights of such a child to attend a court hearing and their Article 6 rights under the European Convention on Human Rights demand such a right be respected and are not adequately met through a video link "attendance " at hearings when one of the outcomes could be a lengthy period in custody.

11.26 Secondly, these children are amongst the most vulnerable in our society. To deprive them of attendance in person in court denies a direct engagement face to face with the judge and lay panel which enables the panel to observe the young person, how they present and project themselves, and relay their feelings through their countenance and body language. The way they conduct themselves and interact with their parents, legal team, social workers, the Guardian Ad Litem (GAL) and other interested parties should be viewed other than on a small screen.

11.27 The inherent limitations means they are not observed in a natural way afforded to other children and young people in the juvenile justice system. The judge would not witness the child under pressure. The vulnerabilities and a nervous bravado in a brief snapshot could be misjudged and taken out of context. The young person may wish to take time to speak at length with the GAL or parents in response to an issue raised through direct questioning by the judge. The limitations of time on the link would restrict this.

11.28 Thirdly, there will be a need for reports to be read, explained to the young person and instructions taken. These trust reports may only be available on the morning of court. Video link may result in delay if the time for the link has to be extended to allow for this process to take place.

11.29 Fourthly, the young person may have a learning disability, autism, dyslexia, dyspraxia or another disability which could be magnified under the pressure of a need to convey as much as possible via a remote link in a short period. The use of registered intermediaries in courts is being addressed in Chapter 16. Children and young people, of course, have the benefit of representation by a highly skilled and experienced GAL in public law proceedings, and they will be best placed to assess the young person and how they will react in a highly stressful situation, but this assessment is on-going and best conducted when the young person is present in court.

11.30 Fifthly, it can be difficult to consult by video link with a young person who, by the fact that they are in secure accommodation, is vulnerable. They are often on edge or "hyper" at hearings, which makes consulting and taking instructions in person difficult. This might only be amplified if done by video link.

11.31 Whilst we recognise the weight of these objections, we are satisfied that they can all be met in the rare circumstances where the safety of a child or the person accompanying him or her to court is endangered.

11.32 The risk of a child or social worker being killed in a car accident as a result of the behaviour of a child being transported or a child coming to harm as result of absconding is too horrific to contemplate.

11.33 The compromise would seem to be that where the optimum position - namely, the attendance of the child at court - is not possible due to exceptional circumstances, provision should be made for (some or all of) the child's legal team and, if necessary, the GAL and social workers to be present with the child at Lakewood while the video link is running, thus enabling the district judge and lay members to remain in their court.

11.34 This would require all the other relevant parties to attend at Lakewood, save for the judge and the lay members. This would avoid the necessity of having to relocate to Lakewood and a complete disruption of the normal court list.

11.35 The judge will always have discretion to order the attendance of the child, after hearing appropriate submissions to that effect, in light of any of the objections raised above. Live Link hearings are the norm in bail applications in youth justice cases, where the liberty of the subject and right to a public hearing are similarly at large. Moreover, the public interest, the safety of the children who might abscond, the safety of social workers taking these children to court and the public purse all favour this step.

11.36 However, any such recommendation would not only require legislative change but would need to address the requirement for counsel to consult with their clients. Any proposal for video link should include a discrete provision for funding specifically for consultations to be sourced. It does not appear under present suggested funding schemes that any provision will be made for additional visits to Lakewood. Moreover, it would be totally dependent on there being a reliable effective Live Link between Lakewood and the court.

Recommendations

1. Art. 44 of *The Children (Northern Ireland) Order 1995* and regulations made under art. 44 to be amended to empower a judge to direct that in exceptional circumstances, where it is deemed to be in the interests of the child or public safety, the child's attendance at a secure accommodation order hearing shall be secured by way of Live Link to the institution where they are then being held. **[FJ90]**

2. As this would be a change in policy and require legislative change, the relevant department first to consult with young people, families, legal representatives and others on proposals. **[FJ91]**

3. The specific circumstances in which Live Link is to be used to be clearly identified, including agreed principles and considerations of risk. **[FJ92]**

CHAPTER 12

PROBLEM SOLVING COURTS

Current Position

12.1 Problem solving courts are centred on a holistic approach with a view to balancing accountability and help with the overall aim of promoting individual and social change. They have been operating successfully for a number of years in other jurisdictions, such as Scotland, England & Wales and the USA, but are a relatively new concept in Northern Ireland.

12.2 The Department of Justice (DoJ) commissioned a scoping study in 2014 on the use of problem solving courts. A paper produced in August 2014, "Problem Solving Courts, a Scoping Paper", recommended the establishment of problem solving courts to address the causes of specific types of offending behaviours. The Northern Ireland Executive subsequently commissioned the Organisation for Economic Co-operation and Development (OECD) to conduct a Public Governance Review of Northern Ireland in 2015. As part of this exercise, the OECD carried out six case studies, one being "DoJ Problem-Solving Justice". The OECD report, "Northern Ireland (United Kingdom): Implementing Joined-up Governance for a Common Purpose", was published on 6 July 2016[46] and it stated that: "interagency collaboration and judicial authority are key determinants of a successful problem-justice initiative leading to positive outcomes in the justice system. More specifically, creative partnerships, a team approach and judicial interaction generate an informed decision-making process on the circumstances of the case leading to positive victim-focused outcomes."

12.3 The concept of problem solving courts was supported by the Committee for Justice in the report of its Innovation Series[47] published on 8 March 2016, which included the following as one of its key findings:

> "The Committee is of the view that the underlying problems and root causes of offending behaviour in a range of areas such as alcohol and drug addiction must be tackled if reoffending rates are to be addressed; and believes there is merit in exploring the introduction of problem-solving justice in Northern Ireland as an innovative and effective approach to the criminal justice system, particularly against a backdrop of increased pressure in the public sector."

12.4 Although this finding referred specifically to the criminal justice system, the report went on to recommend that criminal and civil cases should be dealt with

[46] http://www.keepeek.com/Digital-Asset-Management/oecd/governance/northern-ireland-united-kingdom-implementing-joined-up-governance-for-a-common-purpose_9789264260016-en#page10

[47] "Report on Justice in the 21st Century: Innovative Approaches for the Criminal Justice System in Northern Ireland" (NIA 313/11-16)

together when they involved domestic violence. The report also recommended that "a pilot project of a problem-solving court solution" should be one of the commitments included in the next Programme for Government (PfG). The Committee noted that the problem solving approach was proven to reduce offending, rectify perceptions of inequality, increase public trust in the justice system and reduce the number of people going to prison.

12.5 The DoJ has since committed to leading on a "Problem Solving Justice" pathfinder project under the new PfG, which is intended to trial the concept of the outcomes-based accountability approach to delivering the PfG indicators being embraced by the Northern Ireland Executive.

Domestic Violence Court

Current position

12.6 The problem solving court model is currently in operation to a limited extent in the form of the Domestic Violence Listing Arrangement (DVLA) pilot in Londonderry. The pilot, which has been led by District Judge Barney McElholm, has been developed and implemented in conjunction with Women's Aid, Victim Support NI and other partner organisations. In a powerful speech in September 2014, Judge McElholm made a very strong argument for this pilot scheme, which is widely regarded as having improved the court experience for victims of domestic violence and abuse.

12.7 The specialist court listing arrangements have been operating since November 2011. At the first appearance in the court list, the prosecutor 'flags up' to the District Judge that the alleged offence is one of domestic violence or abuse. Once that is established, any adjournment is into one of the domestic violence review courts. Eventually, once the matter is ready to be fixed for a contested hearing, it is listed into the special domestic violence contest days.

12.8 Contested cases are clustered into each second and fifth Tuesday. No other cases are listed for those days. This helps to reduce the number of people attending court, thus maintaining a less oppressive and intimidating atmosphere. It also allows the other agencies involved to concentrate their efforts and resources into those days.

12.9 The Public Prosecution Service (PPS) provides a specially trained prosecutor on these days. Foyle Women's Aid and Victim Support NI also liaise to mentor and support victims and prosecution witnesses. Victim Support provides a range of support services, including a pre-trial court visit, information about court procedures, and a separate, safe waiting room away from public areas. The Northern Ireland Courts & Tribunals Service provides a separate entrance for victims to avoid them having to come into contact with the defendant or defence witnesses.

12.10 Prior to the contested hearing, all adjournments or reviews are listed into a domestic violence review court on each first and third Wednesday. These review courts aim to employ some of the elements of the 'fast-track' specialist domestic violence courts used in some areas of England and Wales. The intention is to proceed to list contests as early as possible. It is generally accepted that the entire prosecution process is extremely traumatic for victims. They are under constant pressure, internal and external, to drop the charges and withdraw their co-operation. A common tactic employed by perpetrators is to try to delay the final hearing of the case or cause endless adjournments. If the process is too long and drawn out, the victim is less likely to continue to participate. The purpose of the review court is to focus PPS and judicial attention on eliminating all unnecessary delay.

12.11 The DVLA pilot, in the main, concentrates on facilitating the work of other groups and agencies with one common aim – that is, to support victims and give them confidence to attend court and give evidence.

Discussion

12.12 Although the DVLA pilot has been an extremely positive initiative, Judge McElholm has highlighted the continuing high level of attrition in domestic violence cases, which suggests that support for victims of such abuse needs to be made available at an earlier stage. Prior to the commencement of the pilot in November 2011, 52% of cases did not proceed due to the withdrawal of the victim's co-operation and by July 2014 the corresponding rate was 46%, even with an improved package of support in place for victims. He has also highlighted the need for a protocol to ensure clarity among both statutory and non-statutory service providers on their respective roles and for a new intensive, court-supervised perpetrator programme.

12.13 The OECD viewed the court listing arrangement last year as an example of local justice innovation in action and they commended the approach being taken, saying**:** "Overall the current DVLA experience provides a strong foundation for the Government of Northern Ireland to celebrate the success of the current initiative, strengthen it and explore the possibilities of replicating it in Belfast and with regard to other pressing social challenges in the country." However, OECD concluded that the DVLA is not yet a specialist domestic violence court in that it does not include judicial supervision of offenders and there is no bespoke programme for perpetrators.

12.14 The Department of Justice (DoJ) has been keen to see the DVLA approach rolled out to other parts of Northern Ireland. However, in response to proposals from the Lord Chief Justice, it has agreed that further work should be undertaken to enhance the existing arrangement before it is extended to other geographic areas. Two DoJ-led Working Groups have been established for this purpose.

12.15 The focus of attention for the present is on criminal cases but there is scope to bring civil matters within the purview of a domestic violence court in due course, which could encompass the use of domestic violence protection orders and other civil orders that are designed to protect those who are vulnerable to abuse. Domestic violence is a major societal problem which extends into many aspects of family life. During 2014/15, 28,287 incidents with a domestic motivation were reported to the police, who responded to a domestic incident, on average, every 19 minutes. UNICEF research[48] released in 2006, showing per capita incidence, indicated that there were up to 32,000 children and young people living with domestic violence in Northern Ireland.

12.16 We support the idea, therefore, that the excellent work which has already been undertaken in Londonderry should be further enhanced, with a view to developing the DVLA into a fully-fledged problem solving domestic violence court and extending such an approach to other geographic areas within Northern Ireland.

Family Drug and Alcohol Court

Current position

12.17 In its 2014 paper, DoJ considered the concept of a Drug and Alcohol Court and deemed that suitable pilot areas were likely to be in Belfast or Londonderry.

12.18 A Family Drug and Alcohol Court (FDAC) is already operating in England. The FDAC is a court process for parents involved in public law proceedings when the impetus for intervention is substance abuse. Parents are given the option to engage with the service. The court has a specialist multi-disciplinary team attached to it containing a number of experts relevant to parental substance misuse. The judge holds fortnightly meetings with the parents and the team in the absence of the legal representatives. A problem solving and less adversarial approach is taken. The court provides a forum for capacity to change to be demonstrated.

12.19 The assigned judge essentially manages the multi-disciplinary team and programme of work for the parents. They have at their disposal an intense substances misuse package from the multi-disciplinary team which works closely with and co-ordinates outside agencies which provide relevant services. A tailor - made plan is put together for each individual. The first two reviews in England under *The Children Act 1993*, are attended by legal representatives and, thereafter, the fortnightly attendances are without legal representation unless it is required for a specific issue.

12.20 At the first review, the option is fully explained to parents for them to consider. If there is an interim care order application, it is dealt with at that review. The court will order disclosure of all papers to the specialist team, which has a two week assessment period. After three weeks, there is a second review for which an

[48] "Behind Closed Doors – The Impact of Domestic Violence on Children" UNICEF 2006

assessment report and proposed intervention plan is filed by the specialist team. If everyone is in agreement – in particular the parent – they sign the plan. Thereafter, the fortnightly reviews commence. There is no legal aid for legal representation at these. Any contested issues, such as contact, are listed for a hearing and the legal representatives attend. Cases proceed to a final hearing in the ordinary way and there is an option to leave the scheme.

12.21 Research commissioned by the Nuffield Foundation[49] has confirmed that parents who were offered the opportunity to work with the court and the specialist multi-disciplinary team were more likely to stop substance abuse in comparison with the control group used – 40% of mothers did so compared to 25% in the control group, and 25% of fathers compared to 5% of the control group - and the rate of reunification and stopping substance abuse was also higher than in the control group – 35% of mothers achieved this compared to 19% in the control group[50].

12.22 Professor Judith Harwin, Brunel University, funded by The Nuffield Foundation to evaluate the pilot Family Drug and Alcohol Court, found that parents were offered more help in the FDAC than in the conventional court system, with 95% of mothers being offered substance misuse services compared to 55% in the control group[51]. The quality of the programme was identified as a benefit, with the frequency and intensity, regular testing, motivating approach and therapeutic support being key factors.

12.23 The process was, in the event, no quicker than traditional proceedings and some concern has been raised about how this court model could fit with the timescale suggested for care proceedings in England (which is 26 weeks). Children took longer to be re-habilitated to parents than the comparison sample[52]. However, the process raises issues about how the tension between reducing delay and dealing with parental problems which require some time to address can be achieved[53]. It is not the view of the profession within Northern Ireland that our system requires a mandatory time limit for the very reason illustrated in these cases: that each set of circumstances needs to be tailored to the individual needs.

12.24 The President of the Family Division in England and Wales, Sir James Munby, expressed his views about this FDAC model in the following terms:

> "I consider the FDAC as one of the most important and innovative developments in public law in decades …. I am a strong supporter and believe that

[49] The Nuffield Foundation is a charitable trust established in 1943 by William Morris, Lord Nuffield, the founder of Morris Motors Ltd. It aims to improve social well-being by funding research and innovation projects in education and social policy, and building research capacity in science and social science.
[50] Introducing the Main Findings from: Changing Lifestyles, Keeping Children Safe and Evaluation of the First Family Drug and Alcohol Court in Care Proceedings at page 3.
[51] As above.
[52] The Family Drug and Alcohol Court Evaluation Project, Final Report at page 10.
[53] Bamborough, Shaw and Kershaw "The Family Drug and Alcohol Court in London: A New Way of Doing Care Proceedings: Journal of Social Work Practice (2013)".

> its combination of therapy, offered by the multi-disciplinary team, and adjudication and direction, using the authority of the court is the right approach for parents suffering from addiction …. The process delivers better outcomes for the children and the parents subject to it, and achieves this in a manner which respects the humanity of the parents."[54]

12.25 The benefit of having a tailored, multi-disciplinary team supervised by the court and specifically constructed to deal with a particular problem – substance abuse – is one of the stand-out issues of this model. Providing clients with access to the services they need, obtaining funding for those services and engaging experts are areas most practitioners would describe as frustrating and a cause of delay. In this model they have those services, tailored to their needs and instantly accessible. Obviously the funding and co-operation of the health and social care trusts would be necessary for this and liaison with them in terms of the costs, availability and willingness to provide services would be required.

12.26 The system in London offered modest costs savings (£682 per family) but much greater savings in terms of the shorter care placements (£4,000 per child) and savings on experts (£1,200 per case). The cost of the team per family is £12,000[55].

Discussion

12.27 Improving the chances for parents struggling with addiction needs a fresh approach. Whilst we have no statistics for the family justice system the experience of family judges is that it is often a core problem, especially in public law cases. In the criminal justice sphere, 74% of Probation Board for Northern Ireland clients present with alcohol and/or drug addictions and 65% of prison inmates report that alcohol or drug use has caused their problems and contributed to their offending.

12.28 If consideration were being given to targeting parental substance misuse within Northern Ireland, perhaps an English FDAC could provide a template from which to work on something tailored to the specific patterns of substance misuse encountered in Northern Ireland since, for example, street drugs may represent less of an issue than alcohol or prescription drugs. Research would need to be conducted within Northern Ireland to identify the specific areas of need in relation to substance misuse.

12.29 The Centre for Effective Services has conducted a piece of research on the FDAC. Its brief was to provide an overview of the English evaluation, an examination of the synthesis with the Northern Ireland system and an assessment of the costs of introduction in Northern Ireland. We await its outcome.

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[54] http://www.bbc.co.uk/news/uk-31512532

[55] Introducing the Main Findings from: Changing Lifestyles, Keeping Children Safe and Evaluation of the First Family Drug and Alcohol Court (FDAC) in Care Proceedings at pages 14 and 15.

12.30 Again, this is an area where there is scope to bring criminal and civil justice responsibilities together in order to provide a more joined-up service to the citizen. We are aware that the DoJ is considering the establishment of an Addiction Court pilot for criminal cases and a Family Drug and Alcohol Court pilot as part of its PfG pathfinder project. We regard these pilots as complementary and would encourage DoJ to progress work on each in parallel, so as to maximise the benefits of such an approach for the families most severely impacted by substance abuse.

Recommendations

1. Problem solving courts to be established in Northern Ireland as a means of reducing the societal harm caused by domestic violence and abuse and by substance misuse. **[FJ93]**

2. The Domestic Violence Listing Arrangement pilot in Londonderry to be enhanced, initially to improve support for victims and provide for court-supervised offender programmes and, thereafter, to encompass civil proceedings. **[FJ94]**

3. Consideration to be urgently given to establishing a new Family Drug and Alcohol Court, based on the English model, initially as a pilot scheme, in parallel with the development of the planned Addiction Court pilot. **[FJ95]**

CHAPTER 13

CHILD ABDUCTION

Current Position

13.1 The term "child abduction" covers a number of situations, some of which are relevant to this Review.

Firstly, there are criminal offences associated with kidnapping/abduction, which are beyond the remit of the Review. There are also:

- International abductions between countries who are signatories to the Hague Convention[56].
- International abductions involving non Hague Convention countries.
- Abductions within the European Union which involve consideration of Brussels IIR[57].
- Abductions within the United Kingdom.

13.2 The Central Authority in Northern Ireland (the Central Authority) records that, as of November 2015, it received a total of 22 incoming and outgoing applications in respect of children abducted or wrongfully removed under the provisions of the 1980 Hague Convention and Brussels IIa Regulation[58]. Nine of these were incoming and 13 were outgoing.

13.3 The Central Authority received a total of 31 applications in 2014 under the 1980 & 1996 Hague Conventions and Brussels IIa Council Regulation. Overall, there was a total of 17 incoming and outgoing applications received under the provisions of the 1980 Hague Convention. Four were outgoing applications from Northern Ireland in respect of children abducted out of the United Kingdom in 2014 and 13

[56] The principal object of this Convention, aside from protecting rights of access to children, is to protect children from the harmful effects of cross-border abduction, (and unlawful retentions), by providing a procedure designed to bring about the prompt return of said children to the State of their habitual residence. It is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child, across international boundaries is not in the interests of the child and ensures that any determination of the case of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principal of prompt return serves as a deterrent to abduction and wrongful removals.

[57] Brussels II Regulation (EC) no. 2201/2003, also called Brussels IIa or II bis is a European Union Regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The regulation concerns the jurisdiction responsible for parental responsibility, including the access to the child of the other parent. Jurisdiction is generally referred to the courts connected to the child's habitual residence. The regulation also specifies procedures regarding International Child Abduction but does not take precedence over the Hague Child Abduction Convention (to which all EU member states are parties).

[58] As above

incoming cases in respect of children abducted from a Convention country and brought to Northern Ireland.

13.4 *The Child Abduction and Custody Act 1985* came into force on 1 August 1986, implementing two international conventions – namely, The Hague Convention, protecting rights of custody which is broadly defined and now includes inchoate rights of custody, and The European Convention, which seeks to facilitate, recognise and enforce decisions regarding custody.

Child abduction between Convention countries

Discussion

13.5 It would be impossible to cover all of the issues which have arisen through development of the jurisprudence in this area. However, a number of pertinent examples are raised for comment, as follows, as these appear to have the most bearing upon practice and procedure. They should be seen against a background in Northern Ireland where we start with a considerable advantage in that there is a concentration of decision making with one judge dealing with Hague Convention cases in one court house and that judge is the liaison judge. There is a problem in other jurisdictions where that does not occur.

13.6 These are summary proceedings and must conventionally be heard within six weeks.

13.7 The complexion of Hague cases has changed from the typical case of the non-custodial parent snatching a child to the situation of the custodial parent fleeing with a child from oppressive situations, such as domestic violence.

13.8 While welfare is specially excluded from any Hague consideration, the practical difficulties for the practitioner in keeping to this and following the strictures are well illustrated in Re E[59].

13.9 How the voice of the child can be heard in Hague cases, given that the perspective of children has now been deemed relevant not just to the defence of wishes and feelings but to other issues such as habitual residence in Re LC[60] is a real challenge.

13.10 Judicial liaison is a key component in many instances and can be very effective. Is it utilised enough and in what circumstances can it assist with practice?

13.11 Undertakings are frequently used in Hague proceedings but are they effective and are they enforceable in the country hearing the case and the country of return. What are the penalties for breach?

[59] [2011] UKSC 27
[60] [2014] UKSC 1

13.12 Pending the hearing and resolution of Hague cases, should there be a greater emphasis on contact arrangements for the "left behind" parent and how can these be enforced? Should there be greater use of mediation in Hague cases and, if so, how can that be achieved?

13.13 Should children have separate representation in Hague cases and, if so, in what circumstances?

13.14 When, if ever, should inherent jurisdiction be used alongside Hague proceedings?

13.15 How does the court effectively enforce Hague orders?

13.16 In what situations should oral evidence be taken?

13.17 There seem to be two categories to consider regarding any recommendations this Review can make. The first is procedural and in this regard good practice is already in place, particularly in relation to dealing with Hague Convention cases within the recommended timeframe. It is suggested that a protocol may assist in this, with provision for a written statement of reasons why the parents in a particular case cannot comply. The judicial liaison machinery is well developed in Northern Ireland in that there is a designated judicial liaison judge who can direct - and has directed - judicial liaison at short notice. This has been effectively used within our jurisdiction and as the infrastructure is in place this Review simply commends the ongoing use of such a system.

13.18 We also consider that these cases need to be prioritised (as indeed they are currently) and we would support a practice of taking other cases out of the list to accommodate a hearing in cases of this type. A specific change in the court rules should be considered so that the period for lodging an appeal in such cases is shortened. A former family judge had a practice to direct that the period for appeal was often reduced to one week. Where there is an international obligation to have the entire process concluded, including an appeal, within six weeks, it seems that the approach in our rules to allow the ordinary period for deciding whether or not to appeal is inappropriate. Preferably, this would be by way of a rule change rather than by a protocol. Detailed consideration would need to be given by the Rules Committee as to whether it would require a statutory amendment.

13.19 A co-existing requirement by way of a specific rule would be that if there is an appeal, the appellant must within a matter of one or two days bring a review application before the Court of Appeal so that directions can be given as to the preparation for the appeal and its listing.

13.20 A crucial ingredient in speeding up a properly informed hearing of such cases is to obtain at the earliest date, from Northern Ireland and from the other country involved, all relevant records. These records should be obtained in anticipation of

an argument rather than in response to the formulation of such an argument. Central authorities should be encouraged to initiate the gathering of documents from the very first indication that there are to be proceedings rather than bringing the proceedings and having a judge direct that the documents are to be obtained. This can and should be facilitated by directions at reviews and by judicial liaison.

13.21 The thorny problem of ensuring undertakings given in Northern Ireland by either or both parties are properly enforced in the other country with the possibility of mirror orders - concepts facilitated by judicial liaison - would be immeasurably assisted if all the documents from Northern Ireland could then be sent to the foreign country so that they knew what had occurred here and what, if any, were the risks involved.

13.22 There should be an obligation on the Central Authority to bring proceedings within a defined time period. A number of cases have occurred in which the courts dealt with the litigation promptly once commenced but where the Central Authority or authorities did not bring the proceedings in timely fashion.

13.23 Particular scrutiny of how the child's voice is heard must be considered, together with the form that any representation should take. This should be at an early pre-trial review. We recommend that separate representation for children is not automatic, particularly in the case of young children. Moreover, consideration should be given in cases where the wishes and feelings of older children are at issue, as to how the views can be considered. Baroness Hale has recently delivered a lecture on this topic[61] and generally in this area, some guidelines may assist practitioners. However, these need to be constructed after a multi-disciplinary overview.

13.24 The Court of Appeal in England gave a leading judgment on this issue in 2014.[62] In that case, having reviewed all the recent authorities in the matter, the court drew together a number of themes which are common to each of the authorities, as follows:

- There is a presumption that a child will be heard during Hague Convention proceedings unless this appears inappropriate.[63]

- In this context, "hearing" the child involves listening to the child's point of view and hearing what they have to say.[64]

- The means of conveying a child's views to the court must be independent of the abducting parent.

[61] Baroness Hale address to the Association of Lawyers for Children, 20 November 2015, "Are we nearly there yet?"
[62] In Re KP (A Child) (Abduction: Rights of Custody) Practice Note [2014] 1 WLR 4326
[63] In Re D [2007] 1 AC 619
[64] Re D (above) para 57

- There are three possible channels through which a child might be heard, namely a report by a CAFCASS[65] officer or other professional, a face to face interview with a judge or the child being afforded full party status with legal representation.

- In most cases, in interview with a child by a specialist CAFCASS officer will suffice, but in other cases, especially where the child has asked to see the judge, it may also be necessary for the judge to meet the child. In only a few cases will legal representation be necessary.

- Where a meeting takes place, it is an opportunity for the judge to hear what the child may wish to say and for the child to hear the judge explain the nature of the process and in particular why, despite hearing what the child may say, the court's order may direct a different outcome.

- A meeting between judge and child may be appropriate when the child is asking to meet the judge, but there will also be cases where the judge of his or her own motion should attempt to engage the child in the process.

- The judicial meeting should not be used for the purpose of obtaining evidence from the child or going beyond the important task of simply hearing from the child that which they may wish to volunteer to the judge. The judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit. Since the purpose of the meeting is not to obtain evidence, the judge should not probe or seek to test whatever it is that the child wishes to say.

13.25 We share the views expressed in this judgment, substituting the Official Solicitor for the English CAFCASS. If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced.

13.26 In terms of practice, this Review considers that, notwithstanding the summary nature of Hague proceedings, welfare issues do arise - particularly interim contact. This is something that cannot be avoided and practitioners are usually able to resolve. However, the use of mediation in Hague cases is something which this Review considers should be encouraged to deal with interim issues, outcomes and practical issues such as undertakings and the mechanics of return. It is understood that Reunite, a UK based charity specialising in international parental child abduction, has provided this facility but consideration should be given to the use of

[65] This stands for the Children and Family Court Advisory and Support Service which is the public body in England & Wales which performs the functions of the Guardian ad litem Agency in this jurisdiction. CAFCASS is independent of the courts, social services, education and health authorities and all similar agencies. It looks after the interests of children involved in family court proceedings. Officers advise the courts on what they consider to be in the best interests of individual children.

specialist mediators with appropriate training in Hague-type cases in Northern Ireland in relation to this issue.

13.27 The Hague Convention Bureau in the Hague now places great emphasis on mediation and preparing for outcomes upon return. Australia has a system of specialised Hague Convention mediators. These mediators are specially trained (the Attorney General provided for this). Their training includes understanding the Hague jurisdiction and the concept of complementary or mirror orders. They work in pairs and very often carry out three sessions in three or four days. The legal aid system meets these costs.

13.28 Directive 2008/52/EC of the European Parliament and of the Council (the EU Mediation Directive) of May 2008 is important in this matter. It must be borne in mind, however, that this is not a Regulation and as a Directive it is not binding on the parties. We do recognise some concern that mediation outcomes should enjoy the benefits of cross-border recognition and enforcement and for this to be effective there should be endorsement of quality standards common across borders. However, nonetheless, the Directive does anticipate mediation outcomes will be binding and enforceable.

13.29 The Directive encourages:

- The need for identification, branding and accreditation of Alternative Dispute Resolution (ADR) professionals.
- The need for training on cross-border issues.
- Better recognition of leading mediation organisations in each country.
- Compulsory attendance pre-proceedings, if directed, though not compulsory mediation.
- Powers for courts to adjourn, and refer into mediation and ADR.

13.30 This builds on the existing Hague Conference Good Practice Guide. Published in July 2012, over 105 pages, the Good Practice on Mediation in Child Abduction Work Guide recognises specific challenges in child abduction cases together with the language, cultural, ethnic, religious and other differences arising. It has encouraged:

- The benefit in co-mediation models.
- The need to focus on best interests of the child.
- The need to ensure parties are informed of the effects of abduction on the child and, therefore, focuses on the needs of children not parents.
- That the lawyer mediator must be a child abduction specialist.
- That mediation should be swift and in parallel with court.
- That the mediation agreement should be part of the court order and mirrored.
- Even if there is no settlement, contact should work better.
- Specialised training, the importance of hearing the voice of the child, and the need to take full account of domestic violence.

13.31 We endorse this approach. There is a premium on well informed expedition in dealing with these cases and early mediation with mediators who are well versed in the procedures unique to such cases is vital. This is an area where expertise in this field by the mediators will lead to meaningful and lasting decisions and outcomes in this genre.

13.32 That said, whilst we are fully in favour of mediation, if the reviews drive the issues the results should be apparent at an early stage, especially if both parents are represented and are required to put in writing what their arrangements would be if return was or was not ordered. Experience has shown that invocation of international mediation can in some instances take some time to organise. Our court processes should bring definition to the issues and make available evidence. Mediation is a concurrent method of resolving the dispute.

13.33 We add one caveat on the topic of mediation. In children's cases generally, we encourage and help the parties to work to a resolution which reflects the best interests of the child, guided by the fact that both common law and *The Children (Northern Ireland) Order 1995* recognise principles such as best interests and no delay. Hague cases are arguably different. The obligation there is to return the child to the country of habitual residence as soon as possible for the "home" court to sort things out for the future (save in very limited circumstances). While mediation might sometimes help to find a way through the problem, it is predicated on the basis that the primary objective of the mediation was to reach agreement on the return home rather than the whole case. Is the basis of the Convention really honoured if we develop a mediation service to resolve issues beyond return of the child without the clear consent of the abandoned parent? That parent has the right to expect issues to be argued and resolved in their home country and should not be cajoled into mediation abroad, however valuable mediation is generally.

13.34 This speed Hague process invites one further concerning thought. Parties can get caught up in litigation of this type in circumstances where periods of reflection and advice might be of greater assistance in coming to sensible conclusions. One former family judge recalled one father, to whom he paid tribute, who had a cast iron defence to a return order but upon reflection voluntarily decided to go back to South Africa with the child, as he recognised that in the long term it was in the child's and the wider family's interests to have the matter resolved in South Africa.

13.35 A genuine problem arises in this area concerning the financing of the party who is in Northern Ireland. Legal aid is automatically granted to the party who is represented by the Central Authority in Hague Convention and Brussels II cases. This does not apply to the party who is resisting the application and who is usually a parent in Northern Ireland.

13.36 We understand the position to be the same in both Northern Ireland and England, namely that legal aid is not granted to the non-requesting party. The

position is that the parent seeking the return automatically gets legal aid from the Northern Ireland legal aid fund in light of Article 26 of the Hague Convention, which specifically precludes the applicant from being asked to pay any legal costs. That provision seems based on the obligation imposed by the Convention and accepted by its signatories to return the children other than in limited circumstances.

13.37 The problem is that the parent in Northern Ireland has no such automatic entitlement to legal aid. They must apply for legal aid and then appeal against any refusal. Since the bar for the financial test is set so low, it is not unusual for legal aid to be refused on that ground alone.[66] Given that there are so few cases every year, the cost to legal aid of allowing funding to the Northern Ireland parent is very limited.

13.38 Perhaps more importantly, the delays caused by legal aid applications and appeals make it quite impossible to meet the six week deadline envisaged by the Convention.

13.39 It is unacceptable that a parent who often can hardly speak English should be obliged to conduct the defence of a child abduction case as a litigant in person, either at all or within the short time that is correctly allowed for decisions in such cases.

13.40 The question arises as to whether such a person can obtain a fair hearing in this complex field. This has been a major point that has arisen in certain of the cases determined here in this jurisdiction. The clear perception amongst the profession is that delay is being engendered and thus compromising our international obligation to complete these cases within six weeks. The Legal Services Agency is simply applying the statutory criteria which have been put in place.

13.41 The statutory tests need to be revisited with the Department of Justice, particularly in light of the need to secure compliance with Council Directive 2002/8/EC of 27 January 2003, which aims to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

13.42 In terms of issues of substance, this Review recommends that Northern Irish practitioners should participate in the Hague Bureau. They should make a special point of submitting any suggestions to the Hague Conferences which regularly take place.

13.43 There is no reason why this jurisdiction in Northern Ireland, with substantial experience of and expertise in these cases, should not play a distinctive role in the unfolding developments in the Hague.

13.44 Further, a specialist legal group set up in Northern Ireland - comprising judiciary, Family Bar representatives, Law Society and Central Authority - would be

[66] See O'Hara J in Q (A child) [2015] NIFam 1

of benefit in terms of advising and updating practice and procedure. This group could consider some of the issues of substance referred to at the start of this section.

13.45 The Dutch have annual reports in relation to child abduction cases. In Northern Ireland, we have been collecting statistics on an annual basis. For our size of jurisdiction, and given the lack of finances available, an annual check of the statistics with consultation with interested parties is probably sufficient.

Recommendations

1. A protocol or guidance to be drawn up to ensure compliance with the recommended timeframe in Hague cases and which provides for a written statement of reasons why the parents in a particular case cannot comply. **[FJ96]**

2. Greater emphasis on obtaining at the earliest date, from Northern Ireland and from the other country involved, all relevant records. Central authorities should as a priority gather documents from the very first indication that there are to be proceedings. **[FJ97]**

3. A protocol or guidance to be drawn up (perhaps after a multi-disciplinary recommendation from the Family Justice Board[67]), as to how the voice of the child can be effectively considered in Hague cases. **[FJ98]**

4. Judges in Hague cases in every instance, at the earliest stage available, to consider the advisability of mediation with mediators who are well versed in the procedures unique to such cases. **[FJ99]**

5. Judges in Hague cases regularly to inquire at the outset if the legal representatives are fully conversant with the European Union Mediation Directive and with the Hague Conference Good Guide to Good Practice on Mediation in Child Abduction work. **[FJ100]**

6. The Directive and the Guide to be part of the authorities bundle in most if not all Hague cases. **[FJ101]**

7. Consideration of a specific change in the rules so that the period for lodging an appeal in such cases is shortened. **[FJ102]**

8. Northern Irish practitioners to participate in the Hague Bureau and should make a special point of submitting papers to the Hague Conferences which regularly take place. **[FJ103]**

[67] See Chapter 20.

9. A specialist legal group to be set up in Northern Ireland - comprising judiciary, Family Bar, Law Society and Central Authority - to advise and update practice and procedure in Hague cases. **[FJ104]**

10. Department of Justice and the Legal Services Agency to consider as soon possible revisiting the approach to handling defendants' applications under the Hague Convention and to secure compliance with Council Directive 2002/8/EC of 27 January 2003 and the general approach to Brussels IIR cases. **[FJ105]**

International abductions involving non Hague countries

Discussion

13.46 The remedies available in these cases are limited and there are varied results in this area. The law is fairly settled following a House of Lords decision in Re J[68] whereby the principle to be applied is that it is normally in the best interests of children to have their future determined in the state of habitual residence and that the rules governing Hague are not applied by analogy. In a non-Hague case, the welfare of the child is the paramount consideration. The outcome of litigation in this area, therefore, depends on the facts of each case with a welfare assessment in the particular country involved.

13.47 In particular, there is no reason why the analogous use of judicial liaison in Hague cases should not be invoked in these cases.

13.48 This Review notes that following a meeting of senior judiciary within the United Kingdom, the Pakistan Protocol[69] was implemented in 2003, setting out the approach to be taken in cases involving the UK and Pakistan. This type of approach could be developed if the need arises in Northern Ireland and the use of consular assistance is to be encouraged in these cases.

13.49 However, it is noted that there is a relatively small number of these cases per year and so issues are probably best addressed on a case-by-case basis.

Recommendations

1. Judicial liaison to be used in this area and we encourage that practice. **[FJ106]**

2. Practitioners to be encouraged to seek consular assistance. **[FJ107]**

Abduction within the European Union involving Brussels IIR

Discussion

[68] 2004 UKHL 40

[69] UK Pakistan Judicial Protocol on Children Matters (Jan 2003)

13.50 Within the European Union, the Brussels II regime applies. As such, practitioners have had to become acquainted with the provisions and various issues have arisen in practice, both during Hague proceedings and after Hague orders are made.

Recommendation

1. The Family Bar Association and the Law Society to take proactive steps to set up training sessions to ensure practitioners become more aware of the provisions of the Brussels II regime. **[FJ108]**

Abduction within the UK

13.51 This type of child abduction is governed by *The Family Law Act 1986*. A system is in place for registration of an order in one part of the United Kingdom which can then be enforced in another part of the UK. There is also provision for seek and find orders, police assistance and orders for disclosure.

13.52 The practice in this area is well established and no particular recommendations are made as part of this Review.

Additional Recommendation

1. A judge to be appointed as an international liaison judge (perhaps the current serving Hague Convention liaison judge) to develop already existing and new international contacts, sustain contact with family judges internationally and keep abreast of developments. **[FJ109]**

CHAPTER 14

PAPERLESS COURTS

Current Position

14.1 The spread of information technology and digital solutions across the public and private sectors over the past two decades has long formed the basis for calls for greater efficiency in judicial proceedings across the UK and in other legal jurisdictions. The fact of the matter is that most organisations and businesses now communicate material electronically and, arguably, those of us in the legal profession are the last analogue profession.

14.2 The advent of the photocopier, email, texting and our increasing propensity to communicate with each other in written form, coupled with a tendency to put everything but the kitchen sink into general disclosure in legal cases, has led to what Mr Justice Christopher Clarke has described as "an explosion in the production of documentary material in court which threatens to swamp the system and is an enemy to understanding". Sir Brian Leveson in England has spoken in similar terms. The report of Sir David Norgrove's Family Justice Review in England and Wales, November 2011 reads as follows:

> "24. Current IT systems are wholly inadequate. An integrated IT system should be developed for use in the Family Justice Service and wider family justice agencies. This will need investment. In the meanwhile there should be an urgent review of how better use could be made of existing systems.
>
> 25. The Family Justice Service will also have a role in promoting continuous improvements in practice amongst family justice professionals. The Family Justice Service should develop and monitor national quality standards for system wide processes, based on local knowledge and the experiences of service users. There should be a coordinated and system wide approach to research and evaluation, supported by a dedicated research budget (amalgamated from the different bodies that currently commission research). The processes by which research is transmitted around the family justice system should also be reviewed and improved."

14.3 In a speech at the annual dinner of the Family Law Bar Association on Friday 27 February 2015 at the Middle Temple, Sir James Munby, President of the Family Division said:

> "We live in a world in which we do so much online, buying household goods, paying our bills, booking

> our holidays, paying our taxes, … so the list goes on. But how does one issue an application in the family court? If there is still a counter, one can attend the court in order to issue, just as our ancestors did in the days of Dickens. Or one can use the post – the latest technology in 1840 but now rather dated. Or perhaps one can send an email – hardly cutting edge technology and in any event not much favoured by HMCTS unless, and most do not, you have access to secure email.
>
> The way of the future must surely be online issue. Most steps in the process of obtaining a divorce, for example, lend themselves very easily to an entirely electronic online process. At what stages in the process is human activity required? There are only two: first, in deciding whether the pleaded facts, if true, amount, for example, to unreasonable behaviour; second, in pronouncing the decree in open court. Everything else can, in principle, be done electronically, at great savings of both time and cost. That will, I suspect, only be a start."

14.4 Every judge in Northern Ireland – particularly those engaged in family work – is well familiar with innumerable lever arch files produced by the parties and cases copied several times, lined up in court, but which remain unopened or largely unreferred to during the course of lengthy trials. A small proportion of what is often literally thousands of pages of disclosed material bear some relevance to the case.

14.5 Moreover, when the files are explored, one often finds that delving into them reveals a lack of pagination - or worse still pagination that varies from party to party - an absence of chronological ordering, photocopied documents which are blurred or cut off with multiple vertical lines running down the pages, files which are not adequately labelled, papers which have poor indexing or missing pages, supplemented often by papers served at the last minute which are not contained on the judge's papers or the opposition papers. All of which creates a nightmare for transportation or manipulation during the trial.

14.6 Courts must be able to store and process efficiently an increasingly large volume of data and information, frequently in complex civil proceedings. The collection, holding, editing and transfer of this information in the form of paper documents generates considerable expense, is time consuming and impedes flexibility and timeliness in the running of cases. It is widely accepted by the judiciary practitioners and academics that there is a pressing need to deliver "mess for less" by "digitising" the current system. It is time that we gripped the concept of the paperless court**.** The waste in terms of costs, time in preparation and presentation to court is simply unacceptable.

14.7 Resolution of the problem is not easy. Currently, many members of the profession and judiciary, particularly those of a certain vintage, declare a strong preference for documents in paper form, which facilitates underlining, highlighting, cross-referencing, commenting, etc. as part of the process of ordering their thoughts.

14.8 The present system notionally facilitates an ability to move a document to another part of the file or insert other documents in front or after it.

14.9 Many judges and professionals make their own core bundle from the mishmash of the other documents.

14.10 The proponents of the current system declare, at times with some modest justification, that witnesses are not familiar with or are uncomfortable with answering questions by reference to documents on a computer.

14.11 Counsel and solicitors, and for that matter the judiciary, have a strong love affair with notebooks that facilitate cross-referencing the relevant extracts on the paper in front of them and annotated points for cross-examination.

14.12 We have availed of the opportunity to discuss the paperless concept with Her Honour Judge Newton of the Manchester family court, where the concept has been effectively rolled out since 2 November 2015 in public law cases.

14.13 She described E-filing is a "no brainer". Every paper in the case in her court is passed on electronically and filed by e-mail. It goes straight into the e-file**.** This is now compulsory in all public law cases and as a result has transformed the nature of paper preparation.

14.14 E-bundles have been somewhat more complex. The file is electronically handled before each hearing. It is sent to each party by the local authority. The local authority provides the bundle.

14.15 It is not expensive to set up and already there have been savings on administrative staff. In the long run, it will be necessary to have screens for witnesses in all family courts but in the interim witnesses are provided with paper bundles.

14.16 Some judges and parties, although a declining number, have not found this easy to work from and accordingly they print off the key documents.

14.17 As a result, the family court in Manchester is more or less paperless in public law. It has been found that this is a more secure system than transferring papers by couriers when the system was fully paper controlled. It is on the Government service internet. All the barristers and solicitors are on a secure address. All orders are sent out electronically.

14.18 This process is gradually being extended across the north west of England (for example, Liverpool and Lancashire).

14.19 The legal professions have accepted it well. Previously, they had to make up their own bundles from the index provided. Now the whole bundle is provided electronically, albeit some still prepare a paper bundle.

14.20 Private law is next to be considered in this process. At the moment it is confined to public law cases. There is currently shadowing. Every private law case is set up with an e-file. Most documents arrive now by e-mail in any event.

14.21 The e-bundles create a difficulty in England currently in private law because 80%-90% of litigants in private law cases in England have at least one side being a personal litigant. That, of course, is not the position in Northern Ireland.

14.22 The next step after private law use is to extend it to adoption cases.

Discussion

14.23 Despite the attachment of some to the older paper system, most if not all of the practitioners and judges to whom we have spoken in Northern Ireland are agreed that there must be a more accessible, efficient, less costly and technologically proficient system that reflects the digital era in which we live.

14.24 The digital revolution is already upon us in various courts inside and outside the family justice system. It is the direction of travel in every other jurisdiction with which we have made contact. In the Republic of Ireland, the local authorities deliver virtually all papers online in the family justice system, although the professions are being somewhat slower to emulate this trend[70].

14.25 In England, Manchester and Nottinghamshire have used electronic bundles in care proceedings since 2014/2015. Anecdotally, there remains in other areas a preference for a printed bundle. However, the local authorities will not provide this. They simply provide USB sticks with the court bundle contained in the electronic file and so counsel, and anyone else who wants a hard copy, must print it.

14.26 Outside the family justice system, the Ministry of Justice's Criminal Justice Strategy and Action Plan is committed to turning courtrooms paperless and fitting them with WIFI. Great progress has been made in implementing a fully digital criminal justice system, with police adopting digital case file management and sending case files electronically to the Crown Prosecution Service which in turn submits digital case files to magistrates' courts. The majority of police forces in

[70] Conversations with Judge Horgan, April 2016

England and Wales are now transferring a vast amount of case information electronically.

14.27 The concept of the paperless court is in regular use in the family courts of New Zealand and Australia.

14.28 In all these jurisdictions, the problems we adumbrate below in are being tackled or have been adequately solved.

14.29 In Northern Ireland, it is estimated that over 95% of all correspondence with Directorate of Legal Services (DLS) Family Law Section is now via email and email attachments. Some counsel already operate from electronic briefs. The infrastructure and basic IT skills required for the use of electronic bundles is already widely available throughout the legal profession. Since April 2016 Court staff no longer issue family court orders by email or post to the legal profession. They are directed to access orders via ICOS Case Tracking Online. However orders will continue to be issued to the PSNI, Probation Service and personal litigants or when directed by the court.

14.30 The current Historic Abuse Inquiry in Banbridge under the chairmanship of Sir Anthony Hart uses a wider scope system, whereby the information is logged onto a central network established and maintained by the Northern Ireland Courts & Tribunals Service (NICTS). Each individual user is given an electronic key to access information, including court bundles relating to the case. In this inquiry, NICTS is responsible for the running of the system, which includes the provision of IT support throughout the hearing – for example, by calling up relevant extracts from the bundle. Each party has to install the software on their own machine or "borrow" a laptop from NICTS for the duration of the proceedings.

14.31 The Saville Inquiry and the Hyponatraemia Inquiry chaired by Mr Justice O'Hara deployed similar technology.

The advantages of a paperless court

14.32 The advantages of developing the concept of a paperless court in keeping with the digital tech revolution are numerous. They include:

- Having vast swathes of documents on computer means reduced storage space for large files, reduced transportation costs, avoidance of the need to scan, a reduction in photocopying, etc. and will inevitably turn out to be a money saver for everyone within the family justice system.

- A judge or professional lawyer with the benefit of documents carried in a USB stick or the like to refer to, and, where appropriate, to copy from can easily work from home or elsewhere. Documents can be securely accessed by a computer, laptop or iPad from any location with internet access.

- The presence of documents in e-form (many of which will be in e-form in any event) permits, where appropriate, a largely screen-led trial with very few documents physically copied. The vast majority of documents in large trials are never likely to be looked at. Their presence on computer provides for the off-chance that they may become relevant. They can always be turned into hard copies if need be.

- The interminable footnotes often contained in skeleton arguments can have hyperlinks references to the relevant document or transcript accessed easily by clicking on the reference. It precludes the necessity to locate the bundle, page and passage and type out a quotation.

- Documents on computer often have greater clarity and can be enlarged. Photographs, when copied in trial bundles, often are virtually indecipherable. They can be perfectly reproduced on computer.

- An electronic file of evidence can be searched in seconds to find occurrences of anything one wants to obtain. In ancillary relief cases, for example, accounts, if available in a spreadsheet format seen in tabular form, can be filtered to find just the numbers one is looking for and can be used to produce an infinite variety of alternative schedules to illustrate whatever points you wish to establish.

- Such proposals can be implemented relatively easily. Members of our committee visited and saw in action how such a system has been implemented in civil proceedings in the Chancery and Commercial courts in London and in the Supreme Court. Digital information can be served in large and complex cases. For some years now, using media such as CDs and DVDs, such a system has been used by certain solicitors. A future development may be for barristers and solicitors to sign up for secure e-mail which will enable the profession to communicate securely and be served with electronic bundles. Papers which are received can be saved onto computers.

Disadvantages of a Paperless Court

14.33 We should not be blind to some of the problems.

(a) Moving to new ways of working is not always easy. Overall, there appears to be a nervous resignation amongst some of the older members of the professions and judiciary rather than enthusiasm about the introduction of electronic bundles. Fear of the unknown and the inconvenience of adapting long established ways of working can delay even the inevitable.

(b) For the advocate conducting a cross-examination, the limitations imposed by only having access to one, or even part of one, page of any given document at one time can be difficult to overcome. How does one compare documents side by side? The solution to this is learning to use split screens or the availability of two screens. The issue is brought into focus in the rare trials involving foreign witnesses where numerous documents are disclosed in a foreign language, since a witness will frequently want to be able to have in front of him or her both the original document and a translation. Witnesses giving evidence in a language which is not their first language may perhaps require a complete set of hard trial bundles for their use when being cross-examined.

(c) E-files are a simple and obvious concept that should be quickly introduced. E-bundles are a little more complex. Even though electronic trial bundle software packages may allow bundles to be annotated electronically, it is likely to take some time before advocates have sufficient familiarity with such a system for this to be adopted as a platform for cross-examination, or as a general alternative to the use of an annotated hard copy version of the trial bundle. The answer to this is early training and to introduce incrementally a fully electronic system through a "paper light" system.

(d) Data protection and confidentiality issues, access from third parties or hackers for malicious purposes and manipulation of documents filed electronically also have to be confronted by a rigorous security system drawn up by NICTS.

(e) Digitisation is predicated on ready access to and on the ability to use digital technology. Not everyone has such access and can use it readily. The House of Commons science and technology committee recently referred to the "digital divide", with up to 12.6 million adults in the UK lacking basic digital skills and an estimated 5.8 million never having used the internet at all. We cannot assume that all litigants will have access to a lawyer who is available to enable such individuals to secure effective access. One way in which we can approach this is to draw from experience in other countries (such as the USA), providing digital navigators, available on line, over the phone, in an office in the court buildings or over a secure live web chat platform, who could assist litigants to issue claims and find documents, etc. For those who have no access to the internet of their own, we should provide access to terminals in court buildings and other public buildings throughout the country. Access to justice should be local. In truth, however, as experience in the Northern Ireland Civil Service (NICS) has shown, if online services are incentivised – for example, by being cheaper -

people will use them, if necessary with the assistance of more digital-savvy family members, friends or neighbours.[71]

(f) The logistics for implementation of an e-filing or virtual or remote court system, with presumably a portal provided by the NICTS to manage such an enterprise, may have cost implications and would require educating the parties, the legal representatives, and the judiciary in its operation. However, digitisation of the courts fits in precisely with the move towards digitisation currently operating in the NICS[72]. In England, the Treasury has recently made available £168m for digitisation services in the English court system. Moreover, it is widely recognised that such investment will be a clear money saver in the medium term and is a classic example of an initiative of invest to save.

(g) Some of the more significant problems raised by barristers, both here and in England, relate to the inherent difficulties of relying on technology. Sometimes it just does not work, one of the laptops may not work, the USB drive is not compatible (although the trust should really make sure this is not an issue), it crashes, takes time to set up, etc. The legal advisor has to control the witness bundle, which seems a rather difficult way to do things.[73]

14.34 We suspect these are all teething problems which may arise in the early stages but to be apprised now of them is to be forewarned and we should be able to deal with them. They would be the subject of early detailed discussion with the service provider. Certainly, when we raised these issues with the service providers in the Rolls Building in London and the Supreme Court they were all confident they could be, and had been, obviated under the current systems in operation there.

Paper light

14.35 There may be a case for an interim stage on the way to the paperless courts - the concept of "paper light". Mr Justice Christopher Clarke recently expressed the view that in a large trial you will need to have both paper and computer files. A compromise relates to the critical documents, which could operate as a small bundle of hard copy which can be observed by downloading from the computers for the benefit of the judge himself or for counsel when cross-examining. That allows the judge or counsel to move a document from the physical position to somewhere else or insert a critical document in front or after another document upon which reliance

[71] Discussion with Malcolm McKibbin, Head of the Northern Ireland Civil Service, April 2016.

[72] The "16 x 16"initiative being used in an "Invest to Save" approach to improve digital working across the Northern Ireland Civil Service.

[73] Some interesting articles on the issue are http://www.familylawweek.co.uk/site.aspx?i=ed137486 http://www.familylawweek.co.uk/site.aspx?i=ed159427 and a website, which seems to provide the service - http://www.paradigmfamilylaw.co.uk/paperless-courtroom/ There is a London pilot for financial remedy proceedings - http://www.familylawweek.co.uk/site.aspx?i=ed160431

has been made. In other words, the judge would be provided with a core bundle, or could make his own, or add to an existing one as he goes along in the same way that counsel may wish to do so. Such an approach might ease us all into the inevitable move towards a paperless court by stages.

E-Files

14.36 As Her Honour Judge Newton from Manchester family court intimated to us[74], e-filing of documents is a "no brainer". It is already invoked by all the trusts and we are sure it only a matter of time and experience before all parties avail of it and courts insist on it.

14.37 The implementation of an electronic file management system, whereby all correspondence and documents is processed and retained electronically throughout the length of a case, is a natural progression.

14.38 One immediate benefit that such a practice could have in the Northern Ireland family division would be in the Family Proceedings Court (FPC). No bundles are used in the FPC so they would not be affected by the introduction of electronic bundles. However, case information (pleadings and reports) has to be lodged in triplicate in the FPCs (one for the presiding district judge and one each for the two lay members). The lay members have previously requested through the Children's Order Advisory Committee that consideration is given to them being able to access court files before the day on which they are sitting. The introduction of an electronic file management system, whereby they have a laptop and can log on remotely and review papers in advance, could facilitate this.

E-Bundles

14.39 E-bundles need separate consideration. As part of the inevitable drive towards the paperless court, we should already be recognising that in implementing electronic bundles there are two main options. Firstly, the "narrow scope" refers to a system in which the applicant provides the electronic bundle and emails this to all parties and the court. The other parties and the court office download the bundle onto their own individual laptops. Each party is responsible for preparing their case with reference to this bundle and for ensuring that the electronic information is retained safely. Each party uses their own laptop during the hearing with a separate one provided by NICTS for the witness box. No additional IT support is available during the hearing. The judges would have to locate pages in the electronic bundle themselves and the court clerk can assist witnesses as required.

14.40 The advantages of this narrow scope are substantial, namely:

- It minimises the need for multiple computers to be provided and maintained in the courtrooms at the expense of NICTS.

[74] Meeting with Judge Newton by telephonic exchange, May 2016.

- It does not require NICTS to undergo a lengthy procurement process or extend an existing contract for a specialist service.

- It does not commit NICTS or any of the other parties to a certain provider without the opportunity to test the general application to see what other practical uses may arise.

- It does not require constant IT support to be available throughout the hearing.

- It minimises the exposure to system crashes. With one linked network, if the network crashes the entire case has to stop until it has resolved. Using the "narrow" scope system, each laptop or tablet operates independently. The electronic bundle can be easily downloaded onto different laptops. It allows the parties to prepare cases on their own computers. This ability allows for familiarity and confidence building, something which may be crucially important, particularly at the early stages of any pilot.

- It could be implemented quickly, being dependent upon the provision of computers for the judge and witness and the relevant training of judiciary in the use of the system.

- It is flexible enough to permit limited use of key documents in paper format – perhaps the core bundle only could be paper whilst all others, including discovery, are electronic.

- Should individual parties wish to retain and work from a hard copy they have the ability to do so – nothing prevents parties from printing out their own hard copy from the electronic bundle.

- Most of the population have their own tablet or laptop so there should not be any prejudice to personal litigants. They could require a hard copy from NICTS at the appropriate fee. Personal litigants might welcome the option to submit electronic bundles rather than paper copies as few of them have access to photocopiers.

14.41 The second possibility for implementation is the "wider scope". In this system, all information is logged and a central network established and maintained by NICTS.

14.42 Each individual user is given an electronic key to access information, including court bundles relating to their particular case.

14.43 This is similar to the approach currently used by the Historic Abuse Inquiry in Banbridge. NICTS is responsible for the running of this, which includes the

provision of IT support throughout the hearing, such as calling up relevant extracts from the bundle.

14.44 Each party has to install the software on their own machine or "borrow" a laptop from NICTS for the duration of the proceedings. The system worked well for an Inquiry which lasted a lengthy period with the same parties. It may not be so manageable or cost effective for discrete and disparate hearings.

Electronic Applications

14.45 We should consider extending the concept of electronic bundles for final hearing to electronic bundles for full applications. This would permit an electronic bundle to be submitted at the outset of an application. It would represent a significant advance towards a fully electronic court. This is likely to be of use in types of cases where all the information is available at the date of the application – it would have limited use in evolving litigation.

14.46 A natural progression of this is for the application to be determined without need for any party attending for an oral hearing.

14.47 Sir James Munby identified undefended divorces as an area that could lend themselves very easily to an entirely electronic online process. As noted in Chapter 9, divorces and ancillary relief cases in the Netherlands can also already be dealt with in this way through the Rechtwijzer platform.

14.48 Interlocutory applications in all divisions of the High Court and in the county court would provide a fruitful field for such electronic applications. Certain "C2" applications in family cases, particularly those which would have been heard on submissions only, could be decided on electronic submissions rather than oral hearings.

14.49 It also might be of use in certain judicial review matters involving family justice matters, especially leave hearings.

14.50 In a digital system, parties would potentially be able to initiate cases on-line, pay fees online, or attend hearings remotely either by exchange of text or video conferencing tools from their homes (or, more likely, the offices of their legal representatives). Some of these solutions are already employed on an ad hoc basis by courts.

Virtual reality courts

14.51 Hearings in trials will, of course, continue to be held in open as they are now. Open justice is the central means by which the family justice courts are kept under scrutiny by the public.

14.52 However, that is not to say that all hearings must be held in physically accessible courtrooms. The functions of the court being exercised on each appearance are still required, but the means by which that function is exercised could, in certain types of cases, and at certain stages of each case, be managed in an alternative format which would maximise the efficient running of the case in isolation and the entire body of cases which the court processes at any given time. A number of jurisdictions have piloted and adopted a variety of schemes.

14.53 If video or telephone conferencing systems are available to converse across the world, there is no reason why, with suitable facilities for the public and for recording what happens, they should not be used as a mechanism for improving efficiency and avoiding needless trips to court, whether for lawyer or participant.

14.54 Certain hearings - straightforward case management hearings, some interlocutories, date fixing, reviews, explanations for various matters, adjournment applications, undefended divorces, etc. - can be conducted virtually or on papers, both parties having had the opportunity to submit their argument. Well prepared papers could be filed, and the decision ultimately left for the judge to exercise on papers or on, for example, telephonic or Skype communication.

14.55 The current system requires a court appearance in the majority of cases at the stage where any determination is being made by the court, or where case management functions are being exercised. The primary 'problem' with this system is efficiency. From the perspective of the litigant, their solicitor and counsel, the court staff and the judiciary, attendance at court in the current manner at multiple junctures of every case is time intensive. In certain cases, the result reached at that appearance could more efficiently be achieved without a court appearance. Certain stages of cases could be managed and exercised without requiring attendance of a party's representative before a judge or Master.

14.56 Paperless – or, in the interim, paper light - courts, teleconferencing hearings, video link evidence and examination, mediated dispute resolution systems and minimising oral presentation in favour of Judicial officers making determination based on papers electronically filed are all part of the legal fabric, not only here in some cases but as far apart as the USA, Australia, Poland, Brazil, India, Sri Lanka, Israel and, of course, England and Wales. The time has come for us to enthusiastically embrace these concepts.

Online Dispute Resolution

14.57 More radical is the prospect of conducting full legal proceedings wholly or partly upon electronic platforms across the internet in the form of an online court service. We have looked at this concept in detail in our Civil Justice Review. As appears in our chapter on private law in this Family Justice Review[75], we have

[75] See Chapter 6.

recommended this for "no fault" divorce cases. In the chapter on ancillary relief[76], we have discussed the more vexed question of extending this to instances of financial relief.

14.58 The professions, the judiciary and NICTS will all need time to accommodate themselves to these new digitisation processes. To that end, we need to hasten cautiously. It is felt that we should make a start with selected areas piloted such as Belfast (as has occurred in England, for example, in Manchester) so that within 24-36 months all public law and private law hearings in the family division are subject to the new regime. Thereafter, a review of that process should be instituted, perhaps by the newly constituted Family Justice Board[77] to enable lessons to be learned from the process already implemented. That is not to say that those judges and Masters currently developing the concept on an ad hoc basis should be inhibited from continuing to do so.

Recommendations

1. Within 12 months from the date of this Report, the Bar Council, the Law Society and NICTS to collaborate to draw up a best practice protocol regarding e-files, electronic bundles, electronic applications and electronic file management systems. That best practice document should form the basis for the area chosen for a pilot scheme and as a basis for further dissemination. **[FJ110]**

2. A family court centre to be thereafter selected as a pilot scheme for hearings listed from that date involving the use of e-files, narrow scope electronic bundles and virtual reality hearings in appropriate instances unless directed otherwise by the judge. That should become a key component of all case management hearings at an early stage. Within 24-36 months all family justice cases should use these processes. **[FJ111]**

3. In the family division, all "no fault" divorce applications, unless otherwise directed by the Master or the judge, to be processed by way of online applications as soon as the relevant legislation is passed. **[FJ112]**

4. A full review of the use of this system in the family division to take place within one year of its inception – that is, within 24 months of this Report - by the Family Justice Board or such body as the Lord Chief Justice sets up to consider it. **[FJ113]**

5. NICTS to take steps to ensure that all arrangements adopted now regarding e-files and electronic bundles will be compatible with any future implementation of a fuller electronic file management system, the same to be set up within two years from the date of the publication of this Report. **[FJ114]**

[76] See Chapter 9.
[77] See Chapter 20.

6. NICTS to set up and service an online special support system for the benefit of non-users of the internet. This must ensure that potential litigants who are incapable of access to internet are not marginalised. **[FJ115]**

7. Any system of regulation for the use of electronic bundles, applications or file management systems to retain the flexibility to allow parties to transfer from the electronic administration affairs to the traditional paper form at the discretion of the Master or the judge. **[FJ116]**

8. Any digital filing solution to ensure the security of the data being stored and prevent unauthorised access to electronic court files. NICTS should immediately undertake steps to ensure this protection is secured. **[FJ117]**

9. The Judicial Studies Board, Bar Council and Law Society to provide, as soon as practicable, appropriate training seminars to meet the new digitisation system. **[FJ118]**

10. The relevant rules committees to consider the necessary rule changes to implement this process. **[FJ119]**

CHAPTER 15

DISCLOSURE

Current Position

15.1 The problem with excessive disclosure is that the photocopier has become a substitute for thought. The hope is that something will turn up; there is a failure of solicitors to get advice on evidence and a lack of time for judges to compel parties to get to the real issues and stick to them. The end result is that family court proceedings are often submerged in a mountain of paper, most of which is never looked at and which, in any event, contains countless duplications, out of order documents, lack of pagination, etc.

Discussion

15.2 In February 2014, Sir James Munby, the President of the Family Division in England and Wales, had criticised lawyers for routinely ignoring practice directions imposing a 350 page limit on bundles warning that surplus court documents would be destroyed without notice if practitioners cannot keep to these directions.

15.3 Sir James has now proposed introducing mandatory restrictions on the number of pages in court documents for family cases on the basis that lawyers have ignored previous calls for restraint.

15.4 In proposals published for consultation in January 2016 (see Appendix 5), Lord Justice Munby said he is "not conscious" this has had much effect and that the time may now have come to impose page limits for certain types of documents. These are not currently regulated by practice directions. The limits would be mandatory unless the court specifically directs otherwise. Lord Justice Munby has proposed amending the practice direction to specify limits on the number of sheets of papers specific documents should contain. The proposals include a 10 page cap on skeleton arguments, a maximum of 20 pages per witness statement and 40 pages for expert reports. He has also suggested amending the rules to specify that bundles should not contain more than 10 authorities.

15.5 He said the need for mandatory restrictions was highlighted by the case of Seagrove v Sullivan[78] when a family judge removed most case documents from court after the parties' lawyers submitted 3,500 pages of documents from 32 authorities for consideration ahead of a proposed 8 day trial. Lord Justice Munby is asking for opinions on whether his proposals are desirable, and if so whether the length would be controlled by page count or word count and if by page count what figures are appropriate.

[78] [2014] EWHC 4110 (Fam)

15.6 We are conscious that the Care Proceedings Pilot Project chaired by Eilis McDaniel, a senior official in the Department of Health, is looking at solutions.

15.7 We feel we should explore a practice direction along the English lines for Northern Ireland and that the judiciary at all levels must become involved in this.

Recommendation

1. The implementation by the Senior Family Judge of a practice direction along the English lines for Northern Ireland. **[FJ120]**

CHAPTER 16

THE VOICE OF THE CHILD AND VULNERABLE ADULTS

The voice of the child

Current Position

16.1 The Chief Justice of the Republic of Ireland said recently that the moral test of government is:

> "How that government treats those who are in the dawn of life – our children. This moral test is moving into law at international, constitutional and national level. It is enabling those, who were all once children, to remember how to listen to a child." She quoted Professor Dumbledore from Harry Potter:
>
> > 'A child's voice however honest and true, is meaningless to those who have forgotten how to listen'."

16.2 It is not only the child who needs to be listened to in an informed manner but also other vulnerable witnesses in family proceedings, and particularly in care proceedings. How their oral testimony is to be facilitated is a key component of any justice system. Maturity, age (in the case of a child), mental health and social functioning disabilities are all matters which demand attention. The family courts arguably appear to be struggling to find their way to a scheme of suitable arrangements for vulnerable witnesses, particularly when they are children[79].

16.3 It has to be acknowledged that courts in this jurisdiction are, rightly, still feeling their way forward in order to determine how best to "hear" the voice of a child in all family proceedings, including where the child is the subject of an application under the Hague Convention. What is, or is not, the appropriate channel through which a child is heard will differ from case to case and the manner in which the task is undertaken will depend on the developing skill and understanding of the judge and other professionals involved. In short, our collective understanding of how best to "hear" a young person within the court setting is developing and is still, to an extent, in its infancy. It is not our aim to say anything that may set current practice in concrete or otherwise prevent discussion, thought and further development of good practice[80].

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[79] Penny Cooper [2014] CFLQ 132 "Speaking when they are Spoken to: Hearing Vulnerable Witnesses in Care Proceedings".

[80] Echoing the views of the Court of Appeal in England in Re KP (A Child) (Abduction: Rights of Custody) Practice Note [2014] 1 WLR 4326.

16.4 The starting point nowadays perhaps is reflected in Article 12 of the United Nations Convention on the Rights of Child (UNCRC):

> "1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be afforded the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body in a manner consistent with the procedural rules of national law."

16.5 The procedural rules in Northern Ireland, as well as in England and Wales, have left "the professionals" to communicate with a child and pass on that communication to the court. It is recognised that the court will hear the thoughts and views of children through:

- adults, including their social worker,
- their parents if they are having contact with them ,
- the Guardian Ad Litem or, in private law cases, the Official Solicitor and direct contact with the judge.

16.6 The Guardian ad Litem's role ("the Guardian") is to represent a child in order to safeguard their interests. The Guardian is expected to explore with the child their wishes and feelings if they are old enough to express them. Although the Guardian will not necessarily agree with the child's wishes and feelings, they are is expected to pass these on to the court, including in a written report for the final hearing, because the court must have regard to the child's wishes and feelings.

16.7 However, when the child's evidence is being passed on by their guardian, their solicitor or even their parents, it is only effective if the adult carefully asks the right questions, properly understands what the child has said and passes it on accurately without anything crucial being lost in editing.

16.8 Professor Penny Cooper, who has written widely on the subject and to whom we have spoken, records that research with children in the criminal sphere reveals that conducting forensic interviews is a special skill, and training should be based on scientific proven methods. Moreover, training for interviews should be on an on-

going basis[81]. Thus, for example, police officers who carry out interviews with children and vulnerable adults in criminal cases undergo extensive training before being allowed to conduct an Achieving Best Evidence (ABE) interview for evidential purposes. Some of the complexity of ABE interviewing and skills needed is set out in the recent report by Queens University[82] for the Department of Justice.

16.9 Scotland's "Children's Hearings" are worthy of note. Children have been able to attend hearings for over 40 years. Children as well as their parents must normally attend the hearings, which are actually meetings in private venues. Provision is made for the use of assistance for the vulnerable[83]. Decisions are made about them in an atmosphere conducive to their participation and there is provision for the use of Live Link for the vulnerable. However, when matters are in dispute, the Scottish system still relies on adversarial cross-examination conducted by the lawyers.

16.10 We know from cases in the European Court of Human Rights that it is standard practice for children to be present for at least some of the time in children's cases in Germany and almost invariably for the judge to speak to them.

16.11 Conventionally, under the current rules, in Northern Ireland cases almost invariably take place without the child in court.

16.12 In the past there was also a reluctance to see children in private. By and large, the assumption was that it was not the right thing to do.[84] The traditional reasoning behind the reluctance to see children in private arose out of the following reasons:

- Seeing the child in private still precludes giving them a guarantee of confidentiality.

- The child has to be told that if a judge hears anything which might influence the decision, all the parties have to be told so that they can have a proper opportunity for dealing with it by evidence or argument.

- Skill is needed in eliciting the child's views and in interpreting them and a short meeting with a judge might not meet these criteria.

- Judges may have little experience of direct communication with children and they may fail to see the pitfalls that a professional would see.

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[81] H Stewart, C Catz and La Rooy (Training Forensic Interviewers) in "Children's Testimony – Handbook of Psychological Research and Forensic Practice (Wiley-Blackwell) 2nd Edition, 2011 at p. 199.

[82] https://www.justice-ni.gov.uk/publications/good-practice-achieving-best-evidence-interview-child-witnesses-northern-ireland

[83] Vulnerable witness provisions are contained in the Children's Hearings (Scotland) Act 2011.

[84] Re M (A Minor) (Justices' Discretion) [1993] 2 FLR 706
Mabon v Mabon [2005] 2 FLR 1011

- It is a complicated matter meeting children. Judges would have to appreciate the depth of family background in that if a child comes from a family where you are not allowed to speak out, particularly to criticise parents' actions or decisions, there may well be difficulty voicing the feelings to anyone, let alone a judge. If a child has been abused, they may have negative feelings about themselves which will affect their self-esteem and confidence in their right to have a view.

- Moreover, in past years the idea that children might be live witnesses in these cases was almost unheard of. *The Children Order (Northern Ireland) 1995* should have dispelled any doubts about the admissibility of hearsay evidence in non-wardship proceedings because videoed interviews could be admitted.

16.13 In Northern Ireland and the Republic of Ireland[85] increasingly, however, there are circumstances where children of appropriate age are interviewed by the judge, principally in private law cases. However, we are acutely aware - perhaps too acutely - of the attendant dangers of raised expectations or misunderstanding of the role of the judge by the child, the Article 6 rights of the European Convention on Human Rights (ECHR) of the other parties in the case and the child feeling betrayed if even the gist of what they said is revealed to the parents. Moreover, we recognise that damage to child witnesses during the course of giving the evidence can be a real possibility and courts must be conscious of the danger of inflicting more harm on a child than benefit to them by giving evidence.

16.14 Broadly, we follow the test for when a child can give evidence in the family court in England and Wales, where the concept has been considered in a number of leading English authorities.[86] The test set out in these authorities amounts to this:

> "When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that it will bring to the determination of the truth and the damage it may do to the welfare of this or any other child"[87].

16.15 This test has been criticised[88] on the grounds that when the court is considering the future plans for the child, the test does not consider the harm it may do to the child's welfare if they do not give evidence. Not giving evidence may give rise to a child's sense of injustice and a feeling of being unfairly excluded by a judge who is, however, prepared to hear directly from the adults, possibly including those who have caused the child significant harm.

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[85] As revealed in our discussions with Judge Abbott, Judge White and Judge Horgan
[86] Re W (Children) (Abuse: Oral Evidence) [2010] UKSC 12; Re P-S (Children) [2013] 1 WLR 3831.
[87] Re W at para [24].
[88] See article of Professor Cooper above.

Discussion

16.16 However, the reluctance to meet with children has been increasingly questioned. Growing awareness of the UNCRC, the concepts of children's rights generally, the advent of *The Human Rights Act 1998* and a leading case in the ECHR[89], which held that "it would be going too far" to say that the national court was always obliged to hear directly from a child but the expectation clearly was that both that and the up-to-date psychological report on the child would be normal practice.

16.17 Five main advantages for seeing children have emerged[90]:

- The judge will see the child as a real person rather than as the object of other people's disputes or concerns. These children may have a very clear idea about what they think is right.

- The court may learn more about the child's wishes and feelings than is possible at second or third hand.

- The child will feel respected, valued and involved as long as the child is not coerced or obliged to make choices that they do not wish to make.

- It presents an opportunity to help the child understand the rules. Just as the parents will have to obey the court order whether they agree with it or not, so will the child. Hopefully, a child who has been involved in the process may feel more inclined to comply with the decision than one who feels that they have been ignored.

- Parents too may be reassured that the court has been actively involved rather than simply stamping the professionals' opinions.

16.18 In England in April 2010, the Family Justice Council issued "Guidelines for Judges meeting children who are subject of Family Proceedings". The purpose was "to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the judges understood their wishes and feelings and to understand the nature of the judge's task". That guidance[91] has been criticised on the basis that none of the considerations invites the court to consider the potential benefit to the child of knowing that they have had their day in court to give their truth about what has happened to them.

[89] Sabin v Germany [2003] 2 FLR 671 and Summerfield v Germany [2003] 2 FCR 619

[90] Speech of Lady Hale, Deputy President of the Supreme Court at the Association of Lawyers for Children Annual Conference 2015 Manchester "Are we nearly there yet?", 20 November 2015.

[91] Working Party of the Family Justice Council "Guidelines in Relation to Children Giving Evidence in Family Proceedings".

16.19 In 2014, pilot projects in Leeds and York sought to put meetings between children and the judge or magistrate on a more routine and structured footing by offering suitable children the opportunity of a meeting and providing them with information and the participant professionals with guidance. The reports from those projects suggested:

- Quite a high proportion of the children were deemed unsuitable for a meeting with the judiciary, usually because of age but sometimes because of other factors.

- Of those deemed suitable, quite a high proportion did not want to see the judge.

- There was only limited feedback from the children themselves but most seemed to find it positive.

- The feedback from CAFCASS and practitioners was positive.

- There were some practical problems in making the arrangements, particularly with magistrates.

- The judges welcomed more guidance about what the purpose of the meetings was.[92]

16.20 We consider that *normalisation* of the process - but not necessarily as a matter of routine - is to be recommended in appropriate cases so long as there is clarity about what the purpose is for meeting the child. It would not be helpful if the child wanted it for one purpose (to tell the judge their views) and the court offered it for a different one (to tell the child about the court). Judges must retain the flexibility to decide when it is appropriate but the normalisation of the process would serve as an impetus to the notion that it should be carefully considered throughout the hearing and certainly at the case management stage.

16.21 We emphasise, however, that the concept of normalisation does not mean it must normally happen in every instance. It simply means it will be normal to *consider* the possibility in every case**.** In short, judges should determine at an early stage whether or not it is in the child's interest for the child to be interviewed personally by them. The child's wishes on the matter must be a consideration. Where the decision is made not to interview directly, this should be kept under review as the case proceeds.

[92] See also H Barrett, HHJ Hillier A Johal, *Children and Young People meeting judges and magistrates, Evaluation Report of the West Yorkshire Project; HHJ Finnerty, Gittims. P Scatchard, Children and Young People meeting judges and magistrates Evaluation Report of the York and North Yorkshire Project May 2015 FJYPPB, FJYPB, CAF CASS HMCTS*

16.22 We recommend that every family judge should receive training, and thereafter refresher courses in child development and the art of interviewing children.

16.23 A different range of issues arise in considering the role of children as witnesses of fact. The Supreme Court in 2010[93] held that where a child was making allegations against a parent, it was wrong to have a presumption against that child giving live evidence in court. The rights of all parties, to a fair trial and to respect for their family lives, had to be balanced against one another.

16.24 In December 2011, the Family Justice Council issued its "Guidelines in relation to Children giving Evidence in Family Proceedings"[94] and recommended:

- The court should carry out a balancing exercise between the possible advantages that the child being called would bring to the determination of the truth against the possible damage to the child's welfare from giving evidence.

- A number of factors need to be taken into account, starting with a child's own wishes and feelings.

- An unwilling child should rarely, if ever, be obliged to give evidence.

- Alternatives to the child giving evidence at the hearing need to be considered, including the option of further questions being put to the child outside the hearing.

- Once it has been determined that the child should give evidence, the court should consider the use of "special measures", advanced judicial approval of any questions to be put to the child and agreement as to the proper form and limit of any questioning and the identity of the questioner.

- Ground rules should be laid down, including avoiding suggestions or leading questions including tag questions to the child, no "Old Bailey" style cross-examination, avoiding restricted choice question and an assumption that the child understands the question.

16.25 Again there are two views on this matter. Requiring a child to give evidence about the abuse they have suffered could turn the proceedings which are designed to protect them into a further abuse. On the other hand, it may be seen as respecting the child as a real person with their own account to give of what has happened to them. Hearing the authentic voice of the child must, on occasions, include finding a sensible way of assessing the reliability of what they have to say. This need not mean giving the parties a freehand to cross-examine the child in whatever way they

[93] Re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12
[94] [2012] Fam Law 79

think fit. Just as a tight control is kept on the manner in which children give evidence in the criminal courts, so that should be extended to family justice cases.

16.26 A further issue arises as to whether or not a similar procedure – that is, the child giving evidence - should be adopted to ascertaining the child's wishes and feelings as to what should happen in the future. Recently, the Court of Appeal in England[95] stated very firmly that a meeting between the judge and a child involved in abduction proceedings should not be used for the purpose of obtaining evidence. When listening to what the child has to say (as opposed to explaining the nature of the court process), the judge should largely be a passive recipient and should certainly not seek to probe or test what the child says. Leave to appeal that case to the Supreme Court was refused.

16.27 Nonetheless, the question arises as to whether if wishes and feelings are to become a matter of evidence, just like anything else, should children be called to give evidence far more frequently than happens at present even routinely?

16.28 The final report of the Vulnerable Witnesses and Children Working Group (the working group) chaired by Mr Justice Hayden and Ms Justice Russell, published in February 2015, pointed out that "thousands of children and young people go through the criminal justice system (as witnesses) every year but the direct evidence of children is seldom heard or rarely available in the family courts". It records that in 2012 in England and Wales there were 33,000 child witnesses in criminal cases.

16.29 That report has been described as a very radical document[96] that took on board the views of the Family Justice Young People's Board. It asserted that the evidence of the wishes and feelings of children should come directly from the child themselves rather than through the mediation of professionals, and certainly not through a private meeting with the judge. Making them feel part of the proceedings and understanding how the legal process works is one thing. The report stated:

> "It is not part of the judicial function to evidence gather so wishes and feelings expressed at the meeting cannot properly be taken into account when decision making."[97]

16.30 If the criminal justice system has been able to develop tools for educating judges and advocates, why is it that the family justice system cannot do the same thing? Why should it not abandon its traditional reliance on hearsay and professional evidence in favour of direct evidence from the child? Perhaps the child should be the primary witness, both as to what has happened to them and as to what she wants to happen in the future, providing special measures to enable them to do so.

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[95] Re KP (A Child) (Abduction: Rights of Custody) [2014] EWCA Civ 554
[96] See speech of Lady Hale supra at p14
[97] See report at paragraphs 23 and 24

16.31 Whilst remaining open minded about the discretion of a judge to permit a child to be called as a witness in a case, we recommend that courts should give serious consideration in each instance to whether or not it is appropriate for the child to give evidence and it should not be the case that the child or the alleged abuser can presume that the child will not give evidence.[98]

16.32 Moreover, the family court should be given the power to adopt the so called "special measures" when it thinks appropriate for a child to give evidence. As appears later in this chapter, it should also be extended to vulnerable adults.

16.33 The working group recommended a number of new rules and practice directions which we consider ought to be adopted in Northern Ireland. The object of these recommendations is to give prominence and emphasis to the treatment of the child and the parties in family proceedings, to emphasise the importance of the role of the child and the need to identify the necessary support and special measures for the child or vulnerable adult witnesses and/or parties from the outset of the proceedings or at the earliest opportunity.

16.34 These will include:

- An obligation to make provision for vulnerable parties and witnesses and children to assist them in improving the quality of their evidence and to participate fully in the proceedings.

- An entitlement to a party or witness in family proceedings on grounds of age, incapacity, fear or distress to obtain such assistance.

- An early case management hearing at which the need for the child to give evidence should be considered and what assistance the child may need to give the best evidence of which they are capable.

- If the child has to give live evidence, ground rules, such as those introduced in criminal proceedings, establishing who does the questioning and about what and how.

- Preventing a party or witness from seeing the other party, the giving of evidence by Live Link and participating parties and witnesses being questioned with the assistance of an intermediary where necessary. There may be a slightly different timescale for such intervention than that which occurs in the criminal justice system.

- The court being empowered to direct that public funding be made available for such purposes.

[98] Re W (Children) (Family Proceedings: Evidence) [2010] 1 WLR 701

16.35 An early product of our Reference Group discussions in Northern Ireland has been a potential project put forward by the NSPCC, which provides the current Young Witness Service for child witnesses in criminal proceedings, taking forward a suggestion of piloting a similar service in the family court. A meeting was held in June 2016 with the Department of Justice, as the policy lead and as funders of the existing Young Witness Service, taking the lead. Development of this project is one of our current recommendations.

16.36 We conclude on this question of the voice of the child by reiterating what we said at the start: namely that our understanding of these matters and how best to hear a young person within the court setting is developing and is still to an extent in its infancy. Judges must form their own views and exercise their own discretion on these issues given the particular circumstances in each instance. However, our task is to ensure that those who consider it appropriate to meet with children and to permit them to give evidence in hearings should be empowered to do so, armed with the appropriate tools to allow this to happen.

Vulnerable witnesses and special measures

Current Position

16.37 The task of defining who is a vulnerable witness is, of course, a daunting one. Many of the parents, and indeed children, who appear in the family courts have difficulty exercising control of their relationships, and have longstanding mental health issues often going back into childhood against the background of domestic violence, substance misuse, learning disability, etc. Some of these people could be considered vulnerable in the general sense of the word. In order to give some definition to the phrase, however, the definition for vulnerable witnesses in *The Criminal Justice (Northern Ireland) Order 1999* and, in England and Wales, under *The Youth Justice and Criminal Evidence 1999* may well provide sufficient parameters within the family justice setting, including as it does those who are:

- under 18 or
- for whom the quality of their evidence "is likely to be diminished" by reason of them suffering from mental health disorder within the meaning of *The Mental Health Act 1983* or
- otherwise having "a significant impairment of intelligence and social function" or "a physical disability" or "physical disorder".

16.38 Currently there is no family court special measure legislation in Norther Ireland to assist a judge comparable to the situation in criminal law. However, there is no logical reason why in certain appropriate cases the family courts cannot sit in a criminal court with Live Link equipment and consider using court funds, if they are available, to pay for the services of an intermediary.

16.39 There is no research data available to us to indicate how often applications for family court special measures are made to deal with vulnerable parents or how often they are implemented.

16.40 Contrast in England, where a 2010 practice direction states that the court will "identify any special measures such as the need for access for the disabled or provision for vulnerable witnesses".

16.41 Although there is no family justice system special measures legislation to assist the judge, the family justice system in Northern Ireland is, as matters stand, well advanced in recognising the needs of the vulnerable in other respects. The High Court[99] has as far back as 2006 addressed in detail the steps that need to be taken by courts in removing the barriers to the provision of appropriate support to parents, including negative or stereotypical attitudes about parents with learning disabilities. However, have we gone far enough?

Discussion

16.42 Registered Intermediary (RI) Schemes have been put in place in this jurisdiction since May 2013, on a pilot basis, to assist with the provision of evidence in the Crown Court by vulnerable witnesses and defendants with communication difficulties.

16.43 Examination of a witness through an intermediary is one of the eight "special measures" provided for in *The Criminal Justice (Northern Ireland) Order 1999* (art. 17). In considering the commencement of this special measure, it was difficult to estimate likely uptake and associated costs. The RI Schemes pilot was launched in May 2013 in respect of offences which were triable only on indictment in the Crown Court sitting in Belfast and in November 2013 the pilot was extended to all of Northern Ireland.

16.44 In response to the judiciary's view that intermediaries should also be made available to defendants (as provided for by art. 21(b)(a) of the 1999 Order) on the same basis as for victims and witnesses, in order to ensure equality of arms, it was agreed that all vulnerable persons should be catered for by introducing parallel schemes for victims/witnesses and for suspects/defendants.

16.45 MindWise, a local mental health charity which runs the Appropriate Adult Scheme, provides a court defendant supporter to sit with the defendant during his trial with an RI only assisting the defendant when their evidence is being given.

16.46 England and Wales and Northern Ireland are the only jurisdictions in which RIs are used and Northern Ireland remains the only part of the world in which a

[99] Re G and A(Care Order :Freeing Order: Parents with a Learning Disability)[2006]NIFam8 cited with approval In the matter of D(A Child)[2016]EWFC 1

scheme for defendants is in place. Scotland and the Republic of Ireland have been maintaining a watching brief and officials from the Republic have attended a number of Department of Justice events.

16.47 By the end of phase one of the pilot, 260 requests for a RI had been received. The majority of these were made by the police (223) and the RI assistance was mainly for victims (220). Three fifths of requests were for children under 18 years of age. In addition, three fifths of requests were in respect of sexual offences. The largest category of vulnerability was persons with a learning disability (one fifth). The cost of providing an RI for these cases was approximately £164,000 (around £630 per case).

16.48 An evaluation of the pilot[100], between November 2014 and March 2015, found that the RI schemes were working well, particularly at police stage.

16.49 In light of the limited experience at court, it was decided to have a 12 month phase two pilot from 1 April 2015 with the scope extended to all cases being heard in the Crown Court. A further evaluation was undertaken in April 2016. The pilot is reported to have been going well, with 325 requests received between 1 April and 31 December 2015.

16.50 The judiciary in Northern Ireland have shown an active interest in the schemes and the Lord Chief Justice, during a keynote speech at a vulnerable witness conference hosted by the Institute of Professional Legal Studies in November 2014, stated that he fully supported the use of RIs in Northern Ireland and envisaged that they will form part of the justice system for the foreseeable future. He also called for the use of intermediaries to be considered in the civil context.

16.51 The role and availability of intermediaries could be a crucial factor in this vexed area. Intermediaries, as currently used in the criminal justice system, are neither expert witnesses nor witness support. They provide communication guidance and sit alongside the witness in the Live Link room (or stand/sit next to them if they are giving evidence in court) in order to monitor communication and intervene to assist with communication matters. They would have a role to play in assisting family judges to hear the voice of the child and other vulnerable witnesses where, for example, the extent of their communication deficits would diminish the quality of their evidence as a witness or if they would be unable to participate effectively in proceedings as a witnesses giving oral evidence.

16.52 The RI's paramount duty is to the court and they are required to be impartial. They are not, therefore, acting in the role of supporter or advocate. They do not answer on behalf of a witness or interpret what they have said and they do not offer opinions on the truthfulness or reliability of what has been said.

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[100] The evaluation report of phase one of the pilot can be viewed at www.dojni.gov.uk/publications/registered-intermediary-schemes.

16.53 They carry out an assessment of the vulnerable person and provide the criminal justice practitioner with a report on their findings, together with strategies on how best to communicate with that person. The report may include, for instance, the recommended mode of communication, the extent of the person's vocabulary and attention span, their expressive and receptive communication skills, their ability to understand temporal or spatial concepts and sequencing, and whether they are suggestible or tend to be overly compliant. The RI is then currently present during the police interview or trial to assist with any communication difficulties that may arise.

16.54 RIs are subject to a Code of Practice and Code of Ethics and are required to follow a Procedural Guidance Manual. A separate oath has been devised for their use in court.

16.55 For some time in England the absence of an intermediary scheme in family cases has been criticised[101]. The Family Justice Council guidelines encourage practitioners to consider the use of intermediaries at the "earliest opportunity".

16.56 In its report entitled "Vulnerable Witnesses in Civil Proceedings" published in July 2011, the Northern Ireland Law Commission recommended that a scheme of special measures, including the use of intermediaries, be put in place on a statutory basis in relation to civil proceedings in Northern Ireland.

16.57 The principal challenge in implementing similar schemes for civil and family business is likely to be availability of resources. Hence the Law Commission recommendation in respect of intermediaries has yet to be implemented.

16.58 The Department of Justice had indicated previously that it would be willing to allow the pool of accredited RIs that it had recruited and trained to be used for civil business (provided this did not interfere unduly with criminal business) but the cost per case would need to be funded. Since the use of RIs would be novel in this setting and would represent a cultural shift, some resources would also need to be invested in raising awareness of the particular role played by the RI.

16.59 Already, training is delivered for RIs in both Northern Ireland and England and Wales by Professor Cooper and her colleague David Wurtzel.

16.60 The question would arise as to how the additional work to be carried out by the RIs in the family pilot scheme would be funded. Since there must be some flexibility in the fund available for criminal cases, it does not seem to us that the additional figures for a pilot scheme in Belfast would be a huge increase in the sum already set aside for RIs.

[101] Re X (A Child: Evidence) [2012] 2 FLR 456.

16.61 In short, RIs have potentially more of a role to play in family law, where the rules of evidence are relaxed somewhat and where welfare is the core consideration. Family justice in Northern Ireland is ahead on this issue anyway, although in an ad hoc way. We now use befrienders in court and voluntary organisations (such as Mencap and Women's Aid) frequently come to court on sensitive issues. We advocate that family law leads the way still further in potentially creating a more formalised structure in supporting child witnesses with a better system of supports for court.

Recommendations

1. Every family judge to receive training in the art of interviewing children and child development. **[FJ121]**

2. Judges to determine at an early stage whether or not it is in the child's interest for the child to be interviewed personally by them and where the decision is made not to interview directly, this should be kept under review as the case proceeds. **[FJ122]**

3. The Bar Council and the Law Society to introduce guidance and specialist training for those questioning children and the vulnerable. **[FJ123]**

4. Family courts to be open to pre-recording of evidential interviews, pre-court familiarisation, court supporters and special measures such as Live Link and screens. **[FJ124]**

5. Registered intermediaries to be introduced into the family justice system with the power of the court to appoint them. In this context, courts should consider putting the required questions to a vulnerable witness through an intermediary. This could be done by the court itself, as would be common in continental Europe.[102] **[FJ125]**

6. As a first step, Registered Intermediaries (RIs) to be introduced for a specific part of civil justice, namely family justice, on a non-statutory basis. Referrals for RI assistance could be limited to cases where the securing the evidence of the vulnerable witness was of particular importance for the effective conduct of court business. **[FJ126]**

7. This to be done administratively in the first instance using the court's inherent powers for a pilot scheme in Belfast Family Proceedings Court and Family Care Centre, where there would be sufficient numbers to allow a proper evaluation. Whilst it would be cheaper to permit it in smaller jurisdictions - such as Craigavon, where there are fewer cases - this would diminish the evaluation process. A pilot would demonstrate that the costs are justified by

[102] See Re W at para [28].
[103] See Chapter 20.

the benefits – better client experiences, most effective use of court time and compliance with Articles 6 and 8 of the European Convention on Human Rights. **[FJ127]**

8. The Department of Justice to explore with NSPCC the potential for the Young Witness Service, which currently supports child witnesses in the criminal justice system, to be extended to the family court. This should initially take the form of a pilot to identify the costs and benefits that would be associated with a full roll-out. **[FJ128]**

9. The formation of a Family Justice Board[103], if adopted, to take up this issue of children and vulnerable adults in the family courts, carry out further research and make further appropriate recommendations. **[FJ129]**

[103] See Chapter 20.

CHAPTER 17

THE COURT SETTING

Current Position

17.1 In most family courts, no allowance is made for the unique family justice nature of the proceedings in terms of how the physical structure of the court is set up. We have considered suggestions to alter the formal nature of the court setting.

17.2 There is some precedent for a much more informal setting in the youth justice context. Both the youth court and Family Proceedings Courts are constituted in the same way as juvenile courts under *The Children & Young Person Act (Northern Ireland) 1968*.

17.3 Following series of reports from Lord Clyde (in his role as Justice Oversight Commissioner) commencing in 2003, and as a result of a recommendation from an inspection report by the Criminal Justice Inspectorate, guidelines[104] in relation to the operation and layout of the youth court were reissued in 2014.

> "In some courthouses, particularly older buildings, the structure and layout may present a challenge to providing all the facilities that are desirable for youth courts. However, the case should always be heard in a courtroom where everyone involved is on the same, or almost the same, level. Research has shown that the physical court environment - the type of furniture, layout and seating arrangements – can influence communication. It can help people to play an active part in the process or can prevent people from feeling involved."

17.4 Currently no such provision has been made in the family courts. Should this change?

Discussion

17.5 The argument in favour of a modern approach ("the proposal") to the court setting is that family proceedings should be conducted in what might be perceived as a more friendly and consequently less formal manner than other courts. Parents and children should not be intimidated by the formality of the traditional court setting and the shift towards these courts being problem solving fora would arguably lend itself to this change. Currently, judges and most of the profession appear without robes or wigs (although the family division in Northern Ireland has

[104] https://www.courtsni.gov.uk/en-GB/Publications/UsefulInformationLeaflets/Documents/p_uil_youth-court/The-Youth-Court.pdf

recently reintroduced the wearing of gowns by judges) in all such courts in the UK and some rooms are set up in boardroom style with modern furnishings.

17.6 The argument against any change in the status quo is based on three contentions:

- Firstly, the cases often, if not invariably, involve domestic violence or heightened emotions. We have seen recently how matters can escalate in the Irish Courts where a family judge was viciously assaulted in a court in Dublin. There is too much of a risk if we change to a different model. One local judge spoke of an incident where a father had confided in a worried child (who fortunately asked to share something important with the Official Solicitor) an intention to mount a 'Spectacular' which involved the death of his ex-wife and solicitor in chambers on a stated date. The incident ended when security staff (newly introduced) removed a nine inch knife from the boot of the father before the proceedings started.

- Secondly, we consider that proceedings should reflect the seriousness of the subject matter. Often in non-accidental injury or sexual abuse cases the standard for criminal prosecution is not met and so the family court is the only court asked to make findings. These are substantial cases which involve contested evidence, including the evidence of experts. The use of the current court structure is appropriate, in our view, for such cases. The more formal the proceedings the better it is for the judge to maintain control and proper decorum in court. Family judges in Northern Ireland are now recommencing to wear gowns as a move towards some more formality.

- Thirdly, the proposal confuses litigation with facilitated mediation or conciliation, which can be more informal but is not judge led. We have layers of mediation involving Court Children Officers, etc. and a step up in formality conveys an important message. Litigants in person need to know when the negotiations stop and (potentially) adjudication begins.

17.7 The Civil Justice Review has examined the possibility of changing the nomenclature of the judiciary - for example, that all judges simply be addressed as" judge" or "Your Honour" in order to modernise the courts, making them less alien and intimidating. We do not discern this to be a matter of much public concern and, in any event, views expressed to us on this potential change are so split that we have decided to postpone any further consideration of it until it is reviewed, perhaps by the Family Justice Board[105].

17.8 That is not to say, however, that we do not place a premium on the absolute need for the use of plain and simple language in family courts. A complaint that surfaced on our website was the image of courts where the litigants, often placed at

[105] See Chapter 20.

the back of the courts, were unable to hear what was being said by the legal representatives at the front in a somewhat noisy court setting. Courts must be user-friendly in every sense. Proceedings should be conducted in a manner and in language which fully involves all parties.

17.9 One final matter under this heading: we have had to the fore of our thinking throughout the need to have courts in which the public are fully involved. That should include the adjudication system in appropriate instances Hence, we regard the participation of the lay magistracy, with its rich tapestry of experience, knowledge and community involvement, as an important part of the administration of open access to justice. They are diligent in their attendance at court and in their preparation for court in reading often many, many files (often coming apart at the seams and held together with nothing more robust than a treasury tag) and faithful in their attendance at our divisional meetings.

17.10 In the context of Northern Ireland, they provide a crucial link with and involvement of the public at large in the administration of justice. Accordingly, we do not join the somewhat small chorus of voices which has called for their abolition.

Recommendations

1. No change in the current formal setting of the family courts or the nomenclature used, although this is a classic example of how the Family Justice Board could revisit the matter as time passes and experience evolves. **[FJ130]**

2. A renewed emphasis on the use of plain and simple language by judiciary and the legal profession in family courts. **[FJ131]**

3. No change in the role of the lay magistracy in the family courts. **[FJ132]**

CHAPTER 18

OPEN JUSTICE

Current Position

18.1 There are few more difficult issues in family justice than the matter of open justice and the reporting of cases. There is a tension between concerns about "secret justice" and legitimate expectations of privacy and confidentiality for the family. Both standpoints are valid and the question is whether they are irreconcilable.

18.2 The starting point for consideration of publicity in the family courts, as in all courts, is the principle of open justice. Open justice promotes the rule of law. It also promotes public confidence in the legal system. The principle has a long history, dating back to a seminal case in 1913[106] wherein it was described as at the heart of our justice system[107].

18.3 Since the enactment of *The Human Rights Act 1998*, the common law principle of open justice has been reinforced in different forms, by Art. 6 and Art. 10 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). It has been held that the principle of open justice is to be derogated from only to the extent that it is strictly necessary to do so[108].

18.4 Most applications in the Family Proceedings Court (FPC), the Family Care Centre (FCC) and the family division are heard "in private" – that is, "in chambers". Members of the public are not permitted to attend hearings held "in private". Duly accredited members of the media are often permitted to attend hearings of family proceedings held in private in the family division, the FCCs and the FPC, subject to the power to exclude them on specified grounds. This is different from hearings "in camera", where neither media representatives nor members of the public can attend.

18.5 We are witnessing a particularly complex and changing landscape populated by, on the one hand, judges trying to strike a balance between what it is appropriate for the media to report or publish in cases – which, by their nature, are necessarily personal and potentially life changing - and, on the other hand, ensuring the privacy, safety and anonymity of the parties, specifically the children and young people involved. It is a challenging task for the family justice system to strike an appropriate and fair balance between public accountability and transparency in the manner in which family cases are decided upon - ensuring that the public maintain confidence in the system and a belief that decisions are not taken by judges based on the

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[106] Scott v Scott [1913] AC 417

[107] R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966; Global Torch Limited v Apex Global Management Limited [2013] 1 WLR 2993; R (Guardian News and Media Limited) v City of Westminster Magistrates' Court and The Government of the USA [2013] QB 618.

[108] Scott v Scott [1913] AC 417; Re S (A Child) (Identification: Restrictions on Publication) [2004] UKHL 47; Re Guardian News and Media [2010] UKSC 1.

evidence of unaccountable experts or a malicious parent - whilst equally ensuring that the best interests of children and the paramountcy of their welfare is protected.

18.6 In recent years, there is an emerging and growing consensus that the law should be reformed to ensure greater transparency in proceedings concerning the welfare of children. We must not underestimate the role that public debate, and the jealous vigilance of an informed media, has to play in exposing past miscarriages of justice and in preventing possible future miscarriages of justice. There is a compelling and irrefutable public interest in the effective operation of family justice courts, which deal with matters of the greatest importance. In the case of Re: J (a child)[109], the President of the Family Division in England and Wales stated:

> "with the state's abandonment of the right to impose capital sentences, orders of the kind which family Judges are typically invited to make in public law proceedings are among the most drastic that any Judge in any jurisdiction is ever empowered to make."

And in 2014 he said:

> "One (aspect) is the right of the public to know, the need for the public to be confronted by, what is being done in its name. Nowhere is this more necessary than in relation to care and adoption cases. Such cases, by definition, involve interference, intrusion, by the state, by local authorities and by the Court, into family life. In that context, the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling." (Paragraph 27)

18.7 The workings of the family justice system in this case are matters of public interest and do merit public discussion. Public confidence in the process is necessary and the emergence of the changing circumstances of this case merits an open discussion[110]

18.8 However, it is also well established that there are exceptions to the general presumption of open justice and one such exception concerns proceedings relating to the welfare of children. *The Children (Northern Ireland) Order 1995* states that when a court determines any question in respect to the upbringing of a child, the child's welfare is the court's paramount consideration. Children are not involved in these proceedings by choice. Research tells us a great deal about the potential for long

[109] 2013 EWHC 2694

[110] Foyle Health and Social Services Trust v Mason and X [2008] NIJB 339 [2008] NIFam 6 (Gillen J).

term ill effects on the health, well-being and development of children who have had troubled childhoods. Therefore, ensuring their safety and well-being during court processes does matter and that means protection from unwanted press intrusion and publication of intimate painful details about their lives which have the potential to create long lasting and permanent damage to those who are least equipped to handle it.

18.9 It is these conflicting dynamics that command the attention of this chapter. Sadly, there has been very little research conducted in this jurisdiction on this matter. It is, therefore, ripe for debate as to what statutory reforms, practice directions or overall regulation or reform is required.

The current legal position in Northern Ireland

18.10 In matrimonial cases, generally speaking, the media can report names and addresses of parties and outline the grounds, defences, legal points and the judges' rulings. In matrimonial finance cases, such as maintenance and property adjustment orders, and divorce the media can usually publish names, addresses and occupation of parties and witnesses, a concise statement of the grounds of the application, defences raised, submissions on any point of law and the judgment. It cannot report what has occurred in the proceedings nor information or evidence disclosed in relation to cases by the parties orally or contained in documents filed in the court unless the court has given permission.

18.11 We can summarise the position in Northern Ireland with regard to cases involving children in family courts as follows:

- Unless the court otherwise directs, proceedings involving children in the family court shall be heard by a judge in chambers. No member of the public at large can attend as of right.

- Under art. 170(2) of the 1995 Order no person may publish to the public at large or any section of the public any material which is intended or likely to identify any child involved in any proceedings under the 1995 Order or any address or school as being that of a child involved in any proceedings.

- Any contravention is a criminal offence. This prohibition ends when the relevant proceedings are concluded, unless extended by the court.

- Under art. 89 of *The Magistrates' Courts (Northern Ireland) Order 1981,* media representatives can be present during the hearings of domestic proceedings, save in those circumstances where the court exercises its powers under art. 89(3)-(4) to exclude them.

- This is not the position in the High Court or Family Care Centre courts, where the press (or members of the public) still require the permission of

the judge to be present However, judgments in the High Court in family law cases have been published, suitably anonymised where appropriate.

- *The Administration of Justice Act 1960 (s.12*) prohibits accounts being given or published of what has gone on at the hearing before the judge, contents of documents drawn up for and arising out of the hearing and transcripts or notes of the evidence or judgment. This does not apply to the publication of the text or summary of the whole or part of a court order, unless expressly prohibited by the court.

- The inherent jurisdiction of the High Court may be used to relax or to reinforce the statutory restriction on publication contained in the 1995 Order or 1960 Act.

- The legislation balances open justice and confidence in the process on the one hand and the necessary confidentiality required to protect children in an area of law where their interests are paramount.

- The prohibition on publicity and privacy at the hearing can be dispensed with under the ECHR not merely if the welfare of the child requires it but whenever the court was required to give effect to the rights of others, and a judge must consider whether or not to exercise his discretion if requested by one of the parties, not giving pre-eminence to the claim of the child.

The position under the ECHR

18.12 Article 8 of the ECHR provides for the right to respect to private and family life.

18.13 Article 16 of the United Nations Convention on the Rights of the Child (UNCRC) provides that children have an undeniable right to have their privacy protected. Therefore, domestic jurisdictions have a clear mandate to ensure their dignity is guaranteed by not exposing their private troubles to the public ear. Concerns about sharing of information about children and young people found expression most recently in the Supreme Court[111] even where the aim of Scottish legislation to appoint named persons to monitor children was manifestly clothed in an aspiration to safeguard the welfare and safety of children.

18.14 The general rule at common law, as augmented by jurisprudence under *The Human Right Act 1998*, is that the administration of justice must be done in public. Article 6.1 of the ECHR provides as follows: "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and partial Tribunal established by law. Judgement shall be pronounced publicly but the Press and

[111] The Christian Institute and others (Appellants) v The Lord Advocate (Respondent) (Scotland) [2016] UKSC 51

public may be excluded from all or part of the Trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private lives of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice."

18.15 Article 10 of the ECHR confers the right to freedom of expression. Accordingly, nothing should be done to prevent the publication to the wider public of accurate reports or proceedings by the media unless there is good and lawful reason. The open justice principle is recognised by Parliament and the common law. It is has been supplemented by statute.

18.16 S. 12 of the Human Rights Act makes provision for protection of journalistic and literary material against prior restraint but does not apply to criminal proceedings.

Judgments

18.17 The publication of written judgments is an important element in this discussion. Since 2000, the combined Republic of Ireland and Northern Ireland approach allows written judgments to be reported on the internet. Hand written judgements submitted by the judiciary to the Judges' Reference Library for publication on the internet are subject to a two stage scrutiny (first by a member of the administration office and, thereafter, by a legal officer) to ensure compliance with all or any reporting restrictions. It should be borne in mind that the primary responsibility for ensuring such compliance rests with the judicial officer who is the author of the judgment and appropriate care should be taken in the preparation and proof reading of judgments to avoid a breach of any relevant or appropriate restrictions.

18.18 The British and Irish Legal Information Institute (BAILII) publishes court decisions online, including judgements made by the Northern Ireland High Court of Justice, family division. The decisions which are anonymised give an insight into the family court proceedings. Family division judgments are published online.

18.19 In Northern Ireland, as elsewhere, the experience is that the press are not particularly anxious to attend divorces or ancillary relief proceedings which are generally held in chambers. However, there may be more of an appetite, particularly amongst investigative journalists, to attend Children Order proceedings, where the result of those proceedings may be the removal of a child from the care of their parents.

Current position in other jurisdictions

England and Wales

18.20 The modern law in relation to the confidentiality of proceedings relating to children is contained principally in *The Administration for Justice Act 1960*, s. 12 ("the AJA").

18.21 In England, child protection proceedings under *The Children Act 1989*, Part IV are proceedings to which the Family Proceedings Rules (FJR) 2010 apply and are, therefore, held in private. The prohibition established by AJA 1960, s. 12 remains in force after the conclusion of the proceedings.[112]

18.22 The default position established by AJA 1960, s. 12 and FPR 2010, r. 27.10 is that publication of information relating to public law proceedings with respect to a child under *The Children Act 1989* is liable to be a contempt of court unless the court directs otherwise. It is well established that that the family court and the High Court has the power to relax the prohibition on reporting on a case-by-case basis. The rules provide for exceptions with respect to communication of information from proceedings held in private in order to arrange for professional people and agencies to be engaged (for example, legal advisors, the Legal Services Agency, a welfare officer) in order to facilitate the progress of the proceedings[113].

18.23 The general public have no right to be present in private proceedings[114]. Duly accredited representatives of news gathering and reporting organisation can attend at a "private" hearing, subject to the court's power to exclude attendance. Attendance at a private hearing remains, however, subject to the overall restriction on publication imposed by AJA 1960 s. 12 and the specific restriction on naming the child and/or the child's school established by CA 1989, s. 97(2)).

18.24 Accordingly, under the current law in England, accredited media representatives can attend fact-finding hearings but they are unable to report what they saw, heard or read within the proceedings.

18.25 Thus, any presumption or principle in favour of open justice which applies generally to court proceedings does not apply to proceedings that are held in private and which relate to children[115]. The default position in such cases is, as a matter of statute and the rules, one which prohibits the publication of any information relating to the proceedings. That default position, which is designed to protect children, can, where appropriate, be modified by a judge upon the application of a party or the media.

18.26 In England, these restrictions on open justice in such cases have been tempered by the President of the Family Division's transparency initiative (see below), the purpose of which is to allow greater public access to, and understanding of, the work of the family courts.

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[112] Clayton v Clayton [2006] EWCA Civ. 878.
[113] FPR 2010, r. 12.73
[114] FPR 2010, r. 27.10(2)
[115] Re: W (Children) [2016] EWCA Civ. 113 at paragraph [36].

18.27 He has drawn attention to the importance of transparency in the context of family justice in a practice guidance[116] and in a 2014 consultation document[117] issued on 16 January 2014. As paragraph 1 states, the guidance was "intended to bring about an immediate and significant change in practice in relation to the publications of judgments in family courts and the Court of Protection."

18.28 The guidance then seeks to distinguish between two classes of judgment: those that the judge must ordinarily *allow* to be published which includes "A substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm, have been determined" and those that may be published.

18.29 The guidance explained that while a great deal of information about the history of the case could be set out in rulings that the President was encouraging judges to publish, minors and their relatives should be anonymised. Importantly, however, he said that the local authority and any expert witnesses involved should normally be named.

18.30 Anecdotal evidence from colleagues in England is that it is still proving difficult to persuade some judges to put cases online on Bailii for publication/reporting and that there is only a small proportion of cases to be found there.

18.31 Problems are recognised because, for example, even the date of birth can be sufficient to identify a child. Consideration is being given to providing more guidance for what should be contained in judgments. To that extent, there may have been a measure of rowing back from the guidelines in that, initially, the aim had been to name social workers, local authorities etc. One has to be careful to ensure that this will not provide identification or, in Northern Ireland, cause personal security problems.

18.32 In addition to the practice guidance of January, a further consultation document was released on 17 August 2014 proposing significant reform to reach the goal of greater transparency in the family justice system. The service of applications for reporting restriction orders on the national media can now be effected through a press association copy direct service. What is most important is that the court retains the power to make without notice orders but such cases will be exceptional and an order will always give persons affected the liberty to apply, to vary or to discharge at short notice

[116] Transparency in the Family Courts: Publication of Judgments [2014] 1 FFR
[117] Transparency – Next Steps

Republic of Ireland

18.33 The then Minister for Justice signed an order to ease a long standing ban on journalists reporting on family law and child care court proceedings on 13 January 2014.

18.34 The order removed the blanket ban on reporters attending family law, child care and adoption cases in courts around the state, thus enabling the media to cover proceedings dealing with divorce, separation, domestic violence, maintenance and custody as well as those cases where the state takes children into care. The law also imposed a strict ban on the publication of any material likely to lead to the identification of any individual involved.

18.35 The move, echoing to some extent the reforms introduced by the President of the Family Division in England and Wales, was declared to be in the public interest namely that there should be a greater knowledge of the administration of the law in these areas and the reforms would provide valuable information to the public, judiciary and legal professionals.

18.36 The Minister, however, referred to the fact that the public's right to know must be balanced against the family's right to privacy and the court, therefore, retains the power to exclude journalists or to restrict reporting in certain circumstances. Again, the emphasis is on the attempt to strike an appropriate balance between transparency and the best interests of the children being protected.

18.37 Divorce and ancillary relief proceedings are included but are also the subject of a number of factors which the court will consider in deciding whether to restrict reporting or exclude journalists. Of significance is the need to protect the party against coercion, intimidation and harassment, and a judge may also consider whether information given in evidence is likely to be either commercially or personally sensitive. This would cover information relating to the medical history of someone, their tax affairs or sexual orientation.

Discussion

18.38 Information in proceedings relating to children relate inextricably to their emotional and psychological development. The argument is that there is a very real public interest in protecting children from the inevitable trauma of knowing that their details are "out there". This extends beyond the child and includes the psychological impact to a parent.

18.39 Indelible harm can be caused to children if anonymisation fails to operate effectively because of jigsaw identification, where the information released is sufficient to identify a child. This is a particularly relevant consideration in our jurisdiction, taking into account size, ability to identify geographical locations, small number of trust areas and different cultural concerns.

18.40 This area was investigated by the Children's Commissioner in England in 2010. She spoke with more than 50 children and young people. The overwhelming view was that reporters should not be allowed into family court proceedings because the hearings address matters that are intensely private. The children stated they did not believe their personal details were the business of either newspapers or the general public. There was also a feeling that the press get facts wrong and that children and young people felt strongly that articles could be sensationalised. There is a very real fear that if they are identified, bullying and harassment within their schools and elsewhere would be a result. Also, children and young people would not speak freely to professionals charged with undertaking assessments if a reporter is in court to hear the evidence.[118] This in turn could seriously impact on a judge's ability to make difficult and often life changing decisions in a child's best interest.

18.41 We have spoken to the current Children's Commissioner in Northern Ireland, Ms Koulla Yiasouma, who is to carry out a similar type exercise over the forthcoming months to ascertain the views of children currently and whilst this will not be ready by the time this preliminary Report is circulated, this analysis of the crucially important voice of the child shall play a role in our final recommendations.

18.42 The current thinking of the Children's Commissioner, echoed by the Children's Law Centre, can be summarised as follows:

- Public confidence in family courts can and should be addressed in ways that do not put already vulnerable children at risk. There are other ways to let the public know how the family courts work.

- The Government and Parliament should have the opportunity to scrutinise proposals to increase media access in reporting of family cases since the safeguards originally put in have now been removed.

- Proposals should be subject to a proper public consultation exercise over an appropriate timescale accompanied by wide spread publicity, making it clear what is proposed, what children think and helping other people to respond. Just as the adult going through sensitive deeply private troubles would not

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[118] There is important research into children's and young people's views on media access to family courts carried out by Dr Julia Brophy. In her 2010 study she concluded that:

> *"children fear 'exposure': they are afraid that personal, painful and humiliating information will 'get out' and they will embarrassed, ashamed and bullied at school, in neighbourhoods and communities."*

A number of cases in English Courts have considered the principles of open justice and how they apply to the reporting of cases. These cases are referred to in a series of articles by Mary Lazarus, Barrister in 42 Bedford Row Chambers, published in three parts in the Family Law Week 4/3/14.

want them broadcast or published, children and young people have a right to both privacy and dignity. The courts need to listen to their concerns.

- In April 2016, a judgment in England from care proceedings was published on Bailii relating to a fact-finding hearing in respect of sexual abuse to a young child in which all the parties, including the child and both parents and the intervenor (against whom allegations were made) and the local authority, were named in full. All the details of the allegations and the medical evidence were set out in full and graphic detail. In the event, no harm was done and the case was removed within 24 hours. However, this illustrates the need for guidance on anonymisation of judgments accompanied by judicial and Northern Ireland Courts & Tribunals Service (NICTS) human resource and training if it is to be wholly effective. The latter must lay down robust operational procedures to ensure that privacy is maintained in such cases.

- The significant risk in a small jurisdiction such as Northern Ireland comes from jigsaw identification, where the child or family involved are identified by piecing together details of the case that are in the public domain. More rigorous assessment may apply in Northern Ireland, taking into account the unique nature of a small state where geographical and cultural considerations will have to be applied. A small and otherwise innocuous reference to a particular trust area, school or comment could serve to identify the child and their family and there is, therefore, perhaps an argument for more stringent regulations and a more forensic examination of what the media can or cannot report.

- The potential for the sensationalising, not only of Children Order cases but also divorce and ancillary relief proceedings, and the need to guard against the recanting of evidence by a child or young person, simply because they do not want the media to hear that evidence, are all very relevant considerations.

18.43 The counter-argument for more open and accountable justice is, however, a compelling one and can be summarised as follows:

- There is a strong argument for much more open justice in the family courts, even if the families concerned have to be anonymised, as it is would increase public confidence in the courts. It would serve to remove suspicion that miscarriages of justice are happening behind closed doors, where a judge relies particularly on the evidence of an unaccountable expert. Replies to our public website are replete with allegations of unfairness, secrecy, etc. in our system. Charges, however unjustified and spurious, of secret courts, bias in favour of women and hidden judgments which have emerged here and in the press, need to be challenged if the rule of law is not to be traduced. An even greater danger, however, is that where serious injustice takes place it may go unreported.

- The family justice system must be seen to be challenging the practice and policy of agencies and organisations charged with the protection of vulnerable children and young people, particularly if those judgments can serve to inform and shape future practice. The Baby P Case in England highlighted the need for public scrutiny of professionals and organisations charged with the protection of children and the early identification of risks to children remaining in the care of their parents or other individuals. Media coverage could be argued to be essential if children are to remain on the political agenda and child protection services are to remain accountable.

- Important statements are often made by judges during family court hearings, but due to the private nature of proceedings these are not routinely heard by the public. We have experience in Northern Ireland of judgments, when published, helping to inform and shape policy matters, such as trusts needing to reassess their decision-making procedures where considerations are given to what supports and assessments should be put in place for parents to allow the children either to remain in their care or to be rehabilitated to their care. The BBC recently reported a decision by Mr Justice O'Hara where, after studying expert evidence, he approved the separation of a teenage child from her mother and the transfer of the child to the appropriate support centre in the Republic of Ireland. In the course of the reporting of that case, the press referred to Mr Justice O'Hara expressing his surprise that statutory agencies had not shown a real interest in the child's education and domestic arrangements years sooner. The public are entitled to know that statutory agencies will be held accountable for their actions or inactivity. Accordingly, absent positive evidence of the risk of identifying the child by so doing or the risk of danger to, for instance, a social worker, trusts and the experts called should be named as in all other types of litigation.

- The arguments in favour of transparency are powerful ones and the importance of freedom of expression in open justice cannot be understated. In Crown Court cases, extremely sensitive information relating to children's lives and locations are discussed with no reporting restrictions other than the media being prevented, and even then not in all cases, from using the children's names.

- The balance between a general principle of open and accountable justice and properly competing interests can be achieved by a clear understanding of the legal basis for the imposition of restrictions on the part of judiciary, court staff and the media.

18.44 Accordingly, every court should have a proper procedure for ensuring that adequate steps are taken to draw any discretionary restriction order to the attention of media representatives who may not have been in court when the order was made. Courts should ensure the procedure has been followed.

18.45 However, the obligation remains on the media to ensure that they take the appropriate steps to make themselves aware of any discretionary reporting restrictions and to comply fully with them (see Attorney General's Application (Sunday World))[119].

18.46 NICTS' ICOS System should now record all non-automatic reporting restrictions against the name of the case to which it applies.

18.47 The family justice system should not fear public scrutiny with the present safeguards. There are circumstances in which the court can exclude the public and media and impose temporary or permanent restrictions on the media's reports of court proceedings by making a court order. The court can exercise their discretion also to hear media representations on the lifting of such restriction.

18.48 While there were opposing views along the lines mentioned above in our considerations, the majority view was in favour of more open and accountable justice for all the reasons set out above. Our recommendations reflect this.

18.49 Three further discrete matters arise in this context. Firstly, is the child's welfare paramount in the balancing decision taken by the judge as to the level of media presence and reporting? The Court of Appeal have recently indicated in England[120] there may be a conflict, or at least a tension, between the apparently accepted view that welfare is not the paramount consideration on an issue such as this, on the one hand, and Court of Appeal authority to the contrary on the other hand[121]. This is obviously a matter that ought to grip the attention of the Northern Ireland Court of Appeal when a suitable case arises.

18.50 Secondly, "live" daily reporting is a novel development in child protection proceedings. It is a process that goes far further, in terms of transparency, than the mere publication of the final judgment, which is the focus of the current "President's Guidance", and it is a topic that is really only at the "preliminary pre-consultation" stage of discussion within the family justice system generally.

18.51 A judge would need to put in place some detailed arrangements to maintain some control on the material that could be reported by press representatives who were attending court. In Re W (see footnotes below), the Court of Appeal said that in circumstances where the final judgment will be published in due course, the issue

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[119] [2008] NIQB4

[120] Re W (Children) [2016] EWCA Civ. 113 at paragraph 41.

[121] Re S (Identification: Restrictions on Publication) [2004] UKHL 47; Clayton v Clayton [2006] EWCA Civ. 878; Re Webster; Norfolk County Council v Webster and Others [2007] 1 FLR 1146.

of daily reporting relates to the quantity and timing of reporting rather than reporting the facts of this case as such in principle. It is a matter that calls for a proportionate approach on which a trial judge is entitled to exercise a wide margin of discretion, albeit the Court of Appeal confessed "to having a feeling of substantial unease at this degree of openness at the start of an unpredictable fact finding exercise". It tightened up the wording originally provided by the judge (which was to the effect that "such reporting is subject to any further directions given by the court concerning what can and cannot be published if an issue arises during the course of the hearing") to the extent that it added to the first instance judge's order the following words: "such reporting (whether by live reporting, Twitter or otherwise) may not take place until after the court proceedings have concluded on any given day, in order to ensure that the court has had an opportunity to consider whether any such additional directions are required".

18.52 In the event that daily reporting is likely to occur, detailed arrangements should be put in place to maintain control on the material that can be reported by press representatives who are attending court and a suggested order would be to the effect that: "Such reporting is subject to any further directions given by the court concerning what can and cannot be published if an issue arises during the course of the hearing. Such reporting, whether by live reporting, Twitter or otherwise, may not take place until after the court proceedings that concluded on any given day, in order to ensure that the court has had an opportunity to consider whether any such additional directions are required".

18.53 Thirdly, there needs to be some clarity about whether the identity of other people should be disclosed. In the Republic of Ireland, there would appear to be clarity in that no individual should be named. In England, the direction of travel was that individuals such as social workers, experts and local authority individuals, etc. should be named. In a small jurisdiction such as Northern Ireland, naming of such parties could lead to identification of the child or social workers and so we recommend that courts should be particularly cautious in their approach to such identification.

Recommendations

1. The rights of the media to *attend* fact finding hearings and other family courts in Northern Ireland to be brought into line with the position in the rest of the UK and Ireland. We recommend the introduction of rules similar to r. 27.10(2), r. 27.11(2) of the FPR in England and Wales. **[FJ133]**

2. The law to remain that the media are unable to report what they saw, heard or read within the proceedings without permission of the court but the family court and the High Court should have the power to relax the prohibition on reporting in a case-by-case basis by means of a rule similar to FPR 2010, r. 12.73. **[FJ134]**

3. Every court to have a proper procedure for ensuring that adequate steps are taken to draw any discretionary restriction order to the attention of media representatives who may not have been in court when the order was made. A judge should ensure the procedure has been followed. **[FJ135]**

4. However, the obligation to remain on the media to ensure that they take the appropriate steps to make themselves aware of any discretionary reporting restrictions and to comply fully with them.[122] **[FJ136]**

5. The senior Family Judge to secure the drafting of a similar practice note or guidance on the publication of judgments as that drawn up in England in January 2014[123] and exhibited at Appendix 6 to this report. **[FJ137]**

6. In order to secure consistency of approach across all family courts in the making of reporting restriction orders, a practice note similar to that drawn up in England in August 2014, containing links to model forms for both draft orders and explanatory notes, to be created. **[FJ138]**

7. In the event that daily reporting is likely to be permitted, detailed arrangements to be put in place to maintain control on the material that can be reported by press representatives who are attending court. **[FJ139]**

8. A joint protocol between the judiciary, the profession and the representative body for the press in Northern Ireland outlining guidelines for reporting cases in the family division. **[FJ140]**

9. Consideration be given to the means of securing the service of applications for reporting restriction orders on the national and local media through a press association copy direct service. **[FJ141]**

10. Northern Ireland Courts & Tribunals Services' ICOS System now to record all non-automatic reporting restrictions against the name of the case to which it applies. **[FJ142]**

[122] see Attorney General's Application (Sunday World) 2008 NIQB4.
[123] https://www.judiciary.gov.uk/wp-content/uploads/2014/01/transparency-in-the-family-courts-jan-2014-1.pdf

CHAPTER 19

PERSONAL LITIGANTS

Current Position

19.1 Speaking to the House of Commons Justice Committee on 26 January 2016, Sir James Munby, President of the Family Division, said:

> "The impression I get when people discover what I am and start asking the inevitable questions is that, when I say that I am to do with the family justice system, they say 'what's that'? The fact is that we have done shamefully little, despite recent attempts. …. The general level of provision of information for litigants in person, whether in relation to the system or in relation to fee remission is woefully inadequate. My perception, from the perspective of the family justice system, is that there is a need to provide information for litigants in persons …. Only very recently has there been any kind of indication from either Whitehall or Westminster that something effective is going to be done.
>
> I suspect on the ground, particularly in the family cases, there has traditionally been a large amount of informal help and, as far as it is permissible, guidance and advice on how to apply and what you have to do.
>
> Now the general assumption would be that the system, even as revised and revamped, is still of labyrinthine complexity. It is almost certainly couched in language that most people do not understand – why should they? A lot more needs to be done. Lawyers now appreciate that people do not understand Latin and they do not understand what I call lawyer's English. What lawyers do not understand is that the kind of language used, even if lawyers think it is ordinary English, is not ordinary English in the sense in which the man or woman in the street would recognise it. Therefore the task of getting this material into a form that ordinary people understand is very difficult.
>
> What we have done in the family system – not on fee remissions – is to make use of Advice Now, which is

> an organisation that goes through documents to make sure they are presented in a user friendly way, in a way that is accessible to the ordinary man and woman in the street. This has paid enormous dividends. We need to do more of that."

19.2 In general terms, family law practitioners in Northern Ireland have encountered greater numbers of self-represented litigants in recent years.

19.3 Family lawyers in Northern Ireland believe that this trend has been fuelled by a number of factors, including a reduction in the availability of legal aid and a belief among some that family disputes do not require specialist legal advice and representation.

19.4 However, in this jurisdiction there have also been some intractable and long-running family disputes in which a self-represented litigant mistrusts and/or has no regard for the legal profession and family justice system. These disputes have taken up a disproportionate amount of court time and, in some instances, have been very stressful for the opposing party, court staff and some members of the legal profession.

19.5 There are a number of glaring problems with an informed analysis of the current system in Northern Ireland.

19.6 First there is insufficient data or access to what data there is.

19.7 There has been insufficient research regarding:

- The number of self-represented litigants in the family justice system in Northern Ireland (at every level of the court system).
- The reasons why people self-represent in family ligation.
- The key characteristics of self-represented people in family litigation in Northern Ireland.
- The effect of self-representation on the administration of family justice in Northern Ireland.

19.8 Secondly, the written guidance available for self-representing litigants on the Northern Ireland Courts & Tribunals Service (NICTS) website is limited to proceedings in the High Court. It is generic guidance and contains no checklist for family or matrimonial proceedings, albeit NI Direct provides step-by-step advice about getting a divorce or dissolution of a civil partnership in Northern Ireland.[124]

[124] https://www.nidirect.gov.uk/articles/getting-divorcedissolution-civil-partnership

19.9 There is no accessible guidance on the NICTS website for family proceedings in the magistrates' courts or county courts.

19.10 There is no guidance on the NICTS website specific to self-represented litigants in family or matrimonial litigation.

19.11 It is very likely that NICTS staff who work in the court offices are called upon to assist personal litigants who seek or need advice about how to fill in forms, draft affidavits or statements of evidence and about the court process in general. This is bound to be time consuming and diverts staff from other tasks.

19.12 Valuable court time is taken up offering guidance to self-represented litigants. In cases involving self-represented litigants who mistrust lawyers or the legal system, a disproportionate amount of court time has been taken up in some cases with irrelevant argument and lines of inquiry. This has the unintended consequences of increasing cost and stress for the opposing party, which is an important variable in family cases, which, by their very nature, are upsetting and, at times, overwhelming for parties.

19.13 These local problems are not confined to Northern Ireland. They mirror the findings of the 2006-2007 research conducted by the Ministry of Justice in New Zealand, which found that:

> "…Family Court cases can be more complex and personal. Key informants suggested that self-represented litigants are more likely to stay in the court system longer and make repeated requests on key informants' time. … Self-represented family litigants were found to increase the other party's costs and stress. Children could be upset and unsettled."

19.14 A publication by Citizens Advice in March 2013 - "Standing Alone: Going to the Family Court without a lawyer" - looked at the issue of personal litigants in the family courts in England. It concluded that the way people use them is changing. Since funding for legal aid was reduced in 2013, there has been an increase in the number of people going to the family courts without a lawyer (as a 'litigant in person'). Two-thirds of Citizen Advice advisers report an increase in the number of people they see going to court without representation.

19.15 Although some people found the experience of self-representation positive, the majority found self-representing difficult, time consuming and emotionally draining. As well as a bad experience for court users, it also means litigants in person achieve worse outcomes compared with their represented counterparts.

19.16 Nine in ten litigants in person said it affected at least one other aspect of their life. The report explored four key areas affected: mental and physical health, working lives, finances and relationships.

19.17 The report identified eight ways to improve the process of going to the family court alone:

1. Litigants in person need a clear way to navigate through the court process.

2. Information should be easy to find, consistent, reliable and user-friendly.

3. Paperwork and processes should be designed with the layperson in mind.

4. The physical court environment must help, not hinder, litigants in person.

5. Litigants in person need the tools to cope with pre-trial negotiations.

6. Guidance for legal professionals needs universal adoption.

7. People need more information to make the most of lawyers' services.

8. Evidence requirements should not be a barrier to those eligible for legal aid.

19.18 The report makes three key recommendations about how courts, professionals and other service providers can address these challenges:

1. Litigants in person need access to reliable advice and information to determine the validity of their case; investigate alternatives to court; progress their case through different stages; represent themselves effectively and deal with outcomes.

2. Processes, physical courts and professionals' behaviour should respond to the increased numbers of litigants in person by ensuring best practice for working with laypeople is provided consistently.

3. Support for vulnerable people should be more easily accessed. Victims of domestic abuse should be able to access the legal advice and representation to which they are entitled. Other vulnerable groups, such as people with mental health problems, should be signposted to appropriate services.

Discussion

19.19 It must be said at the outset that personal litigants (PLs) will be with us to stay and we need to devise a user-friendly, strategic approach to assist them. That will also be helpful to the courts.

19.20 We must not conflate personal litigants with vexatious personal litigants. Moreover there is not a simple binary situation - that is, someone who has legal representation and someone who does not and, by implication, never had access to legal advice.

19.21 Rigorous data recording practices should be established across each tier of the family court system and in each geographical division. This should enable proper and periodic analysis of self-represented litigants, identifying whether there are any variations between courts or divisions. The data obtained would then inform whether a regional approach is appropriate or whether there are certain divisions or areas of practice that encounter most problems.

19.22 An additional tool to advance our knowledge of PLs would be the provision of feedback from them in a formal questionnaire issued to each one at all tiers to measure their experience together with any suggested improvements.

19.23 The research on litigants in person in private family cases by Liz Trinder and others (November 2014) for the Ministry of Justice looked at the evidence concerning PLs in private family law cases in five courts in England and Wales, including behavioural drivers, experience and support needs. The work covered the period January to March 2013 prior to the removal of private family law from the scope of legal aid in England and Wales. The research was both quantitative (observations, interviews with PLs, lawyers, judges and court officials) and quantitative examination of files, statistics, available information, etc.

19.24 The research found that PLs often start with legal representation but then lose it - usually for financial reasons - and, in some cases, access support through advice centres, McKenzie Friends, etc. Many PLs were responding to legal action rather than initiating actions. Moreover, the PLs observed in the Trinder study had lower levels of drug, alcohol and mental health problems than the legally-aided group observed (this may well reflect the income levels that prevent entitlement to legal aid in the first place). The vast majority of unrepresented litigants in the private family cases were not vexatious.

19.25 There is no evidence before us to suggest there would be markedly different findings in Northern Ireland. However, there is a need for data to be collected and research to be carried out to assess properly both the incidence and effects of self-representation in the family courts in Northern Ireland.

19.26 Hence, we welcome the research into the needs and experiences of PLs which commenced in April 2016 for a period of two years conducted by the Human Rights Commission and Ulster University School of Law. It will involve observations in the family courts and bankruptcy proceedings, interviews with PLs, judges, lawyers et al, an analysis of the characteristics of PLs and how they become PLs in the first place. The research will also provide a human rights analysis of the right to representation under Article 6 of the European Convention on Human Rights (ECHR) and the running of a legal clinic for some PLs to provide signposting and process advice on how the courts work to see if this is of any value. Finally, the research will look at what materials and other sources of support are used by PLs and the information provided by the courts.

19.27 Given that the research findings will post date the Review, we consider that the arrival of this empirical data would be a fruitful area for the new Family Justice Board[125] to consider.

19.28 We have researched to some extent Advice Now (see paragraph 19.1 above). It is a public legal information website set up by Law for Life (Foundation for Public Legal Education), a charity established to equip people with the knowledge information and skills to resolve successfully problems encountered in everyday life. The Advice Now website translates the law into accessible and engaging information "which not only explains the law but empowers you to use it". It performs international work for disadvantaged communities and has a European Erasmus Programme. However, essentially, Advice Now relates to England and Wales only.

19.29 We understand Her Majesty's Courts & Tribunals Service (HMCTS) provided the law to Advice Now and Advice Now translated the law into language which could be understood by the average person. They used, for example, cartoons and captions which were user-friendly.

19.30 The Advice Now website suggests searchers from Northern Ireland might seek assistance from Citizens Advice in Northern Ireland. For a similar venture we would obviously require a similar group here to set up a website communicating the Northern Ireland legal position. There may not be a similar charitable group to that of Law for Life. Therefore, realistically, we are back to the default position of NICTS providing the hub recommended earlier in this Report[126]. At the very least, such a hub doubtless could enlist advice and assistance from Advice Now in such a venture. There should be a move away from the conventional printed fact sheets and a more interactive approach adopted.

19.31 NICTS should provide an information hub for personal litigants along the lines advocated by Advice Now. It must be couched in appropriately plain language with an emphasis on information, education, what the courts expect and how the court will assist the PL. It should not assume the PL is a vexatious litigant.

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[125] See Chapter 20.

[126] See Chapter 8 and 9.

19.32 Consideration should also be given to a central information hub located in specified court buildings (e.g. Laganside in Belfast), which would be staffed by at least one person trained by NICTS specifically to assist personal litigants. Such an online advice line and staffed centre should provide accessible and easy to understand guidance for personal litigants in the magistrates' court, county court and the High Court.

19.33 The Trinder research noted the complexity of forms and materials in the England and Wales system. We are no different. Litigants in person need a clear way to navigate through the court process. Information should be easy to find, consistent, reliable and user-friendly. Paperwork and processes should be designed with the lay person in mind.

19.34 NICTS should conduct a review of current forms to ensure they are appropriately plain and comprehensive for all court users.

19.35 There is no good reason why that hub should not complement the use of social media, such as You Tube, and provide short videos on aspects of bringing a claim to court. This could include, by way of example:

- a guide to the forms and applications that have to be completed
- the stages through which cases progress
- time limits for applications and appeals
- alternatives to the court process
- a description of the court environment, how the court is to be addressed, etc.
- rudimentary guidelines as to how evidence is taken and obtained in the family court system
- the consequences of refusal to obey court orders
- voluntary help that is available
- the use of McKenzie friends
- signposts to services for the vulnerable
- cost implications of the legal process

19.36 The court process itself must adjust to the arrival of PLs. The first hearing in family proceedings involving personal litigants should be regarded as a serious case management opportunity. The judge should take time not only to advise as to the benefits of legal advice and the availability of pro bono and voluntary services, but outline what is expected from all parties, what the case is essentially about, options to resolve the case outside the court as well as inside the court and the nature of the process, including timetabling, so that there are no unrealistic expectations.

19.37 Courts should indicate that they may set specific court times for hearings involving PLs—or indeed any litigant, whether represented or not. Mr Justice O'Hara has used this to good effect in a recent hearing involving PLs.

19.38 It is important that the judiciary and the professions be alert to the possible existence of a disability on the part of a PL. Accordingly, it is imperative that all judges should be familiar with and guided by the current Equal Treatment Bench Book. They should be alert to PLs who may have a disability, such as an autistic spectrum condition, and be ready to make appropriate adjustments to procedures to accommodate this from the outset. The Northern Ireland Court of Appeal has recently dealt with such a case and laid down appropriate guidelines.[127]

19.39 In truth, it may well be that if the proliferation in PLs continues in Northern Ireland, the family courts and the legal professions will have to consider fresh approaches to the issues before it. The traditional adversarial approach may not meet the needs of justice in such circumstances, particularly where one or other party may have a disability. The inquisitorial approach, already a frequent presence in the family court, may become even more prevalent. Albeit in the very different arena of a civil libel action in the High Court in England[128], we cite the very recent approach of the judge dealing with two personal litigants where he said:

> "111. Because both sides were litigants in person, I conducted the hearing by asking first Ms Hunter and then Ms Mole about each of the matters complained of in the counter claim. I then gave each of them an opportunity of asking questions of the other. Ms Mole chose to ask no questions. I then went through the chronology of events as I understood them to be, inviting each of them to correct or complement the understanding I had formed on my own reading of the papers and to make their submissions. Before doing this I invited each party for their consent to the procedure I proposed to adopt….. I also indicated that I also proposed to hear both applications before me before making a ruling on either of them."

19.40 This procedure may be an example of what the Lord Chief Justice of England & Wales, Lord Thomas, referred to in a lecture to "Justice" the week after this hearing (on 3 March 2014) when he cited "The Judicial Working Group on Litigants in Person: Report" at paras 2.10, 5.11 and page 33. This report recommended that there be consideration of:

> "Introduction of a specific power into CPR Rule 3.1 that would allow the court to direct that, where at least one party is a litigant in person, the proceedings should be conducted by way of a more inquisitorial form of process than in civil proceedings where both or at least one party is represented."

[127] Galo v Bombardier Aerospace UK [2016] NICA 25
[128] Mole v Hunter [2014] EWHC

19.41 On the issue of pro bono representation, we take this opportunity to recommend the implementation in Northern Ireland of the equivalent to s.194 of *The Legal Services Act 2007*, which allows pro bono cost orders to be made where a client represented pro bono wins his or her case. These costs are then paid to the Access to Justice Foundation which uses the money to support pro bono initiatives. The Bar, Law Society, Public Interest Litigation Strategy Project and Law Centre (Northern Ireland) are already on record as supporting such an initiative.

19.42 Both the Bar and the Law Society need guidance for members as to the problem of its members dealing with PLs. They should draw up a joint protocol governing the approach to be adopted to PLs, ensuring best practice for working with lay people is consistently provided.

19.43 One final matter. The Family Justice Council in England recently produced a guide to help PLs who may be confronting the seemingly daunting prospect of negotiating their own agreements in the context of divorce and family breakdown. The guide, "Sorting Out Finances on Divorce", is intended to demystify what is a complex area of law which many PLs may find intimidating. It provides a succinct summary of the law to help those who cannot afford legal advice to reach financial agreements without the need to go to court. The guidance is specifically aimed at a lay audience and its primary purpose is to provide a road map through what is often, for many, uncharted territory. It sets out in clear terms how the family court approaches financial needs on divorce. Advice Now has produced a shorter online version of the working group's document in plain English[129].

19.44 The guide was a response to the Law Commission's recommendation in its 2014 report on matrimonial property, needs and agreements for greater clarity regarding the distribution of assets and the determination of financial needs on divorce and civil partnership dissolution. The then Minister of State for Justice, Simon Hughes, wrote asking the Family Justice Council to take forward this recommendation. The Chair of the Family Justice Council, Sir James Munby, asked Mrs Justice Roberts to chair a small but hugely experienced Working Group whose task was to produce this guide.

19.45 This illustrates two important matters of which we should take note. Firstly, the task of meeting the needs of lay persons and PLs is an ongoing process that needs to be addressed as and when need arises. Secondly, it serves to illustrate a classic example of the value of joined up and inclusive thinking between government departments and the legal fraternity to produce judge led outcome-focused work to improve access to services. PLs provide fertile ground for joint working between government departments and the legal fraternity particularly

[129] This can be found at: http://www.advicenow.org.uk/guides/sorting-out-your-finances-when-you-get-divorced

through the Family Justice Board. It should be a harbinger of the manner in which our proposed Family Justice Board would work in the future.

Recommendations

1. The first hearing in family proceedings involving personal litigants should be regarded as a ground rules setting or case management opportunity. The judge should take time to advise on such matters as:

    - the benefits of legal advice and the availability of pro bono and voluntary services;
    - what is expected from all parties;
    - time limits on applications and, indeed, submissions if necessary;
    - skeleton arguments, including the suggested length of these;
    - interlocutory concepts;
    - what the case is essentially about;
    - defining the issues as early as possible;
    - options to resolve the case outside the court as well as inside the court;
    - the outline of the process, including the nature of reviews, examination in chief, cross examination, disclosure, the role of experts, timetabling, the role of the Guardian Ad Litem, etc. so that there are no unrealistic expectations; and
    - the consequences of failure to comply with court orders. **[FJ143]**

2. All Judges to be familiar with and guided by the current Equal Treatment Bench Book. They should be alert to personal litigants who may have a disability such as an autistic spectrum condition and be ready to make appropriate adjustments to procedures to accommodate this from the outset. **[FJ144]**

3. The use of an inquisitorial approach to be considered in appropriate cases where personal litigants are involved. A change in the rules should be implemented to facilitate this. **[FJ145]**

4. A renewed emphasis by judiciary, the professions and other family law participants on use of appropriate, plain and readily understandable

language in the family division. Courts should be proactively interventionist to ensure this occurs. **[FJ146]**

5. Where appropriate, courts to consider fixing specific time periods for hearings, provided there is some inbuilt measure of flexibility. **[FJ147]**

6. A booklet, similar to the existing booklet which is given to all personal litigants in the High Court to be drawn up for all personal litigants in the family division highlighting, for example, opportunities for assistance. The current High Court booklet has been criticised by some personal litigants as employing insufficiently plain language and this error must not be repeated. Paperwork and processes should be designed with the layperson in mind. The Northern Ireland Courts & Tribunals Service (NICTS) should conduct a review of current forms to ensure they are appropriately plain and comprehensive for all court users. **[FJ148]**

7. A much needed guide similar to the English version of "Sorting Out Finances on Divorce", intended to demystify this complex area, to be a task for the new Family Justice Board. **[FJ149]**

8. NICTS to revisit its current website to establish a single authoritative website providing an online, objective information hub in family cases with an added emphasis given to support for vulnerable people. It should be more easily accessed. Vulnerable groups, such as people with mental health problems, should be signposted to appropriate services. **[FJ150]**

9. The online advice line and staffed centre to provide accessible and easy to understand guidance for personal litigants in the magistrates court, county court and the High Court. **[FJ151]**

10. A move away from the conventional printed fact sheets and a more interactive approach adopted. **[FJ152]**

11. Consideration to be given to a central information hub located in specified court buildings (e.g. Laganside in Belfast), which would be staffed by at least one person trained by NICTS specifically to assist personal litigants. **[FJ153]**

12. Both the Bar and the Law Society to draw up a joint protocol governing the approach to be adopted to personal litigants, ensuring best practice for working with lay people is consistently provided. **[FJ154]**

13. Implementation in Northern Ireland of the equivalent to s.194 of *The Legal Services Act 2007,* which allows pro bono cost orders to be made where a client represented pro bono wins his or her case. **[FJ155]**

14. Rigorous data recording practices to be established across each tier of the family court system and in each geographical division. This should enable proper and periodic analysis of self-represented litigants, identifying whether there are any variations between courts or divisions. The data obtained would then inform whether a regional approach is appropriate or whether there are certain divisions or areas of practice that encounter most problems. **[FJ156]**

15. Provision of feedback from personal litigants in a formal questionnaire issued to each one at all tiers to measure their experience together with any suggested improvements. **[FJ157]**

16. Court staff, lawyers and judges to receive training for dealing with problems with personal litigants. NICTS should consider training and delegating one staff member in each family court office to deal with such issues. **[FJ158]**

17. The results of the current research being undertaken in Northern Ireland on personal litigants to be specifically considered by the newly created Family Justice Board and further recommendations made. **[FJ159]**

CHAPTER 20

FAMILY JUSTICE BOARD

Current Position

20.1 The Children's Order Advisory Committee (COAC) was established by the then Secretary of State with the following remit:

- To advise Ministers on the progress of Children Order cases through the court system with a view to identifying the special difficulties and reduce avoidable delay.

- To promote through family court business committees commonality of administrative practice and procedure in the Family Proceedings Courts (FPCs) and county courts and to advise on the impact on Children Order work of other family initiatives.

20.2 Over the years it has continued to meet regularly. Membership has increased on an ad hoc basis. Whilst the resulting breadth of experience contributes to valuable different perspectives, currently those who are responsible for implementing the Order in courts are under-represented around the table. The Regional Court Users Committees (RCUC) are under-utilised and frequently lacking in purpose or direction from COAC. The view was regularly expressed to us that COAC is increasingly being seen as a Committee that is out of touch with the realities of practice.

20.3 There are frequent changes of representative members. While they bring fresh ideas and initial enthusiasm, there is no easy way for them to find out what has gone before. Consequently, the same issues recur every few years, similar work is done, no real change occurs, the work disappears into the ether and the issue is effectively shelved for resurrection at some underdetermined date in the future when the cycle starts again.

20.4 It is unclear if representative members are free to vote in accordance with their own personal views or should reflect the majority view of their group.

20.5 Communication is problematic – it is difficult for non-members to find out what is due for discussion or has happened at meetings. There is limited interest in the annual reviews and the Best Practice Guide needs updating and, indeed, is only intermittently invoked.

Discussion

20.6 Hence, there is a widespread view that COAC has outlived its original purpose and the time has come for change. A number of views from an array of

sources has echoed this view. Generally, the feeling is that it is too cumbersome and unwieldy in an era that demands some visionary thinking and clear directions outside sectional interests. We are satisfied that COAC should either be reformed or, preferably, replaced. There is a recognition that reliable management information (which is currently not available) is necessary to enable COAC to meet its current remit. In addition, COAC needs to reflect better the experience of those who are responsible for the day to day operation of The Children (Northern Ireland) Order 1995. For example, there is currently only one representative at district judge level although the bulk of family proceedings work is done here. Similarly, there is no police representation (although we note this is to be addressed).

20.7 We recommend the establishment of a Family Justice Board (but not one identical to that created in England) to drive significant continuous improvement, review progress and consistency in the system, carry out research where necessary and suggest reform in the performance of the family justice system.

Other Jurisdictions

Republic of Ireland

20.8 The Courts Service in the Republic of Ireland was established by an Act of the Oireachtas, *The Courts Service Act 1998*. The Service is supervised by a Board established in accordance with s. 11 of the Act. The Board has the power to establish committees, which may be standing committees or committees set up for particular functions.[130]

20.9 The Board can appoint to a committee persons who are not members of the Board but have a special knowledge and experience related to the purposes of the committee. The Family Law Development Committee is a standing committee of the Board, and has been in operation since the establishment of the Courts Service. The draft terms of reference of this body are instructive in the context of our proposals.

Draft terms of reference

1. Recommend appropriate reforms in administrative and judicial structures in the management of family law cases to ensure that, as far as possible, cases involving child care related issues are prioritised, cases are listed according to priority, waiting times are mitigated and that the rules for same are clear for all users.
2. The promotion of alternative dispute resolution as a means of solving family law disputes.
3. Ensure the voice of the child is heard in family law proceedings on custody and access, by reports or other means, in an appropriate manner.

[130] The power vested in the Board to establish committees is set out in s.15 of the Act.

4. Encourage partnerships with key stakeholders and external agencies to deliver a better service for the citizen.
5. Develop partnership arrangements with the Legal Aid Board and look for opportunities to support running of the family law courts for the benefit of all stakeholders.
6. Assist the board and other committees of the Courts Service in outlining key elements of accommodation and facilities in family law courts, where opportunities to improve same arise.
7. The dissemination of information to the public on the family law courts.
8. Encourage practices which make use of the family courts more efficient, less costly, and relieve stress on the parties.
9. Promote education and seminars on family law.
10. Foster the publication of judgements of all benches suitably redacted to ensure confidentiality.
11. In consultation with the Committee for Judicial Studies, facilitate judges in specialised training on family law matters.
12. With board approval, make recommendations, where necessary on the reform of family law.

England and Wales

20.10 In England and Wales, a Family Justice Board (FJB) has been created with an independent chair chosen after a properly advertised selection process.

20.11 The judiciary's role is that of an observer. A sub-committee of the Review Group had the privilege of discussing with Sir David Norgrove the workings of the FJB in England and Wales. The following matters arose from this:

- It is essentially a policy-making body. Its membership includes, for example, the head of CAFCASS. Hence, the judiciary, preserving their independence, do not serve on it albeit the President of the Family Division attends as an observer and does make comments.

- As a policy committee, it does not have serving members of the profession on it.

- It has a small budget.

- Much emphasis is placed on the local Family Justice Councils who deal with problems at a local level, as opposed to the wider policy considerations of the FJB itself. Local problems do, of course, surface in local FJBs provided they have a general application.

- Sir David emphasised the importance of the group not being too unwieldy or large if one is to maintain focus and progress.

20.12 Our information to date is that there was very little cost incurred in setting up the FJB in England and Wales and the only cash cost was for the contract for the Board's chair and the recruitment exercise to recruit that chair. The latter was approximately £13,000 (advertising, etc.) and the former was a daily rate of circa. £400 per day for 20-30 days per year. There would, of course, be a necessity for secretariat costs but COAC already incurs secretariat costs.

20.13 There is also a Family Justice Council (FJC). It is a multi-disciplinary body charged with more "blue skies" thinking to advise the Government. Essentially, it deals with the quality of decision-making, leaving policy to the FJB. Amongst its tasks, for example, are drawing up guidelines to deal with parents who lack capacity. Membership includes judiciary, members of the Government, psychiatrists, psychologists and paediatricians.

Discussion

20.14 There is no doubt that the structure of accountability in England and Wales is different to the proposed FJB for Northern Ireland. We believe there are two reasons for that. The first is that there is in place a management structure within the judiciary in England which ensures close monitoring of the reforms. In every new family court (since the amalgamation of the equivalent FPC and county court) there is a designated family judge who is circuit judge level. They report to a High Court Judge, who in turn reports to the President of the Family Division, Lord Justice Munby. A key management tool is the computerised management information (CMS) which was designed by the judiciary and which we do not have in place. We do not have any similar management structure.

20.15 Secondly, a much smaller jurisdiction such as Northern Ireland does not need as complex structure as exists in England, which includes local FJCs feeding into a main FJC and then an FJB with local FJBs. We need simply one body which is responsible for holding each stakeholder to account for the way it manages the services provided for children.

20.16 In the absence of a formal management system within the judiciary, the reforms which we are recommending require a body with a Chair who is of the highest calibre and is a person likely to carry weight with all stakeholders and government departments. They would be independent of all the stakeholders. The body would include, of course, family court judges, members of the professions and other stakeholders in the family justice system. Our suggested model is closer to that of the Republic of Ireland (see its terms of reference above), with its Family Law Development Committee, save that we do not consider it needs to be statutory and it requires a distinguished independent chair. The aim, therefore, would be to revitalise the thrust and direction of family justice within Northern Ireland with a multi-disciplinary body that, by virtue of its make-up, demanded to be heard.

20.17 The suggested FJB model for Northern Ireland, therefore, is intended to ensure operational accountability. There would, however, be no question of interference in judicial decision-making. Hence, we are of the view that COAC should be replaced by a Family Justice Board with such an independent paid chair with a fresh remit and fresh procedures.

Recommendations

1. A Family Justice Board to be set up with an independent chair recruited after a properly advertised recruitment exercise. The chair would be expected to be a person of outstanding and proven distinction and would be paid an appropriate daily rate with an expectation that they would work for 20-30 days per year. The chair should be genuinely independent of all stakeholders. **[FJ160]**

2. The terms of reference of the new FJB *possibly to be* along these lines:

"a. The Board's overall aim is to drive significant improvements in the performance of the family justice system, where performance is defined in terms of how effective (and efficient) the system is in supporting the delivery of the best possible outcomes for children who come into contact with it.

b. The Board will collectively work together to achieve its objectives. This principle of cross-agency working will be crucial in ensuring that the Board achieves its overall aim of driving significant improvements in performance.

c. In delivering against this aim, the Board will have a particular focus on:

- reducing delay in public law cases;
- resolving private law cases out of court where appropriate;
- building greater cross-agency coherence;
- tackling variations in local performance;
- carrying out research where appropriate;
- supervising the provision of training;
- suggesting reform - for example, the implementation of suggestions for reform from bodies such as this Review Group.

d. The detailed objectives for the Board which will underpin its work might be:

to develop and monitor the implementation of a system-wide plan which sets out clear actions to be taken within, and particularly across, delivery agencies in order to achieve significant improvements in system performance;

to review and analyse whole system performance, based on evidence, and to report on this including through an annual report;

to concentrate on outcome-based approaches, challenge poor performance and make recommendations on performance improvements to Ministers, agency heads, local authorities and others;

to develop, support and monitor local manifestations of the Board (Local Family Justice Boards) which will oversee the operation of family justice in their areas;

to identify, disseminate and monitor the implementation of local best practice and to help Government disseminate the latest research throughout the system;

to identify processes by which research can be transmitted around the family justice system, enabling it to be reviewed and improved;

to oversee the delivery of particular Family Justice Review recommendations, for example, on workforce, (excluding the judiciary), standards and the "voice of the child"; and

in the longer term, to consider the case for more fundamental structural change to the family justice system and provide advice accordingly to the Government.

e. The Board will at all times respect and act in a manner which protects judicial independence, both in relation to the judiciary generally and to individual judicial decisions." **[FJ161]**

3. The core membership of the Family Justice Board to be approximately 8-10 persons with the right to set up sub-groups and second relevant persons for defined purposes. Since the objective is to identify strategic goals and ensure accountability, the following membership might be *chosen from*:

at least 2 family court judges

Chief Executive, Northern Ireland Guardian Ad Litem Agency

a senior representative of the health and social care trusts

Chair of the Family Bar Association

Law Society member

Director of NICTS

Chief Executive of the Legal Services Commission

an academic member to advise the Board about current research on issues affecting children and to have particular responsibility for multi-disciplinary training.

One from:

- Director, Children's Services, Department of Health
- Director, Family Policy, Department of Justice
- Director of Family Policy, Department of Finance

On a rotational basis, the Board should co-opt a member from the voluntary sector to ensure that a range of perspectives informs decision-making. **[FJ162]**

4. The Family Justice Board to have the power to set up sub-committees, co-opting persons from outside the Board. **[FJ163]**

5. The Family Justice Board to provide annual reports on its work. **[FJ164]**

6. The minutes of the Family Justice Board meetings to be distributed widely and publicly online. **[FJ165]**

7. The Family Justice Board to have a secretariat and be given a modest budget to finance, for example, the drafting of practice guidelines, measured research, training manuals, expenses for attendance at seminars or conferences to which the chair or a nominated person might usefully attend or address, etc. **[FJ166]**

8. Pending the setting up of this Family Justice Board, a number of steps to be taken to improve the Children Order Advisory Committee (COAC). These should include:

   (a) The agenda items for the following meetings should be finalised at each meeting. These, along with any associated option/background papers, should be circulated to the representative groups (including the Regional Court Users Groups, the trusts and Guardian Ad Litems) in advance of their own meetings to allow them to debate and report back.

   (b) The current practice of inviting speakers to COAC should cease. Interested parties should be asked to contribute a short paper which again should be circulated to the representative groups for comments and queries.

(c) There should be a one page briefing paper issued within a week of each meeting for publication on the COAC section of the Northern Ireland Courts & Tribunals Service website. This would allow for transparency and provide an easily accessible record of previous business for new members.

(d) The format of the annual review should be changed. A shorter review based around the briefing papers, published in a timely way, is more useful than a longer document that is out of date before it is written.

(e) A Regional Court Business Group should be specifically tasked to identify changes to the Best Practice Guide and to forward draft changes to COAC.

(f) The agenda should remain focused on the remit. Irrelevant additional items should not be added merely to "beef up" a short agenda. **[FJ167]**

9. Our current Family Court Business Committees (or potentially a single Committee for the region akin to the Family Justice Council in England) to undertake the role of adviser to COAC (or its replacement body, the Family Justice Board) through its periodic reports to assist in the making of strategic decisions about the family justice system in Northern Ireland. **[FJ168]**

CHAPTER 21

CONCLUSION

21.1 Throughout history, the law has had to respond to changes in the way people conduct their personal relationships. The present struggle for law to adapt to fresh developments in practices and beliefs concerning family law is no different from many other occasions in the past.

21.2 Predictions about the future of family law cannot be made with confidence. It is impossible to predict what it will look like in 20 years' time. All this Review can hope to do is shape the road ahead.

21.3 Law reform/review is always a complicated task, and family law reform is particularly sensitive, due to the emotional nature of the subject matter it governs. There are few areas of law that affect so many people, and in such profoundly personal ways. Any review of family justice must reflect changing social patterns, emerging research evidence and the voice of stakeholder groups. Whilst perfection in law reform is undoubtedly a misnomer, respect for the law comes in part from understanding it, and is what underpins it. That we have attempted to achieve in this Review by advocating a fresh, multi-disciplinary, outcome-based approach, centred on a combination of resolutions outside the court arena and the courts moving in most instances to be problem solving fora.

21.4 However, it cannot be assumed that changing social norms and views on reform are uniform or even congruous or reconcilable. The difficulty with reform proposals based on appeasing some and providing concessions to others is that it can end up with continuing cycles of dissatisfaction, particularly because the messages conveyed by those recommending that reform and those received by members of the public affected by it are not necessarily the same.[131]

21.5 This preliminary Review and these recommendations have been the product of the earnest endeavours of a wide array of judges, lawyers, departmental officials, professionals in the wider family justice system, voluntary sector participants and members of the public at large.

21.6 This preliminary paper, which is to be widely circulated, will be influenced greatly by the responses which we receive. The construction of the debate that we hope this Review triggers is not set in stone but is constantly in flux. The ideas that have been put forward can improve or indeed degenerate as the arguments unfold. Doubtless, with the dissemination of this preliminary

[131] See *"The Handling of Parental Responsibility Disputes by the Australian Family Court following a Decade of Reform"* – the Honourable Justice Victoria Bennett, the Hochelaga Lectures 2015 in Australia.

report, amendments, deletions and additions - perhaps even fundamental restructuring – may occur as result of more widespread thinking and input. That is the purpose of its dissemination.

21.7 This consultation phase will end within 12 weeks from the publication of this preliminary report. Thereafter, the responses will be absorbed and considered by our two committees – the Review Group and the Reference Group - leading to a final report by around the autumn of 2016.

21.8 There is a difference between marginalising a debate and winning an argument. We are all familiar with this brand of cognitive dissonance. We do not so much believe in the sanctity of the present state of family law as decry the notion of stirring things up when the world works after its fashion the way it always has. Because attitudes to change are sometimes conflicted and contradictory, there is often no motivation to examine our current situation closely which might lead us to the question of whether some of the attitudes that we currently hold are not at odds with real access to justice. In truth, the love of change can be a filtered affection.

21.9 We conclude as we started, with a quotation from Frances Bacon: "He that will not apply new remedies must expect new evils; for time is the greatest innovator". Just because one group of people in the past set the frame, does not mean that others in the future cannot break the mould. If we fail to grasp this opportunity, new evils will beset us. If time is not to overtake us, we need these new remedies which we have recommended.

21.10 One concept will remain unaltered, however. It is that there is no reason whatsoever why the family justice system in Northern Ireland should not be one of the most progressive and fairest in the world. With all the benefits of a small jurisdiction, and with the enormous talent at our disposal within the family justice system, we can quickly and effectively pilot new and creative ideas at minimum cost and be an example to other jurisdictions. Far from being merely followers of fashion elsewhere, I am certain that we have in this jurisdiction the capacity to be leaders in the development of family justice and an example to the rest of the world.

GLOSSARY

ADR
Alternative Dispute Resolution – ways of attempting to resolve disputes so as to avoid litigation. Mediation is the primary form of ADR.

Affidavit
A written statement made in the name of a person (based on facts within his/her own knowledge) who voluntarily signs it (in the presence of an authorised person) having sworn or affirmed that it is true.

Ancillary relief
Ancillary relief (in the context of matrimonial proceedings) is where a party to proceedings for a divorce, nullity or judicial separation seeks an order for financial provision

Brussels IIa
Brussels II Regulation (EC) no. 2201/2003, also called Brussels IIa or II bis is a European Union Regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The regulation concerns the jurisdiction responsible for parental responsibility, including the access to the child of the other parent. Jurisdiction is generally referred to the courts connected to the child's habitual residence. The regulation also specifies procedures regarding International Child Abduction but does not take precedence over the Hague Child Abduction Convention (to which all EU member states are parties).

C1 forms, C1AA forms, C2 forms:
Form C1 - This is the form of document by which an application is begun for any of the court orders available under the Children (Northern Ireland) Order 1995 and it should contain relevant information about the circumstances of the child/children the subject of the proceedings. **C1AA** is a supplemental information form to be completed by applicant and respondent.
Form C2 - This document is for applications for one or other of the following: a) Leave (permission) to commence proceedings (this is required in situations where the applicant does not have an automatic right to come before the court to seek an order); b) For an order or directions in existing family proceedings; c) To be joined as, or cease to be, a party in existing family proceedings

CAFCASS
This stands for the Children and Family Court Advisory and Support Service which is the public body in England & Wales which performs the functions of the Guardian ad litem Agency in this jurisdiction. CAFCASS is independent of the courts, social services, education and health authorities and all similar agencies. It looks after the interests of children involved in family court proceedings. Officers advise the courts on what they consider to be in the best interests of individual children.

CFA
Conditional Fee Agreement – An agreement under which a lawyer agrees only to be paid by their client in the event that the client's claim succeeds – a 'no win – no fee agreement.' Where the client's claim does succeed, the lawyer is paid their normal fee and an additional amount, known as a success fee. The success fee is not calculated as a proportion of the amount recovered by the client.

Chancery Division
The Chancery Division is a part of the High Court of Justice (the other divisions being the Queen's Bench Division and Family Division).
Further information on the work it undertakes can be found here: www.courtsni.gov.uk/en-GB/AboutUs/RCJ/Pages/Royal%20Courts%20of%20Justice%20Customer%20Information.aspx#Chancery

Chatham House basis
The **Chatham House Rule** is a system for holding debates and discussion panels on controversial issues, named after the headquarters of the UK Royal Institute of International Affairs, based in Chatham House, London, where the rule originated in June 1927. The Rule states: 'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.'

Contempt of court
Failure to comply with the order of a court or an act of resistance or insult to the court or judge

County Court Judges (CCJs)
County Court judges are judges in Northern Ireland who, primarily, sit in the County Court, Crown Court and Family Care Centre.

Citizens Advice (formerly Citizens Advice Bureau, CAB)
A charitable organisation which has offices throughout the country at which the public can receive free advice and information on civil legal, and other, matters.

Civil Justice Council (CJC) (England & Wales)
The CJC is an advisory public body established under the Civil Procedure Act 1997. It is responsible for overseeing and co-ordinating the modernisation of the civil justice system. Further information on their role can be found here: https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/

Costs Budgeting and Costs Budget
Costs budgeting is the management of costs throughout the litigation process. The Civil Procedure Rules require parties to prepare a costs budget detailing their likely costs based on considering the issues in the case, the procedural stages and the

amount of time each stage of the litigation is likely to take. The court then approves or amends those budgets at Costs and Case Management Conferences ("CCMCs").

County Court
The County Court deals with civil (non-criminal and non-family) matters.
Types of civil case dealt with in the County Court include:

- individuals and businesses trying to recover money they are owed;
- individuals seeking compensation for injuries, or damages for breach of contract or other wrongs;
- landowners seeking orders that will prevent trespass, or for possession at the end of a tenancy.

Designated Family Judges (DFJ)
Every care centre has a DFJ who is responsible for it and for other Family Courts in the area which have been designated as hearing family work. DFJs are County Court Judges. They are responsible for leading all levels of the family judiciary other than High Court Judges at the courts for which they have responsibility, and for ensuring the efficiency and effectiveness of the discharge of judicial family business at those courts.

Direct Access
A scheme whereby members of the public may now go directly to a participating barrister without having to involve an instructing solicitor or other intermediary. In the past it was necessary for clients to use a solicitor or other recognised third party through whom the barrister would be instructed.

Discovery
A process whereby the parties to court proceedings disclose to each other all documents in their possession, custody or power relating to issues in those proceedings

Dissolution
The act of dissolving or ending a marriage

District Judges (DJs)
District judges are full-time judges who deal mainly with the majority of cases in the County Court. They are assigned on appointment to a particular circuit and may sit at any of the County Court hearing centres or District Registries of the High Court on that circuit.

Divisional Court
A divisional court, in relation to the High Court of Justice of England and Wales, means a court sitting with at least two judges. Matters heard by a divisional court include some criminal cases in the High Court (including appeals from Magistrates' courts and in extradition proceedings) as well as certain judicial review cases.
The usual constitution of a divisional court is one Lord or Lady Justice of Appeal and one High Court Judge.

Early Neutral Evaluation (ENE)
Early neutral evaluation is a process, provided both privately and on occasion by the court, in which an early indication is given of what the outcome might be if the matter were to be finally adjudicated in court.

Employment Tribunal (ET)
The Employment Tribunals is a specialist tribunal established to resolve disputes between employers and employees over employment rights. The tribunal will hear claims about employment matters such as unfair dismissal, discrimination, wages and redundancy payments.
Further information on the work of the ET can be found here: https://www.employmenttribunalsni.co.uk/

The European Convention on Human Rights and Fundamental Freedoms
An agreement between the members of the Council of Europe to identify and protect the human rights of its members. It led to the establishment of the European Commission for Human Rights and the European Court of Human Rights. The United Kingdom is a signatory to the Convention and has enshrined the rights afforded by it in United Kingdom domestic law by virtue of the Human Rights Act 1998. **Article 8** of the Convention provides a right to respect for everyone's 'private and family life, his home and his correspondence', subject to certain restrictions that are 'in accordance with law' and 'necessary in a democratic society' and this article is often in play in family proceedings.

The European Court of Human Rights
The international court, sitting in Strasbourg, which interprets the European Convention on Human Rights. Only when every legal process has been exhausted in his or her own member country may an individual bring a case to the European Court of Human Rights.

Family Division
The Family Division is part of the High Court of Justice along with the Queen's Bench Division and the Chancery Division.
Further information can be found at: www.courtsni.gov.uk/en-GB/AboutUs/RCJ/Pages/Royal%20Courts%20of%20Justice%20Customer%20Information.aspx#Family

Guardian ad Litem
A person, normally a social worker in the Northern Ireland Guardian ad Litem Agency, appointed by the court to protect the interests of a child who is the subject of a public law application in a Children Order case for the duration of that case. A guardian ad litem is so called because ad litem means "for the suit" or, more loosely, "for the purpose of the proceedings" and serves to distinguish the office from the role of legal guardian whose duty extends to protecting a child generally and is not confined to the lifetime of a set of proceedings.

Hague Child Abduction Convention
The principal object of this Convention, aside from protecting rights of access to children, is to protect children from the harmful effects of cross-border abduction, (and unlawful retentions), by providing a procedure designed to bring about the prompt return of said children to the State of their habitual residence. It is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child, across international boundaries is not in the interests of the child and ensures that any determination of the case of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principal of prompt return serves as a deterrent to abduction and wrongful removals.

High Court Judges (HCJ)
High Court Judges are Judges that are assigned to one of the three divisions of the High Court – the Queen's Bench Division the Family Division and the Chancery Division.
High Court judges usually sit in Belfast. They hear serious criminal cases, important civil cases and appeals in the High Court and assist the Lord Justices to hear appeals in the Court of Appeal.

Injunction/Injunctive relief
An order or decree by which a party to proceedings is required to do or refrain from doing a particular thing

Jackson Report/Reforms
In November 2008 the Master of the Rolls appointed Lord Justice Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost.
Lord Justice Jackson published a preliminary report in May 2009 and a final report in December 2009.
The Jackson Reforms refer to the changes made following the publication of his report, largely pursuant to his recommendations.
The final report can be found here: https://www.judiciary.gov.uk/publications/review-of-civil-litigation-costs-final-report

Judicial Studies Board (JSB)
The Judicial Studies Board for Northern Ireland was established in 1994.
Membership of the Board consists of at least one representative from every judicial tier and a legal academic. The Board is chaired by a Lord Justice of Appeal. The Northern Ireland Courts and Tribunals Service provides secretarial support for the Board and finances its work directly from the Court Service budget.
The Board are to provide suitable and effective programmes of practical studies for full and part time members of the judiciary and to improve upon the system of disseminating information to them. In order to protect judicial independence and in

particular to ensure that sectional interests are not brought to bear on the judiciary through the training events, the Board is "judge driven".
The Board seeks to facilitate a variety of training events each term (presentations, workshops etc.), designed to meet the needs of judiciary at all levels.

Jurisdiction
Either: 1. the power/competence of a court to hear and deal with certain proceedings or application; or, 2. The territorial or other limits within which the judgments or orders of a court can be enforced or executed.

Law Society of Northern Ireland
The Law Society is the professional association that represents and governs the solicitors' profession for the jurisdiction of Northern Ireland.

Liberty to apply
Some judgments, orders, or agreed settlements put up to the court give the parties liberty to apply implying a right to apply to the court for the purpose of working out, putting into effect or enforcing the judgment, order or settlement. Liberty to apply is implied in any non-final order or a primary judgment.]

Litigants in Person (LiPs)
A litigant in person is an individual, company or organisation that is a party to legal proceedings but not represented by lawyers.

Lord Chief Justice
Lord Chief Justice is the judge who is the Head of the Judiciary in Northern Ireland.

Lord/Lady Justice (LJ)
A Judge of the Court of Appeal.

Maintenance pending suit
After a petition for divorce, judicial separation or nullity has been filed one party may apply to the court for an order that the other party make payments for his or her maintenance. This is known as maintenance pending suit and the order will expire at the conclusion of the proceedings.

Malthusian Gap
The Reverend Thomas Robert Malthus (1766–1834) posited a theory that, as population growth is ahead of agricultural growth, there must be a stage at which the food supply is inadequate for feeding the population. The difference between demand and the inadequate supply is what is meant by the phrase 'Malthusian gap' which is being used metaphorically in the context of this report to refer to the growth in demand for support service in relation to the resources which government can provide for these purposes.

Masters
A Master is a judicial officer in the High Court who exercises the jurisdiction of a High Court Judge in chambers and whose role is concerned primarily with interlocutory or procedural matters such as applications ancillary to the substantive proceedings and case management. They also have competence to hear an increasing number of cases in circumstances where a High Court Judge is not required.

Mareva injunction
Where debt proceedings are taken against a party the court may grant a Mareva injunction to prevent the defendant from removing assets from the jurisdiction before the trial of the matter.

Minor
A person under the age of 18 years. This is also how 'child' is defined under the Children (Northern Ireland) Order 1995.

NICTS
The Northern Ireland Courts and Tribunals Service (NICTS) is an Agency within the Department of Justice (DoJ) sponsored by the Access to Justice Directorate.
The role of the NICTS is to:

- provide administrative support for Northern Ireland's courts and tribunals;
- support an independent Judiciary;
- provide advice to the Minister of Justice (the Minister) on matters relating to the operation of the courts and tribunals;
- enforce civil court judgments through the Enforcement of Judgments Office (EJO);
- manage funds held in court on behalf of minors and patients;
- provide high quality courthouses and tribunal hearing centres; and
- act as the Central Authority for the registration of judgments under certain international conventions.

No fault divorce
This is a divorce in which the dissolution of a marriage does not require a showing of wrongdoing by either party.

OC
Online Court - see Chapter 6 of this Review for further details in relation to the proposed OC for Northern Ireland.

Official Solicitor
Refers to the Official Solicitor to the Court of Judicature of Northern Ireland appointed under section 75 of the Judicature (Northern Ireland) Act 1978 whose principal purpose is to represent the interests of certain persons who are under a legal disability (*i.e.* "Patients"). The Official Solicitor normally acts as a Controller for a Patient when there is no one else available to assume this role. Aside from acting as a Controller, the Official Solicitor's work also includes the following:

- providing legal assistance to the High Court's Office of Care and Protection in connection with the estates of Patients where someone other than the Official Solicitor is appointed as Controller.
- representing the interests of persons under a legal disability, including children, in family or other civil proceedings
- taking responsibility for other miscellaneous matters (such as consent to medical treatment cases) where the court feels that the assistance of the Official Solicitor would be an advantage.

'On the papers'
A matter decided or determined on the papers is one where the decision makers arrives at his or her decision after reading the relevant papers/submissions and without hearing any oral submissions or evidence.

Online Dispute Resolution (ODR)
Dispute resolution which uses technology to assist the resolution of disputes between parties.

Perfect
To perfect a court order is to bring about the completion of all that the order requires.

Personal Injury (PI)
Personal Injury is a term used to describe any type of physical or mental injury which has been caused to an individual.

Petition
A formal statement addressed to a court by which the petitioner 'prays' (ask for) remedy or relief. Thus e.g. proceedings for divorce and bankruptcy are commenced by petition.

Practice Direction (PD)
Practice Directions accompany and amplify rules of court and give practical advice on how to apply and act in accordance with the rules themselves.

Pre–Action Protocols (PAP)
These set out how the courts expect parties to behave prior to commencement of any claim. They are primarily designed to assist the parties to resolve disputes without recourse to starting proceedings in court.

Pro Bono work
Advice given or professional work undertaken voluntarily and without payment as a public service.

Proving service
Before a court proceeds to hear and deal with a matter it may require the party bringing the proceedings to prove, by oral or documentary evidence, that the papers

initiating those proceedings and giving notice of the date and time of the court were duly served on the other party where that party is not before the court on the date of hearing

QB Judges
Judges of the Queen's Bench Division.

Qualified One Way Costs Shifting (QOCS)
The ordinary rule in litigation is that the losing party pays the winning party's legal costs. This is known as costs shifting. One way costs shifting is where the ordinary rule is changed so that when the winning party is a claimant the defendant pays the claimant's litigation costs. Should however the defendant win, the claimant does not have to pay the defendant's litigation costs.

Queen's Bench Division (QBD)
The Queen's Bench Division is one of the three divisions of the High Court together with the Chancery Division and Family Division.
Further information can be found here: http://www.courtsni.gov.uk/en-GB/AboutUs/RCJ/Pages/Royal%20Courts%20of%20Justice%20Customer%20Information.aspx#Queens

Registrar
Registrars in Bankruptcy are judges who sit in the Chancery Division of the High Court, both in the Bankruptcy Court and in the Companies Court. The jurisdiction involves hearing and determining a wide variety of personal and company insolvency cases, as well as matters involving specialised aspects of company law not related to insolvency.

Royal Courts of Justice (RCJ)
The Royal Courts of Justice is a court building in Belfast which houses the Court of Appeal and High Court.

Rules
This refers to the statutory rules of court which govern the procedures of the courts to which they apply

Rules of the Court of Judicature
The primary rules of court for civil litigation in the High Court in Northern Ireland.

Summons
A document issued from a court office or a judicial authority requiring the person to whom it is addressed to attend before a judge or other officer of the court. A summons may be issued to a person to answer a charge or complaint against him or her or it may be issued to require someone to attend court to give evidence.

Totally without Merit (TWM)
If a case is certified as being totally without merit by a Judge at the paper consideration of a permission to appeal application or an application for then there is no right to request that the decision be reconsidered at an oral hearing.

Unified Civil Court (UCC)
A proposed unification of the High Court and County Court that was last considered by the Brooke Report in 2008.

The United Nations Convention on the Rights of the Child (UNCRC)
The United Kingdom is a signatory to this convention (which identifies and enshrines certain minimal rights for children) and has therefore bound itself by its provisions. The UNCRC does not have force of domestic law in the way that the European Convention on Human Rights does. The provisions of the UNCRC inform and influence the approach taken in the family courts.

APPENDIX 1

TERMS OF REFERENCE

REVIEW OF CIVIL AND FAMILY JUSTICE

Introduction

1. The Lord Chief Justice has commissioned a Review of Civil and Family Justice, to be led by a Lord Justice of Appeal.

2. Since the last comprehensive review of the civil justice system in Northern Ireland was completed in June 2000, the landscape within which the civil and family courts operate has changed substantially and there is a growing demand for the speedier resolution of business against a backdrop of declining resources. In addition, a judicially-led review of the Civil Justice System in Scotland was undertaken in 2007-2009, the outcome of which was published in September 2009 as the "Report of the Scottish Civil Courts Review", and there is a programme of civil justice reform planned for England & Wales, which is also being judicially led. These recent developments in GB have highlighted a number of potential opportunities, many of which should be capable of a local application. It is considered timely, therefore, to assess to what extent current arrangements in this jurisdiction are fit for purpose in a modern context.

3. The aim of the Review is to look fundamentally at current procedures for the administration of civil and family justice, with a view to:

    - improving access to justice;
    - achieving better outcomes for court users, particularly for children and young people;
    - creating a more responsive and proportionate system; and
    - making better use of available resources, including through the use of new technologies and greater opportunities for digital working.

4. The Review will proceed from the premise that the courts should be reserved for business that cannot be resolved through alternative means. It is recognised that additional capacity outside the courts would need to be created for such alternative approaches to be successfully implemented, and the Review will seek to provide an evidence base and clear rationale for potential new working practices that might better meet customer expectations in a modern justice system.

5. The outcome of the Review will be a report for the Lord Chief Justice to forward to the Department of Justice with recommendations designed to inform the direction of policy development in this area in the next Assembly mandate, building on any relevant findings in the report of the Access to Justice Review II, when published. This will highlight where legislative reforms would be required as well as the identifying "quick wins" that could be implemented on an administrative basis. The Department of Finance & Personnel and Department of Health, Social Services & Public Safety will be engaged, as appropriate, on matters relevant to their responsibilities.

Scope of the Review

6. The main areas to be covered by the review are as follows:

- the jurisdiction of the small claims and county courts
- the types of business that should be conducted within these jurisdictions
- the use of mediation and other forms of alternative dispute resolution, including on-line options (for example, online dispute resolution)
- opportunities to facilitate and provide support to unrepresented parties
- the workings of the family justice system
- the scale costs system and options for the proportionate recovery of costs
- opportunities for more proportionate use of evidence
- opportunities to streamline court procedures and improve case management, including for the transfer of business between court tiers and the potential for a single entry point for all non-criminal claims
- invocation of modern technology into the court process.

Duration

7. The Review will commence in September 2015 and be completed by no later than September 2017.

Methodology

8. A Review Group will be established to:

- examine current levels of business in the civil and family courts and how these are being managed;
- look at best practice and experience in other comparable jurisdictions;
- consider the adequacy of currently available data on civil and family caseloads;
- investigate the potential for closer collaborative working with voluntary sector providers;
- identify potential business improvements;

- highlight areas where legislative reform is required;
- assess the potential equality implications of any proposals, with a view to ensuring there is no adverse differential impact for any section 75 groupings; and
- identify training and development needs.

9. The Review will be substantially informed by the views of interested stakeholders. A Reference Group will be established to allow external stakeholder groups to provide their input and members of the public will be encouraged to contribute on the basis of their personal experiences.

10. The Review Group will, in consultation with relevant members of the Judiciary, develop a series of issues papers covering key themes within and across the various court divisions and tiers within the civil and family justice system. The issues papers will be shared with the Reference Group and made available on-line, as a means of providing the basis for an informed and inclusive debate. The Review Group will then produce an interim report, which will be made publicly available, and consider views on this before publishing its final report.

Governance arrangements

11. The Review Group will be chaired by Lord Justice Gillen and include the following membership:

- Mr Justice Horner
- The Recorder of Belfast
- The Presiding District Judge (Civil)
- The Presiding Master
- Gerry McAlinden QC, Bar Council nominee
- Arleen Elliott, Law Society nominee
- Laurene McAlpine, Department of Justice
- Laura McPolin, Department of Finance
- Eilis McDaniel, Department of Health
- Paul Andrews, Chief Executive of the Legal Services Agency
- Paula McCourt, Northern Ireland Courts & Tribunals Service
- Maura Campbell, Principal Private Secretary to the Lord Chief Justice

12. The Reference Group will include nominated representatives from:

- Advice NI
- Association of British Insurers
- Citizen's Advice
- Chamber of Commerce

- Children's Law Centre
- Federation of Small Businesses
- Consumer Council
- Family Mediation NI
- Health & Social Care Board
- Law Centre
- Law Society/Bar dispute resolution services
- Mediation NI
- NI Commissioner for Children & Young People
- Northern Ireland Council for Ethnic Minorities
- NIGALA
- NI Human Rights Commission
- NSPCC

13. The Office of Lord Chief Justice will provide the secretariat for the Review.

APPENDIX 2

FAMILY STATISTICS

Family statistics for October 2015

	Public FCC		Private FCC		Appeals		Adoptions		Family Homes & Domestic Violence	
		%		%		%		%		%
Belfast	104	52	140	57	23	81	59	57	17	65
Londonderry	25	13	38	15	2	1	11	11	6	23
Craigavon	57	29	54	22	7	18	22	21	3	12
Fermanagh & Tyrone	13	7	14	6	0	0	11	11	0	0
Totals	**199**	**100**	**246**	**100**	**32**	**100**	**103**	**100**	**26**	**100**

APPENDIX 3

Civil Justice Review

Research

Index

The Family Drug and Alcohol Court (FDAC)

What is it?

1. The FDAC is a Court Process for parents involved in public law proceedings when the impetus for intervention is parental substance misuse. Parents are given the option to engage with the service. The structure works within the Children Act 1993 and after being piloted in London has been extended to other areas in England. It is based on a US model.

2. The difference between this Court model and proceedings in Northern Ireland is:

    1) The Court has a specialist multi-disciplinary team attached to it containing a number of experts relevant to parental substance misuse.
    2) The assigned Judge essentially manages the multi-disciplinary team and programme of work for the parents. The Judge heads up fortnightly meetings with the parents and the team (without legal representatives) to manage problems and be updated about progress. The idea of these is to take a problem solving approach and to reduce the adversarial approach.

3. The Court essentially provides a forum for the parents capacity to change to be tested. There is an intense substances misuse package of opportunities from the multi-disciplinary team who also work closely with and co-ordinate outside agencies who provide relevant services. A tailor made plan is put together for each individual. The first two reviews are attended by legal representatives, thereafter they are fortnightly and without legal representation unless it is required for a specific issue.

4. At the first review the option is fully explained to parents for them to consider. If there is an interim care order application it is dealt with at that review. The Court orders disclosure of all papers to the specialist team who have a two week assessment period. After 3 weeks there is a second review for which an assessment report and proposed intervention plan is filed by the specialist team. If everyone is in agreement with it - in particular the parent - they sign the plan. Thereafter the fortnightly reviews commence, there is no legal aid for legal representation at these. Any contested issues (for example contact) are listed for a hearing and the legal representatives attend. Cases proceed to a final hearing in the ordinary way and there is an option to leave the scheme.

Analysis

5. The Nuffield Foundation have carried out an in depth evaluation of the FDAC and this paper will by no means to justice to the depth with which they have considered the issues. However, I have set out some of the interesting findings.

6. In comparison with the control group, parents in this Court structure were much more likely to stop substance misuse - 40% of Mothers did compared to 25% in the control group and 25% of Fathers did compared to 5% of the control. The rate of reunification and stopping substance misuse was higher as well - 35% of Mothers achieved this compared to 19% in the control group.[132] There are a number of relevant factors to consider in relation to these statistics, first there is a selection process for suitable cases to go through the process. Secondly, the access to services would appear to be significantly better.

7. The Nuffield Foundation found that parents were offered more help in the FDAC, 95% of Mothers were offered substance misuse services compared to 55% in the control group.[133] The quality of the programme was identified as a benefit, the frequency and intensity, regular testing, motivating approach and therapeutic support were key factors.

8. The process was no quicker than traditional proceedings and some concern has been raised about how this court model could fit within the timescales suggested for care order proceedings in England (26 weeks). Children took longer to be rehabilitated to parents than the comparison sample which is explained as purposeful delay.[134] However, the process raises issues about how the tension between reducing delay and dealing with parental problems which require some time to address can be relieved.[135]

9. The Court structure has received awards and accolades since inception. Recently Sir Justice Munby is quoted by the BBC as saying:

> *I consider FDAC as one of the most important and innovative developments in public family law in decades... I am a strong supporter and believe that its combination of therapy, offered by the multi-disciplinary team, and adjudication and direction using the authority of the court is the right approach for parents suffering from addiction....The process delivers better outcomes for the children and the parents subject to it and achieves this in a manner which respects the humanity of the parents*.[136]

10. The success of the project in London is reflected by the fact it is now being rolled out throughout England.

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[132] Introducing the Main Findings from: Changing Lifestyles, Keeping Children Safe an evaluation of the first Family Drug and Alcohol Court (FDAC) in Care Proceedings at page 3.
[133] As above.
[134] The Family Drug and Alcohol Court Evaluation Project, Final Report at page 10.
[135] Bamborough, Shaw and Kershaw, "The Family Drug and Alcohol Court in London: A New Way of Doing Care Proceedings" Journal of Social Work Practice [2013]
[136] http://www.bbc.co.uk/news/uk-31512532

Considerations in introducing a similar a system

11. There are some headline grabbing features of this system which at first blush seem to be the reason for its success, for example they promote the fact that they have judicial continuity and "lawyerless" reviews. I would suggest that judicial continuity is not a problem within Northern Ireland. The benefit of the reviews may not be the fact that lawyers are absent, rather the benefit may in fact be the frequency with which they are held and the fact that the Judge is the chair. This introduces a closer level of accountability for the professional services involved with the substance cessation plan. The frequency would remove delay in dealing with problems which arise.

12. The benefit of having a tailor built, multi-disciplinary team dedicated to the Court and specifically constructed to deal with a particular problem - substance misuse- is no doubt one of the stand out features of this model. Providing clients with access to the services they need, obtaining funding for those services and engaging experts are areas most practitioners would describe as frustrating and a cause of delay. In this model they have those services, tailored to their needs and instantly accessible. However, the funding and co-operation of the Trusts would be necessary for this and liaison with them in terms of the cost, availability and willingness to provide would be required. It is this feature of the Court which is perhaps most different to our current structure and procedure. Unfortunately, the Nuffield evaluation did not include a cost analysis for the additional services.

13. The system offered modest legal savings (£682/family) but much greater savings in terms of the shorter care placements (£4,000/child) and savings on experts (£1,200/case). The cost of the team per family is £12,000.[137]

14. If consideration were being given to targeting parental substance misuse within Northern Ireland perhaps the FDAC could provide a template from which to work on something tailored to the specific substance misuse encountered in Northern Ireland. Street drugs may represent less of an issue than alcohol or prescription drugs for example. Research would need to be conducted within Northern Ireland to identify the specific areas of need in relation to substance misuse.

15. Location may be another factor to consider, the Court may need to be able to provide services for sufficient numbers of families to make it viable. The intensity of the process and nature of the services mean it is unlikely to be feasible for people to travel to make use of it. Therefore research would be required to see if it is a sustainable model.

[137] Introducing the Main Findings from: Changing Lifestyles, Keeping Children Safe an evaluation of the first Family Drug and Alcohol Court (FDAC) in Care Proceedings at page 14 and 15.

Conclusion

16. The evidence would suggest there are significant benefits to this model in terms of parent/child outcomes. There is a large volume of analysis of this court model which has already been conducted. If it is being considered, we would have the benefit of that analysis which would allow a tailored approach for Northern Ireland. There could be an element of cherry-picking to benefit from the experience of the English Courts and fit it within our own system. Significant research and liaison with social services would be required in considering taking this forward.

Sources

The Family Drug and Alcohol Court Evaluation Project, Final Report

Introducing the Main Findings from: Changing Lifestyles, Keeping Children Safe an evaluation of the first Family Drug and Alcohol Court (FDAC) in Care Proceedings

Bamborough, Shaw and Kershaw, "The Family Drug and Alcohol Court in London: A New Way of Doing Care Proceedings" Journal of Social Work Practice [2013]

http://www.bbc.co.uk/news/uk-31512532

The Scottish System

EXPLANATION OF THE SYSTEM

1. Children's proceedings are governed by the Children (Scotland) Act 1995. In many Sheriff's courts there is an assigned family sheriff.

2. A proposal was explored in the Scottish Civil Court Review that a pursuer ought to be able to choose whether or not to bring such matters before a sheriff or a district judge. It was proposed that on lodging the initial writ (the process by which proceedings are began in Scotland as opposed to the C1 in Northern Ireland) the pursuer may specify a preference. The case would then be allocated and a defender who disagrees with the pursuer's choice of venue may raise this at the first case management hearing.[138]

3. Both the procedure and terminology used in these proceedings somewhat differs from Northern Ireland. The basic sequence of such proceedings is as follows:
   - Consult with client and investigate legal aid eligibility
   - Draft pursuer's (applicant's) application to the court. This is known as the initial writ for which there is a standard format.
   - The initial writ is sent to the Sheriff Clerk for warranting. (Birth certificates should be included)
   - When warranted the writ is returned and a service copy should be served on each defender (respondent). Service can be carried out by a Sheriff Officer or recorded delivery.
   - The defender has 21 days from the date of service to respond.
   - If the defender lodges a notice of intention to defend the court will send a G6 form which largely contains timetabling arrangements.
   - If a notice of intention to defend is not lodged within 21 days the court will grant decree by default. (OCR 33.37)
   - There is then an "adjustment period" where parties adjust their pleadings.
   - A child welfare hearing will almost always be fixed. This is generally 21 days or more after the defences are lodged, unless the Sheriff feels that it should be sooner.
   - There is then an "options hearing". The pursuer must lodge two copies of the pleadings no later than two days before the options hearing. OCR 9.11 and 9.12 provide the procedural rules.
   - At the options hearing the following courses may be taken.
     1. Continuation (adjourned) for a maximum of 28 days.
     2. Proof (evidential hearing)
     3. Debate (a hearing on a specific point of law)
     4. Proof before answer (a hearing on a specific point of fact)

4. It is apparent that such proceedings in Scotland are intended to be tightly managed and focussed on achieving a resolution between the parties without the need for a proof to take place. Case management hearings take place before a proof to help streamline the hearing and see if resolution can be reached at that stage.

[138] Scottish Civil Court Review, Chapter 3, A New Case Management Model

5. Like with proceedings under the Children (Northern Ireland) Order 1995 the welfare principle is the courts paramount consideration under the Scottish legislation. Adherence is also given to the no order principle. Private law applications regarding parental responsibility, residence and contact etc. are governed by section 11 of the Children (Scotland) Act 1995. In determining such matters the court *"shall regard the welfare of the child concerned as its paramount consideration and shall make any such order unless it considers that it would be better for the child that the order be made than that none should be made at all."*[139] The wishes and feelings of the child are also taken into account, like in Northern Ireland, consistent with the child's age, maturity and understanding.[140]

6. During the course of proceedings concerning children people can be appointed to safeguard the child's interests and / or provide a report on matters affecting the child. Such appointments can be statutory or common law. Reporters may be appointed under Rule 33.21 of the Ordinary Cause Rules where no formal requirements as to qualifications and experience are set out. It is submitted that guidance in relation to qualification and experience is also inadequately dealt with under section 40 of the Children (Scotland) Act 1995. This provision is very vague in that it prescribes only the qualifications of a reporter shall be such as the Secretary of State may prescribe and that the secretary of state may make regulations in relation to their functions. Unlike in Northern Ireland Scotland does not have a centralised Guardian ad Litem Agency (in relation to public law proceedings) or trust employed Court Children's Officer (in relation to private law proceedings). Further, various different names are given to these individuals such as "reporters" and "curators ad litem". As a result of this there is no prescribed form and content for reporting nor is there any fee structure. These reporters tend to be solicitor or sometimes social workers.

7. Like in Northern Ireland litigants in person are becoming more common in family proceedings. Litigants in person may apply to the court to have a "lay assistant" alongside them. Lay assistants are equivalent to a McKenzie friend and like in Northern Ireland they are not permitted to speak on their behalf in court. The role of the lay assistant is limited to advice and assistance.[141]

8. Scottish family law judge Lord Brailsford has developed a draft protocol for family law cases in the Court of Session. The aim of the draft Protocol is more effective case management of family law cases, being introduced in the wake of the report of the Scottish Civil Courts Review. This is not yet part of the rules of court or a practice note, however, the draft protocol has been piloted since October 2012 and is now widely used where possible. The difficulty in fully following same appears to lie in the fact that the necessary work is not funded in legally aided cases. It should be

[139] Section 11(7)(a) Children (Scotland) Act 1995
[140] Section 11(7)(b) Children (Scotland) Act 1995
[141] Families Need Fathers (Scotland), "Representing Yourself in a Scottish Family Court: a guide for party litigants in child contact and residence cases" March 2014 (revised edition) http://static1.1.sqspcdn.com/static/f/861186/24542841/1395073043610/Representng+Yourself+in+a+Scottish+Family+Court.pdf?token=qnYGubczdcS6w8ENkP9F4ZsWGss%3D (accessed 10/10/15).

noted that this draft protocol was devised in relation to the Court of Session, not the Sheriff's court.[142]

9. This draft protocol in places appears to be modelled towards the English system whereby evidence in chief is by affidavit rather than oral. This is clearly intended to reduce expense and the amount of court time required, however, this is controversial among practitioners. Clark and Wylie questioned this proposal stating that "while perhaps reducing the length of the proof, is the process now front- loaded, particularly in relation to the preparation of affidavits, so that the clients total legal costs are in fact higher?"[143]

10. Like in Northern Ireland parties are increasingly being encouraged to mediate. A report by the National Audit Office in March 2007 found that family breakdown cases resolved through mediation are cheaper and quicker to settle, and deliver better outcomes.[144]

ANALYSIS (PROS & CONS) AND POTENTIAL IMPLICATIONS OF EXPORTING SUCH A SYSTEM

11. While the Scottish system in relation to private law matters is not dissimilar from that in Northern Ireland given that the welfare principle remains the courts paramount consideration it is submitted that this system should not be exported into the Northern Irish courts.

Being able to choose whether or not the case should be assigned to a sheriff or district judge:

Advantages:

- Offers flexibility as it allows the pursuer to choose the court in which to litigate (para 89)
- This proposal was aimed at providing judicial continuity as the case would be allocated to a particular sheriff or district judge (para 87)

Disadvantages:

- Enabling the pursuer to choose the court in which to litigate might be used to gain tactical advantage particularly where there is an inequality in the parties' resources. For example, where an experienced family sheriff was some distance from where the parties reside.
- Offering such a choice may simply give rise to another dispute between the parties.

The Scottish system of appointing reporters/ curators/ safeguarders in order to protect the interests of children in proceedings:

Advantages

- Helps to ensure that the child's interests are protected
- Such individuals help identify and narrow the issues in dispute
- Provide information to assist the court in hearing the case

[142] Lucia Clark and Karen Wylie, New Court of Session Family Protocol, (2015) Family Law Bulletin 136, pages 1-3.
[143] Ibid.
[144] National Audit Office (2007), Legal aid and mediation for people involved in family breakdown http://www.nao.org.uk/wp-content/uploads/2007/03/0607256.pdf

Disadvantages:

- There are no formal requirements as to their qualifications / experience
- No consistent practice for identifying suitable candidates for appointment
- There are no requirements under Rule 33.21 as to the form and content of the reporter's report.
- Reports have sometimes been found to be of poor quality, very lengthy and not always well focussed on the relevant questions. (Paragraph 103 Scottish Civil Court Review).
- There are no set parameters for reporter's fees. Where a solicitor is appointed they will normally charge on a per hour basis at their usual charging rate the fees of which, where one or both parties are legally aided, are usually paid by the Scottish Legal Aid Board.

12. The difficulties with the approach in Scotland were highlighted in the case of *NJDG v JEG* (2012) SC (UKSC) 293. This was essentially a contact and residence dispute, however, such was the acrimony between the parties and the delay in the system that the proof ran for 52 days taking over one year to complete. The Sheriff issued a decision more than 5 years after proceedings had commenced and cost an estimated £1 million in legal aid.

13. In this matter the sheriff allowed the second respondent curator to become a party to proceedings. The curator attended the proof, conducted cross examinations and gave evidence himself. This involved the curator cross examining witnesses about events and conversations which he had been part of and him removing his gown to enter the witness box and give evidence. All of this was able to occur despite the fact that the Ordinary Cause Rules concerning curators ad litem such as 33.16(9) (b) and 33A 16(9) (b) are drafted on the basis that a curator who becomes party to proceedings will instruct representation. The Supreme Court were instructed that this occurred was due to difficulties with legal aid.

14. It is submitted that the concern expressed by Lord Reed in his judgement with regard to the lack of clarity and consistency about what is expected of such individuals is well founded.[145] In Northern Ireland the appointment of Guardians ad litem and Court Children's Officers are regulated by public bodies resulting in higher standards, consistency and an established fee structure. Further, this makes their role in the process much more transparent and regulated and appropriate training, guidance and monitoring can be provided.

<u>Proposal in relation to evidence in chief being by affidavit</u>

Advantages

- Time saving
- Focussed and succinct
- Witnesses less stressed/ nervous

Disadvantages

- The other side do not know what questions were asked to elicit the information contained therein

[145] *NJDG v JEG* (2012) SC (UKSC) 293 at [37] and [40]

- Cost saving to the client likely to be negligible given the considerable extra preparation and drafting time.
- Will put a gloss on the witness's words which would not be present in oral evidence giving the court less opportunity to see how the witnesses present.
- Concern that it will cause proceedings to become "front loaded"[146]

15. It is submitted that evidence in chief by affidavit is unlikely to be appropriate in all circumstances and that there is a genuine concern that such an approach would not save time or costs and would result in the loss of an opportunity for the court to see and hear the presentation of witnesses.

DIVORCE

16. In order to grant a divorce the court must be satisfied that the marriage has broken down irretrievably[147] or that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage.[148] This ground can be proven by:
    - Adultery[149]
    - Unreasonable behaviour[150]
    - Living apart for one year – if living apart for one year and both parties agree to the divorce a court will accept this as proof of irretrievable breakdown of the marriage.[151]
    - Living apart for a period of 2 years continuously- you can apply for a divorce without your partner's agreement.[152]

17. This differs somewhat from the position in Northern Ireland under the Matrimonial Causes (Northern Ireland) Order 1978 whereby the petitioner is required to demonstrate either 2 years separation with consent[153] or 5 years separation without consent.[154]

18. Similar to Northern Ireland, legal aid is available depending on income and capital and how reasonable the Scottish Legal Aid Board thinks it is to give you help. In some cases parties might have to pay some of the legal costs back out of money or property acquired from the ancillary relief, this is known as "clawback". This is similar to the statutory charge system in Northern Ireland.

19. There is a simplified/ do it yourself procedure in place. This can be used in cases where:

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[146] Lucia Clark and Karen Wylie, New Court of Session Family Protocol, (2015) Family Law Bulletin 136, pages 1-3.
[147] S 1(1)(a) of the Divorce (Scotland) Act 1973
[148] S (1)(b) of the Divorce (Scotland) Act 1973
[149] S 1(2)(a) of the Divorce (Scotland) Act 1973
[150] s 1(2)(b) of the Divorce (Scotland) Act 1973
[151] s 1 (2)(d) of the Divorce (Scotland) Act 1973
[152] s 1(2)(e) of the Divorce (Scotland) Act 1973
[153] Art 3(2)(d) of the Matrimonial Causes (NI) Order 1978
[154] Art 3(2)(e) of the Matrimonial Causes (NI) Order 1978

- You are applying for divorce/dissolution because of the irretrievable breakdown of your marriage/partnership based on one year separation with consent or two years separation without consent, or because of the issue of an interim gender recognition certificate;
- There are no children of the marriage/partnership under the age of 16;
- There are no financial matters to sort out;
- You are not, and there are no signs that you spouse or civil partner are not able to manage his or her affairs because of mental illness, personality disorder or learning disability;
- There are no other court proceedings under way which might result in the end of your marriage / civil partnership.[155]

Where the simplified procedure can be used by parties there is considerable cost saving:

- **Fee payable from 22 September 2015 in relation to simplified divorce:**

Application for simplified divorce/dissolution of civil partnership - £111

Service by sheriff officer in a simplified divorce/dissolution of civil partnership - £11 plus sheriff officer's fee

- **Fee payable from 22 September 2015 in relation to ordinary divorce:**

Application for ordinary divorce/dissolution - £147
NID/reponing note (ordinary divorce/dissolution) - £147
Motion or minute (ordinary divorce/dissolution) - £47
Record (ordinary divorce/dissolution) - £111
Fixing Proof (ordinary divorce/dissolution) - £53
Each day or part day of proof, debate or hearing in summary application/misc. application - £223
Initial lodging of affidavits in undefended ordinary divorce /dissolution- £65
Appeal to Sheriff Principal - £111
Initial writ (ordinary) - £94
NID/reopening note (ordinary) - £94
Caveat - £35
Record - £111
Fixing proof - £53
Each day or part day of proof, debate or hearing in summary application/misc. application - £223
Initial lodging of affidavits in undefended family action- £65
Motion or minute - £47
Appeal to Sheriff Principal - £111[156]

- **Northern Ireland Court fees**

Personal Petitioner Interview - £50

[155] Scottish Courts and Tribunals, Simplified/ Do it yourself procedure http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership/simplified-do-it-yourself-procedure (accessed 12 October 2015).
[156] Scottish Courts and Tribunals, Sheriff Court fees http://www.scotcourts.gov.uk/rules-and-practice/fees/sheriff-court-fees (accessed 12/10/15)

Lodging Petition - £200
Setting down High Court - £300
Setting down County Court - £250
Application to make Decree Nisi Absolute/ Make conditional order final - £75[157]

ANALYSIS (PROS & CONS) AND POTENTIAL IMPLICATIONS OF EXPORTING SUCH A SYSTEM

The simplified procedure

Advantages

- Cheaper
- More straightforward
- Saves court time and resources
- Less stressful for parties

Disadvantages

- Undermines the seriousness of divorce

In appropriate circumstances this simplified procedure could be made available in Northern Ireland where parties are divorcing on either 2 or 5 years separation in order to save costs and court time.

SOURCES

Legislation

Children (Scotland) Act 1995
Children (Northern Ireland) Order 1995
Ordinary Cause Rules
Matrimonial Causes (Northern Ireland) Order 1978
Divorce (Scotland) Act 1973

Articles

Families Need Fathers (Scotland), "Representing Yourself in a Scottish Family Court: a guide for party litigants in child contact and residence cases" March 2014 (revised edition) http://static1.1.sqspcdn.com/static/f/861186/24542841/1395073043610/Representng+Yourself+in+a+Scottish+Family+Court.pdf?token=qnYGubczdcS6w8ENkP9F4ZsWGss%3D (accessed 10/10/15).

Lucia Clark and Karen Wylie, New Court of Session Family Protocol, (2015) Family Law Bulletin 136, pages 1-3.

Text Books

Joe Thomson, Family Law in Scotland, Butterworths, 4th edition

[157] Northern Ireland Courts and Tribunals Service, Getting a divorce/ dissolution of Civil Partnership https://www.courtsni.gov.uk/en-GB/Publications/UsefulInformationLeaflets/Documents/Getting%20a%20Divorce%20-%20What%20do%20I%20do/Getting%20a%20Divorce%20Booklet_for%20PRINT.pdf (accessed 12/10/15)

Reports and Online Sources

Scottish Civil Court Review, Chapter 3 A New Case Management Model
National Audit Office (2007), Legal aid and mediation for people involved in family breakdown http://www.nao.org.uk/wp-content/uploads/2007/03/0607256.pdf
Scottish Courts and Tribunals, Simplified/ Do it yourself procedure http://www.scotcourts.gov.uk/taking-action/divorce-and-dissolution-of-civil-partnership/simplified-do-it-yourself-procedure (accessed 12 October 2015).
Northern Ireland Courts and Tribunals Service, Getting a divorce/ dissolution of Civil Partnership https://www.courtsni.gov.uk/en-GB/Publications/UsefulInformationLeaflets/Documents/Getting%20a%20Divorce%20-%20What%20do%20I%20do/Getting%20a%20Divorce%20Booklet_for%20PRINT.pdf (accessed 12/10/15)

Scottish Courts and Tribunals, Sheriff Court fees http://www.scotcourts.gov.uk/rules-and-practice/fees/sheriff-court-fees (accessed 12/10/15)

Caselaw

NJDG v JEG (2012) SC (UKSC) 293

The Dutch System - Online Dispute Resolution & Compulsory Mediation

Part 1- Online Dispute Resolution- Rechtwijzer 2.0

1. Rechtwijzer is an online-based dispute resolution platform that supports litigants through the process of divorce and consumer issues. This article will focus on the issue of divorce.

2. The program was developed by HiiL (an advisory and research institute for the justice sector in the Hague) along with the Dutch Legal Aid Board and the University of Tilburg and was supported by the Dutch Ministry of Security and Justice. It had the support of the judiciary, government and bar.

3. Rechtwijzer 1.0 was first launched in 2006 and guided its users through a triage phase after which they would find relevant self-help tools and referrals to legal professionals.

4. Rechtwijzer 2.0 it takes the model a step further. It does not simply signpost and direct the litigant but rather it provides a means of resolution itself. It is largely inspired by eBay's hugely successful resolution centre (resolving over 60 million small consumer disputes annually).[158]

5. At the first stage, the system gathers personal information from the user and invites the other party to engage through an online dialogue. The two parties can then negotiate a separation agreement with this tool. If there are issues that cannot be resolved then the parties can request online mediation. Alternatively (or after the mediation if it was unsuccessful) the parties can obtain an online adjudication. The final step is a neutral legal review.

6. At each point flat fees are charged. The mediation, adjudication and reviews are provided by mediators and lawyers for a lower rate than tradition services. For lower income users the process is subsidised by legal aid. It is certainly a much more cost effective means for a separated couple to obtain a divorce and as it is designed to be low content per page, it does seem to be user friendly.[159]

7. Although law is constantly evolving, necessitating the need for constant updating of the software, Rechtwijzer 2.0 is designed to ultimately be self-financing.[160] Once this is the case, the savings to the legal aid pocket will be staggering.

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[158] D Thompson The Growth of Online Dispute Resolution and its Use in British Columbia Civil Litigation Conference 2014 p1.1.3

[159] Dutch Justice Innovation Puts People First: Realizing the Potential of On-Line Dispute Resolution. Nsrlp 31/07/14

[160] Digital Delivery of Legal Services to People on Low Incomes From Online Information To Resolution. Roger Smith. December 2014 p7

Application in Northern Ireland?

8. The first point worth noting is that there would have to be legislative changes to allow the Rechtwijzer model to be adopted here in Northern Ireland. Although of course the church and state are separate, it is undeniable that the church remains politically influential in Northern Ireland. We only have to look at the topics of liquor licensing, homosexual marriage and the recent Asher's Bakery case to see the weight religion carries in society. It is unlikely that an online "click for divorce" system will be met without significant opposition by the public and politicians. It may well be seen as belittling an important legal and personal decision.

9. Practically speaking the translation of the Dutch model to Northern Ireland would be hard to facilitate. In the Netherlands, like in Northern Ireland, there is one ground for divorce: the irretrievable breakdown of the marriage. However there is no need to evidence this ground in the Netherlands. In Northern Ireland irretrievable breakdown has to be proved in at least one of five ways; Two years separation with consent, five years separation, adultery, unreasonable behaviour and desertion. This would make it difficult, particularly in the fault-based grounds, to process the divorce electronically.

10. There is a section on Rechtwijzer 2.0 dealing with domestic violence. The user answers a series of questions and if domestic violence is considered an issue then he or she is redirected to sources of help. This does not seem like an adequate response. Often victims of domestic abuse do not wish or feel able to do anything about it. This is an area in which the role of a solicitor or barrister goes beyond being the voice of the client in court. A face-to-face encounter with the client is necessary to build up trust and necessary to spot any indications of domestic abuse. The virtual experience simply does not cut it. There is also the worry that the partner is with the user during the online process and there is pressure to answer the questions in a certain way.

11. Not everyone is computer literate and even those who are might find an interactive process would exacerbate an already stressful situation. If a user had someone assisting them through the process, they may not necessarily be as honest, as many of the questions are personal.

12. It is true that if a Rechtwijzer model were adopted here in Northern Ireland, after the initial start up expense, it would result in huge savings for the legal aid fund. However, it could in effect create a two-tier system in which the rich can afford proper legal representation while the poor will have no other option but go through the online process.[161]

[161] http://www.crippslink.com/index.php?option=com_content&view=article&id=2071:odr-in-family-law&catid=81:family&Itemid=537

13. There are of course advantages to the Rechtwijzer 2.0 model other than the long term savings to the legal aid pocket. It is possible that the litigants will feel a greater sense of control over the process and indeed it may remove some long term acrimony between the parties if they feel they have reached the outcome together. Although this model would obviously reduce the need for lawyers input, they still are necessary for mediation and arbitration so their role is much more focused.

Part 2- Mediation in Holland

14. Hodges et al provides that there is a strong national culture of settlement and ADR in the Netherlands.[162] This is a reflection of the Dutch legal doctrine that although people should have access to justice, litigation should only be available as an *ultimum remedium* (final option) after all other options have been exhausted.[163]

15. The Dutch Judiciary has been promoting alternative dispute resolution since the nineties. The four main goals for ADR are out of court resolution of disputes, attaining the best quality or the most effective way of settling disputes; the realization of various forms of access to justice that make the parties primarily responsible for dispute resolution; and lastly, less pressure on the judicial system.[164]

16. Until somewhat recently, Dutch law contained no specific mediation provisions. This changed with the implementation of the EU Mediation Directive (2008/52/EC)[165]. In November 2012 Parliament passed a law implementing the Mediation Directive which aims to promote the use of mediation and to ensure that parties having recourse to mediation can rely on a predictable legal framework.[166]

17. The Dutch Judiciary have encouraged mediation by making court directed mediations free of charge for 2 and a half hours.[167] General mediation is covered by legal aid. In certain circumstances parties are obliged to negotiate before they are permitted to litigate.[168]

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[162] Hodges C. et al, Consumer ADR in Europe (2012, Hart Publishing), pp129
[163] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2
[164] Court-Based mediation in the Netherlands: research, evaluation and future expectations, Bert Niemeijer and Machteld Pel, Penn State Law review, 2005, nr 2 p 345 – 378
[165] Directive 2008/52/EC of May 21 2008 on certain aspects of mediation in civil and commercial matters
[166] http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Netherlands/Clifford-Chance-LLP/New-bill-aims-to-encourage-mediation
[167] http://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/scjc-pubilcations/literature-review-on-adr-methods.pdf?sfvrsn=2
[168] Ibid

18. The ministry of Justice conducted an investigation into the suitability for mediation in court hearings and after a successful pilot mediation scheme in five courts, every court now has a mediation facility.[169]

Mediation in Northern Ireland?

19. There are many advantages to mediation. Firstly, mediation is cheaper than litigation. Litigation costs can reach values grossly disproportionate to the value of the claim, which also frustrates judges and wastes court time.[170] This is a point that does not only apply to civil law but also family. There is much unnecessary litigation in relation to Ancillary Relief, even for relatively small aspects of the case, such as dividing up the contents of a home. This can often hike up costs incurred and draw out the legal process.

20. Mediation gives parties a greater control over the proceedings. They often feel like they have made a joint decision which works for both parties, which will make it more likely the agreement will last. With mediation you can turn back anytime, and you can have anything you do not understand explained. You can choose to preserve relationships with the other party, and you have control over the remedies which are more flexible to your needs.[171]

21. Mediation is more flexible than litigation as it can provide many different outcomes. As noted by Genn, mediation is often considered capable of producing a "win/win" situation, rather than a "win/lose" situation as with litigation.[172] Mills notes how mediation can give a party proper "closure"[173] and he considers how the Mulcahy report lays out outcomes which mediation can provide that litigation cannot: admission of responsibility; apology; explanation; and reassurance that what happened was not in vain.[174]

22. Mediation is confidential and anything disclosed is on a without prejudice basis which encourages parties to be frank and open with each other.

23. Mediation is reconciliatory in nature. The Law Society of NI's Dispute Resolution Scheme notes that the aim of ADR is to "preserve the best of any pre-existing relationship and good-

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[169] Singer J., The EU Mediation Atlas: Practice and Regulation (Centre for Effective Dispute resolution, 2005)
[170] Paul Newman, "To Litigate, a Privilege not a Right." [2008] C.N.4
[171] Access to Justice Review Northern Ireland: The Report (August 2011) 407-408
[172] Hazel Genn, Judging Civil Justice (The Hamlyn Lectures, Cambridge University Press, 2010) 81
[173] Simon Mills, "We Need to Talk"-Mediation in the Clinical Setting in Northern Ireland" (2010) 16(2) Medico-Legal Journal of Ireland 64,68 citing The Clinical Disputes Forum's Guide to Mediating Clinical Negligence Cases, s1.1, para 2.2
[174] Mills 68 citing mulcahy et al, Mediating Medical Negligence Claims: an Option for the Future (HMSO, 2010)

will between the parties; to ensure that they can continue to work together in commercial and human relationships."[175]

24. However, that emphasis on a "pre-existing relationship and goodwill" might be the stumbling block for compulsory mediation. It is very often the case that if a family matter is before the court, the relationships between the parties has broken down to such an extent that they cannot agree anything. This would make it nearly impossible for a mediator to have any meaningful contribution. Similarly, it can be the case that a Court Children's Officer in Northern Ireland will not become involved in a case if there is not enough of a level of agreement between parties. Compulsory mediation in many family cases would only slow down the process, and it may become a box that needs to be ticked, so to speak.

25. Furthermore, unsuccessful mediation would inevitably result in litigation so in fact, more costs would be incurred. Mediation has been critiqued as "soft justice," nothing more than an additional layer of costs in the litigation stream and a process fundamentally at odds with the role of the court as a decision maker."[176] Admittedly, however, mediation may serve to distil the issues into one or two net disputes, which would save time and money.

26. Mediation is not suitable in all cases, particularly when there is an imbalance of power between the parties (as is often the situation in family matters). An example would be a case involving domestic violence. Baruch Bush and Folger refer to this scenario as the "oppression story" of mediation. They consider critics who believe that mediation has become dangerous- that it "increases the power of the strong over the weak," allowing the strong party to coerce and manipulate the weak. Furthermore these critics believe that as the mediator has to maintain a neutral persona, they can be relived of the responsibility to prevent this problem.[177]

27. Mediators are unregulated and there are no requirements or qualifications needed in order to become a mediator. This means that anyone can become a mediator and there is no guarantee the mediator will be trained or competent. In ancillary relief cases particularly, there are numerous complex issues such as life assurance policies, properties in various titles, state and private pensions and company stocks and shares, state benefits and tax credits An inexperienced mediator with no knowledge of accounts or company law could

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175 http://www.dndlaw.com/documentbank/uploads/General%20Guidance%20on%20Mediation.pdf>

176 Speech by the Honourable Warren K. Winkler Chief Justice of Ontario, "Access to Justice, Mediation: Panacea or pariah?"(2007)

177 Genn 89-90 citing R.A. Baruch Bush and J.P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (Jossey-Bass, 2005) 9-19

not spot any potential problems a settlement could offer a party, for example tax implications. It would be irresponsible to agree a way forward without sound legal advice in most cases. Often in ancillary relief matters, parties do not always come to court honestly and try to hide assets and income sources. It is necessary to have a legal representative to spot these potential issues.

28. Mediation is not legally binding so problems can arise with enforcing the outcome. In contrast, a court judgment is always binding.

29. Although it is considered advantageous to reduce litigation, it has a negative impact on our civil justice system for the long term. Lord Rodger stated that the court system is, "the best vehicle for achieving justice," and without it, "individuals and businesses (would) lack guidance on all kinds of everyday situations.[178] Without trials, and clear rule-making through the courts, people would struggle to avoid legal risk.

30. In the right kinds of disputes, mediation can help parties resolve disputes more quickly and cheaply than litigation, and it can re-build relationships and provide creative remedies, in a way a court simply cannot. However, mediation has its problems and care needs to be taken that the vital importance of litigation is not overlooked. Mediation should certainly be considered in suitable cases but making it mandatory would not be a sensible option. Indeed it could amount to a breach of the ECHR. Dyson L.J explained in the Court of Appeal case of *Halsey* [179]that "…it seems… likely that compulsion to ADR (including mediation) would be regarded as an unacceptable constraint on the right to access to the court and, therefore, a violation of article 6(ECHR)."[180]

[178] Charlie Irvine, "The Sound of One Hand Clapping: the Gill Review's Faint praise for Mediation (2010) 14(1) Edinburgh Law Review 85, 89 citing Lord Rodger of Earlsferry, "Civil Justice: Where Next?" (2008) 53(8) JLSS 16
[179] Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576
[180] paragraph 9

A Study of Family Law Systems in Australia, New Zealand and Canada

1. The purpose of this study is to consider the family law systems in various common law jurisdictions in order to inform potential reform in the Northern Irish system. The study evidences that all three jurisdictions are in a period of reform. Reforms have been implemented in Australia in 2006, in New Zealand in 2013, and are being considered in Canada.

1. Australia

2. A series of changes were introduced to the Australian family law system in 2006. This included changes to the Family Law Act 1975 through the Family Law Amendment (Shared Parental Responsibility) Act 2006 and changes to the family relationship services system.

3. The policy objectives of the 2006 changes to the family system were to:

    1 help to build strong healthy relationships and prevent separation;
    2 encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse;
    3 help separated parents agree on what is best for their children (rather than litigating), through the provision of useful information and advice, and effective dispute resolution services; and
    4 establish a highly visible entry point that operates as a doorway to other services and helps families to access these other services.[181]

4. The changes to the family service system included the establishment of 65 Family Relationship Centers (FRCs) throughout Australia, the Family Relationship Advice Line (FRAL) and Family Relationships Online (FRO), funding for new relationship services, and additional funding for existing relationship services.

5. The legislative changes comprised four main elements that:

    - require parents to attend family dispute resolution (FDR) before filing a court application, except in certain circumstances, including where there are concerns about family violence and child abuse;

[181] Australian Institute of Family Studies, 'Evaluation of the 2006 Family Law Reforms' [2009] <https://aifs.gov.au/sites/default/files/publication-documents/executivesummary.pdf> accessed on 9 October 2015

- place increased emphasis on the need for both parents to be involved in their children's lives after separation through a range of provisions, including the introduction of a presumption in favor of equal shared parental responsibility;
- place greater emphasis on the need to protect children from exposure to family violence and child abuse; and
- introduce legislative support for less adversarial court processes in children's matters.[182]

6. In 2006, the Australian Institute of Family Studies (AIFS) was commissioned by the Australian Government to undertake a large scale evaluation of the impact of the 2006 changes. The evaluation has involved the collection of data from 28,000 people involved or potentially involved in the family law system. This evaluation provides a more extensive evidence base about the use and operation of the family law system in Australia (and arguably internationally) than has previously been available and has continued to affect their ongoing legal policy and practice developments.

Evaluation

7. The 2009 evaluation concluded that the reforms have had a positive impact in some areas and a less positive impact in others.[183] The evaluation concluded that there is more use of relationship services, a decline in children's cases being commenced in the courts, and evidence of a move away from court being used as a first resort with post-separation relationship problems. It evidenced that a significant proportion of separated parents were able to sort out their post-separation arrangements with minimal engagement with the formal court system. It also evidenced that FDR was assisting parents to work out parenting arrangements. It found that about two-fifths of parents who used FDR reached agreement and did not proceed to court.

8. However there were significant concerns surrounding FDR, many clients had concerns about violence, abuse, safety, mental health problems and substance misuse. The encouragement of using non-legal solutions, and the general expectation that parents should attempt FDR, resulted in FDR occurring in some cases where there were very significant concerns about violence and safety.

9. There were also further unintended negative consequences. A majority of lawyers perceived that the reforms have favored fathers over mothers and parents over children. There was concern among a range of family law system professionals that mothers are disadvantaged in a number ways, including in relation to negotiations over property settlements. There is

[182] *ibid.*
[183] *ibid.*

an indication that there may have been a reduction in the average property settlements allocated to mothers.[184]

2. Canada

10. Increasing problems have been identified in the Canadian family law system. As noted by Carol Rogerson, 'Ensuring access to justice is one of the main challenges currently confronting the family law system.'[185] There are stringent restrictions on civil legal aid funding, and large numbers of lower and middle class Canadians are left unable to fund lawyers to resolve their disputes. As stated by Rogerson, 'The result is an increasingly dysfunctional system characterised by clogged court dockets, increasing numbers of unrepresented litigants and growing frustration with a system that is both costly and increasingly perceived as ineffective.'[186]

Reform?

11. Reform is being considered in Canada, with the setting up of the Action Committee on Access to Civil and Family Justice, and its recently published report, 'Meaningful Change for Family Justice: Beyond Wise Words'[187] which states that 'Canadian do not have adequate access to family justice.'[188] However whilst the government has taken some steps in this direction, no significant reform has taken place. As noted by Rogerson, 'the appropriate direction of reform remains contentious and the extent to which the system can truly be fixed without a major commitment of public resources- an unlikely outcome in times of fiscal constraint- remains in doubt.'

3. New Zealand

12. New Zealand's family law system underwent significant reform with the Family Dispute Resolution Act and Regulations 2013 which have been described by the then Justice Minister Judith Collins as the most significant change to New Zealand's family justice system since the establishment of the Family Court in 1981. The reforms are based on a review of the Family Court carried out by the the New Zealand Ministry of Justice from 2011-2014. The reforms relate mostly to the Care of Children Act 2004, which involves issues relating to post-separation care and contact, and account for 40% of applications

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[184] *ibid.*
[185] Carol Rogerson, 'Canada: A Bold and Progressive Past but an Unclear Future' in Elaine Sutherland (ed.), *The Future of Child and Family Law: International Predictions* (2012) 81
[186] *ibid.*
[187] Action Committee on Access to Justice in Civil and Family Matters, 'Meaningful Change for Family Justice: Beyond Wise Words' (April 2013) <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> accessed on 9 October 2015
[188] *ibid.*

to the Family Court in New Zealand. They aim to reduce stress on families and children by avoiding as far as possible, the delays, conflict and expense that court proceedings can entail. They aim to provide better information to the public via a new website for example, to introduce new court forms, such as a standardised questionnaire affidavit to establish the facts in a case. They also try to strengthen the Family Court's response to domestic violence.[189]

Key features of the reforms include:

(1) Expanding Parenting Through Separation (PTS) which is a free information programme that teaches parents about the effects of separation on children, and parenting skills to reduce children's stress during separation. Participation has been made mandatory for many applicants before they proceed to the Family Court.

(2) Introducing a new Family Dispute Resolution (FDR) service for resolving parenting matters outside of court. An approved FDR mediator assists parents to identify the matters in dispute, facilitates discussion, and helps them to reach agreements that focus on the needs of their children. FDR is mandatory for most parties prior to commencing Care of Children Act 2004 proceedings. However in cases where it is inappropriate, such as urgent cases, or where there are safety risks, then the parties can go directly to Court. The cost of FDR is fully subsidised for the estimated 60% of parties who meet an eligibility test. For those not eligible, the cost is likely to be less expensive than getting a lawyer and proceeding to a full court hearing.

(3) Providing low income parents eligible for out of court support with up to four hours of legal advice prior to FDR through the Family Legal Advice Service (FLAS). They may also be provided with up to three hours of Preparatory Counselling to help them make the most of FDR.

(4) Introducing a simplified three track system to support people to navigate parts of the Court independently. Applications to the Court are allocated to a 'track' depending on its complexity:

    a. 'Without Notice' Track- Urgent applications to the Court, for example, where violence is alleged, are automatically allocated to the Without Notice track. This ensures vulnerable people exposed to violence and children needing protection have immediate access to the Court

[189] University of Otago, 'Evaluation of the 2014 Family Law Reforms: Phase One' (February 2015) < http://www.lawfoundation.org.nz/wp-content/uploads/2015/03/Evaluation-of-Family-Law-Reforms-Phase-One-Feb-2015.pdf> accessed on 10 October 2015

b. Simple Track- Applications to the Court for single-issue matters. For example, contact arrangements for children. This track is designed so that the parties are able to represent themselves, without the need for a lawyer.

c. Standard Track- Applications to the Court for multiple or more serious issues, for example, an application for day-to-day care or permission to take children to live overseas are allocated to the Standard track. This track is designed so parties are able to represent themselves, without the need for a lawyer, for most of the process. If matters are not resolved, the case moves on to a formal hearing where lawyers are present.

(5) Domestic Violence Changes. The maximum penalty for breaching a protection order has been increased from two years to three years imprisonment. The definition of domestic violence has been broadened to include financial and economic abuse, such as denying or limiting access to financial resources. Non- violence programmes have been made safer and more effective and there are wider powers for people to be directed to attend an assessment in addition to a non-violence programme. There is also an increased onus on providers to report on the outcomes of non-violence programmes and to identify any ongoing safety concerns about those who have attended programmes.[190]

The Need for Evaluation

13. It is difficult to evaluate the success of the reforms in New Zealand as they have been implemented so recently. Steps have been taken to develop projects in order to evaluate the new policy. It has been recognised following family law reforms in both Australia and the UK, that there is a need for a commitment to invest in evaluation of the reforms. As stated by Gluckman,

> '*Given the large fraction of the public purse that is expended in the social policy domains, quality evidence to support appropriate policy development and formal evaluation of desired impacts is critical. Evaluative science and intervention research is particularly important in the implementation of social policy because the reality is that the nature of human systems is such that it is not possible to predict with certainty the direct effect and spill-over consequences of any one intervention.*'[191]

[190] *ibid.*

[191] Sir Peter Gluckman, 'The role of evidence in policy formation and implementation' (September 2013) <http://www.pmcsa.org.nz/wp-content/uploads/The-role-of-evidence-in-policy-formation-and-implementation-report.pdf> accessed on 10 October 2015

Conclusions

14. The complexities with developing an effective family law system are evidenced through the problems all of the discussed jurisdictions are facing. There is no right answer as to the best way to deal with separated families.

15. There is a general trend of a move away from the court and towards out-of- court methods of resolution. Both Australia and New Zealand now require that parties engage in FDR before court proceedings can be commenced. As discussed, evaluations have proved that FDR has been quite successful in Australia, with two-fifths of parents who used FDR reaching agreement and without the need to proceed to court. However there were serious difficulties with FDR being used in the wrong circumstances, with concerns about FDR being used in situations where violence, abuse, safety, mental health problems and substance misuse were prevalent.

16. Another key development in both Australia and New Zealand has been the acknowledgement that the new reforms must be thoroughly evaluated in order for policy to develop positively. The 2009 evaluation by the Australian Institute of Family Studies has proved very useful in evaluating the 2006 reforms, and suggesting further ways for the family law system to be developed. It is suggested that there is a need for formal evaluation evidence with any reform in Northern Ireland, as currently there is little data to evidence the effectiveness of the Northern Irish family courts.

APPENDIX 4

In New Zealand, *The Care of Children Act 2004* at s.46O provides as follows:

> "Judge may direct a party to undertake a parenting information programme.
>
> (1) At any time after an application has been made to the court for (a parenting order under section 48), a Family Court Judge may direct one or more parties to the application to attend a parenting information programme.
>
> (2) However, the Family Court Judge may not make a direction under subsection (1) in respect of a party if that party has undertaken a parenting information programme within the preceding 2 years.
>
> 47B Mandatory statement and evidence in applications
>
> (1) This section applies to—
>
> (a) an application for a parenting order under Section 48.
>
> (b) an application to vary a parenting order under Section 56.
>
> (2) The application must include a statement made by or on behalf of the applicant for the order—
>
> (a) that the applicant has undertaken a parenting information programme within the preceding 2 years; or
>
> (b) that the applicant is not required to undertake a parenting information programme because—
>
> (i) the applicant is unable to participate effectively in a parenting information programme; or
>
> (ii) the applicant is making the application without notice.

(3) Evidence in support of a statement made under subsection (2)(a) or (b)(i) must be included in the application.

(4) A Registrar may refuse to accept an application if the Registrar considers that the evidence provided does not adequately support the statement ending programme."

APPENDIX 5

PROPOSED AMENDMENT TO THE BUNDLES PD – PD 27A

Memorandum by the President of the Family Division

1 PD27A imposes a 350-page limit (PD 27A, para 5.1) and spells out (para 4.1) the fundamental principle that "The bundle shall contain copies of only those documents which are relevant to the hearing and which it is necessary for the court to read or which will actually be referred to during the hearing." Compliance with these requirements is still fitful.

2 One matter which is *not* regulated by PD27A is the length of individual documents. I urged restraint in *Re L* [2015] EWFC 15, [2015] 1 FLR 1417, paras 21-22. I am not conscious that this has had much effect. I wonder whether the time has therefore not now come to impose page limits for certain types of documents, which will be mandatory in all cases "Unless" – cf PD27A, para 5.1 – "the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly."

3 I accordingly suggest for consideration the insertion in PD27A of a new para 5.2A, as follows:

> "Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, any of the following documents included in the bundle shall be limited to no more than the number of sheets of A4 paper and sides of text specified below:
>
> | | |
> |---|---|
> | Case summary | 4 |
> | Statement of issues | 2 |
> | Position statement | 5 |
> | Chronology | 10 |
> | Skeleton argument | 15 |
> | List of essential reading | 1 |
> | Witness statement or affidavit (exclusive of exhibits) | 20 |
> | Expert's or other report | 40 |
> | Care plan | 10" |

4 I ask three questions: (i) is this desirable; (ii) if so, should length be controlled by a page count or a word count; and (iii) if by page count, are the suggested figures are appropriate?

5 As a separate matter, I further suggest that the final words of PD27A, para 4.3, be re-numbered 4.3A and amended to read (additional words show in *italic*):

> "Copies of all authorities relied on must be contained in a separate composite bundle agreed between the advocates. *Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle shall not contain more than 10 authorities. Where a case is reported in a law report which contains a headnote, such a report shall be used and transcripts (including transcripts on BAILII) shall not be used. Attention is drawn to the Practice Direction dated 24 March 2012.*"

The need for this is indicated by Holman J's judgment in *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), paras 21-22.

James Munby PFD
19.1.2016

APPENDIX 6

TRANSPARENCY IN THE FAMILY COURTS

PUBLICATION OF JUDGMENTS

PRACTICE GUIDANCE
issued on 16 January 2014 by
SIR JAMES MUNBY, PRESIDENT OF THE FAMILY DIVISION

The purpose of this Guidance

1 This Guidance (together with similar Guidance issued at the same time for the Court of Protection) is intended to bring about an immediate and significant change in practice in relation to the publication of judgments in family courts and the Court of Protection.

2 In both courts there is a need for greater transparency in order to improve public understanding of the court process and confidence in the court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name. The Guidance will have the effect of increasing the number of judgments available for publication (even if they will often need to be published in appropriately anonymised form).

3 In July 2011 Sir Nicholas Wall P issued, jointly with Bob Satchwell, Executive Director of the Society of Editors, a paper, *The Family Courts: Media Access & Reporting* (Media Access & Reporting), setting out a statement of the current state of the law. In their preface they recognised that the debate on increased transparency and public confidence in the family courts would move forward and that future consideration of this difficult and sensitive area would need to include the questions of access to and reporting of proceedings by the media, whilst maintaining the privacy of the families involved. The paper is to be found at:
http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/family-courtsmedia-july2011.pdf

4 In April 2013 I issued a statement, *View from the President's Chambers: the Process of Reform*, [2013] Fam Law 548, in which I identified transparency as one of the three strands in the reforms which the family justice system is currently undergoing. I said:

> "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."

5 That applies just as much to the issue of transparency in the Court of Protection.

6 Very similar issues arise in both the Family Court (as it will be from April 2014) and the Court of Protection in relation to the need to protect the personal privacy of children and vulnerable adults. The applicable rules differ, however, and this is something that needs attention. My starting point is that so far as possible the same rules and principles should apply in both the family courts (in due course the Family Court) and the Court of Protection.

7 I propose to adopt an incremental approach. Initially I am issuing this Guidance. This will be followed by further Guidance and in due course more formal Practice Directions and changes to the Rules (the Court of Protection Rules 2007 and the Family Procedure Rules 2010). Changes to primary legislation are unlikely in the near future.

8 As provided in paragraph 14 below, this Guidance applies only to judgments delivered by certain judges. In due course, following the introduction of the Family Court, consideration will be given to extending it to judgments delivered by other judges (including lay justices).

The legal framework

9 The effect of section 12 of the Administration of Justice Act 1960 is that it is a contempt of court to publish a judgment in a family court case involving children unless either the judgment has been delivered in public or, where delivered in private, the judge has authorised publication. In the latter case, the judge normally gives permission for the judgment to be published on condition that the published version protects the anonymity of the children and members of their family.

10 In every case the terms on which publication is permitted are a matter for the judge and will be set out by the judge in a rubric at the start of the judgment.

11 The normal terms as described in paragraph 9 may be appropriate in a case where no-one wishes to discuss the proceedings otherwise than anonymously. But they may be inappropriate, for example, where parents who have been exonerated in care proceedings wish to discuss their experiences in public, identifying themselves and making use of the judgment. Equally, they may be inappropriate in cases where findings have been made against a person and someone else contends and/or the judge concludes that it is in the public interest for that person to be identified in any published version of the judgment.

12 If any party wishes to identify himself or herself, or any other party or person, as being a person referred to in any published version of the judgment, their remedy is to seek an order of the court and a suitable modification of the rubric: Media Access & Reporting, para 82; *Re RB (Adult) (No 4)* [2011] EWHC 3017 (Fam), [2012] 1 FLR 466, paras [17], [19].

13 Nothing in this Guidance affects the exercise by the judge in any particular case of whatever powers would otherwise be available to regulate the publication of material relating to the proceedings. For example, where a judgment is likely to be used in a way that would defeat the purpose of any anonymisation, it is open to the judge to refuse to publish the judgment or to make an order restricting its use.

Guidance

14 This Guidance takes effect from 3 February 2014. It applies

(i) in the family courts (and in due course in the Family Court), to judgments delivered by Circuit Judges, High Court Judges and persons sitting as judges of the High Court; and

(ii) to all judgments delivered by High Court Judges (and persons sitting as judges of the High Court) exercising the inherent jurisdiction to make orders in respect of children and incapacitated or vulnerable adults.

15 The following paragraphs of this Guidance distinguish between two classes of judgment:

(i) those that the judge *must* ordinarily allow to be published (paragraphs 16 and 17); and

(ii) those that *may* be published (paragraph 18).

16 Permission to publish a judgment should always be given whenever the judge concludes that publication would be in the public interest and whether or not a request has been made by a party or the media.

17 Where a judgment relates to matters set out in Schedule 1 or 2 below and a written judgment already exists in a publishable form or the judge has already ordered that the judgment be transcribed, the starting point is that permission should be given for the judgment to be published unless there are compelling reasons why the judgment should not be published.

SCHEDULE 1

In the family courts (and in due course in the Family Court), including in proceedings under the inherent jurisdiction of the High Court relating to children, judgments arising from:

(i) a substantial contested fact-finding hearing at which serious allegations, for example allegations of significant physical, emotional or sexual harm, have been determined;

(ii) the making or refusal of a final care order or supervision order under Part 4 of the Children Act 1989, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;

(iii) the making or refusal of a placement order or adoption order under the Adoption and Children Act 2002, or any order for the discharge of any such order, except where the order is made with the consent of all participating parties;

(iv) the making or refusal of any declaration or order authorising a deprivation of liberty, including an order for a secure accommodation order under section 25 of the Children Act 1989;

(v) any application for an order involving the giving or withholding of serious medical treatment;

(vi) any application for an order involving a restraint on publication of information relating to the proceedings.

SCHEDULE 2

In proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, judgments arising from:

(i) any application for a declaration or order involving a deprivation or possible deprivation of liberty;

(ii) any application for an order involving the giving or withholding of serious medical treatment;

(iii) any application for an order that an incapacitated or vulnerable adult be moved into or out of a residential establishment or other institution;

(iv) any application for a declaration as to capacity to marry or to consent to sexual relations;

(v) any application for an order involving a restraint on publication of information relating to the proceedings.

18 In all other cases, the starting point is that permission may be given for the judgment to be published whenever a party or an accredited member of the media applies for an order permitting publication, and the judge concludes that permission for the judgment to be published should be given.

19 In deciding whether and if so when to publish a judgment, the judge shall have regard to all the circumstances, the rights arising under any relevant provision of the European Convention on Human Rights, including Articles 6 (right to a fair hearing), 8 (respect for private and family life) and 10 (freedom of expression), and the effect of publication upon any current or potential criminal proceedings.

20 In all cases where a judge gives permission for a judgment to be published:

(i) public authorities and expert witnesses should be named in the judgment approved for publication, unless there are compelling reasons why they should not be so named;

(ii) the children who are the subject of the proceedings in the family courts, and other members of their family, and the person who is the subject of proceedings under the inherent jurisdiction of the High Court relating to incapacitated or vulnerable adults, and other members of their family, should not normally be named in the judgment approved for publication unless the judge otherwise orders;

(iii) anonymity in the judgment as published should not normally extend beyond protecting the privacy of the children and adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so.

21 Unless the judgment is already in anonymised form or the judge otherwise orders, any necessary anonymisation of the judgment shall be carried out, in the case of judgments being published pursuant to paragraphs 16 and 17 above, by the solicitor for the applicant in the proceedings and, in the case of a judgment being published pursuant to paragraph 18 above, by the solicitor for the party or person applying for publication of the judgment. The anonymised version of the judgment must be submitted to the judge within a period specified by the judge for approval. The version approved for publication will contain such rubric as the judge specifies. Unless the rubric specified by the judge provides expressly to the contrary every published judgment shall be deemed to contain the following rubric:

"This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment

the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court."

22 The judge will need to consider who should be ordered to bear the cost of transcribing the judgment. Unless the judge otherwise orders:

(i) in cases falling under paragraph 16 the cost of transcribing the judgment is to be at public expense;

(ii) subject to (i), in cases falling under paragraph 17 the cost of transcribing the judgment shall be borne equally by the parties to the proceedings;

(iii) in cases falling under paragraph 18, the cost of transcribing the judgment shall be borne by the party or person applying for publication of the judgment.

23 In all cases where permission is given for a judgment to be published, the version of the judgment approved for publication shall be made available, upon payment of any appropriate charge that may be required, to any person who requests a copy. Where a judgment to which paragraph 16 or 17 applies is approved for publication, it shall as soon as reasonably practicable be placed by the court on the BAILII website. Where a judgment to which paragraph 18 applies is approved for publication, the judge shall consider whether it should be placed on the BAILII website and, if so, it shall as soon as reasonably practicable be placed by the court on the BAILII website.

A Note of Gratitude

Lord Justice Gillen would like to thank the following people who have been tireless in their commitment to this task, unendingly assiduous in addressing the issues and who have selflessly met and consulted for hours on end in order to complete this work well ahead of schedule.

Review Group Members

The Honourable Mr Justice Mark Horner
The Honourable Mr Justice Horner was born on 3rd July, 1956.
He was educated at Campbell College which he left in 1974. He then attended St Catharine's College, Cambridge from 1975-1978.
He was called to the Bar in 1979. He was appointed a Q.C. in 1996. At the Bar he had a wide and varied practice with a particular interest in commercial disputes, Chancery and professional negligence cases and personal injury litigation.
His areas of special interest include practice and procedure in this and other jurisdictions, chancery, commercial litigation and public law.
He is the Visitor at the University of Ulster, Chairman of the Judges' Council, Chairman of Northern Ireland sub-committee of European Network of Councils for the Judiciary (ENCJ) looking into minimum standards for judges across Europe, a Coroner appointed to hear legacy Inquests and President of the Lands Tribunal.

Recorder of Belfast, His Honour Judge McFarland
His Honour Judge McFarland was appointed a County Court Judge in 1998 and is currently the Recorder of Belfast and Presiding County Court Judge.

Her Honour Judge Smyth
Her Honour Judge Smyth is a County Court Judge. Between November 2011 - November 2014 she held the position of Principal County Court family Judge, dealing with the majority of cases at Family Care Centre level. Prior to appointment to the County Court, Judge Smyth was vice-president of the Industrial and Fair Employment Tribunal.

Presiding District Judge, Judge Brownlie

Presiding Master, Master McCorry
Master Cathal McCorry was called to the Bar in September 2001. He was appointed Master (High Court) in May 2001, working across all three divisions of the High Court, before being appointed Master (Queen's Bench and Appeals) in 2006. He was appointed Liaison Master in 2009 that post becoming Presiding Master in September 2013 with responsibilities including co-ordination of the work of all masters in the High Court. He has wide experience in committees related to the field of civil justice generally and in particular in the various departments of the High Court.

Master Sweeney
Master Noreen Sweeney. Noreen was called to the Bar in 1986 and appointed Master (Matrimonial) in April 2015. Before taking up appointment Noreen had more than 25 years' experience in Family Law and particularly the areas of Divorce and Ancillary Relief. Noreen is both a qualified Civil and Employment Law Mediator and a Family Law Mediator and until her appointment was a member of The Bar of Northern Ireland's Mediation Steering Group.

District Judge (Magistrates' Court) Meehan
***Judge John Meehan** is a District Judge (Magistrates' Courts)(Northern Ireland), the post formerly known as that of Resident Magistrate. A law graduate of The Queen's University of Belfast, Judge Meehan was in private practice for some 25 years as a Solicitor prior to his appointment to his present post in 2002. He has been the presiding District Judge (MC) in Dungannon, including the Family Proceedings Court there, since 2005. He is also a former President of the Law Society of Northern Ireland.*

Mr Gerald McAlinden QC, Chairman, Bar Council of Northern Ireland
Gerry McAlinden QC served as the Chairman of the Bar Council of Northern Ireland from 2014-2016. He was called to the Bar in 1986 and appointed a Queen's Counsel in 2011. He specialises in clinical negligence and personal injuries cases and also has substantial experience in Public Inquiries and Inquests, and has been instructed as Counsel for the Coroner in a number of legacy Inquests. Gerry was a member of the Committee of the Judicial Studies Board for Northern Ireland under the chairmanship of Girvan LJ, responsible for the publication of the 4th Edition of the Guidelines for the Assessment of General Damages in Personal Injury Actions in Northern Ireland in 2013. He was also appointed as the Department of Justice's nominee to the Court of Judicature Rules Committee in 2013 and has served as the Legal Member of the Mental Health Review Tribunal for Northern Ireland since 2014.

Arleen Elliott, Senior Vice President, Law Society of Northern Ireland
Arleen Elliott is a practising solicitor who obtained a Law Degree at Kings College, London and completed vocational training at Blackhall Place, Dublin before returning to Northern Ireland and joining The Elliott-Trainor Partnership, Newry in 2002.
Arleen was President of the Law Society of Northern Ireland 2014/15. Presently she chairs the contentious business committee of the Society. She is a Trustee of Tinylife, a charitable organisation who help premature babies and their families.

Mrs Laurene McAlpine, Deputy Director, Civil Policy, Department of Justice
Laurene McAlpine is a senior civil servant and lawyer who has worked for a number of years in the Northern Ireland Courts and Tribunals Service and in the Office of the Lord Chief Justice and is now Head of Civil Policy in the Department of Justice.

Ms Eilis McDaniel, Director of Family and Children's Policy, Department of Health

Mrs Paula McCourt, Business Manager, Laganside Courts, Northern Ireland Courts & Tribunals Service
Paula McCourt. Paula was appointed Business Manager for Belfast Combined Courts, Laganside in 2011 having previously served as Regional Courts Business Manager. She joined the N I Court Service in 1978 and has spent all of her career to date in front line court operational roles. Paula has extensive experience in the criminal, civil and family courts, has served on the County Court Rules Committee and is currently designated Chief Clerk and Clerk of Petty Sessions for the Division of Belfast.

Ms Cathy Scollan, Northern Ireland Courts & Tribunals Service

Mr Paul Andrews, Chief Executive, Legal Services Agency
Paul was appointed Chief Executive of the then Northern Ireland Legal Services Commission in February 2010 following a brief spell as interim Chief Executive. With the establishment of the Legal Services Agency on 1 April 2015, Paul also became the Director of Legal Aid Casework.
Before Paul joined the Legal Services Commission he had worked in various roles in the Northern Ireland Court Service. Paul spent a number of years working on legal aid policy, including the creation of the Legal Services Commission.

Ms Laura McPolin, Civil Law Reform, Department of Finance

Mrs Maura Campbell, PPS to the Lord Chief Justice

Ms Julie McGrath, Secretary

<u>Reference Group Members</u>

Mr Kevin Higgins, Head of Policy, Advice NI

Mr John French, Chief Executive, Consumer Council
John French joined the Consumer Council as Chief Executive on 1 July 2015. The Consumer Council is a statutory body which promotes and safeguards the interests of consumers. It campaigns for the best possible standards of service and consumer protection in Northern Ireland. John graduated from the University of Dundee with an Honours and Master's Degree in Accountancy and Business Finance. He has more than fifteen years' experience in policy, finance and regulation in NI, GB and at an international level. He joined the Consumer Council from Firmus Energy where he was Director of Regulation and Pricing.

Ms Jennifer Greenfield, Asst. Director for Casework and Training, The Law Centre (NI)

Ms Kathryn Stevenson, Head of Legal Services, The Children's Law Centre
Kathryn Stevenson was called to the Roll of Solicitors in Northern Ireland in 1997. She worked in private practice and developed a special interest in Child and Family Law before joining the Children's Law Centre in Belfast in 2000. Kathryn commenced employment with CLC as a Solicitor specialising in Education and has acquired expert knowledge of law, policy and practice relating to education in Northern Ireland. In 2009, she was appointed Head of

Legal Services, responsible for the operational management and strategic direction of CLC's in-house legal team, which provides legal advice and representation for and on behalf of children at education, special educational needs and mental health tribunals and undertakes strategic litigation to vindicate children's rights, principally High Court Judicial Reviews. Since 2007, Kathryn has represented the Voluntary Children's Sector on The Children's Order Advisory Committee (COAC). She is a longstanding member of the Children with Disabilities Strategic Alliance, the Joint Consultative Forum for the Education Sector and the Public Interest Litigation Support Project.

Ms Joan Davis, Director, Family Mediation NI
Joan has been Director of Family mediation NI since 2009, she has significant experience in service delivery in the 'not for profit' sector. She has experience in sourcing funding, raising social policy issues, lobbying, human resources, financial management, event management and training. Joan has experience in both the private and voluntary sector. However, her passion is for the services provided by the voluntary or third sector, particularly those that support families. Joan has previously been employed within the independent advice sector. Joan is a past member of a number of Boards of Trustees, including CiNI, CAB and Housing Rights.

Mr Peter Reynolds, Acting Chief Executive, NI Guardian Ad Litem Agency

Mr Les Allamby, Chief Commissioner, NI Human Rights Commission
Les Allamby is the chief commissioner of the Northern Ireland Human Rights Commissioner. He is a solicitor and former director of Law Centre (NI) and NI legal services commissioner (2003-2011). He has written widely on legal services and access to justice issues.

Mr John Friel, Federation of Small Businesses

Ms Mollie Simpson BL, Head of Legal & Investigations, NI Commissioner for Children & Young People
Mollie is legal advisor to the Commissioner for Children and Young People and Head of the Legal and Investigation Team within that office. The Commissioner for Children and Young People is the statutory body in Northern Ireland charged with safeguarding and promoting the rights and best interests of children and young people. Mollie assists the Commissioner in fulfilling her statutory duty to keep under review the adequacy and effectiveness of law, practice and services for children and young people. Mollie was called to the Bar in 2000, has previous experience in civil, family and child law and current experience of human rights law with particular reference to child rights.

Mr Patrick Yu, Executive Director, NI Council for Ethnic Minorities
Patrick Yu is the Executive Director of the Northern Ireland Council for Ethnic Minorities. He actively campaigns race equality and human rights in Northern Ireland, UK, Council of Europe, European Union and United Nations. He was the former Commissioner of the Northern Ireland Human Rights Commission and Deputy Chairman of the Commission for Racial Equality for Northern Ireland.

Ms Mary Lynch, Director, Mediation NI

Dr Una Lernihan, Children's Services, Social Care and Children, Health and Social Care Board, Belfast.
Dr Una Lernihan is Commissioning Lead in Children's Services at the Health and Social Care Board. Having qualified as a professional social worker over thirty years ago and worked in the Belfast Trust for over 20 years, she has wide experience in practice, research, training and commissioning of children's services. Her particular expertise is in looked after children and she is very keen to ensure that the best interests of the child remain the paramount consideration for family justice system both in principle, and in practice.

Mr Pol Callaghan, Executive Director, Citizen's Advice

Mr Christopher Morrow, Head of Policy, NI Chamber of Commerce and Industry (Belfast)

Mr Michael Jennings, Head of Forensics at BDO, Institute of Directors

Mr Michael Murray, Institute of Directors

Mrs Derek Shaw CBE, NSPCC, Institute of Directors
Ann Shaw served ten years as a Trustee representing Northern Ireland on the main UK Board. She was a member of the policy and finance committees and campaigned successfully for the retention and expansion of the NSPCC's Young Witness Service. She continues her interest and involvement through her role as Divisional Vice President for the NSPCC.
Ann previously held several public, private and voluntary appointments. She chaired the Institute of Directors Northern Ireland, the Health and Safety Agency and Lloyds TSB Foundation Northern Ireland. She served eight years as a member of Senate of Queen's University Belfast and then as a visitor on the Board of Visitors of Queen's University Belfast.
Ann's experience with vulnerable children and families and indirectly with legal services should contribute to the work of the Review.

Ms Natalie Lardner, Policy Adviser, Civil Justice, Association of British Insurers (ABI)

Mr Glenn McKendry, Large Loss Specialist, NFU Mutual, ABI representative
Glenn McKendry is the representative for the Association of British Insurers, Glenn is a Large Loss Specialist at NFU Mutual, he has over 20 years-experience in the General Insurance market with specialism in Northern Ireland Personal Injury litigation across the spectrum of road traffic accidents, employers liability, public and product liability claims. Glenn is a strong advocate for legal reform in Northern Ireland. Glenn and the ABI wish to see the deliverance of greater access to justice in Northern Ireland via an efficient and cost effect court service and system of dispute resolution.

Mr Colin Reid, Policy and Public Affairs Manager, NSPCC
Colin is Policy and Public Affairs Manager for NSPCC and has been a social worker for 29 years working in both the statutory and voluntary sector all in family and child care. He is currently Deputy Chair of the NI Association of Social Workers (NIASW) and a Trustee of the British Association of Social Workers (BASW).

I wish to add a special note of appreciation to the members of the family sub group who produced an array of papers for the perusal of the two committees. Their efforts were thoroughly researched and consistently creative. They are a standing monument to the strength and depth of the professionals in the family justice system here in Northern Ireland. Their presence within the process has convinced me that this jurisdiction has the potential to be at the cutting edge of family justice worldwide.

Family Sub-Group Members
Mr Justice O'Hara
Mrs Justice Keegan
Ms Moira Smyth QC
Ms Sarah Ramsey BL
Ms Kathryn Minnis
Ms Ann Marie Kelly, Solicitor
Ms Jane Corr, Solicitor
Ms Paula Collins, Solicitor
Ms Denise Houston BL
Ms Anne Caldwell
Ms Adele O'Grady QC
Ms Hayley Gregan BL
Ms Michele Nugent

I am grateful also to the following who generously and unflaggingly gave of their time, experience and expertise to me and members of these committees in order that this task might be perfected with the benefit of their guidance. Such was the breadth of the advice upon which we have relied that there is every possibility I have omitted from this list an equally worthy contributor. For those inevitable omissions I apologise in advance.

Mr Alastair Ross, MLA, Former Chairperson of the Committee for Justice
Mr Raymond McCartney MLA, Former Deputy Chairperson of the Committee for Justice
Mr David Ford MLA, Former Minister of Justice
Mrs Arlene Foster MLA, First Minister
Professor Maurits Barendrecht, HiiL Innovating Justice
Ms Marcella McKnight, Department of Justice, Compensation Services
Ms Claire Archbold, Deputy Head of Legal Service, Departmental Solicitors Office
The Honourable Lord Woolman, Chairman, Senator of the College of Justice, Scotland
Sheriff Duff, Director, Judicial Institute for Scotland
Mr Conor O'Brien, Chief Executive Officer, Injuries Board Ireland
Mr Maurice Priestley, Director of Operation, Injuries Board Ireland
Mr Stephen Watkins, Director of Corporate Services, Injuries Board Ireland
Lord Justice Ryder, Senior President of Tribunals
Lord Justice Briggs, Deputy Head of Civil Justice
Mr Colin Stutt, Consultant, *'A Strategy for Access to Justice'*, September 2015
Judge J M Hlophe, Judge President of the High Court
Judge Traverso, Vice President, Cape Town, South Africa
Mr Alastair Hamilton, Chief Executive, Invest NI
Ms Anne Beggs, Client & Sector Manager, Invest NI
Ms Alison Hook, Invest NI
Ms Pamela Reid, Department of Justice
Mr Gareth Herron, Northern Ireland Courts & Tribunals Service
Ms Caron Alexander, Director of Shared Digital Services, Department of Finance
Ms Maeve McLaughlin MLA, Former Committee Chair, Committee for Health, Social Services and Public Safety
Mr Justice Flaux, Commercial Court, London
Mr Justice Burton, Commercial Court, London
Mr Jim Leason, VP & Head of Courts Management Solutions, Thomson Reuters, London
Mr Jonathan Scott, Herbert Smith Freehills, London
Mr Ronnie Armour, Chief Executive, Northern Ireland Courts & Tribunals Service
Ms Sharon Hetherington, Ms Louise Laverty, Ms Cathy Scollan, Northern Ireland Courts & Tribunals Service (Civil Fees Review)
Mr Philip Susskind
Mr Sean Holland, Chief Social Work Officer of Social Services, Department of Health
Mr Adam Lennon, Head of Family Modernisation and Improvement, HMCTS
Ms Clare Galloway, HMCTS

Sir Brian Leveson
Ms Lisa McLaughlin, Herbert Smith Freehills, Belfast
Mr Mark Benton QC, Legal Services Society, British Columbia
Ms Sherry MacLennan, Director of Public Legal Information for the Legal Services Society, British Columbia
Ms Heidi Mason, Legal Services Society, British Columbia
Ms Shannon Salter, Chair, Civil Resolution Tribunal, British Columbia
Mr Matthew Rushton, Senior JAMS International Executive (Mediation) & Mr Charles Gordon
Mr David Gray, Solicitor
Mr Brian Symington, Member of the Board of Directors of Deaf Hear
Ms Pamela Carole Dickson BA
Professor Roger Smith OBE, freelance researcher and writer
Judge Laurence Ryan, President of Family Judiciary, New Zealand
Professor Penny Cooper
Dr Carol Coulter, Director, Child Care Law Reporting Project in Dublin
Ms Isobel Riddell, Looked After Children and Adoption Policy Unit, Family and Children's Policy Directorate
Chief Justice, The Honourable Diana Bryant AO, Australia
The Honourable Justice Victoria Bennett, Family Law Courts, Melbourne, Australia
Ms Koulla Yiasouma, NI Commissioner for Children & Young People
Lord Kerr - we are indebted to Lord Kerr and his team. In particular we wish to thank and to acknowledge the very considerable assistance we received from Paul Brigland, Head of ICT, Ben Wilson, Head of Communications, Dan Money, Systems Administrator and finally Mark Ormerod, the Chief Executive who kindly permitted us to tap the Supreme Court's reservoir of IT talent.
Ms Suzanne Kingston, Partner, Withers Worldwide
Ms Lavinia Shaw-Brown, Garden Court Mediation
Dr Alastair Black, Police Rehabilitation and Retraining Trust
Ms Julia Ritchie, Police Rehabilitation and Retraining Trust
Ms Mette Undall-Behrend, Head of Division, The Danish Ministry of Justice, Procedural Law Division & Anna Barlow
Belfast Lay Magistrates' Association
Ms Caroline Darragh & Mr Rodney Redmond, Northern Ireland Courts & Tribunals Service Statisticians, Business Support Group
Pegasus Scholars – Megan Beasly, Bipin Prudip Aspatwar, William C. Terrell II
Dr Andrew Scott
Mr Richard Cushine, DoJ
Mr Dave Murphy, Chief Executive, Relate NI
Lord Dyson, Civil Justice Council
Sir David Norgrove, Chair of the Family Justice Board
Mr Justice Abbott, Dublin
Judge Peter Boshier, New Zealand
Judge Michael White, Dublin
Sir Malcolm McKibbin, Head of the NI Civil Service

Mr Raymond Calvert, Chair of the Northern Ireland Network of Child Contact Centres (NINCCC)
District Judge (Magistrates' Court) McKibbin
Mr Patrick Stott, Children Services Manager at Barnardos
Mr Richard Marshall from the Ballymena Child Contact Centre
Her Honour Judge Lesley Newton**,** Designated Family Judge for Greater Manchester
Judge Rosemary Horgan, Dublin
Mr David A Lavery, Director of Access to Justice, DoJ
Riikka Koulu, LL.M., Doctoral candidate in Procedural Law, University of Helsinki
FOIL, The Forum of Insurance Lawyers
Professor Michael Schwartz
Ms Margaret Gray BL, Brick Court Chambers
Dr Grainne McKeever, Ulster University
Mr Joseph M. Matthews BL
Mr Terence Dunlop
Judges' Reference Library Staff – Patricia Radcliffe, Claire Marshall, Jonathan Stewart
Law Society Library research

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BIBLIOGRAPHY

Bamborough, Shaw and Kershaw, *'The Family Drug and Alcohol Court in London: A New Way of Doing Care Proceedings'*, Journal of Social Work Practice, 2013.

Bennett, The Honourable Justice Victoria, '*The handling of Parental Responsibility Disputes by the Australian Family Court following a decade of reform'*, The Hochelaga Lectures 2015: The Family Court and the Well-Being of the Child (1), 24 June 2015.

Brooke, The Right Honourable Sir Henry, *'Should the Civil Courts be Unified? A Report by Sir Henry Brooke'*, Judicial Office, August 2008.

Cooper, Professor Penny, *'Speaking when they are Spoken to: Hearing Vulnerable Witnesses in Care Proceedings'*, Child and Family Law Quarterly [2014] Vol 25, No 2, p.132.

Cooper, Professor Penny, *'Valuable lessons and poor relations: Comparing the English criminal and family justice systems' approaches to vulnerable and intimidated witnesses'*. Wildy, 2016.

Hale, Lady, Deputy President of the Supreme Court, *'Are we nearly there yet?'*, Association of Lawyers for Children Annual Conference 2015, 20 November 2015. https://www.supremecourt.uk/docs/speech-151120.pdf

Herring, Jonathan (Editor), '*Family Law: Issues, Debates and Policy*', Willan Publishing, Routledge, 2013.

Hyde QC, Charles, '*The Modernisation of the Family Justice System*', 3, p121-125, P.C.B. 2013.

Kennedy, E., *'Children and Young People in Custody 2012–13'*, London: HM Inspectorate of Prisons and Youth Justice Board, 2013.

Koulu, Riikka, '*Blockchains and Online Dispute Resolution: Smart Contracts as an Alternative to Enforcement'*, Article in *SCRIPTed*, volume 13, issue 1, pages 40-69 May 2016.

Leveson, Sir Brian, President of The Queen's Bench Division, *'Justice For The 21st Century'*, Caroline Weatherill Lecture, Isle Of Man, 9 October 2015.

Norgrove, Sir David, '*Family Justice Review*', November 2011.

Shaw-Brown, Lavinia *'The Mediation Process'*. Garden Court Chambers, 24 February 2016.

Sinclair QC, Fiona, Mirchandani, Sian & Mallalieu, Roger (2015) *'The Pioneering TCC: Pushing the Boundaries on Litigation Costs'*, a paper presented to the Society of Construction Law at meetings in Birmingham on 1 July 2015 and London on 8 September 2015.

Stewart, H., Catz, C. and La Rooy (Training Forensic Interviewers), *'Children's Testimony – Handbook of Psychological Research and Forensic Practice'*, (Wiley-Blackwell) 2nd Edition, 2011 at p. 199.

Stutt, Colin, *'A Strategy for Access to Justice: The Report of Access to Justice (2)'*, September 2015.

Westminster Legal Policy Forum '*The future of judicial review - assessing the impact of changes to funding, costs and procedure*' (July 2015).

Action Committee on Access to Justice in Civil and Family Matters Report (October 2013) *'Access to Civil & Family Justice: A Roadmap for Change'*, http://www.cfcj-fcjc.org/action-committee (accessed 10 December 2015).

Bickel, van Disk and Giebels, (March 2015), University of Twente, *'Online Legal Advice and Conflict Support: A Dutch Experience'*, https://www.utwente.nl/igs/icrisp/news/content/online-legal-advice-and-conflict-support-utwente.pdf (accessed 28 June 2016).

Council of Europe (November 2010) *'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice'*, pages 58-65, www.coe.int/children (accessed 15 March 2016).

Council of Europe, Commissioner for Human Rights (May 2010) *'Positions on Children's Rights'*,CommDH/PositionPaper(2010)1, https://wcd.coe.int/ViewDoc.jsp?p=&id=1621589&direct=true (accessed 15 March 2016).

Family Procedure Rules 2010, Practice Direction 3A – http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a (accessed 28 June 2016).

In Re KP (A Child) (Abduction: Rights of Custody) Practice Note [2014] 1 WLR 4326, http://www.familylawweek.co.uk/site.aspx?i=ed129358 (accessed 28 June 2016).

Lazarus, Mary (2014) '*Reporting Restrictions and the New Transparency*'. Article in Family Law Week www.familylawweek.co.uk (accessed November 2015).

Legal Aid Agency (April 2015), *'Guidance on the Remuneration of Expert Witnesses'*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420106/expert-witnesses-fees-guidance.pdf (accessed 10 December 2015).

McFarlane, Dr Julie (2013) '*The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report*'. https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf (accessed 7 December 2015).

National Center for State Courts website, *'Using Social Media to Support Self-Represented Litigants and Increase Access to Justice'*, http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Social-Media/2-2-Using-Social-Media-to-Support-Self-Represented-Litigants.aspx (accessed 17 May 2016).

National Center for State Courts website, *'Future Trends in Public Access: Court Information, Privacy, and Technology'*, http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Technology/1-1-Future-trends-in-public-access.aspx (accessed 17 May 2016).

Nuffield Foundation & Brunel University London, *'Introducing the main findings from: Changing Lifestyles, Keeping Children Safe: an evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings'* (May 2014), http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_evaluation_summary_findings_01_05_14.pdf (accessed 28 June 2016).

Report of the Scottish Court Civil Justice Review, http://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4, Chapter 7 paragraph 24, page 171 (accessed 28 June 2016).

Smith OBE, Professor Roger, *"Online Dispute Resolution: ten lessons on access to justice"*, https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ODR-access-to-justice.pdf (accessed 28 June 2016).

The National Self-Represented Litigants Project website http://representingyourselfcanada.com/ (accessed 7 December 2015).

Wilson, Tom (2015) '*Greater Transparency in Children Proceedings: A Note of Caution*'. Article in Family Law Week www.familylawweek.co.uk (accessed November 2015).