



PRESIDENT OF THE
FAMILY DIVISION

SPEECH OF SIR MARK POTTER PRESIDENT OF THE FAMILY DIVISION

REPORT ON THE PRIVATE LAW PROGRAMME

13 MAY 2008

1. I have allotted this slot, the brevity of which does not reflect its importance, to clarifying the position concerning the Private Law Programme in the light of proposals from Cafcass by way of an ideal model which they call the “Private Law Pathway”, to which in certain parts of the country such as Leeds they are already working, to a greater or lesser extent. However, in the light of the potential for confusion by reason of the acronym “PLP” I shall refer to it as “the Cafcass Model”.

2. You will remember that the Private Law Programme was introduced in November 2004 by the President in consultation with HMCS and Cafcass. It provided for best practice together with the development of local schemes. A central pillar of the Programme was that the First Hearing should be a Dispute Resolution Appointment which:

- a) Identifies immediate safety issues
- b) Exercises effective Court control so as to identify the aim of the proceedings
- c) Has available a Cafcass practitioner to facilitate early dispute resolution, if possible at that first appointment, without the requirement of a formal report
- d) Save in cases involving issues of safety or where agreement was reached, the family should be referred for support and assistance to locally available resolution services.

The Programme also required continuous and active case management including: Judicial availability, continuity, and continuous case management by the allocated Judiciary.

Although it was not a consideration taken into account at the time, the Private Law Programme now provides at the first appointment an excellent and early and simple procedure for the Court to identify those cases which are not appropriate for the Family Proceedings Court and to transfer the cases which are to that Court.

3. The Private Law Programme has been implemented throughout most of the County Courts in England and Wales and, although there are local variations, has led to the resolution at First Hearing of, on average, about 60% of applications. Cases that needed further mediation or adjudication have been case managed speedily and effectively. Of course applications to the Court in respect of residence and contact represent a very tiny proportion of all the arrangements for residence and contact which parties make after divorce or separation. But those who make applications to Court do so, generally, in order to obtain the fairness and decisiveness that comes

with Court proceedings. The undoubted success of the First Appointment derives from the collaboration between the Judiciary and the Cafcass officer. Once an application has been made to the Court, the Court through its judiciary acquires and retains responsibility for case management control and the welfare of the child the subject of proceedings.

The Cafcass “Model”

4. Against the background of this current practice the Cafcass proposal has two aspects; first, the introduction, or extension, of existing good practices in certain areas and, secondly, a prescriptive, more standardised approach to be applied nationally in County Courts and Family Proceedings Courts.

5. At the present time, on receipt of an application, the Court will set a Hearing date four to six weeks ahead and will pass the C1 application form to Cafcass for them to carry out CRB checks on the parties. Cafcass will then notify the Court in time for the first hearing of anything disclosed by such checks. Under the proposed Model Cafcass would take the opportunity, before the first hearing, to undertake other work on the case. In particular they would deal with the following aspects:

a) More extensive ‘Safeguarding’ checks to ascertain any risk factors, primarily in relation to domestic violence, which would inform the best course for the case to take.

b) They would speak to all the children in the cases, save no doubt, the very youngest.

c) They would hold ‘information meetings’, i.e. separate meetings at which groups of applicants and groups of respondents are given information about the Court Process and the options available to them to achieve resolution of the issues.

d) The Cafcass officer would meet individually with the parents in each case and endeavour to conciliate between them.

e) In default of agreement, the Cafcass officer would then act as ‘case manager’, referring parents on to other agencies, such as mediation, contact centres and advising the parties as to how the case should proceed.

6. The Cafcass officer would then prepare an analysis for the Court, outlining the issues, the extent of the agreement and recommending what should be done next. The Model does not require the Cafcass officer, and indeed not necessarily any Cafcass officer, to attend the first hearing. If the latter were the case, it would be incompatible with the nature and purpose of the first hearing as presently provided for in the Private Law Programme.

7. Indeed, the Cafcass proposal would replace, to a large extent, the collaborative approach of Cafcass and the Judge at the First Appointment by a sequential process in which the Cafcass officer endeavours to resolve all cases by agreement without judicial participation, passing on to the Court those in which agreement has not proved possible or which, for other reason, require to be resolved by litigation.

8. Of course the Judiciary are supportive of the development of any good practice which assists families whose applications are being considered by the Courts, and as a preliminary “add-on” to the courts’ first conciliation meeting, the proposals are wholly to be welcomed. Not least because:

(1) It is now recognised that it is important for children in these situations to know that they have had an opportunity to have their say and for **their ‘voice’ to be heard**. It is common experience that when children convey to their parents through a Cafcass officer, that they love both of them and that all they want is that the parents stop arguing, this can have a dramatic effect on the parents’ capacity to come to terms.

(2) **Risk assessment**, particularly for domestic violence, has become an increasingly important feature of Cafcass’ work and an obligation is placed on Cafcass officers by the Children and Adoption Act 2006 which came into effect in October 2007 to explore any such risk. It is also essential for judges to satisfy themselves, even in the case of consent orders that there is no risk to the child: see my Practice Direction dated 9th May 2008.

(3) It has been learned from mediation procedures, which for many years have included **‘information meetings’**, that parents find such an introduction to the Court and mediation process very helpful.

9. Cafcass have suggested that, in order to ensure the development of good practice amongst their practitioners throughout the country, and to provide a consistency at this stage of family proceedings, it is desirable to have a fairly standard and established national practice which will be essentially replicated throughout the country. I accept that, there is much to be said for such an approach, provided it can be accommodated without delaying, or impinging unduly on, the court process across the piece.

10. Assuming that local Cafcass resources are sufficient to enable such work to be done in time for a first conciliation hearing to be fixed and effective within 6 weeks- as appears to be the position with the Cafcass Model Scheme launched in Leeds on 19th February- it can only be beneficial and welcomed. However, so far as a national programme is concerned, it is clear that there are potential ‘rubbing points’ in the Cafcass Model, notwithstanding its advancement of good practice in a number of ways.

(1) It involves the Cafcass officer in extended work with the parties in every single case, whereas with the present First Appointment system (apart from the time spent at Court by the Cafcass officer in conciliating on that occasion) the work of Cafcass is concentrated on the remaining 40% of cases.

(2) Cafcass anticipate that the funding for the extra work to be carried out in this way will be met with a significant reduction in long Section 7 reports, which all are agreed, represents a potential area for economy. This may well be an optimistic view.

(3) There is wide and justified judicial concern as to whether Cafcass will have the human resources to undertake this work without delay and in

any event within a timescale considerably greater than 6 weeks. In this connection we bear in mind that the Children and Adoption Act 2006 imposes new duties on Cafcass to monitor conditions attached to Contact Orders and to supervise the performance of penalties, where imposed, under the Act.

(4) There is further concern, in relation to cases where the conciliation period is extended, that the length of time required for receipt of a s.7 report thereafter ordered will lead to intolerable delays in resolution.

(5) An issue arises as to whether, where Cafcass undertakes such extensive control of the case in terms of investigating the risks, in assessing what children say, and what adults say, and in advising them and referring them to other agencies of their choice, this is appropriate without the scrutiny of the Court such as is given at the First Appointment.

(6) What is the impact of the increase in litigants in person on the desirability of the Court's exercising scrutiny?

(7) Although the 'Voice of the Child' should be heard, is that to be done in all cases? At what time should children be spoken to? Is it better or worse for them to be spoken to at Court? This latter is an aspect of the problem upon which not only Judges, but also practitioners and indeed Cafcass officers differ in the case of the PRFD practice.

(8) How is the work of the Cafcass officer and the judge to be balanced in the most appropriate way?

(9) Finally, there is the important question of the extent to which local circumstances should be able to vary any national programme, for example, quite apart from divergences in practice and performance, the geographical location of the Cafcass office, in itself a simple matter, could have considerable implications for a programme if its effect were to require travel over a long distance to Cafcass, or on the other hand to Court (whether the County Court or, where not co-located, the FPC).

11. These are some of the principal issues which arise on an examination of the Cafcass proposals. In summary they call for the examination of three areas; first, the best way in which to achieve the good practice at which Cafcass aims; second the way in which the application of these good practices is best related to the Court process; and third the way in which the balance is to be drawn between a national blueprint and the recognition of local circumstances.

Steps Taken

12. Having been alerted by a number of Judges from across the country to practical difficulties in the application of the Cafcass Model, I wrote to all FDLJs and DFJs informing you of the setting up of a Working Group under Hogg J and inviting DFJs to refrain from initiating any new schemes proposed until the Working Group has reported. The Working Group has the following terms of reference:

To propose the method (or methods) of resolving private family law disputes that builds (or build) upon the President's Private Law Programme and that seeks (or seek) to satisfy appropriate means of dispute resolution and aims of the Cafcass Private Law Model.

13. So far as the judiciary are concerned, besides Mary Hogg and John Altman, the other Judicial members are Charles Elly, District Judge Rachel Karp, who sits at Guildford, Barnet and Gee Street and District Judge David Owen who sits in Birmingham. Malcolm Dodds, the Justices' Clerk from Kent, and Margaret Wilson, or her nominee from the Magistrates' Association will join the group. There are senior representatives from Cafcass, Cafcass Cymru and the MoJ.

14. The Judicial members of the Working Group have been presented by Cafcass with much of their working papers and references to research. They recognise that, if their assessment is to be of any value, they should have regard to such research as there is, and the views of others than the Judiciary. They are also anxious to have contributions from other members of the Judiciary, and in particular other Designated Family Judges around the country who can canvass opinion and views locally. It is less anecdotal accounts of local practices that they wish to hear about (although these are important) than the analysis and opinions of the Judiciary. I would therefore urge any of you who have views on the matter to send them to John Altman with some urgency.

15. It has been agreed that national implementation of the Cafcass Model will now be deferred and that meanwhile the provisions of the Private Law Programme remain applicable. The Working Group aims to meet again in early June and to present its report in good time for its conclusions to be considered and acted upon before the implementation of the Children and Adoption Act at the end of 2008.

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