WHAT IS THE FUTURE FOR FAMILY COURTS?
DEVELOPMENTS IN ENGLAND AND WALES

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Introduction

This paper explores the future role of the family courts in England and Wales at a time when there is both the need for, and opportunity to, take action. There is a crisis of confidence in the operation of the family courts. Substantial, well founded 2 criticism from both within and outside the legal profession is being made of the failure of the family justice system in England and Wales to deliver and enforce its decisions in a timely manner.

‘The current way in which the courts intervene in disputed contact cases does not work well. This is the opinion of both Government and members of the senior judiciary.’ 3

In response to this, the government and the President of the Family Division have proposed changes in the way the courts deal with disputes about children. 4 Increased emphasis is being placed on private ordering and the court’s role in safeguarding children’s welfare is being down played. 5 Court is repeatedly referred to as a place of ‘last resort’. 6 At the same time, administrative changes are taking place which would logically lead to the creation of a Family Court. 7 In 1974, the Finer Committee, making the case for a Family Court noted,

‘There is no branch of legal administration for which the respect of the community is more important than the administration of family law, and in the ultimate resort, the

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1 Professor-Elect Bristol University, England, U.K.
2 Dame Elizabeth Butler-Sloss, President of the Family Division of the High Court, evidence to Constitutional Affairs Select Committee Inquiry Family Justice: the operation of the family courts H.C 2004-5 116, Ev 80.
4 Under the new constitutional arrangements for securing judicial independence (The Concordat) the President of the Family Division is Head of Family Justice and has statutory powers in relation to family court procedure and practice. The Secretary of State for the Department of Constitutional Affairs is responsible for the ‘effective and efficient administration of the court system and providing adequate resources, including the number of judges and the distribution of work between courts at different levels’ but judges determine how cases are allocated to judges and listed: Courts Act 2003 and Concordat (2004) paras 19, 26, 32 and 36 available from: http://www.dca.gov.uk/constitution/reform/pubs.htm.
5 ‘The court’s aim is to assist parents to safeguard their children’s welfare’ President of the Family Division, The Private Law Framework (2004).
6 Dame Elizabeth Butler-Sloss, President of the Family Division of the High Court, evidence to Constitutional Affairs Select Committee Inquiry Family Justice: the operation of the family courts H.C 2004-5 116, Ev 80; Department of Constitutional Affairs, evidence to Select Committee, Ev 181, para 2.6.2.
7 Department of Constitutional Affairs, Consultation paper: a Single Civil Court? (2005) p.3.
case for a family court is that it is the institution through which respect for the law can be fully achieved.\textsuperscript{8}

Re-organising family justice alone will not necessarily restore respect, but any reform which seeks to re-establish confidence in the courts must be based on a consensus about the role of the court.

Despite numerous calls since the 1960s for the introduction of a court with competency in all aspects of family law, there is no Family Court in England and Wales. Currently, three separate courts have jurisdiction in family matters, the family proceedings court, a court generally presided over by lay magistrates supported by a legally qualified advisor; the county court, a civil court with wide jurisdiction; and the Family Division of the High Court. As far as the law relating to children is concerned, the Children Act 1989 established triple jurisdiction, with each level of court having the same powers to make orders. Residence, contact, care, supervision and adoption orders cases can be heard in all levels of court and transferred according to their complexity. Similarly, courts have the same powers in relation to domestic violence injunctions, but the family proceedings court has no jurisdiction over divorce, nor any matters concerning property (for example, occupation orders or the transfer of assets following divorce). Until April 2005, magistrates’ courts were administered separately from other courts, by local magistrates’ courts committees and were subject to separate (but largely similar) procedures. The Courts Act 2003 established unified administration and provided for common procedural rules for all courts with family jurisdiction.\textsuperscript{9} The President of the Family Division is now effectively the head of all three levels of court and can issue Practice Directions binding on them.\textsuperscript{10} This potentially paves the way for a Family Court.\textsuperscript{11}

‘Form follows function’\textsuperscript{12}; the design of any family court must relate to its role, the law it has to apply\textsuperscript{13} and the procedures it operates. The Finer Committee and various other proponents of a family court viewed the court as the centre of the system for supporting families, which were breaking down.\textsuperscript{14} Such a vision does not fit with a court, which is intended only to be used \textit{in extremis}. Moreover, demographic and administrative changes mean that the court is no longer the gateway for family dissolution that it was formerly. Unmarried families do not need to approach the court to bring the adults’ relationship to an end. The Child Support Agency has replaced the courts in determining and collecting financial support for children. Crucially, England is no longer a deferential society where judges and magistrates can rely on their

\textsuperscript{8} Finer Report: Report of the Committee on One parent Families (1974 cmnd 5629) para. 4.424.

\textsuperscript{9} Courts Act 2003, s.75. Before the rules can be finalised different practices in the family proceedings Court and the higher courts, for example relating to press access to, and reporting of, proceedings have to be agreed. Rules are expected to be made by the end of 2005.

\textsuperscript{10} Courts Act 2003, s.81.

\textsuperscript{11} DCA, supra, n. 6, p.3


\textsuperscript{13} B. Hoggett, ‘Family courts or family law reform – which should come first?’ [1986] \textit{Legal Studies} 1-17.

\textsuperscript{14} Finer Report, supra, n. 7 at paras 4.282 and 4.314.
position to secure co-operation. Courts have to exercise control over their proceedings, monitor compliance with their directions and be prepared to enforce their orders.

The current work of the family courts

Demands on the courts are constantly changing; new social situations encourage or discourage litigation, and new laws create (or, more rarely, abolish) court powers and remedies. Changes in procedure can increase or decrease the attention courts need to give to particular types of case.

Each year approximately 160,000 couples divorce; almost all of these cases are uncontested.\(^{15}\) Such divorces have been dealt with administratively since the late 1970s\(^{16}\); district judges check that the forms have been completed correctly and grant the decree. Applications for financial orders have declined markedly with the transfer of responsibility for the assessment and collection of child support to the Child Support Agency. The courts continue to make orders relating to property in around 33,000 cases each year.\(^{17}\) They also handle similar numbers of applications for orders to provide for protection in cases of domestic violence.

Two-thirds of divorcing couples have children under the age of 16 who could be the subjects of court orders.\(^{18}\) Divorce procedure requires the welfare of these children to be considered by the court. This is usually done by examining a form, completed by the applicant parent; routine hearings in these cases have been abolished. There are also substantial (but uncounted) numbers of relationship breakdowns amongst unmarried parents, which may result in litigation about child matters. However, the ‘no order’ principle, introduced by the Children Act 1989, seeks to discourage courts from making (and parties from applying for) orders where these are not required for the child’s welfare.\(^{19}\) Nevertheless, in 2002, the courts made 61,000 orders for contact and 30,000 residence orders, four times and twice (respectively) the number of such orders they made 10 years previously. These increases result from growth in the number of breakdowns of non-marital partnerships and greater willingness (by fathers)\(^{20}\) to seek court orders. The courts retain power to grant parental responsibility to unmarried fathers. However, since December 2003, joint registration of birth confers this automatically. The courts now only have to consider cases where there has been neither joint registration nor agreement by the mother.\(^{21}\)

\(^{15}\) The number of contested divorces is no longer published, but in 1991 the High Court heard only 82 defended divorces, Judicial Statistics Annual Report 1991 (1992 Cm 1990) table 5.3.

\(^{16}\) For an account see S. Cretney, J. Masson and R. Bailey-Harris, Principles of Family Law London: Sweet and Maxwell (7th ed 2003) para 11.010. This procedure makes the ground for divorce largely irrelevant.


\(^{18}\) Ibid.

\(^{19}\) Children Act 1989, s.1(5). Divorce and separation do not effect parental responsibility.

\(^{20}\) Contact applications are made predominantly by fathers see, C. Smart et al., Residence and contact disputes in court DCA Research Series 6/03 (2003) p.23.

\(^{21}\) Children Act 1989, s. 4(1)(c), joint registration provision added by Adoption and Children Act 2002
The courts handle smaller numbers of Public child law cases — care proceedings, contact with children in care and adoption, but these cases can take up substantial court resources. The number of these cases has been rising steadily. Greater emphasis on adoption has necessitated local authorities making greater use of the courts to prepare the way for this through care orders, the restriction of contact and freeing orders. However, adoption orders are slowly declining because adoption arrangements within the family (by step-parents and relatives) have become less popular.

The division of cases between the 3 levels of court is determined by statute, court rules and by the individual decisions of the parties and the courts. Private child law matters can be started at any level of court; the vast majority begin and remain in the county court. The family proceedings court heard only 7% of contact cases in 2003, compared with a third 5 years earlier. Public child law matters must usually start in the family proceedings court but can be transferred ‘up’ if they are complex or so that proceedings may be consolidated with matters being heard in the higher courts. Over the last 5 years the proportion of cases started in the magistrates’ court has declined and the proportion transferred has increased. This both results from and adds to lack of confidence in magistrates’ ability to handle these matters. There is now real concern that magistrates’ courts are losing their capacity to decide public law matters.

Although magistrates have jurisdiction over all family matters in their courts, within the county court there are different grades of judge (district judge, recorder, circuit judge) and a system of ‘ticketing’ which determines who is qualified to hear which type of case. This system was introduced to create specialist family judges in the county court but works imperfectly. The training provided by the Judicial Studies Board is too limited to prepare those with no experience in family law, and those who have been trained do not always have the opportunity to exercise their family jurisdiction. Ticketing adds to the complexity of listing cases and making the best use of resources. For example, nominated care district judges are trained in public child law and generally expected to take all the preliminary hearings. Until recent changes they were not able to conduct final hearings, and in some courts, the circuit judges conduct all the hearings in care cases, including those for directions.

Increase in the work of the county court has required additional resources; the number of sitting days allocated to family work has increased by over 50% during the last 10 years.

22 Approximately 25,000 children are subject to such applications each year.
23 Prime Minister’s Review, Adoption (2000); there is a national target to increase the number of looked after children adopted by 40%, Adoption a new approach (2000 Cm 5017) p.5.
24 Just over 1100 orders were made in 2004 compared with almost 2500 in 1998 see Judicial Statistics Annual Reports available from: http://www.dca.gov.uk/jsarlist.htm
27 Lord Chancellor’s Department, Scoping study on delay in Children Act cases London: DCA (2002) fig 3 and Judicial Statistics (as above).
28 Richardson, supra, n.25.
29 For a description of the different grades of judge and tickets see Judicial Statistics Annual Report 2004 (2005 Cm 6565) p. 65. Judges are ticketed to do particular types of work only after they have attended training provided by the Judicial Studies Board.
Despite this, the Select Committee Report on the Operation of the Family Courts identified lack of court resources (judges and courtrooms) as a major factor in delay. At the same time, the family proceedings courts appear to be under used, hearing fewer cases than they did in the 1990s.

**Ethos and practice in the family courts**

Although the courts deal with large numbers of applications, comparatively few of these result in disputed hearings. There is a strong ‘settlement culture’ in the family courts and private ordering is encouraged at all stages of private law disputes. The courts seek to avoid making judgements on the parties’ conduct and focus on the practicalities of separating finances and the future arrangements for the children. Members of the main professional groups for family lawyers promote a conciliatory approach to resolving family disputes, many also work as mediators or refer their clients to mediation. CAFcass, the organisation which provides social work services for the courts provides mediation and conciliation schemes for many county courts. Public funding was made available for mediation for those with a low income in 1997; legally aided applicants are required to consider mediation.

Since the introduction of the Children Act 1989 the family courts have been expected to play an active role in managing disputes before them, not merely to act as umpires. However, judges find it difficult to control litigants, for example they rarely refuse approval for the instruction of experts in public law cases. Similarly, they find it difficult to set timetables to ensure cases are heard quickly, and to make the parties comply with them. Family proceedings courts appeared to have even greater difficulty in managing cases. In private law cases, directions appointments are seen as ‘negotiating opportunities’ rather than a means to secure progress. Cases are prone to repeated and lengthy delays because judges want to create further time for agreement. Despite these practices, in the face of increasing concern about delays in Children Act cases, case management has come to be seen as ‘one of the surest means by which unnecessary delay can be avoided.’

Active case management is the basis of a new system introduced for ancillary relief claims in May 2002 following a pilot scheme. The scheme aims to deal with cases proportionately, avoiding excessive costs, which will reduce the parties’ resources,
and encouraging agreement. The court controls the litigation through a first directions appointment where directions are made for the exchange of specific information and the timetable for this. Both parties are required to attend a FDR (financial dispute resolution) hearing to see if it is possible to agree the division of assets, or to narrow their dispute. A privileged discussion/hearing is conducted by a district judge who has read the evidence filed by the parties. The judge is expected to help the parties to reach agreement by indicating how he or she would decide the case, and advising them about current and future costs. If a settlement is achieved, the judge makes orders by consent. If not, the case is listed for a trial by a different district judge. In the FDR pilot scheme cases were completed much more quickly, whether or not they resulted in a trial and 5% more cases resulted in consent orders.\(^{40}\) The DCA now aims to secure the completion of over 90% of ancillary relief cases by consent orders.\(^{41}\)

Case management principles have been rigorously applied in the development of a Protocol for the management of public law cases.\(^{42}\) The Protocol is a very substantial document (90 pages), which sets out, in detail, the actions to be taken by the parties and the court at each of the 6 steps in the proceedings from application to final hearing. Under the Protocol, the target time to complete care cases is 40 weeks.\(^{43}\) A survey of judges indicated that three-quarters considered that the Protocol had led to cases being heard in a more timely way, but it is too early to establish whether delays are being reduced. The Protocol process seeks to identify and narrow the issues in dispute through co-operation and agreement.\(^{44}\) Only a minority of cases has contested final hearings; the parents commonly accept that the local authority had cause to intervene and only disagree with the plans for the child’s future care.

Case management is also the basis for the Private Law Framework\(^{45}\) guidance, issued by the President of the Family Division in November 2004, for county courts hearing private child law cases. This is intended to establish a more structured approach to contact and residence disputes than currently operates.

Although there are a very small number of highly contentious residence disputes, most applications for residence are by mothers seeking to confirm their position at or after parental separation. These cases are dealt with quickly as a matter of routine. Contact cases are often more problematic.\(^{47}\) Courts dealing with contact have been found to adjourn hearings repeatedly rather than adjudicate on disputes, in the hope that the parties reach a settlement.\(^{48}\) Consent orders are made in 30% of contact cases,

\(^{40}\) M. Bollington supra, n.16 fig. 3.2.  
\(^{43}\) Monitoring for the DCA indicates a wide variation between courts in the proportion of cases completed in this time. When the Children Act was being drafted the aim had been to complete the majority of care cases in 12 weeks!  
\(^{44}\) Protocol supra, n. 41, Principles of Application, para 5  
\(^{46}\) Also, to the Principal Registry of the Family Division. The President’s introduction also announces the intention to extend the Private Law Programme to FPCs ‘in due course’.  
a far lower proportion than in financial matters.\textsuperscript{49} Courts have been reluctant to hold ‘findings of fact hearings’ to determine the veracity of allegations of parental misconduct despite research evidence of the prevalence of post separation violence and litigants’ hopes for vindication. Courts have generally presumed that direct contact should be ordered despite the parent with care’s concerns.\textsuperscript{50} They have also been reluctant to use their powers\textsuperscript{51} to achieve compliance, preferring to vary the order with a view to achieving workable arrangements. More than a quarter of contact cases return to court with a third (or subsequent) application\textsuperscript{52} each of which may involve a series of adjourned hearings. The separate hearings in individual cases, and repeat applications, are rarely heard by the same judge\textsuperscript{53}

Proceedings concerning children are frequently referred to as inquisitorial not adversarial, although it is accepted that adult parties may behave as adversaries and that the court may need to make determinations on questions of fact.\textsuperscript{54} The inquisitorial role and its responsibility to make decisions in the best interests of children require the court to obtain additional information where this is not provided by the adult litigants. Frequently, this is achieved by the court appointing a CAFCASS officer to report on the child’s welfare. Reports are made in approximately 33,000 cases each year.\textsuperscript{55} Alternatively, the child may be made a party so that his or her representative can put forward a case based on the child’s best interest.\textsuperscript{56}

Interdisciplinary working and interagency co-operation are major features of family proceedings.\textsuperscript{57} In most public law children cases the child is represented by a children’s guardian, a social work professional from CAFCASS whose role includes advising the court about the child’s welfare, particularly in relation to plans for the child’s future care. The court also relies heavily on expert evidence from paediatricians, psychiatrists and other health professionals. There is less use of expert evidence in private law cases; courts have relied on reports from CAFCASS for opinions about children’s current and future welfare. Courts also need to maintain links with other agencies and make arrangements about information sharing.\textsuperscript{58} Local authority social services departments may have information about the children’s needs, and child protection concerns identified during proceedings should be referred

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\item Breach of a contact order is contempt of court; judges may fine or imprison a parent with care who fails to allow the visits etc, alternatively, they can transfer residence to the other parent, see: S. Cretney \textit{et al.}, supra, n 49, para 19.052.
\item DfES, supra, n.48, para 25.
\item \textit{Re D. (intractable contact dispute; publicity)} [2004] 1 FLR 1226 FD is an example of an extreme case.
\item 2004-5 H.C. 116 Ev 180 para 2.5.11 (DCA)
\item In most public law cases the appointment of a child’s guardian is routine, see below. In private law cases it occurs exceptionally. There are considerable concerns about costs and CAFCASS lacks the personnel to provide representatives for these cases.
\item M. Murch and D. Hooper, \textit{The family justice system} Bristol: Jordans (1992)
\item All Care Centres (county courts which hear care cases) must have a ‘care centr plan’ which sets out the arrangements for co-operation with relevant government agencies and NGOs. In the Northern Circuit (court administrative region)there is currently a pilot scheme for disclosure of police information in family proceedings
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to them. Liaison with the police is crucial in cases involving domestic violence to obtain evidence of incidents; police are also responsible for arresting those in breach of injunctions and bringing any criminal charges. Interdisciplinary co-operation is being developed nationally through the Family Justice Council and local committees. Local family Justice Councils, based in each of the court areas, will seek to increase mutual understanding of issues through interdisciplinary training and to reduce delays in proceedings by improving cooperation between agencies.

The crisis of confidence

Over the last decade, concerns about the ability of the courts to handle family cases appropriately have been growing. Concerns have led to, and been highlighted in judge-led committee reports on contact and domestic violence, three departmental reviews of the causes of delay, reports from the Court Service Inspectorate and two Parliamentary Select Committee Inquiries as well as numerous research reports and articles in the media. The system is repeatedly described as failing children and families. Proceedings are seen as an ‘instrument in an adversarial battle’ between adults but pressure on parents to agree may be seen as undermining their consideration of their children’s feelings. Contact has been seen as the most problematic area but the courts handling of care cases has also been questioned. In 2004, following the decision of the Court of Appeal to overturn a mother’s conviction for murder made relying on expert evidence relating to cot death, the Minister for Children ordered a review of all care cases involving disputed medical evidence. This gave the impression that cases had not been adequately considered, and when no cases

61 For details see: http://www.family-justice-council.org.uk/index.htm
64 Including: Magistrates’ Courts Service Inspectorate, Seeking agreement (2003) and HM Inspectorate of Court Administration, Safeguarding children in family proceedings (2005). Both these reports are available from www.hmica.gov.uk
65 Lord Chancellor’s Department Select Committee Inquiry, CAFCASS. 2002-3 H.C. 614;
68 Constitutional Affairs Select Committee Inquiry Family Justice: the operation of the family courts H.C. 2004-5 116, Ev 113a (National Association of Probation Officers – the professional association of many CAFCASS officers).
requiring rehearing were identified, raised suggestions that the review had been inadequate.\(^{70}\)

Concerns have focused on four aspects of proceedings: - costs, delay, fairness and enforcement. These are inter-related. Delay increases the time to reach decisions and raises costs.\(^{71}\) High costs increase the inequality between publicly and privately funded litigants, sometimes forcing privately funded parties to withdraw or act without legal representation. Such inequalities and weak enforcement both raise questions about the fairness of the system. The judiciary, government ministers, Parliament, agencies and the public all have expressed concerns. Fathers’ groups, notably Fathers4Justice, have also engaged in direct action to bring their concerns to wider attention – and been rewarded by substantial media coverage for their efforts. In addition, the media have been highly critical of the severe restrictions on reporting the proceedings of the family courts. Rather than acknowledging that this protected family privacy they have suggested that the public cannot have confidence in secret courts.\(^{72}\)

In her evidence to the Parliamentary Select Committee, the President of the Family Division said, 'The present system [of administration of family justice] is open to criticism, much of it well-founded.'\(^{73}\) She noted that delay in completing cases was the main justified criticism. Judges have also expressed particular concern about their limited powers to enforce contact and the lack of contact centres.\(^{74}\) Ministers have been concerned about costs, delay and, particularly, about the handling of contact cases. Organisations providing services for victims of domestic violence have repeatedly criticised the courts and CAFCASS for failing to take safety issues seriously.\(^{75}\) Although domestic violence is increasingly identified in cases, the courts seem less willing to respond by refusing contact.\(^{76}\) In contrast, father’s groups have alleged that the family courts are biased against them because they take a restrictive approach to contact, ordering only relatively short periods rather than dividing the child’s time equally between the parents. They too have criticised the ineffectiveness of enforcement mechanisms.\(^{77}\)

The Parliamentary Select Committee, ministers and the judiciary have all rejected suggestions of bias but accepted that changes are required to reduce the number of

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\(^{70}\) see [2004] Fam. Law 304 and 559.  
\(^{72}\) Constitutional Affairs Select Committee Inquiry *Family Justice: the operation of the family courts* H.C 2004-5 116, Ev 133 (Celia Conrad, Legal consultant) para 30; Ev 142 (Families need fathers) para 16; Ev 200 (John Sweeney, BBC Reporter).  
\(^{73}\) Constitutional Affairs Select Committee Inquiry *Family Justice: the operation of the family courts* H.C 2004-5 116, Ev 80 (Dame Elizabeth Butler-Sloss).  
\(^{76}\) H.C. 2004-5 116, Ev 113 (Napo) and Ev 154 (Women’s Aid)  
\(^{77}\) H.C. 2004-5 116, Ev 141 paras 2. 12 (Families need fathers); Ev 135 (Equal Parenting Council).
families resorting to the courts and to improve the service provided there.\textsuperscript{78} The implication is that private ordering will generally be a more suitable way of dealing with family disputes, that the courts only provide a better approach to a small minority of cases, and that handling these well necessitates keeping other disputes away from the courts. Given the breadth and depth of concerns about the current system, all new approaches by the courts are likely to come under close scrutiny.

\section*{Reform}

In July 2004, the government issued a Green Paper, \textit{Parental separation: Children’s needs and Parent’s responsibilities} outlining its proposals for reforming the way disputes between separating parents are dealt with, focusing on those parents who use the courts. These proposals sought to divert cases from the courts by providing better information about sources of advice and guidance about the likely outcome of court proceedings. If cases reached the courts greater emphasis would be given to early resolution through in-court conciliation and the restructuring of legal aid. Where proceedings continued, courts would aim to manage them to achieve quicker (and better) outcomes. CAFCASS resources would be transferred from preparing reports on contested cases to facilitating agreement and monitoring compliance.\textsuperscript{79} The government also promised legislation on enforcement. The Green paper was followed by \textit{Next steps}\textsuperscript{80} re-affirming the government’s approach with a little more detail and publication of \textit{the Private Law Framework}, guidance from the President of the Family Division about the new court procedures for private law cases.

In February 2005, a draft Children (Contact) and Adoption Bill was issued and referred to the Parliamentary Scrutiny Committee for consultation and review. This proposed a stepped system for achieving compliance with contact orders including requirements for parents to attend ‘contact activities’\textsuperscript{81} and adding community service and curfews to the list of penalties for non compliance.\textsuperscript{82} In March 2005, the Constitutional Affairs Select Committee published the report of its inquiry into the operation of the family courts, broadly supporting the government’s aim of removing cases from the court system. However, it was not convinced that the government’s proposals would achieve this, and suggested that CAFCASS would need substantial additional resources to take on its new role.\textsuperscript{83} The following month, the Scrutiny Committee reported broadly supporting the draft bill but proposing a new court power

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\item \textsuperscript{78} H.C. 2004-5 116 Report, para 54; 2004 Cm 6273 p.1 (Ministerial Foreword); H.C. 2004-5 116 Ev 7-8 (President of the Family Division).
\item \textsuperscript{79} DfES et al., \textit{Parental separation: children’s needs and parents’ responsibilities} London: DfES (2004 Cm 6273).
\item \textsuperscript{80} DfES et al., \textit{Parental separation: children’s needs and parents’ responsibilities – Next steps} London: DfES (2005 Cm 6452) available at: http://www.dfes.gov.uk/childrenandfamilies/
\item \textsuperscript{81} ‘Contact activities’ include programmes or sessions used to assist a person to develop or improve their contact with a child (cl.11E(3)).
\item \textsuperscript{82} For a critique of the Bill see J. Masson and C. Humphreys, ‘Responding o the 10 per cent’ [2005] Fam Law (forthcoming).
\item \textsuperscript{83} H.C 2004-5 116 Report, paras 27-33.
\end{itemize}
to refer the parties to a mediation service.\textsuperscript{84} The bill has been included in the 2005-6 government legislative programme.

**Getting cases out of court**

‘It is a truism, often repeated, that court should be the place of last resort to resolve disputes in family law...’ \textsuperscript{85}

**Restricting access to the courts**

Whereas many family justice professionals have a negative view of the utility of court proceedings in family cases, access to court is seen as a right. Individuals may expect ‘their day in court’ or at least expect that they can, if they wish, turn to the courts to determine their claims. The courts too have been very reluctant to use their powers to restrict applications,\textsuperscript{86} despite concerns that a small number of parents repeatedly resort to the courts in relation to parenting disputes, and that litigation is occasionally used to oppress the parent with care.\textsuperscript{87} Restricting access to the courts potentially breaches the European Convention on Human Rights, arts 6 and 8.\textsuperscript{88} Consequently, making the courts truly a place of last resort will involve convincing would-be applicants that they have no need for the court, rather than removing rights to litigate.

**diversion**

Action to discourage court applications and promote alternative means of dispute resolution needs to recognise that, in England and Wales, only a small minority (10%)\textsuperscript{89} of cases reach the courts and that some of these require formal findings of fact and court orders. The appropriate action in individual cases depends on what leads parties to use the courts. Applicants, particularly those without legal representation, may view the court as the natural place to go. A culture and tradition of court involvement in family breakdown and a lack of awareness of the more recently developed alternatives of mediation and conciliation, or how to access them, means that some court applicants may have not considered how else their dispute might be resolved. Better information provision and easier access to services may divert these people from the courts. In addition, advice provided at court may help some applicants find another means of resolution. Applicants who make a single application, which is resolved by consent are those most likely to be diverted from the courts. Other applicants have tried and failed to resolve issues by negotiation or mediation and want someone else to take decisions.\textsuperscript{90} Others are caught up in a

\textsuperscript{84} Joint Committee on the Draft Children (Contact) and Adoption Bill Session 2004-5 H.C. 400, para 59.
\textsuperscript{86} Children Act 1989, s. 91(14).
\textsuperscript{87} The existence of abuse through litigation is even acknowledged by judges: H.C 2004-5 116 Ev 91 (Ryder J).
\textsuperscript{88} ECHR art 6(1) provides a right to fair trial in determination of civil rights, which includes the right to maintain contact (art. 8 right to respect for ...family life). The restriction must therefore be proportionate: Re P. (Section 91(14) Guidelines)(Residence and Religious Heritage) [1999] 2 F.L.R. 573 C.A. per Butler-Sloss at 952-3.
\textsuperscript{89} This figure, repeatedly quoted in government literature, is based on a finding that only 10% of those with contact arrangements had them established through the courts A.Blackwell and F. Dawe, Non-residential parental contact London: Office of National Statistics (2003).
dispute where resolution requires adjudication or court enforcement. For these applicants, the alternative to court action is giving up - either accepting that contact will continue even though the parent with care feels it is not safe or accepting a level or type of contact less than the non-resident parent desires. Although some of these applicants may have unrealistic or unreasonable claims, the courts exist to decide such matters.

Lawyers owe duties both to their clients and to the court. They are expected to advise clients about their claims, and how best to resolve them but have neither a duty nor a right to prevent court applications, which their clients are entitled to make. Despite the emphasis given to conciliatory practice by family lawyers, it is frequently asserted that lawyers encourage disputes. However, it is more likely that cases proceed to court because they involve issues of violence and are unsuitable for mediation, lawyers are unable to convince clients of the advantages of other mechanisms, or appropriate services do not exist in the area.

rules
In his seminal discussion of ‘bargaining in the shadow of the law’ Mnookin argued that the indeterminacy of the welfare test encourages litigation because the parties cannot predict the outcome and thus whether they should agree to a settlement. Although the theory is very compelling, it is less clear that it operates in practice. Evidence that legal principles determine the way separating couples negotiate their parental responsibilities and financial resources is weak. The majority of parents make arrangements about child residence and contact without seeking any legal advice. Their arrangements may reflect an internalised version of what is in the child’s welfare, (the legal position) but may reflect what parents consider fair to each other, or be what fits with their domestic arrangements. Despite legal advice, some former partners agree to take less or hand over more of the family’s assess because of the circumstances of separation; ethics rather than law determines what they should pay or expect.

Proposals for reform of family law are made on the basis of the utility of rules. Some father’s groups in England campaign for a presumption of joint residence or, more specifically, equal sharing of the child’s free time. However, this has been rejected

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91 Magistrates’ Courts Service Inspectorate, supra, n. 63, para 4.10.
92 A substantial proportion of cases before the courts involve allegations of domestic violence or raise child protection issues: L. Trinder et al., A profile of applicants and respondents in contact cases in Essex DCA research series 1/05 London: DCA (2005).
98 As proposed by some ‘father’s rights’ groups in England, see: Constitutional Affairs Select Committee Inquiry Family Justice: the operation of the family courts H.C 2004-5 116 para 56 and Bob Geldof, ‘The Real Love that Dare not Speak its Name’, in A. Bainham et al. (eds), Children and their families : contact, rights and welfare Oxford: Hart (2003) 171. About 20% or respondents to the
comprehensively by the government, the Select Committee and the judiciary. So far as disputes relating to children are concerned, despite disagreements about interpretation, individualised decision-making based on the judicial understandings of the child’s welfare has become inviolable. In contrast, the government has suggested giving greater emphasis to rules in the area of re-allocation of property, including the possibility of enforcing pre-marital contacts.

Restricting public funding for litigation
Public funding, subject to means and merits tests, is available to indigent applicants for contact orders, residence orders, domestic violence injunctions etc. Evidence from Legal Services Commission (LSC) research indicates that family cases involving legally-aided parties take longer and are more likely to involve multiple issues, hearings and counsel than they were in the in the late 1990s. The LSC considers that legal aid lawyers are adopting strategies, which prolong disputes, possibly because of their lack of experience. It has proposed a stricter approach to granting legal aid for representation and for repeat applications. Although this may discourage litigation, it might only serve to remove the restraining power of the lawyer, leaving the applicant to pursue their claim as a litigant in person.

A new package of legal aid measures includes reducing the maximum income levels for those qualifying for legally aided representation, and redesigning family legal aid to emphasise early resolution of disputes. The government has accepted that legal aid should not be available for ancillary relief claims continued after the FDR, presaging its withdrawal once alternative funding mechanisms (commercial loans) become available.

Improving the way the courts handle disputes
The notion that litigation will be reduced if the courts handle cases better may appear paradoxical. However, it is based on assumptions that swifter decisions will prevent disputes escalating, better decisions will produce greater compliance and more rigorous enforcement will avoid repeated applications. Also therefore, that both parties to private law disputes are rational actors, motivated to end the court’s involvement in their lives. If cases are successfully diverted from the courts, those
remaining are likely to be the more difficult, with parents who are likely to be more troubled and less likely to compromise.  

Case management – the Private law Framework
Under the Private law Framework courts will be expected to hold an early hearing, a First Hearing Dispute Resolution Appointment within 4 to 6 weeks of the application. This is intended to identify immediate issues of safety and the aim of the proceedings. Wherever possible, a CAFCASS officer will be available to facilitate early dispute resolution at this hearing. If this is not successful and there are no safety concerns, the parties will be referred to a dispute resolution scheme and other services which may support them. Where issues remain unresolved, directions will be made for an early hearing. The court’s control will be maintained by ensuring that each hearing in a case is before the same judge. The outcome will be monitored and cases returned to court swiftly where orders are breached. Neither judicial continuity nor post order monitoring are currently usual practice.

In-court conciliation
A wide variety of in-court conciliation schemes have been operated across the country by CAFCASS although many family proceedings courts have not had access to such schemes. The Magistrates’ Court Inspectorate found that almost no reliable data had been collected about schemes. Evidence that schemes worked to sustain agreements was largely anecdotal; there had been no critical appraisal to establish best practice, appropriate staffing nor value for money. The MCSI was critical of the failure of schemes to provide information to parties and to obtain their informed consent. Risk assessment processes were often inadequate and children were generally not involved in any way. Even within schemes there was lack of clarity between the roles of the different professionals involved, lawyers, CAFCASS officers and district judges, in some schemes all of these professionals were used to broker agreements, according to their availability. It also appeared that little time was allowed for each conciliation appointment, and this contributed to pressure on parties to agree. Information currently available provides very little basis for determining which model of scheme should be imposed, nor how schemes can work with the more difficult cases, which are likely to remain in the courts.

Decisions in unresolved cases

106 L. Trinder et al., supra, n. 91.
107 Application forms (“gateway forms” C1A) include provision for each party to disclose incidents of violence.
108 This organisation, now replaced by HM Court Service Inspectorate, is responsible for inspecting CAFCASS services.
109 MCSI, supra, n. 79 at 3-4.
110 The Private Law Programme includes an information sheet for the parties; there is no provision for the parties objecting to their case being processed via a first hearing dispute resolution appointment. (FDRA).
111 In the scheme operating in the Principal Registry of the High Court, children aged 9 and over are required to attend and spoken to separately by a CAFCASS officer.
112 MCSI supra, n. 79 para 4.13.
113 MCSI supra, n. 79 para 2.24.
114 A 12 month pilot scheme, the Family Resolutions Project, was established in 3 courts in an attempt to fill this gap, but intending litigants appear to have avoided those courts so the number of cases included is likely to be too low for any useful research evidence see 2004-5 H.C. 400 paras 60-66.
Judges will be expected to hold ‘findings of fact’ hearings to determine the basis of allegations made by the parties, which impact on their future parenting or the arrangements for contact. Judges are less likely to have detailed reports from CAFCASS officers and will have to rely more heavily on their own assessment of the welfare benefits of contact than they do now. Currently, there is a strong presumption in favour of contact; the courts have demonstrated that they are generally unwilling to refuse direct contact. There is nothing in any of the reform proposals which indicates this will change. The draft bill includes provisions which may allow the court to make contact conditional on attendance at, for example, and anger management programme. Details of available programmes should be made available to judges through the local care centre plan.  But until more suitable services are developed few courts will have this option. Lack of research establishing the success of court ordered programmes to support compliance with contact decisions is likely to impede their development. Even where schemes are established, it will be a long time before they can show that they are effective in ensuring safe contact.

Securing compliance and enforcing contact

Where the post-order follow up shows that contact is not working, there is an expectation that cases will be rapidly returned to the court and heard by the original judge but it has also been suggested that suitable cases could be released to magistrates for enforcement hearings. The draft bill includes provision for further referrals to contact activities, and additional enforcement powers. However, if non-compliance is due to the parent with care’s concerns about safety, new powers are unlikely to avoid the problems currently seen. As well as being prepared to enforce orders, judges will also need to be more reflective about the orders they make.

The role of the judiciary

The new approach to disputes about children will make considerable demands on judges. These are quite different from the current pressures case management impose in finance and public law cases. Judges will have to manage litigation between parties who are likely to be emotionally involved and distressed, often without the support of legal representatives who can help clients to understand what their options really are. Judges will need to ensure that cases are dealt with in the time allowed for the hearing so that case timetables can be maintained. They will need to progress cases quickly and reach conclusions, often without the detailed assistance of a CAFCASS officer. Whilst judges may be better supported through in-court conciliation schemes and other mechanisms for dispute resolution, it seems likely that they will have less support in cases that remain for their decision. If they resort to seeking expert evidence in such cases, the time taken to prepare the case for hearing and the risk of delay will increase. And the benefits of the streamlined approach will be lost.

It seems unlikely that the current level of training (two full days induction training to cover private child law and financial dispute resolution) and refresher training every three years will prepare judges for these new challenges. After all, the limitations of the previous system, including judicial decision-making, necessitated the reform. The

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115 The Private Law Programme p.6.
116 Judicial continuity is one of the key principles of the Programme
117 The time taken to identify an available expert and experts’ failure to complete reports in the time allowed have been identified as major factors in delay see Booth supra, n. 35 and LCD supra, n.26.
structural changes and limited additional enforcement powers are unlikely to have a major effect unless judges can make decisions which determine disputes, either by satisfying litigants of their wisdom, thereby securing compliance, or by recognising that court orders cannot further the children’s welfare. Judges will need much greater help than they are given currently in developing judge-craft, that is, in running hearings and relating to the parties. They should also have opportunities to observe judges who handle cases well and reflective comments on, and appraisal of, their own performance. A proper assessment of this approach requires information not only about the success in achieving, and maintaining, settlements and safe contact in different courts and the outcomes of in-court conciliation schemes, but also about which judges are most able to do deal successfully with contested contact.

There are also likely to be major difficulties in mirroring the new approach within the family proceedings court. Where courts are co-located, they will be able to share conciliation services. However, judicial continuity will be problematic, both because it places heavy demands on lay magistrates who are volunteers and because it conflicts with the practice of transferring difficult cases to the county court. Given that after the FDRA only difficult cases are likely to remain, there seems little room for the family proceedings court to develop this area of work. The suggestion that cases should be transferred to magistrates for enforcement seems to undermine the relationship and control that will otherwise be established through judicial continuity. There could be a role for magistrates, sitting with judges to form a ‘family tribunal.’ Magistrates already sit with judges in criminal cases they send to the Crown Court for sentencing. However, this would add to the complexity of securing judicial continuity, especially where early re-hearings were required following breakdown of arrangements.

Services for families outside the courts

Although the government’s long term objective is to ‘shift behaviour’\(^{118}\) so that parents themselves avoid acrimony and ensure that their children have flexible and rewarding contact despite parental separation, its focus has been on those parents who turn to the courts to resolve family disputes. Currently, there is no general provision of support services for families, other than those in extreme crisis. The government has announced in its Green Paper, *Every Child Matters*\(^{119}\) its intention to provide for children more generally, but despite legislation (Children Act 2004) it remains unclear how this will be delivered. In many areas there are local services providing relationship counselling, mediation and conciliation services, any of which may assist parents with problems of post separation parenting. Parents can access these directly, at least if they can pay for services themselves. However, levels of awareness of existing services and what they can offer are low. The Legal Services Commission has been piloting the Family Advice and Information Service, which seeks to provide families experiencing relationship and parenting problems with such information and advice services.\(^{120}\) Solicitors are the entry point to ‘networks’ of local services; public funding for those who qualify allows for initial interviews to explore ways of dealing with the client’s problems other than through the law. However, this too limits access

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\(^{118}\) DES *et al.*., supra, n 79 para 8.

\(^{119}\) 2003 Cm 5680 available at: [http://www.dfes.gov.uk/childrenandfamilies/](http://www.dfes.gov.uk/childrenandfamilies/)

to services for those, like unmarried parents, who could benefit but who do not approach a lawyer.\textsuperscript{121} Douglas and Moorehead suggest that the FAInS model should be applied in other ways, so that lone parents are assisted to access advice about family and other issues through the benefit system. Lone parents claiming Income Support have a personal adviser whose role is to assist them with re-entry to employment, and this person could also help clients to find other help. However, there is little tradition of ‘joined up’ government in the U.K. The Benefits Agency may not welcome suggestions that its staff should take on further responsibilities to assist its clients unless this also fits with its targets on obtaining employment. Also, personal advisers will only be able to point clients to services; it would be necessary to ensure that funding was provided so that clients could access suitable services.

The government’s role in providing advice has consisted of granting some financial support to advice services and developing advice and information leaflets distributed through the courts, supermarkets and government web sites. The Green Paper on parental separation re-affirmed this approach; the government wants to ensure that parents and children have better access to sources of advice and information by working in partnership with existing services, and by revising the Parenting Plan leaflets.\textsuperscript{122} Drafts of these giving examples of arrangements for contact made for children of different ages etc have already been published.\textsuperscript{123} There are currently no proposals for ‘one stop shops’ similar to the ‘relationship centres’ being established in Australia. However, the Legal Services Commission is developing a telephone helpline, which will provide general advice about relationship breakdown. Telephone advice services are widely used in the U.K. and provide the potential to advise and direct inquirers to a range of services. In order to do so, they will need detailed information about the services available in different parts of the country and how to access them. Collecting this and keeping it up to date will not be an easy task.

**A new family court**

The consultation paper, *A single Civil Court?* starts on a cautious note. The government is not yet committed to court reform and will only pursue it if unification appears to be a feasible and worthwhile venture.\textsuperscript{124} It sets out the development histories of the civil and family courts, which reveal the quite different origins of calls for unification and current arrangements in these two areas of work. In civil work, reforms in the 1990s effectively abolished different procedures for the country court and the High Court and introduced a system of active case management which sought to ensure that the High Court was reserved for complex cases. Distinctions between the two levels of court were now largely irrelevant.\textsuperscript{125} In family work, the notion of a family court was linked with the provision of a wide range of services for separating families centred on the courts, and with removing the complexities created by the different jurisdictions over family matters in the 3 levels of court. Changes in approach to family disputes mean that the courts are no longer considered to be

\textsuperscript{122} DfES et al., supra, n. 78 paras 52-54.
\textsuperscript{125} DCA, supra, n. 123 para 15.
central, but places of last resort. Jurisdictional problems were largely resolved in child matters by the Children Act 1989 and the Courts Act 2003 will bring a single set of procedures, linked more closely to those operating in the civil courts. Nevertheless, major distinctions remain between the family proceedings courts and the higher courts dealing with family work.

The consultation paper appears to countenance two alternatives. One including the family proceedings courts and creating a unified family court: the other removing the distinctions between the High Court and the county court, and between civil and family work, to create a single civil court, whilst leaving the family proceedings court to operate as it does now. 126 There would still be specialist judges, and some work would be reserved to more senior judges, but this could be done through directions from the President of the Family Court, rather than by legislation, allowing for greater flexibility. Any re-organisation of family proceedings which excluded the family proceedings court would seem to devalue it further. It is hard to see that such an obviously second class court could have the confidence of the public and their advisers. However, full incorporation of the family proceedings court will necessitate far more than unified administration and a single set of rules, it will have to be able to provide an equivalent service to litigants with similar levels of expertise and authority.

Conclusion

In many ways the government has been slow to respond to the emotional aspects of increasing family breakdown. Now it finds itself wanting to respond, but with little information about what works on which to base proposals. It has chosen to focus its attention on the cases which reach the courts, with the aim of diverting some and resolving the remainder more quickly and effectively. Whether it succeeds in this will depend on the ability of the courts.

The structure and staffing of family courts depends on the role those courts have to play, the laws they apply and the procedures they must operate. Families, not courts, are the centre of the family justice system, with courts operating to determine disputes which families cannot otherwise resolve and to enforce orders where they are breached. The new systems for dealing with property and child law disputes place substantial demands on judges to manage litigation, to facilitate early settlement, to make decisions where the parties cannot agree, and to respond appropriately where arrangements breakdown. Judges need more training than they currently have to meet these new demands and improve confidence in the operation of the system. It is far from clear that a family proceedings court, reliant on lay judges, can take on this more challenging role and the more difficult cases which are likely to remain for court determination.

It will not be easy to turn the tide on increasing court applications. Considerably more needs to be done to help families avoid disputes, by informing them of sources of support and facilitating access to helping services. Discussions about whether seeing a mediator should be compulsory are irrelevant where sufficient services are not available or parties are unable to make proper use of them.

126 DCA , supra, n. 123 paras 8-12.