Public law article for Family Law in February 2019

This article is the public law equivalent of my article on private law published in Family Law in January 2019. Just as there is a compelling need in the view of Cafcass to update the private law framework in England and Wales, we believe the same is true for public law. Like the Child Arrangements Programme (CAP), the Public Law Outline (PLO) is fundamentally sound, underpinned as it now is by legislation, yet a 'PLO2' could clarify many important issues which cause tension and take up undue time. The Ministerially-chaired Family Justice Board and the new Public Law Working Group, chaired by Mr Justice Keehan with the active support of the new President, can identify positive changes to make, drawing on the analysis in the Care Crisis Review and the Targeted Family Justice Review.

Change over the last five years

As in private law, a lot has changed since the start of the updated PLO in April 2014. Research has helped us to understand more although the implications of that learning can be expensive in the short-term even if they produce long-term savings. FDAC, which helps parents to prioritise their children over their drugs and Pause, which prevents children being born automatically into care, are two good examples of this. Children's online identity can now be just as pre-occupying for many children as their family relationships and children at risk in gangs may not present immediate welfare problems. Assessing these two groups of children and young people is even more challenging.

Ove the last five years, demand measured nationally has rocketed although it has recently plateaued. Locally, some areas have seen a big rise while others have seen or produced a fall, showing significant inconsistency even allowing for different baselines and starting positions. Nationally, the five years since 2014 have been an astonishing story of absorption of pressure through the skill, commitment and goodwill of the tens of thousands of practitioners who work in the family justice system in England and Wales.

The increasing strategic threat is a systemic insufficiency - shortages across the board - of court time, leading to delays in listing; the late production and distribution of court orders; shortages of judges, social workers, secure beds and experts like paediatric radiographers; and a shortage of positive options for children - of a viable placement, especially for sibling groups but also for traumatised teenagers, and a support plan that helps a child to recover from trauma and that child's carer/s to cope. A workforce development strategy for all of the family justice professions as well as the long-term planning and commissioning of children's resources at national and regional levels is needed if the family justice system is going to remain resilient over time.

Can demand be reduced?

Diagnosing the reasons for demand increases has to be done at the local and national levels, locally in order to understand how the known national factors combine or intersect locally, and nationally to understand the patterns such as variation. Family justice

agencies must use data and collective business intelligence to understand the local and national factors which are triggering changes in either demand, regimes or working practices.

Viewed nationally, the main reason for higher demand is the greater understanding and support for children experiencing long-term neglect and emotional harm at home. The greater understanding of sexual and criminal exploitation is also significant. Calls for action about neglect, emotional harm and exploitation after high profile cases like Baby Peter Connelly and the organised sexual abuse of children in many towns and cities had to be heeded. Children are being better protected now. 60% of local authorities inspected by Ofsted since January 2018 have improved, compared to their previous rating. There is no public, political or professional appetite to reduce numbers unless it is safe to do so.

However, excessive variation, far greater than justified by relative levels of poverty and deprivation or other measures of underlying need, is inexcusable, as it means care is a postcode lottery. A child can have the same set of problems and be supported at home on a child protection plan in some parts of the country and be put into care elsewhere. The root cause of variation is more likely to be found in differences in local professional regimes and working practices. Edge of care services to prevent breakdown are more targeted than ever. Although pre-proceedings practice is also inconsistent and still threadbare in some areas, an increased number of local authorities have strong step-down arrangements at the pre-proceedings stage and step down many more families than they issue proceedings on. Without these programmes, the numbers of children in care would be even higher. Practice in the best needs to be extended to the worst. Proven programmes need to be available in every local area, before, during and after a set of care proceedings.

These high levels of variation across England and Wales invite us to develop a more managed family justice system instead of the current ambiguous governance arrangements, so that the big issues can be decided quickly and without a fuss. In the meantime, significant marginal gains can be made by developing and disseminating much clearer official guidance, signed off by the national Family Justice Board and carrying the logos of the major participating agencies. Implementation plans are crucial as much of the change is in culture, not strategy.

For example, the criteria determining the level of child impact that leads to court intervention, especially the assessed need to share parental responsibility with the parent/s or to remove a child on an interim or permanent basis, can be spelt out. Standardised templates and guidance for the assessment of family and friends, Together Apart assessments of siblings, Special Guardianship Support plans, Deprivation of Liberty assessments and use of s20 can also reduce variation and confusion. Clearer guidance about the 26-week limit is needed to introduce more flexibility without undermining the achievements that have been made in reducing chronic delay.

We can also explore research-led algorithms for issues like neglect, with AI supporting professional judgment by taking the legwork out of basic information gathering over the next ten years. En route, Cheshire West and Chester local authorities have developed a set of neglect indicators.

Making cases smaller

The premise of the updated PLO was that the expertise of the social worker and the children's guardian would be enough in most cases. That worked for a while but recently

the system has been reverting to type, with more hearings, more requests for experts and a lack of confidence about the evidence base. We are making cases bigger again.

There are numerous ways to make cases smaller. Judgments could be restricted to the top five issues in a case, saving judicial time without sacrificing transparency; personal responsibility taking by the inter-professional team on the case could mean fewer hearings because of more issues being resolved outside of court, including an ending to habitual late filing – some late filing is unavoidable because the material arrives late of course; clearer communication, to a designated inbox or phone line known to all local professionals as soon as one party knows a hearing is not going to be viable; criteria for urgent applications could be set in order to end the current epidemic of short notice appointments, C2 requests and the over-classification of issues as urgent; guidance about the use of intermediaries would help; and clearer guidance about disclosure could limit the requests we make as professionals and agencies of each other. For example, it can take a police officer two days to work through the mobile phone records of one individual. That is time taken away from other urgent work. Requests or orders for disclosure should be pivotal in the case or highly relevant. We are at risk of embedding a culture where we want to know everything before we can decide anything.

Some family justice systems are making important marginal gains to ease pressure, such as much stronger case progression management in many local areas and across many local agencies including e-bundling. Innovating as well as problem-solving are crucial disciplines and cultures to bring to work on a daily basis. Problem-solving late DNA testing and late notification of potentially viable relatives in care proceedings are examples of knotty problems re-appearing all over the country which need to be solved systemically rather than case by case.

Issues for children

The two main law types, public and private, may benefit in the future from a more closely aligned legal framework. Diverting the 10% to 20% of public and private law court applications that could be better case managed before court in the pre-proceedings stage; using the first hearing in both law types for case management purposes; operating a 26 week limit in all but the most complex of public and private law cases in order to achieve permanence, stability and security as far as possible for a child; and using a common framework for determining contact arrangements, based on the child's needs and attachments, might make the values, principles and objectives of the family justice system clearer to all concerned and could make the framework for improving a child's life more obvious.

Paediatric echocardiographers film a child's heart from numerous angles in order to diagnose any disease or faultline. Family courts also have to make sense of the child's heart and the child's emotional and psychological timeline, which is just as important as the court's timeline. The family justice system is only as good as its service to the next child in the list.

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