



HOUSE OF LORDS

Children and Families Act 2014 Committee

Corrected oral evidence: Children and Families Act 2014

Monday 4 April 2022

4.15 pm

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Members present: Baroness Tyler of Enfield (The Chair); Baroness Blower; Lord Brownlow of Shurlock Row; Lord Cruddas; Baroness Lawrence of Clarendon; Baroness Massey of Darwen; Baroness Prashar.
Evidence Session No. 7 Heard in Public Questions 69 - 76

Witnesses

I: Professor Judith Masson, University of Bristol; Dr Julie Doughty, Senior Lecturer in Law, Cardiff University.

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Examination of Witnesses

Professor Judith Masson and Dr Julie Doughty.

Q69 The Chair: We now turn to the second session this afternoon and I would like to welcome both of our witnesses, from whom we are hearing virtually. That is Dr Doughty and Professor Masson. Could I invite you please to introduce yourselves?

Professor Judith Masson: I am professor emeritus in law at the University of Bristol and I have undertaken lots of research on the courts system and public child law.

Dr Julie Doughty: I am a senior lecturer in law at Cardiff University School of Law and Politics. I have done some research, but not as much as Judith, in public law and in private law. I am also a trustee of two charities, Family Mediation Cymru and the Transparency Project.

The Chair: We are hoping in this session to hear from you about the impact of the reforms that the 2014 Act introduced to the family justice system, with a particular focus on public family law. What do you see as the biggest challenge facing the family justice system at the moment?

Professor Judith Masson: The biggest challenge is to do more and better with less. If we are going to get the backlog down, the proceedings have to be shorter than they have been. We spend a disproportionate amount of resource on deciding cases rather than delivering services before cases get to court or after they have been to court.

In private law, there is a really big challenge of handling disputes where parents are not legally represented. The majority of parties are not legally represented these days because of legal aid changes and we know that the family justice system did very badly in relation to protecting victims of domestic abuse, including both parents and children. That is very clear from the Home Office harm report, so it has to do better and it is not going to have additional resources to do better.

The Chair: As a quick follow-up, in your opinion is the backlog primarily caused by the pandemic or was it building up before then?

Professor Judith Masson: The cases were getting longer beforehand. It was hard to see it as a backlog in a sense. Cases were taking longer and that happened year on year from 2016 onwards. There was less adherence to the principles and provisions within the 2014 Act after really quite a strong start.

The Chair: Dr Doughty, what is your view about the biggest challenge facing the system at the moment?

Dr Julie Doughty: There are lots of challenges. I have not heard anything in any of these sessions that I have disagreed with. In public law the greatest challenge is meeting the needs of individual children identified in court proceedings, because after the court order the local authorities do not necessarily have the resources to implement a continuing and sustainable plan. Sometimes the services that have been identified that the children need just are not there.

I know you have had a lot of information and evidence about that already in respect of placements, but we also have now a growing number of young people who are being deprived of their liberty, and that is a really great concern of judges right up to the Supreme Court. In the latest statistics from the Nuffield Family Justice Observatory, which has just produced some really good research on this, 1,000 children last year were deprived of their liberty. These children have had very traumatic experiences, and we just do not have the right services or resources to meet those specialised needs. The 2014 Act did not predict that, but I would say it is the greatest problem now.

With private law, the challenge is a workable alternative dispute resolution system. The push for MIAMs and mediation that was envisaged in the 2014 Act just has not happened. The recommendations from the President's Private Law Working Group really need to be followed up alongside, as Judith mentioned, the recommendations from the Ministry of Justice harm report.

The Chair: Could I just pursue that point? Where things from the 2014 Act have not really been followed up, do you think it is primarily because of people not thinking that was the right legislation anyway, lack of understanding, lack of resource or just lack of political pressure? What do you think the reason is that those things just have not happened?

Dr Julie Doughty: With public law, there was a focus on the long-term permanence placement for the child. On paper that looked as though it should have been a long-term plan that would have been implemented effectively. I do not really know why it has not happened, apart from the sorts of issues that have been raised by other people already.

With MIAMs and mediation, it was the fact that those reforms were completely undermined by LASPO and the withdrawal of legal aid from private law proceedings. David Norgrove, whose recommendations led to that Part 2 of the Act, literally said that at the time. We all knew that, once solicitors were not referring people to mediation, mediation would drop off drastically, which it did, and it has taken a very long time to start recovering. There are other problems with MIAMs as well.

The Chair: If you were asked to describe the family justice system at the moment, where would you say it is on a spectrum from a public service that is creaking a bit, as many public services are with all the pressures of the pandemic and everything, to, on the other hand, a system near collapse?

Professor Judith Masson: I would not say that it is near collapse. The problem is that the focus is insufficiently on service users, so that the family justice system does a lot of things that really do not serve service users; they serve those who work within it. It is a question of reorientating the system and making it into a family justice service, which it has never been.

The Chair: It is a really interesting point. Just to help us understand that, would you be able to give one example of the sort of change you had in

mind?

Professor Judith Masson: There is a strong focus on the technical delivery of rights without sufficient consideration of what those rights really mean. We want good decisions for children, but the focus has always been on deciding as much as possible before children are compulsorily in care, regardless of the fact that all sorts of things will change subsequently and that the damage is done by a case taking one to two years rather than six months. It has often been described as a Rolls-Royce system, but it cannot deliver a Rolls-Royce service because it simply does not have the resources or the time to do that. Anyway, the time would itself be counterproductive.

The Chair: That is really helpful. Thank you very much.

Q70 **Baroness Prashar:** Good afternoon, Professor Masson and Dr Doughty. My question is about the 26-week timeframe. What do you think has been the impact of that timeframe on care and placement proceedings? What are the factors preventing meeting the 26-week period? One has seen that it is now going up. On average, it takes about 34 weeks at present and only a third of the cases are being dealt with in the 26-week timeframe.

Professor Judith Masson: It is taking quite a lot more than 34 weeks, as shown in the MoJ data. We did a study in 2014-15, comparing how long it took for cases to be decided at that point with a comparable sample from the same areas in 2010-11. The cases took half as long. They took 26 weeks instead of 53 weeks on average, and that was achieved by focusing on doing what the legislation said, so a strong focus on the 26 weeks, a reduction in the number of experts, cases being properly prepared at the start and judges having what the judiciary usually call robust case management.

A lot of those things have gone out the window. Cases are not necessarily well prepared or as well prepared as they could be. Judges do not robustly manage cases. They have been allowing more experts. They have been allowing more adjournments. As a consequence, cases are just taking longer and longer. There is a backlog now, so there is insufficient hearing time for the number of hearings and the length of hearings that the court wants to hold.

In 2014-15, the courts were really constraining hearing time, but they are not doing that to the same extent. The number of hearings has gone up. The more hearings you have in a case, the more resource it takes. The more resource it takes, the greater the backlog will be. There is a whole range of things that contribute to the case lengthening, but it is important to note that this situation is very variable across the country. The percentage of cases that can be completed in 26 weeks varies from court area to court area, but in all these things the general approach is that delay is a form of rationing. If we are making more demands on resources than we can deliver, we will get delay.

Dr Julie Doughty: For some reason, and I do not know the background, there is a serious shortage of judges at present. Although it sounds a little counterintuitive, the less judge time you have and the fewer judges you have, the less management there will be. Things become less efficient and that just builds in more and more delays. Occasionally I have heard that there are attempts to bring in more part-time judges to try to fill the spaces, but then that means that our most senior barristers are not available, so there just are not enough people to go around at that level in order to deal with the current caseload, it seems.

Professor Judith Masson: An element of that, though, is that one way of getting better judicial case management is to have judicial continuity, and the courts never achieved good levels of judicial continuity after the 2014 Act. A lot of courts were not able to deliver a single judge hearing a case and therefore controlling it. Without that, you will never get a smooth-running system.

Julie is right. There is a shortage of judges, but unless you deal with the demands placed by cases you will always have a shortage of judges. One shift that has happened is a shift away from the magistrates' court. There are all sorts of arguments about whether magistrates should do public law cases. Before the 2014 Act, they used to do quite a lot of them and now they do almost none. We cannot suddenly shift cases over to the magistrates' court now, because we have lost the expertise that magistrates and their legal advisers had. As I understand it, we are not using district judges' magistrates' courts for dealing with family cases in the way that we used to. They have been moved to crime.

Baroness Prashar: You said that there is variation across the country. Has anybody done a study where they are able to meet the time framework or not and what the reasons are for it?

Professor Judith Masson: The Courts Service produces figures for each quarter for each family justice area. Within each family justice area, committees are supposed to look at the problematic nature of those cases. The pandemic has reduced some of that work and the possibility of focusing on performance, but in the area I sit on there has been a lot of focus on performance. The committee does not have any control over the judiciary. I have said repeatedly on committee, "We will not get the cases being decided more quickly unless we have fewer hearings, because hearings are a demand on a court resource". If you are going up from three to five hearings on a case, you are bound to have cases taking longer by creating a backlog.

Baroness Prashar: It has been suggested to us that, given the complexity of the cases, there is need for flexibility, because if you stick rigidly to 26 weeks it is a straitjacket and can have a detrimental impact on casework.

Professor Judith Masson: If you create greater flexibility, you assume that the cases that need more time take more time. We do not have the evidence that that will happen. A very small proportion of cases have

contested problematic medical evidence, and those need experts and take time, but the majority of cases are not highly complex. They do not require additional time. The system already builds in the possibility of extensions for reasons.

Dr Julie Doughty: The system does have some flexibility and reasons for extensions. Following on from what some of the previous witnesses have said, there is one situation where it is important to allow a bit more time. If a potential kinship carer comes on the scene relatively late, which is fairly common for reasons you have already heard, the local authority social workers and all the services need sufficient time to make a thorough, robust and safe assessment of that kinship carer. There have been instances where judges, because they are very keen to keep to their record of under 26 weeks and keep the statistics looking good, have made demands for those sorts of assessments to be done in unrealistically short timeframes. That is an example I hear about quite often. Again, on the face of it, that flexibility is there, but it is not necessarily being applied in a flexible way.

Baroness Prashar: Thank you very much indeed. That is very helpful.

Q71 **Baroness Massey of Darwen:** This question builds on what has gone already to a certain extent. It is about the impact of the restrictions on expert witnesses and whether they should be relaxed. We know from research that social workers are increasingly seen as experts, but the perception among individual judges might be different. The social worker may know a family very well, but then an expert may be called in who takes over. I wonder what your view is on that. What impact are restrictions on expert witnesses having on the system?

Professor Judith Masson: We looked at this when we did the research, and we found the areas that used most experts also turned most experts down, which seems rather strange, but it seemed to be that solicitors, usually representing parents and sometimes representing local authorities, would ask for experts and see whether the court would grant them. In some areas, they pushed that envelope all the time. In fact, I had a PhD student who looked at social work expertise for her thesis. The knowledge of the family is really important and the idea that somebody with more qualifications, particularly a psychologist who met the family on one occasion, has better information is not borne out by the evidence. We have to bear in mind that, if the court appoints an expert, the local authority probably has to pay a share of that, so resources are being sucked out of local authorities when they need more resources, not fewer.

Baroness Massey of Darwen: What is the impact of these restrictions on expert witnesses? Does it lengthen the case? Does it make a less accurate case? Is it neglecting the needs of the families and so on?

Professor Judith Masson: The impact occurs when the judiciary allows expert appointments where they are not really necessarily, because those cases tend to take longer. The more experts you have, the longer a case

will take and the longer it will be before a decision is made for the child. Yet the quality of information in most cases does not really change. Practitioners know when you really need an expert, but you might ask for one when you do not really need one, because you see advantages in there being an expert.

Dr Julie Doughty: There are instances, perhaps with unexplained injuries or particularly complex medical conditions, where experts are absolutely necessary, and then there is a problem because there is a shortage of those particular experts, so that will lengthen a case. There is nothing that can be done about that in the current NHS set-up, but certainly if it is assessments of parenting and so on, I completely agree that, as has been said, the social workers in the local authorities and in Cafcass or Cafcass Cymru are normally perfectly capable of undertaking those assessments. It is just a legacy of distrust of social workers, unfortunately.

The Chair: I am so sorry. You have just reminded me that I meant to declare my interest at the beginning of the session. I am a former chair of Cafcass. It is over four years ago now since I was in that role, but I thought I ought to just mention that and say that, when experts were called unnecessarily, for all the reasons you have given, it undermined the professional standing and status of social workers quite often, so that was another important point.

Q72 **Baroness Blower:** Thank you and welcome to our witnesses. How are courts now scrutinising care plans, and is there enough scrutiny of aspects of the plan other than the long-term care of the child? We have been told that line-by-line scrutiny used to happen, but has all but disappeared. Dr Doughty, do you want to take that first?

Dr Julie Doughty: I do not really have a lot to say on this. I am not aware of any evidence. I hope Judith will have some information for you, but, in judgments I have read and cases I have known anything about, I have not seen instances of the judge immediately looking to the long-term permanence for a child and not taking into account the support needs or the existing and future relationships in the shorter term. I do not know logically how they could do that, but that is just my impression. I do not have any hard evidence about that.

Professor Judith Masson: There used to be more scrutiny of contact issues than there is now. I am currently doing a study on discharge of care orders. Some of the cases involve considerable scrutiny of the care plan, but, again, it is very variable. Most judges will not go into the sort of detail that they used to do, although they are often invited by parents' lawyers to do so, and sometimes when they are invited they will do. Again, it goes back to this lack of trust of the local authority, and a failure to realise that children's lives change and that there have to be changes in the plan because an adoptive placement is not found, or because a relative who was caring under a care order is no longer able to do so, and so it will not be a relative placement eventually leading to a special

guardianship. You cannot button everything down, however much the courts would like to do so, and parents' lawyers would sometimes like the court to do so, to constrain the local authority.

Q73 Baroness Lawrence of Clarendon: Good afternoon to you both. My question is about legal aid. I know Professor Masson mentioned a bit about legal aid at the beginning when she answered the first question. How has the Act interacted with other reforms to the family justice system, for example the changes to legal aid?

Professor Judith Masson: In public law, the legal aid has not changed, but, because private law legal aid was pretty well slashed so there is not very much left, a lot of lawyers who had been doing private law work moved to public law, so there was a dilution of expertise in public law work. The increased number of cases meant that there was work to be done in public law, so if they had not moved over perhaps there would have been other problems, but there was initially a dilution of expertise. In terms of private law, not only was there a removal of legal aid but, because of that, legal aid firms closed, so you got advice deserts. Victims of domestic abuse, for example, will qualify for legal aid subject to a means test, but even for the people who qualify for legal aid it is much harder to find a lawyer because there are just far fewer lawyers around.

Dr Julie Doughty: The large number of litigants in person now in private law cases is taking a disproportionate amount of court time. Traditionally, family lawyers had a vital role in negotiating, trying to settle, assisting their clients, focusing on what the relevant issues were legally and so forth. It is a myth that the family lawyers were dragging cases out and making them more expensive. That is not correct when we look in retrospect.

The only achievement of LASPO and the reductions in legal aid, as far as family courts are concerned, is that, yes, they have reduced the legal aid bill. Other stated aims at the time have not been achieved, and they probably reduced it at the expense of shifting that burden of expenditure to the Courts Service, because it is those working in the Courts Service who are having to deal with these cases where litigants in person, understandably, do not know how to conduct the cases and are therefore taking more time than if they had had some sort of advice.

Professor Judith Masson: There is another element to that, because there are cases going to court that lawyers would have headed off. With legal aid, a lawyer would have said, "No, it's not worth taking this to court" or "Try mediation". That has been lost. The mediation services closed because they were not getting the referrals from law firms.

Baroness Lawrence of Clarendon: Over the last couple of weeks we have been hearing about mediation and the fact that families are taking cases themselves through the lack of legal aid in order to get some sort of justice. Listening to what you are saying now, it makes sense, but at the end of the day the families are still suffering, because they are not able to get the support that they need.

The Chair: Just to clarify, do you know what the broad figures are for the number of cases going through the courts where individuals are litigants in person—ie representing themselves and not having a lawyer to represent them?

Professor Judith Masson: Yes, they are published in the family court quarterly statistics. The figure for 2021 was that there were 111,000 parties¹, and fewer than half of those were represented. About 40% of the applicants and about 25% of the respondents were represented, and everybody else was not. That is in private family law, because in public family law there is non-merits-tested legal aid for care proceedings. There is not for all other proceedings, but there is for care proceedings.

The Chair: As you say, there is a very important distinction between public law and private law, but thank you very much for that.

Q74 **Lord Brownlow of Shurlock Row:** Good afternoon, both of you. How has the presumption of the involvement of both parents in the life of the child after family separation affected proceedings and, in your opinion, should the presumption remain?

Dr Julie Doughty: The presumption was one of the reforms from the family justice review recommendations indirectly, because David Norgrove in his very thorough family justice review finally came to the conclusion that there should not be a statutory presumption for shared parenting, for want of a better term.

They relied a great deal on the history of what had happened with the Australian legislation and what had basically gone wrong there. They had a lot of evidence from Australia. That was his final conclusion, although it took him some time to come to it. However, the Government did not agree, and the coalition Government decided that they wanted to reinforce the belief that children should remain in contact with both parents after the parents separated by putting that in statute. Early research by Professor Felicity Kaganas on the effect of the presumption showed that it had had very little impact. There was already such a strong pro-contact culture among the judiciary that she came to the conclusion that the presumption was unnecessary and had not changed practice. She looked at that in 2018.

In more recent research by Jo Harwood, which was published last year, again she agrees that the presumption in itself does not seem to have had a great impact. However, alongside that, the Ministry of Justice harm report gathered evidence that the presumption was one of the factors that supported the pro-contact culture and, as a result, the harm report recommended that the presumption be reviewed. The Ministry of Justice said in June 2020 that it would review the presumption. That is nearly two years ago now.

¹ 111,000 is the figure for 2019. The total number of parties in private law children cases in 2021 was 101,000. The percentages given are approximately correct. The data are available at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2021> Table 11

I agree with those researchers and the research that the presumption itself probably did not change anything very much. However, if we are going to look at private law proceedings, domestic abuse issues, safety, harm and so forth in the holistic way that the harm report has recommended, it would not make much sense for the presumption to remain, so in the longer term it definitely does need reviewing. It would be very difficult to reconfigure everything conceptually if we had that presumption sitting there, but it was in a sense just reinforcing and codifying what most of the judges were already doing.

Lord Brownlow of Shurlock Row: That is very helpful. Thank you.

Professor Judith Masson: There is a further issue, in that the presumption has to be rebutted on evidence, and to rebut something on evidence you probably have to have a finding of fact hearing. You certainly have to have evidence. That could be in an unrepresented case, with both parties being questioned by the judge on oath. That is where the evidence comes from, but that is not a universal practice.

If you have to have a finding of fact hearing, one thing the harm report has found, which we had found in earlier research for the Family Justice Council, is that the judiciary was reluctant to hold finding of fact hearings and, in fact, does not have resources to hold finding of fact hearings because of court time, particularly if the parties are not represented. Any evidence except from the parties themselves is really difficult to get.

It reinforces the idea among the judiciary that we do not want to have finding of fact hearings and the presumption of contact, which has been pretty well established, but it is probably inappropriate itself because it seems to me to be based on the idea that that is all right for ordinary families. But ordinary families are not the people who are having to go to court to resolve disputes about children.

Q75 The Chair: Thank you. Before we turn to our final wrap-up question, can I sneak in one other quick question? It came up earlier in the session and is about mediation. I would be interested to hear your views on the impact of MIAMs and the trend towards compulsory mediation.

Dr Julie Doughty: As you have heard, there was a big drop off in MIAMs and mediation after the 2014 Act. That has taken a long while to pick up again. As Judith mentioned, a lot of mediation services closed. The one that I am involved in managed to hang on and things have improved. I have been informed that MIAMs are picking up quite well now because of online MIAMs. For all sorts of reasons, that works better. It is more convenient for some clients and so forth.

They work well, but there is an awful lot to pack in. The service only gets paid something like £84 for a MIAM. They have to pack everything into an hour with the particular person. That involves setting the whole thing up, assessing whether they are eligible for legal aid, screening out risks, checking that they are suitable for mediation, allowing that person to talk about their case and then informing them all about mediation and all the

other services that might be provided. It is really quite impractical. It needs to be better remunerated.

The other thing with mediation generally is that it is not a particularly well-paid profession, and it takes a very long time to train and be accredited as a mediator. That seriously needs to be looked at, because it takes years and years to be a legal aid-accredited mediator. We have only two legal aid providers in the whole of Wales. We have only one family mediation not-for-profit organisation in the whole of Wales. I am sure there is a similar picture across England.

The Chair: That is really helpful. Thank you very much for that.

Q76 Lord Cruddas: I have one quick question for you. What one change would you like to see made to the family justice system?

Professor Judith Masson: We need more and better data in the system, and it needs to be fed back to the courts in order to get much more similarity in decisions, much more consistency and equal justice across the court network. It is not just about substantive matters. It is also about procedure. We need to have a common procedure in order to get substantive matters decided in the same way, and that probably means a reduction in judicial discretion.

Dr Julie Doughty: As I am a member of the Transparency Project and a member of the President's Transparency Implementation Group, I would like to see more transparency. By that, I mean more publication of judgments on BAILII or on the National Archives, so that people can read about a whole range of family court judgments and not just the few that go up at the moment, controlled and safe media access to family courts and, chiming really with what Judith has just said, better data collection. One aspect of the Transparency Implementation Group is that the President wants to have better data collection. That is being looked at in quite a lot of detail in that group, I am glad to say, and one aspect of that is that he wants to be able to produce an annual report so that the public have a better understanding of what is happening across the whole country. It is not an answer, but it would serve to help to improve public legal education, public trust and confidence, and families' understanding of what might happen to them when they go to a court or what has happened to other people in the name of the public.

The Chair: There were some very interesting points there from both of you, so thank you very much indeed for that. Just before we close, were there any points that you were very keen to get across to us that we have not asked or you have not had an opportunity to say?

Professor Judith Masson: If I had been allowed two changes in the family justice system rather than one, we need much better recognition that it is a service and it has to be one that individuals can navigate without necessarily having lawyers. That probably means having an inquisitorial system rather than having an adversarial system, where the parties take their dispute to the court and the court hears their dispute from them and resolves it. It is far too complicated to bring a case before

the court when you do not have a lawyer, and that is not a suitable mechanism for dealing with family justice.

Dr Julie Doughty: I would agree. The only extra brief point I would like to bring to the committee's attention is that the evidence you have heard about adoption has been fascinating, and, as I said earlier, I have not heard anything I would disagree with, but it would be worth having a look at the system in Wales. You have been hearing about the system in England, and, because we have slightly different legislation, which I will not go into now, the system is rather different in Wales and it has been different since 2014. It may be worth the committee having a look at those differences.

The Chair: That compare and contrast work that you are suggesting is always helpful. There were very interesting points coming out in these final questions and some quite fundamental issues about how the family courts operate, so we will have to ponder long and hard on those. Could I thank you both very much? It has really helped us to segue from the quite concentrated look we have been having on adoption into the family justice system. The two are linked, but it has been very helpful indeed. Thank you for your time, and for sharing your thoughts and expertise with us.