



HOUSE OF LORDS

Children and Families Act 2014 Committee

Corrected oral evidence: Children and Families Act 2014

Monday 25 April 2022

3.15 pm

Watch the meeting

<https://parliamentlive.tv/event/index/1a64d8c6-23d3-42b9-8151-6150cb77472f>

Members present: Baroness Tyler of Enfield (The Chair); Lord Bach; Lord Cruddas; Baroness Lawrence of Clarendon; Baroness Massey of Darwen; Lord Mawson; Baroness Prashar; Lord Storey; Baroness Wyld.

Evidence Session No. 8

Heard in Public

Questions 77 - 86

Witnesses

I: Lisa Harker, Director, Nuffield Family Justice Observatory; Sarah Blackmore, Joint Head of Chambers, Spire Barristers; Hannah Markham QC, Head of the Family Team, 36 Family.

USE OF THE TRANSCRIPT

1. This is a corrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.
2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.
3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 14 days of receipt.

Examination of witnesses

Lisa Harker, Sarah Blackmore and Hannah Markham.

Q77 The Chair: Good afternoon, everyone. I welcome you to this, the eighth public session of the Children and Families Act 2014 Committee. The session is being broadcast online and a transcript will be taken. We have a very important session today looking at the family justice system, covering both public and private law. Before I invite our witnesses to introduce themselves, although it is no longer formally an interest that I need to declare, I wish to say for the record that my involvement with the family justice system came through being chair of Cafcass between 2012 and 2018, which is a little while ago now. Could I perhaps invite our three witnesses to introduce themselves very quickly before we move to the questions?

Lisa Harker: I am director of the Nuffield Family Justice Observatory, which seeks to improve the lives of children and families by bringing evidence, data and research to those working in the family justice system.

Sarah Blackmore: I am a family law barrister and joint head of chambers up in Leeds, where Hannah is now. A few years ago, I co-authored a book called *Reforming Family Justice: A Guide to the Family Court and the Children and Families Act 2014*. As a consequence of how things have been going since then, we did a second update to that book in 2016, called *Family Justice Reformed: A Guide to the Family Court Since the Children and Families Act 2014*. I have been a family law barrister in practice for about 20 years in children's cases.

Hannah Markham: Bizarrely, Sarah is in London and here I am up in Leeds. I am currently the chair of the Family Law Bar Association, and chair of Women in Family Law. I have practised in public and private law and in human rights-type family cases almost exclusively for 12 years now, but I have been practising for 23 years. In preparation for today, I have a focus on children cases so I have taken some soundings from colleagues who work in the financial aspect of family law.

Q78 The Chair: I thank all three of you for giving your time this afternoon. We are very lucky to have such a distinguished panel, so thank you very much indeed. I will kick off with a very general question. I would like to get your take on what big challenge or challenges the family justice system faces. To give a little context, as a committee we are particularly interested in whether changes in legislation or statutory guidance are needed to address those challenges, or whether it is more to do with things outside the legislation itself, such as resources, be that local authorities, Cafcass or court time, and cultural issues.

Lisa Harker: You are asking me what the biggest challenge currently facing the system is. That is quite a tricky question to answer succinctly, but I would put my finger on the fact that the family courts are being asked to make decisions about families who are facing the kinds of problems that the courts do not have the power to solve. We are talking about families with mental health problems who face poverty, discrimination, housing difficulties and so on, where what is open to the court is largely deciding with whom the child should live. Increasingly, the court is in a very difficult place, knowing that perhaps families have not received the support they might have received prior to the point of court, but also recognising that the children are at risk of significant harm. To give an example of the nature of this problem, the observatory has been looking at the experiences and health histories of mothers whose children subsequently go on to be removed into care. We found in our study in Wales that over half of mothers whose children had subsequently been removed had appeared at A&E or had a GP appointment for a serious mental health problem in the two years prior to proceedings.

There is clearly a mental health crisis going on, not a parenting crisis, yet the courts are being asked to make decisions in those kinds of contexts. There is also the feeling that, once those decisions are made, perhaps the underlying problems of the family do not go on to be addressed. Half of the mothers of infants taken into care have previously had a child removed, so we are seeing the perpetuation.

The real challenge facing the family courts at the moment is that they do not have the power to deal with the underlying problems that the families before them are facing.

The Chair: That is helpful and certainly chimes with other evidence we have received about the importance of mental health issues. Thank you very much. I am sure we will pick these issues up as we move forward.

Sarah Blackmore: On top of the mental health issues that Lisa has just explained, the family court is facing a tsunami of applications at the moment. I am not entirely sure whether that is a result of the pandemic or whether it was there in any event, but everybody in the family justice system, whether it is the lawyers, the judges, the court, the social workers or Cafcass, is working at the outermost limits of their capacity. Hannah is currently in Leeds because she is waiting outside court. We are dealing with myriad cases every day, much more than we would have done before remote working came in, for example.

To my mind it is that so many cases need to be dealt with, whether they are care proceedings or private law proceedings that have been brought by parents who have separated. It does not matter.

It seems to me that there is not enough court time, court hours or judges to deal with them. The answer to your question about whether there is a need for further statutory guidance or further legislation is that I am not sure. Because of the tsunami of cases, it is firefighting all the time. That is my take on the real challenge at the moment.

The Chair: That is really helpful. Is the tsunami, as you describe it, affecting public and private equally?

Sarah Blackmore: It is. The majority of litigants in the private law cases coming before the court do not have access to free or reasonably affordable legal advice on whether it is the right way to go, so the applications are being issued by those litigants in person and are then clogging up the system to a certain extent.

The Chair: I know some colleagues around the table want to follow up on the legal advice point a little later.

Hannah Markham: I echo the two points made by Lisa and Sarah. In preparing for today I spoke to a colleague who is a lead lawyer in local authorities in London. She told me that the casework for London local authorities—I am assuming it is roughly the same around the country—has increased almost 50%. Before the current pandemic, the London Borough of Barnet, for example, was dealing with case loads of 30 to 35 cases; it is now at 55 to 60. Extraordinarily, the London Borough of Enfield has 93 current live public law cases. Madam Chair, from being in Cafcass, you will know how high that is.

The problem is linked to myriad issues, which we will talk about, such as the turnover of professionals, social workers and experts, but also the delays. Normally we have the aspirational 26 weeks to get through casework, but now most cases are aged between six and 24 months.

On top of that demand, you then have the delays in private law proceedings. I am aware of this because of my involvement in practitioners' meetings. So that you are all aware, we have meetings every fortnight with either the President or Mrs Justice Theis and with the chairs of Resolution, the Law Society and the ALC, so we are able to share our stories from around the country. In private law proceedings people are waiting between six and nine months for their first hearing, which is extraordinary.

How can we resolve it? Sarah has already picked up on some thoughts, such as more judges and more courtrooms, but perhaps there are other ways, such as incentivising settling through ADR, particularly in finance. Can we look at any changes to the statutory scheme that penalises in costs those who do not use ADR to try to settle? Part 3 in the Family Procedure Rules could be looked at to assist in that.

Can we try to move more of the family finance matters away from court into private ADR or FDR cases? Can we use arbitration or mediation more widely in private law proceedings? Again, you have to incentivise it away from the courtroom. In litigious cases there is often a reason why somebody wants the delay and wants to be in front of the court, so when looking at costs for behaviour and conduct, a statutory provision might assist.

A colleague flagged this and I am grateful to them for doing so: at the moment, a lot of international cases, the abduction cases, take an inordinate amount of time. Could there be some changes to the statutory guidance to take away the reserved nature of those cases, so that more district judges and/or circuit judges could hear them? There are some ways in which we can look at trying to manage and take the pressures off, which will allow the public law cases and the very difficult private law cases, in which children are suffering, to have the court time, support and focus they need. Finally, I would pick up on what Lisa said about a really serious problem, which is the mental health issue. It is not just the adults. CAMHS is in crisis. The mental health support for children is in dire straits at the moment across Great Britain.

The Chair: Thank you. That is very helpful, particularly taking us through the case numbers involved, which are quite staggering to hear. As a very quick follow-up, related to something Lisa said at the beginning, do we have figures for how many of the public law cases involve children being taken into care multiple times? I shall never forget a project I visited and speaking to a mother who was in court because her seventh child was being taken into care.

Hannah Markham: Lisa probably has more. I am sure that we can assist in getting that detail. Lisa may already have it, but it is the type of detail that local family justice boards and Cafcass could provide.

Lisa Harker: It is about one in three.

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

Q79 Lord Bach: You all know, of course, that the Act of Parliament we are looking at was put into practice less than two years after the LASPO Act came into effect on 1 April 2013. I am particularly interested in what Sarah had to say in relation to the need for legal aid. We know that in public law cases legal aid survives, but lots was taken from it in private law cases. How crucial, in the serious situation that there clearly seems to be, is the absence of legal aid, particularly at the advice stage, as a way of helping to resolve some of these difficulties? Perhaps I could ask Sarah first, as she mentioned legal aid.

Sarah Blackmore: The need for litigants to have that advice at the very beginning of private law proceedings, usually with heightened emotions and almost an inability to think straight, is

critical. I do a lot of work pro bono through what used to be called the Bar Pro Bono Unit—it is now a scheme called Advocate—as a reviewer of cases that come in needing assistance from barristers, as well as representing parents themselves, usually fathers, who are not able to access decent, or any, legal advice before launching into an application to the court or defending an application made against them.

Although there is a willingness across the Bar and the legal profession generally to assist, it cannot assist all those cases sufficiently to prevent applications being issued, which, as Hannah has already outlined, could perhaps be better dealt with through the alternative dispute resolution process.

I know the Act was intended to ensure that many more private law cases were dealt with by way of mediation in the first instance, but I cannot see in practice how that has actually happened. There is potentially legal aid available for that mediation, but it does not seem to follow through in practice, particularly for a litigant in person. They simply say, “I’m not prepared to involve myself with mediation”, and then it is an application to court. To answer your question, yes, it is critical that there be legal advice at the very beginning of the process.

Lisa Harker: Yes, it is definitely contributing to backlog and the quality of evidence. We did some research on the nature of applicants coming into private law proceedings pre and post LASPO, and we found that there was a decline in the number of private law cases immediately after the legal aid changes were introduced. Cases have now returned to pre-LASPO levels, but there has been a decline in the number of applications from parents living in disadvantaged areas, young parents and parents with young children. We are concerned that there may also be a justice gap in terms of who makes it into proceedings, which has been rather hidden from view today and needs to be considered.

Hannah Markham: The MIAM voucher scheme, which is fairly new, is up and running, but I am not sure that it is doing what is actually needed, as both Sarah and Lisa have identified, which is getting to the people who perhaps fall between the cracks. I was really interested in her numbers about the young parents and young people.

There have almost been false savings. There have been difficulties in some complex cases with victims and possible abusers or perpetrators cross-examining, and the Domestic Abuse Act is now being considered in order to fill in the gaps. It has had a serious detrimental impact on the entirety of family justice, not least access to family justice, and on the times the court needs to work with litigants in person to resolve proceedings.

Q80 Baroness Prashar: My question is about the 26-week

timeframe. How important do you think it is? What is required to fulfil the 26-week timeframe without damaging the outcomes?

Sarah Blackmore: To my mind, the 26 weeks was achievable at the time the Act came into force. Everything that had been set up by the public law outline process and the Act itself was a great idea in theory and, at least in the first few months after the Act came into force, was achievable within the court process. The social workers were preparing, as they should have done, prior to issuing the care proceedings, and the courts and the family justice system itself were on board with what was expected.

For avoiding delay for children and decisions being made as to their futures it was a great idea, but because of the way in which society has developed, particularly over the last couple of years during the pandemic, social workers, as I said at the outset, are now firefighting to a large extent, and are fearful of being criticised for the work they do with families and for either stepping in too soon or not stepping in early enough and bringing the case to court.

I do not have any figures for it, I am afraid, but it is my experience that social workers and local authorities will issue care proceedings to get a case in front of the court almost to protect their own professional credibility, which then clogs the system up.

Assessments may happen during that 26-week period, but then there is not enough court time available. You can get to court and be told, "Yes, you can have a final hearing of this matter, but it won't be for at least another six months", which then takes you outside the 26 weeks.

That damages outcomes for children, but is that not a chicken and egg situation in the sense that you are back to the vicious circle of not enough resources and not enough court time. That is my initial take on it.

Lisa Harker: I agree that timely decision-making is crucial for children, as we know from all the research about the impact of delay on children and the need for consistent relationships in their lives, particularly at a young age. The latest Cafcass quarterly data suggests that cases are being heard within 44 weeks, but there is huge regional variation. If you look at different core areas, the quickest is 14 weeks and the longest is now 69 weeks. There is quite a bit of variation around the country.

Reducing delay is really important, but there are a couple of caveats. It is crucial to keep the needs of the child in mind at a time when you are also trying to give parents sufficient time to make the change they need in their lives. We have seen from the experience of the family drugs and alcohol court that it is possible to go beyond 26 weeks and still make good decisions in the best interests of children while stretching that time limit.

Similarly, the evidence and research we published on special guardianship orders suggests that a fight to meet the 26-week deadline can sometimes work against children, because insufficient time has been given to consider the relatives concerned and their needs. An unintended consequence of the 26-week rule was that it became the success measure through which everything was judged, and we ought to go back to thinking about the best interests of the child. Yes, focus on timeliness, but also on the impact and outcomes for children, which is ultimately the most important thing.

Baroness Prashar: What is the role of the judiciary in achieving the 26 weeks?

Hannah Markham: I was on the Public Law Working Group led by Mr Justice Keehan, and we talked about the role of the judiciary in terms of the 26 weeks. That is perhaps the wrong focus, because, as Lisa and Sarah have just articulated, it might be easy to say that judicial continuity is important, for example, but there are so many other variables and factors around that 26 weeks.

Taking a step back, the judiciary has been proactive, led by Sir Andrew McFarlane, President of the Family Division, in asking Sir Michael Keehan to lead the Public Law Working Group. He brought together a huge variety of professionals to look at what could be done to keep the 26-week ideology at the forefront in our minds but along with everything that Lisa and Sarah have just mentioned: thinking about the children and about the cases where more time may be more beneficial, and looking at the risks, which we became aware of, to children who were placed under special guardianship orders too quickly and without proper support.

A neat answer to that question is that the more often we have judicial continuity in proceedings, the easier it is. That is one good outcome, but it is too small a box to put that point into, if I am making sense. You need to stand back and look at everything else that is happening, including the continuity of social workers and of guardians. It is an obvious point that if you are going to be in court for 24 months, you are more likely to have turnover of guardians and social workers than if you are in court for six months. The judges can do what they can to keep it on track, but there are so many other variables.

The judiciary is leading from the top, which is important. We had guidance from Sir Andrew early in March on case management and making every case matter, looking at the role of the advocates and working together as a team. The judiciary can lead in that way, but we have systemic difficulties throughout our family justice system that will undermine even the best intentions of the judiciary at the moment.

The Chair: Lisa, could I just check that I heard you right and that

the shortest period was 14 weeks?

Lisa Harker: Yes.

The Chair: That does seem extraordinarily short.

Q81 **Lord Mawson:** This is a wider question in relation to what Hannah was saying, because in the last few years in my work life I have had to turn my gears into the court system. As a person who has not spent my life in the court system apart from sometimes having to speak for people in court, I was rather surprised by what I saw, which is a fundamentally broken system. It is fragmented and not joined up in all sorts of ways.

I suggest that what you are describing here for very vulnerable children and families is the thin edge of a wedge of a much bigger broken system, and that throwing money at it or anything else will not solve the problem. There is something more fundamental going on here that is a real source of difficulty, and you are describing one aspect of it.

Do you think that is fair, Hannah? You have spent a lot of time in these systems. I have spent a lot of my life trying to mend broken pieces of the public sector, not in the courts, but having had a look at it recently I think it is pretty seriously broken. Maybe I am wrong.

Hannah Markham: It is a system that I have worked in for my entire adult working life, so I would be very sad and troubled if I agreed with you that it is so broken. It is in dire need of external financial input and support at many levels. For example, if you had a local authority practitioner speaking to you now, they would highlight the need for training, as I am sure we will when we talk about social workers. We need more government input into local authority support. You have heard Lisa talking about mental health and education support.

The family law justice system is working, because it is led by people who dedicate their time and who work cohesively together. In the Public Law Working Group, for example, I have seen teams from the Family Rights Group, Cafcass, education, barristers, solicitors and judges coming together in their own time to share their views and to think about keeping it on track. I would not say that it is fundamentally broken; I would be hard pushed to say that. I would be interested to hear Lisa's point of view.

Just so that people know, even the liaison between Lisa at Nuffield and the Family Bar, for example, is up and running, and working. As long as we are all still driven to come together and talk about it, it is not yet entirely broken, but it needs a great deal of input, proper reflection and not brushing things under the carpet; otherwise, it will get worse and it may become broken.

Lisa Harker: There is a danger in trying to fix the problems we face by looking at only one part of the system. We are all saying

that that will not solve the problems. For example, adding more judges to a system that is fundamentally failing families before they get to the court is not solving a problem.

There are huge regional differences in almost every area of family justice that you look at. The data that we have on the family justice system is in its infancy but improving, and a huge amount could be achieved by sharing that information and trying to understand why some areas seem to be working better than others. There are grounds for hope, even in a system that is not broken but buckling.

Sarah Blackmore: On the point about whether the system is broken, I fully agree with Hannah. We need a bit of a shift in what society believes is an important public service. We have a health system that is free at the point of need, we have education that is free at the point of need, but we do not have access to justice free at the point of need. I do not know how that comes about with the fat cat lawyer argument. We could never get to that point, but I just wanted to make that point.

Q82 **Lord Cruddas:** I will start off with Hannah, because she is in court today. What has been the impact of the restrictions on expert witnesses? Is the quality of expert evidence in the family courts sufficient?

Hannah Markham: To begin with, it impacts on your 26 weeks, because we have an extraordinarily difficult time at the moment trying to get expert witnesses. It depends on the type of witness that you are looking for. In my mind at the moment are medical experts, where you have cases of NAI and you need radiologists or paediatricians. In the very sad cases where you have a death of a child, there are certain experts that we have only one of in the country, so you can sometimes wait a year to get a report off that expert.

In relation to the restriction on expert witnesses in public and private law, some extraordinary, innovative work is being undertaken, led by Mr Justice David Williams, who is trying to think about different ways to encourage experts to engage in family cases. They now have regional court groups, led by a judge and a local expert, to try to encourage experts to take part in both public and private law proceedings.

What is difficult is where, in a care case for example, you are struggling to get a paediatrician and can identify two paediatricians but they both charge an hourly rate that is outside Legal Aid Agency rates. You then have to get prior authority. Prior authority can take time, because it is all online, so then you get delays because you cannot get your expert in time. You then have to go to the local authority and say, "If we can't get prior authority, and the Legal Aid Agency says that it will pay only X an hour and we need to top up, can you, poor cash-strapped local authority, please top it

up?" We have difficulties at many levels in getting experts into proceedings, and they all lead to delay for the children. I do not know whether I have quite answered your question.

I also need to reflect the fact, as I said I would to several members of my association, that there is a real question at the moment about the involvement of experts. Do we cross-examine all of them or do we try to manage challenge through asking questions? There is a real concern about the loss of proper challenge to experts, because there are many cases where the outcomes for children have changed because of the cross-examination of experts, for example on genetic disorders, or just because the assessment of facts has led to different outcomes.

There is a real issue about experts in private and public law. At the moment, it is on many levels, but the court, the judiciary, the teams and groups of professionals who work in the family justice system are trying to find ways to manage it with creativity and adaptability.

Lisa Harker: It was a very interesting picture from Hannah. I understand that the work that Justice Williams has been doing is also drawing attention to questions about the quality of expert witnesses, but this is a very good example of an area where there is insufficient data available. HMCTS may well have data that tells us who is using expert witnesses in what circumstances and in which areas, but we have yet to see it. We ought to be tracking the use of expert witnesses systematically across the system, and understanding where expert witnesses are being used differently or where there are major gaps. I would just draw attention to the fact that we need to improve data in this area.

Sarah Blackmore: It was interesting to hear from Lisa that that data is not available, because to my mind that is what was intended by the Act and the case law: that it at least be thought about and brought to the fore where a court is deciding whether to instruct an expert and needs to meet a "necessary" test.

It is now vital to get that data up and running, because, thinking about cases that are not at the non-accidental injury level that Hannah has talked about but normal run-of-the-mill cases such as potential neglect, in my experience more recently there has been a reversion to how matters used to be before the Act, which is of applications being made for an expert witness who is an independent social worker to carry out an assessment of a family or a parent's ability to parent their child.

Ordinarily that should be the remit of the local authority, but there seem to be an increasing number of cases where the applications are being made for an independent social worker, which then drags out the 26 weeks. It also begs the question whether that is necessary. The answer, nine times out of 10, is that it is, because

we do not have capacity in the local authority to undertake that piece of work. I am not sure that the restriction on the use of experts that was perhaps intended when the Act first came into being is still the case in practice.

Lord Cruddas: The committee has heard evidence that social workers may not be viewed as experts in some courts, and that is part of a legacy of distrust of social workers. In your experience, are social workers viewed as experts in the court? If not, how could their professional status be enhanced?

Lisa Harker: I have certainly come across that view within the system. It strikes me that there are social workers who are very unconfident in dealing with a court. It might be wise to look at the training that social workers get and the information they receive, because there is a surprising lack of fundamental knowledge among some social workers about what to expect in proceedings. That is definitely one of the key issues to consider.

We do not have a definitive picture of what is going on here and to what extent this is a question of continuity of social workers and pressures on the local authority, to what extent it is being driven by the opinion of the judiciary, and what the availability of expert witnesses might be in different parts of the country. There is an enormous amount to unpick there.

Sarah Blackmore: From my experience, judges do treat social workers as experts in their fields, but they are becoming increasingly frustrated, as are practitioners, by the capacity of a social worker who is allocated to the case to undertake the assessment necessary to provide that evidence to the court. I do not get any sense of judges not taking a social worker's professional opinion and professional work as expert in that sense. It is more a question of frustration, because there is not that continuity of social worker due to the pressures of work. They are going off sick and they are being replaced by other social workers. To get one person to do an overall assessment, the quickest and the easiest way seems to be by giving permission for an independent social worker to give that evidence.

Hannah Markham: I had quite a lot of feedback on this from members of my association. I asked the team to give me some views. There are some really good social workers out there, and there are some social workers who absolutely are experts in what they do, but perhaps the focus on the term "expert" is misleading. They are professionals, and they will be professionals with a whole arc of different experience. Some of them are more expert and accomplished in what they do. Others perhaps need far more guidance and training. They need better legal oversight so that the final evidence they produce for the court is balanced, is nuanced and looks at different aspects of the parenting. They need time and

space in which to provide their evidence and undertake their assessment for the court. We are back to the recognition—Lisa and Sarah mentioned this earlier—that this is a really important public service.

There has been a serious increase—particularly in the London area and, I understand, more widely too—in social workers from outside our jurisdiction coming in, because we simply cannot encourage enough people into the job. It is about recognising the skillset and ensuring that there is good training in place so that a professional can acquire the expertise in the work they do.

Q83 Baroness Wyld: I want to ask specifically about the presumption of involvement of both parents in the life of a child, which in the majority of cases, as I understand, has not made a huge amount of difference. I guess we were concerned specifically about the possibility that, in a minority of cases, it exposes children to parents who might be abusive. I would be interested in your views on that.

Sarah Blackmore: I am not sure that it has had a major impact on the family court and the way the court has always approached private law cases, even before the Act and before that presumption came in. The starting point has always been that a child has a right to a relationship with both its parents to the same extent, unless and until there are some reasons why that should not happen. From representing fathers, for example, there has been a sense that the family justice system always finds in favour of the mother in a private law case, and that largely continues. A lot of work has been done—I am sure Hannah will be able to assist further—under Mr Justice Cobb, as he then was, in respect of the private law child arrangements programme, et cetera, and the bringing in of practice direction 12J in respect of domestic abuse allegations and those being formulated and addressed by the court at an early stage. Hannah has already mentioned the introduction of the Domestic Abuse Act, which brings into play the fact that potential victims should not be examined by their potential abusers. There are safeguards in place. There is a greater recognition from the court, if it was not there before, of coercive control and those types of issues, meaning that the family court is, as it always has been, treating the child's best interests as paramount. It is keeping them at the forefront of all decision-making, but keeping the equality, almost, of both parents in mind. The protections are still there.

Baroness Wyld: You think that it should stay, in other words.

Sarah Blackmore: Yes. It has not had a detrimental impact, but equally I do not think it has had any particular impact on the way in which the family court deals with those types of cases.

Baroness Wyld: That is really interesting.

Lisa Harker: I gave evidence to the Justice Committee in the pre-legislative stage of the Bill against the introduction of a presumption of contact or involvement. At the time I was very worried that it might water down the paramountcy principle. I could find no evidence at that stage that there was a bias in the way the courts were deciding cases, despite, obviously, very strong views to the contrary. As Sarah says, there is no evidence that it has had an impact, so my worst fears have not played out. Should it remain? I think it should not, for the same reasons why I thought it should not have been introduced in the first place. We have the paramountcy principle. We do not need to water that down with any other presumption. I am very aware of the concerns of many about the fact that there may be pro-contact opinions affecting decisions. I am not sure that that is fully evidenced, other than the examples of some very worrying cases.

To be honest, whether this exists in law or not, it does not take away from the very difficult decisions that have to be made in relation to contact and involvement, particularly in private law proceedings. It is very interesting to contrast the way we handle these situations in public law and in private law cases. In public law, there is a presumption of contact, and in the vast majority of cases we manage contact where it is in the best interests of the child that they are carefully supported and managed. In private law, we do not have the resources to manage that contact in the same way, and decisions are obviously being made that take into account the impact on the parent with whom the child is living. These are very difficult decisions and, no matter the language in the Act, it does not take away how difficult they are.

Hannah Markham: I do not have much to add to those two submissions. Perhaps jumping to your B point, the change to the language used has made a difference. The use of "live with" is significant and has changed the way some orders are made. It makes a massive difference to the way parents see winners and losers if you have a "live with" order. Children just have two homes when mummy and daddy, or mummy and mummy, separate. The time you spend with either parent does not matter if you know that you live with parent A on these days and parent B on the other days. That can actually take some of the fight out of the child arrangements that are made.

The language around the orders has made a bit of a difference. I agree with both Lisa and Sarah as to whether presumption of a relationship has changed. I do not necessarily agree with Lisa about whether it should remain in place. She also highlighted an ongoing tension between the way we manage some of the more difficult private law cases and the way they would be managed if

they were public law. That is probably resource-led, and we all know that Cafcass is in a dire situation at the moment.

Baroness Wyld: They were really helpful, clear answers. Thank you very much.

The Chair: These are all very big issues, but time is pressing. We need to move on.

Q84 **Baroness Massey of Darwen:** My question is in two parts. One is for Lisa, because it is about the Family Justice Observatory research. What can you tell us about the research on children's experiences of private law proceedings, because I note that children are feeling unheard in proceedings, that some have had positive experiences, and that children want to be involved in decision-making? Perhaps you can tell us a little about that.

Lisa Harker: I will try to be brief, given the time constraints. We have recently reviewed the research evidence on children's participation in private law proceedings. There is an absence of research generally, and it is quite old; most of the research in England and Wales was conducted around the early 2000s, largely with children aged 10 and above, and of course most children in the system are younger than that. There is a need for further research, but the research that does exist has some clear messages in it. We have pulled out six.

The first will not surprise you. It is that parental separation can be very stressful for children and can have a big impact on their lives, not just in the short term but well into adulthood, which tells us that the court system itself should be thinking about how to minimise stress and not exacerbate it in the process.

Secondly, children often feel very left in the dark about what is happening in their parents' separation. Children often seem to know more than their parents think about what is going on. Adults are reticent to share information, whereas children are filling in the gaps themselves and thinking about what might be happening. There is a need for accurate and timely information for children, and for thinking about how to provide information in child-focused ways.

Thirdly, children feel unheard in court proceedings, and this can cause them distress. When they report positive experiences of participating, it is often not about the outcome of the decision, but about the way it is made and communicated. Relatively simple changes such as communicating the final decision in a child-friendly way, a letter from the judge for example, or ensuring that proceedings have started with explaining the process to children can be very beneficial.

Fourthly, we know that children want to be involved in decision-making, and that there is a distinction between being

involved and feeling responsible for the decision. That is an important distinction for us to observe.

Fifthly, children are engaged with a lot of professionals during the process of a parent separation, and there are adults around them, for example in schools, who could be supporting them more effectively.

Finally, children have strong views about contact and they want their views to be heard. Again, this has to be carefully supported in the context of what we have just talked about.

Overall, this is an area where, for a system that does put the child's interest at the forefront, we could do better in ensuring that children and young people feel heard and feel able to participate in meaningful ways during proceedings.

Baroness Massey of Darwen: Do you think that one of the problems might be the way in which people address children? Do people get special training for that? I know that some children under 10 are perfectly capable of answering questions in a really quite healthy way. I wonder about the professionals talking to them. Is this an issue or not?

Lisa Harker: That is a very fair point. There is a range of levels of confidence, if I might put it that way, in terms of experience of communicating with children and young people. I am sure you can become a very good barrister and a very good judge without much experience or training in that area. It is something that perhaps the judicial college could pick up and support. We see examples of great practice from lawyers, judges and magistrates who have developed fantastic ways of communicating with young people. There is a lot to draw on.

Baroness Massey of Darwen: It would be nice to know about some of that. Thank you.

This question is for anybody now. Is the voice of the child sufficiently respected in these procedures in the family law system?

Sarah Blackmore: From my perspective, yes, absolutely. It is interesting hearing what Lisa has to say about teaching judges and us lawyers how to communicate effectively to children. As family law practitioners, we are dealing with cases involving children, and it is vital that they understand exactly what is happening and why. I know of three judges, before whom I regularly appear, who, at the end of the proceedings, whether it is public or private law, will always write a letter to the children in addition to any judgment that they have given, setting out in child-friendly ways why they have come to the decision they have. As Lisa said, that is a start, but we need to progress that throughout.

Any decision made in respect of the child in the family court is to be done in their best interests, with them being paramount in the decision. Absolutely every professional involved in the family

courts, to my mind, deals with that on the basis that we need to hear that child, so the voice is heard.

Hannah Markham: We can be better, particularly in public law cases, and this comes back to the current crisis in Cafcass. I have been doing this job long enough to know that, sadly, we are a long way away from where we were 10 or 15 years ago, when Cafcass would have the time and the luxury—it is now a luxury—to pop in and see children more often at school, and to make them feel more included in the process. It is a long way away from when teachers would be involved in and know what was going on. Now we seem to have this bold line between school and the process. We are not allowed to tell schools what is happening and they do not see the orders.

There are simple things that we can do to learn. You are probably getting a sense of the one thing I would change. Cafcass needs our love and attention, because it really is the bedrock of listening to children. It is in dire need of support and financial support.

Q85 Baroness Lawrence of Clarendon: My question is about the implementation and whether the local authority sees fostering for adoption in the same way as the courts, which prefer to look at what the legislation is trying to say. Hannah, how can we ensure that the changes brought about by legislation such as the 2014 Act are filtering through into the practice of the courts?

Hannah Markham: I am afraid I have to say that it is about support, training and guidance in the social work department. If we are presented with a care plan that has an active placement, which is fostering to adopt, the court process will support and endorse that. The difficulty is what happens on the ground when fostering agencies have the placements available for fostering for adoption, and what training is involved, not only for social workers working with the families to support that placement, but even for having agency in the different teams.

I use the word “agency” in two ways: agency as the will, desire and ability to do so, but also formal agency as a setting in which people are able to identify those who can foster to adopt or support the adopted placements in the way the legislation sets out. We have the skeleton there and the framework for it, but we just need more training on the ground to support it.

There have been changes. I know that there has been a movement away from each local authority having its own adoption team, for example, and moving into a bigger format. I understand that the wider pool that has given has been helpful, but we are a tired country. People are coming out of a pandemic. People are only just managing to care for their own families. Reaching out and being able to take in, support and think about being foster carers or adopting is quite difficult. We will have a knock-on effect in the

next 18, 24 and 36 months, unfortunately, but the framework is there.

Baroness Lawrence of Clarendon: Lisa, our understanding is that the local authority starts from the premise of fostering and looks at how fostering can move into adoption, but the court sees it a little differently. What is your view?

Lisa Harker: More generically, there is the absence of an opportunity to get round a table and have discussions between members of the judiciary and local authorities, not just about that issue but about lots of issues. When the family justice review was done over a decade ago, Sir David Norgrove commented that we did not really have a system that functioned like a system. Many of his recommendations were not implemented. Some of them were, but many of them were not.

We still have a system where leadership is very diffuse and there are huge challenges to judicial time to look beyond the court. Local family justice boards are functioning very differently around the country. Some are functioning well, but some are hardly functioning at all. There is too little time to get round a table and look at differences between parts of the country and why people are operating differently. Data is inadequate. If we could fix some of those problems, we might create a system where you could pose those challenges to the system and the system would have the means to resolve them, but at the moment the family justice system is not really operating like a system.

Sarah Blackmore: What Lisa and Hannah have both said is accurate. It is about getting a cohesive system together to ensure that it can function properly.

Q86 The Chair: Lisa, you have talked two or three times about regional variation, and you have just talked about the very different ways in which different local family justice boards operate. Is there anything that you could let us have in writing so that we could start to try to understand that? It is such an important point. You have given some suggestions already, but bearing in mind that we have virtually no time left, is there one change that you would like to see made to the family justice system that you have not already offered us? I know that you have already offered us some ideas.

Sarah Blackmore: I concur with what Hannah said about Cafcass having more support. I will defer to her, if I may.

Hannah Markham: Cafcass needs input, support, guidance and more financial support. It needs more people in it. It is the bedrock of our voice for children and our support. Going back 10 to 15 years, if contact was not working, your Cafcass officer would go in and take that child and that family under their wing. They would go in on a Saturday and on a Sunday. They would get that contact;

they would sort it out. They cannot do that now, and that is having an impact on almost everything we have said about the breakdown of the system. Does the child feel included? Is the child feeling heard?

In public law proceedings, I have so many cases I could tell you about where two or three guardians have been involved and so the child does not have continuity. There are lots of reasons for that. When you go to any of the courts in England and Wales at the moment and ask for a Cafcass report, you are lucky if you get one within 14 or 16 weeks. Sometimes you are lucky if you get it in 24 weeks. It is in crisis and, if Cafcass breaks, I really worry about what happens with our system. It is on the verge of breaking, so Cafcass needs our support.

Lisa Harker: We have not talked about the role the courts could play in adopting more of a problem-solving approach. There is a huge amount that we can learn from the family drug and alcohol court, using the authority of the judge, convening a range of services to support families better, and applying that principle not just in public law but in private law, where the vulnerabilities of families are also acute.

The Chair: Thank you very much indeed. It has been a fascinating session. I know that we have gone over by a few minutes, but we have covered an awful lot of ground and you have given us some very clear, concise and important evidence. We are very grateful to you.