HOUSE OF LORDS

Children and Families Act 2014 Committee

Corrected oral evidence: Children and Families Act 2014

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Members present: Baroness Tyler of Enfield (The Chair); Lord Bach; Baroness Bertin; Lord Brownlow of Shurlock Row; Lord Mawson; Baroness Prashar.

Evidence Session No. 10 Heard in Public Questions 93 - 102

Witnesses

I: Mavis Maclean, CBE, Senior Research Associate, Department of Social Policy and Innovation, University of Oxford; Sir James Munby, former President of the Family Division and Head of Family Justice.

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Examination of Witnesses

Mavis Maclean and Sir James Munby.

Q93 **The Chair:** Welcome back to this, the 10th public session of the Select Committee on the Children and Families Act 2014. I thank both of our witnesses very much for agreeing to attend this session. We are very much looking forward to hearing what you have to say. Just before I ask you to both introduce yourselves, if I could just say for the record that Sir James Munby is a retired judge and is here in a personal capacity, rather than as a representative of the serving judiciary, and we will, of course, not be asking him about the merits of individual cases.

Having made that opening statement, could I ask you to introduce yourselves, please?

Mavis Maclean: I am from the University of Oxford. I have been doing research into the family justice system for 20 years or more. My obsession is to find out who is doing what. I do not do big questionnaires and collect huge numbers. I just annoy people by following them around and trying to see whether they are doing what everybody thinks they are doing or what they think they ought to be doing, or just trying to unravel the jigsaw a bit.

My interest is also in comparative work internationally and at the moment my focus has been on the relationship between welfare and justice: how do they mesh together in a family justice system and what do we want from our family courts? What do we want them to do? We are always cross with them and worried about them, but I am never quite sure what we want.

Sir James Munby: I was a family judge from 2000 until 2018. From January 2013 until I retired in July 2018, I was the President of the Family Division. Bearing in mind the subject of this afternoon's session, could I just make this point? Because of the date of my appointment, I was not concerned personally with the legislative process which led to the Act and it is now the best part of four years since I retired, so although I keep in touch with what is going on, I do not have daily, hands-on experience to share with you.

The Chair: Thank you very much. We understand those points. Just to set the context, the purpose of this session is as an opportunity to explore some reflections on the Act, particularly on how it has operated since it was passed, by people who are very much steeped in the family justice system.

Could I kick off by asking whether, when the Act was passed—I

know that you were not involved in the actual lead-up to that—you had any specific concerns about it and whether those concerns been borne out since then? Do you feel there have been any unexpected consequences since the Act was passed?

Mavis Maclean: Perhaps I should have confessed to having been an advisor at the MoJ since the Child Support Act. There was a need for research help closer to hand. Peter Graham Harris, who was responsible for it all, had to contact the embassy in Washington if he wanted to know what was happening with the Child Support Act, whereas I was around the corner and happy to come and take a seat and remain there. I am afraid I am still in and out of the building, as it were.

I was around when the Act was being created. I was part of the review of our children and care proceedings, which took place internally in the MoJ just beforehand. There were many other issues at the same time. That is one of the things to remember. We were in the middle of some pretty tough activity from the fathers. If you remember, the requests for 50:50 parenting were very vociferous at the time. We were also in the middle of concerns about opening up the courts. We had just had major consultations and complications on that issue.

As far as I was concerned, this was one of the less complicated issues to deal with. It was not as problematic as the other two. The other two issues are still running and still difficult, so I suppose it is not surprising that this one is too. It is wonderful when there is some energy, some excitement and some effort to make a difference, but it is quite often not as easy as it appears and it is important to remember what we heard. The advice from the review of family justice was to collect more information that would be useful for management, analysis, and basically my question: "Who is doing what and is there another way of doing it more efficiently and more sensibly?"

The Chair: Could I just press you on that last bit of the question, which is whether you feel there have been any unexpected consequences that have arisen from the Act?

Mavis Maclean: As a social scientist, I am very cautious of causation and I am much more into association. It is not really surprising, given the context—austerity, the huge increase in families being in difficulty through poverty, housing or whatever—that there has been a far greater demand for help at a time when social services departments were not burgeoning or developing. They were shrinking and being cut back.

There is this acute anxiety in the social work field about another disaster happening and another terrible set of blame and shame and misery. It was a potent cocktail that has inevitably resulted in the 26-week target becoming unattainable. To be honest, it is no longer really treated as a mandatory requirement. It is seen as no more than an aim.

The Chair: I know we are going to return to the issue of the 26 weeks. Sir James, could I ask you, then, for your reflections on the Act and particularly its impact Act since it was passed?

Sir James Munby: I had two concerns when the Act was passed, one a major and one comparatively minor. The major concern was a fear that the mediation provisions would simply not work. That, I am afraid, was a concern which has been borne out in practice ever since. The other concern was a more minor one. I thought that the provisions in relation to shared parenting were unnecessary and would probably not change the law or practice at all. My concern was that it built up expectations in certain quarters which were almost bound to be disappointed, as has turned out to be the case.

As far as MIAMs are concerned, I had the distinct impression—I am afraid this was reinforced when, on the rule committee, we subsequently tried to put flesh on the bones, draft the relevant rules and redraft the forms to take account of MIAMs—that insufficient analysis and thought had gone into the whole concept before the Act was passed. It was frankly embarrassing sitting in the rule committee, watching officials from the Ministry of Justice. I got the impression that they were beginning to realise for the first time the complexities of what they had put in place.

When, after too much time had passed, the ministry finally accepted that the plan, as they saw it, was not working, they set up a committee to look into it. That committee, very properly and appropriately, was chaired by David Norgrove. Forgive me, I cannot remember whether, by then, he was Sir David or just Mr David. He was in the best possible position to come to a view. Forgive me, I cannot remember the precise numbers, but his committee came up with a large number of detailed recommendations, of which approximately half were accepted and implemented by government. The consequence, of course, was that MIAMs, which began as a disaster, has continued in a very unsteady way. Things are better than they were initially but they could have been much better if the full Norgrove package had been accepted.

Were there unexpected consequences? No; I am afraid the consequences were entirely expected. I do not claim any particular

insight in these matters. They were expected by all family justice professionals and lawyers within the system. The fundamental problem, which government had been warned about but did not accept for whatever reason, was that solicitors were, in practice, the major route into mediation, and with the cutbacks in legal aid under LASPO, which came in at about the same time, the solicitors were no longer involved in the very cases in which mediation was to be the solution. Therefore, the route to mediation was being cut off at the very point when government policy was that mediation was the solution.

The Chair: Thank you very much indeed. I am sure we are going to pick up on a number of those points as we move through the session.

Q94 **Baroness Prashar:** I want to go back on to the 26-week timeframe. I would like to know how crucial it is to achieve that timeframe in such cases.

Mavis Maclean: It is rather a difficult question to answer as it is not achieved. Clearly, we have emergency procedures and EPO is a different matter altogether, but what matters more than the amount of time that is spent is what it is being spent on. If it is being spent productively then one would be happier. As it is, there is a feeling growing that the 26 weeks is actually preventing the few social workers who are left standing being able to help families. They are so busy having to meet deadlines and complete reports.

There was a very interesting piece by Martha Cover in this month's *Family Law* that describes this situation extremely potently. She is very concerned. If you are a social worker and you want to help a family, you have to get to know them and get their trust. You want to help them in this way, but you find that is not being as helpful as you want so you want to try another tack, or you have a mum who you have managed to get off drugs but you need to stay with her for some time to make sure that that is a firm change—you cannot do that in 26 weeks.

Baroness Prashar: Sir James, do you have any view on the 26-week timeframe?

Sir James Munby: Yes. One has to distinguish between two things. One is the statutory framework itself and the other, the more narrow question, is whether 26 weeks can be achieved and should be achieved in every case. So far as concerns the statutory framework, it was fundamentally important. It was probably the single most important outcome of the Norgrove review. The combination of that fundamental change and the other fundamental

change in the same Act, which tightened up the requirement for evidence so that, for example, expert evidence was to be adduced only if it was necessary, not if it was just desirable or people thought it was a good idea, was absolutely fundamental in changing the entire psychology of the system and in radically improving performance.

The fact is that, while Norgrove cogitated, the average care case was taking something in excess of 60 weeks. I think it was some 64 weeks and, shockingly, the average timetable actually increased while he was reporting. But as a result of the fact that 26 weeks became – subject to exceptions; that is a very important point—not a target, not an objective, but a legal requirement. It was absolutely fundamental in changing things on the ground.

The consequence of the 26-week framework was that performance improved dramatically. Week on week, the average duration of care cases reduced and we got it to the point where we were almost at an average of 26 weeks. It enabled us, for example, to have a blitz on a huge number of old cases we discovered. A horrifying number of very elderly care cases were in the system, some, believe it or not, up to four years old. Those were identified and targeted so that at the same time as we were reducing what I used to call, rather frivolously, the "golden oldies", we were also driving down delay in the typical care cases.

It needs to be remembered, at this point, that people thought 26 weeks was unachievable. That turned out to be wrong. People thought it was unachievable in a wider sense in that it was inappropriate. We have to remember that, when the Children Act was first passed in 1989—this is still part of the Act—the initial ICO ran for eight weeks and after eight weeks you can renew it for a further four weeks, and thereafter four weeks by four weeks. The reason for that was that the architects of the 1989 Act thought that the typical care case would be disposed of within eight weeks and therefore would need only one ICO, and that you would have the extra ICO, up to 12 weeks, for those cases which took rather longer than anticipated.

In that sense—I was quite clear about this in 2013-14—the 26-week limit was actually quite a relaxed limit and the fact is we achieved it. The reason it has all gone wrong since is very simple. It is the relentless increase in the number of cases at a time when resources remained static. Mavis has already touched on this. Forgive me, I am not up to date on the latest figures but, for all practical purposes, 26 weeks is now a distant dream.

The important thing to remember, however, is that the statute itself built in important safeguards, in particular—I am paraphrasing—the safeguard that you would go beyond 26 weeks if that was necessary for the interests of the child. Therefore, 26 weeks was never an overall limit that could not be exceeded in appropriate cases. The important thing was to ensure that, when it was exceeded, that happened only in what I would call an appropriate case.

Forgive me, I cannot remember the details, but I deliberately gave a practice guidance judgment in I think April 2014, the month before the 26-week limit was due to come in, explaining those circumstances in which a case could properly go beyond 26 weeks. One example was a case going through the family drug and alcohol court where it was recognised that the FDAC process, which I fully supported and which has been a marvellous means of reuniting children with their families, would typically take longer than 26 weeks. Therefore, I made it clear in this guidance judgment that, in an FDAC case, there would be no shame, no complaint and no adverse consequences if the judge took the case beyond 26 weeks.

Likewise, we recognised that there would be cases where a family carer would emerge at a late stage in the process—for example, around about 17 to 19 weeks—but it would be quite impossible to do the necessary assessments to evaluate whether that person could in fact care for the children within the short balance of 26 weeks. Again, in such a case, the time limit had to be increased compatibly with the statute so as to ensure that justice was done and, as one judge very properly put it, that justice was not being sacrificed on the altar of speed.

For example, it was recognised there might be highly complex cases where you would need a separate fact-finding hearing where you might have to spend days and days going through very complex medical evidence with a split hearing, which again could not properly be dealt with within 26 weeks. That was compatible with the statute and that is why I slightly jib at the idea that the question is, "Why is every case not being dealt with within 26 weeks?"

The downside of this, of course, was that we were monitoring the performance. Every month there was a meeting of a group, of which I was a member, involving judges and HMCTS where we were shown the latest statistics and the heat maps. These were coloured green if you were a good performer, amber if you were not such a good performer, and red if you were a poor performer. They showed, by reference to each DFJ area, which courts were

performing better than others and how many weeks they were taking.

Now, that was an essential management tool. The unfortunate consequence was that judges managing courts which had poor performance took the view that their objective, their duty, was to get every care case through within 26 weeks. The consequence of that was most unfortunate because it meant that some cases that should have taken more than 26 weeks were not being allowed the appropriate time.

Q95 **Baroness Prashar:** What role do you think the judiciary can play to make sure the 26-week timeframe is actually met in appropriate cases?

Sir James Munby: The simple answer is they are fundamental. It is, after all, the judges who are conducting these cases, but there is only so much that the judges can do. Can I make a general point at this stage? Mavis has already touched on this. We do not know enough of what is actually going on in the family justice system That was a concern I had from an early stage, I think back in 2016, when the figures all started going wrong: "What is actually going on?"

Since I retired, I have now become the chair of the Nuffield Family Justice Observatory, so my current concern is very much with data evaluation and research and so on and so forth. What we do know is that practice and performance varies markedly—as it happens, between England, Wales, Scotland and Northern Ireland, but just within England for the moment—nationally, regionally and locally. That has been a concern for many years now. The work which has been done, allotted by or under the supervision of Nuffield, has demonstrated these very great regional variations.

We know what is going on but we are still at the early stages of discovering why it is going on. To get uniformity of performance, one needs proper data. Once one has the data, once one can understand what is going on, it then becomes a matter for judicial leadership. The leadership for this purpose is three-tiered. First of all, at the top, there is the President of the Family Division. Then there are the Family Division liaison judges, one for each circuit, but crucially—these are the judges who are the crux of the system—it is the designated family judges in each area. There are some 40 to 42 of them across England and Wales. They have the local leadership responsibility for ensuring that the system is working properly. They, of course, like everybody in the system, are overburdened with an accelerating caseload that is unmanageable and, as anybody who has a leadership role in the

family justice system will be all too aware, it is very difficult deciding how to divide your time, if you are a leadership judge, between the judging activity and the leadership activity.

The short answer—I have taken rather a length of time, I am afraid, for which I apologise—is that ultimately it is down to judicial leadership, but judicial leadership is hobbled so long as we do not have adequate access to proper data. The effort to get hold of the data has taken a long time, I am afraid.

The Chair: Mavis, do you want to come in briefly?

Mavis Maclean: I was just going to say there have been some practical suggestions that the judiciary should not have to worry about the precise details of a care plan, just the decision. They need not go over the previous proceedings of very often rather a lot of hearings. That might be one.

The other terribly simple thing is that I did a study of judges, watching and using my stopwatch to see what kinds of tasks were being done. The amount of decision-making time spent on case management, on encouraging people to settle, was some 60% of the day. One of the changes, comparatively recently, is the absence of clerks, by and large. So a judge is checking on whether an order has been received. He is trying to find out whether this report is ready or that a person is going to do what they said they were going to do on such-and-such a day. This is extraordinarily extravagant use of the time of a judge. If we want to get more cases through, give the poor creatures some help.

Baroness Prashar: I take your point. Thank you very much.

The Chair: Data keeps coming up in all our discussions at the moment and just to mention, from the briefing, I think I am right to say that the average case length now is 45 weeks. Is that right? That is where we are at the moment but thank you. That was a very important session.

Q96 **Lord Mawson:** We have heard concerns that the family justice system is not operating cohesively. What is needed to create a single, cohesive family justice system? That is the first question, and what is the role of Cafcass in achieving this? Does Cafcass require additional support?

Mavis Maclean: Of course it does. What is needed for a cohesive system? Well, go back to David Norgrove. He was the first person to use the term "justice system". When I started working in this field we talked about "family law". We did not talk about a

"system". We never thought of it, I do not think, as a "system". We talked of individual cases and individual judges.

David, very cleverly, brought us to understand that we need to collect what I would call management information: who is doing what? How long does it take? Which grade of person do you need to do this? It was all those sorts of things. A bit of that kind of management thinking would help, although as an academic I would resist being managed to the death. If we are going to have a system, it has to function as a system. A little more resource would help, obviously.

As for Cafcass, there are two questions. It needs more money because it is dealing with more cases, this is associated with austerity, exacerbated by Covid. It simply has more to do. But then there is this question of whether you actually want it to do more. I do not know whether we want to talk about this here, but there are the new pathfinder courts, the pilot schemes which are going ahead, which bring Cafcass in much earlier, which might help to bring the welfare and justice elements together at an earlier stage so that they work with each other rather than struggling to control each other.

We are also asking for an awful lot more now in the safeguarding letters. This is far more than ever happened at the time of the Act, the kind of quick checks which were asked for from Cafcass.

Cafcass is struggling because it is doing more things and it is doing more of the same things, but a cohesive system is not going to happen until we understand who is doing what and decide what we would like them to do.

Q97 **Lord Mawson:** I am not as experienced as you are in the justice system but I know quite a bit about the NHS and often, out there, people say, "If we only throw more money at it, everything will be fine."

Mavis Maclean: No, I am not saying that.

Lord Mawson: I am not saying you are. I am not saying that, but I am just wondering, because one of the facts in life is there is probably not going to be lots more money. So the question is: how do you actually innovate in this circumstance? How do you make this stuff work better and how do you create a system that is really learning? In our earlier session, I raised the question about whether the justice system is a learning organisation. Does it have any real memory yet? For example, Baroness Deech, who knows a thing or two about the justice system, gave a rather brilliant speech last week about how the change in the structures of the

Lord Chancellor in the Blair years has had massive implications for the whole system. Both you and Sir James have been around this system for a long time, so you will have the long view on all of that. It would be interesting to get both of your reflections about something, because you have the long view.

Mavis Maclean: The judiciary has suffered from not having a Lord Chancellor who is the head of the judiciary and has a position of strong influence. There is no one to speak for the judges, no one to ask what they are doing. There is always huge respect for their independence and in a strange way that rather inhibits people asking them what they are doing all day. If we knew that they were chasing letters that had gone astray and doing a phone call for the third time, we might decide that their time might be better used with a bit of administrative support. There are those sorts of issues. I am sure James has more to say.

Sir James Munby: In headline terms, two things are needed to achieve the single, cohesive family justice system about which you ask. One is more data and the second is leadership. The leadership is crucial but there is a limit to how leaders can lead if they do not have the data. I am not going to go back on the data issue.

In terms of leadership, it is important to remember—I am focusing for the moment on care cases—that the family justice system involves the intersection of three different groups of professionals. There are the judges, there is Cafcass, and there are the local authorities. Both Cafcass and the judiciary have, in management and leadership terms, a pyramid system where there is one individual at the top of the pyramid. With the judiciary, it is the President of the Family Division; with Cafcass, it is the chief executive. They can both lead and, in the case of the chief executive of Cafcass, they can manage.

I make that distinction because the President of the Family Division can lead; he cannot manage. This is often forgotten: the independence of the judiciary is not merely vis-à-vis the Executive or outside agencies; it is the individual independence of each judge, independent of his or her colleagues. There are only two people to whom a judge is answerable: one is the Court of Appeal, the other is his or her conscience. In that sense the President can lead but cannot manage.

The third pillar of the tripod are the local authorities. There, there is this fundamental difference that there is no single agency involved. There are, I think I am right in saying, 152 local authorities in England and another 22 in Wales. The national bodies

which represent them do not fulfil the same function as either the President or the chief executive of Cafcass.

Therefore, one is dealing with this huge number of different local authorities, some of which are excellent, with wonderful, innovative leadership achieving wonders and some of which still are in a terrible state. We will never have a single, cohesive family justice system unless, somehow, we manage to solve the local authority issue, that there is no single lever there, as there is in terms of both the judiciary and Cafcass.

Does Cafcass require additional support? Yes. I will be corrected if I am wrong on this but Cafcass has never had the funding which it and informed observers thought it needed. That was so even before austerity and the recent increase in volumes. The matter has got worse, of course, because as the volume of cases has increased, both care cases and private law cases, the volume of cases that Cafcass has to deal with has grown. The lay man would say exponentially; it is not exponentially, but you know what I mean. It has grown very significantly in recent years and they do not have the relevant resources.

When you put on top of that the point that Mavis has already made—that we are now expecting more of Cafcass in some senses, on the safeguarding front—then something has to give, and something has given on Cafcass. That is that far too many families complain, too often, I fear, with justification, that they do not see enough of the Cafcass officer, that the Cafcass officer's investigations are not as detailed and as thorough as they would like, and that they are not, therefore, getting a proper service.

Q98 **The Chair:** Just for the record, I remind the committee of my former declared interest as chair of Cafcass, a post from which I stood down in March 2018.

I am asking the next question. It is a point that came up quite a lot and in a very interesting way in our previous session. It is how we ensure that the right cases are coming to court and that the right cases are being resolved by alternative means, be that alternative dispute resolution or other ways of resolving them, and what you feel the role of the courts is in making sure that it is the right cases, or the most appropriate cases, that are coming before them.

Mavis Maclean: That is a horrible question.

The Chair: Mavis, it is a tricky question, I know, but would you like to start?

Mavis Maclean: I feel very uncomfortable with the notion of a court having to send people away. A court is there to help people. In my international wanderings, I have spent quite a lot of time in Poland, where the Government are falling over backwards to persuade people to go to family courts to release them from the domination of their families and the Church. The court is seen as the place where you have a free, open, rational outcome to your problem. You have a question, you get an answer and you follow instructions. It is quite simple.

It is more complicated here, but this notion that you can simply send everybody off to mediation gives me the shivers, as I think it does some others. We know so little about mediation. It is one of the big data black holes in the family justice world. We do not even know whether people who have been to mediation and have come to some form of agreement show up in court six months later, which seems one of the basic things you would need to know before you hand out vouchers and sing the praises of mediation.

It is not that long since the McEldowney report was very critical of the way that mediators are trained and the way that their work is not regulated, and talked about the internal divisions between different groups that grew up. It was seen as a magic cure for all the ills of the legal aid system or the family justice system when it appeared.

In the early 1980s, the family legal aid bill was going through the roof. The MoJ was panic-stricken and convinced that it was all the fault of legal aid lawyers trying to increase their incomes by revving up the arguments. The people there did not understand. I was there at the time. It took me about three years to persuade them that some of this increase had to do with the fact that the divorce rate had tripled and you would expect it to cost a little bit more. There was more property to sort out, more home ownership. There were more women with occupational pensions. Fathers were wanting more time with their children. There was much, much more to be sorted out, as it were.

The lawyers, in fact, earned much more doing what they were proud of doing and loved doing, which was helping people to negotiate to a settlement. You had a legal aid lawyer on both sides who knew the area, knew the house prices, the school catchment areas, knew each other. Everything could be sorted out by the end of the week and a legal aid solicitor would much rather increase his income by case volume than by cost per case.

It was a tragedy, and in the middle of this appeared the conciliation movement—the mediators—who were lovely people. They were

volunteers, being nice and helpful and smoothing away trouble, but somehow or other it has all gone a bit askew, in that I do not think they can do what I saw people come into solicitors' offices for, saying, "My husband has gone. What do I do? What do most people do? What is the best thing I can do and what should I do next?" All of those things are exactly what a family solicitor does. A mediator is actually prohibited from doing any of those things. They cannot give advice. They cannot even say, "Why do you not go and see somebody else about it?"

The Chair: Just to explain, in the previous session our witnesses were arguing quite strongly that there were a range of other forms of dispute resolution, certainly not limited to mediation, that were sometimes more appropriate than going to the courts and that they should be spelled out more clearly. That was the first thing they were arguing. The second was that, of the ones who came to court, sometimes the cases that most needed a judicial approach were not receiving it because the courts were being occupied with cases that really should never have got in front of them. That was the gist of what our previous witnesses were arguing.

Mavis Maclean: My argument would be to divert them to some early legal advice and then they will not be crowding the courts. It is well documented that if early legal advice is available it reduces the length of dispute in family matters. There is no doubt about it. We have no information whatsoever about the impact of mediation on the length of disputes or the outcome at all, so it seems rather silly not to try the process which we have the manpower for, know how to do, and have seen work. If we are not going to do that, at least we should work towards legally assisted mediation: put a bit of law into the mediation setting.

Sir James Munby: One has to distinguish between care cases and private law. Just following through on private law, one of the great disasters and one of the great mistakes by government in 2013 was identifying mediation as *the* non-court solution. Even at the time there were all sorts of other techniques and remedies available. There were collaborative law, conciliation and arbitration. There were all sorts of things.

I thought at the time, I have always thought and I am afraid subsequent experience has only brought this further home to me, that the great, fundamental error was not going for alternative dispute resolution as it used to be called or non-court dispute resolution as it is now called but saying there was this one single thing. We need to encourage people to use all of these techniques, recognising that one technique may suit one case and another

technique may suit another couple. The idea that one techniques suits everybody and all cases is, I am afraid, simply silly.

Now, how does one get them diverted out of the court system? There ought in theory to be no problem. It has been part of the rules since 2010 that, and I paraphrase, at every hearing, it is the duty of the judge to consider whether some other form of non-court resolution may be appropriate and, if so, to make appropriate directions or noises.

That, in practice, I fear, has always been a dead letter. One of the problems, which emerged very early on with the MIAMs fiasco was that the MoJ, or at least its officials, believed that you could stop a case coming to court at all until there had been a MIAMs simply by telling the court staff to refuse to issue the proceedings. We on the rule committee had to point that it was a fundamental matter of the rule of law and a constitutional principle that only a judge, not an official, could, as it were, strike out a case. They had not thought of that. They had thought there would be no problem.

Of course, the consequence of that was that if you do not fill in the form properly, if you tell lies on the form or, because of its complexity, misunderstand it and tick the wrong boxes the case comes to court. I fear that there is then too much of a belief that, "Well, since you're here now, we might as well get on and deal with it, rather than knocking you back and making you start again." But in principle the powers are there. The simple fact is, taking private law cases, that the system is clogged up with far too many cases that do not require a judge at all. Most judges, I am afraid—this is my impression—are reluctant to take the appropriate steps to kick the case out.

Let me give three examples from my own judicial career. Very early on, I had a case where there were two issues. There was weekend staying contact. One issue was whether the weekend staying contact on the Sunday should come to an end at 5 pm or 6 pm. The related issue was whether the handover point should be the Happy Chef at junction 14 on the M25 or the Little Eater, whatever it was called, at junction 16. It is completely absurd to have a judge deciding issues like that, not just because it is a waste of judicial time and public resources but because it is actually emasculating the parents. The parents ought to be able to decide these things themselves, without the need for judges, mediators or anybody else. They should be forced to confront this sort of thing, and sit down and sort it out.

Now, a second example, which I had more recently, was a case in which the parents could agree on nothing. They were middle class

and highly educated. That, dare one say it, made matters only more difficult. Their case had been dealt with, until he retired, by Sir Mark Hedley—a very wise, experienced and humane family judge. He said, "I am simply not going to decide this case", because the issue that they were canvassing before him, unbelievably, was whether the handover point, which everybody believed should be Clapham Junction station, should be on platform two or platform eight. He said, "I'm not going to decide this issue. You've to decide it yourselves, because otherwise you're just going to come running to court every time there is some little issue". He said, "If the consequence of that is that your six year-old son stands shivering in the rain on Clapham Junction station, that is your responsibility, not mine."

Sir Mark retired. The case came back in front of me and the issue was that they could not agree on what form of dental treatment the boy needed. They wanted me to hear expert evidence from two dental experts as to what he should have. I said, "I'm not going to decide this. You must go away and decide this yourself, because otherwise you are going to come back"—this boy, I think, was six or seven years-old—"every six months for 11 years asking judges to decide these utterly footling questions. Go away. You are the parents." People forget that one of the great innovations of the Children Act was the concept of parental responsibility. Parents are very keen on talking about their rights and talking about the duty of the other parent. Responsibility is the key concept. In other words, be a parent.

In the third, even more absurd example—I happened to hear this case when I was President, up in the north somewhere—there were 30 things the parents could not agree on. By the time they came in front of me the list was down to five. One of those five questions was what length of hair their eight year-old son should have. The father said he should have a crew cut and the mother said he should have a longer haircut. I was expected solemnly to sit there and decide the length of this eight year-old boy's hair. I said, "I'm sorry, I'm not going to do this. You must go away and decide these things yourselves."

Those are three bizarre, absurd examples from my own experience. I am sure other judges have similar experiences, but most judges are very reluctant to tell them to go away. There should be much more emphasis on simply saying to parents, "You are the parents. You may be separated, you may loathe each other, but you are the parents and you both have responsibility towards this child. You must do your job." There is much more scope for a robust approach.

On public law, on care cases, there is a completely different issue. There is a general acceptance that we need to do much more pre-proceedings work in care cases. I do not myself see why we should exclude the courts from the pre-proceedings phase of care cases. There are significant numbers of care cases that, if they are properly identified and resourced and if the pre-proceedings are properly handled, would never get into a court at all. There would be another means of resolving it within the overall care system, not involving judicial proceedings.

The current problem with care cases is that it is entirely demand led. The judges simply have to decide the cases that come in front of them. There is no judicial control over the volume. We do not know from day to day how many care cases are coming. We faced these appalling difficulties in 2016 to 2017, with the numbers rocketing up 10% or 20% year on year.

My view has been for a long time that we need to focus pre-proceedings. I cannot remember whether this was during your time as the chairman of Cafcass, but there were some very interesting projects that Cafcass undertook on this very topic, which were showing remarkable results and where the pre-proceedings diversion point was being done by Cafcass. Tragically, as I recall, that came to an end because somebody advised Cafcass that it was ultra vires for Cafcass to be dealing with these things because a word was missing from the statute. Therefore, these very important projects suddenly stopped. That was a great sadness.

Most care cases do not involve genuine emergencies. They are slow-burn cases that go on for a long time. Leaving aside genuine emergencies, I would like to see a system—I do not think it is beyond the wit of men and women to come up with a system—under which, before you started the care proceedings, there was some mechanism for involving Cafcass and a judge, although not the judge who would deal with the care case if it came to court, to see whether there was some way to divert it from the court. After all, there are many other areas of civil litigation where you cannot come to court unless you first get permission from the court to do so. Why should that not apply in care cases?

In care cases, there is a need for diversion. That involves pre-proceedings work. I would like to see that involving the judges as well as Cafcass. Otherwise, we are going to face a very simple problem: the volume keeps on going up, not, perhaps, quite as quickly as it was at one point, but it keeps on going up. The resources essentially are static or declining. That cannot go on forever. The system will simply collapse.

If I can just make one final point on this, people hate this idea but there is a very simple point on this. If the volume keeps on going up and the resources stay static, the system is unworkable. There are, in principle, only two solutions to that problem. One is more resources or the other is rationing the number of cases the court can deal with per annum. We have never been prepared to face up to that in just the same way as we have never been prepared to face up publicly and openly with the problem of rationing in the National Health Service.

The Chair: Thank you so much for covering that very important point so comprehensively. Time is moving on a bit but we have a couple of more questions.

Q99 **Baroness Bertin:** Do you think the presumption of the involvement of both parents in the life of the child after family separation is working? Should there be some kind of amendment? We had some very different views on the last panel, so it would be very important to get your views on this.

Mavis Maclean: I am very happy to comment on that. At the time, if we had not had that clause, we would have had bloodshed. Things were so desperately conflicted that something had to be done. There was enormous pressure for 50:50 shared parenting, which I was very opposed to and spent a lot of time objecting to. They did this in Australia and had to back off. It has not worked anywhere in that way.

I was worried about the clause until Elizabeth Butler-Sloss, bless her, added this rider to say that the involvement of both parents will be assumed to be in the child's best interests unless it can be shown that it is not. She hung on to welfare paramountcy by the skin of our teeth. That was a wonderful way through and things did calm down. We ended up with parental alienation popping up instead. The gender war is not over but it is certainly infinitely less unpleasant, difficult and miserable than it was.

I know that a lot of the domestic violence specialists are very anxious about it. In actual fact, I have watched in a few courts. I have talked to some judges and to some parents and I am not so worried. I think it is just about okay and any alteration now would just be stirring up trouble. We should be grateful for the tentative ceasefire that we have and I would hang on to that.

Baroness Bertin: Do you think beefing up, amending or reminding people that the welfare of the child is paramount would help at all to try to alleviate some of the issues? I know it is anecdotal but there clearly are some issues there around abusive parents now

getting contact in a way they, perhaps, did not before.

Mavis Maclean: Programmes such as SPIPs are absolutely wonderful. I do not know if you have ever taken part but I have taken part in several—not as a participant but as an observer. It is quite extraordinary. In a SPIP you have separated parents, both mothers and fathers, but not your own partner. It is organised in a sociable way. You sit around the table and have a cup of tea. Lots of chocolate biscuits are essential. People relax, and then somebody starts saying all the things that your partner used to say that drove you mad, but you are hearing somebody who is really rather nice—you have been talking to them—saying them and they do not sound so bad. Somehow or other, it lowers the temperature and people are able to see the different points of view much more calmly. That is an extraordinarily successful way of improving things and I would love to see more of them.

Sir James Munby: I very much agree with what Mavis said. The narrow, lawyer's point here is that the statutory presumption did not change or add anything to the law. It was always there. All I can say is thank goodness that the attempt to take it further in the statute was headed off because otherwise it would have cut across the statutory duty to have the welfare of the child as paramount. In that sense, it was, and probably for the reasons Mavis explained, using the word "political" with a small "p", politically essential to have something in the Act that conveys some kind of message, but it did not do any legal good and the message had this downside that it disappointed people when it turned out the message had not changed things as much as some people had hoped. The cynical have said that it was never going to change anything.

I agree entirely with Mavis. It should not be removed. It should not be amended because it goes as far as it can, unless you are prepared to junk the welfare principle. If you water it down it will raise a storm of protest. If your remove it, it will raise a storm of protest. It should simply remain. It is something that you should not find in a statute. A statute should do legal work. This does not do legal work. It sends a message and in so far as it does the message is probably useful.

The idea that emphasising the welfare principle will actually change things on the ground is interesting. I am sceptical. The problem is that if you point out to the warring parents that you, the judge, are concerned with the welfare of the child, they both chorus, "So are we. Of course we agree the child's welfare is paramount." They do not agree on what is the route to the child's welfare. You only push the problem back.

The great advantage of the welfare principle is it stays up to date. If you examine what the judges are doing today, what they think they mean by welfare today, it is very different to what they meant 30 years ago or 100 years ago, when the principle first came into our statute law. Welfare is a concept that is tremendously important. The paramountcy principle is fundamental, but it has built-in flexibility so that one can adjust as the years go by. The trouble is that anything that you put in by way of provisos, glosses, presumptions or anything else is either ineffective or cuts across the welfare principle.

Q100 **Lord Bach:** I will try to be as quick as I can because we have touched on legal aid already and the closeness in time between the LASPO Act and this Act coming into effect. I am going to ask both of you whether you think that that particular combination—I think you have already said so—has had a pretty bad effect on the success or otherwise, but particularly on the success, of the later Act, the one we are looking at.

Mavis Maclean: It has not helped, to put it mildly.

Lord Bach: Do you agree that it is a very unfortunate combination? Indeed, talking about private law and obviously not public law, one of the disastrous effects of taking away legal aid, except in the most extreme and very rare circumstances, from private family law was that not only did it kill off mediation but it made it much more likely that people would end up in court without representation. Is that just a statement of the obvious? That is really what I am asking.

Mavis Maclean: You are absolutely right. It is tragic. It has happened so often in policy-making: you do something for which there are perfectly good reasons but the context changes and you are caught in the aftermath of something else. It is slightly irrelevant but I do not know whether we have mentioned the possibility of one lawyer, two clients, because that is another option. Mediation is not working. We do not want to pay for legal help for very many people and so one has to look for the crossovers. As I say, there is no reason why mediation with a bit of law available or one lawyer, two clients should not happen.

Of course there is emotion when people separate. People are not being very rational. They need some structure to lean on while they sort out their new way of life and the law is that structure. What it does is tell you what is acceptable and, even better, it can tell you what most people do, which we might be able to do with this tweak to form D81 on finance.

We can do what the Canadians did, which was collect data on financial agreements from lawyers' offices and what it is that people have agreed to. Then you have this wonderful website with resource levels, income level, property, number of children, and so on. You could look on this website and see what people like you do. That is an enormous piece of scaffolding to build on when you are trying to make your new arrangements. One lawyer can do that; you do not need two. That is a major economy.

But it is very hard for people to start from scratch. I have observed about 40 mediations; I did a book on it a couple of years ago. What worries me about mediation is that you are not starting from what most people do, what is possible, and, "What should I do?" You are starting from, "I want". There is no boundary to contain your wildest dreams and no pathway to follow.

Sir James Munby: I agree entirely with what Mavis said. I have, for years and years, believed in the advantages of what I call frontloading. Money properly spent at an early stage usually pays dividends later on. One of the great tragedies of LASPO is that what the elderly amongst us fondly remember as green form legal aid has gone and there is a desperate need to have proper legal advice right at the outset, if only to manage expectations.

One of the things that became very apparent in 2014 to 2015 on the impact of LASPO was that the average initial hearing of a private law case doubled in length, because the district judge had to spend 10 or 15 minutes explaining what was going on to people who previously would have had that explanation from a solicitor. Therefore, the cost burden was simply being shifted elsewhere.

You do not necessarily need the old-fashioned family solicitor as the initial point of contact. After all, legal advice centres and law centres are doing wonderful work. Mavis has talked about one lawyer acting for both sides, which I completely support. There are all sorts of other techniques, but one needs proper professional input from lawyers at the outset to manage expectations and to enable people to see the lie of the land before their positions become entrenched. The impact of LASPO in that sense was utterly foreseeable and has been catastrophic.

Q101 **Lord Mawson:** I thought that what you were saying earlier was very interesting. I am always interested in how the money works with lawyers because in another world, which is not this one, I am certainly aware that sometimes, when you are in a room with lawyers, there are very expensive fees and they love to make it ever more complicated because the fees keep running, et cetera. This is how it appears.

Generally, the view out there is that people are not clear about how the money works with lawyers. What you are telling us with legal aid is that the very mechanism is rather different from what you assume. That is an important thing to understand, because as I said, other parts of law become extremely expensive and do not necessarily solve a problem.

I can remember a situation where I once had to be very clear with the lawyers by saying, "Stop coming in here with 100 complicated reasons why we cannot do X, Y, and Z. I am paying you. Come in with a solution or I find another lawyer." The clarity about where the money is going and how it is being used and for what, et cetera, in this case seems to be rather an important matter. I had not realised before you said that how it worked in this case. I do not know whether that is a thing you would agree with, but money and lawyers is an interesting thing, I find.

Sir James Munby: One needs to remember that family lawyers do not, by and large, come at their cases in the same way as many civil lawyers. What motivates most family lawyers is a deep concern for the welfare of their clients and their clients' children. There will of course be exceptions but the view that family lawyers are simply spinning it out to line their pockets is not one that I recognise, outside the ambit of big money financial disputes.

Lord Mawson: My point is that, if that is the case, which is very reasonable, there needs to be some way of communicating it to the general public. This may be difficult, but people need to understand that they are in it for the right reasons and there is a necessary cost to that.

Mavis Maclean: Of my students going through Oxford, teaching family law all these years, among the ones who go off and do family law there are an awful lot of women who work part time and have children. When I watched them they looked like social workers but they had a few more weapons at their disposal. I always thought of them as social workers with clout, because they were encouraging good relationships. Most women want the dad to see their children. It is free childcare, for goodness' sake. Why would you not? It all gets distorted by these ludicrous big money cases.

Sir James Munby: The simple fact is that, with the possible exception of big money cases, lawyers do not go into family law in order to make money. The money that lawyers make from family law cases is modest, by and large, always excluding the money cases.

Mavis Maclean: It was always known as "Robin Hooding": at a local solicitors' firm it would be the conveyancing that paid for the family work.

Q102 **The Chair:** We have only two minutes left, so I will have to ask you to be very brief. In winding up, I would be interested to hear: if there was just one change you would like to see, either to the law itself or to the way the family justice system operates, what would it be? If you feel you have already told us, fine, but I want to give you one last opportunity to say something.

Mavis Maclean: In one line: put legal aid back for all children cases, particularly the crossover cases: private law cases, very hostile contact cases, which have uncertain elements and may well be actually public law cases.

Sir James Munby: On substantive law, as opposed to procedure and legal aid, I have three things. I am not going to be lured into saying one. First of all, the law concerning transparency in the family courts is a complete shambles and is in desperate need of reform. There is powerful reason to say—there are, after all, Members of your Lordships' House who are saying this vigorously at present—that we need to revisit the substantive law on ancillary relief.

The big one, which has been talked about ever since I have been in the law, is the need to legislate for the discarded partners and children of non-marital relationships. Which of those three is the most important rather depends upon which one I am focusing on for the moment, but they are all three very important.

The Chair: Thank you so much to both of you. It has been an absolutely fascinating session and so important for the committee to hear from you both, so I thank you very much indeed for sharing your time and very considerable expertise. I hope that, as we move forward in our inquiry, if there are any points we might like to come back to you on that we could approach you just to get your thoughts. On that point, and in thanking you both very much indeed, I now draw this meeting to a close.