VIEW FROM THE PRESIDENT'S CHAMBERS

Sir James Munby, President of the Family Division

The number of new care cases continues to rise, seemingly relentlessly. CAFCASS figures show that in the 12 months to March 2016 there were 12,781 new cases, an increase from 11,159 in the previous year (an increase of 14%). In the four months from April to July this year there were 4,959 new cases compared to 4,118 in the corresponding period in 2015 (an increase of 20%). The reasons for the increase are little understood and are currently being investigated. We must however plan on the basis that there will continue to be significant increases.

That is one reality. The other reality is that we are unlikely to see any increase in resources, judicial or otherwise.

Given the realities, we must continue to look for new, innovative and better ways of handling these cases, while never departing from the fundamentals, namely that:

- Care cases, with their potential for life-long separation between children and their parents, are of unique gravity and importance
- It is for the local authority to establish its case
- Common-law principles of fairness and justice demand, as do Articles 6 and 8 of the Convention, a process in which both the parents and the child can fully participate with the assistance of representation by skilled and experienced lawyers.

I make quite clear: I will not countenance any departure from the fundamentally important principles which I sought to explain in *Re B-S* [2013] EWCA Civ 1146 and in *Re A* [2015] EWFC 11.

I propose in a future 'View' to deal with other ways in which we can and must improve how we deal with public law cases, for example, by continuing to expand the concept of the 'problem solving court' through extended use of such techniques as FDAC and PAUSE, and by reaping in the family court all the benefits of the digital on-line court which is key to the success of the entire court modernisation programme.

Here, I want to concentrate on two important initiatives.

Settlement conferences

Settlement conferences were pioneered in Canada, where all the indications are that they have been a success. They are, in principle, something that I support, which is why I encouraged HHJ de Haas to start a trial in Liverpool and supported the idea of a wider pilot in a number of other courts. I attach, as Annexes 1, 2 and 3, documents, issued with my support and encouragement, which set out both the basis upon which the pilot is proceeding and how it is being evaluated.

I am aware that the pilot has met with a mixed response. On 1 July 2016, the Association of Lawyers for Children issued Guidance for its members, revised on 7 July 2016, which is attached as Annexe 4.

I feel it would be helpful to clarify a number of misconceptions.

First, I must stress that the pilots have my full support and that the judges taking part are volunteers. It is, therefore, a judicially-led initiative, as it was in Canada when the approach was first introduced over 15 years ago. Settlement conferences in public law cases are now an established part of the

Canadian legal system. The Canadian model is being tested in the pilots to see if it can be adapted to our system.

Secondly, it is also important to stress that the paramountcy principle and the tandem model of representation of children apply just as much to settlement conferences in the pilot as to any other part of the public law system. It is an entirely voluntary and consensual process conducted in the presence of the parties' lawyers with ample opportunity for advice to be given outside the process and for careful reflection by all parties before decisions are made.

During the course of the settlement conference the judge will hear from all parties on a without prejudice, confidential and legally privileged basis. If a settlement conference does not succeed in reaching agreement and there is a subsequent trial nothing disclosed at the settlement conference may be used at the trial which, moreover, will be not be heard by the judge who conducted the settlement conference. Where a child is a party the child's solicitor and/or Guardian will ensure that the child's wishes and feelings are made known.

The ethos of the settlement conference is not to pressure parties to settle but to explore whether the candour and confidentiality of the process can help to reach common ground. Judges do not, and in my view must not, address parties in the absence of their legal representatives. A question may arise as to whether a judge should see one party, together with their legal representatives, on their own and without the other parties or their representatives being present. In my view very great caution is needed. Only in exceptional circumstances would this be appropriate, and then only if *all* parties expressly agree to the judge proceeding in this way.

Thirdly, it is important to remember that the settlement conference approach is being piloted. I acknowledge, as I have said, that views on the merits of this approach are currently divided. The pilot is a genuine attempt to test whether the model can work as well in our system as it does in Canada.

The pilots will be evaluated through the collection of quantitative data and the conduct of qualitative research by specialist social researchers from MoJ Analytical Services. The findings will be shared with an advisory group following a similar approach to that taken during the pilot of the revised Public Law Outline in 2013/4. This will enable lessons to be learned, challenges identified and areas of good practice shared so that the model can be refined and improved.

When the pilots come to be evaluated I will be looking closely to see whether the settlement conference approach compromises, in any way, the fundamental principles of our public law system such as the right to legal representation, Article 6 and 8 rights, the paramountcy principle and the importance of ensuring that the voice of the child is heard. I, and other members of the judiciary, will sit on the Advisory Group.

The 'tandem' model

The tandem model is fundamental to a fair and just care system. Only the tandem model can ensure that the child's interests, wishes and feelings are correctly identified and properly represented. Without the tandem model the potential for injustice is much increased. I would therefore be strongly opposed to any watering down of this vital component of care proceedings.

This does not mean, however, that the practical operation of the tandem model should be immune from scrutiny. The tandem model requires that in every care case the child is represented by both a guardian and a solicitor. In some cases, the solicitor will instruct counsel, sometimes, in the very heaviest cases, two counsel, a junior and a QC. This, I emphasise, is as it should be. But we need to remember that all this costs money. I repeat in this context what I said in *Re L* [2015] EWFC 15, para 38:

> "I end with yet another plea for restraint in the expenditure of public funds. Public funds, whether those under the control of the LAA or those under the control of other public bodies, are limited, and likely in future to reduce rather than increase. It is essential that such public funds as are available for funding litigation in the Family Court and the Family Division are carefully husbanded and properly applied. It is no good complaining that public funds are available only for X and not for Y if money available for X is being squandered. Money should be spent only on what is "necessary" to enable the court to deal with the proceedings "justly". If a task is not "necessary" – if it is unnecessary – why should litigants or their professional advisers expect public money to be made available? They cannot and they should not."

MoJ, with my support, is investigating whether there is scope for a reformed level of representation for children in public law cases and how a reformed model might work in practice. From my perspective, the focus of this is the question of whether, at certain stages in the proceedings and at certain type of hearing, there could properly be scope for dispensing with the attendance of some, or even, in some circumstances, all, of the child's professional team. But, I emphasise: so far as I am concerned, none of this can be allowed to prejudice the fundamentals of the tandem model.

With my support, MoJ will accordingly be conducting a data-collecting exercise in 12 courts. A second phase, also involving the judiciary, will explore how a reformed model of representation could work in practice.

James Munby

11 August 2016

Annexe 1 – Settlement Conferences: Guidance for parties May 2016

The government is testing a new collaborative approach to dealing with public law family cases ("care cases") called a **settlement conference**. If parties consent, they will be involved in this test (called 'a pilot'). This guidance provides information on what will be happening during the pilot and what the government will be measuring.

A settlement conference is a hearing held for the purpose of discussion and settlement of the case. It is a without prejudice hearing that takes place before a judge with the **consent of all the parties**.

A without prejudice hearing means that what is said and discussed during the settlement conference will not be admissible in evidence (except at the trial of a person for an offence committed at the conference or in the exceptional circumstances indicated in *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231, where a statement is made clearly indicating that the maker has in the past caused or is likely in the future to cause serious harm to the well-being of a child). The judge hearing the settlement conference must have no further involvement with the case, other than to make a final order by agreement or a further directions order. The purpose is to try to resolve some or all the issues by agreement. Parties will attend with their legal representatives (where instructed) but are encouraged to speak directly with the judge with the aim of settling the case or particular issues.

The **judge hearing a settlement conference will be different to that of the trial judge**. They will be specially trained in dealing with hearings of this type. The settlement conference judge is a different person. Before the conference, they will have read the case file and might ask the parties questions during the conference.

The judge may not make an order resolving some, or all, of the issues without the agreement of all parties. Where an application is for adoption or placement, a judge may give a judgment with the agreement of the parties (eg, in care order or placement order application where there is no opposition to the same.)

Process

Settlement conferences will take place for public law cases. They will ordinarily take place after an Issues Resolution Hearing (IRH) At the IRH, the parties will be asked if they consent to take part in a settlement conference to be assisted by a judge, other than the trial judge. **The court will still list the case for a final hearing date as well as a settlement conference date at IRH stage** to ensure there is no delay if the matter is not resolved and a final hearing needs to take place.

During the settlement conference the judge will work with parties in a way that promotes settlement. **There is no obligation or pressure to agree to anything at a settlement conference. If agreement is not reached, the case will proceed to final hearing**.

At the end of the settlement conference if there is agreement on all matters, the case will end and an order drafted reflecting the decisions made; the parties will not have to attend a final hearing. If some or all of the issues remain outstanding the parties will come back to court for the final hearing or adjourned settlement conference if appropriate.

What will happen in the pilot and what are we collecting

The pilot will be testing how these settlement conferences work. At the end of the settlement conference the judge will fill in a form (see attached). The form the judge is asked to fill in will help the government understand the reasons why a case is referred to a settlement conference, the outcome, time spent on preparing and facilitating the conference, the number of final hearing days listed and the estimated number of days saved (if a case settles). No personal details about the parties will be recorded.

From July selected judges, Cafcass representatives, local authority solicitors and lawyers involved in the process will be asked to take part in interviews and workshops where they will be asked about their experiences of settlement conferences. They will not be naming individuals that they have worked with, they will only be asked about what they think about the process, what went well and what did not go well. If you (as a party of the proceeding) would like to give feedback on what you thought about the settlement conference you can tell your legal representative who may be asked to provide this as part of the research.

How long with the pilot last?

5 months starting from June 2016 and ending in October 2016.

What will happen to the information that is collected?

The information will help government to understand whether this way of conducting a court hearing is a good thing. It will also help identify any problems with the system.

Information for other people involved

Judges and court staff have been provided with guidance on settlement conferences. If you have any questions or would like to know more information, please ask the settlement conference judge.

Annexe 2 – Settlement Conferences: Judicial Guidance May 2016

We are expanding a pilot on a new collaborative approach in dealing with public law family cases. Your area has been chosen to be one of the trial areas.

A settlement conference is a hearing held for the purpose of discussion and settlement of the case. It is a **without prejudice hearing** that takes place before a judge (who is different to the allocated judge) with the **consent of all the parties**.

As this is a without prejudice hearing, what is said and discussed during the settlement conference will not be admissible in evidence (except at the trial of a person for an offence committed at the conference or in the exceptional circumstances indicated in *Re D (Minors) (Conciliation: Disclosure of Information)* [1993] Fam 231). The judge hearing the settlement conference must have no further involvement with the case, other than to make a final order by agreement or a further directions order. The purpose is to try to resolve some or all the issues by agreement. Parties will attend with their legal representatives where instructed, but are encouraged to speak directly with the judge with the aim of settling the case or particular issues.

The **judge hearing a settlement conference will be different to that of the trial judge**. They will be specially trained in dealing with hearings of this type. The settlement conference judge is a different person. Before the conference, they will have read the case file and might ask the parties questions during the conference.

The judge may not make a final order without the agreement of all parties. All parties must be in full agreement to resolve some or all of the issues.

The purpose is to try to resolve some or all issues or to inject a creative or innovative method of resolving the case.

Process

Settlement conferences should be used in public law cases and data will only be collected on these cases as part of the process evaluation. They will ordinarily take place after an Issues Resolution Hearing (IRH) and are listed as an adjourned IRH. At the IRH, parties will be asked if they consent to take part in a settlement conference to be resolved by a judge, other than the trial judge. **The court will need to list for a final hearing date as well as a settlement conference date at IRH stage**.

The settlement conference will be conducted in a way the judge considers appropriate to promote agreement. At no stage will there be any pressure on any party to agree any issue.

At the end of the settlement conference either there is a resolution of all or some of the issues or there is no resolution. Sometimes the settlement conference is adjourned for further consideration.

Where issues are resolved a consent order will be drafted. Where some of the issues are resolved an order will be drafted to reflect this.

Where some issues remain to be resolved or all issues remain to be resolved, the case will be adjourned for final hearing as listed at IRH. If the case is resolved, the hearing which has been listed for final hearing will be vacated.

In Liverpool, where the pilot originated, two judges are undertaking settlement conferences. Court staff have expressed that this is a good number for them to work with as it allows them to keep on top of listings, undertake the administrative work that is involved and allows judges to discuss progress with one another.

Legal issues

The judge will speak to each of the parties but anything said by the judge or the parties is confidential and privileged. This is why it is important for the settlement conference judge to be

different from the allocated trial judge and to have no further involvement following a settlement conference.

Nothing which the judge has said or the parties have said will be referred to at the next hearing or at any other hearing.

What is required from you during the pilot?

The pilot will be supported by a small-scale process evaluation. To inform this evaluation, we ask that you complete a short data collection template for each public law case that is scheduled for a settlement conference during the pilot period (see attached template for your information). This will be collected by the nominated HMCTS contact in your court and sent to the Ministry of Justice Analytical Services on a fortnightly basis.

As part of the process evaluation, Ministry of Justice Analytical Services would like to conduct some follow-up research with members of the judiciary who have been involved in facilitating settlement conferences. This will involve a short telephone interview with a social researcher to explore your views and experiences of what worked well, what did not work well, and what could be improved.

The data collection template includes the option to provide your contact details to take part in this research. Interviews are anticipated to take part in July.

We will be contacting you from late June to arrange interview sessions so you can feed back how you think the process is going to Ministry of Justice staff who will be analysing and reporting on the pilot.

How long with the pilot last?

5 months starting from June 2016 and ending in October 2016. We will be collecting the data as outlined above from the commencement of the pilot.

Workshops with HMCTS staff, Cafcass, local authority social workers and lawyers will take place from July.

What will we be collecting?

The forms will help us to collect information on the reasons why a case is referred to a settlement conference, the outcome, estimated time spent on preparing and facilitating the conference, the number of final hearing days listed and the estimated number of days saved.

When speaking to those involved in the workshops and interviews, we hope to understand experiences of the family justice professionals involved, identify lessons learned and good practice to inform the design and delivery of any future arrangements.

Information for the HMCTS, Legal Aid Agency, parents

HMCTS staff have been provided with information on what role they are expected to play during the pilot phase. They will be responsible for collecting data from you and providing it to Ministry of Justice Analytical Services with all the data you are recording.

The Legal Aid Agency has been informed about the process. During the pilot period it will be paying successful settlement conferences at a final hearing day rate for an IRH. Any unsuccessful settlement conference will be paid on a unit rate as an interim hearing.

A short guide for the parties has been produced and it is advised that parents are provided this before a settlement conference.

Questions and contact

For any questions about the pilot please email leslie.muir@justice.gsi.gov.uk

For any questions relating to data collection in relation to the pilot please email natalie.corbett@justice.gsi.gov.uk

Annexe 3 – Letter dated 10 June 2016 from Dr Elizabeth Gibby, Deputy Director, MoJ, A2J Strategy and Specialist Policy, to the 'pilot' DFJs

Many of you will have heard at the President's recent Conference, HHJ Margaret de Haas's motivating session on settlement conferences and the President's subsequent call for you all to consider settlement conferences in your respective areas.

The Ministry of Justice (MoJ) has been in discussion with the President on how best to achieve and support his vision of a wider roll out of settlement conferences and I am pleased to announce that we have agreed to implement a plan of phased pilots, supported by the collection of quantitative data and qualitative research. This work will be supported by expert social researchers from MoJ Analytical Services.

In addition to Cheshire, and Merseyside and Devon, where settlement conferences are already underway, the President has agreed that three further DFJ areas; Central London, South East Wales and Avon, Somerset and Gloucestershire should be included in the first phase of the pilot. These areas have been carefully identified by analysts to ensure the findings of the research are reflective of a range of court and judicial experience. This will strengthen the ability of the findings to inform whether, and how, a phased roll-out can be most effectively implemented and ensure all DFJ areas are prepared. We are very grateful to HHJ Robin Tolson QC, HHJ Stephen Wildblood QC and HHJ Isabel Parry for their agreement to participate at this stage, and for the ongoing contributions of HHJ Margaret de Haas and HHJ Miranda Robertshaw.

Findings from the study will be shared on an ongoing basis throughout the research with an advisory group, to include the President and representatives from MoJ, Cafcass and local authorities. This will follow a similar approach to that adopted for the revised PLO research. This will enable lessons learnt, challenges and areas of good practice to be shared with the judiciary and other stakeholders throughout the pilot so the model and delivery of settlement conferences are continually improved and the potential benefits are maximised.

Our pilot and research proposal assumes continued roll out of settlement conferences to other areas, subject to the emerging findings from the first phase, which will be considered by the advisory group and MoJ Ministers. We plan to review early findings in August to inform whether, and how, the next phase of the pilot should be rolled out.

We anticipate that, following the President's Conference, many of you will be keen to join the pilot and start settlement conferences as soon as possible. We therefore ask that if you wish to trial settlement conferences in your area, you contact natalie.corbett@justice.gsi.gov.uk copying your email at the same time to alex.clark@judiciary.gsi.gov.uk in the President's office. We will then include you in our roll out plans and will be in touch to discuss at what point we will be able to facilitate the extension of the pilot of settlement conferences to your area.

I understand that the phased approach to trial settlement conferences will be frustrating for some, but, as the President has acknowledged in agreeing to this approach, it is important that we undertaking thorough research to explore how the implementation of settlement conferences can best be supported and effective. My team and I very much look forward to engaging with you in the very near future on this work. In the meantime if you have any further questions or comments, please do not hesitate to contact me.

Annexe 4 – Guidance to its members issued by the ALC on 1 July 2016 (as revised on 7 July 2016)

We have considered the document published by the Ministry of Justice (MoJ) 'Settlement Conferences: Guidance for Parties'. We have concerns in principle about this project, which is being piloted in certain family courts. Our advice to members currently is to consider very carefully whether it is possible for them to discharge their professional duty to their parent (and extended family) clients by taking part in such conferences. The role of separately represented children and the children's guardians is not mentioned in the guidance, and we are not clear how it is envisaged that children are to be independently represented, and their voices heard.

Our main concerns are as follows:

1. The only published guidance on the pilot comes from the MoJ. It is not clear what legal authority the MoJ seeks to exercise in promoting this scheme, or how the judiciary who are to pilot it have been selected and trained.

2. The settlement conferences pilot has begun with scant information about their scope, conduct and evaluation, and no notification to the legal or social work professions or the judiciary as a whole. There has as yet been no publication of the MoJ guidance for the judiciary, or of the training that judges are to receive in order to be equipped to conduct these conferences.

3. We are unclear about the protection of the child's UNCRC rights to participate in the proceedings, and have their views heard by the court in this setting. Beyond a reference to the presence of "all parties", there is no specific consideration given to the voice of the child in such a conference, their participation, and how their views are to be represented. If a child is competent, separately represented, and disagrees with professional views, is that child to attend the settlement conference, in order to be persuaded by the judge that s/he should take a different view of his/her future? We doubt that such a procedure could meet the child's right to a fair hearing.

4. Care and adoption proceedings are a grave interference in family life by a public authority. They can have consequences for several generations. We believe the scheme may be in breach of the ECHR Article 6 and 8 rights of both parents and children. The right of individuals to communicate privately with their legal representatives is a cornerstone of access to justice. The right to professional advocacy is wholly undermined if lawyers are expected to remain silent. A child cannot have a fair hearing if his parents do not.

5. The Issues Resolution Hearing (IRH) exists to narrow the issues and, if possible, to resolve the case. It is when this fails that the settlement conference is proposed and, we understand, conducted by a different judge (although in some areas it seems that the IRH judge also conducts the settlement conference). The essential difference between a conventional IRH and the settlement conference lies in the judge seeking directly to persuade the parties to agree

with his or her view of the likely outcome, and expecting the parent or other parties to speak directly to the judge, without the protection of professional advocacy and legally privileged advice.

6. The judge taking the settlement conference will not be the allocated judge, and therefore the scheme undermines judicial continuity, which has been a central aim of the family justice system for many years. The settlement conference judge will not have the depth of knowledge and nuance of the case and may therefore arrive at the wrong conclusion about the merits. Apart from the issue of further delay, there is a risk, particularly in the smaller court centres, that the judge who deemed the case suitable for a settlement conference will communicate their disappointment to the trial judge if the conference fails to produce a settlement.

7. Lawyers are to be present at settlement conferences, but they are discouraged from speaking, and therefore their presence provides only a semblance of legal representation and due process. The judge may ask a question directly of the lay client which the lawyer objects to, but the client may answer before the objection can be made. The judge may attempt to restrict the lawyer's interventions as an undermining of the process. The passive presence of lawyers will not best serve the parents' or child's interests, but will serve to make appeals from "consent" decisions more difficult to launch. We believe it will be very difficult if not impossible for our members to discharge their overriding professional duty to promote the interests of their clients in such an environment.

8. The parents in care cases are usually vulnerable and disadvantaged individuals, a disproportionate number of whom have learning disabilities and mental health problems. They find it difficult to articulate their experiences and present their views effectively in a court room setting. They are inevitably under considerable emotional stress when attending court about their children. Being directly addressed by the judge and expected to reply is likely to be experienced by the parent as a form of pressure to make concessions, no matter how tactful and skilled the judge may be. The scheme is intended to produce settlement by bypassing lawyers and using the using the judge's authority and personality to produce concessions. If it were not, it is difficult to see why the settlement conference should produce a better rate of settlement than a properly conducted IRH.

9. The scheme will seriously undermine public confidence in the fairness and transparency of judicial decision-making in the family courts. Public confidence in the "secret" family justice system is shaky. Final decisions for the permanent removal of children from their parents made "by consent", without parents having the benefit of legal representation and privileged advice, will be highly suspect. This will further damage public trust in family justice.

10. The scheme is clearly advanced by the MoJ in order to save court time and money. It is to be evaluated on the basis of court time saved by avoiding contested hearings. It is not focused on the quality of the decisions made, nor on the centrality of the child's welfare, including the benefit to the child and the parents of having had a fair hearing. There would appear to be no plan to follow up "failed" settlement conferences, to see if the trial judge came to the same conclusion as the settlement conference judge had argued for.

11. Trials are not simply a process which must be gone through in order to demonstrate fairness. The tenor of many care cases changes radically when oral evidence is heard and opinion evidence is tested in cross-examination. Expert opinion and social work evidence are often shown to be weak, and the professional views of the family too negative. Parents' explanations of events, which have previously been dismissed by professionals, may be found by the judge to be credible. The trial process must be preserved in order to ensure that the evidence against the parents is properly tested, and that the best possible decision is arrived at for the child.

12. The guidance does not mention the fact that the local authority must prove, on a balance of probabilities, that the section 31 threshold criteria are met. It may be that only cases where the threshold criteria have been fully conceded are considered suitable for settlement conferences. However, if aspects of the threshold criteria remain to be proved, it cannot be a fair process for the judge directly to ask the parent to make damaging concessions on threshold issues, without lawyers having an opportunity to advise them in private and speak on their behalf.

13. Judges are trained to consider cases impartially and to make decisions on the evidence. It is not in our view a proper exercise of the judicial function to come down off the bench (it seems literally as well as figuratively) and engage directly with the parent. It seems that judges are to be free to address any issues and ask any questions they choose. This seems to us to be an improper and uncontrolled use of judicial authority.