House of Lords Select Committee
The Children and Families Act 2014

Written evidence submitted by Resolution
April 2022

Introduction

Resolution is an organisation of 6,500 family lawyers and other family justice professionals in England and Wales, who believe in a constructive, non-confrontational and collaborative approach to family law matters, especially if there are children involved. Resolution also campaigns for better laws and better support for families and children undergoing family change.

Summary

- The introduction of the Children and Families Act 2014 has made little difference to the family justice system and the children involved.
- The presumption of the involvement of both parents in the life of the child after family separation has not had any impact on proceedings or made a significant difference to judicial decisions, but it can be helpful in giving early professional advice to parents.
- Future reforms need to ensure the centrality of the voice of the child and address the narrow scope of private family legal aid.
- Applicants and children need to move through the family justice system more quickly, perhaps involving the introduction of a statutory time limit on child arrangements proceedings.
- Resolution recommends replacing statutory Mediation Information and Assessment Meetings to give people access to a broader Advice and Information Meeting on all types of dispute resolution, or at least introducing a requirement for a respondent to attend a Mediation Information and Assessment Meeting. In practice that meeting is used primarily as a route into mediation which is not suitable for all cases, or as a stepping-stone to court.
- There should be access to earlier and statutory Separated Parents Information Programmes.
- We believe the 26 week time limit on care and placement proceedings strikes the right balance, but the time limit frequently needs to be extended to meet the best interests of the child.
- The family justice system cannot be considered and changed in isolation. Providing more resources and a joined up government approach to help families access early family support and to steer more cases, where appropriate and safe, away from the family justice system are needed.

If there were to be a Children and Families Act 2022, what should it include and what might be the barriers to implementation?

1. We would like to see more of a framework around how the court and Cafcass consider how the child's views are to be to be taken into account, perhaps a statutory requirement that the issue of how the voice of the child will be heard specifically in the particular case should be addressed at the first hearing. The inclusion of the child in the current Pilot Scheme: Private Law Reform: Investigative Approach under PD36Z is welcome.

2. Applicants, and children, generally need to proceed through the private law system more quickly once an application is issued. In October to December 2021 (the last period for which statistics are currently available), it took on average 44 weeks for private law cases to reach a final order, up 7 weeks from the same period in 2020. This continues the upward trend seen since the middle of 2016[1].

3. Listing capability needs to be improved. Resolution recommends that consideration be given to the introduction of a statutory time limit on child arrangements proceedings, with power to the judge to case manage matters outside of that timeframe where this in the interests of the child's welfare. In our members' experience, the time between the making of an application and the first appointment (currently generally four to five months), and between any subsequent court hearings is simply unacceptable and damaging for children, especially if they are not seeing a parent or have only limited contact. Consideration would need to be given to what an appropriate time limit and exceptions, such as relocation cases, would be.

4. Alongside this, Resolution considers that:

    a. Resources need to be focused on the early analysis of cases to make sure they set off in the right direction and proceed more efficiently to save time and resources in the longer term. We touch on the wider picture in paragraph 14 below, but some of the challenges in the private law children system could be resolved by proactive and early case management from experienced judges (with up to date expertise to identify domestic abuse cases when they are not so obvious whilst recognising that in some cases it is not possible to gauge the safeguarding threat level until allegations have been committed to written evidence) who are there from the start and stay involved with the case. Or at least by an early and effective triage hearing to consider all issues and deal with the facts so that the parties and the case can move on. Triage by a district judge or more senior judge, perhaps a triage judge for a particular area (including for 'returners'), would be most likely to rightly streamline and set the framework for a case, increase the prospects of settlement where possible, and be an efficient use of resources. It would also give signals to the magistrates around how to most effectively deal with the matter. Knowing that a judge of appropriate level had set the case on track would, we believe, give increased confidence in the system for our members and their clients.

    b. More robust application of the statutory Mediation Information and Assessment Meeting (MIAM) process should be applied by the judiciary as recommended in the recent CA judgment in K v K [2022] EWCA Civ 468 which emphasises the importance of this both at the outset and during a case. For example, urgent applications made around holiday times usually apply the urgency exemption, but a MIAM should then be properly considered by the judge, once the urgent issue has been dealt with to avoid escalation if the case then proceeds down the child arrangements order route.

    c. The judiciary could do more to encourage parties to use pauses in the court process and periods between court activity/ hearings to pursue other options, especially during foreseen long periods of court inactivity. We do not recommend putting the court process on hold as mediation or other efforts at issues resolution take place; the two processes should operate in tandem, without adjournments (so not causing

[1] Family Court Statistics Quarterly: October to December 2021

delay). It would be useful to produce some standard court order clauses to support the use of any out of court process complementary to the court process.

5. We urge caution around how well the current statutory MIAM works and whether the MIAM, often perceived as a siloed hurdle to court proceedings, has steered families away from court as much as envisaged by S.10 of the 2014 Act. In its second report the President's Private Law Working Group found that there is widespread recognition that the current MIAM system is not working as intended.

6. Resolution recommends that legislation replace MIAMs giving people access to a broader Advice and Information Meeting (an AIM) earlier in the separation process, before minds are set on court and an application to court is considered, about the different ways of proceeding and to help parents make an assessment of what might fit best for their circumstances and produce a fair and lasting outcome. It should be made clearer to those who assume or feel that their dispute is unsuitable for mediation, (and sometimes wrongly think that their only options are mediation or litigation), that there may be other options (including those not available when policymakers were developing the MIAM) to help them settle their matter for the benefit of their children.

7. It is important to recognise that there are still those who will go first and possibly very early to a solicitor, well before any focus on court gatekeeping. A first advice meeting with a solicitor would be one of the ways to provide an AIM, as well as providing initial and individualised legal advice.

8. There is currently no requirement for a respondent to attend a statutory MIAM. Government needs to revisit how legislation could be used to better engage respondents in the process, including looking to how the civil and tribunal services make out of court resolution more of an expectation.

9. A Separated Parents Information Programme (a SPIP) and a MIAM are clearly different, but it makes no real sense why only one is compulsory before an application can be issued. Having a statutory SPIP (with exceptions such as an emergency) may be very useful in appropriate cases and in light of the value of early intervention.

10. There are of course limited resources but very high demand which would undoubtedly be a barrier to or be seen to be a barrier to implementation of much of the above. Please also see paragraph 14 below.

Have the reforms to the family justice system succeeded in making the system faster, simpler and less adversarial?

11. Overall, no, not much has changed. In fact the system is generally slower and more difficult for families and children to navigate. And so many users of the family justice system are of course without professional advice and unrepresented

12. The 26 week time limit for public law proceedings helps to focus minds on resolving cases within that time if possible, but is met in the minority of cases, and there will be good reason for taking longer in some cases. The average time for a care and supervision case to reach first disposal was 47 weeks in October to December 2021, up 5 weeks from the same

quarter in 2020 and the highest average since 2012. 23% of these care proceedings were disposed of within the 26 week limit introduced in the 2014 Act[2].

13. Resolution members' commitment to our Code of Practice means they believe the process of making arrangements for children can be done in a way that minimises conflict and promotes amicable agreements. Our members find that matters are often easier to resolve if discussions or negotiations are about co-parenting and parenting time in the interests of the child. Removing labels helps children. Resolution therefore supported the introduction of child arrangements orders. The term 'child arrangements' is less loaded than 'residence' and certainly 'custody' which is not a bad thing. It is right for the orders available, including the name of the order, to be clearly focused on the child and support encouraging the involvement of both parents in the child's life after separation where safe to do so. However, the drafting of orders is important and the language within them could sometimes be more neutral. There will be some cases where it is very clear who the child lives with, and varying circumstances and levels of agreement. But for example "will live with" can be a trigger term, "The child will divide their time as follows…" can be a more constructive approach.

14. Legislation alone can only achieve so much. Piecemeal legislative developments will not achieve cultural change. Resources will need to be dedicated firstly to achieving culture change so people better understand the impact of conflict on children and where court is inappropriate. Secondly, to early analysis of those cases coming before the court to make sure the court provides protection and that cases set off in the right direction. Some separating and separated people simply need help with co-parenting and to sort out the arrangements for their children. That can be for many different reasons and without there being any safeguarding reasons. Some parents and children would like the other parent to be more involved. There needs to be appropriate investment in early family support and parental education as well as in legal advice and the family justice system. Resolution endorses the recommendations of the Family Solutions Group for a wide public education campaign, to reframe family breakdown away from justice language and towards an understanding of child welfare.

How has the Act interacted with other reforms to the family justice system, for example the changes to legal aid?

15. People need to have access to other support, including early advice that is pertinent to their individual circumstances. The importance and positive impact of early access to legal advice (which advice is not representation) is well recognised[3]. Early legal advice helps people

[2] Family Court Statistics Quarterly: October to December 2021

[3] In their July 2021 Future of Legal Aid report, the House of Commons Justice Committee, having heard evidence from Resolution and others, recommended investing in *early* legal advice.
Academics including Anne Barlow and Mavis Maclean, recommend from research, including Mapping Paths to Family Justice, that early legal advice would help more families to make use of mediation, and avoid the risks of escalating problems.
A review of the Child Arrangements Programme June 2019 (para 73).
Law for Life's Affordable Advice Service pilot September 2021 confirms that there is potential for the advice provided by this pilot service, involving Resolution members, to reduce conflict when a potential / LiP reaches that service at earlier stages, and by empowering LiPs to get a better grasp of the parameters of family law proceedings. The recent introduction of the 'Where do I stand?' advice session, which provides a broad overview of the divorce process for LiPs at an earlier stage, was also successful, with positive impacts on the emotional preparedness of clients, particularly those who were less advanced in the process.

understand their legal rights and responsibilities and where court is inappropriate, manage expectations on outcomes and is a point of appropriate referral away from or to court to resolve issues. It can help people feel empowered and confident that they don't necessarily need a judicial decision and about going to mediation or other dispute resolution.

16. Signposting to and encouraging the use of certainly legally aided family mediation, via early individualised legal advice, is lacking. National Statistics show that Legal Help has fallen continually and significantly to a small fraction of the level prior to implementation of the LASPO Act 2012[4] . This was the major point of referral to out of court dispute resolution[5] so some of those who might have benefitted from direction to legally aided mediation will have simply missed out. Mediation Assessments and Starts still stand at under a half of pre-LASPO levels[6].

17. Supporting mediation with legal advice from an early stage supports participants to use mediation to find a full, workable and effective settlement, and to have legal advice on any legal issues arising within the mediation with which the Family Mediation Council's Code of Practice prohibits their mediator from assisting. The majority of mediators themselves encourage parties to have independent legal advice to support and inform the mediation process, as a protective measure, and to facilitate implementing their proposals via a binding consent order, including in complex situations, which is more cost-effective if a solicitor has been involved from the outset. But Help with Mediation for a financial consent order to be drafted is rarely used – even if a family client is aware of such, it is not viewed as commercially viable for legal aid providers to deliver and there are very few solicitors offering it.

18. The purpose of statutory MIAMs is to provide information about the ways in which family disputes may be resolved other than by the court, and the suitability of any of those, but legal aid is available solely for mediation. Mediation may be unsuitable but another tool may be suitable so legal aid should be available for a wider range of family out of court dispute resolution options. The scope of legal aid fails to cover a broader range of approaches to issues resolution than family mediation or litigation only.

19. Whilst not directly connected to the 2014 Act but importantly, for far too long there have been, and continue to be, parties (who may be unrepresented themselves) giving evidence in the family court and being cross-examined by their alleged or proven perpetrator. The family courts make decisions which often have life-long consequences for the children involved and need the best evidence possible to provide a safe, lasting and satisfactory outcome for the child and to ensure justice is done to all parties. Legal aid for representation of both victims and perpetrators up to and including fact finding in private family cases, would in our view address the problem of perpetrators seeking to use the family court process to abuse their victims more effectively than the provisions in the Domestic Abuse Act 2021 alone coming into force shortly. The issue of perpetrators using the family justice procedure to abuse victims is much wider than cross examination, there are ancillary issues including repeat applications and dragging out the process.

[4] Legal Aid Statistics England and Wales bulletin: October to December 2021.

[5] The LASPO PIR found that "Prior to LASPO, the majority of referrals to mediation were made by legal aid funded solicitors. The removal of private family law from the scope of legal aid removed the opportunity to refer cases towards mediation." (Para 613).

[6] Legal Aid Statistics England and Wales bulletin: October to December 2021.

Does the 26 week time limit on care and placement proceedings strike the correct balance between justice and speed?

20. On balance, yes the 26 week time limit strikes the right balance but the time limit frequently needs to be extended to meet the best interests of the child. As mentioned in paragraph 12 above, whilst the time limit is only met in the minority of cases, it does help to focus minds on avoiding delay if possible.

How well have the limitations on expert evidence served children in the family justice system?

21. Resolution supports the control of the use of expert evidence in children proceedings and the need for specific expert reports before the family courts. Our Children Committee members report that the use of expert evidence may have been slightly reduced. More importantly for children, there can be challenges to ensure that the right experts are available to assist the court and provide timely evidence, and to meet the 26 week timetable or the needs of the particular child and case, where the court decides that expert evidence is necessary.

What has been the effect of the requirement to consider mediation?

22. Mediation Assessments and Starts still stand at under a half of pre-LASPO levels. In practice the MIAM is used primarily as a route into mediation or as a stepping-stone to court. As part of the court process, the MIAM becomes part of positioning for that court application, often simply comes too late in the separation journey for mediation to appeal and be successful, or the MIAM process isn't enforced by the court.

23. Resolution has always believed that there is a better way. Mediation and other dispute resolution processes are effective processes in the right circumstances. There is no doubt that they can provide more bespoke and creative solutions than court, again in the right circumstances. Some who may have been unwilling to consider mediation have achieved outcomes once made to find out about it. And it must be the case that some of those self-representing in court (for example, where their case did not involve strict legal principles, or serious or complex issues) would be less in conflict and distress if they had made use of or been able to make use of other dispute resolution.

24. The current Family Mediation Voucher Scheme has had some success in motivating separating and divorcing parents to participate in mediation. Mediators participating in the scheme are asked whether, in their view, if there was no financial contribution available the participants would have gone to mediation. Mediators have consistently answered no in around 48% of cases (and yes in around 52% of cases). We understand from mediator members that this scheme has been particularly beneficial where one party is legally aided, in that it has meant the non-legally aided party could attend more mediation sessions free of charge which might otherwise be unaffordable for them. We support the FMC's calls for the Mediation Voucher Scheme to continue and for further data to be gathered. We suggest that vouchers for other out of court processes, for example children arbitration, should also be tested, as these are additional opportunities to reduce the burden on the family courts, and get families and children to quicker resolutions.

How has the presumption of the involvement of both parents in the life of the child after family separation affected proceedings?

25. We do not believe that the presumption has had any impact on proceedings or made a significant difference to judicial decisions.

26. Our Children Committee members report however that there has been some impact on out of court client meetings with individual parents. The presumption can be helpful in giving advice to parents and explaining the approach the court will take. This can help to manage expectations about what an application to court can achieve, help parents to reach agreement and avoid court proceedings.

27. Our current policy position is that the wording of the rebuttable presumption for involvement with both parents in S.1 Children Act 1989 (as amended by S.11 of the 2014 Act)(rather than a presumption for contact) does not require amendment. The issue is more where a court may be approaching the rebuttable presumption wrongly when making orders for contact (unsupervised or otherwise), and where the understanding of abuse in all forms and familiarity with PD12J – as well as consistency in decision-making - is not as we would want it to be. But we await the evidence, findings and recommendations of the current review of the presumption of parental involvement in child arrangements further to the June 2020 report Assessing Risk of Harm to Children and Parents in Private Law Children Cases.