PRESIDENT OF THE
FAMILY DIVISION

SPEECH OF SIR MARK POTTER PRESIDENT OF THE FAMILY DIVISION

THE PRESIDENT'S CONFERENCE

12 - 13 MAY 2008

Opening Address

First, may I start by welcoming all of you to Highgate House for this year's President's Conference.

Second, I apologise if the programme, as included in your pack appears somewhat less 'alluring' than in previous years, unleavened as it is by an Archbishop, a Child Psychiatrist or any other interdisciplinary figure from outside the judicial or administrative circle. However, in the light of the various developments which have taken place since last we met, I felt it valuable, if not essential, to concentrate on matters of planning, administration and leadership which are now such an important aspect of the life of DFJs as well as FDLJs, who now find themselves managers of judicial business effectively in partnership with the Court Service.

My decision also stems largely from a high level meeting called by the Senior Presiding judge at the end of last year between PJs, FDLJs, and the Regional Directors, at which common cause was made between the judiciary and the court service in resisting proposed cuts in resources which threatened to undermine the success of improvements sought to be made by the judges, not least in relation to my own Framework for a Family Court about which I spoke at this conference last year. This convinced me of the real value of close working with HMCS in the current climate if best results are to be achieved.

It may help if I run briefly through what has happened since then, in progressing the move begun under Dame Elizabeth to create a unified family court system within the existing court framework.

But before I do, may I sound a note of reassurance. This will not be the occasion for announcing yet further initiatives beyond those already in progress. So much has happened in the last year, with the piloting of the Public Law Outline, the revision of the Allocation Order to encourage work down to the FPCs, the Ticketing Review and the move to co-location of courts wherever possible, that I see this next year as a period of "bedding down" on lines already set, with the chance for the judiciary and administration to play themselves in together against a background of limited resources.

Last year, in my introduction, I outlined the seven elements of the Framework for a Family Court as follows.

First, arrangements for judicial management of a family court, comprising judges of the High Court, Circuit and District Judges, and Magistrates of the Family Proceedings Court. The key element was an effort, in combination with HMCS, to bring together the work of the FPCs and the County Courts, wherever possible under one roof as fully integrated family courts. There are now eighteen such Family Court Centres established. Examples which have opened since the last Conference include Manchester, Rhyl, Nuneaton, Luton, Wolverhampton, Exeter and Plymouth. It has also been possible to co-locate family justice listing and administration in 36 locations where FPCs have access to the same case management IT systems as the County Court in their area. This has improved the IT available to staff and now renders possible the gathering of reliable statistics in relation to those courts. Inevitably the Unified Family Service Programme established by HMCS will not achieve unification of all FPCs and County Courts, for a variety of reasons including geography and the need for access by local court users. However, the exchange of information, the co-ordination of listing and the keeping of proper statistics will be much improved when all the FPCs receive the Family man system as part of the SUPS programme, hopefully by the end of 2009.

The Second, element of the Framework was my introduction of new draft allocation criteria for the categorisation and distribution of family proceedings as between the various judicial layers. This has been successfully worked to since. It was intended to make clear that all family work should be heard at the appropriate level of court, with the emphasis on as much work as possible being steered to the FPCs. It was deliberately left flexible so it could be tailored to the resources available in your area.

The existing Allocations Order has now been revised in the light of the changes made and proposed and the resulting draft Allocation Order was circulated for consultation on 27th March, with a closing date of 17th June.

The consultation is restricted to the details and drafting technique of the new order and practice direction, since the Government has already formulated its policy position that as much family work as possible, both private and public, should be heard by the FPCs (whether Family Magistrates or DJ (MC)s qualified to do the work). To this end, the draft order is in more directive terms than my original guidance. However, it still recognises the necessity <u>not</u> to make the directions mandatory, so that, for the avoidance of delay, and where local resources dictate, discretion in relation to the allocation of individual cases is maintained.

I am in the process of finalising the form of new Allocation to Judiciary Directions, which are a matter for me rather than the government. It is however, incumbent on me to consult the Lord Chancellor. An initial draft of the proposed new directions is available for those who wish to see a copy at this stage. There have been some preliminary discussions with the MoJ and it

is understood that the overall scheme of the draft is acceptable. However, the current draft is subject to any further comments which MoJ officials and lawyers may have.

A limited but important issue arises in relation to allocation of Children Act proceedings to unticketed judges who are not nominated for public or private family law proceedings. At present unticketed judges may hear interlocutory matters, unopposed applications and ex parte applications.

Following the ticketing review, and recognising that complex family issues can be involved in even unopposed applications, I have concluded that, except in what should be a restricted number of emergency situations, all judges dealing with family cases should be nominated for and have the necessary training to deal with the cases.

I understand that there may be instances where an applicant attends a court seeking an emergency Part 1 order to protect the welfare of a child, and there is no family ticketed judge present in the building, or within a reasonable travelling time, to consider the matter. In such circumstances, the applicant should not be prevented from making the application because of the lack of a family judge, and the application may need to be heard by a circuit judge or a district judge without a ticket.

However, such decisions may sometimes have far-reaching consequences, and it seems to me sensible to restrict them so far as possible to family judges.

It would be very helpful if you could advise me, through my office, how often you think this situation is likely to arise in your area, and whether you have any practical suggestions for dealing with the problem, or indeed any other advice for the drafters of my Allocation to Judiciary Directions.

By way of reassurance, it is of course the case that the Directions will in any event be subject to section 9(3) of the 1990 Act, which provides that:

> "Where any directions have been given under this section allocating any proceedings to specified judges, the validity of anything done by a judge in, or in relation to, the proceedings shall not be called into question by reason only of the fact that he was not a specified judge."

As you are aware, I have now completed my ticketing review designed to create a simple two-tier system as between those holding public law tickets and private law tickets. Such an exercise was necessary to meet the recommendations of the Judicial Resources Review. All tickets have been reviewed on an individual basis and decisions made on the basis of information and advice provided to me by the FDLJs, DFJs and Regional Directors. This has inevitably created tension and disappointment on the part of certain District Judges who will no longer be ticketed for public law directions only. In some cases, where the initial information upon which I had based my decision had been faulty in relation to business need, my decision was reviewed and hurt feelings assuaged. I have had a meeting recently with representatives from the Association of District Judges and I understand that, despite certain individual examples of disappointment

remaining, the Association are satisfied that my review has been properly and fairly conducted.

The Judicial Studies Board are now considering how future training courses can best be organised to complement the new ticketing regime. Course Directors are exploring the possibility of introducing a new course covering both private and public law designed for judges who already have some experience of family work. The course is still very much at the conception stage. However, it will be likely to be a week long, the first such course taking place in May 2009. Please may I urge you to assist myself and the JSB by considering and advising my office how many people you think you will be likely to be putting forward for such a course.

It may be helpful at this stage to add that the JSB intends that, in future, DFJs should be invited to a three-day public law continuation course every three years, not only for the purpose of enjoying the bar and ping pong facilities available at Highgate House, but to give you the luxury of additional training and the exchanging of ideas away from your immediate responsibilities. Attendance on the course will be staggered, with the various invitations being sent for an event this autumn.

The third element of the Framework, referred to last year was the intended issue of gatekeeper and listing guidance, covering the issue and allocation of proceedings and the administrative support necessary in that respect. However, such has been the efficiency and co-operation of judiciary and administration in this respect against the background of the implementation of the PLO, that HMCS has expressed itself satisfied that, at any rate for the present, such guidance is unnecessary.

The fourth element of the Framework was, of course, the revision of the Protocol to become the Public Law Outline which, is now being generally implemented as from 1st April, following trial in the various initiative areas. It is set out in the attractive glossy with red and white cover with which we are doubtless now all becoming familiar and, no doubt, its impact and implications will form a significant part of your seminar discussions at this conference. I say no more about it at this stage.

The fifth element of the Framework was stated to be a revision of the President's Private Law Programme (PLP) in the form of a new private law Practice Direction. The principal concern of the PLP was to initiate and provide impetus for in-court conciliation using Cafcass practitioners to assist wherever in-court conciliation schemes were in place or could be developed. The position has now been reached where, having achieved the existence of such schemes throughout the country at County Court level and in a number of FPCs, Cafcass are anxious to revise their internal working processes and to extend and improve efforts at conciliation prior to the first hearing. This is a most laudable aim and has already been the product of local agreement between DFJs and Cafcass in a few centres in the country. However, the resources and performance of Cafcass across the country are patchy and, before further steps are taken whereby a change to the PLP might become appropriate, in-depth discussions require to be held with Cafcass. These are

currently in train within a working party chaired by Hogg J, of which John Altman is vice chairman and I intend to report upon them in the last session of this conference tomorrow.

The sixth element of the Framework was the drafting of the new Family Proceedings Rules as devised by the Family Procedure Rule Committee with the aim of bringing out a completed code along the lines of the CPR by April of this year. In the last year, such a consummation, while devoutly to be wished, has proved impossible, not for lack of ambition or industry on the part of the committee, but because the state of IT development precludes the ability to produce the necessary forms under the new rules until the end of 2010. 'Workaround' measures have nonetheless enabled the PLO to come in on time and will also enable the enforcement and contact activity provisions under the Children and Adoption Act 2006 to come into effect in the autumn of this year.

The seventh and final limb of the Framework was stated to be a new model for a Family Court Plan for each local justice area. The starting point last year was an interim family court report from each care centre, to which care centre and FPC plans were annexed. This has now been developed into a more sophisticated and less burdensome form of family court report, in which the report on the previous year's performance is combined with sections on plans for the future in the form sent to you in advance of this conference and which will be addressed by Ernie Ryder in the next session. Not only should it be easier to compile and be less demanding on your time, but it has the potential to be an effective planning tool and is a useful source of headings by way of an agenda in your first seminar discussions this morning.

Leadership

Departing from the specific aspects of the Framework may I say a word about the enhanced leadership role in which DFJs seem to me to be cast, not least by reason of the implementation of the Public Law Outline and the high importance that the PLO should prove a success in the Case Management and disposal of Public Law proceedings. The success achieved in a number of the judicial initiative areas has not been achieved merely by strong judicial case management within the proceedings but by the DFJs concerned talking to other local agencies, notably Cafcass and Local Authorities to discuss expectations with them, learn of their problems, and seek to foster a shared set of values about the importance of the PLO. It does seem to me that this can and should be done by all DFJs without any threat to judicial independence or compromise of the independent role of the court as adjudicator. The forum provided by the Local Family Justice Council for discussion of such matters is not necessarily (and in the early stages of implementation will almost certainly <u>not</u> be) sufficient to progress matters in this direction. What may well be appropriate in some cases is a meeting, not just with local authority lawyers, but with the local Director of Children Services or other key children services figure to ensure that the Local Authority is engaged at a high level with the requirements of the PLO other than simply through their legal disbursements. It is likely also to lead to an understanding of any difficulties which may exist in respect of giving priority

to the PLO against the background of other initiatives and requirements which no doubt beset the Local Authority.

Similarly, regular meetings with the local Cafcass Manager should achieve clarity and understanding in relation to difficulties over allocation of guardians and the timing and content of Cafcass analysis. As already suggested, the extent of the success of the PLO as it develops is bound to depend not simply on case management within the confine of the Outline, but on a shared set of values which the DFJ, together with any judge to whom he/she has deputed responsibility for the Local Family Justice Council, is in the best position to promote. I hope that this is an aspect which you will find time to discuss in the plenary session this afternoon, following the presentation by Peter Shaw and Judith Moir designed to assist in managing yourself and your workload.

On this particular aspect, you may remember that last year I said that I had had a productive meeting with the Chief Operating Officer of HMCS, Neil Ward (now its interim Chief Executive) over the question of additional administrative support for DFJs. In consequence a group called the National Family Programme Forum under Gill Hague the Area Director for Lancashire was set up and, in particular, was asked to consider the impact of the PLO on the courts and to ensure that court staff were trained in readiness for 1st April. I understand that this was done and that in various court centres additional administrative support has been made available for DFJs. However, if there are still problems in this respect, they will be an opportunity for you to air them with your Area Director or Family Lead Administrator in the syndicate groups tomorrow.

On a wider front, at the beginning of each term, I have a meeting with the FDLJs and we spend a full day discussing practical circuit issues and problems. If you let your FDLJs know of any particular matters you feel could usefully be discussed at these meetings, they will place them on the agenda as appropriate.

Bulletin points

I now turn to a few bulletin points. First, I hope you have all received a copy of my New Guidance regarding Rule 9.5 appointments, which was published on 15th April. Its form is simply a reversion to the previous position, so that it is no longer necessary for these appointments to be made by a Circuit Judge. This change has been made for the avoidance of delay. It is not intended to encourage a return to the previous uneven levels of appointment by District Judges in certain areas, which inspired the change in the first place. The resources of Cafcass and the Legal Aid fund remain under great strain.

Second, on Friday 9th May, you have all been sent a copy of my overdue Practice Direction- Residence and Contact Orders: Domestic Violence and Harm. This is a thoroughly comprehensive document, the views of Cafcass, the Department of Health and the Family Justice Council having been taken

into account as well as those of policy officials and lawyers at MoJ. I am extremely grateful to Philip Waller for his skills and hard work in drafting it.

Third, as I am sure you are finding, the number of litigants in person appearing before you is ever increasing. In the light of this growth at all levels of family court and in the wake of the Court of Appeal decision in *re children of O'Connell and others*, on 14th April 2008 I issued a revised McKenzie Friend Guidance, which supersedes that of 13th May 2005 and is a reminder that the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing. It makes clear that there is a strong presumption in favour of the admission of McKenzie friends and gives practical advice on how applications for the assistance of a McKenzie Friend should be considered.

Finally, as you may have noted from the media, I have been very concerned at the information reaching me regarding the level of non-molestation orders granted since the implementation of the relevant provisions of the Domestic Violence Crime and Victims Act 2004 on 1st July 2007. I am aware that judges across the jurisdiction are concerned that the effect of the removal of the power to attach a power of arrest to a non-molestation order and the making of a breach of such order a criminal offence has in fact been to reduce the protection provided to the complainant in practice, and has reduced the number of applications by victims who not wish to criminalise the offender. The Government, as you may have read in the press, is not convinced that is the position and has commissioned research by Bristol University into this area. The research should be published in June. The issue has been taken up and is being considered very closely by the Family Justice Council as well as the Home Affairs Sub Committee (now rechristened the Justice Committee). I have asked that as soon as the results of the research are available the issue should be referred to the Family Criminal Interface Committee for consideration.

Well that completes all I have to say by way of introduction. I hope you will enjoy the day. So far as I am concerned it will be an invaluable process to receive your communal input on the administrative issues which concern us all. I cannot thank you enough for the effort you all put in in your DFJ roles without which the system simply could not function.

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