

JUSTICE publishes report on Improving Access to Justice for Separating Families



On 13 October 2022, JUSTICE will publish its latest report “*Improving Access to Justice for Separating Families*”. The report has been prepared by a Working Party of experts, chaired by Professor Gillian Douglas, Emeritus Professor, King’s College London. It makes 43 ambitious but realistic recommendations related to child arrangements problems and their resolution in England and Wales. They build upon reforms in private family law already underway, including the commencement of the Domestic Abuse Act 2021 and the ‘pathfinder courts’ being piloted currently in Dorset and North Wales.

Separation is often a distressing and traumatic event, particularly when children are involved. Most families resolve disagreements about children (e.g. where they live, how often they will see other family members) privately. However, some cannot and need additional help; they may not be emotionally or practically ready to negotiate, or imbalanced power dynamics, for example domestic abuse, would make unassisted negotiation unfair or unsafe.

The central question for the Working Party has been how to better secure access to justice for these families. It has consulted widely with professionals and experts in the family justice system; individuals (adults and children) with experience of using the system; and those outside it, from other jurisdictions and from other child-related disciplines.

The challenge is not a small one. Families face a confusing and disaggregated landscape of advice and support. Affordable and trustworthy legal advice is scarce (families in court are disproportionately economically deprived) and there is a lack of coordination of the support families need. Those who do go to court often do so unrepresented since legal aid was significantly cut in 2013 (only one in five cases has a lawyer on both sides). These litigants in person experience a system still designed for lawyers, which is marginalising, confusing and stressful. Additional vulnerabilities, such as domestic abuse, mental health difficulties, and substance abuse, are prevalent amongst court users and can intersect, whilst courts with limited resources struggle to cope with families’ complex problems. Meanwhile, the children who are at the centre of the dispute, but in the vast majority of cases not a party to the legal proceedings, too often feel unheard and unsupported, like the object of an adult dispute rather than an individual with their own perspective about their future – and a right to be heard.

The report proposes 43 recommendations for a **safe and problem-solving approach** to families’ child arrangements problems. Recommendations include:

Beyond court: the wider family justice system

- **Information and early legal advice:** a single authoritative information website for separating families and piloting of publicly funded early legal advice for child arrangements problems.
- **Coordination of legal and non-legal services:** the creation of hubs, alliances and networks to coordinate services for separating families in the community, including the use of DfE-funded family hubs. We recommend legal and non-legal services work in partnership to support families with their child arrangements problems.
- **Consistent risk screening:** the systematic use of a common, structured, overall risk screening tool by professionals throughout the family justice system including mediators, legal professionals, and Cafcass in court, to ensure a consistent and proportionate response to risk, wherever a family go for help.
- **A child participation presumption:** throughout the justice system, we recommend a new presumption that all children will be offered the opportunity to participate in processes which assist in the resolution of a dispute which concerns them, both in and out of court, in an age-appropriate way.

- **Non-court dispute resolution:** in addition to mediation, other non-court dispute resolution processes should be financially supported, including “packages” of support which combine legal help with non-legal help (like counselling). Non-court processes need to be better supported to be child inclusive, through parental education, professional practice, and funding incentives.

Going to court

- **The “case progression officer”:** we recommend the introduction of this role as standard in every case. They are a neutral, legally-trained court employee, who will: provide the family with information at the outset and throughout; manage preparation for hearings if one or both sides are unrepresented; answer queries about the outcome of any hearing; and help a litigant in person with next steps required of them.
- **An initial investigation should be conducted by a “Court Team”:** a multidisciplinary Court Team – consisting of the case progression officer and a Cafcass officer, to which specialists, e.g. in domestic abuse, could be added – should screen the whole family for risk, provide the family with information, talk to the adults and relevant third parties such as the child’s school, and importantly would also consult the child. The investigation could make referrals for support while the family try another process, such as mediation, or it could better prepare the case for the judge/magistrates.
- **Funding for expert evidence and representation:** when the court deems expert evidence or testing is necessary, but the parties cannot afford it, there must be funding available. When the court deems a fact-finding into alleged harm necessary, but the parties cannot afford representation, there must be legally-aided representation for both parties. When the court decides the child should be a party, there must be sufficient resources to make a Guardian available.
- **Child participation in court:** the court should have an explicit duty to offer children the opportunity to participate. This participation is a process, not a one-off event, which means letting the child know what has been written about them more often; letting them meet the decision-maker more often (and training judges and magistrates to do this); and giving the child feedback about the outcome and how their voice was taken into account (which is currently entirely absent from the process).
- **Cases should be reviewed as standard:** a reviewing officer, normally Cafcass, should follow up with the family (including the child) after a certain period of time to ask if the final order is working in the best interests of the child. If it is, there is nothing further and no additional hearing. If it isn’t, the same judge can hold a review hearing to consider any changes necessary. This primarily ensures children do not become stuck in arrangements in which they are seriously unhappy or unsafe, with no oversight of the court.

Chair of the Working Party, Professor Gillian Douglas said:

“It was a great privilege to chair this Working Party on such an important issue. Much work has been done on finding better ways of helping parents to resolve their child arrangements problems outside of the family courts. But we know that a significant number of families and their children will continue to need help from the legal system. In framing ambitious but realistic recommendations for policy makers, we have sought to ensure that the family justice system can deliver accessible, fair and effective outcomes in the best interests of children.”

JUSTICE’s Chief Executive, Fiona Rutherford said,

“When families break down, the law is often not needed, but it is there to make sure the vulnerable are protected and any disputed arrangements put the child’s welfare first. However, individuals must be able to understand what the law says, navigate their options safely, and participate effectively in any dispute resolution process (court or non-court) that follows. This includes children: they are not objects of dispute – like a car or a debt – but individuals with the right to effectively and meaningfully participate. The current system is under pressure; JUSTICE recognises the appetite for change and the great work ongoing elsewhere. We call upon government, courts and family justice professionals to seize this opportunity for reform, and to redesign the family justice system around the families who need it.”

Notes to editors

1. JUSTICE has a long history of using Working Parties of its membership to effect systemic changes within the legal system. For example, the Ombudsman system and Criminal Injuries Compensation Board were set up on the recommendation of previous JUSTICE Working Parties.
2. The Working Party was generously supported by law firm Mishcon de Reya LLP who provided financial and pro bono support. It was also supported by The Clifford Chance Foundation, The Eleanor Rathbone Charitable Trust, and The Treebeard Trust.
3. The Working Party was chaired by Professor Gillian Douglas, and its members were: Nicholas Allen KC (Deputy High Court Judge; Recorder; IFLA arbitrator; barrister, 29 Bedford Row); DJ Stephen Arnold (Deputy District Judge; retired District Judge); Victoria Butler-Cole KC (Recorder; barrister, 39 Essex Chambers; JUSTICE Council); Professor Shazia Choudhry (Faculty of Law, University of Oxford; non-practising solicitor); Jude Eyre (Associate Director for Strategy and Delivery, Nuffield Family Justice Observatory); Antonia Felix (solicitor, Mishcon de Reya LLP); Professor Jane Fortin (Emeritus Professor, University of Sussex); Professor Rosemary Hunter (University of Kent; Family Justice Council Liaison); Jessica Lee (barrister, 1GC Family Law); Ellen Lefley (rapporteur, JUSTICE); Sara McIlroy (PhD Candidate, Exeter University; barrister, Harcourt Chambers); HH Lesley Newton (Retired Designated Family Judge for Greater Manchester); Christine Nwaokolo (solicitor, Owen White & Catlin LLP); Lucy Reed (Recorder; barrister, St John's Chambers); James Sandiford (solicitor, Russell-Cooke LLP); Natalia Schiffrin (magistrate, attorney (New York)); Natasha Shotunde (barrister, Garden Court Chambers); Somia Siddiq (solicitor, ITN Solicitors; co-vice chair, Association of Lawyers for Children); Juliet Thomas (solicitor, Shanahans Solicitors (Cardiff)); HH Sally Williams (retired Circuit Judge); Naomi Wiseman (barrister, Garden Court Chambers). Sub group members were: Samuel Coe (barrister, KCH Garden Square); Victoria Francis (solicitor, Ben Hoare Bell LLP); Olivia Stiles (solicitor, Kingsley Napley LLP). Rebecca Anderson (Model Office Programme Manager, Cafcass) was an observer to the Working Party.
4. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom. For more information, visit www.justice.org.uk.
5. Please direct queries to Maddy Breen, Membership and Communications Coordinator, at mbreen@justice.org.uk.