PRESIDENT OF THE
FAMILY DIVISION

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Address to the Area Justice Forums Conference

23rd March 2007

I am very grateful to Lord Justice Leveson for inviting me to speak at this conference, which comes at a very good time for me as I am moving to implement a process of considerable change within the family justice system as the FPCs become part of a unified family court and this is an excellent opportunity to keep you all informed of developments.

I realise that the eyes of many of you who do not try family cases may begin to glaze over for this part of the programme, but one of my real concerns as Head of Family Justice is to fight the corner of family business which has traditionally played second fiddle to crime in the queue for resources and in its claims to the attention and expertise of those responsible for administering the magistrates courts.

I am determined that that should change under the new regime following handover and I am fortunate that the LCJ, the outgoing SPJ, John Thomas and his successor, Brian Leveson, are all fair-minded men who take the same view.

I propose to come to what that means for Area Justice Forums briefly at the end of my speech. My main purpose is to give those of you (many I suspect) who are unaware of it, an outline of what is, and will be, happening to increase the work of the FPCs, which work will have to be accommodated by proper priority being given to it by the administration.
First, I know that the magistrates have concerns arising from the government consultation exercise on "specialisation" of magistrates sitting in family proceedings. This is a sensitive matter, which I and the Lord Chief have carefully considered and which he is now discussing with Cindy Barnet as Chairman of the Magistrates' Association..

In fact, the LCJ has recently taken some time off from crime to visit a number of FPCs in order to talk directly to magistrates on the question of sitting in the family courts. He has visited Birmingham, Wells Street and Wimbledon to view the position at first hand for the for the purpose of informing those discussions. I am afraid I cannot give you a specific date by which an announcement will be made on the topic. Cindy may be in a better position than me in that respect..

The important thing to stress is that, contrary to earlier rumours, no one is to be

required to specialise in family work. The question is whether anyone, particularly experienced chairs of FPCs, should be able to opt for it if they wish.

The residuary and broader question is simply whether, and to what extent, family justices generally should in any event be required to sit a minimum number of days in the family proceedings court in order to acquire and maintain the expertise necessary for their work. While in my view there should in principle be such prescribed minima, one has to recognise that in other than busy family centres it may be impracticable to prescribe minima and hence -at best- guidance only may be possible.

I now turn to matters relating solely to the family courts. As the first Head of Family Justice responsible for the judicial management of all Family Judges and Family Magistrates, I am currently working to establish what I have called the "Framework for a Family Court," approved by the LCJ and the Lord Chancellor. The framework will cover the following areas.

1) The practical arrangements for judicial management of a unified family court - comprising judges of the High Court, Circuit and District Judges and magistrates of the family proceedings court.
2) Allocation criteria for the categorisation and distribution of family proceedings as between those groups of judges. A draft has already been circulated.
3) Gatekeeper and listing guidance covering the issue and allocation of proceedings, and the administrative support necessary in that respect.
4) A public law case management practice direction (i.e. a revised and simplified Protocol) applicable to all levels of court.
5) A private law case management practice direction (i.e. the revised Private Law Programme) to which I will turn in more detail.
6) New Family Procedure Rules (as devised by the Family Procedure Rule Committee) codified along the lines of the CPR and accommodating the new arrangements.

It is, if course, necessary to ensure that each step in the framework is co-ordinated and properly planned. The inter-relationship between elements of the framework and the involvement of all levels of the judiciary including the magistrates (and in many respects, magistrates together with their legal advisers, will assume a pivotal role) makes proper co-ordination essential.

Furthermore, none of these steps can be achieved without the support and co-operation of the key family justice agencies; the DCA/HMCS Family Policy Unit, CAFCASS and the DfES in respect of local authority practice. This co-operation has already been brokered by my formation of the President's Combined Development Board and a Ministerial Strategic Group, chaired by Harriet Harman as the minister responsible, on which all elements are represented. These groups, and those supporting them, will ensure proper co-ordination and the development of an overall approach to family justice by means of the Framework, which will be circulated to inform all concerned how the elements interrelate and how they may best be implemented.

In April I am meeting the Regional Directors of HMCS to work through what is

required from them to assist in supporting the Family Division Liaison Judges (FDLJs) and Designated Family Judges (DFJs) in the implementation of the Framework in their court areas and centres, emphasising the need for the administration to work closely with the family judges and magistrates, in the same way they do with the Presiding Judges and Resident Judges in crime and civil. The key will be to agree Regional Frameworks for each region's family courts and to improve the throughput and consistency of performance for those who use them.

I have been making a series of visits to family court centres across the country, and in the last eighteen months have visited Blackpool, Lancaster, Leicester, Liverpool, Manchester, and Newcastle. I shall visit Bristol, Oxford, Plymouth and Swansea within the next two months. I have consistently been impressed by the level of commitment of the family magistrates whom I have met and their enthusiasm to do work for which they have been trained, but in respect of which their services have been under-utilised in the past.

In Derby, I was told that the Designated Family Judge HHJ James Orrell has sat in to observe the magistrates at work in the FPC. A number of magistrates have returned the compliment and visited the County Court to see Judge Orrell in action. In other areas too, magistrates have sat with family judges. I hope to see this practice locally extended over the next few months. It boosts the confidence of magistrates in the FPCs if they are to deal with more public law work, as well as that of the practitioners, who are concerned that things (inevitably) go more slowly before a bench of three than before a single judge.

I have heard wide complaint from the family magistrates that they are not getting enough work.

You all know by now that, following the Judicial Resources Review there is an overall strategy for the judiciary of "cascading work" down within the system. In essence, this means working with the judges and magistrates and the other key agencies to reduce the delays in completing family cases and ensuring the best use of the limited judicial resources available and which are unlikely to increase. It is clear that there will be no increase in the number of Family Division Judges to sit in the presently overloaded High Court, and yet the pressure on that court is increasing with a number of new areas of work developing. Workloads in family law, particularly in care cases, are increasing across the jurisdiction with the result that the Circuit Judges, who are themselves overloaded, are not in a position to absorb the work passed on. I am therefore giving extended public law tickets to selected and trained County Court District Judges to enable them to relieve some of those pressures but the FPCs will increasingly be playing their part by hearing cases presently dealt with in the County Courts.

In December last year, I circulated my draft Guidance on Allocation to all judges and FPCs, which no doubt you will have seen. The guidance sets out the factors to be taken into account throughout the system in sending the work to the lowest appropriate level, whether in private or public law proceedings.

While the guidance sets out the factors to be taken into account when deciding which is the correct court to hear the case, what it does not do is to write in stone who should make the decision. It is not my intention that future guidance will be

prescriptive on this point. It is clear that in relation to the distribution of work, there should be the fullest possible consultation between the individual courts in question, so as to ensure that factors such as the availability and experience of magistrates and judges, and the present and anticipated pressures on listing are taken into account, and to ensure that there is agreement between the courts that a proposed transfer is appropriate.

It is anticipated that in most areas, arrangements will be made for consultation to take place between a judge in the County Court, usually a District Judge selected by the Designated Family Judge and responsible to him, and whichever is the most appropriate of a Legal Advisor, District Judge (Magistrates' Court) or family chair in the Family Proceedings Court in relation to the majority of individual cases. Where this is not practical, a general approach should be agreed and implemented between them and, in each case, the minimum requirements of the Family Proceedings Rules for notification and consultation must be observed. Whatever the local arrangements, it is vital that close and flexible links are formed between those working at all levels in the Family Proceedings Court and the County Court, and it is the Designated Family Judges who will take the initiative in this respect, and will maintain oversight as to how the system is working.

The eventual aim is the issue at the end of the year of Gatekeeping and Listing guidance in association with the final form of the Allocations Guidance (whether by means of a Practice Direction or formal Guidance) which will apply across the system but be sufficiently flexible to allow for local conditions.

The first move in this process has been to establish and take forward four judicial initiatives launched at the turn of the year in Cardiff, Hampshire, Liverpool and London. In each, the DFJ, Area Director and court administrations are working within local conditions and using local resources to improve the process of allocating and cascading the work through the family justice system. Local conditions prevent their having a "uniform" process to achieve this, but it is clear that the individual arrangements they have made in their differing areas appear to be working very well. When I have visited, I have spoken to court staff, the local authorities and CAFCASS representatives as well as to magistrates and judges. I am impressed by how well they have all signed up to the local arrangements and pulled together to make a success of their schemes. The DFJs for these initiative areas will report to my conference in May, to which selected magistrates and DCA representatives will also be invited.

In relation to the Allocation Guidance, you will by now know that it states clearly that the general philosophy should be for as much private law and domestic violence work to be heard in the Family Proceedings Court as is practicable, and it is expected that, in future, the majority of straightforward private law disputes will be considered suitable for determination in the FPC subject to pressures of work and magistrate availability.

With regard to public law proceedings, a rigid embargo on the Family Proceedings Court hearing cases where the listing time estimate exceeds a particular number of days is inappropriate. In the past, there have been indications that magistrates should confine themselves to hearing cases of no more than 2 or 3 days in length and it is likely that the bulk of the work suitable for trial, or at any rate by lay magistrates, in the Family Proceedings Court will continue to fall into this category. However,

there may occasionally be cases of up to 5 days which it would be appropriate for them to hear. It is anticipated that it will rarely, if ever, be appropriate for lay magistrates to hear cases with a time estimate exceeding 5 days. Not only will it be difficult in most areas to convene a bench of magistrates who could sit for more than 5 consecutive working days; but a matter which is likely to take up the court's time for more than a week will almost inevitably involve a quantity of material and issues which give it a degree of complexity unfitted for a trial in the FPC.

I have invited comments on the operation of this Allocations guidance from all those who have used it. It will be formally issued in its final form in late 2007/early 2008 as a matter of national practice, incorporating any amendment found to be necessary or appropriate in the light of the experience of the judicial initiatives currently under way in various court centres.

Meanwhile I encourage you to implement the principles contained in the Allocation Guidance in your own court centre so far as conditions permit.

I mentioned earlier that the Public Law Protocol is being reviewed. The review is being led by the team of High Court Judges who were involved in drafting the original Protocol. The changes will take into account the views of "users". For example, Donald Cryan, the Medway DFJ, conducted a consultation exercise on the paperwork generated by the Protocol and was clearly advised that there are far too many pieces of paper, and that unnecessary duplication is involved if parties comply with the Protocol in its present form. You will be glad to know that the new procedures will result in the need to chop down fewer trees.

I am unable today to go into detail regarding other changes in the Protocol, but I can just reassure you that it is the intention of those who are working on it that it should be leaner than the existing document, and will provide for fewer hearings. It will be coupled with a pre-proceedings protocol, which will be embodied in Guidance issued by the DfES to local authorities obliging them, save in cases of emergency, to have done more work with the family before coming to court, so as to provide judges and magistrates with better quality information, shortly and clearly presented, on which to base decisions and make meaningful directions from the outset.

The revised Public Law Protocol will cross-refer to the Allocations guidance. It is designed to ensure that those public law cases which can be heard at FPC level are retained there, or indeed returned there, if they subsequently become less complex or lengthy than originally anticipated. In particular, there is no intention to amend the Children (Allocation of Proceedings) Order 1991, which presently directs that, save in the exceptional circumstances clearly provided for in it, all public law proceedings begin in the FPCs.

A draft Outline of the Protocol, designed to replace the 6 steps of the existing route map in the Protocol with a 4 stage process will be discussed and refined at my President's Conference in May attended by all the DFJs nationwide. Again, the Magistrates' Association and the Justices' Clerks Society will be represented at the conference.

Following on in June, seven further initiative courts around the country will begin to trial the draft revised Protocol, along with the original four areas whose experience

will have shaped it. Local Designated Family Judges will take the lead, and build on the existing experience, to set up local management systems to ensure that, once again, all the key agencies are involved in ensuring the success of their initiatives. The relationship of these management systems with the Area Judicial Forums will need to be developed both locally and nationally.

It is my intention that by April 2008, having taken into account the lessons learned in practice, and consulted through the Ministerial and Stakeholder Group, the new Public Law Protocol will be rolled out to all courts.

Training on the new Protocol is being led by the Judicial Studies Board. The training team is led by Judge Margaret De Haas, the DFJ at Liverpool, and includes both senior legal advisers and others with experience of working in and with the FPCs, in order to ensure that the training engenders confidence in how the Protocol will work in practice at all levels of court.

The aim is to enable all who use the Protocol to do so confidently, so that cases are not subject to unnecessary delay and are heard within the timeframe appropriate for the child or children concerned. As you will imagine, this is a fairly large undertaking, and initially the training will be delivered nationally in a series of JSB conferences to key parties, including your legal advisers. They will in turn organise programmes back in your areas, to ensure that all are on board.

When sitting, judges and magistrates will need to be clear that the advocates appearing in front of them are "au fait" with the changes. Thought is now being given to how we can assist in the training of lawyers and the other agencies involved in the delivery of the new care system.

Private Law Programme

The Private Law Programme was formally launched in the county courts in January 2005. The Programme provided for a first directions (conciliation) hearing in Section 8 Children Act 1989 cases. The focus of that hearing being to assist the parties to reach early agreement rather than eventually having a decision of the judge imposed on them following a contested hearing. CAFCASS officers play the key role in the conciliation process.

That development has been the outstanding success of the last year or so in the family law field. In many areas the success rate has been as high as 80% and it has freed up judge time to tackle the increasing amount of public law work.

When the Programme was published, it was accompanied by a promise that the President would review it in due course. Last summer, my office, HMCS and CAFCASS designed a questionnaire to be used by those three agencies in the regions to learn how the scheme is working in practice throughout the country. The questions focussed on the various practical arrangements which courts and CAFCASS have been able to put into place to make such conciliation hearings possible.

There has been a good response to the questionnaires, with useful information coming from the areas. The data is now being analysed to extract the main lessons learned in order to give further guidance on the implementation of the programme.

When the Programme was introduced by my predecessor Baroness Butler-Sloss it was clear that it was building on the best practice which already existed in some areas for the resolution of private law disputes. Local, and by no means identical, schemes have evolved to take into account the workload, expertise and resources available. It is clear that the variation in local conditions and volume of work do not allow me, (indeed I would not wish) to impose centrally a "one size fits all" model. New guidance will be directed to highlighting what has been found to be good practice, and to encourage the Designated Family Judges, CAFCASS and the Area Directors to continue to develop their schemes and, wherever possible, to extend them to the FPCs.

There are inevitably concerns about the likely effectiveness of bench-led conciliation processes involving three magistrates engaging with the parties, and the obvious candidates for oversight of an initial process largely conducted by CAFCASS are Legal Advisors specialising in family work.

There will, of course, be cases where it is not appropriate to ask parents to try and resolve these matters by consent. In particular, CAFCASS and the courts must continue to be vigilant to identify cases where domestic violence is an issue. Here, the court will need to make appropriate directions to ensure that evidence is available to proceed safely to resolution of the case.

One matter which I know is of concern is the lack of specialist legal advisers to assist magistrates in their work. This is a matter I have persistently highlighted with government, particularly when giving my evidence to the Constitutional Affairs Select Committee on the operation of the Family Courts in May last year. The Government response to the Select Committee's Report accepted the validity of this concern and in November stated, "We have no plans to reduce the number of Legal Advisers in the Magistrates' Courts". It continued, "HMCS is working closely with the Justices Clerks Society and the Legal Advisers Working Group to develop a new career structure for both Justices' Clerks and Legal Advisers to help both with recruitment and retention." I am afraid I am not in a position to give you more information on this, but have made clear to government that I do regard it as a key element in the success of the cascading process.

I have, so far been able to lend my support to two practical changes which should encourage more work into the FPCs.

1. Harmonised rates for solicitors' private law family work under the legal service Commission public funding scheme will be implemented on 2 April 2007. The practical effect of this will be that, by paying the same rates for private law family work in the county courts and the FPCs, the financial disincentive for solicitors to issue proceedings in the Family Proceedings Court should be removed. The new intermediate harmonised rates will also apply to domestic violence work.

2. Extending rights of audience in the FPCs to members of the Institute of Legal Executives. Experienced and well prepared Legal Executives have appeared in private law matters in the County Courts as a matter of right. Until this change, they had no right to appear before magistrates who had to grant them permission

on a case by case basis. In many cases the possibility of extra expense and delay to the client on transfer to the FPC, through the need to instruct a solicitor with an automatic right to be heard, operated as an inhibiting factor on transfer by District Judges. This will no longer be so.

It is important to recognise that, even under the new regime, procedural differences between the County Court and the FPCs may continue to affect practitioner choice when deciding where to issue proceedings and may move them to resist transfer from the County Court to the FPC. In particular, I have in mind the necessity for magistrates to formulate and deliver reasons for their decisions.

Rule 21 of the Family Proceedings Courts (Children Act 1989) Rules 1991 requires magistrates to give reasons in writing before making an order or refusing an application, leading to delays and waiting time for practitioners. I do urge magistrates to consider with their legal advisers and the parties the extent to which they can make use of agreed facts and proposed orders drafted by the parties when appropriate. I am aware that some courts already use such documents and pro-formas to assist them in the processing of their reasons. I would encourage this, as it reduces the time parties are kept waiting in the courthouse.

For the longer term, in the redrafted Family Procedure Rules, I am proposing to introduce provisions which allow magistrates to defer the giving of full written reasons where necessary to avoid delay.

As I have already stated the Rules Committee intend by April 2008 to have formulated a single family code along the lines of the Civil Procedure Rules. In particular, it is intended as far as possible to harmonise the rules across the jurisdictions. Anomalies already existing as a result of statute cannot be addressed by this committee, however, and existing differences in, for example enforcement powers, will not be removed by this process. However, the Children Act 1989, the core piece of legislation in the family justice system, applies equally across all of the courts, and the Family Procedure Rules Committee's intention is to support the magistrates and judges to operate it as consistently as possible.

I began by saying that I am determined to champion the work of the family courts within the legal justice system, and I have recognised the need to promote the work of the FPCs and to create an environment where they can operate to their full potential. I have discussed with Brian Leveson how best to ensure that the voice of family magistrates is heard within the new structures you have come to this conference to discuss. It seems to me that the Designated Family Judge, or a nominee, should be a permanent member of the Area Justice Forum and should attend each meeting rather than simply coming on invitation. Advice in relation to the running of the criminal magistrates will often have an impact on the family jurisdiction not foreseen at the time the agenda is set. Sometimes the consequences of this will only be clear to someone with family antennae, and matters put onto the agenda which at first sight relate only to crime, may well have a knock-on effect on the management of family business, if only in relation to sitting days. And in the ultimate analysis the responsibility for such management must reside in the DFJ.

I am thus presently discussing with Brian Leveson what amendments may be

necessary to the paper, “Responsibilities for the leadership and management of the judicial business of the magistrates’ courts”, which you received last December.