Public and private law: should the 2 law types be unified?

The single-family court introduced a common administrative framework for all family court cases. This article suggests the next stage of reform could be a unified practice and legal framework to replace the PLOI and the CAP – a Children's Futures Framework perhaps – in which the current divisions between public and private law are replaced by harmonised operating principles within a single system, supported by separate protocols to reflect any continuing technical and legal differences. The underlying issues in public and private law are more similar than different and there is a fixed resource to cover both.

First suggested principle: Diversion

A substantial number of public and private law cases do not need to be in court. Many public law cases end up with the child in question still at home because the case for permanent removal has not been made out. Up to a year may have been wasted with an adversarial court process. The child in question may have felt in limbo to no avail with no change in home circumstances. An equal and probably greater number of private law cases without any child protection or serious welfare concerns do not need to be in court. Community-based support and psychological services make more sense, with access to court denied unless the same threshold of significant harm to a child used in public law can be demonstrated. Introducing common eligibility criteria would also remove the anomaly in children's services that children in private law cases in the family courts receive a service purely because their parents have separated or divorced, not because they reach the threshold for a child in need of support or protection. Mind you, the scale of emotional harm experienced by many children in private law cases should warrant a child in need status far more than it does.

Second suggested principle: Permanence

Children in private law cases would benefit from the permanence framework used in public law. The aim should be to conclude a case within 26 weeks with the best possible permanence arrangements for the child, including who the child lives with and spends time with. All children, regardless of law type, need security, stability and protection from emotional harm. Children in private law cases need this just as much as children in public law cases. Common to both law types is that emotional harm along with neglect are more frequently than not the main concerns. The evidence bases in public and private law cases are converging. A child permanence report (CPR) for example would be a better standard product in private law cases than a s7 report.

Third suggested principle: The court process and decision making

In both law types, the first case management hearing, the CMH and the FHDRA respectively, is important, to sort out the issues in the case and to set out a case management timetable. Strong case management is crucial in both law types. A clear plan of intervention to improve the child's life and prospects are common to all cases. The different terminology for first and subsequent hearings in the PLO and the CAP could

usefully be combined and consolidated, which would send a clear message about court expectations. It would also be easier to train practitioners on the agreed principles underpinning a common framework. Decision making like transferring residence in a private law case or placing a child via a Special Guardianship Order in a public law case, is the same in terms of the opportunities and risks for the child being created. To the child, legal status matters less than the quality of daily lived experience and attachments.

Interim and permanent removal

Many children living in desperate situations remove themselves psychologically and emotionally from the fray long before a public or private law case starts up. What we claim to be early help is early for professionals yet invariably it is late and often too late for children who have faced adverse childhood experiences for some time already. The task of professionals and the court is usually to return the child from a position of complete isolation to one of being connected. Connection in terms of attachment, comfort and love is far more important than being a 'connected person' in name only. The language used in the family courts would benefit from an overhaul so that the issues for children form the basis for a shared child-centred language and that law and policy also better reflect the child's language and issues growing up in the UK today.

Interim removal is even more acute for parents with a learning disability. If their child is removed, they will almost never be able to pass the various tests about improving parenting capacity asked of them. Interim removal in these cases is almost always permanent removal by another name.

A child born today in the UK will have a 50% chance of living to be 100. It is important not just to think of removal for a few years but of protecting the child's relationships for the longer term. For vulnerable children or children who have been traumatised, recovery is often a lifelong process. Decisions made by the court need to take lifetime needs into account. At the moment this is only reflected in a single welfare checklist – for the 2002 Adoption and Children Act.

The court needs mostly to concern itself with any proposal to remove a child from one or both of their parents. Whilst these decisions are the basis of public law, the removal of a child from a parent in a private law case is equally draconian. Withholding contact at the first hearing on an interim basis in a private law case until safeguarding concerns are resolved, is also likely to be a permanent removal as the longer a parent is out of a child's life, the harder it is for them to get back in.

A common framework to inform assessments and decision making about removal would be fairer to children and to their wider family.

The contact framework in use in the family courts

Discussions about contact are often polarised into questions about which parent the child should see and how often. But for children in public and private law cases, seeing brothers and sisters and other relatives can be just as important as their parent/s. As one child said to me, "if you knew my parents, you wouldn't want to see either of them". It is better to understand who matters to the child, including local friends and social media friends. A good friend can support a child through a difficult transition just as much as some parents and relatives. This is another example of the law and policy lagging badly behind the way people are living their lives today. At present we are applying different thresholds for contact in public and private law cases. With minor modifications, the Cafcass Child

Impact Assessment Framework could be used in both law types to achieve a greater consistency.

Timescales in the family courts

Too often many months are spent debating a case culminating in a final order, only for circumstances to change in the weeks or months after the court case and decision, rendering them out of date. Equally, many children feel burdened by a court decision that is no longer right for them. A more agile and constantly available court process would make more sense, even though this would mean a logistical and procedural upheaval and more flexible Rules about access to court.

Lawyers and guardians

A visit to a typical public and private law case in court quickly tells you that public law is infinitely better resourced than private law. As the problems children face are converging more, the resource inequity and imbalance is no longer justifiable. More of lawyers and guardians time is needed in private law cases relative to those public law cases which are straightforward. We have institutionalised complexity in public law and treated private law, especially in the aftermath of LASPO, as if it lacks complexity entirely. Deploying resources more flexibly across law types based upon assessed need would allow courts to operate in a more agile way. For example, a solicitor for the court might work to good effect with both parents in a private law case and innovative court-based services like settlement conferences in both law types could commission the right professionals and resources in to match the situation. Establishing a threshold common to both law types of serious and persistent emotional harm to a child and developing much clearer evidence bases about how this can be assessed, would support decisions about resource allocation to cases.

Conclusion

Many children in private law cases have similar needs to those in public law cases. Equal status between law types would help to remove any residual culture of snobbishness that public law is more important than private law in the work of the family courts. Moving from the PLO and the CAP to a single Children's Futures Framework could enable the right children to receive the right level of help more reliably.

Anthony Douglas CBE
Chief Executive of Cafcass
March 2019.