

Quick guide

Private Law Cases and the Family Justice Review

March 2012

Introduction

The Family Justice Review has recommended **major reforms to the family justice system** in England and Wales. The Review was commissioned by the UK and Welsh Governments in response to an **increase in both the number and duration of family law cases** in the courts and the **negative effect** on families and children. An interim report¹ and final report were produced in 2011². The Welsh Government published its response to the final report in February 2012³ at the same time as the UK Government, which responded to each of the **134 recommendations** in the Review, **almost all** of which it has **accepted**⁴.

1. **Public law** proceedings involve any case about the **protection of children** where the **local authority social services department** is involved.
2. **Private law** proceedings involve any case of **family break-up** where **separating parents cannot agree** on the upbringing of their children.

This Quick Guide summarises what the Review has to say about **private law**, the **Government response** and the implications for **devolved and non-devolved areas** affecting children in Wales. It also outlines **criticisms from key organisations**.

A Quick Guide has also been produced on Public Law Cases and the Family Justice Review.

The need for change

The great majority of separating parents make their own arrangements for their children without going to court. For the 10 per cent who cannot⁵, the Review is concerned about the **adversarial approach** in divorce proceedings that **can worsen family disputes**. In these situations courts are dealing with **complex and emotionally charged issues** and

¹ Ministry of Justice, *Family Justice Review interim report*, March 2011, [accessed 29 February 2012]

² Ministry of Justice, *Family Justice Review final report*, November 2011 [accessed 29 February 2012]

³ Welsh Government, Gwenda Thomas (Deputy Minister for Children and Social Services), *UK Government's Response to the Family Justice Review*, Cabinet Written Statement, 6 February 2012 [accessed 29 February 2012]

⁴ Department for Education, *The Government Response to the Family Justice Review: A system with children and families at its heart*, February 2012 [accessed 2 March 2012]

⁵ Nuffield Foundation, *Caring for children after parental separation: would legislation for shared parenting time help children?* May 2011 [accessed 1 March 2012]

many parents do not know where else to go for information and support. Cases are expensive and can be lengthy. The Review also refers to a perception that the system favours mothers over fathers.

Parents often have limited awareness of alternatives to court to resolve disputes. Court-directed arrangements to resolve parental disputes may be inflexible and eventually fail. The court system is hard to navigate especially where parents have no previous experience of using it. The Review points out that this could become a more significant issue with proposed cuts to Legal Aid which may result in more parents representing themselves in court.

The Review makes recommendations for change in devolved (social welfare) and non-devolved (family law and proceedings) areas. The dividing line between the two is not always clear but will be clarified over time.

Devolved areas

The Welsh Government is responsible for Welsh local authority social services departments, child welfare and child protection services. It is also responsible for the Children and Family Court Advisory Support Service in Wales (CAFCASS Cymru).

The Review says that separating parents need the right information to help them and that the UK and Welsh Governments should establish online information and a national helpline to help couples resolve parental disputes and develop their own Parenting Agreement. The Review also recommends that parents should be given information about parental responsibility⁶, given that many people are confused about what it actually means.

When parents cannot agree about arrangements for their children the Review states that the first point of contact should be a mediation or dispute resolution service rather than the court system.

The Review also says that children and young people should be given the opportunity to have their voices heard in any court proceedings about them. It refers to the *Rights of Children and Young People (Wales) Measure 2011* when discussing the importance of the voice of the child. This means there is already a way to monitor how children's voices are heard in court proceedings in Wales and how they are given appropriate information through CAFCASS Cymru.

Non-devolved areas

The Review wants to see the creation of a new Family Justice Service to bring together all the different people involved in the family justice system (devolved and non-devolved areas) with an interim Family Justice Board established until this is set up

On legislation, the Review recommends repealing contact and residence orders and

⁶ Parental responsibility was defined by the *Children Act 1989*. A birth mother automatically has parental responsibility for a child as does the birth father if married to the mother or if his name appears on the child's birth certificate (since 1 December 2003). Other ways of obtaining parental responsibility are set out in the *Children Act 1989*.

replacing them with a **new child arrangements order**. It argues that this will allow parents to think about **practical arrangements for their children** rather than focussing on the **potentially contentious** terms of **residence and contact**.

Another recommendation in the Review states that there should be **no legislation on shared parenting** to avoid any **perception of a parental right** to substantially shared or equal time with children. It discusses concerns about the risk of **compromising the principle** that the **child's welfare is the paramount consideration in any court proceedings**. The UK Government **has not accepted** this recommendation and wants to develop proposals 'encouraging both parents to play as full a role as possible in their children's upbringing'⁷.

Where parents **do not comply** with arrangements that a judge has determined to be in the **child's best interests** disputes need to have **clear and quick processes** to resolve them, reinforcing the notion that a **child has a right to a relationship with both parents** where this is safe. When a court order is **breached within the first year** the Review says that the case should go back to the **same judge** who made the original order, be **heard within a fixed number of days** and be **resolved in a single hearing**. If an order is **breached after twelve months** parents should go to a **dispute resolution service**, thus encouraging them to reach an agreement without returning to court.

On reform of the court system the Review recommends creating **single family courts**, separate from other court facilities. It acknowledges that this could be more difficult in **rural areas**. However it also points out that **many hearings do not need to take place in a court room**. For example **video-conferencing facilities** could be used in 'family-friendly rooms' to make the experience **less stressful for parents and children**.

Welsh Government response

In its response the Welsh Government supports **plans to make mediation compulsory** for parents in the context of supporting children through the Children's Rights agenda. The Welsh Government wants to work with the UK Government to influence any **development of a legislative statement on shared parenting** and notes the importance of children having a relationship with both parents, where it is safe and in the child's best interests. The Welsh Government plans to establish a **Family Justice Network in Wales** that will inform the work of the **interim Family Justice Board** and its Welsh representatives. It will meet for the first time in **April 2012**.

Criticisms of the Review

There has been controversy over the UK Government's decision to consider **legislation on shared parenting**⁸ in spite of the Review's misgivings. This has also been a **controversial**

⁷ Department for Education, *The Government Response to the Family Justice Review: A system with children and families at its heart*, p66, February 2012 [accessed 2 March 2012]

⁸ Higgs, L., (2012) *Ministers ignite debate on shared parenting*, Children and Young People Now, 21 February 2012, p10-11 [Hard copy]

issue in Australia following a change to the law in 2006⁹. There are concerns that litigation may change the focus to that of **parents' rights rather children's rights**¹⁰. **Two Private Members' Bills** about shared parenting are currently being considered in the **UK parliament**^{11,12}.

Organisations representing **grandparents** have been disappointed that the Review did not go as far as they had hoped. Grandparents will continue to be required to **seek the leave of the court to apply for contact orders**¹³. For many it is seen as an additional hurdle they must go through when the court has the power to reject 'vexatious applications'¹⁴.

Concerns have been raised about **capacity within the mediation system** to cope with **compulsory assessments**¹⁵. This has been raised in a Parliamentary Committee¹⁶ discussing the impact of **proposed Legal Aid reforms** which will have a **direct impact** on legal representation in private family law cases¹⁷.

Further information

For further information on the Family Justice Review, please contact **Lynette Hayward** (Lynette.Hayward@Wales.gov.uk), Research Service.

See also:

Quick Guide: [Public Law Cases and the Family Justice Review](#)

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⁹ The Australian, [John Howard parenting law finds favour in Britain](#), 9 January 2012 [accessed 1 March 2012]

¹⁰ Nuffield Foundation, [Caring for children after parental separation: would legislation for shared parenting time help children?](#) May 2011 [accessed 1 March 2012]

¹¹ [Children \(Access to Parents\) Bill \[HC\]](#), Bill 174, 2010-12 [accessed 1 March 2012]

¹² [Shared Parenting Orders Bill \[HC\]](#), Bill 56, 2010-12 [accessed 1 March 2012]

¹³ Grandparents Association, [Government response to the Family Justice Review](#), 6 February 2012 [accessed 1 March 2012]

¹⁴ Family Law Week, [Norgrove - The Response Considered](#) [accessed 29 February 2012]

¹⁵ Resolution, News Release, [Family Justice Review: vital reforms at risk from legal aid cuts](#), 3 February 2012, [accessed 1 March 2012]

¹⁶ [HC Deb 12 July 2011 c57](#) [accessed 1 March 2012]

¹⁷ [Legal Aid, Sentencing and Punishment of Offenders Bill \[HL\]](#), Bill 129 2010-12 [accessed 28 February 2012]