

# Children's Arbitration: An Alternative to Court

*"Whilst it is obviously necessary for there to be access to a branch of the justice system in the event of an intractable dispute about children or family finances following a break-up, taking proceedings in the Family Court should be the option of last resort, rather than, as it is seen by many, the first port of call."*

**The RT Hon Sir Andrew McFarlane: President of the Family Division**

**31 October 2022**



1. St Philips, St Ives and No 5 Chambers are taking a collaborative approach to raise the awareness of the use of arbitration as an alternative to court proceedings.

### **The current landscape of private law children cases**

2. Between April and June 2022, there were 13,537 new private law applications. This was 7% less than 2021. The number of private law disposals during this period was down 16% to the equivalent quarter in 2021.<sup>1</sup> It took on average 46 weeks for private law cases to reach a final order. This was up 6 weeks from the same period in 2021. This has continued the upward trend seen since 2016, where the number of new cases overtook the number of disposals.
3. Whilst the statistics begin with a decrease in the number of applications which appears to be good news, this of course is only good news if the courts are disposing of the same or more cases. Unfortunately, that is not the case, with the number of cases disposed decreasing. As a result, the family court is even busier at the end of the quarter than it was at the start.
4. In turn, the demand on Cafcass has increased. Cafcass worked with 102,486 children in private law proceedings in 2021/22 compared with 82,818 in 2017/18, an increase of 23.7%.<sup>2</sup>
5. With the number of cases being issued, being greater than the number of cases being disposed of, it has led to unprecedented back logs in the family justice system.
6. In September 2022, Sir Andrew McFarlane set out the continued back log in his speech 'Relaunching Family Mediation', where he set out "*the first indicator of a need for change, and there being substantial pressure for it to occur, is, unfortunately, a negative one. Over recent years, the volume of private law children applications being made to the Family Court has significantly increased. In 2015,*

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<sup>1</sup><https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2022/family-court-statistics-quarterly-april-to-june-2022>

<sup>2</sup><https://www.cafcass.gov.uk/about-cafcass/our-data/>

*the year before the removal of Legal Aid for most parties, the number of private law children cases was 43,298. In 2019 it was 54,909 and in 2021 it was 54,649... Dealing expeditiously with this much larger volume of cases has stretched the capacity of the court system. The need to understand the various drivers behind these changes, and develop strategies to address them was behind my decision to set up both the Public Law and the Private Law Working Groups in 2018. As those groups were progressing, COVID 19 struck and, whilst heroic and sustained efforts were made to list and hear as many cases as possible in the restricted environment within which we had to operate, further backlogs inevitably developed.<sup>13</sup>*

### **A push towards Alternative Dispute Resolution**

7. For some time now, there has been strong support of the use of ADR by the President of the Family Division:
  - a. In June 2020, Sir Andrew McFarlane was clear that *“regard should always be had to alternative means of dispute resolution”*.
  - b. In October 2020, the Family Law Solutions Group (a spin off from the President’s Private Law Working Group’ released a report ‘What about Me?’. The FLSG were clear that it was *‘important to distance private law children disputes from the context of other legal proceedings to rebut the understanding which many parents have that an argument about their child’s arrangements following separation is predominantly a legal issue’*.<sup>4</sup> They recommend that *‘arbitration can play a valuable role in enabling parents to resolve a particular issue between them...this avoids them becoming entrenched in lengthy and protracted court proceedings with all the consequent harm to their parenting relationship.’*

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<sup>3</sup> <https://www.judiciary.uk/speech-by-the-president-of-the-family-division-relaunching-family-mediation/>

<sup>4</sup> [https://www.judiciary.uk/wp-content/uploads/2022/07/FamilySolutionsGroupReport\\_WhatAboutMe\\_12November2020-2-final-2.pdf](https://www.judiciary.uk/wp-content/uploads/2022/07/FamilySolutionsGroupReport_WhatAboutMe_12November2020-2-final-2.pdf)

- c. In October 2021, Sir Andrew McFarlane delivered a speech 'Supporting Families in Conflict – there is a better way'<sup>5</sup> in which he set out the need for a 'new approach' with greater support for families to settle disputes outside of Court.
- d. In September 2022, Sir Andrew McFarlane delivered a speech 'Relaunching family mediation'. He was clear that there was a need to "*reduce pressure on the system by diverting all those who do not need to go to court and would be better served by not doing so*".
- e. In October 2022, Sir Andrew McFarlane delivered a speech sub-titled '*Almost anything but the Family Court*'.

### **The Children Arbitration Scheme**

- 8. The scheme was rolled out in 2016, and operates under its own 'Children Scheme Rules' specifically designed for the needs of a family arbitration.
- 9. The scheme covers:
  - a. Any issue between parents (or other people with PR or sufficient interest in child's welfare).
    - i. Where a child should live (including shared living arrangements);
    - ii. Spend time with arrangements;
    - iii. Education and religious issues;
    - iv. Health and non-life-threatening medical treatment;
    - v. Routine arrangements.
- 10. The scheme does not cover:
  - a. Applications for child's return to or removal from the jurisdiction (save proposed relocation to a Hague convention country);
  - b. Disputes in respect of life-changing or life-threatening medical treatment;
  - c. Any dispute where person under 18 holds PR for the child;

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<sup>5</sup><https://www.judiciary.uk/speech-by-the-president-of-the-family-division-supporting-families-in-conflict-there-is-a-better-way/>

- d. Any case where a party lacks capacity (MCA 2005);
- e. Any case involving safeguarding issues for a child.

### **How do you set up an arbitration?**

- 11. The first step, is that the parties must agree to arbitration. They must provide an ARB1CS form, a DBS check or Cafcass safeguarding letter and any local authority documents.
- 12. The parties can select an arbitrator either by approaching individual arbitrators or the IFLA and select an arbitrator who is on the children panel. If parties are unable to agree an arbitrator, they can ask the IFLA to appoint one.
- 13. Arbitration will only commence once the arbitrator receives the forms and agrees to proceed.
- 14. Court proceedings do not have to have been commenced. However, if there are ongoing court proceedings, the court can adjourn and stay proceedings to await the outcome of arbitration.

### **The arbitration process**

#### **Features of arbitration**

- 15. An arbitrator has wide-ranging powers to make any case management or substantive decisions in disputed cases:
  - a. They can decide what issues should be included;
  - b. They can appoint an expert or assessor;
  - c. They can decide evidence required, amount of disclosure, the need for written submissions and whether oral hearing necessary;
  - d. They can appoint an expert/ISW to see the children.

16. Some features include:
- a. Arbitrators never meet subject children;
  - b. Children's wishes and feelings can be canvassed via an ISW or other expert;
  - c. Third parties can be joined to proceedings if agreed provided they accept the rules and determination of the arbitration;
  - d. Arbitrators can appoint experts even if the parties do not seek one;
  - e. There is an ongoing duty to disclose once the arbitration commences.
  - f. If one party fails to comply with directions of the arbitrator then the other party can apply to the court for an order requiring compliance;
  - g. Communication is never ex parte;
  - h. Parties do not need to be legally represented.

### The outcome

17. The arbitrator will issue the determination at the conclusion of the arbitration. The determination is equivalent to a final judgement, and is binding on the parties. The court must endorse that determination, and cannot vary or refuse it, this is done by way of lodging an order.

### Appeals

18. Interim decisions cannot be appealed, but can be varied.
19. Final decisions can be appealed, but not varied.
20. Appeals are allowed 'on a question of law'.

### Benefits of arbitration

21. Arbitration can offer a range of benefits:

a. Speed:

Arbitration enables matters to be resolved in a far quicker timescale than cases appearing in the family court.

b. Less acrimonious approach:

Arbitration offers a less acrimonious approach.

c. Continuity:

It will be the same arbitrator dealing with all of the steps in the case, which is often not guaranteed in court proceedings.

d. Flexibility and control;

Parties are able to choose their arbitrator, identifying the best independent expert to deal with the particular issues in the case.

Arbitration provides greater flexibility in relation to timescales and dates, enabling parties to have active involvement in such arrangements, as opposed to being told a non-moveable date for a court hearing.

The parties are able to identify the issues they want the arbitrator to rule on, as opposed to the court ruling on any issue they see fit.

e. Confidential:

There is now a move to increased transparency in the family courts, with a proposed scheme that will permit reporters and legal bloggers to not only attend private law proceedings but report on those proceedings.

The transparency rules will not apply to arbitration, so there is no possibility of media reporting, with matters remaining private and confidential.

f. Cost

Costs are predictable and transparent. In the long-term, arbitration is often more cost effective due to matters being resolved quicker, less hearings being required, and a reduced risk of wasted preparation by solicitors and counsel for vacated/ineffective hearings.

### **Arbitration in Birmingham**

22. Currently, there are two arbitrators in Birmingham.

#### Elizabeth Isaacs KC

23. Elizabeth Isaacs KC is the Head of St Ives Chambers. She is a specialist child law silk, Deputy High Court Judge and Bencher of Lincoln's Inn. She is a qualified Children's Arbitrator registered with the Institute of Family Law Arbitrators. She has a national reputation for a strategic and collaborative approach, excellent advocacy, forensic preparation and is highly regarded for her compassionate style with clients. She is a contributing editor to the Family Court Practice. In 2019 she was awarded an Honorary Doctorate from Coventry University in recognition of her contribution to family law and equality law.

24. Elizabeth is able to conduct arbitration hearings in person in chambers in Birmingham, London, Liverpool or Manchester, or is very happy to travel to any venue as requested. She is also able to conduct hearings remotely if required, and at weekends or out of normal working hours. Elizabeth is available for instruction via Chambers and as member of; Integrated Dispute Resolution (IDR), a legal and associated support services directory and FOMAS, the Family Online Mediation and Arbitration Service. FOMAS is a subsidiary of IDR and is an organisation which aims to make alternative dispute resolution available to everyone, regardless of the issues surrounding their dispute and their personal



circumstances by having a nationwide network of expert lawyers, mediators, private 'judges' and arbitrators, all with a wide range of specialist skills and experience.

### Michele Friel – No 5 Chambers

25. Michele is a dedicated and specialist children law practitioner with over 30 years' experience. She qualified as a Children's Arbitrator in 2017 and is a member of The Chartered Institute of Arbitrators. Michele has a long established and well-deserved reputation and is consistently ranked by both The Legal 500 and Chambers UK as one of the country's leading juniors in the field of private law. Described as 'the crème de la crème', 'absolutely outstanding' with 'knowledge and expertise second to none'.
  
26. Michele is able to conduct Arbitration at any of No5 Barristers Chambers offices (Birmingham, London or Bristol) or is happy to travel to any venue as requested. Michele is also happy to conduct Arbitrations remotely if required and at weekends or outside of normal working hours. She can be instructed via chambers or Institute of Family Law Arbitrators (IFLA).

### Conclusion

27. Practitioners are being encouraged to consider at the earliest opportunity whether a case is suitable for alternative dispute resolution. There are many cases that require the assistance of the family court. However, the family division is clear that the mindset needs to change. Taking proceedings to the family court should be considered the option of last resort, rather than the first port of all.

**Elizabeth Isaacs KC, Michele Friel, Carolyn Jones, Holly Hilbourne-Gollop**

**ST IVES CHAMBERS, NO 5 CHAMBERS, ST PHILIPS CHAMBERS**

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