

LEGAL PROFESSIONALS AND THE FAMILY JUSTICE SYSTEM

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One of the major contributions that John Eekelaar has made to family law has been his ground-breaking work on legal professionals and their roles within the family justice system. This work has often been the result of enduring intellectual partnership with Mavis Maclean,¹ the two of them linking empirical work seamlessly with deep theory, doctrinal analysis, and policy perspectives, increasingly later in standing up to the challenges facing an embattled family justice system.² But it also links to other aspects of Eekelaar's scholarship, including in particular his powerful writing about legal aid and access to justice in the family law field,³ demonstrating Eekelaar's ability to give abstract, theoretical concepts a concrete reality.

Having had my doctorate supervised by Maclean and examined by Eekelaar (along with Gillian Douglas), it is perhaps unsurprising that much of this work on the legal professions, on what family justice professionals actually *do* and what this tells us about the law as it really exists, also permeates much of my own scholarship. In this chapter, while considering some of the strands of Eekelaar's work in this area, I draw on a series of qualitative interviews with family justice professionals conducted by Mavis Maclean and myself in the summer of 2020 to think about how some of the ideas raised in the studies that I cite can inform understandings of the family justice system during and after the pandemic.

* I am grateful to Alison Diduck and Mavis Maclean for comments on a draft of this chapter. As usual, the views and any errors are mine alone.

¹ The three key studies that I focus on here are: J. EEKELAAR, M. MACLEAN AND S. BEINART, *Family Lawyers: The Divorce Work of Solicitors*, Hart Publishing, Oxford 2000 [I refer to this as the Solicitors book]; M. MACLEAN AND J. EEKELAAR, *Family Law Advocacy: How Barristers Help the Victims of Family Failure*, Hart Publishing, Oxford 2009 [I refer to this as the Barristers book]; J. EEKELAAR AND M. MACLEAN, *Family Justice: The Work of Family Judges in Uncertain Times*, Hart Publishing, Oxford 2013 [I refer to this as the Judges book].

² Most clearly in M. MACLEAN and J. EEKELAAR, *After the Act: Access to Family Justice After LASPO*, Hart Publishing, Oxford 2019.

³ These include: J. EEKELAAR, 'Family Justice: Ideal or Illusion?' (1995) 48 *Current Legal Problems* 191; J. EEKELAAR, "'Not of the Highest Importance": Family Justice Under Threat' [2011] *Journal of Social Welfare and Family Law* 311 [I refer to this as Not of the Highest Importance].

1. THE FAMILY JUSTICE SYSTEM

While the idea of there being a family justice *system* is not entirely new, it is also not of such longevity as to be unremarkable.⁴ In their Judges book in 2013, Eekelaar and Maclean spend some time explaining the idea of the family justice system, which they say includes

‘institutions whose primary purpose is to define, protect and enforce the legal rights family members have *as family members* and to resolve conflicts between family members concerning those rights’.⁵

As Eekelaar and Maclean say,

‘[a]t its heart, family justice is about how far the community [meaning here the state, through its laws and institutions] believes it should become involved in problems people encounter in their personal lives’.⁶

The work of the courts and of legal professionals is particularly emphasised, along with the mutually ‘supplemental’ relationship between legal remedies and mediation.⁷ The family justice system’s work is done with the support of various other organisations and individuals such as counsellors, medical and psychotherapeutic services, and social services. These organisations are focused on supporting individuals and families, and play a key role within the family justice system, but in Eekelaar and

⁴ The term entered general use following David Norgrove’s Family Justice Review in 2011, though there are a number of examples of the phrase being used before that.

⁵ Judges, p 8.

⁶ Judges, p 205.

⁷ Judges, p 43. Mediation covers a wide range of practices, which can include the resolution of legal disputes and which therefore can fall within the definition of what the family justice system is doing as set out by Eekelaar and Maclean. See also their book specifically on mediation, M. MACLEAN and J. EEKELAAR, *Lawyers and Mediators: The Brave New World of Services for Separating Families*, Hart Publishing, Oxford 2016.

Maclean's model they are not per se part of that system because they are not concerned with resolving legal issues or supporting legal rights.⁸

Those who are part of the family justice system, as defined in Eekelaar and Maclean's work, have long been misunderstood by policy-makers and others (such as some sections of the press),⁹ though the extent to which this is a deliberate misunderstanding is less clear. The characterisation of family justice professionals as 'fat cat lawyers' continues unabated, despite the reality that many struggle to make a living in the profession. Those doing family legal aid work saw a cut of about 10% to fees take effect in 2014,¹⁰ and since 2013 there has been no uplift in legal aid rates, equating to a further 15% cut in real terms.¹¹ It is unsurprising that solicitors and barristers with predominantly legal aid practices are increasingly rare, and family departments in larger firms and mixed-practice chambers are often cross-subsidised by other departments.

The effects of this on family court users, and on the courts themselves, have been enormous. Whereas in 2012, only 13% of private law family cases involved neither party having any legal representation, the figure is now 36%, and whereas previously 45% of these cases involved legal representation on both sides, that figure is now down to 21%.¹² While these figures for the court process might be thought to have encouraged a move away from court adjudication (if that is what courts are seen as being for) and towards mediation and other non-court dispute resolution, the ironic effect of pushing parties away from seeking legal advice is that they are now *less likely* to access mediation services. Attendance at mediation assessments is now at around a third as many as before the 2012 legal aid cuts, while actual mediation is at around two thirds (having been at

⁸ The role of local authority children's services is, in my view, something of a hybrid, as they do appear to me to have a key role in supporting the legal rights of children who are suffering or are at risk of suffering significant harm within their families.

⁹ This is not news: see, e.g. P. LEWIS, *Assumptions about Lawyer in Policy Statements: A Survey of Relevant Research*, Research Series 1/00, Lord Chancellor's Department, London 2000.

¹⁰ Ministry of Justice, *User Guide to Legal Aid Statistics, England and Wales*, MoJ and LAA, 2021, p 14, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021444/user-guide-legal-aid-statistics-apr-jun-2021.pdf.

¹¹ Author's calculations.

¹² Ministry of Justice, *Family Court Statistics Quarterly: January to March 2021*, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/995911/user-guide-legal-aid-statistics-jan-mar-2021.pdf <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2021/family-court-statistics-quarterly-january-to-march-2021#legal-representation>.

around half for several year).¹³ The cause of this is likely to be that parties who do not have access to lawyers for advice are not diverted away from the family court into mediation.

2. FAMILY JUSTICE PROFESSIONALS IN ‘NORMAL’ TIMES¹⁴

The line between lawyers and mediators is also a site of serious misunderstanding, with government persistently suggesting that there is a binary choice to be made between adjudication and mediation,¹⁵ with lawyers said to represent an inevitable first step towards adjudication and an equally inevitable barrier to mediation. The evidence, from Eekelaar and Maclean as well as others, is that this is an entirely false dichotomy, and one that creates an unreal image of what family lawyers actually do.

The financial attack on the family justice system through legal aid cuts is, consequently, just one front in a much larger war.¹⁶ A further front is seen

¹³ Ministry of Justice, *Legal Aid Statistics Quarterly: January to March 2021*, p 14, online at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/996037/legal-aid-statistics-bulletin-jan-mar-2021.pdf

¹⁴ Are there any ‘normal’ times? By this, I mean only pre-pandemic times, though normal times were far from easy times. Eekelaar and Maclean called them ‘uncertain’ in the title of their Judges book; Jo Miles and I talk of the ‘ever more challenging times in family justice’: J. MILES, R. GEORGE and S. HARRIS-SHORT, *Family Law: Text, Cases, and Materials*, 4th edn, OUP, Oxford 2019, p v. Before the pandemic, Sir Andrew McFarlane’s tenure as President of the Family Division of the High Court was focused on the wellbeing of family justice professionals, noting for example that a ‘general focus on wellbeing has developed coincidentally with a massive increase in pressure within the Family Justice system’: A. MCFARLANE, ‘Wellbeing and the Family Justice System’, 19 June 2019.

¹⁵ Judges, p 26.

¹⁶ Indeed, legal aid is only one of many financial cuts that impact on the family justice system. In addition to a 36% cut to non-criminal legal aid between 2011 and 2018 (House of Commons Library, *The Future of Legal Aid: Summary*, 31 October 2018, online at <http://researchbriefings.files.parliament.uk/documents/CDP-2018-0230/CDP-2018-0230.pdf>, p 4), local authority budgets have been cut by 28.6% (National Audit Office, *Local Government in 2019: A Pivotal Year*, online at <https://www.nao.org.uk/naoblog/local-government-in-2019/>); and the MoJ’s own budget (from which courts are funded, for example) has been cut by over 25% (Institute for Government, *Whitehall Monitor 2019*, online at <https://www.instituteforgovernment.org.uk/publication/whitehall-monitor-2019/finances>), with ‘savings’ found in part by closing around 300 court buildings and reducing the number of ‘sitting days’ that judges are allowed. Cafcass delays are now enormous, with a section 7 report, once available in around 6 to 8 weeks, now taking upward of 14 weeks, and services on which the family

in the attack on the role that family lawyers play in family disputes. Far from accepting that barristers ‘help the victims of family failure’, as the sub-title of Maclean and Eekelaar’s *Barristers* book puts it, this attack sees family lawyers as a *cause* of the antagonism and conflict that is a feature of many contested family law cases. The argument is made that these disputes would be resolved in other (and, either impliedly or expressly, better) ways if lawyers were not involved. As the Government’s 2010 white paper put it, in linking these arguments directly to legal aid cuts:

Legal aid funding can be used to support lengthy and intractable family cases which may be resolved out of court if funding were not available. In such cases, we would like to move to a position where parties are encouraged to settle using mediation, rather than protracting disputes unnecessarily by having a lawyer paid for by legal aid.¹⁷

There is so much that is wrong packed into this short quotation. Almost every element of it is questionable, and the overall message is profoundly misguided. The idea that family law disputes arise from ‘the litigant’s own personal choices’,¹⁸ and therefore represent ‘unnecessarily litigation’ where people ought, instead, ‘to take greater personal responsibility for their problems’,¹⁹ reflects what Eekelaar rightly calls a ‘diminished concept of what constitutes justice in regard to family matters’, and ‘a startlingly limited view of the role of a court, and hence of the law which courts apply’.²⁰ It seems doubtful that the decisions of your former partner to stop you seeing your children, or to deny you access to a fair share of the family assets, or to subject you to domestic abuse, are properly seen as ‘personal choices’ that you have made. Nor is it obvious that by avoiding court, you will be able to take ‘personal responsibility’ for resolving that dispute. Maclean and Eekelaar said that ‘the idea that justice within families is somehow of lesser significance than elsewhere must be dispelled in the strongest terms’.²¹

court relies like Child and Adolescent Mental Health Services facing backlogs of up to two years, despite accepting only the most serious cases.

¹⁷ Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales: Consultation Paper 12/10*, HMSO, London 2010, para 4.211.

¹⁸ *Ibid*, para 4.19.

¹⁹ *Ibid*, para 2.11.

²⁰ *Not of the Highest Importance*, p 313.

²¹ M. MACLEAN and J. EEKELAAR, ‘Family Justice’ [2011] *Family Law* 3. Maclean and Eekelaar return to this theme in their evaluation of the effects of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, *After the Act: Access to Family Justice After LASPO* Hart Publishing, Oxford 2019, especially in the opening chapter and at pp 174-181.

It is against this background that Eekelaar and Maclean's work on family justice professionals is so key. Building on earlier studies,²² their Solicitors study in 2000 gave an in-depth look at the everyday work of family law solicitors. Contrary to the impression given in policy statements before and since, they saw clear evidence of the 'overwhelming push towards settlement' in the approach taken by family solicitors.²³ Court applications were felt to be necessary only when one of the parties had no incentive to engage in a negotiated settlement,²⁴ and even then 'the court was frequently used as an aid to the settlement process'.²⁵

A key finding, largely overlooked by policy-makers, was about the extent to which solicitors were engaged in negotiation with their own clients, as well as with 'the other side'.²⁶ The work of the family solicitor in trying to navigate the 'mismatch between the aspirations of the client and the solicitor's perceptions of what was a realistic outcome'²⁷ is crucial to a successful negotiation, not least for introducing the client – perhaps for the first time – to the legal framework within which their dispute will need to be resolved. The lawyer's work in providing 'reassurance, information, advice and practical support' is also not to be overlooked,²⁸ with solicitors in finance cases, for example, 'very ready to offer practical advice on how to get a grip on the household economy, ride out the crisis and prepare for longer-term solutions'.²⁹

Turning to the barristers, the impression in the popular imagination likely bears little resemblance to the reality. As Maclean and Eekelaar summarise it in their later work:

[Barristers] are usually introduced into the dispute at a time when a hearing for some kind of direction or ruling by a judge is imminent. Clients are therefore under maximum

²² M. MURCH, *Justice and Welfare in Divorce*, Sweet and Maxwell, London 1980; G. DAVIS, *Partisans and Mediators: Resolution of Divorce*, OUP, Oxford 1988.

²³ Solicitors, p 108.

²⁴ Solicitors p 118.

²⁵ Solicitors, p 108.

²⁶ This process reminds me often of the description of the relationship between the Government, the Opposition, and the Civil Service in *Yes, Prime Minister*, when PM Hacker explains that the Opposition are only the opposition in exile, and that it is the Civil Service who are the opposition in residence. In some cases, 'the other side' are only the opposition in exile, and it is the client who is the opposition in residence, acting (in the lawyer's view, at least) in a way contrary to his or her interests, or in a way that makes the lawyer's case strategy harder to implement effectively.

²⁷ Judges, p 29.

²⁸ Judges, p 30.

²⁹ Solicitors, p 83.

stress, and the barrister needs to explain to the client what is happening, provide reassurance and display authority in dealing with the court and the other party. At the same time, since the pressure to settle is at its height, they need to check facts and question the client to assess not only the strength of the case but also the scope for movement in discussions with the other side. This is done within extreme time constraints. The barrister will also negotiate with the court for time to pursue discussions with the other party and, of course, attempt to arrive at an agreed outcome with that party.³⁰

The outcome of this intense process is that '[a] dispute has been managed' and 'hopefully this injection of reality has led to a settlement, though agreement may be too strong a word'.³¹ The role of the barrister, like the solicitor, in managing their own client and in acting as guide, protector and agent to someone in a moment of vulnerability is emphasised:

'[a] sometimes bewildered client has had the goings-on explained, been comforted, been protected from hostility from antagonists, been prepared for disappointment in the outcome and, perhaps most important, his or her viewpoint has been represented'.³²

Coming finally to the family court judges, Eckelaar and Maclean suggest three core activities that make up the function of a family judge: legal activity (acting as adjudicator of a dispute or scrutiniser of a proposed settlement, for example), management before or during a hearing, and help (where the judge provides information or works to facilitate agreement).³³ While the archetypal image of the judge is as umpire or adjudicator, their study suggests that this kind of activity occupies only about half (46.9%) of family judges' time, with the remaining time divided more or less evenly between management (29.8%) and help (23.2%).³⁴

Unlike the lawyers, judges do not have 'clients' to manage in the ways seen in the earlier studies, but this does not mean that they have no role in trying to explain, reassure, and assist. As well as being 'unfailingly courteous and helpful to all parties', judges chose language carefully and clearly saw themselves as having an important role in managing the *experience* of being in court for family justice system users:

³⁰ Judges, p 31.

³¹ Barristers, p 121.

³² Barristers, p 121.

³³ Judges, pp 80-1.

³⁴ Judges, p 82.

Contradictory statements in evidence would be referred to as confused or mistaken, rather than dishonest. Even when a Circuit Judge in a care case had to be firm with a young mother whose answers were less than clear, the judge very quickly suggested breaks when the young mother seemed tired and distressed, and often encouraged her by saying it was clear how much she cared for her child and how hard she had been trying to deal with her drug addiction.³⁵

At the same time, judges spend time helping the parties to find workable solutions, particularly at short hearings where the court's ability to impose outcomes is limited even if the judge were minded to want to do so. In equating the work of the family judiciary in this regard to that of a General Practitioner, Eekelaar and Maclean describe the half-hour listings for cases

'all requiring help and encouragement in finding and making effective an acceptable outcome, namely [in private children proceedings] a workable parenting arrangement which would be beneficial to the child'.³⁶

The role of the court in aiding negotiation by providing 'dispassionate evaluation, and an opinion backed up by judicial authority and the threat of the alternative, a full and costly final hearing' is not to be underestimated.³⁷ The value of this approach is apparent from the frequent use that lawyers, especially barristers, make of the borrowed authority of the judge, saying (to make up some examples) 'well, what I would expect the judge to say about that is...', or 'the judge is unlikely to accept that, so then we end up at a contested hearing and the judge will impose their own decision.' This form of negotiation between the lawyer and their own client is a powerful tool for attempting to inject what, from the lawyers' perspective, will be seen as a dose of reality, but only works if attending court and having the judge in fact say something along those lines is a realistic option (and, of course, if the lawyer is sufficiently experienced to predict the judge's view reasonably accurately).

3. FAMILY JUSTICE PROFESSIONALS AND COVID-19

I turn now to examine the ways in which family justice system professionals responded to the Covid-19 pandemic, and how the dramatically

³⁵ Judges, p 121.

³⁶ Judges, p 115.

³⁷ Judges, p 117.

changed ways of working that developed may impact the understandings of those professionals and the system in which they work. In writing about this, I draw on the experiences of 26 family law professionals who spoke to Mavis Maclean and me in the summer of 2020.³⁸ As with many of my projects, I am in the fortunate position of being able to acknowledge the help and support that John gave to us as we formulated our ideas and processed the data that we had gathered.³⁹

It is hard in retrospect to remember how fast things changed in March 2020. On 9 March 2020, the only official change in the courts was that hand sanitiser was permitted to be taken into court buildings, but the instruction otherwise was that ‘[y]ou should continue to use courts and tribunals as usual’.⁴⁰ Even as late as 18 March 2020, while cautioning that longer cases might need to be adjourned, the President of the Family Division suggested that ‘there may be the need, and no harm involved, in having a number of people present in court for an oral hearing’.⁴¹ Five days later, the position had developed such that the Bar Council felt confident in advising barristers that ‘the default position is to stay away [from court] unless yours is one of those rare hearings that must be in person and the court tells you to go in’.⁴² This was confirmed by updated guidance from the President, seen in the 25 March 2020 update to Mac-Donald J’s remote hearings manual, which said that

‘live court-based hearings should now be confined only to exceptional circumstances where a remote hearing is not possible and yet the hearing is sufficiently urgent to mean that it must take place with those involved attending court in a manner which meets the social distancing requirements’.

Unlike some parts of the justice system, which largely came to a halt, the family court was at the forefront of moves to ‘keep the show on the road’, with remote hearings being rapidly rolled out. Initially, the focus was on telephone hearings, particularly away from the higher-profile cases in the High Court; and equally, other than for cases that truly could not wait, the

³⁸ I am grateful to Mavis for letting me use these research findings, which were very much the product of a joint endeavour. Some of our ideas have been previously published in M. MACLEAN and R. GEORGE, ‘Family Practice During Covid and Access to Justice’ [2021] *Family Law* 226.

³⁹ Thanks also, of course, to the individuals who gave up their time to speak with us and share their experiences.

⁴⁰ HM Courts and Tribunals Service, *Covid-19: HMCTS Planning and Preparation: An Update for Professional Court Users*, 9 March 2020.

⁴¹ President of the Family Division, ‘Covid-19: National Guidance for the Family Court’ 19 March 2020.

⁴² ‘Updated Message from the Chair of the Bar’, 23 March 2020.

initial focus was on holding hearings to re-timetable contested hearings.⁴³ As it became apparent that the pandemic was not going to be a short-term event, and as courts increasingly got to grips with technology, video hearings became more common,⁴⁴ and suggestions of simply adjourning cases until after the pandemic were (by necessity, if nothing else) rejected.⁴⁵ Judges gained confidence about holding contested hearings with complex evidence being heard by video link, with strong encouragement given from senior judges to reassure colleagues that this was both possible and indeed satisfactory.⁴⁶

To explore the experience of family justice professionals undertaking this work at the coalface, Maclean and I conducted a small-scale qualitative investigation based on telephone interviews with a purposive sample of 10 barristers, 10 solicitors and 6 family court judges and magistrates. The sample was recruited through professional networks and most were based in and around London. Most of our barristers were relatively junior (up to 10 years' call), while our solicitors were more varied, including junior associates and partners. The judges were a mixture of Circuit and District Judges, based in both large and smaller court centres, and two magistrates were also interviewed. In writing about their experiences, I refer to the barristers as B1, etc.; the solicitors as S1, etc; and the judges and magistrates together as J1, etc. All interviews took place between May and September 2020.

3.1. THE LEGAL PROFESSIONALS' OWN EXPERIENCES

Experiences from the professionals' own perspectives varied. In part because our interviews started with the barristers, the experiences that they

⁴³ In retrospect, moving of cases from March / April to July / August displayed a complete lack of understanding of the realities of what was facing us, but in truth most people thought that by the summer of 2020 life would be back to normal.

⁴⁴ The Court of Appeal noted early on that 'there is a qualitative difference between a remote hearing conducted over the telephone and one undertaken via a video platform'; *Re B (Remote Hearing: Interim Care Order)* [2020] EWCA Civ 584, para 35.

⁴⁵ See, e.g. *Re Q* [2020] EWHC 1109 (Fam).

⁴⁶ In addition to numerous hearings in the Court of Appeal and High Court, starting as early as 16 March 2020 (albeit in the Court of Protection: *A Clinical Commissioning Group v AF* [2020] EWCOP 16, accurately predicting that 'hearings will be conducted remotely in this way as a matter of routine practice'), see e.g. the letter from Mostyn J and HHJ Hess entitled Financial Remedy Courts on 15 April 2020: 'the court should start from the position that a remote hearing is likely to be consistent with the interests of justice', including in many cases where live evidence was required: <https://www.judiciary.uk/wp-content/uploads/2020/04/letter-from-Mostyn-J-and-HHJ-Hess-150420-1-1.pdf>

reported were focused on the early months of the pandemic, whereas other participants were interviewed slightly later when, for example, remote hearings had become more established.

The barristers talked about the collapse in their work as cases were routinely adjourned by the courts, sometimes without any hearings at all and sometimes following a very short telephone hearing. One barrister (B2) told us of his experience of having no work at all at first, and then getting back (by the time of our interview) to billing about half what he had been doing. Those who worked in public law tended to remain busier in the early weeks and months, while those doing private law children work or, even more so, finance work were quiet, as the courts prioritised child protection work in the limited hearing slots available. Barristers also tended to face the brunt of the technology challenges in the early weeks of remote hearings. B1 found out the afternoon before a hearing that he was the one expected to set up the zoom link for the High Court hearing the next morning, including ensuring that the hearing was recorded and then sending the recording to the court in a GDPR-compliant manner.

Positive aspects of working remotely were identified by some barristers, including some thinking that the lack of travel made for a better work/life balance, and for some it made it easier to organise meetings with clients in advance of hearings.⁴⁷ Given the amount of travel that family barristers typically do (particularly at the junior end), it is easy to see how working from home would make it easier to do a hearing in the morning and be confident of being ready to meet another client in conference in the afternoon, for example. We were told about the fact that, whereas courts in person before the pandemic tended to list all cases at 10.00 or 10.30, now with remote hearings it became more common that hearing would be given a more precise time when they were to start, which made planning the day easier for the barristers. Solicitors found it easier to multi-task,⁴⁸ and were able for example to attend pre-court conferences with counsel and their client when time and financial cost would ordinarily have made attendance at court impractical.

Other aspects of the work/life balance were less positive though. Both barristers and solicitors told us about the inability to draw meaningful lines between work and home, though with many barristers used to working from home in the evenings and at weekends anyway, the difference may have been less marked for them. Judges told us with some concern

⁴⁷ See also M. RYAN ET AL., *Remote Hearings in the Family Court Post Pandemic*, Nuffield Family Justice Observatory, London 2021, p 3.

⁴⁸ This manifested in a number of ways, including S1's comment that 'you can be half watching TV taking instructions in pyjamas'.

about ‘advocates send[ing] documents all through the night’, which left judges and the other advocates in the case feeling that ‘there’s no turning off from the emails’ (J1). The President has subsequently tried to take steps to curtail this practice, as well as reminding judges and practitioners that hearing times should normally be limited to between 10.00am and 4.30pm.⁴⁹

Harder to control was the feeling of work physically invading home space. Junior barristers often had relatively small homes, and so tended to be conducting court hearings from their living rooms or even bedrooms (rather than, say, in a dedicated study). This created the possibility that clients would in effect be invited into the lawyers’ homes (an experience noted by other participants as being potentially disconcerting from clients’ perspectives as well, particularly for clients coming from different backgrounds from their lawyers), but also that the professional ‘mask’ might not be in place. As one barrister told us, ‘having a judge cross with you in your own sitting room is not pleasant’. Judges had similar experiences of ‘the intrusion of work into home’ (J3); as another explained: ‘if I was doing an [interim care order hearing], I didn’t want to be at home – I didn’t want to take people’s children away while my children are playing in the garden’ (J2). Unlike their lawyer colleagues, though, the judges often had the option (after the initial period of lockdown) of going into their court buildings and conducting hearings from there.

3.2. LEGAL PROFESSIONALS’ PERSPECTIVES ON THE EXPERIENCES OF COURT USERS

Turning away from their own experience of remote hearings, we were also concerned to find out what our participants thought about the experience of court users. Participants were acutely aware of how varied that experience might be, depending on things like the nature of the proceedings and the resources available to the individual in question. Some participants were concerned for example in relation to care proceedings that major decisions were being taken about people’s children, including children being removed from their parents’ care, at remote hearings where the parent had no meaningful support available.

One judge spoke about the difficulty of ‘seeing a mother on her own in her flat, of watching her hear me say I’m making a placement order or removing the child to local authority care’ when there was no one there to

⁴⁹ A. MCFARLANE, *The Family Court and Covid 19: The Road Ahead 2021*, 8 January 2021.

provide the mother with support (J1).⁵⁰ B7 told us of a mother in domestic abuse proceedings who, in order to be somewhere away from respondent, (with whom she was still living as she was unable to move out), was sat on a park bench while the hearing was taking place. This barrister, noting that neither she nor the solicitor were there to support the client, described the experience as ‘harrowing’. She also noted the potential disconnect for these parents, having their children removed from their care, while ‘staring at barristers in fancy houses with pictures of their kids on the wall’. As another solicitor put it, ‘a vulnerable client having the final decision on a child on evidence from a small screen, likely to have poor tech at home, is not acceptable. But we have to make the best of what we’ve got’ (S3).

Several lawyers reported the experience of having clients who had no real understanding of what had happened at the hearing. They were in attendance, but did not understand the language being used, and did not feel able to ask anyone to help them. One felt that it was as if ‘parents are being bypassed’ (S5), with the focus on making the hearing ‘work’ from the professionals’ perspective but losing sight of the experience of the court users. This fitted a more general pattern of lawyers being concerned about their inability to provide meaningful support for their clients, and anxiety about missing the nuances of a case due to the limited time they were able to spend with clients. Some solicitors talked about the difficulty of taking instructions on complex matters, particularly where there were numerous documents that they needed their clients to read, understand, and comment on.

Whether remote hearings are materially the same as in-person hearings was something of an open question for participants in our study. Maclean and I previously linked this to what Martha Cover has termed ‘the magic’ of the courtroom:

[A] huge part of the magic and value we family lawyers do is to be in a room with a person to listen and understand, and give advice on human matters, the family, while looking them in the eye. This empathy is not only therapeutic, it leads to practical results, to better understanding between lawyers and clients, and between lawyer and lawyer. It facilitates better sharing of information and offers the opportunity to learn

⁵⁰ See also M. RYAN ET AL., *Remote Hearings in the Family Court Post Pandemic*, Nuffield Family Justice Observatory, London 2021, p 13.

more about the clients and the other side which can enable on the spot sharing of information to take place at what used to be known as the door of the court.⁵¹

The legal professionals in our study generally thought that the outcomes of judicial determinations were the same as they would have been at an in-person hearing, but as noted above this is just part of the function of a family court judge. Even this aspect, though, was not universally accepted by our participants: as one solicitor said, having a hearing by phone or even on screen had the effect of equalising the participants, including the judge, and therefore of ‘downplay[ing] the seriousness’ of the hearing (S1). However, many participants were less sure that the process that led to those outcomes was as satisfactory: were people given proper opportunity to participate? Did people understand properly what was going on? Eekelaar and Maclean’s work draws on Sen’s writing,⁵² which requires one to look at both the process and the eventual outcome to understand what is termed the ‘comprehensive outcome’: ‘perceptions of fairness of outcome are determined by the nature of the outcome and the procedure by which it is reached’.⁵³ These concerns are reflected by court users in other studies, with a clear majority (83%; N=174) of parents in Ryan et al’s study of family court users under Covid for the Nuffield Family Justice Observatory in July 2021 ‘indicat[ing] that they had concerns about how their case was dealt with’.⁵⁴

Of more concern to some participants was the loss of the interaction outside the formal hearing. As one barrister put it, ‘we learn so much outside the court as well as inside’ (B7), and it was generally thought that negotiating in the immediate run-up to a hearing was more difficult.⁵⁵ Given the stricter timetables being used by the court about when each hearing was to start, there was also rarely any flexibility to ‘negotiate with the court for time to pursue discussions with the other party and ... attempt to arrive at an agreed outcome with that party’.⁵⁶ Judges’ ability to ‘help’, therefore, which previously occupied nearly a quarter of their time in family courts,⁵⁷ was limited: getting an indication from the court, going

⁵¹ Quoted in M. MACLEAN and R. GEORGE, ‘Family Practice During Covid and Access to Justice’ [2021] *Family Law* 226.

⁵² A. SEN, *The Idea of Justice*, Harvard University Press, Cambridge MA 2009.

⁵³ Judges, p 17,

⁵⁴ M. RYAN ET AL, *Remote Hearings in the Family Court Post Pandemic*, Nuffield Family Justice Observatory, London 2021, p 3.

⁵⁵ See also M. RYAN ET AL, *Remote Hearings in the Family Court Post Pandemic*, Nuffield Family Justice Observatory, London 2021, p 13.

⁵⁶ Judges, p 31.

⁵⁷ Judges, p 82.

away for an hour to negotiate and then coming back to court later in the day when the judge had a gap in the list was no longer an option in most cases. The loss of this help and of the space to negotiate, when the pressure to settle is at its highest, is a real concern, and means that cases will more often end up with judges forced into their adjudicative function. While that might be unproblematic on one level, it is discordant with the general attitude in the family court, repeated by judges on a daily basis, that a negotiated outcome is better than one imposed by the court.⁵⁸

4. CONCLUDING THOUGHTS

The findings of our small study fit into a broader picture of the remote family court and the experience of family justice system users during the pandemic. Some of these links have been made already, but others are worth highlighting.

The third ‘rapid consultation’ conducted by the Nuffield Family Justice Observatory, reporting in July 2021,⁵⁹ gives some insight into how things have developed in the year since our research was conducted. The potentially less intimidating nature of a remote court hearing was highlighted as a potential benefit for court users, with particular emphasis placed on cases where there might be safety concerns for one of the parties.⁶⁰ The tensions in this aspect are apparent from one quotation from a mother in the study, though:

I couldn't talk to anyone during the hearing so I didn't feel like a participant so much as a spectator. It was preferable for me to attend the hearing by telephone from a logistical point of view (travel and childcare) and also from a personal point of view: I did not have to see my ex-partner who has been abusive.

The benefits of childcare and being separate from an abusive former partner were obviously real to this person, but need to be off-set against the fact that she felt like a spectator at the hearing, a concern that links clearly to some comments in our research.

⁵⁸ The concerns raised about this approach to mediation (Judges, p 38) apply to some extent also to negotiations at court, though these are lessened to a considerable extent by the ‘scrutiny’ function of the judge, especially in (now fairly rare) cases where both parties have legal representation.

⁵⁹ M. RYAN ET AL., *Remote Hearings in the Family Court Post Pandemic*, Nuffield Family Justice Observatory, London 2021.

⁶⁰ *Ibid*, p 12.

Similarly, the lack of ability to negotiate effectively around a remote hearing was highlighted in Ryan et al.'s study. For example, in considering whether First Hearing Dispute Resolution Hearings in private law children matters should continue to be conducted remotely after the pandemic, one solicitor is quoted as saying that 'if there is to be any hope of resolving matters at that stage or narrowing issues parents need to be in a court room'.⁶¹ Concerns about unrepresented litigants also permeate the study, which must count as a major obstacle to continued use of remote hearings given the high proportion of litigants in person in family cases.

At time of writing, it remains unclear what will happen in the medium or long term in relation to the remote family justice system. While there are some clear benefits, two things seem apparent. First, those benefits are far from universal, and seem to apply to some types of hearings more than others; cases with vulnerable parties, those needing interpreters, intermediaries or other support, and those involving evidence about sensitive issues seem particularly ill-suited to remote hearings. Second, many of the benefits that are identified seem more pertinent to family justice professionals than to court users, and given that the purpose of the system is to serve individuals who are experiencing various forms of family crisis, it seems perverse to give undue focus to the experience of the professionals involved rather than the users.

Where I want to finish, though, is by linking back to Eekelaar's work in this area. I have tried in this chapter to draw some links between his studies with Maclean and the current pandemic experience of the remote family justice system, because the broad understanding of the workings of the system and of the professionals within it that is gained from that scholarship is crucial to a fuller understanding of what is happening now, in this (temporary?) operating model of remote family justice. Understanding the central role of negotiation and settlement at every stage of the family justice system's processes, for example, is crucial to a meaningful evaluation of how successful or otherwise remote justice can be. If the purpose of attending court is to get a decision, then remote hearings seem reasonable enough; but if the aim is rather broader, and sees the court as a vehicle to assist the parties in various ways only one of which is by way of formal adjudication, then remote hearings might be seen as rather less successful.

The magic of the court that Martha Cover noted is not just in the court's ability to impose outcomes, but rather as she noted is in the court experience: listening, understanding, earning trust and giving advice are as

⁶¹ Ibid, p 20.

much a part of the process of being a family lawyer as arguing a case, cross-examining a witness or making legal submissions. Similarly, being a party or litigant in family proceedings, is about more than making applications and giving evidence. It involves vulnerability, anxiety and a requirement to lay open some deeply personal and integral parts of one's identity, usually at a time of enormous change and pressure. It also very often involves complex power dynamics that create inherent and often gendered inequalities between the parties in terms of their effective bargaining power,⁶² which is part of the reason why recognising family disputes as involving questions of law and justice is so important.⁶³ Family law and family justice are inherently relational, both in terms of the issues at stake but also in terms of the way that those issues are resolved, and a remote family justice system will struggle to capture that essential relational dimension.

⁶² J. EEKELAAR, 'Family Justice: Ideal or Illusion?' (1995) 48 *Current Legal Problems* 191, p 210.

⁶³ Not of the Highest Importance, p 313.