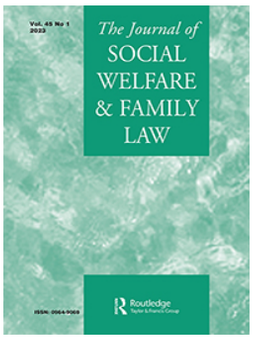

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Autoethnography: a personal reflection on the work of the family bar in the North of England

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ABSTRACT

This study offers a personal reflection on 18 months at the Family Bar. It provides a unique perspective on a family justice system, which despite acute pressure has retained some of the most compassionate professionals who despite severe cuts to funding, and lack of resources, continue to work efficiently and effectively and with good humour, under stress. The authors are experienced practising lawyers who have published extensively in the area of family law relating to children and family justice. This experience, coupled with the methodological approach of autoethnography, provides a distinct perspective to which academics and practitioners may relate. The aim of this paper is to reflect upon the impact of recent changes in family justice on barristers working in both private and public law family cases.

KEYWORDS

Private children law; public children law; reflection; autoethnography; family law bar

Introduction

After a period of 13 years in academia, and 35 years working in child protection, Holt returned to the Bar, and is now combining a senior academic role with taking instructions in some of the most complex public and private law family cases in the North East of England. Thomson is a solicitor with experience of instructing barristers in private law family proceedings. They share an interest in the use of self-reflection and writing to explore their experiences.

The authors have been able to examine research into the impact of the revolutionary changes within the family justice system over the last ten years, beginning with the introduction of the Public Law Outline in 2008 leading to the Children and Families Act 2014 and the 26-week rule for the completion of public law care matters, followed by severe cuts to legal funding through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which continue to leave some of the most vulnerable litigants without independent legal advice and representation. The impact of the loss of legal aid for people who are unable to afford lawyers, and the risk of injustice to children (Heung 2017), are discussed within the paper. The LASPO cutbacks reduced support at a time of increased hardship while the government sought to reduce the UK's deficit (Heung 2017). This issue is relevant once again

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This article has been corrected with minor changes. These changes do not impact the academic content of the article.

in consequence of the current cost of living crisis where use of the phrase, 'a choice between heating and eating' has become increasingly prevalent. If the public are choosing between heating and eating, it is doubtful that fee notes will be at the top of their agenda.

This study is a personal reflection on 18 months at the Family Bar. It provides a unique account of a family justice system, that despite acute pressures has retained some of the most compassionate professionals, who despite severe cuts to funding, and a severe lack of resources, continue to work efficiently and effectively and with good humour, under the most stressful of conditions. This experience, coupled with the modern methodological approach of autoethnography, provides an original and distinct perspective to which academics and practitioners may relate. Autoethnography will allow the authors to describe and systematically analyse their personal experience to understand the experience with greater clarity (Holman Jones 2005). Although this is an English case study, the complexities of the work may resonate with academics and practitioners across jurisdictions.

The crisis in family justice

In his 15th View from the President's Chambers, Sir James Munby (2016) stated: *We are facing a crisis and, truth be told, we have no very clear strategy for meeting the crisis*. The Care Crisis Review (2018) was a response to that challenge, and made 20 recommendations for change, ranging from immediate operational changes for workers engaging in direct work with families, to wider structural, financial and systemic imperatives. The aim of the review was to examine the reasons for the rise in care proceedings and the number of children in care, while retaining a focus on achieving the best outcomes for children and families (The Care Crisis Review 2018). A further aim was to take account of the current national economic, financial, legal and policy context which impacts on families, the local authority and court practice (The Care Crisis Review 2018). The final objective of the review was to identify specific changes to local authority and court systems, national and local policies and practices, to help safely stem the increase in the number of care cases proceeding to court and the number of children in the care system (The Care Crisis Review 2018). The aim of this paper is to reflect upon the impact of these changes for barristers working in both private and public law family cases.

Cafcass national statistics on the number of care applications report a consistent decrease, from April 2016 to March 2021, as in the number of public law cases received from April 2017 to March 2022, though there was a nominal increase from 18,752 to 18,847 between March 2017 and March 2018 (Cafcass 2021a, 2021b). The target length of time for completing care and supervision (s31 Children Act 1989) cases, as set out in the Public Law Outline (PLO), Children and Families Act 2014 and Family Procedure Rules Practice Direction 12A, is 26 weeks (Children and Families Act 2014 (c. 6). S14(2)(ii)). The average time for the completion of cases has increased each year since 2016; most notably, during the period 2020–21, it was 41 calendar weeks; for 2019–20, 34 calendar weeks, and for 2018–19, 31 weeks. (Cafcass 2021a). The average time for the most recent available quarter, which is quarter 3 of 2021–22 is 45 weeks (Cafcass 2021b). The growth in the number of children looked after under a care order, at a point in time, reflects the changes observed in the legal status of children starting to be looked after. In recent years, the number of children accommodated under a voluntary agreement has fallen due to sharp criticism of the use of

S20, particularly in relation to young babies, whilst the number of children being accommodated under a care order has increased (Broadhurst *et al.* 2022).

CAFCASS has highlighted that, over the last five years, the biggest increase in their work has been in private law proceedings, from working with 79,180 children in private law proceedings in 2016/2017, to 97,496 children in 2020/2021 (Cafcass 2021b). During this five-year period, there were increases in the number of private law applications year on year of between 3.1% and 8.3% until March 2020 (Cafcass 2021a). The final year reported, April 2020 until March 2021, showed an increase of 0.8% (Cafcass 2021a). Although lower than previous years, this still represents an increase, despite the impact of the Covid-19 pandemic on court users and on access to justice. In the earlier stages of the pandemic, the Remote Access Family Court guidance detailed three categories of prioritisation: work that must be done, work that will be done and work that the court will do its best to accommodate (Courts and Tribunals Judiciary 2020a). As regards private law proceedings, only urgent applications constituted work that must be done (Courts and Tribunals Judiciary 2020a). The work that will be done related to gatekeeping and allocation in private law proceedings (Courts and Tribunals Judiciary 2020a). Whilst the court will do its best to accommodate the processing of orders, documentation and correspondence in private law proceedings (Speed *et al.* 2020), the processing of orders, documentation and correspondence for public law proceedings was regarded as work that *will* be done (Courts and Tribunals Judiciary 2020a). There was a clear discrepancy in the treatment of private law proceedings compared with public law, in consequence of the perceived urgency of the proceedings. There may be an argument arising over the decrease in public law proceedings and the increase in private law proceedings and whether the onus of dealing with childcare matters is shifting from the Local Authority to the parents.

Whilst caution must be exercised with regard to taking statistics at face value, it is clear that the number of both public law and private law applications shows no sign of abating and whilst there is variation across and within regions in England, the North East of England remains one of the areas with the highest number of both private law and public law applications. The Care Crisis Review comments: (The Care Crisis Review 2018, p5)

The Review has achieved its aim of developing a greater understanding across the sector about the factors contributing to the crisis and of involving a wide range of those involved in the system in identifying and developing options for change. The next stage is much more important. For all of us to own the problem, reflect on messages from the Review, and consider the commitments we can make to safely tackle the crisis and improve the experiences of children, families and practitioners.

Whilst the legislative framework might be largely effective, and the system generally works well, particularly through the goodwill of practitioners, administrators and the judiciary, there is insufficient funding and resources to meet the needs of children and their families when they seek help, regardless of whether this is at an early stage or when they are in crisis and most in need of care and protection.

Every day some of the most vulnerable people in our society come before the family courts, where difficult decisions are made in often highly emotive cases, and so it is crucial

that the system is able to protect them from further harm and the risk of harm. (Ministry of Justice 2020)

The lack of funding and resources for the family justice system is by no means a new issue and will come as no surprise to readers. There was, therefore, impetus from the President of the Family Division to identify and address the concerns in both private and public law childcare, hence the publication of the reports and recommendations of the Private and Public Law Working Groups, which further underpin and develop the findings of The Care Crisis Review (2018). The President noted that the reasons for initiating such a response were two-fold for the Private Law Working Group: '[f]irstly, the court was experiencing an upsurge (which has continued) in parents making applications about their children. Secondly, and in any event, there was a body of criticism over the working of the previous attempt to reform this area of our work and a review was therefore clearly necessary' (Courts and Tribunals Judiciary 2020b). The outcome of the reports was a clear recommendation of the need for greater synergy and information sharing between services, service users and agencies, as well as the court (Courts and Tribunals Judiciary 2020b). This greater synergy would be enhanced by the panel's recommendation that consideration be given to training being conducted on a multi-disciplinary basis across all professions and agencies within the family justice system, to ensure a consistent approach (Ministry of Justice 2020).

Holt, after 13 years call, decided to apply for a practising certificate, and rather than writing about the 'crisis', decided that there is work to be done to specifically effect change, and continues to practise from Chambers in the North East of England. Holt is, therefore, in a position to report her findings following a return to the Bar through the use of autoethnography.

Methodology – autoethnography

Autoethnography is an approach to research that seeks to describe and systematically analyse personal experience using the tenets of autobiography and ethnography in order to understand cultural experience (Holman Jones 2005). Therefore, as a method, auto-ethnography is both a process and a product, and challenges more traditional methods of research and representing others (Spry 2001). Holt and Thomson, like academics before-hand, turned to autoethnography to seek a positive response to critiques of traditional ideas about what research is and how research should be undertaken. In particular, the authors sought to concentrate on ways of producing meaningful, accessible and evocative insight to issues that were grounded in personal experience and research which might otherwise be shrouded in silence, and to offer forms of representation that deepen our capacity to empathise with people who share different experiences from ourselves (Ellis and Bochner 2000).

Autoethnographers recognise innumerable ways in which personal experience influ-ences the research process and provides an alternative method and form of writing (Neville-Jan 2003). Involving both the self and others into a larger story as major characters marks a departure from much academic discourse by challenging accepted views about silent authorship, where the researcher's voice is not included in the presentation of findings (Holt 2003). Commentators such as Delamont (2009), remain firmly of the opinion that such research can be undertaken from a neutral, impersonal,

and objective stance; others adopt a position that such an assumption is not tenable (Bochner 2000). Consequently, autoethnography is one of the approaches that acknowledges and accommodates subjectivity, emotionality, and the researcher's influence on research, rather than hiding from these matters or assuming they do not exist (Holt 2003). This is particularly so given Holt's work as a barrister, rather than solely as a researcher immersing herself into an alien working environment. In this research, she already comes with a wealth of experience as a social worker, barrister and academic professor. The findings arise from Holt's engagement in the chosen methodology, but Thomson's interpretation of the findings also involves a researcher with a background of family law practice as both a solicitor and researcher. Involving the self can break the silence and invite the reader to 'co-create meaning and discover what his or her own positioning is in a given context' (Richards 2008).

The authors provide a lens on family law at the Bar; including the culture's relational practices, common values and beliefs, and shared experiences, for the purpose of helping *insiders* (cultural members) and *outsiders* (cultural strangers) to understand the culture with greater clarity (Maso 2001). Ethnographers achieve this by becoming *participant observers* in the culture; that is, by taking *field notes* of cultural happenings as well as documenting both their part in and others' engagement with these happenings (Goodall 2001). An ethnographer also may interview cultural members (Berry 2005), examine members' ways of speaking and relating (Ellis 1986), and investigate the use of space and place (Corey 1996). Holt, indeed, engaged in both private and public law children's cases (conferences, drafting and hearings), as well as spoke with her learned friends in Chambers and observed judicial practice. These combined experiences arguably create a richer and more diverse contribution to the findings. The methodology also lends itself to a more natural discourse among colleagues. Although the Chambers is located in the North East of England, the barristers worked on cases throughout the jurisdiction of England and Wales, perhaps now more abundantly and facilitated slightly more easily given the increased use of remote hearings.

When researchers do *autoethnography*, they retrospectively and selectively write accounts that stem from, or are made possible by, being part of a culture and/or by possessing a particular cultural identity. However, in addition to talking about experiences, autoethnographers are often required by social science publishing conventions to analyse these experiences. In order to achieve this, they may be required to compare and contrast personal experience with existing research and interview cultural members (Foster 2006). The authors have used self-reflection and writing to explore their personal experience and to connect this autobiographical story to the political and legal context of the family justice system (Ellis 2004). When researchers use autoethnography, they retrospectively and selectively write about epiphanies that stem from, or are made possible by, being part of a culture and by possessing a particular cultural identity – in this case, as a practising barrister in the family justice system (Ellis *et al.* 2010). Through the use of autoethnography, these insights have greater accessibility to both academic and non-academic audiences: a goal of autoethnography is to create texts for a wider range of audiences (Adams *et al.* 2017). This 'potentially' allows a greater reach to wider and more diverse mass audiences that traditional research often disregards (Ellis *et al.* 2010). The personal nature of the writing, coupled with the storytelling format allows for understanding by, and dissemination to, an audience not ordinarily accustomed to reading

academic texts. In the context of this paper, barristers may be better able to relate to the experiences of Holt and validate their own experiences. They can then, potentially, use the recommendations to bolster their advances for change. However, the methodological storytelling nature allows for those not working as barristers to be introduced to the challenges of the family justice system. The research method is different, but by no means less valuable. It has received a significant degree of suspicion because it contravenes certain qualitative research traditions, as how researchers are expected to write influences what they can write about. However, the development of writing themselves into their own research has liberated researchers from being curtailed by realist representations of empirical ethnography and silent authorship (Holt 2003).

In using personal experience, autoethnographers not only implicate themselves in their work, but also others, and therefore 'relational ethics' are heightened (Ellis 2007). Holt tells a story that refers to colleagues engaged in family work in the North East, who are, therefore, implicated by what is said; it is difficult to disguise colleagues without altering the meaning and purpose of the story (Ellis 2009). Holt may attempt to conceal the location of the community, but it would, arguably, not take much investigative work to identify individuals. Furthermore, Holt must maintain interpersonal relationships with the participants, thus making relational ethics more complex. Consequently, ethical issues affiliated with friendship become an important part of the research process and product (Kiegelmann 2010).

There is a dearth of literature available about place and space in what is essentially the private, and closed world of childcare law proceedings, accessible only to those who have the right to be there, either by profession, or as a party to proceedings (Holt and Kelly 2020). Whilst this is a case study located in the North of England, the issues will resonate with an international audience of professionals, parents, and extended families. Holt has, throughout the research, discussed and shared written accounts with barristers and members of the judiciary implicated in or by the accounts, allowing others to respond, and/or acknowledging how others feel about what is being written about them, and allowing them to reflect upon how they have been represented in the accounts (Ellis 2007, p.25). Ethical approval was sought from Northumbria University Law School and approval was given for this study.

Findings

It is important to note that, notwithstanding the enormous challenge facing the family bar in the North East of England, both in terms of the volume and complexity of cases, and the cuts to legal funding, this group of professionals is a hard-working community of barristers, who work tirelessly to represent some of the most hard to reach families, who often experience a range of complex vulnerabilities, and Local Authorities who are overstretched in terms of resources and over-burdened in respect of referrals.

The evidence from both research and submissions suggests that too often the voices of children go unheard or are muted in various ways where domestic abuse was raised. A large proportion of children have no direct involvement in the family court process, with parents or carers being relied upon to represent their views (Ministry of Justice 2020). There is a very real challenge for the family bar to ensure that children remain pivotal in proceedings. In a recent private law matter, where Holt received a brief

involving a child aged 5, the proceedings had been ongoing for 2 years, 8 months. The child was largely invisible within a court bundle of 300 pages that detailed allegations and counter allegations relating to the parents' relationship. This is not dissimilar to the experiences of other barristers who noted the abundance of evidence with a predominant focus on the parents within court bundle after court bundle. This is a particular issue in private law children's proceedings where there is an absence of child-focused Child Protection Conferences and the associated support team. There is an overwhelming focus on parental allegations in Scott Schedules and C1A applications too. Although important, there was noted to be frequently substantially more documentation concerning the dispute between parents, rather than how to address the needs of the child. Children being unheard during proceedings is all too often an occurrence, and the Bar must seek to challenge this situation, particularly given the statutory need for the court to consider the ascertainable wishes and feelings of the child (s1(3) Children Act 1989) and the enshrinement of this concept in the United Nations Convention on the Rights of the Child (UNCRC) 1989. The UNCRC provides for children's perspectives to be included in legal proceedings which affect them. However, the lack of involvement of children in proceedings is not confined to the Children Act 1989: although an ancillary point, children are rarely consulted about matrimonial proceedings, despite being the first consideration of the court in s25(2) (Matrimonial Causes Act 1973). Children can be left feeling let down or suspicious of authorities involved in decisions about them, and trust in the court system can be eroded as a result of a child's negative experiences (Ministry of Justice 2020). It was also noted that litigants in person are frequently unable to divorce their own feelings from their children's feelings about the other parent. Their entrenched position can cloud their ability to hear their child's voice and to allow greater agency to the child.

The majority of barristers receive instructions in both public law and private law family proceedings, with only a small number of barristers choosing to exclusively work in one or other area. Especially for public law, barristers noted that funding remains a significant issue, particularly given the changes introduced by the Government in the vision outlined in A Fairer Deal for Legal Aid, published in July 2005. It set out a new direction for the provision of legal aid and a wide-ranging programme of reform. Further developments were outlined in the Review of the Child Care Proceedings System in England and Wales (May 2006); and Lord Carter was commissioned to undertake a review of legal aid procurement and his findings were published in 2006 (Legal Services Commission 2006). These reforms culminated in the Legal Aid Sentencing and Punishment of Offenders Act 2012. If we turn to funding, which is of pivotal importance to professionals who are self-employed, payment by the legal aid agency for a private law matter remains significantly lower than for a public law matter. It is, therefore, implicit from the fee structure that public law cases are viewed as more important and complex. Whilst the procedures may be quite different, the level of knowledge, skill and professional judgement in private law proceedings is equal to that required in public law proceedings.

It was anticipated that Holt would take public law cases given her extensive previous experience as a social worker and children's guardian, and therefore accustomed to public law proceedings. However, Holt was introduced to private law proceedings by shadowing an experienced barrister who worked exclusively in this area. The experience

highlighted that private law proceedings were found to have all the complexities of public law cases, but with the additional challenge of managing the expectations of privately funded clients, the entrenched position of parties who regard the child as a 'trophy' to be won, and the complexities involved in dealing with the litigant in person (Holt and Kelly 2020). These challenges, of which there are many, are addressed below in more detail. In private law proceedings, barristers receive a brief, primarily from solicitors instructed by privately paying clients, and only in exceptional cases are parties entitled to legal funding: the exceptionality is domestic abuse, forced marriage and female genital mutilation. Although called to the Bar in 2005, Holt commenced practice on the North East Circuit in March 2019. The majority of briefs received within the area of private law proceedings have been to represent parents who have separated, and where domestic abuse is a feature, and arrangements in respect of children within the relationship are contested. These cases require a great deal of preparation; with the reading of applications, statements, previous court orders, viewing exhibits, and the drafting of position statements or a case summary in preparation for the hearing, for a case that is to be listed the following morning. It would not be unusual to spend an entire evening preparing a case for the following morning, before attending at court an hour before the hearing, for pre-hearing discussions between the parties. This work requires considerable skill and judgement to attempt to broker agreement between the parties, and the challenge was much greater when, as in the majority of cases, the other party was a litigant in person as they did not qualify for legal aid and they had insufficient funds to pay privately for representation.

It is the contention of Holt and Thomson that legal aid should be made available (subject to means testing) for the respondent in every case where there are allegations of domestic abuse, and where the applicant has been granted legal aid. It feels wholly unsatisfactory that a litigant in person finds themselves not only representing themselves, but their opponent is a barrister, with the knowledge, skill and judgement to navigate the procedures and court etiquette. Following the hearing, it is expected that the advocate representing the applicant drafts the order and shares it with the parties, before sending it to the judge for approval. Where the applicant is a litigant in person, and the respondent is represented, it is the practice that the order is drafted by the advocate representing the respondent, and this requires careful negotiation between the advocate representing the respondent and the applicant in person. Furthermore, Holt reflected on her own publications, notably the position taken that parents, following the introduction of Legal Aid Sentencing and Punishment of Offenders Act 2012 and the Children and Families Act 2014, will have less time and resource to retrieve their position when a case proceeds to court, due to a less tolerant approach to welfare and to parents who are unable to resolve disputes through mediation (Holt and Kelly 2015). In practice, the actual time allowed by the court for litigants in person is significant, despite the official listing being for the same duration whether parties are legal represented or not. Both parties and the court navigate these tensions daily adopting a professional and sensitive approach that requires knowledge, skill and experience.

Professionalism and sensitivity are also integral to the smooth running of domestic abuse cases. Barristers noted the uncertainty of special measures directions, the difficulty of applications being dismissed without sufficient reasoning at times for the decision and the difficulties of remote hearings. In some remote hearings, judges were left muting

parties, whereas in the court room, there appeared to be a greater sense of authority and control.

Whilst Holt started at the North East Bar with the anticipation that she would accept only one brief a day to ensure sufficient time to prepare fully, it quickly became apparent that the majority of barristers would take instructions in up to four cases a day, to include both private law and public law proceedings. The volume of applications, and the complexity involved, resulted in both late night and early morning preparation becoming the norm; the computer replaced numerous bundles for ease of reference, and Holt quickly established that one computer was insufficient, and a second tablet would enable easier access to an electronic bundle, to mark up and navigate quickly when in court. The pace is fast, efficient and business like; with a strong camaraderie amongst advocates in the foyer, canteen, interview rooms and waiting areas. There may be fierce challenge when in court, but there is respect and humour amongst advocates working hard to ensure that the system remains operational.

There is amongst members of the Bar a clear hierarchy of cases; public law proceedings are favoured amongst the majority of barristers, with receiving instructions from a Local Authority being very highly regarded, as with representing the Children's Guardian, and thereafter parents. However, there was a notable group of barristers who worked exclusively in the area of private law proceedings. Arguably, there are few legal contexts where the law is secondary to the agonising disputes concerning arrangements for children following the breakdown of the parental relationship. These disputes are focussed upon issues of: contact, residency, parental responsibility, specific issues and prohibited steps, relating to education, holidays, passports or a change of name. These proceedings were seen as potentially fraught situations where there was little that could be achieved to resolve matters between parents who were in the main unable to prioritise the needs of the children, due to being entrenched in their own protracted dispute. '*In the battle between the parents both children risk being run over by the tanks*' (JD & Anor v VB & Ors 2020). It was also acknowledged that this was an area of practice whereby parents would complain, and the expectations placed upon advocates to broker effective agreement was time consuming and often unrealistic. Barristers talked about the frustration of working within this deeply disputed area of family law, where they were required to broker more effective relationships between the parties, as opposed to public law children's cases, which were more procedurally driven and where contact with parents was more prescribed – the battleground in these cases was between parents and the Local Authority, which they felt was a more legitimate dispute, rather than between former partners.

The child, within the context of private law proceedings, was often regarded as *belonging* to a parent, with parents frequently describing the loss of a child, even for a short period, as like losing a limb. This is supported by the standard argument of a parent needing reassurance before the other can receive the benefit of contact. The focus was almost exclusively on the needs of the parents, as opposed to the needs, wishes and feelings of the child. In many cases, lawyers would describe how a child was intrinsically linked with the identity of either or both parents, and the reasons for parental separation remain pivotal to the dispute over child arrangements. Crucially, important decisions about child arrangements are often made following parental separation when emotions are heightened and the ability to mediate or achieve agreement is reduced (Holt and Kelly

2020). It was not unusual for private law proceedings to remain ongoing for well over 2 years, with parties locked in disputes, resulting in the need to hold fact finding hearings, order s 7 reports, expert reports, and introduce contact interventions (where children have not spent time with the non-resident parent). Often by the time a final hearing is scheduled, the child has been involved in litigation for a significant period of their childhood, and where the child experiences the impact of extensive knowledge and involvement with court proceedings and experts, it further exacerbates issues of parental alienation and impacts upon the child's experience of adult relationships (Holt and Kelly 2020). In one case, the proceedings had only just concluded when they were re-listed with an application for an enforcement order due to non-compliance with the Child Arrangements Order. This is by no means an isolated incident and repeat court applications were regarded as common by other barristers, perhaps the reason for the current focus on robust case management and s91(14) Children Act 1989 orders. In another matter, where parents had been involved in private law proceedings over three years, the father had removed two children from the jurisdiction, refusing initially to return them. The risk escalated, and there followed an application for Care Orders with the children being accommodated in foster care, as by this stage, the effect of protracted parental hostility had resulted in the children being unable to live with either parent due to emotional harm.

Discussion

Despite the significant changes to family justice, there is currently a dearth of place-sensitive information which provides a lens on how the system operates on the ground. While the timetable for the child metric driven approach is pivotal in public law cases, in private law disputes, there is evidence of lengthy delays and drift for children (Holt and Kelly 2020). This has been exacerbated by the Covid-19 pandemic and the court's recognition that public law childcare constitutes 'work [that] must be done', whereas private law childcare fell under the lesser serious two of the three categories of 'work that will be done' and 'work that [the court] will do its best to accommodate' (Courts and Tribunals Judiciary 2020a). In a significant number of private law cases, there was evidence of lengthy and protracted legal proceedings, a lack of judicial continuity and counsel; in contrast to public law cases, where the emphasis from the initial application to the conclusion of the proceedings was to achieve the 26-week deadline for the completion of care proceedings, with a focus upon achieving judicial continuity and oversight, and evidence of continuity of counsel. The 26-week deadline has become an end in itself. Concerns raised by practitioners surround the inflexibility in applying the 26-week timescale, and rising care figures in the North East of England were thought to be potentially caused by cases reappearing in the system when decisions had been made too hastily. There was also concern that the rigid approach to timescales was based on case duration being the sole measurement of performance, rather than taking into consideration factors that are inherently complex in some cases.

There is a somewhat intractable tension within the law and policy between normative concerns with parental autonomy, hence the impetus to achieve safe diversion to avoid the need to go to court, and a children's rights perspective, evident in the recent rhetoric of the timetable for the child, that has been introduced to justify a deadline for the

completion of cases within 26 weeks following an application to court, but makes no regard to delay introduced elsewhere in the process (Luckock 2008). Furthermore, the 26-week rule is applied where there are additional complexities, for example in respect of transnational children. The migrant population in the UK has more than doubled between 1993 and 2015 (Migration Observatory 2020). The expansion, stimulated by a number of Eastern European countries joining the European Union in both 2004 and 2007, has introduced migrants with a complex range of vulnerabilities, including economic hardship and social isolation to the UK (Migration Observatory 2020). Whilst there is limited research evidence in respect of the position of transnational children within the English family courts (Bergamini and Ragni 2019), the challenges placed upon barristers and members of the judiciary has been significant in respect of ensuring appropriate translation services are available to parties both prior to, and in court, and that the placement of children both within the UK and outside the jurisdiction is appropriate in meeting their needs. Published English family court judgments provide rich documentary accounts of the difficulty that *all parties* can face in navigating both domestic and international law to ensure decisions are made in the best interests of children, for example see N (a child) (2020). This was a judgment of Mostyn J concerning whether the court should exercise its powers to make a summary return order in respect of a child removed to Greece from England when an application for the child's return had already been made under the Hague Convention 1980. It is the changing landscape of family law, such as the increased number of transnational children that brings into sharp focus the complexities involved in both private and public law childcare cases. These cases require considerable knowledge, skill and experience to ensure that all parties have fair access to justice and that the child remains pivotal in proceedings that can so often be eclipsed by the multiple and complex needs of the adults involved.

The challenges facing the legal profession, with increased globalisation and the movement of individuals between states, have increased significantly during the last 15 years. This can be seen as enriching for families and their children when relationships are working effectively. However, not all relationships remain amicable and an increase in the number of families facing separation and divorce has resulted in an increase in the number of cross-border disputes involving children in the second half of the 20th century (Harper 1995). A number of research studies have identified that in cases of child abduction, the main issue appears to be primarily about one partner seeking revenge against the other partner, rather than a desire to be with the child (Sagatun and Barrett 1990, Greif and Hegar 1993, Garrity and Baris 1994). These studies highlight the complexity of cross-border family disputes, and the family Bar remains at the forefront of brokering effective relationships between parties and the court, to ensure these complex multifaceted cases proceed in an efficient and effective manner.

Baroness Hale shared the concerns that the child should always remain the focus in cross-border disputes when she commented in Re A (Jurisdiction: Return of Child) (2013); Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) (2013) and Re LC (Reunite: International Child Abduction Centre Intervening) (2014):

> *'It is troubling that these proceedings have been continuing for so long without any inquiry being made about how the children are. Children and Families Across Borders (formerly*

> *International Social Service) have helpfully intervened to suggest how this might be done, and the judge may wish to consider what they say.' (at [65](vi))*

Assessing risk of harm to children and parents in private law childcare cases, the final report published by the Ministry of Justice (2020), sought evidence: to understand how Practice Direction 12J, Part 3A FPR 2010, Practice Direction 3AA and section 91(14) orders are being applied in practice and their impact, including the interaction of these Practice Directions with the risk of harm exception to the presumption of parental involvement; and to understand the risk of harm to children and parent victims in continuing to have a relationship with a parent, or to be caused through contact orders to continue to have interactions with a parent perpetrator, where there is evidence of domestic abuse, including coercive and controlling behaviour, or other conduct that poses a risk of harm to a child or parent (Ministry of Justice 2020).

Since the review was published, an online survey involving 88 respondent lawyers has been published by (Lefevre and Damman 2020). The key findings from this report are significant for the Bar. Respondents confirmed that domestic abuse/coercive control (DA/CC) was a feature in at least 50% of cases. Respondents with the most DA/CC experience thought that half or more of their cases were *not* allocated to the appropriate tier. Adherence to PD12J was lowest at Tier 1, better at Tier 2, and strongest at Tier 3. Special measure applications appeared to be underutilised, being only made in a minority of cases. There was variability in court directions in respect of fact-finding hearings, and only half of respondents felt that the reasons for determining that a fact-finding hearing was unnecessary were sufficiently recited in the order. Where there had been an admission of DA/CC, fewer than half of the respondents reported this to be sufficiently recorded on, or in the schedule to, the order (Lefevre and Damman 2020), perhaps in contradiction of PD12J, paragraph 40. The experience of court proceedings for victims of domestic abuse is affected by concerns for their physical safety, as well as by the trauma that they have experienced as a result of the domestic abuse. Regardless of the outcome of the case, victims generally reported not feeling safe at court and the evidence submitted suggested that they often found that the court proceedings themselves had been re-traumatising. This is supported by findings from a recent study:

> *The disclosure of confidential details, the empowerment of the alleged perpetrator, and victim cross-examination by the perpetrator or their counsel had substantial adverse effects on victims' sense of safety and could be further traumatising. (Lefevre and Damman 2020).*

Submissions reported that each stage of the journey through private law children proceedings (getting to court, in the court building itself, in the courtroom and returning to court to respond to repeat applications) raised specific safety issues, which involved:

Physical security – many respondents noted that proceedings in the family court were often not accompanied by the adequate provision of special measures, leaving victims vulnerable to intimidation and physical attack. This can be somewhat mitigated by remote hearings, where victims are not dependent on judges approving the use of special measures or courts have the appropriate facilities in place (Speed *et al.* 2021). At the Family Court at Newcastle, there are separate entrances and exits for victims/survivors and perpetrators. There is still significant uncertainty in application of special measures/participation directions across England and Wales, and greater use and consistency of the measures is required as a matter of urgency.

Psychological wellbeing – victims reported that participating in proceedings and giving evidence of their experiences can be re-traumatising; this is currently not properly addressed, particularly for in-person hearings. Those with Independent Domestic Violence Advisors or with the benefit of Support Through Court will be likely to be informed of options for special measures, but guidance is lacking for litigants in person in the absence of a court administrator going above and beyond their role. For remote hearings, the guidance requires the court to be mindful of the 'invasive, (re)traumatising and endangering' nature of hearings for victims of abuse, as well as indicating that victims should be consulted about their preferred mode of participation prior to listing of the hearing (Family Justice Council, s4. Speed *et al.* 2021). However, remote hearings are not the silver bullet to alleviating re-traumatisation, as they provide an opportunity for perpetrators to 'see and note details of the victims' private space, which may also be used to track them down, break into their home, continue the exercise of coercive control or harass or intimidate them in other ways' (Family Justice Council, s4, Speed *et al.* 2021).

The impact on litigants in person has been identified as particularly acute with regard to safety and security, as they lack knowledge of the available measures, and the rules which provide for them, and are without legal advice which would otherwise alert them to their rights to special measures, as well as the roles and duties of CAFCASS, the Local Authority, the Children's Guardian and the legal representative for the child. This lack of appreciation of the roles of the professionals involved can be of significant detriment to the party's position, particularly when the common allegation of a 'biased CAFCASS officer' is made. This finding supports the recommendations of Trinder *et al.* (2014) advocating for provision of clearer and more accessible guidance to litigants in person. The authors echo the recommendation by (Speed *et al.* 2020) that regional guidance for litigants in person should be drafted, be accessible and updated regularly.

Direct cross-examination – a victim/survivor has faced the prospect of being cross-examined by their abuser in cases where an abuser is representing themselves, or of having to cross-examine their abuser where they are themselves a litigant in person (Ministry of Justice 2020). This is mitigated by s65 (Domestic Abuse Act 2021), which has amended the (Matrimonial and Family Proceedings Act 1984) and which now prohibits cross-examination by a perpetrator, or an alleged perpetrator, against the victim or alleged victim, nor can the victim, or alleged victim, cross-examine the perpetrator or alleged perpetrator. However, the training, guidance, regulatory clarification and recruitment of the special s65 focused advocates is currently limited at best.

The experiences of both children and adults who may have a range of complex vulnerabilities, and who turn to the family justice system when they are most in need, are often observed to be negative. This is particularly the case where there are capacity issues and/or cognitive difficulties. Whilst there are measures in place such as the use of intermediaries, there is often a delay in the appointment of such experts, usually after the initial hearing and case management hearing where important decisions have been made and the timetable for the case is set in train. This remains an important area of work for the family Bar to ensure that individuals who are most vulnerable have their rights protected and remain visible in the proceedings, rather than being lost in the needs of the parents (Chatterje 2021).

The visibility of all participants, but principally lay parties, has been a source of much concern in the context of the operation of the Family Court following the Covid-19

pandemic. The President's Guidance, in The Road Ahead (Courts and Tribunals Judiciary 2021), saw the majority of family cases being dealt with remotely, with hearings conducted by telephone, Court Virtual Platform (CVP) and hybrid hearings (a combination of attended and CVP, with parents and their counsel in attendance, and all other parties attending remotely). The majority of public users attended remote hearings from home (79%) and it was rare for their legal representative to be present in person with them on the remote hearing (Clark 2021). 78% of legal representatives stated that their preference during the pandemic was to work from their home (Clark 2021). It is astonishing that only 62% of judicial respondents and 57% of HMCTS staff recalled receiving training and guidance on remote hearings, as did 42% of legal representatives (Clark 2021). From an Equality, Diversity and Inclusion perspective, it is concerning that information on interpreters, signers and intermediaries in remote hearings was not included in the training and guidance (Clark 2021). As noted by Richardson et al, a respondent to their study provided that the court administrators had failed to contact a litigant in person whose first language was not English to attend a hearing (Richardson *et al.* 2021).

It is noted that 58% of judicial respondents and 54% of legal representatives felt that remote hearings impacted on their health and wellbeing (Clark 2021). There are also implications for both parties and barristers with conducting hearings remotely:

> *Even in 'normal' circumstances where a parent has been able to seek legal advice and is participating in the proceedings from home, a primary concern for respondents was the available support for parents involved in care proceedings. Concerns have been highlighted . . . about the need for privacy, but for many parents, this will not be possible due to the presence of children at home. One respondent discussed a situation where the subject child was not only present but was asked to become involved in the proceedings* (Richardson *et al.* 2021).

There is also the risk of vulnerability for domestically abused parties in showing their homes on camera to their alleged perpetrators. The feeling of people being able to see into your home is not exclusive to the parties, but also to their barristers, other legal representatives/third parties and the judiciary, as well as the difficulty managing the work/home boundaries (Clark 2021).

There is a sharp disparity between policy documentation depicting the kind of society the government espouses with the reality of life within a climate of austerity, both for those who are most in need and professionals who are tasked with providing help to challenge the injustices. There is a sustained focus on achieving targets and reducing costs regardless of the impact on families who rely on welfare support (Holt and Kelly 2014). Within a context of austerity, providing effective advocacy for parents both prior to court and during court proceedings is crucial in ensuring justice is achieved for parents and their children. Ensuring parents are subject to fair decision-making processes at all stages has never been so important. Whilst the state may incentivise alternative forms of dispute resolution, this does not work for all parents, and in a context of poverty and austerity for many recipients of welfare benefits, the tensions within families are heightened resulting in a greater degree of hostility that cannot be managed by alternative forms of dispute resolution. This is aggravated by the lack of enforceability of Parenting

Plans and Memorandums of Agreement arising from mediation; mediation being mandatory for most family law court applications (Children and Families Act 2014, s10(1)). There has never been a more pressing need for good advocacy in an attempt to mitigate against the highly regulated and instrumental procedures and to broker more effective solutions for parents (Holt *et al.* 2013).

Members of the family Bar are professionals who are extremely skilled at negotiating with parties, including litigants in person, and the court, to ensure that the child remains the focus in every case, whilst representing and managing the expectations of all parties. In the light of these negotiating skills, the authors posit that an additional, but distinct and specific, Resolution Hearing be introduced into the Child Arrangements Programme, akin to a Financial Dispute Resolution Hearing in Financial Remedy Proceedings where the Judge provides their thoughts on the likely outcome with a view to agreement being reached without the need for a resource intensive and emotionally exhaustive Final Hearing. This would be similar to the piloted Settlement Conferences in Liverpool. This not only utilises the negotiating skills of legal representatives, but manages the expectations of litigants in person, and promotes robust case management, as required from the outset of proceedings, in accordance with the Family Procedure Rules, r1.1 and r1.4 (Family Procedure Rules 2010). With greater direction provided by the Judge as to the likely outcome of the case, it would further the premise that, 'it is the court that controls the evidence in the case: FPR r22.1' (Sir Andrew McFarlane 2022). A carefully negotiated outcome with judicial input/recommendations may reduce repeat court applications. This recommendation to improve procedure may, along with parity in funding for public against private cases, also lead to an increase in the number of barristers taking instructions in private law children's proceedings, thereby reducing the competition for the more procedure-driven public law cases.

There is a clear need for greater focus on the child, furthering the objectives of the Children Act 1989, UNCRC and the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, all of which seek to place the child at the centre of proceedings. This greater focus on the child will promote their voice and allow greater agency for the child in proceedings of which they are the subject. The above suggestion of a child-focussed resolution hearing is one method of, potentially, reducing the administrative burden on the court, but does not detract from the usual plea for greater state funding into family justice, as erosion of the system can only take place for so long until there is nothing left to erode leaving a sea of chaos.

Conclusion

This study has offered a personal reflection on 18 months at the Family Bar. Although autoethnography, as a research method, has been challenged by critics as being insufficiently rigorous, theoretical, and analytical, relying too heavily upon an aesthetic, emotional, and therapeutic approach (Ellis 2009), it has allowed for a unique perspective on a family justice system from those involved in it. The authors have highlighted the acute pressure and difficulties with the family justice system, as well as the contextual significance and suggestions for improvement of the system. The paper has addressed the lack of involvement of the child in proceedings, the delays in court cases, the differences

in public and private law children's proceedings, the issues for litigants in person and domestic abuse victims, and the skills and attributes demonstrated by the Bar to prop up a justice system nearing collapse.

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