

# Scottish Civil Courts Review

## Response to Consultation Paper by Families Need Fathers

Dr Martin Crapper  
Families Need Fathers  
13 Brunswick Terrace  
Edinburgh  
EH7 5PG

### **Background**

Families Need Fathers (FNF) is a UK registered charity (Number 276899) providing information on shared parenting issues arising from family breakdown and support to divorced and separated parents, irrespective of gender or marital status. Our primary concern is the maintenance of the child's relationship with both parents. FNF remains the only national organisation offering charitable support specifically aimed at parents who do not live with their children, and its primary function is social care work.

We believe that all parents should be treated equally. Research shows that children thrive best with two caring parents, yet it is clear that prevailing attitudes towards shared parenting after separation or divorce are marginalising non-resident parents - almost always fathers - on an alarming scale. Most people come to us in 'crisis' situations and some of them are in alarming, or dangerous states of distress.

In response to this need, Families Need Fathers was founded in May 1974. FNF provides information through its publications and through its Internet website. Personal support is provided by a national network of volunteers who act as telephone contacts and local organisers, and regular branch meetings are held nationwide. Building on the ethos of self-help, members can also receive advice and support through on-line self-help and chat forums, as well as a national helpline staffed by volunteers. The charity also runs parenting workshops that address issues of parenting after separation.

FNF seeks to influence public opinion by raising awareness of the weaknesses of the current social and legal systems and its effect upon divided families, both parents and children alike, and works with policy makers and the media to achieve this.

FNF service users are made up of a broad cross-section of all people affected by family breakdown, including fathers, mothers, grandparents, other family members and second partners. It welcomes parents of either sex and has a growing number of mothers as members. FNF also seeks to make its services more readily available to black and ethnic minority groups as well as the socially disadvantaged.

It is known that where separation goes badly and, in particular, where children are drawn into parental conflict, or suffer the loss of a loved parent, then the effects can be profoundly damaging for children. Children in this situation are likely to do less well in life. For example, financial hardship can limit educational achievement; family conflict before, during and after separation can contribute to behavioural problems; parental ability to recover from distress of separation affects children's ability to adjust; multiple changes in family structure increase the probability of poor outcomes. However, quality contact with the non-resident parent and resolving parenting issues in an amicable fashion improves

outcomes, reduces the legal aid burden and improves the likelihood of contact and maintenance arrangements being maintained.

FNF therefore seeks to support separating and separated parents achieve non-adversarial, child-centred outcomes, and help them maintain constructive relationships. This enables parents to support their children be healthy, stay safe, enjoy and achieve, make a positive contribution and achieve economic well-being.

It remains the case that most people approaching Families Need Fathers for support do so because they find themselves in, or facing the prospect of litigation over child residence and contact. It is against this background that we make our response to this consultation. It should be borne in mind that our comments refer only to court processes concerning child residence and contact, and occasionally other aspects of child law such as adoption. Other areas of family law, most notably divorce and property issues, are not our primary concern and we have no expertise in these areas. Most of our interest centres on private law cases.

We have not attempted to answer all questions, since we have no view on many of the issues. We indicate below which questions we are addressing.

## Responses to the Consultation

### Chapter 1

*Question 1: Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so what would be the key features of such a system?*

In terms of outcomes for children in the case of family break-up, it is known that a major negative indicator is conflict, and that solutions reached by agreement are generally more satisfactory. There is therefore considerable reason to promote such solutions, outwith the courts, where possible.

In conjunction with the passage of the Family Law (Scotland) Act 2006, the then Scottish Executive devoted some resource to the formulation of the Parenting Agreement for Scotland. Any support that can be given for separating parents, often facing difficult emotional and practical circumstances, to use this or other frameworks to achieve agreed solutions, should be encouraged and possibly in most cases required, before court proceedings are entered.

We note that in many cases, court actions over child residence and contact proceed as a series of *de facto* negotiations between parties, often – and helpfully – with the active involvement of the judge at child welfare hearings, who, by reason of his authority, can exert moral force upon the parties to negotiate where “softer”, voluntary approaches have failed. We believe that there is scope for extending the remit of the justice system in many family cases, to provide an early intervention, with the authority of the court, but focussed on achieving a negotiated outcome for the benefit of children. It may be possible to achieve this through a speedier and less resource-intensive means than a series of child welfare hearings.

Another key feature of good solutions for children is speed of resolution, since *inter alia* this will reduce the period when conflict is at its height. Where there are clear indicators that negotiated agreement is not going to be possible, and indeed that one or both of the parties may be undertaking mediation or similar in an attempt to prolong the issue rather than resolve it, we believe that a speedy resolution in the courts, without a requirement to undergo various preliminary stages of mediation which are clearly not going to work, is the best solution that may be obtainable.

*Question 2: Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review’s recommendations?*

We would comment that in our own area of interest, the value of a case is not financial, but in terms of the welfare of children. The proportionality aspects of such cases need to be judged differently from the majority of civil litigation which can be assessed on the basis of financial value.

## Chapter 2

*Question 1: What contribution can public legal education make to improving access to justice?*

The standard of public legal knowledge with regard to child law has, we believe, been very poor. A classic example of this is the position with regard to Parental Rights and Responsibilities of unmarried fathers. Prior to the Family Law (Scotland) Act 2006, unmarried fathers had no parental rights unless they had actively entered into an agreement with the child's mother, now they have them only if they jointly register the birth; most unmarried fathers were and are unaware of this, and there was no systematic attempt to inform them of this in any of the processes such as ante-natal education, midwife booking, GP services or registration of births, to which they might reasonably expect to be exposed.

As a further point, fathers facing separation often take actions such as voluntarily leaving the marital home without first taking advice, and end up creating a *status-quo* which then turns out to have significant bearing on the subsequent outcome of the situation.

Situations like these could be avoided with a better understanding of the legal position with regard to children, the incidence and consequences of family break-up and the best approaches to adopt for the benefit of children in such circumstances would be hugely beneficial.

We are not sure however that this is the responsibility of the courts. We think that promotion of relevant information should be wide ranging by government, schools, health service, the voluntary sector and many other organizations. It does, however, have to be funded by government in some way.

*Question 3: To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?*

*Question 4: What contribution, if any can (a) "self-help" services for party litigants and (b) court based advice services make to improving access to justice?*

We respond to these questions together. We believe it is important to make a clear distinction between advice and representation, and a clear distinction between advice on the *law* and advice on *court procedures*.

Families Need Fathers has, at least in the English jurisdiction, a long tradition of facilitating self-help support to litigating parents – usually but not exclusively fathers – primarily in private law child residence and contact cases. This is done by means of our network of branches and latterly, our internet forums. In the early days of the society (1974 onwards) this was motivated primarily by the cost of legal advice, but over the years our members have often found that acting as party litigant (generally with the support of a McKenzie friend) has given them more ownership of a case and more ready access to relevant detail than is the case when using a solicitor. This can be advantageous to the court as well, since it can enable the judge to gain a greater understanding of the party's motivations and character.

This is not to disparage the importance of expert legal advice in matters of complex law – but child law on residence and contact is essentially very simple. It depends upon the paramount principle of the best interests of the child, and does not generally require understanding of complex points of law.

Turning to the matter of procedures, there is no doubt that Scottish legal procedures are complex. The need to prepare an initial writ, respond to defences, create a record and so on are all specialized skills, and the mechanisms of enrolling motions, lodging summonses for calling and all the other minutiae of a process are at first glance quite arcane to the layman. This contrasts sharply with the English system where simple form-filling is generally all that is required.

In theory, procedural as opposed to legal advice should be available from Sheriff Clerks, but our experience is that this has been patchy and the usual response is a bland “consult a solicitor.” Whilst we have emphasized the importance of proper advice on complex law, we do not think it should be necessary solely for procedural reasons.

McKenzie friends, of course, tend to befriend repeatedly, and will become more used to these procedures. They also have the opportunity to explain to the parties they befriend the reasoning behind the use of pleadings and other matters so that the parties can understand their relevance and the need to stick to protocols.

In summary, we believe in child residence and contact cases it is desirable and feasible to create systems in which party litigants can participate without traditional legal representation, provided both the party litigant and the points of law involved lend themselves to this. We believe that warnings should be given to the effect that this approach is not suitable to all.

Clearly, party litigants should abide by the court rules, but these are long and complex, and nor do they make obvious accepted practice which falls outwith the letter of the rules. We believe it would be appropriate to create a more simple protocol for use in party litigant cases, and to expect party litigants to abide by this. We believe that the right to the assistance of a suitable McKenzie friend should also be guaranteed, though it would not be unreasonable for the McKenzie friend also to be required to abide by a simple protocol, indeed we have such a protocol ourselves for McKenzie friends who wish to receive referrals via Families Need Fathers.

Similarly, we believe that information on court procedures should be made available much more widely and in a more simple form. Sheriff Clerks could be given more training – or perhaps specialist officers appointed – to give relevant advice on procedures (but not law) to party litigants and also to refer them to other sources of advice such as Families Need Fathers. Web sites could be developed to include a more step-by-step approach, with examples of documentation, on how to conduct a case, with reasons for the various procedures explained in simple terms.

We would be happy to work with the court service and others to assist in the development of these features.

### Chapter 3:

*Question 2: To what extent does the cost of litigating deter people from pursuing or defending cases in court?*

Our experience is that fear of likely costs, including uncontrollable costs such as reporters' fees, and opposition costs in the event of failure are a significant deterrent to court action. We are often approached by parents in this position, seeking cheaper alternatives. Another factor is the *prioritization* of expenses. At times of extra hardship such as family break-up, parents wish to focus resources on their children, for example ensuring they have adequate accommodation to house them, rather than spend them on lawyers' fees.

The relevant costs are almost all solicitor and counsel fees, which can amount to £5000 to £10000 for a relatively simple case and often much more. Court fees are not particularly significant. Solicitors fees can be increased dramatically by waiting time in the courts.

*Question 6: To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?*

Our experience with legal aid is that it is often provided for the parent having residence of the children but not to the other parent. This results in an inequality of arms and a consequent injustice. In many of these cases the parent with residence is attempting to invoke the support of the courts in excluding the other parent from his children's life, and if legally aided the parent in question can do this virtually without consequence, using the system mischievously to promote conflict and prolong the contest until the opposing party is priced out of the arena.

We do not believe legal aid is necessary or appropriate for parents in child residence and contact cases, where the law is simple. We believe that public funding in these cases should be for the child only and the curator or other legal safeguarder appointed for the child should give each parent the same advice on what they consider best for the child. This would enable both parents to receive basic advice, but would prevent the system being used unreasonably to promote conflict for mischievous ends. Judges would be expected to take a somewhat proactive role in managing the case, as in many cases they already do with beneficial effect.

If either parent needed or wanted support (particularly relevant in the case of vulnerable people), they could use a McKenzie friend, either an experienced person such as a voluntary sector worker or simply a friend or family member who was not a witness to the case.

The consequent saving on legal aid could be used to fund more child-centred services devoted to conflict resolution.

## Chapter 4

*Question 4: Should there be a greater degree of specialization within the civil courts in Scotland? If so, in what types of case and in which courts?*

We believe that the specialist family court in Glasgow has shown that there is benefit in specialist family courts generally. In particular, family actions benefit from speed, judicial continuity and more active judicial involvement in case management, and we believe these could be provided more effectively in specialist courts. We would not necessarily expect sheriffs to work only in this sector all the time, but we would expect the sheriffs that devoted time to it would be given additional training. We believe there should be uniform provision across Scotland in respect of specialist family courts.

*Question 5: What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where the jurisdiction is concurrent?*

In residence and contact cases, raising an action in the Court of Session would be undertaken primarily if there were an international dimension to the case (including England) where a Court of Session interlocutor would be likely to receive more respect in the foreign court than a shrieval one. We believe this is significant and is a reason for retaining the Court of Session as a court of first instance in these cases at least.

A less valid reason for raising a Court of Session action would be tactical, to make life difficult for the opposing party either by virtue of the increased cost of representation in the Court of Session (which normally requires counsel) or by fixing the location of the case in Edinburgh when the defender may reside in a remote part of Scotland.

*Question 17: Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?*

We believe there is a case for uniform provision of specialist family services across Scotland and having a national sheriff court may be one approach to achieving this. It would presumably allow appropriate resources to be diverted to specific physical locations at various times.

*Question 18: Is there a case for all sheriffs to have an all-Scotland jurisdiction?*

We believe there is. Where there is a child law issue concerning “leave to remove from the jurisdiction” or where the pursuer and defender reside in different sheriffdoms, it makes sense for any Sheriff to be able to issue interlocutors valid in the whole of Scotland (and ideally the whole of the UK or EU) rather than solely in his own sheriffdom.

## Chapter 5

*Question 1: Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?*

Much of the discussion in the consultation document features on philosophical principles of justice. However, we are concerned with children and we believe that in connexion with child cases there should be an overarching principle which emphasises the duty of the court to ensure that children are treated with respect, that their welfare is promoted, that they are protected from harm including the harm which would arise from the exclusion of one of their parents from a meaningful contribution to their life, and the right to have a continuing relationship with both parents other than in the most exceptional circumstances.

*Question 2: Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?*

*Question 3: If so, how should this be done and at what point or points in the progress of a dispute?*

*Question 5: What form should mediation or other methods of dispute resolution take and how should this be funded?*

We have already touched on these points in our answers to Chapter 1 Question 1 and Chapter 3 Question 6. We believe that the court, by which in this context we mean the justice system in its widest context, should do all it can to encourage the resolution of disputes over child residence and contact with the minimum of conflict, for the benefit of the children. We believe in this respect that some form of mediation should be compulsory. This need not mean face-to-face meetings between parties who may regard each other with antipathy and fear. It does mean that some attempt should be made by each party to understand the others' perspective.

Our preferred approach would be that at the commencement of a dispute a court officer would meet each party, determine the points at issue, give advice on factors influencing the outcomes for children and require the parties to attempt to achieve a parenting agreement. In the event of such an agreement not being possible the officer should determine why this was the case and present this finding to the judge who will take it into consideration *inter alia* in reaching his judgement in due course.

The same court officer, who would be trained in child welfare (but not necessarily a lawyer) would represent the interests of the child to the court and undertake any non-specialist reports. The officer would be funded from the savings made by not making legal aid available for child residence and contact cases.

We would see this approach as primarily an early intervention scheme prior to the start of more formal proceedings, but it would be possible to invoke it at other stages to resolve particular points which arise, or if there is some material change of circumstances.

*Question 4: Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.*

We recognize that there will be cases where such approaches are inappropriate, for example where there is clear evidence of domestic violence.

*Question 6: In what respects can modern communications and information technology be harnessed to improve access to the civil courts?*

See the answer to Chapter 2 Question 4.

*Question 7: To what extent should the court control the conduct and pace of litigation?*

*Question 8: What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?*

In family cases, there is a growing practice, particularly in Sheriff courts, for the judge to take a proactive, rather than a refereeing role in helping to resolve the case, and if possible encourage the parties to come to their own joint decision rather than giving a judgement. This is both understandable and helpful. We believe this approach should be the norm in cases over child residence and contact.

It must be remembered that in these cases the parties – parents in the wake of separation – are not likely to be at their best, whilst their legal representatives are not likely to have a particularly detailed grasp of the complexities of the family situation. The active involvement of a judge in seeking resolution can therefore play an important part.

It may be that some change to the rules of court is necessary to clarify that such an approach on the part of a judge is both allowed and encouraged.

We do however feel that in order to make the most of this approach two factors, both of which have wide repercussions for court resourcing are vital. The first of these is timeliness: children grow and change, situations such as the temporary interruption of contact due to one of the parties in a case failing to abide by an order become a new status quo and formal pleadings mature over a period of months. We believe that the timescale of hearings regarding children should be speeded up dramatically so that a case should proceed through all its stages within a few months at the very most unless there is a clear child welfare reason otherwise.

The second factor is judicial continuity. We believe that a particular family should be entitled to have the whole of their case heard by a single judge who can then have the opportunity to learn about the family and form a judgment as to the parties' motivations and character. This would allow a positive relationship between the court and the parties to develop, would prevent the need to constantly review the case detail and would ensure that any procedural mischief on the part of either party were recognized at an early stage.

## Chapter 6

*Question 7: Should there be a single initiating document for (a) all types of actions and/or (b) at all levels of the court structure? If so, what format should the document take?*

*Question 8: To what extent should an abbreviated system of pleadings be introduced?*

We consider these questions together. We comment in our answer to Chapter 2 Question 4 on the complexity of Scottish court procedures. Nevertheless we believe that there is considerable merit in the system of pleadings to establish the exact issues at dispute, and we believe if anything that in child residence and contact cases there has often been too flexible approach to allow extra matters to be brought in to mischievously delay proceedings.

We therefore believe the system of proceedings which brings focus to the argument of a case should be retained. We do however believe that information technology could be used to assist in the preparation of both initiating documents, defences, records and other procedural documents. It would be possible to devise a web based system into which the various clauses could be entered, and then presented for answers to be entered. This would then automatically be available to all parties and the courts.

*Question 13: In the conduct of substantive hearings, should there be greater use of written rather than oral arguments?*

We believe that the right to present a written statement where a witness cannot attend in person should be guaranteed, subject to the proviso that evidence which cannot be cross-examined will carry less weight.

We believe that the need to have witness statements notarized is arcane and should be abolished. It might if necessary be replaced by a simple confirmation of identity from an individual of standing, on a par with the countersigning of a passport application.

*Question 15: To what extent should the court have control over the use of expert and other evidence?*

In child cases there are often conflicting expert views and experts frequently come from particular “camps” of opinion in a field which is not subject to the same kind of scientific analysis as, for example, the causes of a fire. We believe there might be merit in the courts exerting some control over the use of experts, particularly, as we believe is often the case, where common sense might readily suffice.

One possible approach would be for the court to require parties to agree on the use of a single expert from a panel maintained by the court. Such experts could be funded from the savings made by removing legal aid from child residence and contact cases.

*Question 18: Should written judgements be required in all cases?*

We believe they should. Parties are entitled to understand the reasons for a judgement, particularly where judicial discretion as to what constitutes the welfare of a child is involved. Further, in future years, the children concerned will be entitled to know the reasons for decisions made concerning them. We believe that written judgments should include as a matter of course a risk assessment for the various possible outcomes, and that this risk assessment should include the harm which may arise from the exclusion of one parent from meaningful involvement in a child’s life.

*Question 19: Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?*

We believe that this is a difficult issue in child cases. Failure to comply with the rules might arise from the desire to do mischief to a case, to the end that a status quo such as one of no contact might be prolonged to the point of significance in the outcome. On the other hand, since child welfare is at stake it will be difficult for the court to proceed in a summary way without hearing the issues.

The key issue here is speed of progress of the case, and we believe that if a court officer with a remit to represent the interests of the child were available, as described in our answer to Chapter 5 Questions 2, 3 and 5, he would be able to advance the case without waiting on a party who was in breach of court rules yet without compromising the child's welfare.

*Question 20: What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?*

The primary concern here as far as our issues are concerned is the malicious making of false accusations in order to abuse the process. We do not know how common this is but we are convinced that it occurs in some cases. Whilst allegations of abuse have to be taken seriously, we believe that there should be sanction, in the form of a list, against those who make false allegations. Persons appearing on this list would then require leave of the court to make any further allegations in a process, and a repeated incidence of false allegation should constitute a criminal offence.

*Question 22: Should a person without right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?*

We have previously discussed the use of McKenzie friends (see our answer to Chapter 2 Questions 3 and 4). We believe party litigants should be entitled to the assistance of a McKenzie friend. McKenzie friends do not represent a party, and would not normally address the court directly. We believe, however, that there are occasions when a McKenzie friend addressing the court may assist the court. Examples of this would include the questioning of a party litigant – who may himself be naturally inarticulate and/or emotionally charged - in order to elucidate his evidence-in-chief, and the cross-examination of the other party or their witnesses on behalf of a party litigant, where for the party litigant to do this personally might cause stress due to emotional tension between the parties.

We would recognize that in the process of doing this, as well as generally acting as a McKenzie friend, persons would have to abide by the rules and practice of the court and not impose extra burden on the court or indeed the opposing parties.

Families Need Fathers is in the process of developing training and protocols for McKenzie friends in England and we would expect that in due time this would be extended to cover Scottish practice. We would emphasise that the purpose in doing this is to facilitate our self-help ethos and empower individuals in their own cases by providing charitable support. We do not seek, and we do not believe it would be right, to create a new class of professional paralegal to take business more appropriately placed in the hands of qualified solicitors and counsel.