Debating the merits of transparency with the great & good

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CATEGORY:
BLOG

Earlier this summer, we gathered a varied panel of individuals to discuss the question of increasing transparency in the family courts*. Sir Paul Coleridge framed the question for the evening with a reminder of the traditional position: “Divorce proceedings were always held in public, and were as public as a wedding ceremony. But when it came time to discuss the financial elements and deal with children, the discussion would take place in private in the judge's chambers. Now, what has changed that also requires a change to this method of dealing with finance and children matters on divorce?” In the lively debate that followed, the answers were several: “Senior family judges”; “The pressure of fathers' groups who have waged a successful battle to increase transparency”; “Vocal media campaigning about secret family court justice”. The range of views suggests to us that there is no single source of change, but that several sources of pressure are converging and pushing on the courts at once. Accordingly, the debate was nothing if not wide-ranging. Chaired by Withers Family team partner Diana Parker, the event featured Sir Paul, who has recently retired from the High Court bench, media executive and former editor of The Sun Kelvin MacKenzie, Piers Pressdee QC, a specialist in children's cases and Withers partner Michael Gouriet. Alongside the views of these knowledgeable participants, the direction of the debate was also actively steered by the audience, which was made up of family law practitioners and journalists. Starting with questions on exactly what the media can report on in court, and the distinction between public and private law cases, it was agreed that there was great confusion for all parties about the rules in each circumstance. Many participants felt that public law cases, especially those involving the intervention of the state in the lives of children, should be subject to some form of public examination. In a similar vein, Kelvin raised the interest of taxpayers in cases where finances were under dispute. Is it a good thing for these cases to be heard in public, allowing HMRC to identify where tax avoidance may have occurred, so as to ensure full reporting? Conversely, in private law cases involving two individuals trying to agree on the separation of their affairs, there would seem to be no particular public interest to pursue in the majority of cases. Kelvin went on to explain that the changing business environment in the media has led to huge lay-offs of reporters, meaning that there are extremely limited resources for court reporting. Is the commonly-held view of the media as a means of holding the courts to account still realistic? Can it provide the public with a comprehensive view of court decisions and justice in action if it only has the manpower to cover the bare minimum of cases? Sir Paul took this one step further, pointing out that the contemporary nature of the ‘public interest' and the media's need to sell newspapers means that only cases involving celebrities, or particularly salacious and eye-catching details, grab the attention of the press. Most other cases, and especially many heard outside London, are ignored no matter the significance of the issues at stake. The journalists in the audience acknowledged that this was broadly true, though also argued that it should not be used as an excuse for restricting transparency. If the press is unable to hold the courts to account, are there any alternatives? There was complete agreement with the notion that the justice system should be open and accessible, and that justice should be seen to be done. Not least, visibility enables the public to actively understand how the system works. One of the journalists in attendance raised the potential of the public at large, with the tools of blogs and social media at its disposal, to carry out a watchdog function. Going further, a member of the audience suggested that there could be inspectors, similar to OFSTED inspections of schools, which would take an unbiased, critical view of court proceedings. And of course, all cases proceeding to the Court of Appeal are subject to a detailed review, as well as being more open to public view. Calling on the collective experience of the audience, Diana asked if anyone had experienced trying to argue a case in open court. One of the guests confirmed that, having tried a high profile case under the full scrutiny of the press and public, it was a much more challenging process than in private. She raised the question of whether participants might not be inclined to play to the gallery, and there was general agreement that the whole dynamic of court proceedings are changed by their visibility. This is by no means bad in all circumstances, but the risk of forcing parties into quick settlements was discussed, and it was agreed that there was a very real possibility of blackmailing parties who wished to avoid the public eye. Another audience member was able to present the position of the Scottish courts, which have been open to the media and public for centuries. In contrast to English courts, the Scottish courts start from a position of complete openness, and require parties to demonstrate why there should be restrictions on access and reporting. She reassured everyone present that the Scottish position has never been a source of problems. Though there isn't a huge volume of media reporting on family cases in Scotland either, the introduction of cameras to the criminal courts recently has been very well received by the public and has helped to demystify the judicial process. In an attempt to summarise the views of this diverse audience, Diana asked all attendees to vote on three questions: – Should public law children cases be more open? – Should private law children cases be more open? – Should financial cases on divorce be more open? The voting on public law children cases saw 81% opposed to opening up cases further. The view on private law children cases was even clearer, with 95% of the audience against increasing the transparency of proceedings. However, the voting on financial cases on divorce found 50% in favour of opening them and 47% against. When asked at the end of the debate if they had changed their views, it appeared that the audience was still split in the same proportions on the merits of increased transparency. We are not the only ones interested in debating this issue. On 15 August 2014 the President published his consultation paper on the next steps for transparency. Firstly, he wants to hear how his Practice Guidance on transparency, issued in January 2014, is working in practice, and what impact it is having. He acknowledged that there are likely to be unforeseeable consequences to the change that he has brought about. Furthermore, some consequences will only be revealed in the long term — the children involved in cases being reported now may come to read the judgments years later and discover information that might otherwise never have come to light. In particular, but certainly not limited to, the President is interested in the extent to which the increase in transparency has effected children and the families, local authorities and other professionals, and also if it has changed the level and quality of news reporting on family law cases. Secondly, the President wants to hear views on a plan to increase the descriptive listing of cases to aid understanding of their subject matter. He would like ideas as to catch words or phrases that would indicate what the case involves. Another proposal that he would like to canvas opinion is the disclosure of ‘certain categories of document' to the media, subject to appropriate restrictions and safeguards. The types of documents that he considers would be appropriate for accredited members of the media to read under his proposed pilot scheme include advocates' documents and expert reports (initially confined to reports in the ‘hard sciences'). The President made clear that he is ‘very conscious that this is a topic which causes nervousness amongst many professionals in the family justice system. I am aware of these concerns and propose to proceed carefully.' Finally (and

appropriately bearing in mind the debate) he wants views about the possible hearing of certain types of family case in public. It is clear that transparency is an issue that will continue to develop and to interest the President, and therefore all those interested in family law issues If these scores can be said to reflect the view of family law practitioners, we also have some sense of what may be coming next from the family courts. In his 12th View from the President's Chamber, Munby P announced the forthcoming publication of a consultation dealing with: Practice Guidance on transparency, issued in January 2014; ways of increasing the descriptive listing of cases to aid understanding of their subject matter; the disclosure of 'certain categories of document' to the media; and 'preliminary, pre-consultation views about the possible hearing of certain types of family case'. In view of this consultation, the President may be interested in the views expressed at the debate. *All participants in the debate were presenting arguments to facilitate a discussion, and not expressing fixed opinions on these issues.