Care proceedings reform: The future of the pre-proceedings process

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Introduction

The pre-proceedings process was the most effective of the reforms introduced with the PLO in 2008. A study of cases where pre-proceedings letters were sent in 6 local authorities in 2009-10 found that although the process did not shorten care proceedings, it could help children and families be diverted away from them. Nearly a quarter of the children remained out of care proceedings a year later; the diversion rate rose to a third in cases where the parents had engaged with the process and a pre-proceedings meeting was held (Masson et al (2013) Partnership by Law? Available at http://www.bris.ac.uk/law/research/researchpublications/2013/partnershipbylaw.pdf) Despite this success, the future of the pre-proceedings process looks far from certain. Use of the process has declined, and the new PLO emphasises using the time before proceedings to prepare the court application. However shorter care proceedings make it more important for there to be opportunities for parents to demonstrate change or propose relatives as carers before proceedings start.

What is the pre-proceedings process?

The pre-proceedings process is outlined in Children Act 1989, Guidance and Regulations Vol 1, Court Orders (2008), statutory guidance which local authorities are required to follow. Local authorities ‘should liaise with parents’ with a view to seeing whether proceedings can be avoided, or narrowing the issues in dispute in all cases ‘with the exception of those where urgent action is needed’ (para 3.27) or the ‘scale, nature and urgency’ of safeguarding concerns mean that this is not in the child’s interests (para 3.31). Parents should be notified using ‘a letter before proceedings’ (para 3.29). A pro forma letter is provided in the guidance.
Figure 1 sets the pre-proceedings process within the wider context of child protection processes and meetings. The process is initiated by decisions at a legal planning meeting that the threshold for proceedings is met and the process should be used. The social worker then sends the parent(s) a letter before proceedings, inviting them to a pre-proceedings meeting and setting out concerns about the child’s care. It is this letter that entitles the parent to free legal advice (level 2) under the legal aid scheme. Parents attend the pre-proceedings meeting with their solicitor (or a paralegal).

At the meeting, which is usually chaired by a social work manager, the social worker discusses how the concerns can be addressed. Parents are generally asked to sign a written agreement intended to address these concerns, including, for example attending a parenting programme or domestic violence intervention project, or agreeing to their child being cared for by relatives, or accommodated. Meetings are sometimes used to get parents’ agreement to assessment by a specialist in-house service or an external agency. One of the 6 local authorities did this in nearly half its pre-proceedings meetings, focusing the meeting itself on the information to be provided to the assessment team. Local authority lawyers interviewed gave examples of discussions with parents’ lawyers (by letter or email) about the questions to be asked of experts. However, this was quite a
rare occurrence; local authorities had become unwilling to commission external experts prior to proceedings because the courts still ordered repeat assessments, and because of the cost.

Lawyers were sometimes able to make appointments to see their client in advance of the meeting; some local authorities timed meetings so parents and lawyers could talk privately before the start. Parents’ lawyers used these opportunities to provide their parent clients with advice on the local authority’s proposals, and on the implications of rejecting them or failing to comply with any agreement. They emphasised that they wanted to be ‘realistic’ with parents and to avoid proceedings where this was possible, although they recognised that there could be cases where it might be better to get into court.

Parents interviewed for the study were generally very positive about having their own lawyer at the meeting. They felt reassured, supported and more able to take part in the discussion.

‘You know that everyone in the room is against you ... and when you’ve got your solicitor with you, you know they’re the only person who’s 100% backing you up, so it helps you.’

‘... I think he [lawyer] handled it really well, and he helped me stay calm and if I was rambling on – you know, when you talk about it more you get angry – he was like “calm down”, and he was really good …’

Some parents also felt that their lawyer’s presence made social workers moderate their demands.

Lawyers rarely spoke on behalf of clients in the meeting, although a few did where their client wanted this. Rather they monitored the discussion, seeking clarification on behalf of clients and requesting breaks where their client was becoming angry or distressed. Meetings provided little space for negotiation; written agreements were generally based on pre-existing child protection plans and social work managers were only willing to agree minor changes.

**When should the pre-proceedings process be used?**

The guidance (DCSF 2008) suggests that using the pre-proceedings process should be the general approach but recognises that it is not appropriate in every case. Social workers and local authority lawyers interviewed regarded use of the process as a fairer way of working with parents at the edge of care proceedings, some referring to the letter as ‘the fairness letter’. However, such a positive view is not taken in all local authorities. Figures collected by the Legal Aid Agency suggest considerable variation between local authorities in use of the process, which does not simply reflect differences in the use of care proceedings. It appears that some local authorities make relatively little use of the formal pre-proceedings process, or that the parents to whom they send a letter before proceedings do not obtain legal advice.

**Cases**

The process is unsuitable for urgent or immediate cases – parents need time to contact a lawyer, and their lawyer must be able to attend the meeting. In the study, the average time between the letter and the meeting was 11 days, and almost a quarter of meetings were re-arranged to allow parents to attend with their lawyer. The possibility of avoiding court was not essential; all local
authorities had a form of letter to use when proceedings were planned. Such ‘letters of intent’ accounted for 20% of the letters before proceedings seen.

Five of the 6 local authorities in the study were above average users of the pre-proceedings process, sending a letter before proceedings in most of their cases. The majority of cases where the process was not used were emergency or immediate cases, where the court application followed within 15 days of the legal planning meeting. Local authority lawyers (and social work managers) also thought that there was ‘no point’ in using the process in some cases, for example where there concerns of intergenerational sexual abuse. There were also parents who attended a pre-proceedings meeting but saw no point in bringing a solicitor.

The process was most commonly used in relation to plans for unborn babies; thirty per cent of the pre-proceedings cases in the sample related to unborn babies. Parents were invited to a pre-proceedings meeting in three-quarters of these cases where the legal planning meetings agreed that the threshold for proceedings was met. Lack of time was the main reason the process was not used; nearly a quarter of these babies were born early, and there was evidence that early birth derailed plans to use the process in some cases. Also, a letter before proceedings was less likely to be sent where the baby was the parent’s first child.

In Re B [2013] UKSC 33, para 219 Baroness Hale was critical of the local authority for failing to send ‘the usual pre-proceedings letter’ before applying for an interim care order, implying that this contributed to the poor relationship between the parents and the local authority. Clearly, there was little risk in sending a letter before proceedings when the baby was in a special care baby unit. However, the standard letter would not have been suitable because the local authority intended proceedings. It is not possible to say whether a letter would have changed the course of events, but the local authority concerned appears to have made substantial use of the process in the context of a low rate of care applications.

Timing

The timing of the pre-proceedings process is dependent on the timing of the legal planning meeting. Most local authorities have procedures designed to control access to these meetings, requiring permission from managers and, in some authorities, the preparation of documentation in all but the most urgent cases. It can be difficult to identify the right time to take action, particularly where cases are not triggered by an incident; a Cafcass survey in 2009 found guardians considered that over 40% of the sample care applications were ‘late’, but only 29% when the survey was repeated in 2012 (Cafcass, Three weeks in November..three years on, 2012).

The Family Rights Group has criticised local authorities for using the pre-proceedings process too late, giving little time for the parents to address the concerns (Select Committee on Adoption Legislation 2012-13 HL 94 Q668). Sending pre-proceedings letters earlier risks bringing cases into the shadow of proceedings that could be managed without this. Parents found receiving a letter with the phrase HOW TO AVOID GOING TO COURT ‘scary’; It is not the best foundation for a social work partnership. Most families with child protection plans do work with social workers to resolve concerns without needing to be threatened with legal action, or requiring a solicitor in their discussions with the social worker.
Use of the pre-proceedings process can seem too late if care proceedings swiftly follow but this may be due to a new crisis, failure to co-operate with the pre-proceedings process or the use of a letter of intent. A short period between the letter and the care application does not prove that the process was delayed but it may be worth considering whether a standard letter before proceedings, sent earlier, would have been more useful than a letter of intent.

Delay is more apparent where children have spent long periods on child protection plans without much improvement in their care before referral to a legal planning meeting. This is not just an issue of delay but also one of thresholds and trying to secure good enough care with the least intervention. Legal planning meetings can be more effective where decisions are made on the basis of full assessments, chronologies and even draft statements. The court’s expectations under the new PLO require local authorities to have effective processes for reviewing documentation. These greater demands may delay the referral to legal planning, or extend the time between that meeting and the court application, effectively shifting delay to the period before proceedings start. Neglect cases are particularly prone to delayed applications. Fluctuations in care with periods of improvement encourage optimism in social workers; local authority lawyers are reluctant to propose an application because of the view taken of neglect in the courts.

In the study, the median period between the legal planning meeting and the care application was 19 weeks for cases with the pre-proceedings process but less than 3 weeks without it. Where s.31 applications related to new babies quite different periods were found, determined by the point in pregnancy when the local authority considered proceedings. The median duration for cases with the pre-proceedings process was 9 weeks, 6 weeks without it; in nearly a quarter of cases the time was reduced by birth before the expected date. In the ‘Triborough’ local authorities, the introduction of the pilot to shorten the length of care proceedings in 2012 also resulted in a substantial reduction in the time cases spent in the pre-proceedings process from 16 to 8 weeks. The evaluation report for the pilot noted that the shorter pre-proceedings period could indicate more pro-active decision-making, or the use of letters of intent rather than a last attempt to see if proceedings could be avoided (Beckett et al, Evaluation of the Triborough Care Proceedings Pilot, 2013).

The Family Justice Board’s LA Pre proceedings practice: good practice essentials document (Family Law 2013, p 1076) also promotes later rather than earlier use. The pre-proceedings process is not listed as an action under box 3: Legal Gateway/ planning, where the study local authorities made the decision to use it, but only under box 4: Final Decision. Box 3 does list ‘further attempts to support…the child at home’; but such work is undertaken before the formal pre-proceedings process and without parents experiencing its galvanising effect. Listing the process only under Final Decision suggests the focus is on the arrangements for the proceedings, not avoiding court.

Not all local family Justice Boards appear to take this approach. The Sussex Local Authority Protocol for achieving effective expert assessment outside court proceedings aims to assist the 3 local authorities concerned to meet the demands of the new PLO through, ‘Much earlier involvement of parents, their representatives and legal advice in the process, with the letter before proceedings and associated meeting being integral to the intention of diverting families from the need for care proceedings.’ The Protocol makes provision for engaging parents’ lawyers in discussions about the questions to assessors, and specifically draws attention to the need for earlier use of the pre-proceedings process in ‘slow burn’ ie neglect cases.
Effects of the pre-proceedings process

Diversion

As noted earlier, the pre-proceedings process enabled a quarter of the cases where a standard pre-proceedings letter had been sent to be diverted from proceedings. Diversion rates were higher when only the cases where a pre-proceedings meeting took place were counted (33%) and in the smaller sample of observed cases in 2011 they were considerably higher, although not all of these were tracked for a whole year. Comparable rates for avoiding care proceedings were seen in the Cafcass plus pilot in Coventry and Warwickshire (Broadhurst et al 2013). Care proceedings were avoided in the study cases in two main ways: through the improvement in parental care (19); and through arrangements for alternative care being agreed (10). There were cases in the study with dramatic and unexpected improvements, and others were the care remained only just acceptable but work was continuing on improvement. The researchers assessed outcome in the improvement cases: in six of the 16 file cases, there was marked improvement. These parents were able to engage with the social worker and other professionals and use their support to provide better care. Three other cases had been closed quickly and the legal department file contained insufficient information to make any assessment. A higher proportion of observed cases (37%) showed substantial improvement of care.

The Drury family (a pseudonym) from the observation study provides one of the strongest positive examples in the study. Colette had lost the care of her three older children in care proceedings after long concerns of neglect in the context of domestic violence and Colette’s poor mental health. She and her new partner, Owen, were living in a tent when Colette found she was pregnant. The couple were motivated to make changes so they could care for their (unborn) baby, who was put on a child protection plan. Children’s Services had obtained a very negative psychological assessment of Colette in the previous care proceedings and wanted to update it. Colette and Owen engaged well with all the professionals, undertook parenting classes and co-operated with assessment. Children’s Services helped with the deposit for a flat and allocated a family support worker. A year after the pre-proceedings meeting, the baby was at home with the parents and no longer subject to a child protection plan. The family was getting support from the local children’s centre.

Alternative care arrangements were made in 10 cases. Three involved private law proceedings through which children went to live with fathers; two other fathers took over the care of their children without a court order. Two children went to live with grandparents, in one case the grandparent became a foster carer; in three other cases children were looked after under s.20 by unrelated foster parents.

The Children Act 1989, s.20, makes provision for looking after children short or long term without a court order. Local authorities have duties to provide such care but cannot do so if a parent who is willing and able objects. Lawyers are sometimes suspicious of s.20 arrangements, either on the basis that parents do not understand and really consent, or that care plans should be scrutinised by the court. Care proceedings should only be contemplated where the local authority believes it can satisfy the threshold; where parents are co-operating fully, and the local authority has no other reason for needing parental responsibility, bringing care proceedings is an abuse of process.
Where the child is on the edge of care proceedings, the pre-proceedings process should ensure parents get a clear explanation of the effects of s.20 and their continuing role in their child’s life. The process itself is less alienating, allowing for greater participation in discussions and decisions than care proceedings. It is hard to see that there are any advantages in care proceedings for parents who accept they cannot care for their children, and can agree a suitable alternative arrangement with Children’s Services. Children too can be given a say in these arrangements without the need for a children’s guardian. Once the child is looked after, there is a common process of review for all looked after children, and the IRO must advise considering when s.20 ceases to be suitable, for example where parents have completely disengaged.

Legal advice and the support of a lawyer at the meeting (and subsequently) enabled some parents to begin to recognise that they needed to make changes and could do so. Lawyers’ realism was delivered with optimism – ‘you can beat them’ and their (tacit) support in the meeting helped parents to feel empowered. They no longer had to face Children’s Services on their own but now had their lawyer ‘on their side’. Self-efficacy and empowerment have both been linked in social work literature with engagement with services. Lawyers’ partisanship meant their advice to co-operate with children’s service was listened to, and even acted on. Co-operation with child protection services is seen as lowering risk, making it more manageable without court action. In this way the lawyer’s presence acted as a catalyst for a working partnership between some parents and the social worker.

**Delay**

The pre-proceedings process does carry with it the risk of delay unless cases are monitored whilst they are subject to it. As noted above, cases in the study spent considerable time in the pre-proceedings process before getting to court; without the process cases got to court much more quickly. Where proceedings were avoided, cases spent even longer, being monitored through the process with further review meetings. The original guidance viewed pre-proceedings as an event and included nothing about review. In some local authorities, cases, particularly those involving neglect, drifted with long periods before proceedings were started despite little engagement or change by parents.

Making the best use of the pre-proceedings involves initiating the process before proceedings have become inevitable and building on parents’ desire to do the best by their children with casework, support and services. It is also important to keep cases under review, and be realistic about progress or the lack of it so that cases do not drift at this stage.

**Use of the pre-proceedings process**

The only source of national data on the use of the pre-proceedings process is the Legal Aid Agency’s data on the number of bills for level 2 work. This shows a marked decline in 2012-13, despite the increase in the number of children on child protection plans and the number of care proceedings, see Figure 2. This decline is occurring across the country; there were only a handful of local authorities where the number of bills was higher last year than in 2009-10.
This reduction is most likely to be the result of local authorities sending fewer letters and fewer parents seeking legal advice. Behind this are two further factors: the failure of the courts to take note of their pre-proceeding work, which has made local authorities sceptical about its value; and the changes to legal aid, particularly a reduction in legal aid firms, which makes it harder for parents to find a solicitor to act for them.

If pre-proceedings work is to contribute to the effective operation of the new PLO action has to be taken to reverse the decline. Leaving sending the letter to just before proceedings is unlikely to achieve this. Parents who receive a letter of intent are defeated, not empowered; they unlikely to want to attend a meeting about it. Parents who avoid the meeting are likely to contact lawyers only after they receive the application. Without a solicitor who knows their circumstances when proceedings start, they will be in a weak position to respond to the application in time for the first advocates’ meeting, on day 10.

Making more use of the pre-proceedings process

There are three main reasons for making more use of the pre-proceedings process; it is fairer to parents to enable them to have early legal advice when there is a risk of care proceedings; proceedings can be avoided; and the court can operate more smoothly. Early legal advice for parents also reassures all professionals that parents have been treated fairly and may make them more able to take the difficult decisions that care proceedings entail, particularly where cases must be completed in 6 months.

The pre-proceedings process can lead to delay at an earlier stage, when decisions and actions are not under the scrutiny of the court. For this reason some lawyers who acted for parents (and children) questioned whether it might sometimes be better to go straight into proceedings. The 26 week time-table of the new PLO alters that balance. Whilst time in proceedings has allowed a few parents to demonstrate change or identify a potential relative carer, the current messages about the new PLO indicate that extensions will not generally be allowed for this.
Local authorities who have made little use of the pre-proceedings process, or mainly send letters of intent, should begin to use it and comply with the statutory guidance (DCSF 2008), drawing on the experience of the local authorities in the study. Allowing time for a last chance at engaging the parents may avoid some court applications. It will require earlier referral to a legal planning meeting, which may also be necessary if the new PLO is not to be derailed by large numbers of less well prepared, emergency applications for care proceedings.

The pre-proceedings process has the potential to provide a framework enabling some work undertaken in the Family Drug and Alcohol Court (FDAC) without an application to court. The work currently done after application to assess the parents’ suitability and identify the services they need could take place under the pre-proceedings process. Indeed, developments to this effect are currently being considered by the FDAC team. How far the court could be replaced is unclear; the philosophy of therapeutic courts such as FDAC is that judicial authority is an element in keeping parents on track. An alternative model, where legal advice in the shadow of proceedings is a catalyst to parental engagement, may also be effective.

Use of the pre-proceedings process under the new PLO

There is a risk that the emphasis on preparing cases for court will over shadow other social work activity during the pre-proceedings period; some local pre-proceedings protocols already appear to be focussing on this aspect of pre-proceedings work to the exclusion of efforts to engage parents and avoid proceedings. However, the pre-proceedings process provides an effective framework for the whole range of work with parents on the edge of care proceedings, including completing assessments and identifying possible relative carers. Legal advice aids parents’ understanding of their own position, that of the local authority and the powers of the court. Advice on the consequences of not co-operating is crucial; parents need to be helped to understand how assessment of themselves and any potential relative carers impacts on court decisions, and assisted to participate in decisions which will affect their future as parents.

The complexity of fitting EPO applications into the new PLO makes temporary s.20 agreements all the more attractive. Access to legal advice may prevent the need for an EPO through an agreement for support or temporary care on discharge from hospital. This was commonly part of the plan in pre-birth pre-proceedings cases. Parents-to-be had better opportunities to discuss arrangements than immediately after the birth. Using the process early in the third trimester (or even earlier) can enable mothers (and fathers) to start to address substance abuse or other issues. Parents who are able to make necessary changes at or immediately after birth are more likely to be able to care for their children, as Colette and Owen did; see also Harriet Ward et al, Safeguarding babies and very young children (2012).

Conclusion – valuing the pre-proceedings process

Walsall, examining its procedures in the wake of the Munro Report on Child Protection adopted the approach: ‘if it doesn’t help, don’t do it’. The pre-proceedings process has been shown to help families, and is seen as helpful by social workers; it can also help the courts by keeping cases out of proceedings and facilitating effective representation for parents. ‘Use it or lose it’ - a common refrain in the face of threatened closures applies here too. The pre-proceedings process needs to be used
primarily to avoid care proceedings, not only to allow the preparation of a court application and to inform parents that proceedings will be issued.