JUDICIARY OF
ENGLAND AND WALES

PRESIDENT OF THE FAMILY DIVISION

President's Memorandum: Drafting Orders

1. In my speech to the FLBA on 16 October 2021 I stated:

> "The task of drafting an order has become a prolonged process. Partly because of remote working, the process of negotiating the order extends for days, with input from instructing solicitors and lay parties. These drafts are embellished to a Byzantine degree."

I had previously referred to the problems that had arisen in the agreeing and drafting of orders in my *Guidance: Forms of Orders in Children Cases* (17 June 2019). There I observed that:

> "Many judges and practitioners are not using electronic templates or programs and are, instead, preparing lengthy narrative orders in each case by a more laborious method with the result that the preparation of orders is now taking more time rather than less."

2. In that Guidance I proposed that the first order made in any children's case should contain the key information but that subsequent orders should be in short form omitting lengthy narrative material and containing recitals stating only who attended and their representation; the issues determined at the hearing; any agreement or concession made during the hearing; and the issues that remain outstanding. I hoped that this would mitigate the problems.

3. In the field of public law a comparable problem has been addressed by the issue of amended orders 18 April 2021 [1] which should have had the effect of substantially shortening orders made in that sphere with the result that time will have been saved and contention reduced.

4. Yet, it is clear that the problem has persisted in the field of private law, both in relation to litigation about children, and about money, and that the preparation of orders has become a highly adversarial and confrontational process leading to much unnecessary verbiage and great delay in the production of agreed drafts.

5. I have been asked to consider issuing a Practice Direction regulating professional standards in this area.

6. I do not consider that the Family Court needs such a Practice Direction, at least not at the present time. However, the Family Procedure Rule Committee will have to consider introducing such a measure if the principles in this

[1] Click here for the announcement and the orders.

memorandum are not observed and the non-compliance with elementary principles continues.

Standard Orders

7. When drafting orders, whether by consent or following a hearing, the standard order templates should be used, adapted as appropriate to the facts of the case: *Practice Guidance: Standard Financial and Enforcement Orders* (30 November 2017); *Practice Guidance : Standard Children and other Orders* (6 June 2018)[2].

8. However, these templates only provide standard clauses for agreements and orders disposing of the case together with rules about formatting. They say nothing about the content of the recitals. This is the area where great controversy seems to arise.

Recitals

9. The first and most basic rule is that where the order follows a hearing its terms (including its recitals) must reflect the result of the hearing, no more, no less.

10. The purpose of a recital is not to summarise what happened at a hearing, but rather to record those essential background matters which are not part of the body of the order.

11. In my Guidance of 17 June 2019 I said that in an ideal world the aim was to encapsulate all of the essential information about a children's case in the most recent court order so that anyone taking up a case would only need to turn to the latest order to understand the issues, the parties, the state of the proceedings and other key information.

12. However, that process has led to delay, expense and confrontation, which has continued notwithstanding the use of short form orders. Therefore, while it remains necessary in children's cases, both domestic and those with an international element, to record the essential background matters, it is essential that this is done as shortly and as neutrally as possible and that the parties should not seek to introduce adversarial and partisan statements in their favour in the recitals to the order. This is the first area of potential conflict.

13. It is not necessary in a financial remedy order to record any background matters, although the court in its discretion may permit the parties to do so. In this event it is, again, essential that this is done as shortly and as neutrally as possible.

14. The second area of potential conflict is the practice of parties seeking to attribute views to the court which did not form part of the court's decision. This is a surprisingly prevalent practice and gives rise to much controversy. It is a practice that must cease.

15. The third area of potential conflict is the practice of a party's representative seeking to record that party's position before, or during, the course of, the

[2] Click here for Volume 1 of the Standard Orders; click here for Volume 2

hearing. Again, this can give rise to much conflict, but is wholly superfluous. This, too, must cease.

16. More latitude is permissible as regards consent orders but, again, restraint in relation to the content of recitals must be exercised given the cost to the parties and the time of the court that is spent approving them.

When the order must be drafted and lodged

17. Where one or both parties has legal representation at a particular hearing, the order must be agreed, drafted and lodged before the parties leave the court building or, on remote hearings, on the day of the hearing, unless this is wholly impracticable, in which event the order must be agreed, drafted and lodged within two working days of the hearing. The date for the next hearing must be fixed by the parties with the court and stated in the order before the parties leave the court, unless the court otherwise orders.

10 November 2021