JUDICIAL APPROACHES IN SETTLEMENT CONFERENCE PILOTS IN CHILDREN CASES:

THE VIEWS AND EXPERIENCES OF ADVOCATES

DR JULIA BROPHY
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Judicial Approaches in Settlement Conference Pilots in Children Cases:
The Views and Experiences Of Advocates

Dr Julia Brophy
with
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Mark Sefton
and
Dr Marisol Smith

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The Association of Lawyers for Children (the ALC) is a national association of lawyers working in the field of children law. It has over 1,000 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years’ experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children law, and hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

i. lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice.

ii. lobbying against the diminution of such mechanisms.

iii. providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children.

iv. providing a forum for the exchange of information and views on the voice of the child, being a reference point for members of the profession, governmental organisations and pressure groups interested in children law and practice.

vi. funding or co-funding independent research where gaps are perceived in knowledge or evidence relating to changes/proposed changes in policy and practice in children proceedings.

The ALC is a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.
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**George Eddon**, Local Authority Solicitor.

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Any errors or shortcomings however remain the responsibility of the author.

Julia Brophy, 2018
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EXECUTIVE SUMMARY

- This is a qualitative study based on in-depth interviews with 19 advocates reporting on practices in 61 settlement conferences in the initial five pilot areas identified by the MOJ.

- Selection was by open invitation but advocates must have attended at least one procedure. Take up of the pilots remained low in many areas hence the spread of cases across courts is uneven. That factor should be borne in mind when addressing some findings.

- Qualitative findings cannot be generalised to all pilots, they do however permit construction of hypotheses to be pursued in a larger quantitative evaluation and a cost/benefit analysis.

- Substantial data gaps remain in this field. In addition to a lack of base-line data for pilot courts, we lack data on case selection and outcomes by key variables (e.g. type of dispute, parent vulnerability factors, judge and practitioner behaviours etc). We also lack detailed data on cases that do not settle, cases thought inappropriate – and comparable cost data.

PARTIES REPRESENTED BY RESPONDENTS

- Most respondents (14/19) represented children and/or parents/adults; those representing parents only were the largest group.

THE PILOT SETTLEMENT CONFERENCES: PROTOCOL PRINCIPLES IN PRACTICE

- Findings to date do not support a roll out of the procedure in its current form. Further evidence – both qualitative and quantitative, is required. This study provides important variables on which to build that work– and the cases where the procedure might best work.

- The Protocol Principles (2016) were not applied consistently by judges. Variation in approaches covered the delivery of a preamble, attention to consent during the procedure, pressure on parties and advocates, and approaches to the involvement of advocates.

CRITERIA FOR CASE SELECTION

- Very few judges made explicit their criteria for selecting cases; almost all respondents (17/19) did not know how or why their case(s) had been selected. In one court all cases were selected, in others, respondents thought selection was random or idiosyncratic.

- Some judges were perceived as trying to rustle up cases ‘on the day’ to demonstrate a willingness to try the procedure or increase numbers. In some courts, selection was based on an imminent 26-week deadline and court resources, rather than case variables that could be tracked and tested as to indicators for the procedure.

- Overall, evidence of a ‘developmental’ approach to case selection and to the involvement of advocates in that discussion was limited.

IMPOSITION OF A SETTLEMENT CONFERENCE PROCEDURE

- Some respondents (8/19) had not observed imposition of the procedure on parties but there were concerns that once a judge presented the procedure as ‘routine’/the ‘norm’, it becomes very hard to resist.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

- Similar numbers (7/19) reported the procedure had been imposed on a party. Examples included parents with limited capacity, some who did not really understand the proposal and some reported as bewildered by the procedure.

- Pressure to consent to the procedure could be substantial. There were examples where advocates and clients were unhappy about participating but pressed to agree. Respondents reported it could be difficult – and in some areas, virtually impossible – to refuse.

- Pressure on parents could be subtle or it could be direct and overt. Where the discourse engaged by judges to persuade parents included terms such as ‘reasonableness’ ‘good/best practice’, ‘worth a try’ – it could make refusal difficult where parents did not want to be seen as uncooperative or unreasonable by a judge.

Types of disputes

- In this sample settlement conferences were used for both welfare and threshold disputes, and included cases where the plan for a child was adoption.

The court room layout and seating

- Seating arrangements for the procedure varied between courts and between judges in the same court. Some seating reflected a court hearing with no changes throughout, some judges changed the seating at the start, others changed it during the procedure.

- Moving parents to the fore (i.e. seating them in the front row) was said to be aimed at making parents feel more comfortable/relaxed.

- Where a judge comes down from the bench and sits next to a parent, the aim was said to be to aid communication. Some parents were reported as perhaps initially liking the informality; others however may find it disarming, inappropriate and potentially coercive.

The Judge’s preamble

- Delivery of a preamble varied according to the judge; some set out the objectives and ‘rules’ of engagement, but some had not.

- Some judges addressed parents directly, some reiterated the ‘consensual’ nature of the procedure, telling parents they would not be forced into an agreement. A very small number of judges then re-checked willingness to continue and reiterating rights to a final hearing.

- Overall, respondents were not immediately focused on whether or how issues of consent were addressed in the preamble or during the procedure. As one advocate suggested ‘consent’ was likely to be assumed as “…we are only there if parents have consented...”.

- Data to date suggest some fluidity in addressing issues of ‘consensus’ (a willingness, in principle, to try the procedure) and ‘consent’ during the procedure.

Listing practices

- Listing practices varied: at one end of the spectrum advocates said settlement conferences were listed for an hour – sometimes two, at the other end, half to a whole day.

- Where all settlement conferences were listed to start at the same time, respondents reported they could be at court from 9.30 but not get started until late afternoon, some said parties could wait all day with no idea of a start time.
Use of waiting time may depend on the stage at which the procedure is listed (pre or post IRH) and notice of listing, but also on an interpretation of the principles of the procedure (as entirely judge and party led and thus little/no role for advocates – especially if post IRH).

Sufficient time for the procedure

Most respondents said that once the procedure started there was no pressure to come to a decision within a specified time. However, some vulnerable clients required more time.

Judges’ approaches to parents

Overall, most judges were described as adopting a calm, patient, facilitating manner towards parents; some were described as particularly good with parents. However, some judges did not address parents, conducting the entire procedure through advocates.

Some respondents qualified positive views: informality when overly friendly risks subtle disarming and manipulation of parents, some approaches could be patronising. Some respondents indicated it was not the job of a judge to present as the parent’s friend or ‘counsellor’.

A small number of judges were variously described as brutal, harsh, blunt and insensitive with parents, with the latter effectively backed into a corner.

Party engagement with the judge

A primary barrier to party engagement was the approach of the particular judge: some parties were not invited to participate. A further barrier resulted from poor or inappropriate case selection to include some highly vulnerable parents with comprehension or communication difficulties.

A small number of procedures may have resulted in an order where ‘informed consent’ was debatable and where parents had not been addressed directly by the judge.

Where the judge’s approach was based on good, empathic communication skills with parents, parents were enabled to participate. However, where skills and attention to the Protocol Principles were poor, parents could be coerced/bullied, misunderstood or ignored.

Pressure on lay parties to agree to a suggested consent order

A minority of judges were described as not exerting pressure on parents to concede an order; most however applied some pressure: it could be direct and forceful – or it could be subtle but potentially disarming – or it could be both.

Evidence of pressure on local authorities to change a position, in this sample at least, was rare; that issue requires further examination in a larger, quantitative study.

Where the dispute concerned potential adoption, or threshold, respondents were ‘very uncomfortable’ with the approach of some judges. Most respondents said these disputes were inappropriate for a settlement conference.

There were examples of judges adopting a ‘hybrid’ procedure, part settlement conference part hearing, where parties were unprepared, and where a ‘preamble’ was poor or absent.

Some parents were unhappy about the approach of some judges in trying to persuade them to agree to an order; some left the court in distress, some reported feeling bullied, threatened, intimidated and coerced.
Advantages of a different judge and a ‘fresh pair of eyes’

- Notwithstanding the argument that a settlement conference judge is better placed to express an opinion as to outcome, respondents indicated that the benefits associated a ‘fresh pair of eyes’ need to be considered alongside caveats:
  - The issues in dispute and the profile of parents. Where parents are highly vulnerable and/or where the plan is adoption or where fact finding was required, the procedure does not have advantages which outweigh a hearing.
  - The approach of the particular judge. Advantages were often due to a skilled, empathic family judge, rather than fact that they were a ‘fresh pair of eyes’.
  - Reading time available to the judge and the documents read. And also, a new judge’s real grasp of the complexity of some cases.
- Some respondents reported the approach of some judges did not reflect a ‘meeting’, or ‘dialogue’, or a ‘negotiation’ and could not be described as advantageous to all parents.
- Some respondents cast doubt on the assumption that all orders resulting from settlement conferences were necessarily better for parents, highlighting a lack of evidence on parents’ views, data on longer-term outcomes – and the type of case/dispute.

Human rights issues: views before and following attendance at a settlement conference(s)

- Concerns regarding parties’ Articles 6 and 8 under the ECHR were broadly the same before and also following attendance at a settlement conference(s).

Criteria for case selection and Article 6

- A recurrent view was that the procedure is not appropriate for disputes concerning the threshold criteria, or adoption.
- It was also considered inappropriate for parents with mental health problems, learning difficulties or communication problems and certain other vulnerable or volatile clients.

Articles 6 and 8 of the ECHR: fairness and equality of arms

- Respondents raised issues of fairness and Article 6 concerns where they observed parents had poor, inexperienced or ill-prepared advocates.
- Some concerns were also raised about judges giving advice to parents, and talking to the local authority without the parent(s) in the room.
- Timetabling the procedure at very short notice or ‘on the day’ (e.g. where it was listed on a Friday with a final hearing the following Monday) also raised concerns about fairness.
The role of advocates

- Many advocates had little or no role in the procedure. During negotiations, any ‘non-advocacy’ involvement depended on the particular judge: most wanted no involvement from advocates, others involved advocates but levels of involvement varied.

- Advocates for parents expressed concern about their treatment by some judges. Perceived restrictions on the role of advocates made interventions difficult for some; examples of direct intervention by respondents in this sample were rare.

- Some procedures were not a dialogue or negotiation: respondents reported parents were simply ‘told’ what should happen. Advocates’ work was restricted to ‘out of court’ discussions with parents as to whether they should concede.

Judicial variations in running settlement conferences

- Most respondents (14/19) had attended more than one settlement conference (some many more – the maximum being 15); 11/19 observed one or more conference – all before the same judge, 8/19 observed more than one conference and more than one judge.

- Where respondents observed more than one judge (8/19) experiences were split between judges who differed in their approach, and those adopting broadly the same approach.

- One variation lies in approaches to advocates: some judges completely ignored advocates, a few were hostile at any attempt to participate; others included all advocates from the start. Some judges checked, intermittently, whether advocates needed to consult with clients in private, and finally, double-checked with advocates that all the issues had been covered.

Advocates’ capacity to advise clients during the procedure, or privately

- Overall, 5/19 respondents experienced at least one procedure where it had not been possible or it was difficult to give a client advice during the procedure. Examples of an advocate calling a halt to the procedure were however rare.

- Most respondents (12/19) had not sought to advise a client during the procedure but felt, if that had been necessary, they could have done so. Most (13/19) were also afforded time to consult privately with their client or felt they could have done so, had it been necessary.

Children and young people: attending settlement conferences

- Some respondents said that the involvement of young people and competent young adults has not been sufficiently thought through. There were examples of where respondents said the young person should have attended the procedure.

Attendance and participation of the children’s guardian

- The guardian attended in almost public law cases. However, participation varied: some judges addressed the guardian from the start, others did not, some invited the guardian to speak, others did not. The approach of a small number of judges caused concern.

- Whatever the judge’s approach to the participation of the guardian, respondents said the guardian needed to be well briefed about the procedure and human rights implications, with the skills, experience and confidence, if necessary, to withstand judicial pressure.
Focus on the voice and rights of children

- Respondents concurred that the primary focus of the procedure is on adults – usually parents, and achieving a consent order. Having decided where the best interests of children lie, the judge's focus was generally not on the views of children.

- Most respondents said the voice of the child was ‘there’ – in that, the child’s guardian and lawyer were present but some qualified views as to whether it was really heard or relayed – beyond a view that it would be in the documentation.

- Just under one third of respondents were concerned that the voice of the child was not heard; there were cases where respondents said a young person should have been present.

The United Nations Convention on the Rights of the Child (UNCRC)

- Views about children's rights under the UNCRC varied: relatively few respondents said these rights were clearly addressed, most felt they were “in there somewhere”; 4/19 said they were not addressed.

- Respondents themselves did not refer to Article 12 rights (right of children to a say and to have their views ascertained and addressed in any decision-making forum which affects their welfare) and the implications of Article 12 for their role, or that of the judge.

- Equally, no mention was made of General Comment 12 and the conditions necessary to enable young people to express a view and make informed decisions.

Was the procedure fair?

- The picture is mixed; very few respondents (2/19) said unreservedly, the procedure was fair; 5/19 respondents said it had not been fair.

- Many (8/19) had mixed experiences; it had been fair in some cases but not in others. A small number (3/19) said while procedures were fair ‘in the main’, there were pockets of concern and thus caveats.

- Key concerns were timing (things could be rushed and chaotic without time to properly brief clients or plan), variations in judicial approaches (different approaches to parents and to advocates), and lack of criteria for case selection.

Did the procedure meet the needs of the case?

- Where the procedure had not met case needs, reasons were (i) case had already settled (ii) dispute was not appropriate (e.g. evidence needed to be tested, the dispute included a plan for adoption) (iii) case selection and negotiations failed to take account of the capacity of vulnerable parents (iv) the rights and views of a young person were not explicitly addressed.

- The procedure was said to have the best chance of succeeding where the dispute concerned concrete and specific disputes in private law cases, contact disputes and disputes about placement between family members in public law cases.
Outcomes

- 34/61 cases were fully resolved, 19 failed to resolve any issues and had a Final Hearing.
- A small number reached partial agreement or narrowed down the issues but there is potential for the procedure to make things worse – perhaps a lot worse – for the final hearing. Some agreements did not hold or were thought highly unlikely to hold.
- The figures herein are too small for generalisation, but they do permit the generation of hypotheses for a larger quantitative evaluation providing key variables for testing outcomes (e.g. type of dispute, parent vulnerability factors, judicial and advocate behaviours).

Could an Issues Resolution Hearing (IRH) have achieved the same result?

- Overall, most advocates said a properly conducted IRH could have reached the same result but restrictions on the time allocated to the IRH mean it is now largely ‘administrative’ with little/no time for judicially led discussion, negotiation and party reflection.
- The contribution of a fresh ‘pair of eyes’, able to give an opinion as to likely final order and to hold discussions with parents, featured for a minority of respondents but these were not determining factors. They were compared with the skills and approach of a professional empathic family judge; it was that skills set – plus the additional time allocated to the procedure which provided the benefit, rather than the fact that it was a different judge.

Respondents’ final thoughts: Is the procedure appropriate, could it work/work better?

- Most respondents reiterated disputes concerning threshold, or where findings of fact and/or where placement includes a plan for adoption, are inappropriate for the procedure. Equally, cases involving parents with mental health problems, learning disabilities, communication, language or comprehension limitations were deemed inappropriate.
- With amendments, most respondents thought the procedure might be appropriate for private law disputes, placement disputes between family members, and contact disputes.
- Key amendments include a need for detailed Guidance spelling out how the procedure should operate in practice; this to be applied consistently by all judges.
- Most respondents also reiterated lack of criteria for case selection, variation in judicial practices, and listing and time issues, but many returning to the power imbalance between lay parties and the judge by virtue of the latter’s status and position.

Ways forward – a discussion

1 A more limited role for an amended model for settlement conferences procedures

- Findings to date raise concerns. Despite pockets of good practice, overall, they do not provide support for rolling out the procedure in its current form – indeed, there are several forms. Some of the concerns articulated at the start of the pilots have some merit.
- One option – in the absence of further quantitative research, might be to identify appropriate cases (e.g. private law disputes and the public law disputes outlined above) and develop a procedure with safeguards suited to those cases.
2 Revisiting an inquisitorial, Article 6 compliant IRH for public law cases

- Wider verification may be necessary but indications are that the IRH has become a largely administrative procedure. That was not the original intention. Currently however there is little or no time for judges to explore whether agreement on disputes might be reached.

- Notwithstanding some doubts cast on the benefits of a ‘fresh pair of eyes’ compared with the skills of a professional, empathic family judge, it is suggested that the offer of an opinion as to likely outcome may, with safeguards, also be possible at an IRH (arguably returning to the original PLO remit).

- One option is to consider whether an updated/enhanced PD12A is needed to specify that the task of the judge at the IRH is not only to define outstanding issues and timetables, but with sufficient court time, to also explore whether/how disputes might be resolved. In the same way a settlement conference judge, when ‘invited’ can give an opinion as to likely outcome, likewise the IRH judge, if invited, could also give a view – with safeguards outlined herein.

- Guidance for professionals to accompany an updated PD12A may also be helpful. Given the nature of the issues and a need for stakeholder input (lay, clinical and professional), such guidance may best be undertaken by the Family Justice Council in collaboration with relevant representatives on the Council.

3 Potential benefits of revisiting the IRH

- PD12A (if, as amended) plus Guidance for professionals would apply to all public law cases. Judicial practices to explore potential for party agreement at an inquisitorial IRH would be more consistent and transparent; safeguards regarding due process are in place and can be subject to evaluation.

- It would keep the issue of party consent and the practices leading to it within the framework of judicial case management and the appeals system, and key principles of fairness and access to justice in a problem-solving structure. It would thus also be more likely to meet the principles outlined in the modernisation programme and to gain lay, public and professional support.
PURPOSE AND STRUCTURE OF REPORT

This report explores advocates' views and experiences of judicial practices in a sample of settlement conference pilots. The research was commissioned amid concerns about the procedure and a lack of independent academic evaluation of pilots both here and in other jurisdictions.

The report starts by setting out the legislative and policy framework in which the pilots are situated and the challenges facing the family justice system in an extended period of austerity, and with regard to the principles set out for the modernisation programme for court and tribunals.

Secondly, the report addresses the background to settlement conference pilots and the reasons underscoring its introduction in England and Wales, the professed benefits, and the protocol covering principles of practice. Thirdly, it sets out issues and concerns about the procedure in the light of principles of fairness, access to justice, the rule of law and due process, as these relate to children and family court proceedings and the role and public expectations of family judges.

Fourthly, it sets out the aims and methodology for the research; this is followed by seven sections (A – G) reporting on findings under the theme headings set out in the interview schedule:

Section A sets out the sample respondents, number of settlement conferences attended and judges observed.

Section B explores the selection of cases by judges, case criteria and screening, imposition of the procedure on parties, and the types of dispute referred to the procedure.

Section C examines advocates' experiences of judicial approaches to running settlement conferences. It highlights variation in approaches and while most judges were described as calm, patient and facilitating, some caveats applied and a small number of judges gave rise to concerns in their approach to parents and others. This section also judicial approaches to explaining the procedure, negotiating with parents and ascertaining ongoing consent. It addresses issues of fairness and human rights – and identifies most advocates had mixed experiences regarding issues of fairness. It looks at some of the differences between a settlement conference and an Issues Resolution Hearing (IRH), juxtaposing the benefits and limitations of both procedures.

Section D explores the position of advocates in the procedure: it identifies variation in judges' approaches to the role and involvement of parties' representatives with some judges described as 'inclusive', others not. It explores whether respondents were able to consult with their clients within and outside of the procedure and whether there were any barriers. It highlights how some new seating arrangements could make it difficult to support/advice lay clients where they became anxious/distressed. It also raises questions about the approach of some advocates, for example, with regard to stepping in or calling a halt to the procedure where parents became distress/effectively disengaged with the procedure. It highlights limitations in the application of the principles of the Protocol (2016) by some judges and advocates.

1 At the start of this research there is no evidence of independent academic evaluation of the procedure in the UK or elsewhere (e.g. Canada, B-C); the latter requires more detailed investigation than is indicated in subsequent Guidance documents for England and Wales – see note 18, below).

2 Briefly in lay terms this means that a law that is duly enacted by the legislature is valid if it has followed the correct procedure. Following this doctrine means, for example, that a person can be deprived of his life or personal liberty according to the procedure established by law. Settlement conferences within proceedings – if they are lawful, cannot stand outside of that framework: the procedure should not reduce the rights and safeguards already provided for litigants in general, and children and parents in particular, as these face proceedings in which children may be permanently removed from birth parents/families.
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Section E addresses the role of the children’s guardian and the voice and rights of children and young people under the UNCRC. It explores how often the guardian was present and whether and how judges included them in discussions. Respondents identified variability in judges’ approaches to the involvement of guardians and on occasion, some worrying practices. This section highlights the need for skilled, experienced guardians; it also identifies the importance of being well briefed and explores other factors, such as timing and listing practices which can impact on the guardian’s participation. This section also addresses the voice and rights of children in the procedure, and in particular, potential involvement of older and competent young adults.

Section F examines issues of continuing consent as this is addressed by both judges and advocates. It explores whether/how ongoing consent is addressed, and whether judges return to this issue once the procedure begins: some do this with care, others do not. For some judges and some advocates, the message appears to be that if parents (and others) remain in court, that implies on-going consent. Section F also explores issues of procedural fairness, outcomes (in terms of consent orders obtained) and respondents’ views about the role and capacity of an IRH in public law proceedings to achieve the same or similar result.

Section G sets out the conclusions and ways forward. It identifies the strengths and weaknesses of data to data and as an evidence-base for a further roll out of the settlement conference models herein, comparing findings with the ‘Basic principles of practice for settlement conference pilots’ (2016), and with key concerns set out in the introduction. It offers a way forward (a) by improving the settlement conference pilot model and case criteria, and (b) improving existing inquisitorial case management practices at the IRH stage of the PLO for all public law cases, incorporating some of the key benefits associated with settlement conferences.
INTRODUCTION

The legislative framework: The Children and Families Act 2014 and the 26-week mandatory limit

1 Settlement conferences have arrived on the family justice landscape in England and Wales when concerns about court resources, limits on legal aid and a mandatory time limit for case completion dominate debates. Despite changes following the Family Justice Review (FJR) (MOJ, 2011) private and public law children applications continue to rise, and by a magnitude said to be unsustainable within the resources currently allocated to family courts.

2 The Children and Families Act 2014 put into effect changes proposed by the Family Justice Review (2011). The major areas of change were s.14 (statutory time limits), s.13 (expert evidence), s.15 (care plans) s.8 (contact while in care) ss 2 & 3 (adoption) and s.9 (Contact after adoption). A key change was the introduction of time limits and timetables in care, supervision and other family proceedings (s.14).

3 Section 14 of the Act placed the 26 week timetable set out in the revised Public Law Outline [PH 36C] (the ‘PLO’) on a statutory footing by way of insertions into s.32 of the CA 1989. Section 32(1)(a) requires the court to draw up a timetable with a view to disposing of an application (i) without delay, and (ii) in any event within twenty-six weeks beginning with the day on which the application was issued. While some felt the wording (‘with a view to’) suggested flexibility, the (then) President made it clear that was not the intention (President’s View No.1, April 2013). That was later incorporated into the decision in Re S (A Child) [2014] EWCC B44 (Fam), where the President stated “this deadline can be met, it must be met, it will be met. And remember, 26 weeks is [. . .] a maximum, not an average or a mean. So many cases will need to be finished in less than 26 weeks.”

4 The Act makes provision for proceedings to extend beyond 26 weeks in certain circumstances, although not by drift. Rather, the timetable can be changed by way of specific ‘revision’ (see below). Subsequent debate and further case law (e.g. Pauffley J in Re NL [2014] EWHC 270 (Fam), para 40) addressed potential injustices and asserted “Justice must never be sacrificed upon the altar of speed.” (as indeed did Sir James Munby P in Re S, para 29). However, as others have pointed out, that is not what the 2014 Act says: it says that proceedings may take longer than 26 weeks when this is “necessary to resolve the proceedings justly”. The President in Re B-S (Children) (Adoption Order: Leave to Oppose) [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035, dealt with the possibility of extension beyond 26 weeks in a potential adoption case if the court was not properly equipped to make decisions. In this judgment he said (para 27) “That approach, which is entirely compatible with the requirements of section 32, applies not just in the particular context under consideration in Re B-S but more generally”. There was considerable confusion and uncertainty following judgment in the cases of Re B-S [2013] EWCA Civ 1146 and Re B (Care proceedings: Appeal) [2013] 2FLR 1075. In the judgment of the case of Re R (A Child) (2014) EWCA Civ 1625, the President addressed the ‘post Re B-S landscape’ and sought to clarify the issue further.

5 This landscape was again addressed by the President in Re S (Parenting Assessment) [2014] 2 FLR 575, (para 24) referring to the 26 week rule but turning to the qualification in s. 32 (5) at para 26-27: “the general principle that, if the court does not have the kind of evidence it needs if it is to be properly equipped to decide issues before it, then an adjournment must be directed, even if this takes the case over 26 weeks”. The President continued, “...the outcome is not to be determined by rigorous adherence to an inflexible timetable if justice if thereby potentially denied.” He went on to endorse the words of Pauffley J in Re L (as above) “Justice must never be sacrificed on the altar of speed’. He continued (paras 30-34) that despite the imperative demands of s.32(1)(a)(ii) of the Children Act
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1989, there can be exceptions and went on to set out the test: an extension beyond 26 weeks is to be permitted only if it is ‘necessary to enable the court to resolve the proceedings justly…’. Moreover, extensions are ‘not to be granted routinely’ and require ‘specific justification’.

6 Further, in a recent judgment (In the matter of P-S (Children) [2018] EWCA Civ 1407) the President by way of supplement to the judgment of Sir Ernest Ryder added some concluding remarks regarding the imperative to conclude care cases within 26 weeks. Addressing s.32(5) he went on to offer ‘some preliminary and necessarily tentative observations’ (paras 32-34) as to the forensic contexts (para 33 (i)-(iii)) in which an extension of the 26-week time limit in accordance with s.32(5) may be necessary. He concluded ‘I repeat because the point is so important, that in no case can an extension of the 26 weeks be authorised unless it is “necessary” to enable the court to resolve the proceedings “justly”. Only the imperative demands of justice – fair process – or of the child’s welfare will suffice’ (para 34).

7 Nevertheless, the 26-week deadline on which statistics are gathered by courts and by judge is a key factor in debate about developments in children cases following the Family Justice Review and subsequent reform. Some commentators suggest it is a key driver in piloting settlement conference procedures. However, alongside this statutory deadline for case completion, there are concerns that, despite local authority endeavours to divert some vulnerable families from statutory intervention by earlier and better targeted support services and by attempts to improve multi-agency/multi-disciplinary support, the number of applications continue to rise. And at the ‘coal face’, courts and practitioners struggle to maintain a balance between speed for case completion, and issues of justice and fairness in the face of reduced resources and complex family profiles. But while statutory time limits on cases and year-on-year increases in children applications are a key part of the landscape into which settlement conference pilots have been introduced, they are not the only development in the justice arena.

Modernisation programme for courts and tribunals: transforming justice

1 Developments in family law children cases also take place within wider reforms aiming at a transformation of justice and tribunals following the work of Sir Michael, now Lord Brigg in his Civil Court Structure Review. The purpose of his review being to identify how best to preserve the strengths, address the weaknesses, maximise the opportunities and manage the threats facing civil courts. A central recommendation was the creation of on-line courts for certain types of disputes, initially ‘low value’ money claims, but with the possibility of other disputes being moved to on-line courts. Such courts are designed for use by litigants without legal assistance (such as those developed in British Columbia).

2 For the purposes of family law courts, apart from an on-line service for divorce, digital courts are not currently envisaged for other types of family cases. However, developments have implications for children cases on at least three levels. First, because the programme makes the case for establishing an


4 Ofsted figures for 2016-17 indicate a year-on-year increase in cases with almost 41,000 new private law cases received in 2016-17 – an 8.4% increase from the previous 12 months, with public law cases up 11.6% compared to the previous year. Paras 8-10, Inspection of Cafcass 2018 (https://reports.ofsted.gov.uk/cafcass/national-inspection-reports).


8 DJ Chris Lethem, Judicial Adviser to the Online Court: What do the reforms mean for the judiciary and legal professions, https://www.ucl.ac.uk/laws/sites/law/files/ucl_foj_02_02_lethem.pdf
evidence-based agenda for moving forward; pilots are thus seen as key in deciding what does and what does not work in the modernisation programme. Second, with regard to improved decision-making the programme highlights a need for rigorous and informed judicial training (and feedback) and for a problem-solving approach, and third, in the reassertion of the key principles of fairness, access to justice and the rule of law within the programme. All these issues are central to any development/change in children proceedings.

With regard to establishing an evidence-base for reforms, the introduction of digital court within the HMCTS reform programme, the use of pilots is said to be key, and embedded. It is argued we are now far more used to testing reforms through pilots – to see how they operate, whether they achieve their aims, whether there are unintended consequences and how these can be addressed before any programme is rolled out.

Reforms need to be implemented through rigorous and informed training. And, as Sir Ernest Ryder argues while it might be said judges do not need training in how to make decisions (having spent their careers testing evidence hypotheses and theories and drawing conclusions, critical thinking is in the judge’s DNA), in the face of the modernisation programme there is much to be learned to improve skills and extend judge craft to meet the challenges of the programme. Key to these and following the Briggs reforms was a move (already well-known in the family jurisdiction) to a problem-solving focus in the civil judicial process. In civil proceedings this differs from the traditional common law adversarial process, it is intended that judges become more investigative and this requires different or at least additional skills to the forensic approach central to the adversarial system. The aim is to bring what is described as a form of mediation and early neutral evaluation into case management ‘drawing on the skills and experiences in financial dispute resolution hearings, issues resolution hearings and settlement conferences’. In family proceedings and public law children cases in particular, it should be noted these have been ‘hybrid’ for some time, incorporating inquisitorial and investigative procedures.

One consequence of the modernisation programme has been a series of documents distributed by the Lord Chief Justice and the Senior President of Tribunals known as ‘Judicial Ways of Working – 2022’. Amongst other things, they seek judicial views of the modernisation programme and on how to simplify, clarify and improve processes through digitalisation, to incorporate and expand provision for ADR and Online Dispute Resolution (ODR), to increase the use of technology and video hearings, to increase access to justice and provide a flexible, diverse and skilled judiciary.

A further issue highlighted by the modernisation programme is a debate on the principles of justice which should underscore and drive the programme. For example, Sir Ernest Ryder argues changes are about ‘greater access to justice and improving the quality of justice’; planning for change is not merely moving from analogue to digital based systems (the latter is simply the means to deliver the message). Rather, he argues the message of the programme is ‘greater access to better quality justice in a justice system that best safeguards the rule of law in the 21st century’. Moreover Sir Ernest argues, ‘Access to justice is an indivisible right – there can be no second class, even in – and I would say particularly in, an age of austerity’.

11 In coming together with the Lord Chief Justice (Lord Thomas) and the then Lord Chancellor, set out the aims for the modernisation programme and six principles. The aim was to “give the administration of justice a new operating model with a sustainable and affordable infrastructure that delivers better services at a lower cost in order to safeguard the rule of law by improving access to justice” (note 9 above)
12 Ryder, LJ – see note 10 above, page 6, para 13 therein.
14 See note 13 above.
15 See note 9 above – page 2, para 3 therein.
16 See note 9 above – page 3, para 6 therein.

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16 See note 9 above – page 3, para 6 therein.
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7 These then are the policy contexts, debates and legal framework into which children settlement conference pilots are placed.

Settlement Conference pilots in children cases

1 Settlement conference pilots in children cases in England and Wales were inserted into the Public Law Outline (PLO) case management framework, beginning in one court in July 2015, with a small number of courts subsequently added (see below). The formal aim of settlement conferences is to encourage parties to reach an agreement on disputed issues by way of a consent order or give any direction that s/he thinks appropriate. Like settlement conferences the procedure is confidential. If the judge/master needs evidence to decide on an issue, the case will go to a hearing. The leaflet concludes, ‘A FCC isn’t the place to make decisions about substantial issues if the two of you don’t agree’. See, http://www.familylaw.co.uk/system/uploads/attachments/0001/9829/FPR_PD12A.pdf.

2 Various forms of settlement conferences or similar judge-led procedures are used in other jurisdictions; in some (e.g. North America and British Columbia Canada) they are used in some private law disputes, while Nova Scotia has started using them in child protection proceedings. However, as indicated below while there is considerable variation in the models used, there is little evidence of independent academic evaluation of procedures, and in particular the approach which judges use in children cases, and in public law cases in particular. There is some judicial support for trying the pilots in England and Wales – in the face of increasing applications and limited court resources, but indications are support for the procedure is not unanimous. There are concerns – and little consensus about the approach judges should adopt in seeking settlements from vulnerable parents. Judicial techniques in North America are known to vary; some judges are described as uncomfortable with the scope and ethical responsibilities in settlement conferences, and concern has been expressed about behaviours by some settlement conference judges.


18 Which was incorporated into subsequent Guidance, President of the Family Division, 5 July 2017 https://www.judiciary.gov.uk/publications/settlement-conferences-pilot/

19 British Columbia Provincial Court has a procedure call a ‘Family Court Conference’ (FCC). The judge/master at an FCC, can mediate on any issues parents cannot agree, decide issues that don’t require evidence, require parties to participate in a family dispute resolution process, require parties or a child to attend counselling, make any orders parties agree, give a non-binding opinion about the likely outcome of a trial, reserve a trial date and a pre-trial conference date. If necessary, and, depending on the circumstances, the FCC judgelmast can also make procedural orders to ensure the case is ready for trial or make any order or give any direction that s/he thinks appropriate. Like settlement conferences the procedure is confidential. If the judge/master needs evidence to decide on an issue, the case will go to a hearing. The leaflet concludes, ‘A FCC isn’t the place to make decisions about substantial issues if the two of you don’t agree’. See, http://www.familylaw.lss.bc.ca/resources/fact_sheets/Family_Case_Conferences_Provincial_Court.php. The Court of Appeal and the Supreme Court of B-C also have settlement conference procedures, see, http://www.courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/civil_practice_directives_/PDF/(Civil)Judicial_Case_Conferences.pdf and, http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/civil_practice_directives_/Civil_Judicial_Case_Conferences_Provincial_Court.php. The Court of Appeal and the Supreme Court of B-C also have settlement conference procedures, see, http://www.courts.gov.bc.ca/practice_and_procedure/civil_practice_directives_/PDF/(Civil)Judicial_Case_Conferences.pdf and, http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/civil_practice_directives_/Civil_Judicial_Case_Conferences_Provincial_Court.php.


21 In Federal systems such as North America, Canada and Australia child protection – or child welfare as it is sometimes called, is dealt with at state/territory/provinces level; each state has its own legislation and rules governing the protection/welfare of children and disputes between families and the state.


24 See Cratsley J, note 23 above.
3 While some pilots in England have now been running for some time, we lack data on the range of approaches judges use and whether, for example, some approaches may be more appropriate or productive than others in facilitating agreement between parties, whether this might vary according to the matter in dispute, and whether some agreements do not hold and why.

4 Moreover, while the dominant discourse as to the benefits of such procedures is well rehearsed (in terms of professed savings in court time and resources, and reductions in fully contested final hearings), little is known about any risks inherent in the procedure for the children and parents/families involved, or for the justice system in terms of public confidence in courts and judges as impartial and fair decision-makers, and issues of access to justice.

5 Equally, evidence from other jurisdictions indicates judges have different approaches to the role of advocates in settlement conferences, but we have little/no data on advocates’ views as to whether issues of fairness, human rights and access to justice are properly addressed or maintained.

Protocol as to Basic Principles for Settlement Conference Pilots

1 The research herein reports on advocates’ views and experiences in the initial five MOJ pilot areas\(^\text{25}\) in the period, 10 October 2016 to 30 June 2017 (see below, Methodology). Key to pilot practices during this period was the ‘Protocol as to Basic Principles’ (Nov 2016)\(^\text{26}\) (see Appendix 2). Key principles from that document for this research are:

<table>
<thead>
<tr>
<th>‘Para 1 Protocol aims and objectives</th>
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<tbody>
<tr>
<td>a. The role of the Settlement Conference is to facilitate discussion of the issues, clarify information, analyse issues and promote understanding between parties with a view to helping to identify solutions.</td>
</tr>
<tr>
<td>b. It is the parties and not the Judge who determines whether there is agreement on any of the issues and whether an order will flow following such agreement.</td>
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P2 Training

a. All Judges who operate this scheme have received appropriate training.

P3 Participation

a. All parties must consent to a Settlement Conference by signing a document (see Appendix 1, Annex A) and be provided with information (Appendix 1, Annex B)\(^\text{27}\).

b. Any party may withdraw from the Settlement Conference at any time and this will not, in any way, prejudice their case.

P4 Status of Settlement Conference

a. Pilot Settlement Conferences have the status of an Issue Resolution Hearing.

b. Where parties have legal aid, the Settlement Conference will be paid to providers as a further IRH if unsuccessful, and as a Final Hearing if successful.

P5 Judicial Continuity

a. A Judge who conducts the Settlement Conference should not be the Case Management Judge (unless all parties are agreed).

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\(^{25}\) That is, it excludes subsequent pilots in other areas such as that instigated in Milton Keynes County Court and Bucks and Guildford Family Court Hearing Centre, Surrey.


\(^{27}\) At the beginning of the first pilot (2015), consent was oral; later (by December 2016) it was required in writing (see Appendix 2, Annex 1)
b. If the Settlement Conference does not result in a resolution of all issues, the Settlement Conference Judge must not be the Judge who conducts the Final Hearing.

c. There shall be no communication about the settlement conference between the settlement conference Judge and the Judge undertaking the final hearing.

P6 Confidentiality/Privilege

a. Anything which is said by the parties and the Judge during the course of the Settlement Conference Process is confidential to the Settlement Conference. Any proposals made by any party shall not be referred to in the event that the matter is not settled save where issues are agreed and may be recorded as such.

P7 Listing

a. Settlement Conferences must be capable of being listed as a matter of priority so that delay is not encountered in the proceedings.

b. Generally, a Final Hearing should be listed so that all parties are aware of the availability of such a hearing if the Settlement Conference does not resolve issues.

P8 Role of Judge

a. For the purpose of the Settlement Conference, the Settlement Conference Judge will have access to the Court bundle (or such documents as the parties agree) and a case summary.

b. For the purpose of enabling the parties to have direct involvement in the Settlement Conference, the Judge may directly engage with any of the parties.

c. Such involvement will only be in the presence of the relevant party's legal representative who may raise an objection to such dialogue taking place without giving a reason. In the event of such objection the Judge will respect the legal representative’s position without question.

d. Notwithstanding the procedure is flexible, a party is never to be seen without his/her legal representative. If a party is not represented in Public Law cases, the Guardian will attend. In Private Law cases, CAFCASS generally and, if appropriate, to welfare issues, will be present.  

e. No pressure will be brought to bear on any party with a view to reaching agreement.

f. Exceptionally, and where the parties agree, one party can be seen by the Judge (in the absence of other parties) but that will only happen in the presence of their legal representatives. This is generally to be considered only if protective of Article 6 rights of the parties e.g. litigant wishes to speak to a Judge without other parties being present so that he/she is not prejudiced in any final hearing which may follow and there can be no risk of prejudice to the parties.

g. Where the Judge addresses a litigant with a view to probing issues, the legal representative is free to engage or object to any question or raise any issues.

h. The Judge will not ask legal representatives for a view on any issue as that may potentially embarrass the legal representative/party and go behind legal/professional privilege.

i. A Judge can give a neutral evaluation if the parties indicate that they wish this to be expressed. However, a Judge should point out that another Judge may disagree and should further point out any other limitations on his/her opinion.

P9 Pressure

a. At all stages of the Settlement Conference, the Judge will repeat that there is no pressure to agree anything. Further, a hearing date is available for full determination of the issues.

b. If there is any issue as to lack of understanding/capacity of any party or any effect of emotional pressure or vulnerability, the Settlement Conference must be terminated.

c. If a party has learning disabilities/mental health issues/or any other such issues as impact upon full participation, a Judge will be fully aware of this and only communicate with that
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party in a manner which is appropriate and upon appropriate advice from all parties and, in particular, that party's legal representative.

d. Judges must appreciate/be aware that a Judge/Court setting often intimidates a parent or vulnerable party. It is possible for a parent/litigant to answer a question/provide a response which is intended to please the Judge but does not reflect a true wish or need.

e. Although the judge should ask all parties to clarify their position as to disputed issue(s) once the judge has seen the party/parties for consideration of the issues the judge will not ask that party if the issue/issues are agreed. He will allow that party/parties to withdraw from the court to reflect or obtain advice from legal representatives as to how they wish to proceed.

f. Any party's lawyer is free at any stage to contribute to the process of the settlement conference.

g. No party is required to speak directly to the Judge. At all times a party may refuse to answer a question/engage with the procedure or leave the process/terminate the Settlement Conference.

P10 Adjournment of Settlement Conference

a. If a party requests, a Settlement Conference can be adjourned for a period to allow reflection/consideration or further information to be obtained.

P11 The Voice of the Child

a. Where a child wishes to see the Judge, this may be arranged with the CAFCASS Officer/Reporting Officer/Guardian following the 2010 guidelines.

P12 Fair Process

a. It is critical to preserve a party's Article 6 and Article 8 rights throughout the process. Each party is entitled, if they wish, to a final trial. This cannot be abrogated by the Settlement conference process.

b. Settlement Conference Judges are Judges who have been appropriately trained in the process and who are willing to engage in such a process.

c. They must uphold the law and where appropriate international treaties such as the UN Convention on the Rights of Children and the European Convention on Human Rights during the Settlement Conference and when endorsing any agreement reached between parties.

P13 Role of Representatives

a. It shall be the primary role of the parties’ legal representatives to ensure that the party they represent remains engaged in the process on a wholly voluntary basis and that a [sic] party has a full understanding of the process.

Issues and concerns about settlement conference procedures

Key principles of family justice and public confidence in family court judges

1 Concerns have been raised about settlement conference and issues of due process, the need to test evidence, judicial impartiality, independence and fairness, equality of arms between parties and attention to Articles 6 and 8 of the ECHR, and Article 12 and General Comment 12 of the UNCRC.

2 Concerns are also expressed about public confidence in the family court where there is potential for a reduction in the safeguards parliament provides for children and parents who are subject state intervention in their lives, particularly where this may result in the permanent removal of a child. Where safeguards are perceived as at risk/reduced by changes which fall short of changes to law and without consultation, there are risks for public confidence the family justice system.
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3 There are three broad strands to concerns. As indicated above, the first relates to the position of families facing state intervention and public expectations of family court judges, the second relates to the immediate impact of settlement conferences on parents and children, the third looks at some longer-term implications for parents and children where the latter are permanently removed from parents following a consent order made at a settlement conference.

Families, the State and the duty of family court judges

4 With regard to the first strand, it is argued the family justice system has to be especially mindful of the public reputation of family court judges as arbiters of justice and fairness. In protecting vulnerable parties against the power of the state to intervene inappropriately in family life and in scrutinising the local authority’s statutory responsibilities regarding support and proper assessments of parents (Part III, CA 1989) – judges have stood between parents and the state, holding each to account, ensuring fairness, maintaining equality of arms, and hearing all the evidence before making decisions. Questions are raised as to the status of those principles in settlement conference procedures.

5 If it is the duty of the judge to analyse the evidence before the court and to communicate that analysis in a clear and straightforward way to the parties, to enable them to understand the likely approach of the trial court, there are some concerns about how a judge can do that at a settlement conference without hearing the evidence and legal challenges, and making a full analysis which includes the pertinent issues.

6 The second strand focuses on the experiences of and impact on parents in settlement conferences particularly where, for example, a parent consents to a child’s adoption during the procedure but where their stated intention and instructions immediately prior to the procedure had been to oppose such a plan.

7 There has been little discussion or analysis of issues of power and due process implications when a judge bypasses an advocate and negotiates directly with a vulnerable parent about complex and difficult issues, some of which may be issues of evidence. For some parents who are subject to public law proceedings, issues of ‘learned helplessness’ may influence their responses to a judge. They may also not fully understand that having agreed to try the procedure, they nevertheless are free to leave at any point; they may lack courage/not know how to call a halt during what may be an intense, judge-led discussion. They are likely to need special preparation where there is a potential for them to agree to an order that results in the permanent removal of a child and which order will not be open to future challenge or appeal.

8 There is little/no evidence of robust research – or proposed research about whether/how parents – often with profound problems, are prepared for settlement conferences, whether they fully understand and are able to engage in the procedure on equal terms, whether they feel it was fair and what they understand about the benefits of a hearing and due process.

9 It would be naïve to suggest that the impact on parties and parents in particular, of judicial utterances is negligible – that would be to deny the inherent power held by judges by virtue of their role and status, and to ignore the profile of parents subject to care proceedings. Evidence over many years demonstrates such parents have usually been subject to substantial state interference in their family life, they are usually on the bottom rung of the socio-economic ladder, frequently struggling with

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29 Procedural and substantive.
mental health issues and learning disabilities/difficulties\textsuperscript{32}. Increasing numbers have substance abuse problems\textsuperscript{33} and a substantial number have themselves been in care as children\textsuperscript{34}.

10 The preparation of such parents for a direct and sustained dialogue with a judge in which they must not simply listen but crucially, engage in critical listening and thinking\textsuperscript{35} – and be able to respond ‘on their feet’, presenting cogent arguments while remaining calm and coherent in the face of what may be a strong judicial view about the validity of their position and the potential loss of a child, is a considerable task.

11 Contributors raise concerns about a procedure in which the judge speaks and negotiates directly with a parent and the risk of increasing to an inappropriate extent the influence that the judge can bring to bear – by virtue of his/her judicial status and in a procedure that in theory at least, lacks the standard (and immediate) safeguards of civil court proceedings\textsuperscript{36}. Contributors ask what is to be gained by the judge descending from the bench and talking directly to the parents? It is suggested that it is likely to have an effect over and above the expression of an opinion by the judge – indeed, why else would modifications to judicial behavior be thought necessary, if not to have such an effect? Although some contributors argue it offers a potential for parents to feel empowered, others argue it risks a parent feeling intimidated, persuaded or pressured by proximity and a charming but nevertheless disarming manner.

12 It is also argued that techniques used by judges go beyond the judicial function; some suggest it results in an inconsistent collection of methods/techniques and bits of theory drawn from mediation, collaborative law, and counselling/therapeutic practices for which judges may be ill-prepared/trained, and where combined techniques remain unvalidated. Some contributors are concerned that the procedure and techniques employed are likely to result in judicial pressure on parties and that this is inappropriate from a judge of the family court.

13 Finally it has pointed out that in public law proceedings parents can and frequently do concede orders or aspects of a proposed care plan but they do so with advice from their representative who will also have argued their case with supporting evidence before the judge.

**Longer term outcomes for children and parents**

14 It is also pointed out that where the outcome for a child is adoption, the implications for the child and parents/families are life changing. The current ‘silence’ in debates about settlement conferences regarding research evidence on outcomes for public law children and the potential psychological damage to children where parents ‘give up’ on them, is said to be a matter of concern.


\textsuperscript{34} Broadhurst et al. confirmed earlier work re the likelihood that mothers who had children removed on child protection grounds had themselves been in care. The study, revealed that 40% of mothers who have had more than one child placed in care or adopted had lived in foster care/children’s homes; an additional 14% had lived away from their parents through other arrangements. Many had suffered abuse and neglect as children and 64% became pregnant as teenagers and struggled to cope with being a mother. The study also found that many of these women were unable to access support, either to help them cope with parenthood or to help them psychologically after their children were removed. See, Broadhurst et al (2017) Vulnerable Birth Mothers and Recurrent Care Proceedings (Final Main Report) – http://wp.lancs.ac.uk/recurrentcare/files/2017/10/mrc_final_main_report_v1.0.pdf. The Care Review

\textsuperscript{35} Listening is not the same as hearing. There is a literature about listening skills, there many types but perhaps four key types: Appreciative Learning (e.g. to music, a story etc), Listening to Learn/Gather Information, Critical Listening (to evaluate and analyse), and Therapeutic/Empathic Listening. The capacity to engage in ‘critical listening’ is arguably key for parents in settlement conferences, see for example: http://changingminds.org/techniques/listening/types_listening.htm

\textsuperscript{36} Judges speak directly to parents in FDAC courts but the two procedures are not directly comparable, for example, the FDAC court has a strong support package for parents during the assessment period and while parents attempt change. There is also a clinical/therapeutic arm for FDAC parents, and it is not a ‘one stop’ court hearing/procedure. The Litigant in Person (LIP) (with/without a McKenzie friend) also has a right to be heard and will speak directly to the judge but the circumstances are also not comparable to settlement conferences. The LIP is not there for a discussion as such: they are representing themselves, presenting their evidence, able to ask questions of witnesses and making submissions to the court.
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15 It has been argued over many years that one of the reasons parents defend proceedings is because they wish to ensure that their child(ren) will at some point know that their birth parent(s) did all they could to keep the child(ren) at home, and that they and their parent(s) had a fair and just hearing. This is said to be an important reassurance to vulnerable children and young people as they grow up in foster care or are adopted, and a support for their often-vulnerable self-esteem. It is also said to be important for the wellbeing of parents and for public confidence in the family justice system, that parents felt supported and represented on equal terms with applicants in their fight to retain care of their children.

16 We are frequently told by colleagues in the fostering and adoption field – and by young people in the care system, that children who are fostered and adopted ask about their origins, why they were removed from birth parents and why parents did not fight to keep them. Contributors question the effect on children in later years of a consent order arising from a settlement conference where, in ‘later life work’, they form the impression that parents effectively ‘gave up’ and consented to their removal.

17 This apparent gap between the philosophy of settlement conferences – insofar as anecdotally it addresses the impact on parents and children, is said to be particularly worrying at a time when family justice is said to be more concerned than previously with longer term health outcomes for children of judicial decisions, and where research evidence is posed as having a potential to better contribute to those decisions.

Voluntarism

18 Participation in settlement conferences is said to be voluntary but we lack data on how/when that information is conveyed to parents, whether practices vary across pilot areas and according to disputed issues.

19 Equally, we lack data about whether/how participation is checked during the procedure. Having agreed in principle to participate, once the judge speaks directly to a parent and negotiations begin it may be difficult for a parent to register a wish to discontinue.

20 It is pointed out that the role of an advocate is to advise and represent their client – and to stand between the judge and client. Under civil court procedures, a parent is in a strange/alien world, but their legal representative is there to be their voice, and an active presence between parent and judge, not a passive by-stander/observer. It may be that in practice, settlement conference procedures are experienced as no less strange/alien.

Settlement as an aspiration

21 While the risks for private and public law are debated, private children cases do have ‘settlement’ as a key aspiration; it is part and parcel of the rationale of court procedure. The aim is to assist the parties – usually, the father and mother – to work together for the benefit of the children and to avoid further acrimony that may arise in a contested hearing. The court process, especially with a Final Hearing Dispute Resolution Appointment (FHDRA) and the Child Arrangements Programme (CAP) are designed to achieve that end.

22 In public law proceedings however, while cooperation between parties in the conduct of the case is encouraged, settlement is not the primary aim. Rather the aim is a just analysis of whether the local authority on behalf of the state has demonstrated the crossing of the threshold criteria, and that the local authority has met its obligations under Part III, CA 1989, and then to analyse forensically, the welfare issues where the threshold criteria have been established.


38 https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12b
23 The settlement conference procedure was initially intended to take place following an IRH (in public law cases); it should be before a different judge (i.e. not the CM judge/judge of final hearing) who has read the papers but has not heard evidence or legal submissions but can offer a ‘neutral evaluation’ on the basis of evidence filed to date.

24 A judge may form a view on the papers which sometimes appears to be clear cut. However, judges and lawyers have not been slow to identify cases in which the complexion of a case changed during a contested hearing, sometimes with surprising results that enabled a child(ren) to go/remain at home – and in what had appeared on the basis of the papers, to be a ‘hopeless’ case. For example, as in the comments of HHJ Lynn Roberts in Re William (dismissal of application for a Placement Order) [2018] EWFC B51 (27 July 2018) at para 85: “When this case started, reading the unanimous positions of the professionals, I expected that the local authority would prove their case but this has not happened.” Contributors also highlight cases which have changed direction as a consequence of parents and the guardian hearing the evidence in court.

25 Contributors argue that if, by design or practice, these outcomes are routinely prevented by settlement conference procedures, this renders the procedure inappropriate: it reduces access to justice and would diminish public confidence in family judges.

The PLO: Issues Resolution Hearing (IRH)

26 Contributors ask whether an IRH – properly run and as first intended, could achieve the same results as a settlement conference; some suggest much could be achieved by improving case management by judges within the PLO framework at the IRH stage.

27 Notwithstanding limitations now said to attach to the work of a judge at an IRH (with regard to expressing an opinion as to the likely outcome before hearing the evidence and legal challenges) it is suggested that assessing the evidence and any omissions/gaps and addressing the ‘direction of travel’ with parties, is part and parcel of the case management role of the IRH judge. A professional CM judge seeks to assist the parties by pointing to the hurdles that appear to confront parties at that juncture, be they parents, children or a local authority. The PLO from its early instigation is built on an inquisitorial model of judicial case management.

28 It is further argued that it would benefit the system as a whole to focus on universal case management practices within the PLO framework, improving the time available and the contribution of the judge and others at all IRHs, with the aim of avoiding some final hearings, that being one of the original principal objectives of the IRH.

The research

Aims and objectives

1 The research reported below cannot address all of the questions raised above – that would require a multi-level multi-method study involving all stakeholders and a review of court files. Rather, it seeks the views and experiences of a sample of advocates attending settlement conferences focusing on some key questions. It aims to assist practitioners, professional bodies, judges, policy makers, and

39 It is not currently a matter of record as to which documents are read by the settlement conference judge or whether this is consistent across all pilot areas; practices also appear to vary across other jurisdictions.


41 For example, contributors point to the role of active case management by judges, this includes impartial decision-making in the interests of justice while also actively encouraging parties to co-operate with each other in the conduct of the case and helping parties to settle.

42 And this would require data on pathways and a control/comparison group – which could be undertaken if/when there is a sufficient number of cases and a follow up period is thus available. Qualitative data provides an important starting point; it sets out questions to be pursued in larger scale quantitative work; combined these provide a strong evidence base for future policy decision making.
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others to get a better picture of the types of disputes selected, how conferences operate, how they are experienced by advocates within a framework of parties’ rights and expectations of courts and judges, and to indicate areas that may require further attention.

Methodology

1 This is a qualitative study based on in-depth telephone interviews with 19 advocates. It reports on views and practices in 61 settlement conferences in the initial pilot areas identified by the MOJ.

2 Interviewee recruitment was threefold: by open invitation to members of the Association of Lawyers for Children (the ALC) and other specialist children’s solicitors and Family Law Bar Association (the FLBA) members in the pilot areas. In some pilot areas responses were very poor with multiple indications that in practice, very few settlement conferences were taking place. That finding would need to be verified against MOJ data for the period but informal discussions with the MOJ and Resolution confirmed that position as at May 2017.43 The initial recruitment protocol was therefore followed by two appeals on specialist child law websites for practitioners – with experience of settlement conferences. All practitioners who responded were contacted and offered an interview; a small number were subsequently unable to participate because of court commitments. The next respondent on the list was therefore contacted. The strengths and weakness of the sample are addressed in the concluding section.

3 Interviews were undertaken according to a semi-structured interview schedule with closed and open-ended questions (see Appendix 1); interviews ranged from 30 to 72 minutes and were recorded to assist accurate reporting of views and experiences.

4 Responses were coded according to the categories on the interview schedule and collated in spreadsheet according to the key headings and questions explored in the interview (see Appendix 1). Findings are presented below according to the themes explored (Sections A – F above) and presented for the sample as a whole (see below, confidentiality).

5 In line with qualitative research principles, findings are not intended to be statistically representative for pilots as a whole. Rather they provide feedback for policy makers and family justice professionals based on advocates’ first-hand experiences and observations of settlement conferences, whether/how they achieve the pilot objectives and in what circumstances (i.e. as against stated operational principles) and in the context of concerns about the procedure outlined above. As such they provide an important starting point in framing both further thinking and larger scale quantitative research and the costings data likely to be necessary.

6 For the purposes of this report parties’ representatives (solicitors and barristers) are referred to as advocate respondents, and respondents or advocates for shorthand.

7 The project ran from 10 October 2016 to 31 January 2017; it was extended on two occasions, closing on the 30 June 2017.

8 The information provided was on the basis that respondents, judges and others referred to in interviews would not be identified. While pilot locations are in the public arena, at the start of pilots at least, these involved a small group of judges; the sample thus presents challenges in presenting findings while maintaining confidentiality. As indicated above therefore, findings are presented according to the key themes explored in the interview and reported for the sample as a whole (i.e. not disaggregated by area). Where details of a case are included some changes (which do not affect the point being conveyed) may be made to aid confidentiality. The judges involved in the pilots were both female and male; to assist confidentiality they are all referred to herein as ‘he’.

43 But see, Summerfield, A [forthcoming] [w/t] Exploring the early implementation and delivery of the settlement conferences pilot: A process evaluation. London: MOJ.
SECTION A
RESPONDENTS, SETTLEMENT CONFERENCES AND PARTIES REPRESENTED

Number of advocate respondents, settlement conferences and judges observed

Findings below represent the views and experiences of nineteen advocate respondents attending a total of 61 settlement conference procedures across five court areas.

With regard to the number of procedures attended by respondents, overall:

- Most advocates (14/19) had attended more than one settlement conference – some had attended many more with the maximum being in the region of 12-15
- 5/19 respondents had attended one conference only

With regard to the number of judges’ styles/practices observed by each advocate:

- Eleven advocates observed one or more conferences – all before the same judge
- Eight advocates observed more than one conference and more than one judge

Parties represented by respondents

- Most advocates (14/19) represented children and/or parents/adults,
  - Those representing parents/other adult parties only were the largest single group
  - Those representing children only or a local authority only were the smallest group
SECTION B
SELECTION OF CASES FOR A SETTLEMENT CONFERENCE

In this section we explore whether advocate respondents were aware of how cases were selected for a settlement conference, the types of dispute subject to the procedure and whether they had any experience of a settlement conference procedure being imposed on a party.

Criteria and screening process: why this case?
Respondents were asked whether courts operate consistent and transparent criteria/screening procedure for the selection of cases for a settlement conference.

Overall, very few advocates were aware of any criteria applied to case selection, most (15/19) said there were no criteria or they simply did not know why their case(s) had been selected – some felt the question of criteria for case selection was simply not being asked. Some cases had been selected ‘on the day’ (see below); others reported that every case in their area was selected, regardless of the issue(s) in dispute. For example:

“I don’t know, if there is one, I have no idea what it is…[the] first case had two settlement conferences as the first one was adjourned…it was adjourned for a third conference but that never took place in the end.” [R-9]

“I don’t know. We didn’t know why this case had been selected.” [R-10]

“I don’t know. But my guess is no. I got the impression our case was chosen to rustle up cases that could go into the pilot.” [R-11]

“I don’t know …this was the first case I’ve been involved in that has been selected and I was surprised it was selected. It was suggested at the IRH – not because we hadn’t been able to agree, more as if they were looking for cases to try settlement conferences out on. I think maybe it depends on the judge.” [R-13]

A further respondent referred to a case that was supposed to have gone to a settlement conference but didn’t:

“…that first [case] I could understand as the proposal was to return children to parent’s care and it was a matter of agreeing the support package…and it was clear it would settle.”

However, he continued [a further case]

“…had been scheduled for a settlement conference by the judge – who though it was worth a ‘shot’ [but] we were all quite surprised to be there in a settlement conference…. the local authority wanted [the child] placed for adoption and that was opposed by both parents who were presenting together, so there seemed to be little room for manoeuvre.” [R-16]

In a further area where the respondent also reported being unaware of any criteria for proposing a settlement conference, the respondent said [the judge] “pounced on him” during a directions appointment; he said he felt “put on the spot”. He said the IRH was already listed, but continued,

“…being cynical [I think] the judge seized on the case because it was likely to have a positive outcome at a settlement conference… [it] would have settled at IRH anyway. [The] final hearing hadn’t been listed yet.” [R-6].

A further respondent said initially case selection was not on the basis of a transparent criterion or screening process by the court, but that had recently changed:
“They do now. The process is a lot better and a lot clearer than it was at the start. There is a new template now about the process. This has clarified that the SC will always be heard by a different judge and that everyone has to be in agreement. All lawyers were asked to look at their caseloads and decide whether the case would be better going to IRH or SC. It has to be voluntary and the advocates have to think there is a realistic possibility of settlement”. [R-1]

2/19 respondents were aware of why their cases had been selected; one reported being clear as to the criteria applied and felt screening had been appropriate and transparent, the other (acting for the local authority) had suggested a case to the court.

In one area it was reported that following representations made to the court regarding concerns about a lack of transparency about how/why cases were selected, practices by one judge at least had changed. The respondent reported the process was made a lot clearer with advocates also asked to assist the court in the identification of cases where there was thought to be some potential for a settlement conference procedure. In another area a similar practice was emerging:

“I think they’re trying to get a vibe for which ones look likely, but they’re looking to us to say, ‘well I know he’s not saying he’s agreeing but I think he might…’ I think it’s just a, there seems to be a standard question at the moment, ‘is it suitable for a SC, yes or no?’” [R-6]

5/19 respondents said there were no selection criteria. As with those advocates who were simply unaware of how cases were selected, these advocates went on to say selection appeared completely random with some judges wishing to be seen as supporting the pilot. However, one respondent said that while she was not aware of any criteria as such, in both her cases she thought the selection had been appropriate. Others said they felt it was simply down to the approach of the individual judge on the day – sometimes coupled with wider issues, such as “trying to rustle up cases for the pilot”.

Overall therefore, in some courts and in some cases neither advocate nor parties could be said to come to court with clear knowledge of what was to follow and the parameters of the procedure for which clients should be prepared. Where advocates and parties arrived at court for a hearing to discover the case was listed for a settlement conference, things could be rushed/chaotic while advocates and clerks attempted to discover what was happening. As indicated below some respondents also reported a degree of judicial pressure on parties to participate at this point.

The picture therefore – so far as transparent criteria for the selection of cases is concerned is best described as a continuum: from courts/judges where every case is expected to go through a settlement conference procedure (i.e. no case-specific criteria) to those where a judge had moved to improve transparency (after representations from advocates) and thus sought advocates’ assistance in the selection of cases/disputes.

However, the experience of most advocates was that there was a lack of transparency as to criteria applied in case selection, and a degree of randomness and unpredictability within and between some courts. To many advocates case selection appeared to be completely arbitrary/idiosyncratic.

There was evidence of a lack of planning/prior communication with advocates, so that parties and advocates arrived at court for a hearing to be re-listed for a settlement conference. While a limited number of cases selected were viewed as appropriate for a settlement conference, many advocates expressed surprise at cases selected by judges. For example, cases were selected where the issue in dispute was adoption and/or where the complexity of factors, number of parties and issues in dispute, made it clear to advocates at least that agreement would not be reached. At the time of the fieldwork there was limited evidence that advocates had felt able to address these concerns with the Designated Family Judge (DFJ).

44 This interview was undertaken in the latter part of the fieldwork.

45 “Taking into account the complexity of the issues, timescales and realistic chance of success of parents at a final hearing” [R-14].
Selection criteria – key findings

- Very few judges made explicit their criteria for selecting cases for a settlement conference: almost all respondents (17/19) said they were unaware of how/why their case(s) had been selected.

- In one court all cases were selected, in other courts respondents thought selection was random/idiosyncratic:
  - Some judges were thought to be simply trying to rustle up cases ‘on the day’ to demonstrate a willingness to try the pilot/increase numbers in the pilot.
  - Some cases were selected where the advocates agreed it was always going to settle at the IRH (i.e. where a settlement conference preceded or was held instead of a scheduled IRH).
  - Some cases were selected because the 26-week deadline was imminent.
  - Some cases were selected where advocates said there was no chance of a settlement.

- In one court practices had changed following concerns expressed by advocates – with the judge then looking to advocates to help identify cases thought likely to collapse on the first day of the final hearing. With notable exceptions however, the majority of judges did not appear to discuss criteria for case selection and suitability with advocates.

- Overall, evidence of a ‘developmental’ approach by judges – to criteria applied in case selection and the involvement of advocates in such discussions was limited. While teething problems might be anticipated in the early days of the first pilot, some 12 months on there was little/no overall evidence of a developmental approach to case selection.
Do respondents have any experience of a settlement conference being imposed on a party?

**Pressure applied and procedures imposed**

Overall, 7/19 respondents said settlement conferences had been imposed on a party: examples came from almost all pilot courts.

“Yes – on a client who had limited capacity...the client [was] essentially bewildered by the process and had no understanding of what the process was. The feeling was, there was no choice actually...” [R-1]

This respondent went on to say that at the start of the pilot, settlement conferences were used as a device in the face of listing problems where, for example, a matter was listed for a final hearing the following week and there was a question about court’s capacity to find a judge for that hearing. It was felt that listing pressures rather than any desire from parties to try or specific types of cases underscored decisions to re-list cases for a settlement conference. This advocate added that things had evolved and he had no recent experiences of a conference being imposed by a judge.

A further respondent reported that in one case judicial ‘encouragement’ for the case to go to a settlement conference was very strong. The respondent said it was clear to the advocates that the case was never going to settle:

“They were [several] different fathers and the issue was whether the plan for the children should be adoption or long-term fostering.” [R-8].

In another area a respondent reported that following concerns expressed to judges about pressure to consent, things had evolved; judges were now clearer about the importance of consent.

A further advocate from another area raised the question of informed consent from parents:

“I don’t think the parents in either case understood what was being suggested, so [I’m] not sure there was informed consent from them.” [R-12]

A further respondent discussed a case where a settlement conference had been imposed:

“Yes – in this case it was. The background to the case was that it was originally in [a court]... all the parties involved agreed to a final hearing. The respondent [and client] then left the court although the reps for the LA and the child had remained. The [clerk] had a problem finding a listing to fit within the 26-week time limit and had instead listed it as a settlement conference. This was a step of expediency to try to resolve the case within 26 weeks... which [I] find very troubling.” [R-15]

This respondent said his client arrived at the court expecting a three-day final hearing [but] found [himself] in a settlement conference. In the advocate's view the settlement conference was imposed without consent – effectively in his absence. The procedure had not been imposed where consent was discussed and declined, rather consent was assumed by the court.

A further respondent said in his case that a settlement conference has been imposed:

“My client made it very clear that she didn’t consent.” [R-16]

His client had said; “this is just an opportunity for the judge to bully me into agreeing a placement.”
Subtle and not so subtle pressure – and the difficulties of saying ‘No’

Respondents reported that the pressure to consent could be substantial; there were examples where both advocate and client were unhappy about participating but where both were pressed by a judge to engage in what was presented by judges as now considered ‘good practice’. This was applied in cases where respondents said it was clear to advocates, given the factors and issues and parties in dispute, that it was “never going to settle”. However, where a settlement conference judge was evangelistic about the procedure, advocates highlighted the difficulties of resisting and being labelled as such; it could be difficult – and in some areas, virtually impossible to refuse. For example, one respondent said that while technically, a conference might not be formally imposed on parties, where the judge “evangelises” about how wonderful settlement conferences are, this can make parties who are possibly dissenting feel as though they are being unreasonable – and especially where it is put to them with that this is a process that will also benefit them by being part of healing process, allowing them to “let go” and “move forward” without a contested final hearing. While this respondent had not been in a situation where a conference had formally been imposed upon a parent he represented, judicial pressure could be subtle but considerable.

Other respondents also said judicial pressure on some parents and advocates was subtle but determined, presented so that the client does not want to be seen as uncooperative/unreasonable in the light of what is presented as ‘reasonable’ ‘worth a try’ or ‘good practice’ by a judge. Once persuaded, a small number of parents were reported as not really understanding what was involved.

No imposition of the procedure on clients or advocates

A similar number of respondents (8/19) had not experienced a settlement conference overtly imposed in the face of an unwilling party or advocate; one respondent said [he] would not allow it, another referred to the Guidelines and the issue of consent. However, a further respondent in this sub-group said that consent had not been explicitly sought in her case, and once a court creates an expectation that settlement conferences are the ‘norm’ it is hard to resist. This was especially so in courts where the procedure was presented as now ‘good practice’ or where the question of consent was not addressed at a time or manner which supported ‘informed consent’ (i.e. where parents and guardians/young people had sufficient time and knowledge to enable them to make a decision without pressure, manipulation or undue pressure or influence.)

However, as with respondents who observed overt judicial pressure, some of this sub-group also went on to talk about how judicial pressure/coercion can be subtle, how consent may be ‘fudged’, taken for granted after a speech about the nature of settlement conferences, or a statement about ‘good practice’. This type of discourse as to ‘normal/good practice’ made it hard for some parents (and some lawyers) to resist – especially where judges adopted a ‘crusading zeal’ and attempted to ‘sell’ the procedure as also having a therapeutic/healing value for parents.

The quality and consistency of advocacy for some parents

Some respondents talked about the difficulties of poor/inexperienced advocates for parents and the impact on informed consent by parents. One respondent gave an example, where, when asked by a judge whether a particular case was appropriate he had to say strongly it was not; he had concerns about a parent’s advocate. He also referred to the complexity of some cases and the power of an impending court hearing for parents, but also their needs and thus the role of their representative:

46 This is not to say there were no examples of a client refusing consent despite judicial pressure, but in this sample these were rare. Note this may be a feature of the sampling procedure: we asked for advocates with experience of at least settlement conference; advocates who only had clients who had refused to participate or who routinely advised clients against participation will not appear in this sample.


48 Perhaps borrowing from General Comment 12 of the UNCRC – conditions necessary to enable informed consent (i.e. without pressure, manipulation or undue influence, in an environment which takes account of the child’s individual and social situation, and where he/she feels respected and secure when expressing opinions).
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“[But] it’s a very hard thing because unfortunately it’s the door of the court which very often and for various reasons for parents brings home the reality. That is the day they know a decision will be made…we lawyers work very hard to ensure the process is robust, but there’s an element of safeguarding your client…sometimes you have to go to the first day…”

This respondent reported that the judge in the above case was good with parents, saying they did not have to agree to the procedure; nevertheless, he thought the parents did feel pressured:

“…As a professional it puts you in a very difficult position…but I could feel what counsel was feeling…[the mother] was just one of those parents who needs her day in court…she’s got to be heard and if you rule against her [well] – that’s how it is [that’s the job of the trial judge] but [this] judge was still quite keen for it to be a settlement conference…

He later added:

“….. I would say most definitely for [this] mother it was not the right process… I [couldn’t] see [a chance of agreement at the end of it]. There was a history of very volatile [behaviour] at case conferences and PLO meetings etc. Everything screamed to me, ‘don’t go down the SC route because I don’t think this mother can hold it together’”. [R-6]
Imposition of a settlement conference – key findings

- Overall, 7/19 respondents said settlement conferences had been imposed on a party. Examples included parents with limited capacity, some who did not really understand what was being suggested and some who were reported as bewildered by the procedure.

- Some settlement conferences were utilised by courts in the face of listing problems, for example, when facing an imminent final hearing and concerns about a court’s capacity to find a judge, or where a case was likely to overshoot the 26-week deadline. In some instances, it was felt that these issues – rather than any desire from parties to try the procedure, underscored decisions to list/re-list for a settlement conference.

- Pressure to consent to the procedure could be substantial; there were examples where both advocate and client were unhappy about participating but where both were pressed by a judge to agree to participate.

- Some judges used a variety of measures on both parents and advocates. Some advocate respondents reported problems in resisting pressures and being labelled, some reported it could be very difficult – and in some areas, virtually impossible to refuse.

- Pressure on parents could be subtle (e.g. it may be suggested that the procedure can have therapeutic/healing properties for a parent) or it could be direct and overt. Where the discourses engaged by judges to persuade parents included terms such as ‘reasonableness’ ‘good/best practice’ and ‘worth a try’ it could make refusal difficult: parents may not want to be seen as uncooperative or unreasonable by a judge.

- In one area, following concerns expressed to judges about pressure to participate, being practices had improved; judges in that area at least were reported as now clearer about the importance of real consent.

- A similar number of respondents (8/19) had not experienced the procedure being imposed on parties. However, in this group there was also a concern that once a court had created an expectation that settlement conferences were routine/the ‘norm’, it was that difficult to resist.

- Examples of client or advocate refusal to comply with judicial pressure were rare.
Types of dispute referred to a judge in a settlement conference

Most advocate respondents (13/19 – about two thirds) had one or more cases where a settlement conference dealt solely with disputed welfare issues, these included:

- Care plans and placement disputes, including disputes about placement with extended family members under a Special Guardianship order
- Adoption or placement with family member/parent adoption plan before outcome of mother’s position regarding therapy was known
- Discrete details of contact support for proposed carers
- Supervision and frequency of contact with a child in care
- Placement issue and whether risk can be managed where threshold not accepted by parent(s)
- Contact issues and whether a local authority could be persuaded to provide services recommended by an expert
- Care of children and allocation of time between parent (private law)

About one third of respondents (6/19) had one or more cases in which a settlement conference addressed welfare but also threshold disputes including cases where the care plan was adoption. For some respondents that was something of a surprise:

“…[the] first case was less about a contest really, more an issue of seeing whether the settlement conference would put pressure on the local authority to deliver the services an independent expert had recommended would be needed. In the second case… a settlement conference was listed where threshold was an issue – which was odd in my view….” [R-9]

Another respondent referred to a recent referral which concerned unexplained injuries with added case complexities, where the welfare decision was made at the settlement conference but a discrete hearing was needed regarding causation of injuries. While this respondent thought settlement conferences were more often used for outstanding welfare issues, he continued,

“…if we get to a settlement conference with the [judge] without the threshold criteria having been agreed, the judge will tell us it’s got to be agreed – at the conference”

He added,

“Threshold often is agreed. Usually there’s enough [evidence] that parents will concede that. If there’s an injury, that’s a different matter. But if, for example, its neglect, there’s usually enough there that if people are sensible about it, they come up with something. Occasionally you get a party or representative, who is totally adversarial, and you can’t agree it. But generally, my experience is that [we] can agree it.” [R-7]
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Types of disputes – key findings

- Overall, cases referred to a settlement conference in this sample covered welfare and threshold disputes.

- For most respondents (about two-thirds, 13/19) disputes were restricted to welfare issues; this included disputes about placement of a child within an extended family, or adoption.

- The remaining one third of respondents (6/19) had one or more cases referred to a settlement conference which included both welfare and threshold disputes and where the plan for a child was adoption

49 And in terms of the magnitude of issues referred, these included a dispute as to whether risk could be managed if a child was placed with parents who did not accept the threshold criteria.
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SECTION C
JUDICIAL APPROACHES

Physical layout, seating of parties, representatives and the judge

In all areas, settlement conferences are held in a court room. However, there were differences across the pilot courts and between judges in the same court as to how judges orchestrated the seating plan for a settlement conference.

For example, in one area the seating arrangements remained the same throughout the procedure (i.e. as if it were a normal court ‘hearing’): for other judges, the procedure began with the same seating plan as a hearing but at some point, changed, with some judges stepping down from the bench and sitting in the well of the court facing clients and parties (with further changes as the procedure progressed), and with some judges sitting next to parents. One advocate said the judge had organised a different seating plan (to a hearing) from the start of the conference. A respondent from this area however expressed disappointment: he had expected, as a ‘conference’ and not a ‘hearing’, there would be a different seating arrangement – similar to FDAC50.

In another area the seating arrangement was completely different to that of a hearing from the start of the procedure: one advocate said everybody was invited to sit in a row: “it didn’t feel like a hearing… more relaxed, less formal” and the judge “came and sat in front of us…but at the same level”.

In a further area none of the procedures started with a different seating plan and most retained exactly the same seating arrangements pertaining to a ‘hearing’ before a judge: the judge remained on the bench and parties and advocates were seated according to the protocol for a hearing. In some cases, judges adopted a variety of approaches: they all started with the seating plan for a hearing, but as the judge came off the bench and one or more of the following was orchestrated:

- The judge sits in the well of the court, facing parties and advocates
- The judge sits alongside parties – usually parents
- Row and sequencing of seating (parties and advocates) remain the same
- Rows and seating are changed, and,
- Seating can change further as advocates and parties leave court and return

Overall, the dominant starting point experienced by a majority of respondents (15/19) in terms of the seating plan/arrangements of all participants including the judge was to retain the usual physical layout and seating protocols pertaining to a court ‘hearing’.

In some courts, respondents reported the formal layout and seating protocol for a hearing, remained in place for the entire conference, that is, the judge remained on a raised platform facing the applicant and parties, with the advocates in the first row facing the judge, parties (parents and others) on the next row with (where relevant) social worker(s) and the children’s guardian.

Other respondents (8/15) said that conferences started with the same seating arrangement as a formal court hearing, but at some stage – perhaps following a ‘preamble’, judges orchestrated a variety of changes. For example,

- The judge descends from the bench and sits in the well of the court facing rows of advocates and parties.

Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

- The judge comes down off the bench, moves parents to the front row and sits next to them.
- The judge comes down off the bench, re-arranges the seating placing parents in the front row, solicitors/barristers at the back.51
- The judge encourages advocates to move forward and sit alongside their clients.
- In some instances, advocates were told not to stand when speaking.

A small number of respondents (4/19) reported attending a settlement conference where the seating arrangements differed to that of a formal hearing from the very start of the conference.

Advocates in this group typically described how judges started by seating parents at the front with the social worker and guardian, and with the judge seated alongside parents; counsel (where attending) were seated in next row, with solicitors in the third row.52

Some respondents had anticipated that settlement conferences, by their very nature, would herald a more informal approach by judges, this to be reflected in the physical layout and seating arrangements, for example, reflecting the Family Drug and Alcohol Court (FDAC) and (what was) the Inner London Family Proceedings Court model53. Some respondents expressed disappointment at the loss of opportunity to change the layout to better reflect a ‘conference’ seating style and dialogue: one respondent wondered whether the layout might evolve but others expressed concern and caution about attempts at informality and some parents’ experiences.

51 This arrangement, while aiming to better facilitate discussion between judge and parent, made it difficult if not impossible for a parent’s advocate to assist, calm or reassure their clients. It could also made it difficult for an advocate to hear everything that was said and take notes.

52 Several advocates raised concerns about being seated so far away from their client.

53 This family court adopted a conference style setting – and while the protocols for presenting a case etc. remained the same, it developed a more ‘inclusive’ approach with parents under the direction of DJ Nicholas Crichton but within the framework of legal safeguards and rights. The court closed (2014) and the magistrates’ jurisdiction moved to what is now the Central Family Court.
The court room layout – key findings

- Seating arrangements for settlement conference varied between courts and between judges in the same court:
  - Settlement conferences could reflect the seating format of a court hearing with no changes throughout the procedure.
  - Seating could start off reflecting a court hearing but change at some point with judges moving into the well of the court.
  - Further changes could take place: some judges sit alongside a parent, some remain in the well of the court facing parties and advocates.
  - Some judges changed the order of seating in the rows facing the bench. Seating could further change in the to-ing and fro-ing as parties and advocates leave and re-enter the court room.
- A conference-style arrangement is hard to reflect in a court room where the physical layout is fixed; only one respondent reported participants sat in as near conference style as possible with advocates seated next to their client.
- Moving parents to the fore (i.e. in front of advocates) was said to be done by judges in an effort to make parents feel more relaxed.\(^5^4\)
- Where a judge comes down from the bench and sits next to a parent, the formal aim was to increase informality and assist direct communication between the judge and parent.
- However, this could depend on the judge but also the parent; there are indications that some parents may initially like the informality, others may find it disarming, inappropriate and potentially coercive.
- There is some literature and training materials on how room layout lends itself to different events, be they committee meetings, lectures/teaching environments, conciliation and mediation appointments, and clinical/therapeutic settings\(^5^5\) or formal events such as court/tribunal hearings. Each has its own rules and philosophy as to how the physical environment and protocols for speaking contribute to the objectives of the ‘event’.

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\(^5^4\) This approach could however backfire where parents/family members in dispute sit next to each other.

Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

Judicial preamble and approaches to dialogue

Explaining the aims and principles of settlement conference procedures

In this section advocates described how judges introduced the procedure, for example, covering objectives and principles and explaining how, in practice, judges orchestrated the system of dialogue and negotiation.

Overall, judicial approaches at the start of settlement conferences varied both within and across courts. While most respondents in one area said judges set out the aims and objectives of settlement conference, some did this in more detail than others. One respondent said that in his last two cases the judge had made the introductions and explained the role and purpose of settlement conferences, but in two earlier procedures “it just felt like a normal hearing”. Other respondents in this area also said the process varied depending on the judge: some did not recall any preamble by the judge, or any explanation of how it would actually work ‘on the day’.

Another advocate said the procedure was poorly presented by the judge in his case:

“we just didn’t know what to expect…the judge gave no instructions as to how it would operate and what was required from us…”

He continued,

“we needed more time [than allocated] that was given [and]…we did eventually get it resolved”.

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He continued,

“we needed more time [than allocated] that was given [and]…we did eventually get it resolved”.

 Asked whether the outcome could have been achieved at an IRH56 he said, “That’s exactly it” [R-16]

However, most of this group felt that key issues about the role of the settlement conference judge compared with a case management (CM) judge were covered and it was made clear to parents that if agreement could not be reached, discussions were privileged and could not be referred to in a subsequent final hearing, at which a different judge would determine what should happen.

Nevertheless, a small number of respondents described procedures where there was little/no explanation or ‘scene setting’ by the judge. For example, one judge went straight into the issues in dispute; it was only at the point at which it became clear agreement would not be reached that the judge turned his attention to the parties and addressed them directly.

It was suggested by a small number of respondents that as the pilot progressed, judges would explain the process better, but were certainly clear that it had to be a “consensual” procedure57. One respondent said that the judge had explained the purpose of the procedure but with regard to whether the judge made it clear that the process must be consensual throughout, the respondent was less clear:

“I can’t think…[pause] because we do that before we ever get to the settlement conference…the judge was certainly clear with them that they don’t have to agree [an order] – and it doesn’t bind the next hearing, but I don’t recall particular attention to it being consensual…because we’re only there in theory if they’ve consented.” [R-7]

Two respondents in this area identified settlement conferences where the question of lay party consent was checked by the judge at the start of the procedure. One judge set out the aims and objectives and at that point specifically asked if any party did not want to proceed. A further judge made it very clear to everyone that the matter [was] listed for a settlement conference but continued “no party would be forced into taking part if they’ve had a change of heart”. This judge made it clear at that juncture that no one would be pressured into reaching an agreement, particularly lay parties. The judge then went on to ascertain each party’s position (see below, Getting Started).

56 This issue is taken up with each respondent – see Section F below.
57 Issues of a consensual process and informed and continuing consent are explored in detail in Section C.
In another area one judge expected parties and advocates to attend court an hour before the procedure was due to start. Other respondents did not report that practice. In some courts this may be due to timing issues and timetabling a settlement conference at very short/no notice (e.g. relisted on the day parties attended for a hearing). However, another advocate in a different area, said that given the different purpose of a settlement conference, there was immediate pre-conference role for him – no “negotiations at the door of the court”; it was not a hearing.

In a further area there was disquiet among advocates about the approach of some judges at the start of settlement conferences. Some judges set out the aims and objectives and said, for example, “there would be no pressure, the process was flexible, enabling the judge to talk to all parties together and separately to see if agreement could be reached”. But practices differed (within this court and when compared to other pilots). For example, two advocates reported the first part of some settlement conferences attended were exactly like a normal court hearing; one reported the procedure was in fact quasi-legal hearing: the settlement conference judge wanted to hear submissions from all advocates setting out respective positions. Procedures then moved to the format of a settlement conference with the judge determining the focus of discussions and the process of who stayed in and who left the room at various intervals (the to-ing and fro-ing), for different aspects of discussion and negotiations by the judge.

In another area a respondent said the judge started by setting out the aims; he addressed parents directly and spoke in a straightforward way explaining his role. He then explained that if agreement could not be reached, he would have no further input into the case and the content of settlement conference discussions would be confidential. This judge also told participants he had read all the papers; he then gave his view about the likely outcome and explained how that view had been formed. Unlike some judges who sought submissions at the start, this judge said he would take no submissions.

In a further area, respondents also reported a variety of approaches. One judge explained the procedure and the key point: it was not a ‘hearing’, rather “a conference or discussion”, albeit led by him. He continued that if agreement could be reached, there would be no need for a hearing, if not, he would have no further involvement and all discussions would remain confidential.

Another advocate in the same area answered the question forcefully: “There wasn’t any dialogue! … that was part of my concern about it.” He said the judge dealt with the settlement conference “very like an IRH [but] with very blunt talking.” This respondent said he had a strong impression that the judge [thought] he could say anything he wanted as he wouldn’t continue to be involved if agreement was not reached. The respondent was also shocked that the judge “even directed comments to me and not the client.”

A further respondent also in this area described the procedure as unsatisfactory on several levels. He was not happy about the selection of a case and raised concerns with other parties. This view was relayed to the judge who responded that he would treat it as an IRH. However, the subsequent procedure bore much that was reflective of a settlement conference. The parent would not agree to what was proposed by the judge but the judge would not list it for a hearing; rather said he would deal with it on submissions: five minutes to include both the LA and the parent’s advocate.

Another respondent registered surprise at the approach of the judge: this advocate had not anticipated a role in the procedure but said the judge wanted to hear from all advocates. A further advocate said his judge had explained in detail the aims of a settlement conference and the differences compared with an IRH. Others however raised concerns about issues of consent and lack of a proper introduction to the aims and objectives to the procedure by some judges; one respondent described a settlement conference as “an IRH [but] without advocates”.

58 Most courts now direct parties to arrive up to an hour early for hearings; this is related to pre-court negotiation time and remuneration under the Legal Aid Graduated Fee Scheme. It may be that there is little point in doing it for Settlement Conferences as in theory, it is unlikely that there will be much to talk about – if the conference is listed after the IRH. However, as data indicate, listing practices vary.

59 In ideal situations, negotiations would have been undertaken before and perhaps within the IRH – where an IRH preceded a settlement conference, but as data indicate that was not always the case; in some courts settlement conferences were scheduled before the IRH.
Getting started

As indicated above, the process of negotiation could vary according to the case and the judge but most cases appeared to follow a ‘shuttle’ process similar to a mediation appointment where parties and advocates moved in and out of the court room according to the direction of the judge and the issue(s) which the judge asked parties to re-consider, and on which agreement was sought.

At some point, parents (mostly mothers) would usually see the judge separately when the judge thought they need to be persuaded to change their position. As indicated above, some judges come down off the bench and sat beside the parent(s) to try and persuade the parent to agree with what the judge proposed. Respondents reported that any conversation with the judge was always undertaken with the party's advocate present. However, the re-seating of advocates (to a back row) could make it difficult for a parent's advocate to hear and take notes. It could also make it difficult for an advocate to intervene if that was felt necessary.

For example, one advocate discussed a settlement conference which started exactly like a hearing, the judge then asked the local authority and the guardian to leave the room, the mother and her advocate remaining. Seated beside the mother, the judge told her that her case was “totally unrealistic”. The mother broke down and ran out of court in tears. Her advocate followed to take further instructions. Another advocate reported a settlement conference that became an IRH (consent being absent) but which appeared to retain features of a settlement conference during which the advocate said the mother “dug her heels in… she would not agree but was represented by inexperienced counsel who seemed overwhelmed; the judge took advantage of that”. The respondent continued:

“...the judge addressed comments directly to the parties and specifically the mother. Indeed, he tried to persuade the mother to do what he wanted and he did this by ‘threats’ which were very carefully worded. For example, ‘if you force me to make a decision, I will have to make this decision … and this will be a decision set in stone…” [R-15]

Where a local authority was asked to ‘rethink’ its position, respondents reported the judge did not sit alongside the social worker/advocate to try and persuade the latter to change position, rather the judge sent them out to discuss the issue or continued discussion in court. Respondents identified that where this involved a change of care plan, applicants could not agree changes on the day: the issue had to be referred back to local authority procedures (i.e. the local authority decision-maker, panel, budget decisions etc.). That part of the process therefore had to be adjourned

With regard to the process of negotiation (and to-ing and fro-ing of parties in and out of the court) respondents reported that where the judge addressed a parent, their representative was always present. There were examples of where a guardian asked to speak to the judge alone and where parents (with their advocate) were asked to remain in court without the local authority and the guardian, or to leave court while the judge discussed issues/order with extended family members.

60 In these circumstances it is likely there would be a further hearing after panel approval of the judge's view – should that be forthcoming. Depending on the local authority, a decision may take a month or more. Further data are needed to determine whether in these circumstances, a second Panel and senior manager generally agree the changes advised by the settlement conference judge, and the timescale involved in getting the issue back before a court or a further settlement conference. The HMCTS timescale would not end until the court makes the final order; interaction between the court and the local authority decision-making process requires more detailed work.
### The preamble: key findings

- Judges’ approaches to ‘scene setting’ at the start of a settlement conference varied within and between courts according to the particular judge.

- A preamble setting out the aims and objectives of settlement conferences and the ‘rules’ of engagement was stated in many but not all cases.

- Advocates reported some judges immediately addressed parents, explaining the aims with care and in straightforward language, some reiterated the ‘consensual’ nature of the procedure and some told parents they would not be forced into agreeing an order.

- At the end of their preamble a very small number of judges re-checked willingness to continue with parents (and others) stating no-one would be forced to agree an order and reiterating parties’ rights to a final hearing.

- Overall, respondents’ responses were not immediately focused on whether/how consent was addressed in the judge’s preamble. The reasons for this were not immediately clear, but as one advocate suggested ‘consent’ was likely to be assumed as “…we are only there if parents have consented…”

- Where lack of party agreement to a suggested order was registered on the day some judges appear to adopt a hybrid procedure, part IRH, part settlement conference – the latter part aiming to achieve the outcome identified by judge – by way of a consent order.

- During discussion between the judge and a parent(s), the parent’s advocate was always present but not necessarily seated in a position that was advantageous to a vulnerable or anxious/distressed parent.
Listing practices and the time allocated to settlement conference procedures

There was some variation in respondents’ experiences of the time allocated to settlement conferences. At one end of the spectrum, advocates said conferences were listed for an hour – sometimes two, at the other end, half to a whole day – and on occasion much more and in circumstances where advocates said the case was never going to settle.

Respondents reported that where settlement conferences were listed for an hour, sometime two, they were all listed to start at the same time, respondents thus reported being listed for a 9.30 start but having to wait until perhaps 3.30 to get in to court. In some instances, respondents said advocates and parties could wait all day with no idea of when they would get started.

As to whether waiting time could be used constructively, if the procedure had been scheduled after an IRH and before a final hearing, negotiations on the issue(s) in dispute had usually gone as far as perceived possible, hence listing for a final hearing. However, as data indicate, scheduling of settlement conferences did not necessarily follow that timetable. And as one respondent reported with reference to the principles of the procedure, and thus the role of advocates:

“we are there for a different reason [therefore] there is no scope for pre-hearing discussions, you just have to wait…” [R-1]

As indicated above, some settlement conferences were squeezed in with little/no notice: it could happen a “handful of days before a final hearing”, it could happen “on the day”. Respondents were aware of and sympathetic about pressures on courts but felt this approach was not focused on the needs of the case: “all cases are not the same and should not be treated as such…” [R-17]

While cases may be listed for one to two hours, once in court in one area respondents said a small number of judges stated there was no rush: parties could have as much time as they needed. That statement was repeated by a judge in another area. In the former court, advocates reported judges had other commitments throughout the day but would return intermittently checking progress.

Overall, most respondents did not report undue pressure to come to a decision in a specified time and felt they had sufficient time; some highlighted fewer time constraints compared with an IRH. However, there was concern about timing restraints with some highly vulnerable parents; respondents said these parents may need more time if things are to be done properly.

61 Some respondents were unsure about the time allocated by the court but as above, once in court most felt they were given sufficient time.
62 Similar issues can of course arise in listing practices for standard hearings; ideally, this variable should feature in a cost/benefit analysis of both procedures.
63 This compares with practice by a judge in another court who required advocates and parties to attend court an hour before the settlement conference; presumably so that further negotiations could take place.
64 This is when advocates and parties arrived for an IRH to find it had been relisted as a settlement conference.
Listing settlement conferences – key findings

- Listing practices varied: at one end of the spectrum advocates said settlement conferences were listed for an hour – sometimes two, at the other end, half to a whole day.

- In courts where all settlement conferences were listed to start at the same time respondents could be at court from 9.30 but may have to wait until late afternoon to get started. In some instances, respondents said parties could wait all day with no idea of a start time.

- Some judges require parties to attend court an hour before the procedure starts. However, there are differing views about the advocate’s role and thus use of waiting time.

- Fruitful use of any waiting time may also depend on the stage of a case (e.g. pre or post IRH) and notice of listing, but also a ‘reading’/interpretation of the principles underscoring the procedure (as entirely judge and party led) and thus little/no role for advocates.

- Most advocates said once the procedure was underway there was no pressure to come to a decision within a specified time frame. However, respondents raised concerns about highly vulnerable parents: “one size does not fit all… all cases are not broadly similar, those involving vulnerable parents may require more time if things are to be done properly”.


Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

Judicial approaches and negotiations in settlement conferences: talking to parents

Advocates were asked to describe the judge’s approach and negotiating style in settlement conferences – especially with regard to parents: was it, for example, calm, patient and facilitating throughout? Responses demonstrate a variety of approaches – from those where parents were virtually ignored, to those in which judges adopted an ‘all inclusive’ approach focusing foremost on parents, but to varying degrees, also including advocates (see Section D below).

Calm, patient and facilitating?

Overall, most judges (15/25) were described as adopting a calm, patient, facilitating manner with parents. For example, one advocate said:

“I felt the judge had been very appropriate in terms of how he dealt with the parents – [how he ‘pitched’ his approach]. The parents had certain health issues and way judge handled it was entirely appropriate for those issues in terms of explaining things…the judge was faced with what were quite complex issues. [But] the way this judge handled the settlement conference… wasn’t complex at all; [It] was very skilful I thought.” [R-1]

Another respondent reported on the inclusive approach of one judge – to all participants:

“I haven’t had any experience of a judge being anything but calm in a settlement conference, addressing each party…sometimes wanting to address a lay party direct but only with the agreement of advocate [asking] – ‘do you mind if I address your client?’” [R-5]

A further respondent described some techniques utilised by a judge:

“… initially it was like you’d expect any normal judge to deal with a case. But by the second part when [we] all sat down together, the judge was [much more] informal, chatting to the parents, telling them how it is a bit, really, encouraging them to talk to each other, look each other in the eye – specifically asked them to do that. I suppose much more of a softly, softly, collaborative way of dealing with it, rather than a judge sitting on the bench and giving legal direction or whatever”. [R-3]

A further respondent said one judge was “much closer to the style you would expect for this type of thing, [he] is very good with parents” compared with another judge who by contrast was “very traditional” [R-9]. Another respondent said the judge in her case had been good with parents; she said it probably helped that this judge had received some training:

“…this judge was one of the few judges who had received training: the approach worked really well with my client who was very nervous. [The judge] was very welcoming to my client and to [client’s support person] who had come with her to court”. [R-13]

A similar view came from another advocate: the respondent contrasted two procedures and judicial approaches: in one case the judge did not speak to the parents, in the other the judge spoke directly to the parents: the latter judge was described as “patient, understanding and respectful of why the parents [held] the views that they did.” [R-14]

A further judge adopted an approach which the respondent described as “careful”, “inclusive”, and “non-confrontational”. At the outset, the judge had said: “…everyone will have a chance to say what they want to say”. The respondent continued:

“All the lawyers went first and then all the lay parties. After this the judge started to see where the parameters of agreement were and started to give a view.” [R-18]
Calm and patient but potentially disarming and inappropriate

However, in some of the above procedures respondents qualified views about a judge's approach; there were some causes for concern. For example, respondents said informality with a parent could tip over into a gushy, patronising, overly friendly style; this could run into a form of subtle disarming and manipulation of a parent. Some approaches were described as inappropriate and could be experienced by parents as false and patronising. Advocates indicated it was not the job of the judge to present as the parent's friend or counsellor.

Respondents discussed strategies which some judges adopted – ostensibly to make a parent feel more relaxed/comfortable, but which ultimately could disarm a parent. For example, the judge may begin by explaining to that while the settlement conference judge is a judge, [he] “is there to listen to them”, “is a friend, there is nothing for them to fear, they can be completely open and honest”. The judge may ask to see photos [of children], ask about where they are and what they are doing. Respondents said this technique was deployed to indicate informality. While not dismissive of some informality, where parents are engaged in a serious dispute with the state (where the outcome may be the permanent removal of their child), respondents said an approach – aiming to be “quite positive towards them, was also subversive; quite subtle but [disarming]” [R-4]. Use of a parent’s first name was also thought inappropriate.

Another respondent added concerns about an overly friendly approach arguing that we do not know how parents view this sudden change of judicial role, and at a time when parents do not know what is to come in the subsequent exchanges and the judge’s opinion as to the likely outcome:

“the judge [probably] comes across as terribly gracious to parents. With some parents that’s good and works. In others, they’re thinking, ‘who’s this [ogre] telling me this and talking to me like that’…I think the judge patronises them, [he] probably doesn’t realise it and I don’t think a lot of parents realise they’re being patronised. But the approach can gushy and [over-familiar] …” [R-7]

Another respondent referred to a tendency for more senior judges to be a little more patronising than younger judges “who are better at this” adding “We mustn’t forget that they are learning as they go – they’ve had no training for this.” [R-8]

Not talking to parents or being blunt and insensitive

In the remaining settlement conference procedures [10/25] respondents raised concerns about the approach of judges. In one case a judge was described as blunt, insensitive and brutal with parents, conveying their prospects of success harshly, and in circumstances where the dispute was about the proposed adoption of the child. Another advocate compared two completely different approaches: one judge talking very softly to the parents, explaining patiently and clearly what sort of order he would make and why; another judge did not consider the parents’ feelings or difficult circumstances in delivering his view as to likely outcome.

The first judge was described as no less child-focused than the second judge however his delivery was of a different calibre: calm, patient and respectful, trying to get the parents to focus on the best interest of the child – albeit his message as to the likely order was “clear and firm”. The second judge’s style with parents was “quite blunt, and insensitive”. This respondent continued:

“where [a] case concerns placement for adoption, what parent is going to agree to adoption? But my experience of [this settlement conference] was that it was quite brutal really. [The judge] conveyed his view on their prospect of success, harshly – and the parent’s advocate wasn’t impressed with that either. [He] also felt it was insensitive.” [R-2]

A further respondent said that while the settlement conference judge’s approach was calm and patient: “the mother was deeply upset. She thought she was being pushed into a corner.” [R-10]
Another said in the first settlement conference the mother was “clearly uncomfortable”, and in the second, “the mother said nothing”. [R-12]

One further respondent reported that in both his cases, neither judge knew how to handle a settlement conference. The first case was conducted entirely through lawyers:

“the judge did not ask the parent any questions, nor allow them to speak; the procedure went too fast for my client...[who] is now saying he didn’t understand what he was agreeing...” [R-19]

The respondent continued “I think he probably did – but having thought about it was not happy with it”. In a further case this respondent reported:

“[the judge] began by telling the parents off, then fired questions at them and was angry when my client didn’t answer.” [R-19]

In a procedure described as ‘hybrid’ (part settlement conference, part hearing) another advocate described a judge’s approach with a parent as proceeding by way of carefully worded ‘threats’ in order to gain consent to what was being proposed. A further respondent said that he did not remember the judge talking to the parents: the approach of this judge was simply to “tell the parents, through the advocates, what the outcome of the case was going to be.” [R-16]
Judges’ approaches – talking to parents: key findings

- Overall, most settlement conference judges were described as adopting a calm, patient, facilitating manner with parents; some were described as particularly good or better with parents than others.

- However, some advocates qualified views: informality where it was overly friendly risks subtle disarming and manipulation of parents and before they know the judge’s opinion, and where a parent may then need to be their own best advocate. Approaches could be patronising. Some advocates indicated it was not the job of a judge to be or to present as the parent’s friend or counsellor.

- A small number of judges were described as brutal, harsh, blunt and insensitive with parents with the latter described as effectively backed into a corner by a judge.

- Some judges did not address parents, conducting the entire procedure through advocates.

- Some judges adopted an ‘all inclusive’ approach including advocates in discussions; they were respectful of parents but also of advocates and the latter’s duty of care to their clients.

- Some respondents said some judges had not undertaken training prior to running settlement conference procedures.
Party engagement with the judge: parents, guardians and social workers

Respondents were asked if any parent, children’s guardian or social worker had difficulties engaging with the settlement conference judge and speaking freely, and if so, what the barriers might be.

Overall, about half respondents (10/19) reported cases where they thought communication had been problematic. When asked about barriers one advocate reported that in representing children, he had not experienced difficulties but an advocate for the father had said that the father found it quite difficult expressing his views to the judge. This respondent thought the procedure was in early stages but he continued:

“…often lay parties have never been before court anyway; they are in a situation where they probably don’t know what’s happening anyway, so may see it as difficult when others are sent out [of the court room] and they stay in…” [R-2]

As to which clients attend settlement conferences, this respondent also thought that people who have had advice about how to deal with the procedure either agree to go along and so engage wholeheartedly in process, or they refuse before it is listed.

A further respondent raised concerns about vulnerable clients:

“I think my client probably found it difficult. He was certainly quite frustrated. I think the mother was probably a bit more open to somebody talking to her in that way. But [my client] finds it emotionally difficult anyway, so I was a little bit concerned about how he would be, how he would react to it. Which was why I felt it very important I was there because I was worried he might get himself into trouble, say something he shouldn’t”. [R-3]

This advocate referred to his knowledge of the client and indications from his body language of his level of anxiety – things he would have picked up on but the judge may not, or would proceed anyway. Another respondent talked at length about problems for a parent with learning difficulties and susceptibility to pressure from judges:

“[this father] found the procedure very difficult because judge [struggled understand him]. I tried to help the judge but…the father got very frustrated, he felt he wasn’t being listened to and was being bullied into a decision he didn’t want to make. He ran out of the court very distressed [saying] ‘I’m not being listened to, no one’s listening”’. [R-4]

The respondent followed and calmed his client, returning to tell the judge the father did not want to continue and that the case needed to be listed for a final hearing. The judge however asked the advocate to go out and try to encourage the father to return. The respondent said he did not think that was appropriate, his client had made his views clear and now wanted a full hearing.

This respondent said it was very distressing, his client had felt that the judge wasn’t listening to him and he was not given the opportunity to have his say. He continued, the issue was the father’s communication needs; the judge tried to get down on his level but could not and found it difficult to understand the father. When the father tried to explain himself, the judge had not really given him the opportunity or the time [but] simply told him what the outcome was likely to be.

This respondent along with others said a lot of parents attending settlement conferences are likely to have learning difficulties or were otherwise highly vulnerable, and it was a cause for concern:

“It feels unfair that quite often they’re being encouraged to settle [although that is not their instructions...] and if they don’t want to settle they have right to hearing…notwithstanding [any advice as to] likely success. So, I find it difficult that a lot of the people going to these settlement conferences and settling are parents who have learning difficulties [and who] would sometimes benefit from having their case heard and getting their views, wishes, feelings across…I would
say the majority of cases [I] have dealt [in settlement conferences] concern parents with learning difficulties”. [R-4]

The respondent was asked if he had any ideas for support to mitigate effects for vulnerable parents:

“The difficulty is, the whole process is quite overwhelming for them; a lot of them find meeting judge, and judge sitting next to them also quite overwhelming. It seems that sometimes the procedure results in [an agreed order] because the parent is sometimes just completely taken aback by it.” [R-4]

A further respondent [R-6] reported a mother who had had an issue with a social worker which she was unable to articulate in the settlement conference but would have been able to do so in a hearing. Another respondent [R-7] identified difficulties for parents who lacked continuity of representation, where pressures on them can be subtle and where the attending representative has no personal knowledge of the client and their limitations and ability to withstand pressure.

Other respondents [e.g. R-19; R16] said a key barrier for some parents was how the judge had orchestrated the procedure: some parents were simply not addressed or invited to speak. For example, one respondent said the judge “conducted the whole hearing (sic) through the lawyers”

Four respondents had cases where they said parents had found the procedure difficult but had managed, largely because they were ‘professionals’, able to be ‘relatively assertive’; one was aided by a skilled judge. And where parents had not experienced difficulties most respondents put that down to the skill of the particular judge, for example:

“The judge was very methodical, asking each party in turn for views, starting with the mother, then the guardian, then the local authority.” [R-13]

“… the judge’s approach maintained calm… whenever there were disputed facts which might aggravate one of the parties, the judge would steer the discussion away if it did not seem relevant, [this technique] helped to keep the temperature down. Each party was able to express their views – and [with] a very skilled judge.” [R-18]
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
Party engagement with the judge: key findings

- With regard to barriers to participation by parties (parents, social workers and guardians), a primary barrier appeared to be the approach of the particular judge: some parties, particularly some parents, were not invited to participate by the judge.

- A further barrier resulted from poor/inappropriate case selection to include some highly vulnerable parents with learning or language/communication difficulties. There is also a suggestion that some parents did not understand/really agree with what was proposed and were subject to pressure by the judge.

- There is also an indication that a small number of procedures may have resulted in an order where ‘informed consent’ was at least debatable, and where parents had made no direct contribution to discussions with the judge.

- Where judges’ approaches were based on good communication skills, due process, and empathy for and skills with parents, that could enable some parents to participate.

- Where judges’ communication skills and approaches were limited/poor, parents could be coerced/bullied, misunderstood or ignored – with some judge conducting the entire discussion with advocates/professionals.
Judges’ techniques and pressure on parties to agree to a consent order

In this section the issue of judicial pressure on parties to agree to a suggested order is explored. First, interviews explored whether respondents thought the judge had applied any pressure on parties to settle, second, whether clients thought the judge had applied pressure, third, whether clients reported feeling coerced or intimidated, and finally whether advocate respondents thought some pressure had been appropriate.

Techniques/approaches which did not involve overt pressure

A minority of respondents [4/19] said in their case(s) the settlement conference judge had not applied any pressure on parties, for example, one respondent said instantly, “No – none at all.” When asked why he was so quick to say there was no pressure, he said he had a lot of experience of this judge at interlocutory and final hearings and “knew what it looked like when [this judge] applied direct pressure; this approach was very different”. [R-14]

A further respondent who reported that no pressure had been applied in his case added that he was “surprised at how little pressure the judge put on”. He had expecting parties would to need to hear things more forcefully from the judge. However, he said the judge was careful not to use “forceful language” and what he did say was “carefully worded.” Essentially, the judge said something akin to “this looks to me like the best outcome, these are my reasons and do you agree?” The respondent said it was very much a “dialogue between the judge and the parents.” [R-18]

Pressure on professional parties

Most respondents however reported procedures in which varying forms of pressure were exerted by judges: mostly it was directed to parent(s) to concede the order indicated by the judge, but pressure could be exerted on a local authority and on some guardians. For example:

“Yes, [there was pressure] on the local authority – absolutely; one judge’s whole demeanour and body language was ‘you’re not getting out of this building until you have agreed to what I suggest’”. [R-7]

Another respondent talked about the way in which a judge might try to elicit a concession from a local authority, in effect, trying to ‘sweeten the pill’ for parents, for example:

“The judge will give parents a view as to what they think – and what they want parents to consider, which is basically giving in. The judge will usually ask for some sort of compromise from the local authority – regarding contact or some other concession, so parents don’t feel they are being completely bulldozed”

When asked if there was pressure on a local authority to make concessions, the respondent said:

“Yes, the judge usually tries. In some cases [it’s] entirely appropriate. The judge usually tries to get the parents to feel they’ve achieved something – a bit more than possibly would have been achieved at a final hearing, for example, a bit more contact, a bit more information. As a sweetener, so to speak.” [R-4]

Other respondents (e.g. R-11 and R-13) also referred to procedures where the judge tried to achieve a ‘trade off’ with a local authority when trying to persuade a parent to agree to a care order. For example, one respondent reported a mother reduced to tears by the judge who said a care order was inevitable:

“...the judge was also clearly trying to achieve a trade-off, if he could get the LA to review [a support package] for the placement plan [then] he wanted the mother to agree to a care order. The Judge at one point said to the mother ‘You have to agree’”. [R-11]
A number of respondents reported pressure on them to participate in the pilots, for example:

“…the real pressure applied, was with regard to whether to have a settlement conference…real pressure was put on us to have a settlement conference in this case…my biggest worry is for parents, we are dealing with very vulnerable parents”. [R-8]

The other pressure respondents detailed was where a judge tried to utilise a parent’s advocate to exert pressure on parents in out-of-court discussions to get them to accede to a judge’s position.

A small number of respondents reported judicial pressure on a child’s guardian to change position: respondents reported in some instances the guardian “caved in” in others they resisted and stood their ground. On occasion when discussing what a respondent felt was too much pressure applied to a parent (see below) an advocate added he thought the guardian was of the same view.

**Pressures on parents**

Most respondents [13/19] reported settlement conferences where judges had exerted pressure on parents, frequently a mother; this was reported by parents’ advocates in cases but also by advocates for other parties. As indicated above, pressure could be direct and forceful or subtle but potentially disarming, or it could be both. For example, in response to the question regarding any pressure by a judge to settle, one respondent said:

“Absolutely, yes. I felt very uncomfortable with [an] adoption case – with how it was dealt with, and how it was relayed to me when I was outside. The advocate for the father was not happy about how the father was being strong-armed.” [R-2]

This respondent went on to discuss a further case, as illustrative of this approach:

“I had [another case] recently – it was not listed for a settlement conference [but in court] the judge dealt with it as if it were a settlement conference in that, the judge relayed [his] view directly to mother who was very vulnerable, and that was without final evidence”. [R-2]

This respondent was asked whether the procedure had any other features of a settlement conference (e.g. the judge stating he would have no further involvement in the case). The respondent confirmed that the judge had said he would not be able do the next hearing because of the way he had dealt with it [today]. However, the respondent added that in moving to a settlement conference, there was no ‘preamble’ for parties, and without notice of the change he had felt “very uncomfortable:

“…without parties being aware in advance that it was coming, I felt very uncomfortable with it. I felt uncomfortable because mother didn’t know it was coming – didn’t know judge was going to give an indication – and particularly against her, so I think it was a little harsh. And the advocates didn’t know it was coming, so couldn’t advise or prepare for it in advance”. [R-2]

Asked whether any advocates took that point up with the judge, the respondent said they had not, regrettably mother’s advocate was quite inexperienced.

Another respondent referred to a settlement conference where threshold criteria were disputed:

“In the second case the judge applied pressure on parties to agree the threshold – but we just couldn’t. It was left to the final hearing” [R-12].

Overall, three respondents reported cases where parents left the procedure in distress following pressure from a judge regarding a proposed outcome or order stated as inevitable.
Did clients report any pressure to settle: did any feel coerced or intimidated by the judge?

Overall, nine respondents reported settlement conferences where clients complained about the approach and behaviour of a judge: some expressed it at the time, for example, by leaving the court, some complained to their advocates about feeling bullied, coerced, intimidated, cornered, and not listened to by the judge.

One parent said bullying by the judge was aimed at getting him to “cave in”. Some of these experiences were confirmed by advocates. For example, in one case where a parent reported being bullied by the judge, the respondent concurred with the client’s appraisal of the judge: “it had felt quite abusive at times” [R-16].

Nine further respondents said clients had not raised concerns with them: three acknowledged they had not asked parents how they felt about the process. Two respondents said clients had not felt coerced or intimidated: one [R-1] said he had stepped in, stood his ground with the judge and the case had a final hearing; the other [R-8] said he had been able to ensure his client was well prepared for the procedure.

Was some pressure on parties appropriate?

Many respondents (11/19) said judicial pressure was inappropriate in the cases discussed – and it could be counter-productive. One respondent responded:

“No – [and] I think if I had been the [parent’s] lawyer I might have felt the judge was usurping my role as adviser.” [R-10]

A further respondent argued:

“In the adoption case [discussed]: the [parent’s] advocate was quite enraged – he told me what judge had said; [he] also said they weren’t sure whether they should tell me as they didn’t quite understand settlement conferences … they didn’t know whether what’s said when they’re in there [without other parties] is supposed to be confidential/privileged…”

This respondent continued:

“…But the [parent’s] advocate was clear that they felt that how it had been relayed to the [parent] was inappropriate. And in that case the [parent] … was given [relatively short period of time] to consider their position. The parent’s advocate asked for a bit longer. I felt uncomfortable about the whole thing. I think that in an adoption case it’s wrong to strong-arm anybody… adoption is so final. I don’t think adoption is appropriate for a settlement conference … the judge can’t, at a settlement conference, dispense with [the parent’s] consent as it’s not a final determination, so if it is to settle, it has to have consent – and I think to strong-arm someone into that is so wrong. In the time we spent at court we could have had a final hearing and the [parent] could have given evidence and had their say – and felt that [as the parent] the child had been fought for”. [R-2]

Another said:

“No – It wasn’t necessary in either case, as judicial pressure had already been applied at the IRH, and given this, pressure would not be appropriate at a settlement conference” [R-14]

A further respondent said pressure had been inappropriate and counter-productive in his case but he started by saying the question itself was very difficult. While he described the case as “hopeless” he was not sure applying pressure in the way it was applied – “the particularly patronising approach of the settlement conference judge” – had any value. It had not worked; the case went to a final hearing. “All it had done was to ramp up the emotional consequences for [my client] and for the [other parent]”; this meant that the final hearing was very unpleasant and very distressing.” This respondent said the
procedure had felt quite abusive; the judge had sat on the bench and lectured the parents telling them that it was “a hopeless case and they would lose”. [R-16]

Appropriate pressure

Two respondents had a case where they thought some pressure had been appropriate. One said:

“yes – although the judge kept making it clear it was the Local authority’s decision, he also said they were unlikely to get their care and placement order as at that point they didn’t have sufficient evidence to support their case so it might be better to adjourn the final hearing to allow the mother to start therapy – which she was keen to do. The judge also said that it was unfortunate that the final hearing was only two days away …ideally the settlement conference should happen in plenty of time”. [R-13]

The other respondent identified circumstances where she felt judicial pressure was appropriate: the issues (contact and drug addiction) had to be addressed again and the judge replicated what all the advocates had been saying. Nevertheless, the respondent said she definitely thought [one parent] felt under pressure, and the other parent needed to hear it again – and from the judge.

A further respondent identified circumstances where some pressure might be appropriate but said the focus and delivery were important and within a rights-based framework:

“…in some cases, it is appropriate to apply pressure. For example, if a client has a fixed view which is unrealistic it can be hard for an advocate to keep saying this (because it affects trust with the advocate) and it can be helpful if the judge spells it out. Having said that … people have the right to put their case [to a hearing] however unreasonable it seems.” [R-15]

While another said:

“[in my case] it was not necessarily undue pressure…sometimes [I] appreciate that there will be cases where you would apply a little pressure, [but] if that doesn’t prove fruitful you move on. It can be a little bit overdone…[I] can see a need in certain cases for – not pressure as such, but the judge expressing their evaluation. [There] have been occasions where it hasn’t resulted in [change] and where it may have been applied a little too forcefully.” [R-5]

One respondent said that from the judge’s perspective trying something which saves [court] time is appropriate. However, like others he referred to vulnerable parents, and the format and timing:

“…pressure applied to a lay person struggling to deal with it all is sometimes a bit much. Also, it’s very late in the day in terms of proceedings and parents are already stressed as much of the evidence is against them.” [R-4]
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
Negotiations and pressure on lay parties: key findings

- A minority of advocates (4/19) said judges had not exerting pressure on parents to concede; most however (13/19) said cases where judges had applied some pressure: this could be direct and forceful, or subtle but potentially disarming – or it could be both.

- There were examples (from 9/19 advocates) where parents were very unhappy about the approach of a judge; a small number left the court in distress, others reported feeling bullied, threatened, intimidated and coerced.

- Where the issue in dispute was placement and potential adoption or a dispute about threshold, respondents described feeling ‘very uncomfortable’ at the approach of some judges. Most said these disputes were inappropriate for a settlement conference.

- Most respondents said pressure by judges was inappropriate – and counter-productive. A small number of respondents said some judicial pressure (beyond expressing a view) might be appropriate in certain specific circumstances, for example, regarding the need for a parent to change high risk behaviour or to comply with a contact order.

- There was some evidence of pressure applied on local authorities to change an application or care plan but in this sample, that was unusual. It was more common for judges to try and persuade a local authority to make concessions on issues such as levels of contact proposed – as a sweetener in persuading parents to concede a care order.

- There were examples of some ‘hybrid’ procedures – part settlement conference, part hearing, where parents (and advocates) were not prepared for judicially led negotiations, and where a ‘preamble’ was poor or absent.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

Did advocates or their clients identify any advantages to negotiations led by a different judge?

Almost all respondents felt most claims about the advantages of ‘fresh pair of eyes’ from a judge not previously involved in the case, were subject to qualification based on what actually happens in settlement conferences and the approach of the particular judge to negotiations.

While one respondent [R-8] said she thought the parent in her case “quite liked that aspect of the conference” another said one of the advantages is that the judge can be more direct with clients as to the order but added, “...clients would not necessarily recognise any advantage because they have no experience/knowledge of a final hearing ...and how that might feel”. [R-14]

Most advocates however said the advantages posed had to be weighed against emerging experiences, and respondents applied some fairly consistent caveats; many responses were of form: ‘Yes but...’ or ‘Yes there could be but...’ followed by examples from their experiences of settlement conference. The main caveats were the type of case (including the health profile of a parent) and the issues in dispute, the skills and approach of the particular judge, their real knowledge of the complexity of the case, and pre-procedure reading time.

Many respondents again referred to disputes where the proposed plan was adoption as inappropriate for settlement conferences; a ‘fresh pair of eyes’ did not mitigate the problems identified. For example, one respondent said:

“...For me the perfect scenario for a settlement conference is where the choice for the court is between parents, or other family member. I am less keen on them where it becomes a choice between parent or family member and a plan of, for example, foster care. And I don’t consider settlement conferences appropriate at all where the alternative plan is a placement order.” [R-1].

When asked to explain why, he was reflective, choosing his words carefully:

“...in the scenario which pitches a lay party against the state, that to me is just an entirely different scenario to one that pitches family member [against] family member. I know – although have no personal experience of it, of examples of settlement conferences being used in scenario where it is an ‘away from family’ alternative plan...”

This respondent reported knowledge of at least one case where “...it’s gone for a settlement conference – the judge gave an indication as to outcome [but] it didn’t settle; it went to a final hearing and the parents prevailed. That makes me very apprehensive”. [R-1]

Other respondents concurred that a different judge and a ‘fresh pair of eyes’ did not mitigate the gravity of permanent removal of a child from his/her family where parents/others have not been represented and able to have their case put by an advocate. Respondents referred to examples of where inappropriate pressure had been applied by a settlement conference judge; some also had questions about the time the new judge had to get up to speed in complex cases “for one brief exposure.”[R-7]
They said a discussion with a judge with a ‘fresh pair of eyes’ may be the theory; the reality was that some procedures “...did not feel like a dialogue and negotiation”. [R-11]

Notwithstanding views about criteria for case selection, several respondents said any advantages were due to the skills and approach of the particular judge. For example, in answer to the question as to whether there were any advantages to negotiations with a judge not previously connected with the case, one advocate said:

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65 One respondent raised a question as to how ‘new’ a settlement conference judge might be indicating instances where a CM judge (Circuit Judge) may be the judge who ends up doing the settlement conference.
“Not in this case, no; … the judge was a good judge… a professional judge and he dealt with the case well. The advantages came from him being a professional judge and not because he was unconnected to the case.” [R-15]

Others felt there might have been an advantage to a fresh judge “if the judge had dealt with the case in a different way” [R-16], another [R-19] described the new judge as “utterly destructive” changing the procedure to a final hearing because the client would not agree to the judge’s proposal.

A further respondent reflected on some of the claims or advantages of the procedure for parents, for example, that sometimes they wanted a judge to make the decision for them. Some respondents were concerned that such views were “self or system serving”, especially in the light of some parents’ reported experiences66. One respondent continued:

“The last thing we want to do is to make parents feel worse than they already do” [R-6]

A very small number of respondents felt there was an advantage to a local authority hearing from another judge what needed to happen or change evidentially for it to get a care order, but these cases were rare in this sample.

A number of respondents said the outcome achieved in their case(s) was not due to a “fresh pair of eyes” – it could have been achieved in an IRH”.

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66 Some respondents raised concerns about adjournments where for example parents are told to go away and think about the view of the judge. For some, this raises questions about the basic principles of the pilots – and what some felt might be an ‘overstepping of the mark’. Further work on the number, reasons for and results of adjournments in settlement conferences would be helpful.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
Advantages of a different judge and a ‘fresh pair of eyes’: key findings

- Advocates said claims regarding the benefits of settlement conferences in children cases need to be considered alongside evidence of what actually happens in procedures.

- Notwithstanding the ability of the judge to express a view as to the likely outcome of a final hearing, respondents said the claims associated with a ‘fresh pair of eyes’ need to be considered alongside the following caveats:

  - **The issues in dispute and the profile of parents.** Where parents are vulnerable and/or where the plan is adoption of children, the procedure is inappropriate.

  - **The skills and approach of the particular judge with lay clients.** Advantages were often due to professional, skilled, empathic judges, rather than a ‘fresh pair of eyes’.

  - **The reading time allocated to the judge** and the documents read – and thus a new judge's real grasp of the complexity of some cases.

- The approach of some judges did not reflect a ‘meeting’, ‘dialogue’, or a ‘negotiation’ and could not be described as advantageous to all parents.

- Some doubt was cast on assumptions that all decisions arrived at a settlement conference are necessarily better for parents; respondents indicated we know little/nothing about parents’ views or longer-term outcomes.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

Articles 6 and 8 of the ECHR

Respondent advocates were asked if they had any concerns regarding parties’ Article 6 and 8 rights in the context of settlement conference procedures (a) prior to attending a conference and (b) having attended a settlement conference(s).

Views about Article 6 and 8 rights before attending a settlement conference

Before attending a settlement conference about half the sample (10/19) had concerns about the procedure in the context of parties’ rights under Articles 6 and 8 of the ECHR; for example, one advocate said:

“…. I did, and I had heard a lot about them because people talk at court and having talked to people who had experienced them. [I] had heard very negative and positive comments…so I was pretty open minded when going along. I was dubious that it would work in this case but could see some merits: there are advantages and disadvantages”

He continued,

“[I] …was worried about parents being heard – about ensuring they had legal representation and were not put in a situation where perhaps normally wouldn’t be advise to answer a question or to talk so freely about things. [And] particularly with [this client] – who can get away with himself and could have said things that I would have been worried about, or could have got cross and angry which would have made him look very bad when that isn’t necessarily how he would present in a normal case if I was advocating on his behalf.” [R-3]

A further respondent said,

“Completely [yes], [I] had concerns about that, because at the moment, my view is this is purely a time saving exercise. We have Issues Resolution Hearings – we don’t need a settlement conference. If a client has had appropriate advice and time to consider it, then if they want to withdraw at a final hearing they can do so. But I don’t feel rights of the child are being met at all in settlement conference process™ [R-4]

Another respondent said,

“Yeah, [it] was a concern across the bar and solicitors; it’s hard to marry the right to a fair trial with a hearing where the judge is going to give a view and then see if one or another party can be persuaded to that view. That was how I felt when I first heard about the pilot. It didn’t seem to fit with a person’s right to a fair trial. There are some cases where, with the best will in the world, a parent just needs to have that opportunity to have their say, to have their hearing. Even if the judge’s view is the outcome is going to be the same.”

European Convention of Human Rights (ECHR): Article 6 – Rights to a fair and public hearing that is held within a reasonable time, is heard by an independent and impartial decision-maker, gives a respondent all the relevant information, is open to the public (although the press and public can be excluded for highly sensitive cases), allows client representation and an interpreter where appropriate, and is followed by a public decision. Respondents also have the right to an explanation of how the court or decision-making authority reached its decision. Article 8 – respect for private and family life: A right to live life privately without government interference. The courts have interpreted the concept of ‘private life’ very broadly. It covers a right to determine sexual orientation, lifestyle, appearance and mode of dress. It also covers rights to develop a personal identity and to forge friendships and other relationships. This includes a right to participate in essential economic, social, cultural and leisure activities. In some circumstances, public authorities may need to help a person enjoy rights to a private life, including assisting them to participate in society. This right also means that personal information held (including official records, photographs, letters, diaries and medical records) should be kept securely and not shared without the subject’s permission, except in certain circumstances. With regard to family life, it means clients have a right to enjoy family relationships without interference from government. This includes the right to live within a birth family and, where this is not possible, the right to regular contact. ‘Family life’ can include the relationship between an unmarried couple, an adopted child and the adoptive parent, and a foster parent and fostered child. Equality and Human Rights Commission – https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life

The rights of children under the UNCRC are explored below – Section E.
He continued,

“…before I did children work, I did parent work for a very long time. There are some cases where the outcome is inevitable but parents need to have the opportunity to have their say and to have that hearing. It almost feels like that happens less and less now.” [R-5]

A number of respondents referred to the selection of cases involving vulnerable parents, for example:

“I am worried about the vulnerability of parents in care proceedings. I think we have to be very careful about the cases we choose to take to settlement conferences.” [R-8]

“Yes…in a ‘true’ settlement conferences, the judge speaks directly to the parties and I have significant reservations about that. Adult parties in these cases often have very difficult backgrounds and many find it very difficult to challenge a judge as a person of authority. Some parties will be without the skills, experience and confidence to challenge: it is the advocate’s job to be there to challenge for them.” [R-15]

A further respondent referred to concerns, partly due to a lack of detailed information:

“Yes, I had concerns [because] I didn’t know what the SC format would be until [we] turned up on the day to find out. I was less concerned about Article 6 because I knew that if there wasn’t an agreement, that the case would go back to a different judge for a hearing”. [R-16]

One respondent was more concerned about public law proceedings compared with private law:

“Yes…in relation to public law cases, I would be very reluctant to advise any client to agree to one a public law [proceedings]….in private law cases I think they have potential, but as they are currently set up, they are a blunt instrument and need a lot of refinement” [R-19]

Some respondents added factors they thought should be in place for the procedure to be Article 6 compliant. For example,

- The procedure must allow for the advocate to ask for a break at any time and to take instructions in private [R-9]
- The procedure would need to be dispute specific: welfare issues may be appropriate, disputes over threshold and placement plans were not [R-13]
- Detailed information for advocates and parties about the format the procedure would take prior to taking a decision as to participation: “we didn’t know what was involved – the format was not explained.” [R-12]
- Clarity as to what documents had been read; and further assurances that what clients say during the procedure, really is confidential [R-6]

No concerns about Articles 6 & 8 issues prior to attending a settlement conference

A small number of respondents (4/19) said they had no concerns about Article 6 and 8 rights prior to attending a settlement conference procedure, some added caveats (about the type of dispute), most referred to the principle of voluntarism – as a “get out” clause, for example:

“No, [I had no concerns], [because] clients do not have to accept the indications [so] with the proviso that there continues to be a “get out clause”, that is, clients don’t lose the option to go to a final hearing. If not, I would have significant concerns for vulnerable clients presented with a senior judge who said ‘I understand what you want and I understand what the other parties want and this is my view’ – if there was no option for clients to say we don’t agree, then the right to a fair trial would not exist”. [R-14]
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

“[No] I got the message….it was entirely voluntary…” [R-9]

“No – but it does depend on the case” [R-13]

Concerns about Articles 6 and 8 rights after attending a settlement conference

After attending one or more settlement conferences, the number of advocates with concerns about parties’ Article 6 and 8 rights remained about the same (10/19). One respondent added to his earlier concerns saying he thought there were situations where ECHR compliance would very much depend on the experience, skill and confidence of the guardian. He posed a scenario where the guardian took a different view to that of the judge and the local authority regarding a placement order:

“…you would hope the guardian would be strong enough to say ‘no’, and you would get your fair trial. But if the guardian changed their view in [response to a judge’s view/pressure], that would be concerning, and especially so with a guardian who was [more susceptible to pressure from a judge].” [R-2]

In one settlement conference discussed by this respondent (concerning a proposed placement plan and adoption), he did not think the parent’s ECHR rights were met. He went on to say, that had the guardian been treated in the same way as the parent in this case, he would have been concerned.

A further respondent, concerned about scant information on how the procedure would work in practice, said following attendance, if the dispute concerned a care plan involving removal of a child (adoption or fostering), or a parent with a learning, communication or language difficulties:

“…it would not be fair; the client would not have the ability to participate in a way the procedure envisaged.” [R-18]

That view was shared by two further respondents in this group. A further respondent (also with concerns prior to attending the procedure) raised further concerns about timing issues following two procedures: parents had been rushed into agreeing an order raising Article 6 concerns.

Of those who said they had no concerns about Article 6 or 8 rights – either before (4) or after attending one/more procedures, key to responses was that attendance must be entirely voluntary and that “any party could withdraw at any time”. Where initial confidence (or lack of concern) about the ability of a settlement conference judge to also safeguard parties’ Arts 6 and 8 rights was not matched by subsequent experiences, four factors featured in their appraisal:

• The issues in dispute, in particular, where adoption was the judge’s preferred outcome
• Capacity/space for advocates to seek instructions mid-procedure, and in private
• Judges giving advice to parents
• Judges talking to a local authority in the absence of a parent(s).

For example:

“For the process to work you have to be able to ask for a break and seek instructions; I had to take instructions while we were in the [procedure] – that didn’t feel right.” [R-9]

“The judge gave advice to parents, and talked to the LA in the absence of a parent…” [R-10]

Where advocates had concerns about Article 6 and 8 rights prior to attending a procedure (10/19), many concerns were confirmed following attendance, for example:
Vulnerable/volatile parents “talked out” in circumstances where, in a hearing, advocates can exert control and prevent that happening.

Settlement conferences listed at short notice and too tightly (e.g. slotted in on a Friday with a final hearing the following Monday) leaving little/no time to prepare a parent.

Settlement conference did no more than could/would have been achieved at an IRH – and which were more readily and transparently “ECHR compliant”.

Procedure was observed as inappropriate for highly vulnerable parents.

Instances which raised concerns about ‘consent’ as freely given and where parents were “railroaded into agreement” without an opportunity to have their say.
Human rights and settlement conferences: key findings

- Concerns regarding parties’ Articles 6 and 8 rights were broadly the same before and following experience(s) of settlement conferences.

Criteria for case selection and Article 6

- A recurrent view was that settlement conferences are not an appropriate procedure for disputes concerning a proposed plan for adoption and threshold disputes.

- Respondents also said the procedure was inappropriate for parents with mental health problems, learning disability/difficulties, or communication problems.

- There were also concerns that other vulnerable/volatile clients may not, in reality fully understand the procedure to which they ‘consent’, may ‘talk out’ in court without the advocate to mediate and articulate their position, and protect their rights.

Articles 6 and 8, fairness and equality of arms during settlement conferences

- Respondents raised issues of fairness and Article 6 considerations for parents where they observed such parents had poor/inexperienced/ill-prepared advocates.

- Respondents also said children and young people require experienced, articulate, independent guardians briefed and informed about the HR aspects of the procedure.

- Concerns were raised about judges giving advice to parents, and talking to the local authority without the parent(s) in the room.

- Timetabling of the procedure at short notice or ‘on the day’ (where parties arrive for a hearing to find they were re-listed for a settlement conference, or where the procedure is listed on a Friday with a final hearing the following Monday)

Children and young people and attending settlement conferences

- Respondents said that the involvement of young people has not been properly addressed. There were examples of where young people should have attended; some were effectively excluded, others were not able to come/did not attend for other reasons.

- Procedures where competent young people part company with their guardian need attention. As a principle, such young people should attend; their advocate is in an ‘unscripted’ position and the young person will usually need to attend in order for their advocate to take instructions as to any settlement position suggested by the judge.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
SECTION D
ROLE OF ADVOCATES IN SETTLEMENT CONFERENCES

Advocates’ views of their role

Overall, 8/19 respondents reported they had very little/no role in the settlement conference itself and certainly no advocacy role on behalf of their client. While there is an indication that at the start of the procedure some judges ask the advocate for the local authority to set out the application in some detail, overall however – and with notable exceptions, relatively few advocates for other parties were asked to present their client’s position prior to the judge starting the procedure.

Very few advocates (3/19) began by describing their key role as, in the first instance, advising their client or the judge as to whether a client should/would participate in the procedure. One advocate however referred to that as his only role:

“[other] than addressing the judge in a scenario where [my client] ought not to participate... otherwise I said and did very little”. [R-1]

In a small number of settlement conferences advocates for the child had been invited to set out the guardian’s position, but most described their role as primarily that of note taker:

“As the child’s advocate judges don’t ask much of me other than ‘note taker’ of the discussion – otherwise I am not really involved...in my experience so far as the judge’s view is concerned, it has always been in line with the [view of] the children’s guardian, [I’ve] not yet had a case where there are differences. It would be interesting to see how that pans out....and what happens when child and guardian part company.” [R-2]

Advocates for parents often described their role as limited to one of calming a distressed/angry parent who was upset by the judge, for example:

“I was present whenever my client was but it was difficult... I didn’t really have an opportunity to speak ...on one occasion the judge may have asked me a question or asked me to agree with what he was saying...on occasions I had to kind of suggest to my client [to] calm down but that was difficult because I was not seated next to [him]. I couldn’t tell him not to speak, to calm down...I did not feel my role was of any particular use. Obviously, my submissions and discussion with client beforehand and after were important ...” [R-3]

“...I wasn’t able to undertake any advocacy, I was told to just sit and take notes...the judge went through his position with my client and suggested what should happen...then I went out of the court and discussed what the judge had said, and whether [my client’s] position had changed. But advocacy is limited...the judge may ask if the guardian feels he has missed anything, or if the guardian wants to add anything – but from an advocate’s view there isn’t a great deal of discussion.” [R-4]

“In case one, I had more to do because the judge spoke more to the advocates; in another I had very little to do because the judge mainly spoke to parents...I felt the judge’s style in the second case was more effective with parents.” [R-9]

“At the start it was like an ordinary hearing...the judge then talked [directly] to the parents and made it clear I should not intervene...only when the mother ran out of the room [distressed] was I

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69 This may in part be because in the early days of settlement conferences in some courts the decision as to which cases were selected was somewhat opaque (some advocates said it was chaotic) with advocates turning up for a standard hearing to discover the case was timetabled for a settlement conference. There were also examples of where it appeared judges had been equally unclear as to why a case had been relisted for a settlement conference. The key issue is that some advocates did not get prior notice that a hearing had been rescheduled for a settlement conference procedure and thus, their capacity to have detailed discussions with their client had been limited – by time but also knowledge factors.
able to follow and take instructions...I was concerned that the judge saw the local authority and the guardian and their lawyers without myself and my client present...

This respondent concluded:

“any advantages to a [‘fresh pair of eyes’] were lost because of the way this judge handled information and the way it was presented to the parent; it was not helpful [and] it did not feel like a ‘negotiation’…” [R-11]

Another respondent said:

“it was very much like an IRH, I was an intermediary between judge and the client…” [R-16]

This respondent also said the judge then wanted her to apply pressure on the parents to agree to his proposal; she said the judge tried to railroad the parents, when he failed, he tried to use advocates to obtain agreement from the parents.

A small number of respondents were disappointed with the approach of judges where they addressed advocates but not parents; they had hope for a more inclusive procedure for parents:

“As it turned out my role seemed to involve speaking to my client; I had hoped it would be my client who would speak directly to the judge...[but] this judge wanted to hear from the lawyers…” [R-17]

This respondent went on to discuss a judge’s approach to parents and like others pointed out the dangers of judges becoming too familiar with parents. While some judges tried to give parents some dignity in the process – and in the beginning at least, tried to appear non-confrontational – respondents said this can be counter-productive.

However, one advocate for a local authority said his role was not very different from a standard hearing:

“I set out the local authority’s position, summarised where the case was at and why – just like a normal hearing.” [R-12]

Judicial variation in approaches to running settlement conferences and the involvement of advocates was not necessarily a product of the particular pilot region/circuit; variations existed between judges in the same pilot court, for example:

“In case one the settlement conference was done completely through the advocates...in case two there was no role for the advocates – and I felt unable to protect my client, when I tried to intervene, the judge said I was bordering on impertinence …” [R-19]

“...in the first case, I did, I did speak to the judge, and the judge looked at me with an expression as if to say ‘why are you speaking?’ As a lawyer that was quite difficult; [our job] is to speak for our client.” [R-2]

A small number of respondents also said that, in practice, there was little to do in some procedures – because disputes had already been resolved prior to the settlement conference: some were bemused as to why some cases had been selected – and as indicated earlier, thought it was perhaps to increase pilot numbers.
The role of advocates in settlement conferences: key findings

- Many respondents had little/no role in settlement conferences, although some judges asked local authority advocates to start by setting out the application and the conflicts; a small number of judges asked to hear from all advocates before starting the procedure.

- During negotiations, any ‘non-advocacy’ involvement of advocates depended entirely on the particular judge. Most judges wanted no involvement from advocates, others involved advocates but the level of involvement varied:
  - A very limited number of judges aimed for a dialogue/conversation style and included all parties and advocates as the procedure progressed.
  - Some judges did not involve advocates in any discussions but looked to child care advocates to confirm their view; some tried to utilise advocates (and guardians) to persuade parents when their own endeavours failed to obtain a consent order.

- Advocates for parents expressed concern about the treatment of some parents by some judges; some concerns were endorsed by advocates for the child (and occasionally by a guardian). Perceived restrictions on the role of advocates – and new seating arrangements, made it difficult for some to intervene on a parent’s behalf. Examples mid procedure interventions were rare.

- Some respondents reported procedures that, in practice, were not a dialogue/negotiation: rather, parents were simply ‘told’ what should happen. Advocates’ work was restricted to ‘out of court’ discussions with parents as to whether they should concede.
Variations in judicial approach

Views were sought about whether judges’ approaches to running settlement conferences varied. As indicated above (Section A) 14/19 respondents had observed more than one conference, some many more – eight had observed more than one judge across several procedures.

As also indicated above, one feature of judicial variation was in approaches to the participation of advocates. Some judges completely ignored advocates, a few appeared hostile to any attempt by advocates to engage/participate; others included all advocates from the start of the procedure. Some judges were seen as effective because of their approach with parents but also with advocates.

Advocates’ ability to advise a client during a settlement conference procedure

Overall, 5/19 advocates had experienced at least one conference where it had not been possible to give a client advice during the procedure – or it was limited/done with some difficulty.

Two respondents were able to give their client advice during the procedure, for example: “Yes [I did] although [client] needed more time so we went outside and I gave the guardian some advice.” [R-2]

Others (12/19) had not sought to advise a client during the procedure – but felt they could have done so had it been necessary. However, concerns were expressed for the clients of other advocates where the latter had not/could not intervene and where the respondent felt that would have been appropriate. As indicated above, examples of advocates calling a halt to the procedure were rare.

Opportunities to consult privately with a client during the procedure

Most respondents (13/19) said that during the procedure they were able to take space to consult privately with their client – or felt they could have done so, had they felt it necessary, for example:

“Am I able to say, can we have a few minutes outside? – absolutely!” [R-5]

“You are able to do that...I have seen an advocate stop the procedure and say they needed to give their client some advice, the judge will allow that [but] with [my client], he became distressed so quickly, he ran out of court and I was not able to give advice at that point.” [R-5]

As indicated above, some judges offered advocates an opportunity to consult privately with their client(s); some asked clients if they wished to take a break to talk to their advocate. Some judges sent parties and advocates out of court for a discussion at various intervals (see above Section C). Some respondents pointed out the value of systematic checking with advocates regarding breaks. One respondent spent 45 minutes preparing his client: he did not therefore find it necessary to give advice during the procedure but was afforded 15-20 minutes “on his own with his client” [R-18]. The remaining respondents were unable to comment on whether breaks were/would be given because (a) the procedure was over fairly quickly when it was clear the case was never going to settle (b) the case had settled prior to the settlement conference (c) experience was too limited to comment.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

Judicial variations in running settlement conferences: key findings

- Many respondents’ observations and experiences were limited to one settlement conference, or the same judge over multiple conferences.

- However, 8/19 advocates attended more than one settlement conference – some many more, and had observed more than one judge. One variation in judicial approaches lies in the involvement of advocates:
  - Some judges completely ignored advocates; a few were hostile to any attempt by advocates to participate.
  - Some judges included all advocates in discussions and from the start of the procedure.
  - Some judges checked intermittently, whether clients or advocates needed to consult in private.

- Some judges were seen as more effective than others because of their skills and approach to parents/lay parties, but also to the involvement of lawyers.

Capacity to advise clients during the procedure

- Overall, 5/19 respondents had experienced at least one procedure where it had not been possible/it was difficult to give a client advice during the procedure.

- Most respondents (12/19) had not sought to advise a client during the procedure but felt they could have done so, had it been necessary.

- There were however concerns for clients of other advocates where the latter had not/could not intervene in circumstances where respondents felt that would have been appropriate.

Opportunities for a private consultation with a client during the procedure

- Most respondents (13/19) said that during the procedure they were able to take space to consult privately with their client or felt they could have done so, had they felt it necessary.

- Some judges systematically offered advocates an opportunity to consult privately with their client(s); some asked clients if they wished to take a break to talk to their lawyer. As indicated above, some judges also sent parties and advocates out of the court room for a discussion at various intervals.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
SECTION E
PUBLIC LAW CASES: THE CHILDREN’S GUARDIAN

Attendance and participation

Respondents were asked about the attendance and role of guardians during in settlement conferences. One respondent reported attending a settlement conference in the absence of the child’s guardian but most said the guardian was present.

Most respondents (13/14) also said the guardian was addressed by the judge at some point in the procedure. However, some advocates (5/13) raised questions about a lack of clarity/consistency as to the participation of the guardian. They said that in some cases guardians had had little/no voice or opportunity to contribute and appeared to have only ‘observational’ status, and some were not present for the entire procedure, for example:

“yes, the child’s guardian was there, but beyond being present I would say not really participating.” [R-1]

“Yes, the guardian was almost always there – [bar] one case where [a parent] remained in court and we all went outside.” [R-2]

“Yes [but] this included a period when it was [only] the [parent] and their advocate in court…the guardian was then called in…” [R-3]

“yes – [this judge] usually keeps the guardian and the [child’s] advocate in the room when seeing the parents…” [R-7]

Some respondents also referred to difficulties for the guardian in some courts/procedures; as indicated above much could depend on the experience and confidence of the guardian – if/when addressed. However, involvement depended on the approach of the particular judge and how ‘inclusive’ a dialogue/procedure they ran. For example:

“…this judge spoke to each parent and their advocate – and to the guardian and me as to whether anything else was needed to be covered, but I think that approach is limited to this particular judge..” [R-1]

“Yes – the guardian was involved in some discussion even if only on very small points. The guardian occasionally gets asked to clarify points the judge is making, and asked whether he/she agrees or not…” [R-2]

One advocate however said in his case the guardian had played a key role:

“when we joined [the conference] the guardian did not say much but certainly spoke when necessary, or when asked. I definitely feel [he] played an active role on the day” [R-3]

Others said the judge asked the guardian for a view at various points in the procedure. There were also examples of guardians being asked to “go and speak to a parent” in an effort to persuade a parent agree to the judge’s proposal, and being asked to “state their view of a parent’s case” during the procedure.

There were also examples of where judges applied overt pressure on guardians:

“Yes, the guardian was invited to speak [but] actually, I would say they were forced into a corner by the judge…” [R-11]
Another respondent described a situation where the guardian was asked a question by the judge. She was seated behind her counsel and was obliged to enter the witness box; the respondent indicated that was unnecessary for this type of procedure and added “…she could have said the same thing from where she was sitting.” [R-16].

A further respondent discussed the importance of the child's representative having sufficient time with the guardian prior to a settlement conference to ascertain how the guardian felt about the procedure (what they knew and understood), views about a dialogue with the judge and knowledge about the parameters of the procedure. If the guardian was confident and competent, this advocate said he would not have an issue with the judge addressing the guardian directly. And in the case under discussion: “…the guardian was asked for [her] view at the outset, directly…” [R-5]

A number of respondents (5/14) expressed concerns about the approach of some judges to the participation of the child's guardian: some gave examples of where the guardian was not addressed directly or indirectly (e.g. through the child's advocate) by the judge, and had no input to the procedure. Others referred to the use of the guardian to persuade parents to concede to a judge's proposal; one referred to judicial pressure on a guardian to give a view before all the evidence had been filed.
Public law children cases – the children’s guardian: key findings

- Almost all respondents said the child(ren)'s guardian had attended settlement conferences.

- However, their contribution could vary enormously according to approach of the particular judge. Some judges addressed the guardian directly and at the beginning of the procedure and involved them throughout; others did not; some referring to the guardian only to confirm/support a view or exert pressure on a parent. The approach of a minority of judges gave rise to concerns.

- Whatever the judge’s approach to the involvement of the guardian, respondents said the child’s representatives needed sufficient time in which to brief the guardian. The latter needed to be well prepared and to have the skills, experience and confidence, where necessary, to stand their ground.

- Like some lawyers, there were examples of where guardians were unclear about the procedure in practice, and their role and contribution; variation in judicial approaches to their engagement did not help their development for the procedure.

- There were examples of where the guardian concurred with an advocate's concerns about a judge's treatment of parents.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

The voice and rights of children

Respondents were asked whether they thought the voice of the child was heard in settlement conferences; most (12/19) felt it was, for example:

“I would say so; if I was not happy the voice of the child was being heard, I wouldn’t agree to take part in it.” [R-5].

However, five respondents (5/12) gave a qualified ‘yes’. The respondent below reflected a common view about the primary focus of settlement conferences:

“Yes [it is heard] – through me [the child’s representative], but I think settlement conferences are much more about the parents than the children.” [R-8]

Some respondents indicated it was there – ‘on paper’ but were unsure of its value; others said it was relayed via the guardian but “that’s the extent of it”.

Just under one third of respondents (6/19) felt the voice of the child was not or not really heard in settlement conferences. They too said the primarily focus was usually on persuading parents to concede issues; some said the voice of the child did not a feature in discussions and was not generally the issue:

“I’m not convinced it’s at the top of the tree in considerations at settlement conferences – I don’t think that’s what they are about, particularly – they are about gaining settlement aren’t they, the child’s position is generally not the issue.” [R-7]

Other advocates in this sub-group said:

“In the second case… the guardian contributed, [but] a further case concerned [a teenager] who should have been there…” [R-9]

“The guardian and child’s lawyer were there so in theory ‘yes’ [voice of the child was ‘there’] but in practice…they hadn’t done a settlement conference before and did not know what to expect… and the young person was not there.” [R-11]

As one respondent summarised: judges are aiming to make decisions based on a view of the child’s best interests, having decided where that lies, the voice of the child does not really feature in a procedure aimed at gaining concessions – and usually from parents.

Children’s rights under the UN Convention on the Rights of the Child (UNCRC)

Respondents were asked whether children’s rights under Articles 2, 3, 4, 12 and 19 of the UNCRC were addressed. This question raised a number of issues and reflection; respondents frequently returned to the purpose of settlement conference procedures: it aimed to achieve a settlement on disputed issues and the focus was usually on persuading parents to change their position.

Views about attention to and relevance of rights UNCRC to the procedure varied:

- 4/14 respondents said they felt children’s rights under the UNCRC were clearly addressed
- 5/14 said they were ‘in there somewhere’ (e.g. “they are in there somewhere – if in a rather formulaic form”)

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70 Article 2, non-discrimination (right to be treated fairly); Art 3, best interests (primary consideration in decisions affecting them); Art 4, protection of their rights (services and levels of funding to enable governments to meet minimum standards set by the convention); Art 12, right to a say and to have their views taken into account (thus their views must be ascertained and addressed in any decision-making forum (emphasis added) which affects their welfare); Art 19, protection from all forms of violence.

71 5/19 respondents did not address this question – mostly because of time constraints on the interview.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

- 4/14 said they were partially addressed
- 4/14 said they were not addressed

For example, asked with reference to Article 2 and Article 3 rights\(^{72}\), one respondent commented:

“Yes – but only because the indication from the judge has been in line with what the guardian had said [but] I don’t know whether that would be the same if there was a difference of opinion between judge and guardian] [I] would like to think it would be a simple case of, ‘we are not in agreement’, and [we would have] a final hearing where the child’s rights would be met and the judge wouldn’t strong arm the guardian.” [R-2]

Another said, “…the judge provided a statement and would address these issues…they weren’t the focus in discussion during the hearing [sic] but they were nevertheless there – somewhere.” [R-15]

Others commented:

“Yes, but they always are in the sense that there is something or someone who refers to the rights of the child… [it may be] pretty formulaic [and] it is pretty much a cut and paste job especially with very young children.” [R-16]

“It’s not directly mentioned [but] the fact that the social worker and guardian are there, [and] the evidence would show potentially contrary views from the child.” [R-17]

Young people and competent young adults

Just under half of respondents (9/19) had at least one case concerning a young person of nine years or more\(^{73}\) and as with most respondents, advocates said the views of young people came “through the guardian”. However, one advocate said what while it usually came through the guardian and the child’s lawyer, he had a case in which although he had seen the young person fairly regularly, he said: “it would have been better to have had the young person there.” [R-9]

A further advocate concerned about the voice and rights of young people in the procedure said,

“I presented his view...I found out that morning that he was not going to be there…I tried to speak to him on the phone but it was impossible to get through...” [R-10].

Another advocate said he had assured a young person his view would be put to the judge: “we will tell the [judge] what your view is….” [R-7]. In a further case the advocate said the young person's views were put by the social worker and a parent (the young person was residing with the parent).

Three respondents in public law cases had young clients where they said the young person should have been at the settlement conference. As indicated above, respondents with young people deemed competent to instruct an advocate to disagree with the guardian could make things complex for settlement conference procedures – and in unchartered waters.

One advocate reflected on the issue in more detail. He argued that to exclude a competent young person from a settlement conference would not be in line with their rights but he was also not sure that attendance would be appropriate. He reflected a young person’s experience attending a settlement conference procedure compared with a normal hearing and pointed to potential complexities and tensions, for example, where a parent may be under pressure to concede an order – and how that might impact on their child.

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\(^{72}\) See note 70 above.

\(^{73}\) Seven respondents did not have a case with age relevant children.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates

He went on to discuss the complexities of attendance of a young person deemed competent to instruct his own advocate:

“When a child sees the judge in a normal hearing, they do feel heard, but if a young person has capacity to give you instructions directly, how can you [agree] to [any proposed SC order] unless they are there to instruct you?” [R-2]
The voice and rights of children: key findings

- Respondents concurred that the primary focus of procedures is on adults – usually parents, and on achieving a consent order from the latter. Having decided where the best interests of children lie, the focus of the judge was generally not on the voice/views of children.

- Most respondents felt that the voice of the child was ‘there’ – in that, the child’s guardian and advocate are present. But some qualified views as to whether it was really heard/relayed – beyond a view that it would be in the documentation.

- Just under one third had concerns that the voice of young people was not heard.

The UNCRC: key findings

- Views and experiences about settlement conferences and children’s rights under the UNCRC were varied: relatively few respondents said these rights were clearly addressed, most felt they were “in there somewhere”; four advocates said they were not addressed.

- Respondents did not independently refer to the rights of children under Article 12 of the UNCRC (right to a say and to have their views ascertained and addressed in any decision-making forum (emphasis added) which affects their welfare).

- No mention was made of General Comment 12, UNCRC, in the context of the procedure and the conditions necessary to enable young people to express a view and make informed decisions.

- Some advocates said the attendance of young people at settlement conferences and the issues and rights attendance raise have not been properly addressed in the pilots.

Young people, and competent young adults: key findings

- Just under half of respondents had at least one client aged nine years or above; most said their views “came through” the guardian and their lawyer but some respondents reported circumstances where subject young people should have attended.

- Some respondents pointed out to date they had no experience of the procedure for disputes in which the guardian and a young person part company and the young person is deemed competent to instruct their own solicitor. Attention to the implications of that eventuality on the procedure and the involvement of a young person and his/her lawyer have not been considered.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
SECTION F
CONTINUOUS CONSENT, FAIRNESS, OUTCOMES AND THE IRH

Continuing consent: judges and advocates

The approach of judges

Respondents were asked whether judges checked consent was ongoing throughout the procedure and whether they, as advocates, were confident client consent was continuous. Many advocates (10/19) had at least one case where the judge had not checked ongoing consent during the procedure. The dominant view appeared to be that if a parent remained – that implied consent.

A small number of respondents (3/19) reported the judge returned to check consent was still valid – especially with parents, at points during negotiations. For example, one respondent said the judge kept checking back with parents throughout the procedure; a further respondent said the judge kept checking “were we all OK to carry on?”; this judge also reiterated that “if any party wanted to go ahead with the final hearing they should say so.” [R-13]

Others (4/19) reflected further on the question, for example:

“That’s a difficult [question] am not sure this was a focus…it was a very lengthy and very tiring procedure for parents…lots of ‘to-ing and fro-ing’…it simply ended in ‘we have drafted a consent order’.” [R-3]

“I don’t know – maybe not, but when the judge asks for comments I would say that’s your opportunity to say on behalf of your client if you don’t…”74 [R-5]

“…at the onset the judge made it clear that it was a voluntary procedure and they could leave at any time, but to the extent they stayed [that was taken as an indication of] continuing consent.” [R-18]

Were advocates confident of continuous consent throughout the procedure

Just under half of respondents (9/19) were confident that there was continuing consent from some of their clients throughout the procedure:

“...yes – for my client, but my concerns were that I didn’t feel confident [the agreement] would hold …I was not convinced [a parent] would follow through, sadly that appears right – it has broken down…”75 [R-3]

“…pretty much; there was one [case] where there was not consent…it came ended very quickly.” [R-8]

“Yes, very confident in this case” [R-18]

However, just under one third of respondents (6/19) had cases where they were not confident consent had been continuous throughout the procedure. Concerns related to their own clients but also clients of another advocate (usually a parent). For example, one respondent said he was certain in one of his cases but not in others, another said he was not confident because his client had been “put under too much pressure”, a further respondent also said no, and his client had left “left the [court room] in tears” while another said: “no – and [this case] …was never going to settle”.

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74 Although as indicated above, the timing of this can be difficult – it is not dictated by the parent and some judges did not seek or welcome interventions by advocates.

75 Two respondents felt that while there appeared to be ‘continuing consent’, they doubted the orders would hold because of the type of dispute and the history of parties.
Another said, “no – the judge [simply] tried to get consent for the outcome he wanted”; a further respondent expressed concern about continuous consent from his client in one of two settlement conferences attended.
Continuing consent: key findings

Judges

• Many judges do not check ongoing consent from parties and especially parents during negotiations; where parents remain in court, that is usually taken to imply ongoing consent.

• A minority of judges checked ongoing consent during negotiations; one judge also took time to remind parties of their right to a final hearing during negotiations.

Advocates

• Just under half of respondents had one/more cases where they were confident of continuous consent from their client throughout the procedure.

• However, some respondents expressed concerns for the client of another advocate where the client (usually a parent) was under pressure from a judge and where respondents felt consent to continue should have been checked and could not have been presumed.

• About a third of advocates were not confident of continuous consent from their client; too much pressure was exerted by judges and indications of distress and other signs of client anxiety were not picked up by the judge as indicating, at least, a need to revisit ‘consent’ or as indicating consent was effectively being withdrawn/the procedure should stop.
Was the procedure fair?

Mixed experiences

With regard to whether respondents considered settlement conference procedures fair (whether or not an order was agreed), most (8/19) reported mixed experiences; some had been fair, others had not, for example:

“Case one was fair – but there really wasn’t enough time for reflection; case two was not fair.” [R-19]

“…aside from adoption cases, yes, but…the adoption [case] was a different experience; [the parent] was given [relatively little time] to change his position, effectively. It could have pushed it in the opposite direction; his representative could have said on that basis, ‘don’t agree’. The reality was that was the order that was going to be made, but he didn’t get his chance to have a hearing. In my view he was forced into the position that he was in by the court – and that’s not fair.” [R-2]

“the judge didn’t mislead [the parent] … but on a human level it was very unfair…the judge’s approach, it was a dispassionate legal exercise…” [R-16]

“In the first case, yes…but everyone was already in agreement anyway; in the second case, I’m not sure it was fair to hold a settlement conference in this case – there was no way we were going to reach agreement.” [R-12]

“mixed…some have good outcomes, and others not, like the [parent] in this case who is still muttering about it months afterwards, some of them are not convinced about the outcome…” [R-7]

This advocate, like others, added examples of where cases were listed for a settlement conference but where parties had already agreed issues; others gave examples of where a court hearing was turned into a settlement conference ‘on the day’:

“you can turn up for in IRH, and if it’s before [a judge] you can suddenly find you are dealing with it as a settlement conference, that doesn’t give you a chance to prepare for a settlement conference procedure…”

This advocate continued:

“You’re all in court and the judge says, can we deal with it as a settlement conference? What do you say? You’re put on the spot like that before your DFJ. You tend not to say ‘No judge’. Unless it is something that is completely unsuitable.” [R-7]

Fair – but with caveats

A further 3/19 respondents said in the main, the procedures they had attended had been fair but they had pockets of concern and caveats applied, for example:

“yes [it was fair] in this particular case, but it’s not right to use settlement conferences where a parent is very vulnerable – that’s the biggest worry….“ [R-8]

“Yes in [this example], but it very much depends on the case…could be very different in different circumstances.” [R-13]

“In the main, I would say yes…but that’s because of the work that I do in terms of who I represent…” [R-5]76

76 In the sample cases this respondent only represented children.
As to aspects felt to be unfair/not as fair as they should have been, this respondent said:

“Only in a case where [there was] an argument over the type of order and a local authority was leant on...to change its care plan...there have been cases where [I think] it has been a little unfair...where the judge doesn’t agree with the LA care plan...for the LA representative, it must feel like: 'I haven’t got any alternative but to agree’...if the judge has clearly said he thinks the matter should be resolved with a care order, not a supervision order, well, it’s almost like, what choice has the LA got?” [R-5]

A fair procedure

Just two respondents (2/19) had no concerns about fairness in the procedures they attended; when asked what led to this view respondents said:

“…nothing which could be added that would have made it any fairer and nothing could have been done differently to remedy any unfairness.” [R-14]

“Everyone was given an opportunity to give their views [and] had to consult with their representative [and] they were told that they didn’t have to reach an agreement. The judge made sure that the process was “inclusive” and so all parties felt comfortable with it.” [R-18]

Not a fair procedure

Five respondents (5/19) said procedures had not been fair, for example:

“there was a lot to make it look fair, mother’s lawyer there, mother could leave, but actually I doubt whether it was fair to the mother. She was under a lot of pressure [and] her lawyer was side-lined. [And] I think I would have felt the level of informality disconcerting [had I been] the mother, the judge was really invading her space – which can feel intimidating...there is no set procedure so none of us were able to prepare the client [or protect her].” [R-10]

Another respondent expressed concerns about the reasons for the pilots; nevertheless, accepting pressures on the system and a need to look at different ways of doing some things, she had tried to go with an open mind, but concluded:

“Overall, I don’t think the procedure is fair, at the moment the ones I have experienced haven’t been positive.” [R-4]

Others said:

“Not if the judge behaved as this one did…” [R-11]

“No – because fundamentally, [this case] shouldn’t have been listed for a settlement conference, there was a lack of clarity about how it would proceed...the issue of parent’s contact continuing...to be dealt with on submissions with no opportunity for her to give evidence on this…” [R-15]

One further advocate returned to this issue at the conclusion of the interview; he said,

“Settlement conferences are not something I am against in principle. In certain disputes a properly conducted SC with sufficient time between the IRH and a SC, and sufficient time between SC and Final Hearing date, then in certain cases they can be a very effective tool. My concern is that they are essentially proposed in most cases. My experience in this court is there’s never enough time to build up to them. They’re squeezed in. They are perhaps being used as a device to ease internal issues at the Family Court in terms of number of judges, judicial time, number of cases that go through the court, and that’s a concern…” [R-1]
He continued:

“I have no personal involvement in it but anecdotally I am aware of at least one case that went to a settlement conference, an indication was given [but] the parents stood their ground; it went to final hearing and the parents prevailed. That to me is a huge red flag…”

He also expressed concern about the documents read, comparing procedures with FDRs in financial remedy cases:

“… the judge at FDR has – there’s a Practice Direction, you know exactly what a judge pre-FDR is getting in terms of statement of issues, schedule of assets, etc. and the judge can then give a fully informed indication based on that. And [given] the vast amount of paperwork in public law cases and the complex issues in many cases – it’s a rhetorical question but has the judge dealing with the settlement conference got sufficient grip of a public law case to be able to give a proper indication? In certain cases, I don’t think that’s the case. And I think that’s the biggest Achilles Heel to the process”.

Was the procedure fair? key findings

- The picture so far as issues of fairness are concerned is mixed; few respondents (2/19) said unreservedly, the procedure they observed was fair; 5/19 said it had not been fair.

- Most however (8/19) had mixed experiences; the procedure had been a fair in some cases and not in others. A small number (3/19) said while procedures were fair “in the main”, there were pockets of concern and caveats applied.

- Respondents across all pilot areas raised concerns about aspects of fairness. Key issues in determining whether the procedure was thought fair were:

  - **Timing:** things could be rushed – some said chaotic, settlement conferences were arranged too close to a final hearing, some hearings became settlement conferences ‘on the day’ with no time to prepare – or to prepare clients.

  - **Different judicial approaches to running settlement conferences:** (a) regarding the role of advocates and (b) approaches and skills in addressing and negotiating with parents.

  - **Lack of transparent criteria** for case selection: certain disputes were seen as inappropriate for a settlement conference procedure.
Did the procedure meet the needs of the case?

Views as to whether the procedure had met the needs of the case also varied: most advocates (9/19) said it varied across their cases, a further 4/19 gave a ‘qualified yes’, one advocate gave an unqualified ‘Yes’. The latter respondent said it had met the needs of the case because “it avoided the need for a contested Final Hearing”.

Mixed experiences

The majority of respondents reported a mixture of experiences in their settlement conference case load. Some procedures failed to meet the needs of some cases because of the nature of the dispute, or because of a failure to understand or appreciate the characteristics of lay clients, or because all the issues addressed during the procedure had been rehearsed at an IRH.

In some cases, respondents had ‘predicted’ that a consent order was ‘never going to work’. For example:

“…even though she was seemingly on board [at the settlement conference] having reached the consent order, she still hasn’t complied with it...” [R-3]

“…both cases had potential but both ‘failed’: one was ‘successful’ it resulted in an agreed order but that broke down; in the other case, the way the judge dealt with it meant it was never going to settle.” [R-19]

In other cases, the settlement conference was seen as ineffective, or wasn’t needed – or the advocate thought the issues could have been dealt with at a Case Management Conference.

The issue of lay clients’ ‘needs’ raised issues about case selection. Discussions highlighted that while no one has a crystal ball regarding client compliance – with the settlement conference procedure or a subsequent order, there may be advantages in some pilots to a wider canvassing of views as to criteria for case selection and involvement of those who know and have skills in handling lay clients.

Some advocates discussed the risks and benefits for the particular client of a Final Hearing and possible cross examination in the witness box, and appearance at a settlement conference – unrepresented. Respondents in this group did not advocate Final Hearings per se – save where evidence needed to be tested or where adoption was the care plan, but alongside evidential needs, client needs and rights were weighed against the values and risks of each forum. For example:

“It’s difficult – if it had gone to a final hearing and had an argument for five days, would it have had a different outcome? I can’t say. Evidence unfolds in quite a different way [to that anticipated] sometimes.” [R-7]

A qualified ‘Yes’ – settlement conference met case needs

For those advocates (3/19) who gave a ‘qualified yes’ regarding whether a settlement conference had met the needs of a case(s), respondents said these were cases where the issues were ‘concrete and specific’ and the options (e.g. for placement) were narrow and between family members:

“Yes, but [this is] very case and issue specific; it was one of those cases where a settlement conference is most useful, it concerned placement of a child in an extended family; the [procedure] managed to gain agreement...avoiding a contest where parents would have been pitted against family members, damaging [longer-term] family relationships...” [R-17]

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77 This advocate did not think, necessarily, that the outcome would have been different had there been a final hearing but see below, Conclusion – decision making regarding case selection criteria.
“Yes [but]…in this case there was no need to debate evidence and the settlement conference was dealing with things which were concrete and not disputed.” [R-18]

“In both cases the issues were narrow…” [R-14]

**Settlement conferences that did not meet needs of the case**

For those (4/19) respondents who said the procedure had not met the needs of the case, one respondent [R-11] said it didn’t get any closer to agreement and it seemed unnecessary to adjourn the procedure. Another respondent said in one case, everything had been settled before the settlement conference was called, and in another case, “it should never have gone to a settlement conference.” [R-12]

A further advocate also said one case should not have been listed for a settlement conference – given the views of the young person and what she had said to [a parent]: “fight for me”; the respondent continued: “…all of this was known at the IRH”. He added:

“As generality I wouldn’t want final hearings as matter of course but as an experienced advocate and in every case, my understanding of the evidence has been improved from listening in hearings, compared to reading about it.” [R-15]

A further advocate said the procedure failed to meet case needs because evidence required testing:

“No, the evidence needed testing; [clients] did not accept the allegations [as to caring capacity] [and] the settlement conference did not allow for this to be considered.” [R-16]
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
Meeting the needs of the case: key findings

- Where respondents said that the procedure had not met case needs, key reasons were (i) case had already settled (ii) the dispute was not appropriate (e.g. evidence required tested, dispute concerned a plan for adoption) (iii) case selection and negotiations failed to take account of the capacity vulnerable parents.

- Settlement conferences were said to have the best chance of reaching a settlement where the dispute concerned specific or concrete issues which might be resolved or narrowed through negotiation (e.g. private law disputes, contact, placement disputes between family members).

- Respondents did not argue that all cases require a final hearing, although several talked about the way in which evidence can unfold in different ways when subject to testing and that outcomes cannot be predicted; and there were examples of cases which respondents said had all the features indicating a need for a final hearing.
Outcomes: Consent Orders and Final Hearings

While this is not a quantitative study it was useful to explore with respondents the outcome of cases and whether a consent order was reached in the settlement conferences they had attended. Almost all respondents were able to talk through the outcomes for all their cases in the sample but three (3/19) with high case-loads gave estimates (e.g. a respondent with [multiple] cases said about one third had settled, two thirds had not and required a Final Hearing). The figures below therefore must be treated with caution as they involve some estimated figures:

- 34/61 settlement conferences resulted in an order ‘by consent’; caveats apply
- 19/61 did not result in any agreement and went on to a Final Hearing
- 05/61 reached partial agreement
- 03/61 cases had in fact reached agreement prior to the settlement conference

Cases resolved at a settlement conference and some caveats

As indicated above, many disputes referred to a settlement conferences were fully resolved (34/61 – about 55%) but caveats apply to a small number. For example, in one case a consent order as to contact was made in circumstances which an advocate deemed problematic and doubted would hold; the agreement very quickly broke down. In a further case was agreed at the ‘door of the court’ so parties did not in fact see a settlement conference judge.

Cases requiring a Final Hearing

Just under a third (19/61 – 31%) did not result in any agreement and required a Final Hearing. These included disputes over substantive issues and where the placement plan was adoption. One case settled at a subsequent IRH but the advocate felt the settlement conference had helped: the options for the child were serious (including a Care Order or a Special Guardianship Order), an SGO was agreed at the IRH.

Partial agreement and a Final Hearing

A further five cases reached partial agreement but required a Final Hearing. These included cases where disputes remained over the type of order, where contact issues remained outstanding, where the order was agreed but the placement plan was not, and where eventually a Final Hearing date was adjourned and a further IRH timetabled to see if a mother could engage with therapy. In some instances, partial agreement had reduced the time required for a Final Hearing.

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78 They suggest a ‘direction of travel’ which requires further quantitative data; the ‘direction’ in terms of consent orders (at an estimated 56%) is less striking than the 70% figure indicated in one pilot area (see HHJ Margaret De Haas QC, Family Justice Council 10th Annual Debate (https://www.judiciary.uk/wp-content/uploads/2016/10/fjc-transcript-of-10th-annual-debate-1-dec-2016-updated.pdf) However, several questions remain regarding the variables involved and for which further detailed data would will be necessary.
Outcomes – key findings

- Some caution is necessary with the figures but indications are settlement conferences achieved consent orders in more cases than not in this sample: 34/61 cases were fully resolved, compared with 19/61 where no issues were resolved.

- In a small number of cases ‘agreements’ were not robust and did not hold/were thought highly unlikely to hold. In other cases, the procedure had narrowed down the issues but some procedures had made things worse – sometimes much worse. This outcome and the variables likely to be associated with it require further research.

- The figures are too small for generalisation but they permit do the generation of hypotheses for a larger quantitative based evaluation providing key variables for testing further such as type of dispute, parent profile/vulnerability factors, and judicial and advocate behaviours.

- Further work is also required to establish (a) how effective and enduring agreements prove to be (and there should now be sufficient numbers to permit a follow-up exercise) and (b) to provide hard data on costs and ‘cost saving’ issues bearing in mind listing practices associated with both types of procedure (i.e. court hearings and settlement conference procedures).
Could a properly conducted Issues Resolution Hearing (IRH)\(^79\) have achieved the same result?

For public law cases, many respondents (10/18) had at least one case where they said an IRH could have achieved the same result – some qualified responses; 3/18 respondents said an IRH could not have achieved the same result, the remaining five gave other responses.

Cases where respondents thought an IRH could have achieved the same result

Just over half of relevant respondents (10/18) who thought an IRH could have achieved the same result said the main reason why IRHs did not was because of constraints on the time allocated for these hearings:

“Yes, it’s possible [but] because of listing issues the IRH can be one of five or six things in a judge’s list…they probably aren’t being used as they should be…that’s a [structural] issue.” [R-1] \(^80\)

“Yes – if given time at an IRH; the IRH is a better vehicle because parties usually have all the relevant information, the judge has been dealing with it throughout so it’s a more positive arena…decisions to list a case for a settlement conference may be more to do with the closeness of 26 weeks than type of dispute or an analysis of its suitability…some listed for a settlement conference haven’t gone through an IRH – not many, but it can happen.” [R-4]

Other advocates pointed to variables other than judicial time but also on occasion the benefits of a final hearing in certain cases:

“…I have had bad cases settled at the IRH but there are lots of variables [including] advocates on the day – if [they] are sensible and offer good advice then the chances are [cases] could be resolved…the pressures at a final hearing [of giving evidence] don’t exist at a settlement conference but there are [other considerations] …for example, a case that did not settle went on to a final hearing…and the local authority did a huge U-turn…” [R-2]

“yes definitely, I think both my cases were chosen just to get enough cases in the pilot…they were just wanting to try out settlement conferences.” [R-9].

“…there were no changes in circumstances between the IRH and the settlement conference, it was just that the IRH judge suggested a settlement conference …and maybe the local authority would not have agreed to [an adjournment] without another judge suggesting it.” [R-13]

“…if the purpose of settlement conferences is for another judge to give you an impartial view then obviously that can’t be achieved at an IRH – but in terms of the issues in this case, an IRH would have been as good as this settlement conference.” [R-11]

The issue of time constraints on IRHs and thus the judge’s capacity to undertake a detailed review of the possibilities for a resolution was also raised within other responses to this question.

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\(^79\) As indicated in the introduction, The Children and Families Act 2014, (implemented 22 April 2014) set out on a statutory basis certain changes relating to the timetable of proceedings and expert evidence (along with substantive changes relating to care plans, adoption, and contact after adoption). So far as case duration is concerned, s14 deals with time limits and timetables in care, supervision and other family proceedings. The Act placed the 26 week timetable set out in the revised Public Law Outline (now PD 12A) on a statutory footing by way of insertions into s32 CA 1989. It also removed the time limits imposed on interim care or supervision orders through amendments to s38 CA 1989. Section 32(1)(a) requires the court to draw up a timetable with a view to disposing of an application (i) without delay, and (ii) in any event within twenty-six weeks beginning with the day on which the application was issued.

\(^80\) With regard to the timing of the IRH (PLO, stage three), the revised timetable for practitioners and what would be expected of them to fit within the 26 weeks, was usefully set out in weeks by DJ Simmonds (2012) as: ‘By week 1 – First Hearing; by week 4 – CMC; by week 10 – Finding of Fact Hearing; by week 20 – IRH; by week 26 – Final Hearing’. In other words, some 6 weeks between the IRH and the Final Hearing (The Court and Care Proceedings: Tips and Traps, ALC National Conference 2012). Respondents herein indicate that for many cases, the gap between the IRH and the Final Hearing was now considerably shorter, potentially pushing many cases beyond the 26-week deadline thus exerting pressure on courts to refer cases to a settlement conference with the aim of obtaining an agreed order and vacating the Final Hearing, or reducing the days required.
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Cases where an IRH could not/probably could not have achieved same result

Three advocates had a case(s) where they said an IRH could not/probably could not have achieved the same result as the settlement conference: they cited ‘a fresh pair of eyes’, and ‘client involvement’ as distinguishing features of the latter procedure. For example:

“No – because I think it needed a fresh set of eyes and somebody else telling the parents how it was. I think when you’ve been before the same judge over and over, sometimes somebody else saying it is enough to tip the balance. And [its] more of a forum to try negotiation – because you would never be afforded that opportunity at an IRH. At an IRH you have a discussion before you go in, you say you’re not agreed and that’s it, you either list for final hearing or judge says go for settlement conference. You wouldn’t be afforded the freedom to spend the day negotiating like we were at the settlement conference, so [I] think that was of benefit.” [R-3]

“I don’t think so, people take positions at an IRH…clients are rarely involved…it’s usually a discussion between advocates; with settlement conferences clients are much more involved…” [R-8]

“Probably wouldn’t have done…the settlement conference [procedure] outlined to parties was a consensual one…[it] opened the door for everyone to consider the issues… [and in this case] it avoided a three-day final hearing [which] would have been divisive… [it was] better for [these] children, and family relationships because the approach helped repair some of those relationships.” [R-18] 81

Mixed responses

Other respondents (5/18) gave a mixture of responses to this question; the complexity of cases, limited time for conducting an IRH and perceived limitations on what a case management judge may say to parties about potential outcomes featured. Additionally, the way cases were handled by different settlement conference judges, made comparisons difficult:

- Time constraints on advocates and limitations on the CM judge at the IRH:
  “It’s hard to say; probably – if we had sufficient time at the IRH, that is, if we’d had two hours and didn’t have advocates trying to do three or four other things. And if everybody attended but the difficulty is [also] that the IRH judge can’t give a view in the same way as a settlement conference judge.” [R-7]

- Lack of robust procedure in pilot cases meant the procedure was not a proper test
  “[its] hard to say… the settlement conference was a hybrid, partly SC, party IRH – combined with Final Hearing in the end.” [R-15]

  “[this case] was always going to settle – it would have settled at an IRH.” [R-6]

- Some clients need a hearing
  “I don’t know – because the settlement conference felt more like an IRH anyway…[I] felt these clients needed to get to the first day of a final hearing [at least] …before getting to a final decision.” [R-16]

81 That view requires further research.
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- **The settlement conference is non-adversarial but it is not for fact finding**

  “Potentially [perhaps an IRH could have reached the same outcome] but there is an advantage to having an independent judge because otherwise it is a judicial process. A good IRH should look at the evidence very carefully. It can be an opportunity for consideration of evidence but the advantage of a settlement conference is that it is less adversarial. However, a settlement conference is not appropriate if findings of fact are needed…in the absence of agreement, you need a judicial investigation…” [R-17]
Could an IRH achieve the same result? key findings

- Overall, many advocates (10/18) thought that a properly conducted IRH could have reached the same result as a settlement conference but restrictions on the time allocated to IRHs (for judges and for advocates) was seen as a key barrier; the IRH is now largely an ‘administrative’ hearing with little/no court time for judicially led discussions, negotiations and party reflection.

- The ability of a different judge – a ‘fresh pair of eyes’, to give an opinion as to the likely final order, and to hold a direct discussion with parents featured in a limited number of responses as to why an IRH could not achieve the same result. However, this was not the dominant or the only factor raised in thinking about this question. These issues require further testing with a larger sample.
Final reflections: is the pilot procedure appropriate, could it work?

Finally, respondents were asked whether they wished to add anything further on settlement conferences. Perhaps not surprisingly (given the sampling procedure) respondents generally began by saying said they had not been opposed to the pilots per se, but almost all reiterated earlier concerns along with some strong caveats as to any roll out of the procedures they observed. Most argued settlement conferences should not be a blanket procedure for all children cases, and certainly not all public law proceedings. As one advocate summarised: ‘one size does not fit all’; there are no case filters or criteria and variation in the approach of judges to running the procedure with some practices giving cause for concern. In summary:

Most respondents reiterated the following disputes as inappropriate for the procedure:

- Cases where findings of fact are required
- Cases involving a threshold dispute
- Cases where the dispute includes a placement plan for adoption
- Cases involving parents with mental health problems and those with learning and communication difficulties.

Disputes which, with substantial amendments to the model and its application, might be appropriate for further piloting:

- Some contact disputes
- Some disputes between family members as to placement
- Private law disputes

Key amendments include a need for detailed guidance:

- This should spell out how the procedure should operate in practice and it should be applied consistently by all judges

Other concerns reiterated:

- A power imbalance remains between lay parties and the judge by virtue of the latter’s status and position
- Seating arrangements could be problematic for parents and advocates
- Wide variations in the approach of judges to running the procedure
- Training issues – for some judges and others
- Late ‘re-listing’ of a hearing to a settlement conference procedure

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82 To be involved in the study advocates must have attended one or more settlement conferences.
83 Responses were coded (1=opposed to procedure in principle; 2=circumspect but willing to try it; 3= supports the procedure (3.1=no concerns, 3.2=some concerns); almost all were ‘circumspect but willing to try it’.
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- Squeezing settlement conferences between an IRH and FH
- Indiscriminate listing of all public law cases for the procedure
- Using the procedure to meet shortfalls in court resources/impending 26-week deadline, rather than assessing the suitability of a case for the procedure.
Judicial approaches in settlement conference pilots in children cases: The views and experiences of advocates
SECTION G
CONCLUSIONS AND RECOMMENDATIONS

1 Pilots as an evidence base: the framework and principles

1.1 As indicated in the Introduction, the framework for settlement conference pilots is not solely about ways of saving court time and costs in the face of increasing applications (and there remain some regrettable gaps in information on costs and court time data84). The pilots also take place against the civil justice modernisation programme. This programme argues the case for an evidence-based agenda for moving forward85. Pilots are thus seen as key in providing the evidence about what does and what does not work. The modernisation programme also highlights a need for rigorous and informed judicial training and feedback, and for a problem-solving approach. All these issues (piloting, judicial training and feedback and problem-solving approaches) are seen as key to children cases in the current family justice climate. They are not entirely new/novel concepts: problem solving approaches have been on the family justice agenda for several years, underscoring the first Public Law Outline in 200886. The modernisation programme also reasserts the centrality of civil justice principles of fairness, greater access to justice and the rule of law87 in any proposed reforms. These principles are also key for parents and children – especially in public law cases where the outcome may be the permanent removal of children from birth parents.

1.2 In searching for innovative ways of working in the face of increasing applications the previous President (Sir James Munby) has also stated that new ways of handling cases should never depart from the fundamentals: ‘Care cases with their potential for life-long separation between children and parents are of unique gravity and importance …common law principles of fairness and justice demand, as do Articles 6 and 8 of the Convention, a process in which parents and the child can fully participate with the assistance of representation by skilled and experienced lawyers’88.

1.3 With regard to establishing an evidence-base for reforms by HMCTS, and by judges in the exercise of a new and under researched/evaluated area of judicial discretion, the use of pilots is said to be key. Ryder LJ argues that we are now far more used to testing reforms through pilots – to see how they operate, whether they achieve their aims, whether there are unintended consequences and how these can be addressed before any programme is rolled out89. However, evaluation of the exercise judicial discretion in the field of resource issues/questions is a complex exercise.

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84 Research on public law proceedings including costs data commissioned by the MOJ and prior to the Public Law Review (2011), did not in fact publish any costs data (Masson et al (2008) Care Profiling Study, Ministry of Justice Research Series 4/08). https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/care-profiling-study-report.pdf. That gap has not been filled in the years following the Review; it remains a serious flaw in family justice data generally, and especially when it is necessary to compare costs, time and resources for proposed changes by way of pilots.

85 Reiterating the philosophy of the work of the Law Commission leading to the Children Act 1989 and the principles and practices embodied in Parts III and IV of the Act and the Interdepartmental committee that did the work that led to the public law parts of CA 1989.


87 See note 9 above, page 2, para 3 therein.

88 14th View from the (then) President’s Chambers: Care cases: Settlement conferences and the ‘tandem model’ (15 Aug 2016) see – https://www.familylaw.co.uk/news_and_comment/14th-view-from-the-president-s-chambers-care-cases-settlement-conferences-and-the-tandem-model#.W3HgAOhKg2w. The MOJ quantitative evaluation announced by the President did not take place (see below (“Settlement conference pilots – data sources, strengths and weaknesses”) but a process evaluation has been undertaken – see Summerfield A (forthcoming) (w/t) Exploring the early implementation and delivery of the settlement conferences pilot: A process evaluation. MOJ.

89 See note 10 above, pages 3-5, para 9 therein.

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1.4 Not all proposed changes in children cases undergo pilots or consultation; where pilots do follow, unless evaluation is sufficiently robust, asks the right questions of all stakeholders and collects data of sufficient magnitude (qualitative and quantitative) and is able to compare findings with pre-pilot data, roll out of a model/procedure cannot claim to be based on a strong evidence-base. Moreover, caution is necessary when importing procedures from other jurisdictions without a rigorous review of the evidence and where practices have not been subject to independent academic, peer reviewed evaluation.

1.5 Below therefore, and as a start, research findings on a sample of 61 settlement conference procedures in practice are presented,

(a) Alongside pilot operational principles

(b) Against concerns about the procedure

The strengths and weaknesses of data are then addressed, along with gaps and barriers to evidence-based policy development.

Finally, given pressures on the system and the need for early reform, options for public law proceedings are discussed.

2 Settlement conferences pilots: key protocol principles compared with research findings

2.1 The aims and objectives of settlement conferences

Protocol (page 6 above, para 1): Key judicial aims … ‘being, facilitation, clarification and promotion of understanding between parties aiming to identify solutions; it is for the parties not the judge to determine agreement and the order which should follow’.

Key findings

- There were examples where it would be hard to argue that lay parties were equal partners in determining whether there was real agreement, and that consent orders were wholly initiated by parties. Evaluation of ‘out of court’ discussions would be an important addition.

- Where parents reported feeling pressured/bullied, where they left the court in distress, or where advocates indicated pressure from judges to agree a suggested order, the agency of such parents may be debatable.

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2.2 Participation and issues of consent

Protocol (page 7 above, para 3 a-b): ‘All parties must sign a consent form; any party may, without prejudice, withdraw from the Settlement Conference at any time.’

Key findings

• Judges ‘preambles’ varied; the ‘rules of engagement’ were stated in most but not all cases.

• After a preamble, a small number of judges re-checked willingness to proceed, reiterating party rights to a hearing if parties so wished. During negotiations, a small number also rechecked willingness to continue. However, many did not return to the issue of consent and in some examples on-going consent was questionable.

• Written consent indicates a willingness, in principle, to try the procedure; it does not indicate/confirm consent throughout. There were examples where judges and advocate, appeared to assume that since parents remained in court, that implied ongoing consent.

2.3 Role and approach of the judge

Protocol (page 7 above, para 8 a-i): ‘The Judge may directly engage with any of the parties, engagement will only be in the presence of the party’s legal representative, the latter may raise an objection to such dialogue without giving a reason and the Judge will respect the legal representative’s position without question.’ ‘Legal representatives may contribute at any stage; no party is required to speak to the Judge; parties may refuse to answer a question, or engage with the judge and may leave the court, terminating the procedure.’

Key findings

• Most judges engaging with parents were described as calm, patient, facilitating and respectful; some adopted an ‘all-inclusive’ approach including advocates in discussions.

• Qualification is necessary: informality could become overly friendly, risking subtly disarming, patronising or manipulating a parent – and before the parent was aware of the judge’s opinion and where he/she should be able to decide their response, without pressure or manipulation.

• A small number of judges were described as brutal, harsh, blunt and insensitive; some parents were described as effectively backed into a corner.

• While the protocol makes it clear that a judge ‘may’ engage with any party and no party is ‘required’ to speak to the judge, variation in approaches led to difficulties for parties and advocates:
  • Parents expected to be able to speak to the judge, advocates briefed parents that they would be able to do that; in practice, some were not addressed or invited to participate.
  • There were also examples of where social workers and guardians were not addressed directly or invited to engage in the procedure.
  • There were examples of where judges conducted the procedure entirely through advocates; conversely where judges discouraged any attempt to speak by advocates.
  • There were examples of highly vulnerable/volatile parents: the individual agency of such parties in the procedure is questionable.
2.4 Exertion of pressure on parties

Protocol (page 8 above, paras a-g): ‘At all stages the Judge will repeat that there is no pressure to agree anything, and that a hearing date is available.’ ‘Judge can give a neutral evaluation if parties invite him/her to do so. However, the Judge should also point out that another Judge may disagree and identify any limitations on [his/her] opinion.’

‘If there is any issue as to lack of understanding/capacity of any party or any effect of emotional pressure or vulnerability, the procedure must be terminated.’ ‘If a party has learning disabilities, or mental health issues or any other issues likely to impact upon participation, a Judge will be fully aware of this, only communicate with that party in an appropriate manner on advice from all parties, particularly that party’s legal representative.’

‘Judges must appreciate that a Judge/Court setting often intimidates a vulnerable party… the latter may provide responses intended to please the Judge but which do not reflect a true wish or need.’

Key finding

- Most judges were reported as applying some pressure; it could be direct and forceful or subtle but potentially disarming – or it could be both.

- Where pressure was applied in disputes concerning adoption or threshold, advocates were most ‘uncomfortable’ and raised most concerns about fairness and Article 6 rights.

- Some parents were unhappy with approach of judges, a small number left the court in distress; some reported being bullied, threatened, intimidated/coerced by a judge. There were no examples of a judge halting the procedure in the face of a distressed parent.

- There were instances where advocates felt the child’s guardian had been under inappropriate pressure from a judge.

- While there were examples of where advocates felt the conversation was inappropriate or had gone too far, but few examples of a representative stepping in or calling a halt to the procedure. There are a number of explanations:
  - The respondent in the sample (reporting pressure on a party) was not the representative of the party under pressure.
  - Regardless of the principles of the protocol, the approach of some judges (and seating arrangements) made intervention difficult.
  - Some advocates were simply unaware of their options under the protocol.

2.5 A fair process? Articles 6 and 8 of the ECHR

Protocol (page 9 above, para 13 a-c): ‘It is critical to preserve throughout a party’s rights under Articles 6 and 8; each party is entitled to a final trial which cannot be abrogated by the procedure.’ ‘[Judges] must uphold the law and international treaties such as the [UNCRC] and the [ECHR]…and when endorsing any agreement reached between parties.’

Key findings

- Advocates expressed concerns regarding parties’ Article 6 and 8 rights; these views were broadly the same before and following attending a settlement conference(s).

- A recurrent view was that settlement conferences are not an appropriate forum for disputes concerning adoption and fact finding/threshold.
Advocates also said the procedure was inappropriate for parents with mental health problems, learning difficulties, and language/communication problems.

There were examples of some vulnerable/volatile clients; their real understanding of the procedure and continued engagement on a voluntarily basis was questionable.

Respondents raised issues of fairness and Article 6 considerations where they observed parents had poor/inexperienced representatives.

Concerns arose about judges giving advice to parents, and talking to the local authority without the parent(s) in the room.

Timetabling of procedures at very short notice also raised concerns about fairness.

2.6 The voice and rights of children and young people

Protocol (page 8 above, para 11) ‘if a child wishes to see the Judge, this may be arranged with the CAFCASS Reporting Officer/child’s guardian following CAFCASS 2010 guideline; page 9, para 13): Judges must uphold the rights of the Children under the UNCRC.’

Key findings

Advocates concurred that the primary focus of the procedure is on adults – usually parents – and on achieving a consent order from the latter.

Most advocates felt that the voice of the child was ‘there’; in that the child’s guardian and lawyer were present, but views were qualified as to whether it was really heard/relayed – beyond a view that it would be in the documentation.

Just under one third of respondents had concerns that the voice of the child was not heard; concerns focused on disputes where advocates said a young person should have attended.

There was no evidence of attention to children’s Article 12 UNCRC rights, or GC 12, UNCRC.

There were indications that the involvement of young people has not been properly addressed including the attendance of competent young people who part company from their guardian and instruct their own solicitor.

2.7 Judicial continuity and issues of confidentiality/privilege

Protocol (page 7 above, para 5 (a-c); para 6 (a): ‘The settlement conference judge should not be the CM Judge (unless parties agree) and must not conduct the final hearing; there should be no communication about the procedure between the settlement conference judge and the judge of final hearing. Anything said during the Procedure is confidential; any proposals made by any party shall not be referred to if the matter is not settled; issues agreed may be recorded as such.’

Key findings

There was evidence of some ‘hybrid’ events – part settlement conference, part IRH – heard by the same judge and where the latter made CM decisions. Party agreement was at best unclear; this type of event requires further attention.

There was no evidence of concerns about communication between a settlement conference judge and a CM judge (although it would be hard for advocates to know this with certainty). There was a concern about information added to the face of an order which a respondent felt breached confidentiality.
2.8 Listing practices and case selection criteria

Protocol (page 7 above, para 7 (a-b)): ‘Settlement Conferences must be capable of being listed as a matter of priority; generally, a Final Hearing should be listed and parties aware of its availability’.

Key findings

- Cases relisted ‘on the day’ raised questions about fairness and time to prepare lay clients. For some, an ability to participate and to give ongoing consent may be diminished by vulnerability factors which may be exacerbated by short notice of the procedure.

- Data cannot determine whether in case selection (in design or application) safeguards under rule 3A.3(1) FPR and Practice Direction 3AA – factors to which the court must have regard when considering a vulnerable witness, and rule 3A.3(2) FPR – guidance about vulnerability were considered.

2.9 Role of Advocates

Protocol (page 9 above, para 14 (a): ‘It is the primary role of legal representatives to ensure that the party they represent remains engaged on a wholly voluntary basis, and has a full understanding of the process.’ Page x above, para 11 (a) ‘At a party’s request, the procedure can be adjourned to allow reflection/consideration or further information to be obtained.’

Key findings

- Listing at short notice could impact on the ability of advocates to fully prepare clients.

- Some advocates themselves had been unclear about what to expect of the procedure.

- Wide variation in how judges operated the procedure could also impact on the ability of advocates to prepare lay clients.

- Where judges wanted little/no advocate involvement and where advocates did not sit alongside clients, it could be difficult to ascertain if a client understood the procedure as it developed and that engagement remained wholly voluntary.

- It may be problematic to offload responsibility for ensuring ongoing party consent to advocates, not least in the face of a judge who does not involve them (or some parents) in discussions, gives little/no preamble and does not check consent during the procedure.

- Examples of advocate interventions were rare. That does not mean that on reflection, all procedures were viewed as fair and Article 6 compliant.

- Most respondents felt they could have sought private time with their client had that been necessary. Given subsequent concerns about fairness this requires further, detailed data.

2.10 Settlement conferences judges – training

Protocol (page 7 above, para a; page 9 above, para 13): ‘All judges have received training.’

Key finding

- There are indications that some judges had not undergone training; some practices where training had been undertaken gave cause for concern.
3 Concerns about settlement conference procedures and key findings

3.1 Judicial variation

As findings indicate, practices do not always concur with the principles of the protocol for the pilots: some of the concerns expressed at the start of the pilots are borne out; some new concerns – which include the approach of some advocates, are identified.

There was variation in the approaches of judges; some of this may be beyond what might be termed reasonable differences in the exercise of judicial discretion. Aspects of the Pilot Protocol were followed by some judges; others departed some distance from some principles. There were examples where respondents identified issues of fairness and access to justice for a lay party were questionable.

There were also examples of exemplary skills with vulnerable clients by some judges; a minority addressed ongoing consent during negotiations and reiterated rights to a hearing if any party so wished; some judges also included advocates in some discussions. Such practices were mostly attributed to the qualities of the particular judge – as a professional, skilled, empathic family court judge, rather than a ‘fresh pair of eyes’. There were indications some judges approached lay parties in the same manner whether in a standard hearing or in a settlement conference procedure.

There was a lack of transparency in criteria applied to case selection: this applied with regard to the types of disputes and possibly with regard to the cut off point for vulnerable parents; that requires further detailed data.

3.2 Participation and continued consent

Concerns about the operation of power and the implications when a judge leaves the bench, sits with and negotiates directly with a parent, remain. This may need further and different sources of data but it is a matter of concern that while there are examples of parents in distress/unhappy about the procedure, there were no examples of judges or indeed parents calling a halt to the procedure – unless/until parents ‘voted with their feet’ and left the court in distress. Continued presence cannot routinely be taken to imply ongoing consent. And where judges did not periodically or ever check ongoing consent where some tough concessions were sought from parents, and this might indicate ‘learned helplessness’ on the part of the latter.

3.3 Fairness

Overall, concerns about parties’ Article 6 and 8 rights arose in cases where (a) the issue in dispute was placement for adoption (b) where fact finding was necessary (c) cases selected for the procedure included highly vulnerable parents. Practices in those courts which ‘had a shot’ at all cases raised concerns which require further and different sources of data.

Concerns also arose about Article 6 rights and fairness where respondents observed parents with poor or inexperienced or ill-prepared advocates. That requires further attention from professional associations. Concerns about the quality of representation for parents in public law proceedings are not new but in the context of settlement conference procedures they take on a new direction.

Further sources of data are needed but data to date suggests some settlement conference judges cannot wear ‘two hats’ comfortably; aiming for an agreed order while protecting a party’s Article 6 rights was a tough call and one in which judges were not always successful so far as some representatives were concerned.

3.4 The voice and rights of children and young people

Findings to date also concurred with concerns about the procedure and children: there are gaps in the Protocol and in practice with regard to the rights of children under Article 12 and General Comment 12 of the UNCR. Because procedures in practice and design are adult focused, these rights were not raised
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or addressed by judges during the procedure – but equally advocates did not engage these rights on behalf of relevant young people.

The Protocol for the procedure refers to the FJC Guidelines (2010): Children meeting a Judge but does not address the Guidelines in the context of the aims and objectives of settlement conferences compared to a hearing, nor does it address the position of competent children who wish to attend the procedure. Moreover, listing practices can make the attendance of young people difficult, if not impossible.

3.5 Status of the protocol

Some clarification of the status of settlement conferences may be helpful; it is not entirely clear why – other than for payment of advocates, settlement conferences are deemed to have the same status as an IRH; this may relate to the power to make orders. However, lawyers struggled with some ‘hybrid’ events – part settlement conference, part IRH before the same judge; it is likely therefore that lay parties would also find this confusing. An IRH has a clear advocacy role for representatives, whereas a settlement conference does not, and levels of involvement in the latter depend entirely on the approach of the particular judge. Party agreement to a settlement conference judge undertaking some case management responsibilities may need further clarification and further work; indications are that it may be hard for advocates to resist the suggestion and difficult for parents to understand.

3.6 Listing procedures

This issue was not specifically identified as a point of concern per se by contributors but short notice of listing cases for a settlement conference raised questions about fairness: shortness of time may mean parties were ill prepared/equipped for the procedure. The same concern arose in those cases where existing hearings were changed to settlement conferences at the last minute.

3.7 Role/participation of party representatives

As indicated above, whatever the terms of the Protocol, available data indicates participation of representatives depends entirely on the particular judge; some judges wanted little/no involvement some were hostile to any attempt at contribution/intervention, others adopted an inclusive approach and a dialogue with parties and with all advocates.

However, findings also raise concerns about the approach of representatives. As indicated above there were few examples of advocates stepping in to halt a discussion or judicial behaviour, or halt the procedure. Adverse/hostile cultures may be part of an explanation along with lack of knowledge about pilot principles regarding a ‘right’ to speak at any point, and limited information about how the event would work in practice. Differing judicial approaches, lack of training, short notice and seating arrangements may also play a part. Equally, taking issue with the approach of a senior judge – perhaps on a regular basis, in an ill-defined/discretionary area of practice, may not be easy.

Whatever the explanation, where it was felt judges did not comply with the protocol, indications are some advocates were not as active as they might or could have been according to issues of natural justice, Article 6 rights – and indeed the principles of the protocol. This issue requires further

91 Family Justice Council – Guidelines for Judges Meeting Children (2010) 2FLR 1872) have been subject to some criticism. Younger children may welcome the trip as a ‘day out’ but young people report visits as in effective a ‘damp squids’; older, sharper children can doubt the point, much can depend on the issues and the judge, but young people have reported visits as disappointing (Timms and Thoburn (2003:7-13) Your Shout: A Survey of the views of 706 Children and Young people in Public Care. London: NSPCC. The difficulties for judges have been addressed by MacDonald J, in London Borough of Brent v D and Ors (Compliance with Guidelines on Judges Meeting Children) [2017] EWHC 2452 (Fam) and revisited the issue in B v P (Children's Objections) [2017] EWHC 3577 (Fam)-1. In brief, MacDonald J observed that the Guidelines do not say when the issue should be raised. He advises that the issue should be raised at the IRH. If the child expresses a wish after the IRH, the steps required by the Guidelines should be commenced immediately so that arrangements can be made in a timely fashion. However, that might be difficult given truncated timetables to meet the 26 week-deadline and where settlement conferences are listed at short notice, after, or before an IRH, (or in a ‘hybrid’ hearing). Listing practices may also limit the ability of advocates to comply with Article 12 and GC 12 of the UNCRC (the conditions necessary to enable a child to participate).
discussion within professional bodies. Some professional guidance for solicitors and barristers may be necessary.

At the moment and in some courts, legal representatives may give the appearance of fairness and due process and thus a formal ‘validity’ to a procedure in which, in practice, they have little/no role and which may therefore amount to ‘window dressing’.

3.8 Long term implications for children and parents and implications for public confidence

Concerns regarding longer-term implications for parents and children where parents have consented to a proposed order, cannot be addressed by these data. At a future date, some children may question the circumstances in which their parents consented to orders – especially those which resulted in permanent removal of a child. Questions remain as to how children will come to know and understand a parent(s)’ reasoning and decision making, and the circumstances in which a parent consented to an order placing them in care.

Access to audio recordings of the in-court procedure (which are not really an option for later life work) should these be retained and available, are unlikely to answer some key questions which adopted/long-term fostered children ask. Whether and how this scenario differs to circumstances in hearings where parents are represented and cease to contest an application at some point remains a question.

With regard to concerns about the implications for public confidence in the procedure/judges, while the approach of many judges displayed considerable skill with some highly vulnerable parent, that was not the case for all judges.

4 Data sources: strengths and weaknesses

4.1 Baseline data for proceedings in settlement conference pilot courts

Several limitations pertain to information about the pilots. One component is a lack of quantitative data against which to measure settlement conference outcomes, for example:

- The number of contested final hearings per pilot court in the 12 months prior to the pilot, disaggregated by type of proceedings (private and public law).
- Types of dispute resolved in final hearings for the same period.
- Length of final hearings.
- Estimates of the costs/resources implications for contested final hearings.

4.2 Selection of pilot courts/judges

The selection of courts/judges for the pilots was not based on random sample of family courts in England and Wales, or indeed purposive sampling criteria (e.g. including courts with high and low numbers of contested final hearings and other performance data (e.g. on the 26-week deadline). Rather, inclusion was self-selective based on the willingness of a judge to participate.

4.3 Evaluation of schemes in other jurisdictions

As indicated above, other jurisdictions run a range of similar procedures, but they are by no means uniform. While it was not possible, within the terms of this research, to undertake an international review of research and writing on settlement conferences, preliminary enquiries indicate procedures in children cases have not been subject to an independent academic evaluation. That appears to be the case for Canada, the model said to underscore the pilots in England and Wales. To date, there appears to be no cost data from other jurisdictions; this also requires further investigation.
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4.4 This research

The research reported herein was undertaken amid concerns about the procedure by family justice professionals (judges, lawyers, guardians and others) and in the light of delay in the quantitative evaluation proposed by the Ministry of Justice due to poor uptake of the pilots92. As indicated in the Introduction (Methodology) this is a qualitative study and caveats apply. Selection of advocate respondents was by open invitation and thus, also self-selective but on the basis that respondents had undertaken at least one settlement conference.

At the start of the research the aim was for an equal number of respondents in each pilot area. In practice, so few settlement conferences were taking place in some areas that was not possible. The sample thus contains more respondents from some areas than others. That needs to be borne in mind when looking at some of the findings.

The ‘direction of travel’ regarding some practices raises concerns. And while qualitative findings cannot be generalised to all settlement conference pilots, the study does allow for the generation of some qualitative hypotheses based on the operation of the principles of the protocol and in the context of the civil justice modernisation programme and compliance with issues of fairness, access to justice, rights under common law, the ECHR and the UNCRC. It also has implications for what is likely to be required in terms of the themes and questions to be pursued in a further larger scale quantitative evaluation and factors to feature in a cost/benefit analysis.

4.5 Gaps in an evidence-base for settlement conferences

As indicated above, substantial gaps remain: in addition to a lack of base-line information we lack quantitative data on outcomes – by type of case, dispute and profile of parents. We also lack data of sufficient magnitude from each stakeholder group (judges, parents, guardians, and young people). We know nothing about those cases which do not settle, or those where a settlement conference was not thought appropriate. In short, we lack triangulated data.

Further work may be necessary but in England and Wales at least, the field also appears to lack assessment and accreditation of judicial training provided. As indicated in the introduction, a range of claims have been made about the content of training and the areas on which it draws – but there remains a gap as to how the multidimensional elements work together, if/how they are consistently applied, and how training is validated and practices assessed in a procedure which falls outside the safeguards and corrective measures of the appeals system. Some practices reported herein may be problematic for the ethics and practice of mediation, FHDR, conciliation, and counselling settings.

5 Ways forward – a discussion

5.1 A more limited role for an amended model for settlement conferences

Despite what might be called pockets of good practice – so far as judges’ approaches are concerned, overall, findings to date do not provide support for rolling out the procedure in its current form. Key concerns articulated at the start of the pilots have some merit. One option might be to identify appropriate private law disputes and some public law disputes (see page 92) and develop a procedure with safeguards suited to those cases.

This would need to take cognisance of the concerns of respondents herein and some modification of some judicial approaches would be necessary (see below). Further attention is necessary to the content of training for judges intending to run settlement conference – and there remains a question as to the consistency and validation of training. Equally, training and guidance for professionals (advocates and guardians) is likely to be necessary. Overall, indications are that training may best be developed and

92 Poor uptake of the scheme also made it inappropriate to widen the sampling framework (e.g. via Resolution membership and The Law Society, Children panel membership, and the FLBA).
delivered according to an interdisciplinary model (covering and coordinating the roles of all parties and stakeholders).

As findings indicate, judicial pressure when applied to lay parties can be overt and direct, or it can be subtle (or both). In a given case it can be intangible; the experience is necessarily subjective – one person’s experience of pressure may be another person’s opportunity to exercise a welcome right to participate directly. However, in a procedure where key protections and safeguards (in the form of active representation and options for appeal) are absent93, and where, as indicated herein, the exercise of judicial discretion94 is so wide ranging (in case selection, approaches to running the procedure, whether/how pressure is applied, and the involvement of advocates) further consideration of practices herein and whether these fall within a reasonable exercise of judicial discretion would be helpful. Not least so that parties and advocates can have a reasonable expectation as to how the procedure will operate and their role and contribution, regardless of the particular judge.

This is unlikely to be simply a question of more training: judges, however skilled and sensitive (or indeed charismatic), cannot know the real impact on parties. Some settlement conferences in these pilots are structured so that the exercise of ECHR Article 6 rights (which in theory remain absolute95) risk becoming subject to judicial discretion in how a settlement conference is run.

5.2 Could an updated inquisitorial, Article 6 compliant IRH meet needs?

Further verification may be necessary but indications are that, in practice, the Issues Resolution Hearing (IRH) has become a largely administrative procedure96. That was not the original intention. However, currently there is little or no attempt – and no time at this hearing to explore whether agreement on outstanding disputes might be reached. Rather, the focus is on ensuring the case is ready for trial and thus making any necessary/outstanding directions as to timetable and filing etc.

It is argued the principal benefit of the settlement conference procedure is that unlike a case management judge, the judge is a ‘fresh pair of eyes’97 and, if invited, can offer an opinion as to the likely outcome of a final hearing. Notwithstanding some doubt cast on the benefits of a ‘fresh pair of eyes’ per se (compared with the skills of a professional family judge), it is suggested that an offer of an opinion as to likely outcome may be possible under the IRH – as part of the original remit of the IRH (PLO, 2008; ‘to narrow and resolve issues’). Indeed, some advocates argue that in the past that was done by some case management judges; following a process of narrowing down issues and identifying remaining dispute(s), a judge may ask parties if they would like, or if that would help if the judge expressed a preliminary view as to likely outcome. Practitioners also refer to early training on the PLO and expectations of the time and negotiations to be undertaken at the IRH and raise the question as to whether an updated PD is needed – or simply a return to the original model, with the time to undertake the tasks properly.

In the same way that a settlement conference judge, when ‘invited’ to give a view as to likely outcome, should alert parties that another judge may come to a different view, likewise a judge at an IRH if/when invited to give a view as to likely outcome, should temper his view: in both procedures the view must remain provisional. The option, with safeguards, is arguably available in both procedures.

93 Grounds for an appeal from an order made by consent in a settlement conference procedure are problematic, unless perhaps on reflection it was felt judicial pressure to agree a suggested order had been so great as to amount to duress.

94 The suggestion or argument that settlement conferences are not a court/judicial procedure is not supported by these data. The procedure is held in court, it is led by a judge who determines the procedure; it is attended by lawyers who are paid according to professional (Legal Aid Agency) fees for attending a court hearing, and by guardians who are officers of the court. And the outcome is a court order determining placement and other welfare issues concerning a subject child; and ECHR and UNCRC rights apply.

95 See above page 6, para 6 – Ryder, LJ; also, above page 95, para 1.2 – Sir James Munby

96 Identifying issues which remain in dispute, if necessary, setting the date and duration of the final hearing and on which oral evidence may be necessary, and making final directions as to filing of documents and judicial reading time, and compliance with PD27A (Bundles Practice Direction).

97 Although the issue of judicial continuity in proceedings may be debatable in some areas; there was a suggestion that in some courts contested issues may go before any judge who is available; the notion that only settlement conferences provide a ‘fresh pair of eyes’ may need robust evidence against other practices.
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In neither case does the relevant document (Protocol for pilots and PLO – the IRH) suggest the procedure could be used to place pressure parties to reach an agreement. For example, the FJC in responding to the consultation on the original PLO examined the wording of the duty of the court at the IRH, and was ‘…satisfied with the wording in the [PLO] Outline which does not suggest that parents are to be deprived of the opportunity to present their case in its best light, if necessary, by calling evidence…’ 98.

When introducing the new case management system to track every public law case in 2012, the judge leading the family justice modernisation programme (Ryder J, as he then was) stated (a) principles of inquisitorial case management are part and parcel of an inquisitorial aspect of the work of family courts (b) this does not abrogate the duty of the court when it comes to fact finding and threshold disputes; that task should continue to rely on an adversarial model to test evidence 99. In other words, the principles and tasks/tools are already in place to assist judges at the IRH.

5.3 What would change require?

Such an approach would require a review of the IRH and the extent of the inquisitorial role of judges with a view to providing more court time for the hearing, and possibly guidance/an amendment to PD12A to make it clear that the task of the judge at the IRH is not only to define outstanding issues but also to actively explore whether it is possible to resolve disputes.

5.4 What might it look like?

If a revised IRH is thought necessary, so far as court actions are concerned this could include:

- Identification of key issue(s) to be determined, whether these can be resolved or narrowed
- Seeking views as to whether parties would like the judge to give a provisional view based on:
  - The strengths and limitations of parties’ positions to date.
  - What each party may need to demonstrate in order to succeed in their application at a final hearing.
  - The likely outcome on evidence to date.
- The judge would (a) reiterate his/her view remains provisional; parties retain the right to a final hearing and to call evidence (b) hold a break to allow parties and their representatives to reflect on the judge’s provisional view, and discuss options.

Followed by:

- A further discussion with the judge by advocates – and if they so wished, the parties, as to whether agreement has/might be reached.
- Consider of whether the IRH can be used as a final hearing.

If a final hearing is required, the judge would then

- Identify the evidence to be heard on the issue(s) which remain unresolved.
- Identify documents outstanding and give final CM directions as per PD12.

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99 Ryder J (as he then was) (2012) New system to track all public law children cases over 26-week deadline – see http://www.localgovernmentlawyer.co.uk/index.
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Consider reading list and reading time, including estimates for judgment writing, ensuring compliance with PD27A (Bundles) and if not already timetabled, list the final hearing.

The CM judge at the IRH stage could also be the judge for the Final Hearing but arrangements would have to allow for the possibility of the judge having to recuse themselves from the Final Hearing where the judge has inadvertently crossed a fine line during an ‘enhanced’ – or properly run IRH, and thus need to recuse themselves. It may also have to allow for a party, and particularly a lay party to seek a new judge for the Final Hearing.

5.5 What would be necessary?

This approach to the role of the court at the IRH would require:

(a) The allocation of sufficient court time by HMCTS to enable judges to undertake the IRH task properly to include time to consider whether and how agreement might be reached.

(b) Further judicial training to ensure fair and consistent standards of negotiation practices with lay parties and advocates at the IRH and within a framework of fairness, access to justice and ECHR and UNCRC rights.

(c) Further elucidation, and if necessary, amendment to the wording of Stage 3 of the PLO – the IRH (PD12A): ‘the court identifies the key issue(s) (if any) to be determined and the extent to which those issues can be resolved or narrowed at the IRH’.

(d) Careful consideration would need to be given to variations in judges’ negotiation practices in settlement conferences by The President of the Family Division within the context of the modernisation programme for family justice issues while preserving judicial independence.

And referral to the FPRC – if an amendment to PD12A was thought necessary/helpful.

(e) Guidance for professionals to accompany PD12A/any amendment regarding the enhanced tasks to be undertaken at the IRH. Given the nature of the issues and need for stakeholder input, a review might helpfully be addressed in subsequent Guidance may best be undertaken by the Family Justice Council in collaboration with relevant stakeholders and professionals on the Council.

5.6 Potential benefits and limitations

Practice Direction 12A (and if, as amended) plus Guidance for professionals would apply to all public law cases, judicial practices aiming to explore potential for agreement at the IRH would be more consistent and transparent, safeguards would be in place and subject to evaluation. It would keep the issues and forum within the framework of judicial case management and the appeals system, and thus be more likely to gain public and professional support for the procedure and the modernisation programme.

Implementation would require further piloting and evaluation but if the focus of piloting is to provide a strong evidence base for change there can be no short cuts, or ad hoc approaches. As indicated with regard to the modernisation programme for civil justice:

‘the first principle is that the approach to improving and enhancing judicial decision-making must be systematic, evidence-based, and tested. We cannot afford to pluck best practice out of thin

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100 Judges have a distinct and constitutional role and function. It is a fundamental principle that judges do not comment on the decisions of other judges outside of the appellate process. However, findings to date indicate that aspects of judicial practices in settlement conferences raise some legitimate concerns which cannot easily be considered within the appellate process and thus requires more detailed consideration.

101 Clarity is necessary as to the two aspects involved: HMCTS is the administrative arm of the courts and tribunal service but as a matter of constitutional principle must not be involved in or have responsibility for judicial decision making in cases. The latter is the exclusive responsibility of judges thus judicial practices in settlement conferences in children cases is a matter for President of the Family Division as Head of Division.
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‘air. It is neither whatever is the latest fashion nor is it what any particular judge finds attractive or interesting; even less the sometimes uniformed and historically hidebound views of those who happen to exercise power…’\textsuperscript{102}

And the ‘absence of time to get it right increases [the] chances of getting it wrong’\textsuperscript{103}.

\textsuperscript{102} Ryder LJ – see note 10 above: The role of the justice system in decision-making for children; page 3 para 8.

\textsuperscript{103} Ryder LJ – see note 9 above: What’s happening in justice: A view from England and Wales; page 1 para 2.
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The Children Act 1989

The Children and Families Act 2014

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United Nations Convention on the Rights of the Child (UNCRC)

General Comment 12 (GC12) of the UNCRC

Practice Directions

PD 36C Pilot scheme: care and supervision proceedings and other proceedings under part 4 of the Children Act 1989

PD3AA – Vulnerable persons: participation in proceedings and giving evidence guidance and vulnerability factors to which the court has to have regard when considering the vulnerability of a party or witness mentioned: rule 3A.3(1) FP, see https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-3aa-vulnerable-persons-participation-in-proceedings-and-giving-evidence.


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Family Justice Council (2010) Guidelines for Judges Meeting Children who are subject to Family Proceedings.

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Re NL [2014] EWHC 270 (Fam)

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Re R (A Child) [2014] EWCA Civ 1625

Re S (Parenting Assessment) [2014] 2 FLR 575

London Borough of Brent v D and Ors (Compliance with Guidelines on Judges Meeting Children) [2017] EWHC 2452 (Fam)

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Re William (dismissal of application for a Placement Order) [2018] EWFC B51

P-S (Children) [2018] EWCA Civ 1407.

**Other Jurisdictions – British Columbia (B-C) Provincial Court**

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Court of Appeal and the Supreme Court of B-C see,
http://www.courts.gov.bc.ca/Court_of_Appeal/practice_and_procedure/civil_practice_directives_/PDF/
(Civil)Judicial_Settlement_Conferences.pdf and,
http://www.courts.gov.bc.ca/supreme_court/practice_and_procedure/practice_directions/family/
APPENDIX 1
INTERVIEW SCHEDULE

SECTION A: ADVOCATE RESPONDENT

Researcher ID:
1  Area and respondent code (see attached area/respondent coding sheet)
2  Respondent: m / f
3  Which court(s) have you attended for a settlement conference? (please identify by name)
4  How many settlement conferences have you attended?
5  If you have attended more than one conference, have these all been before same judge?
   Yes
   No, IF no, how many different judges have you observed?
6  Which parties instructed you in the case(s) subject to a settlement conference(s)?
   Local authority; Adults (parents/others); Child(ren)/young people;
   More than one of the above (please specify)

SECTION B – SELECTION OF CASES FOR A SETTLEMENT CONFERENCE

7  (a)  Does the court apply a consistent screening process or criteria in selecting cases for a settlement
   conference?  
      If yes, what criteria are applied?
      No
      I don’t know?
   (b)  Do you have any experience of a settlement conferences being imposed on parties when one/more do
      not freely consent to the process?
      Yes, IF yes, please explain what happened
      No
      Other

8  In your experience are settlement conferences used for: (circle as appropriate)
   (i) Threshold disputes (ii) Welfare disputes (iii) Both

SECTION C – JUDICIAL PRACTICES IN SETTLEMENT CONFERENCES

9  Court formats: Was the physical layout of the court room and seating of participants any different to that of
   a normal hearing?
   (i)  No – same seating layout as a normal hearing
   (ii)  Yes – different to normal courtroom layout (prompt: please describe format and where the
      judge sat (e.g. at any point did the judge sit alongside a parent?)

10  Can you describe how the judge(s) set up the process of dialogue of the conference?

   (a)  Which of the following best describes the process(s) you observed?
      i.  All parties and advocates are in the court room from the start
      ii.  Judge sees advocates alone
      iii.  Judges sees a parent(s) alone
      iv.  Judge moves between parents and advocates,
      v.  Judge moves between parties, then brings parties together
      vi.  Other techniques used (specify)
      vii.  Process varied across cases (probe – if so how?)
      viii. Process differed according to judge (probe: if so how?)
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(b) How much time is usually allocated to a settlement conference?

(c) In your view, was the time allocated usually sufficient for the task(s)?
   Yes
   Sometimes
   No
   If Sometimes/No – (what was problem?)

11 Judicial styles/approaches to negotiations with parents/guardian in settlement conference(s)

(a) How would you describe the judge's approach and negotiating style in the conference – in particular their style/technique in talking directly to parents?

(i) Overall, would you describe it calm, patient and facilitating throughout?
   Yes
   Sometimes
   No

(ii) In your view did any parent, guardian or social worker have any difficulties engaging with the judge and speaking freely?
   If Yes/sometimes, which party, and what do you think were the barriers?
   No

(iii) In your view, did the judge(s) apply any pressure on parties to settle?
   Yes
   Sometimes
   No
   If yes/sometimes, please explain briefly what happened (probe at what point in the process, and the pressure applied)

(iv) Did your client think the judge had applied any pressure?
   Yes
   Sometimes
   No
   I don’t know/did not ask
   If yes/sometimes – what did the judge say?

(v) Do you think some judicial pressure was appropriate in this/some case(s)?
   If Yes, why
   No

(vi) Did your client report feeling coerced or intimidated in any way?
   Yes
   Sometimes
   No
   I don’t know/did not ask
   If yes/sometimes – what did they say?

(b) Do you think the judge remained completely impartial?
   Yes
   Sometimes
   No
   If sometimes/No – please explain what happened:

(c) Did your client think the judge remained impartial throughout?
   Yes/Sometimes
   No
   I don’t know
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(d) Did you or your client identify any advantages to negotiations with a judge not previously connected with the case?
   - Yes
   - Sometimes
   - No
   - I don’t know
   **If yes, please explain the advantage(s)**

12 (a) Before you attended a settlement conference, did you have any concerns about the format and in particular the rights of parents and children under Articles 6 and 8, ECHR?
   - Yes
   - No
   - Other

(b) Having been involved in one/more settlement conferences, do you have any concerns about the process you observed in the context of Article 6 and 8 rights of clients?
   - Yes
   - Sometimes
   - No
   - Other

**SECTION D THE ROLE OF ADVOCATES IN SETTLEMENT CONFERENCES**

13 (a) How would you describe your role in settlement conferences?

(b) If you have experience of more than one judge in a settlement conference, did your experience vary depending on the style/approach of the particular judge?
   - Yes
   - Sometimes
   - No
   - Not applicable
   **If yes/sometimes – can you briefly explain the differences of approach?**

(c) Were you able to give your client any advice during a settlement conference?
   - Yes
   - Sometimes
   - No

(d) If you felt it necessary, were you able to consult privately with your client?
   - Yes
   - Sometimes
   - No
   **If yes/sometimes did/does this vary according to the judge?**

(e) If applicable, was your advice accepted by your client?
   - Yes
   - No
   - It varied

(f) If you are expected to remain silent throughout, were there circumstances or developments where you had wanted to speak?
SECTION E  ROLE OF THE CHILDREN’S GUARDIAN IN SETTLEMENT CONFERENCES

14  (a) Was the child’s guardian always in attendance at any settlement conference you attended?
   Yes
   No

   (b) If present, was the guardian invited to participate by the judge?
       Yes
       Sometimes
       No

   (c) Do you think the voice of the child/young person was heard at the conference(s)?
       If yes, how?
       If No/it varied, please explain why?

   (d) With regard to young people of nine years and above and bearing in mind age/maturity, how were
       their views ascertained and addressed by the court?

   (e) Were children’s rights under the UNCRC clearly addressed?
       Art 2  non-discrimination – right to be treated fairly;
       Art 3  best interests – primary consideration in decisions affecting them;
       Art 4  protection of their rights – services and levels of funding to enable governments to
               meet minimum standards set by the convention;
       Art 12 right to a say and to have their views taken into account, thus their views must be
               ascertained and addressed in any decision-making forum which affects their welfare;
       Art 19 protection from all forms of violence.

F  OUTCOME OF CASES SUBJECT TO A SETTLEMENT CONFERENCE

15 In any settlement conference you have attended was a consent order made?
   Yes, case(s) fully resolved
   Partial agreement reached
   No
   **If yes/partial agreement reached:** what order(s) was made

16  (a) How did the judge ascertain that any consent was continuous throughout the conference?

    (b) Were you confident that there was continuing consent throughout the process?
       Yes
       No – what happened?

17 In your view was the settlement conference process fair (whether or not settlement/partial settlement was
    reached)?
       IF Yes – please explain briefly how the process/technique demonstrated fairness
       IF No – please explain why
       Other – please expand

18 Did the conference(s) meet the needs of the case (e.g. where evidence may need to be tested?)
   Yes – please explain briefly how
   Sometimes – please explain advantages and limitations
   No – please explain why
   Other

19 Is a final hearing scheduled/taken place for any case that has been subject to a settlement conference?
   If Yes – for how long?
   No

20 Could a properly conducted IRH (Issues Resolution Hearing) have achieved the same result?
   If yes, why do you think in this case(s) it failed to do so?
   If no – can you explain why?
   Don’t know/other
21 May we contact you again to see if partial agreement(s) reached were successful/any appeal or otherwise return to court has been necessary?

22 Is there anything else you would like to add about settlement conferences which we have not covered?
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APPENDIX 2
‘SETTLEMENT CONFERENCES – PROTOCOL AS TO BASIC PRINCIPLES’

The role of the Settlement Conference is to facilitate discussion of the issues, clarify information, analyse issues and promote understanding between the parties with a view to helping to identify solutions (including solutions which may be addressed by the consent of the parties and not necessarily within the Court process).

It is the parties and not the Judge who determines whether there is agreement on any of the issues and whether an order will flow following such agreement.

Authority for Scheme

The basis under which the scheme operates has the approval of the President of Family Division.

Training

All Judges who operate this scheme have received appropriate training including observation of Settlement Conferences.

Participation

All parties must consent to a Settlement Conference by signing a document in the form of Annex 1.

They must also be provided with the information as to the process on the basis of the document in Annex 2.

Participation in the scheme is voluntary

Any party may withdraw from the Settlement Conference at any time and this will not, in any way, prejudice their case.

Status of Settlement Conference

For the purposes of the pilot, a Settlement Conference has the status of an Issue Resolution Hearing. Where parties have legal aid, the Settlement Conference will be paid to providers as a further IRH if unsuccessful, and as a Final Hearing if successful.

Judicial Continuity

A Judge who conducts the Settlement Conference should not be the Case Management Judge (unless all parties are agreed). If the Settlement Conference does not result in a resolution of all issues, the Judge who conducts the Settlement Conference must not be the Judge who conducts the Final Hearing. Further, the Judge who conducts the Final Hearing will not speak to the Settlement Conference Judge about the Settlement Conference.

Confidentiality/Privilege

Anything which is said by the parties during the course of the Settlement Conference Process is confidential to the Settlement Conference. This relates also to what the Judge has said to the parties and what the parties have said to the Judge or to each other.

Any proposals made by any party shall not be referred to in the event that the matter is not settled save where issues are agreed and may be recorded as such.

However, it should be made clear to all parties, at the outset of the Settlement Conference, that if it is discovered during the process of the Settlement Conference that a child is at risk of significant harm, the Judge will immediately end the Settlement Conference and will take appropriate steps to protect the child.

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104 As at November 2016.
Transparency

The Settlement Conference will be recorded on audio recording equipment which shall be preserved by HMCS.

Listing

Settlement Conferences must be capable of being listed as a matter of priority so that delay is not encountered in the proceedings.

Generally, a Final Hearing should be listed so that all parties are aware of the availability of such a hearing if the Settlement Conference does not resolve some or all of the issues.

Role of Judge

For the purpose of the Settlement Conference, the Settlement Conference Judge will have access to the Court bundle (or such documents as the parties agree) and a case summary.

For the purpose of enabling the parties to have direct involvement in the Settlement Conference, the Judge may directly engage with any of the parties. Such involvement will only be in the presence of the relevant party's legal representative who may raise an objection to such dialogue taking place without giving a reason. In the event of such objection, the Judge will respect the legal representative's position without question.

Although the procedure is flexible, a party is never to be seen without his/her legal representative. If a party is not represented in Public Law cases, the Guardian will be present. In Private Law cases, CAFCASS generally and, if appropriate, to welfare issues, will be present.

No pressure will be brought to bear on any party with a view to reaching agreement.

Exceptionally, and where the parties agree, one party can be seen by the Judge (without the other parties being present) but that will only happen in the presence of their legal representatives. This is generally to be considered only if protective of Article 6 rights of the parties e.g. a litigant wish to speak to a Judge without the other parties being present so that he/she is not prejudiced in any final hearing which may follow and there can be no risk of prejudice to other parties.

Where the Judge addresses a litigant with a view to probing issues, the legal representative is free to engage or object to any question or raise any issues. The Judge will not ask the legal representative as to his or her view on any issue as that may potentially embarrass the legal representative/party and go behind the legal/professional privilege.

A Judge can give a neutral evaluation if the parties indicate that they wish this to be expressed. However, a Judge should point out that another Judge may disagree and should further point out any other limitations on his/her opinion.

Pressure

At all stages of the Settlement Conference, the Judge will repeat that there is no pressure to agree anything. Further, a hearing date is available for full determination of the issues.

If there is any issue as to lack of understanding/capacity of any party or any effect of emotional pressure or vulnerability, the Settlement Conference must be terminated.

If a party has learning disabilities/mental health issues/or any other such issues as impact upon full participation, a Judge will be fully aware of this and only communicate with that party in a manner which is appropriate and upon appropriate advice from all parties and, in particular, that party's legal representative.

Judges must appreciate/be aware that a Judge/Court setting often intimidates a parent or vulnerable party. It is possible for a parent/litigant to answer a question/provide a response which is intended to please the Judge but does not reflect a true wish or need.

Although the Judge should ask all parties at the outset to clarify their position as to the disputed issue, once the Judge has seen the party/parties for consideration of the issues, the Judge will not ask that party if the issue/
issues are agreed. He will allow that party/parties to withdraw from Court to reflect/obtain advice from legal representatives or to have the opportunity to reflect as to how they wish to proceed.

Any party’s lawyer is free at any stage to contribute to the process of the Settlement Conference.

No party is required to speak directly to the Judge. At all times a party may refuse to answer a question/engage with the process of the Settlement Conference or leave the process/terminate the Settlement Conference.

Adjournment of Settlement Conference

If a party requests, a Settlement Conference can be adjourned for a period to allow reflection/consideration/further information to be obtained.

The Voice of the Child

Where a child wishes to see the Judge, this may be arranged with the CAFCASS Officer/Reporting Officer/Guardian following the 2010 guidelines.

Orders

Where an agreement has been reached on some or all of the issues, this will be recorded in a Court Order approved by all parties. If there is no agreement, the Order will simply adjourn the case for the trial date.

Fair Process

It is critical to preserve a party’s Article 6 and Article 8 rights throughout the process. Each party is entitled, if they wish, to a final trial. This cannot be abrogated by the Settlement Conference process.

Settlement Conference Judges are Judges who have been appropriately trained in the process and who are willing to engage in such a process. They must uphold the law and where appropriate international treaties such as the UN Convention on the Rights of Children and the European Convention on Human Rights during the Settlement Conference and when endorsing any agreement reached between the parties.

Role of Representatives

It shall be the primary role of the parties’ legal representatives to ensure that the party they represent remains engaged in the process on a wholly voluntary basis and that a party has a full understanding of the process.

Judgement (sic)

In the event of a Settlement Conference resulting in a determination of the issues on which a Judgement is required, the Judge shall, with the consent of the parties hand down an extempore Judgement giving reasons.

Her Honour Judge Margaret De Haas Q.C.
Designated Family Judge for Cheshire & Merseyside
8 November 2016
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ANNEX 1\textsuperscript{105}

I ……………………………………… agree to taking part in a Settlement Conference.

The nature of the Settlement Conference has been explained to me and I have read the Guidance and/or it has been read to me.

…………………………………………………

Name and date:

ANNEX 2

NATURE OF SETTLEMENT CONFERENCES

Purpose

In both Public Law and Private Law cases, at any stage (but particularly at the Issue Resolution Hearing) a Judge may, with the consent of the parties refer the case to be resolved (if possible) to a Judge at a “settlement conference”.

This is a hearing which will take place before a Judge who is experienced in dealing with such cases.

The purpose is to try to resolve some or all issues or, if possible, to inject a creative or innovative method of resolving the case.

The Judge will not impose any duress or pressure on any parties. Settlement implies that all parties will agree fully to resolve some or all issues.

The settlement conference will be conducted in such a way as the Judge considers appropriate to promote agreement. He/she may see some or all of the parties together or apart. Parties will only be seen individually or in the absence of other parties if all parties consent, this being recognised as exceptional. A party will never be seen without his/her legal representative.

At the end of the settlement conference either there is a resolution of all or some of the issues or there is no resolution.

Where issues are resolved a consent order will be drafted. Where some of the issues are resolved an order will be drafted to reflect this.

Where some issues remain to be resolved or all issues remain to be resolved, the case will be adjourned for final hearing (which ordinarily will already have been fixed). If the case is resolved, the hearing which has been listed for final hearing will be vacated.

Procedure

No party or legal representative is obliged to say anything to the Judge if he/she does not wish to do so. Parties will never be separated from their legal advisers. Legal Advisers are free to speak at any time.

All parties will be given the opportunity to reflect or obtain advice from their legal representatives at all stages during the Settlement Conference.

Although everything said during the Settlement Conference is confidential to the process of the Settlement Conference and will not be referred to at trial, if it is discovered during the process of the Settlement Conference that a child is at risk of significant harm, the Judge will immediately end the Settlement Conference and take appropriate steps to protect the child.

\textsuperscript{105} Written consent was a later edition to the Protocol.
The Judge will speak to each of the parties but anything said by the Judge or the parties is confidential and attracts "negotiation privilege".

Nothing which the Judge has said or the parties have said will be referred to at the next hearing or at any other hearing.

Any party can withdraw at any time from a Settlement Conference and this will not prejudice their case or lead to an adverse inference at any time.

A Settlement Conference can be listed at an early opportunity so as to avoid delay as it attracts listing priority.

Success

All parties are encouraged to consider settlement conferences as they currently have a success rate of approximately 70%.

HER HONOUR JUDGE MARGARET DE HAAS Q.C.