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ABSTRACT

This contribution to the special issue considers Felicity Kaganas as a feminist socio-legal scholar who persistently 'asked the woman question' in family law. It focuses on one of her important articles, 'When it comes to contact disputes, what are family courts for?' . After summarising her argument concerning the evolution of the family courts' approach to contact disputes, it examines her critique of a problem-solving approach, in light of the recent introduction of the Pathfinder pilot courts, following the recommendations of the *Ministry ofJustice report, Assessing risk of harm to children and parents inprivate law children cases (2020)*.

KEYWORDS

Contact disputes; family law; Felicity Kaganas; harm panel; pathfinder pilot; problem-solving courts

Introduction

To be a family law scholar in the UK in the last 20-odd years was to know – and to read – Felicity Kaganas. She was one of those who defined the field and pushed its boundaries. This was obviously true of her landmark feminist textbook co-authored with Alison Diduck, *Family Law, Gender and the State* (Diduck and Kaganas 1999, 2005, 2012), which to my mind was simply the best textbook on the block, unique in its critical and contextual approach and in its sustained construction of an *argument* about family law, when other texts stayed at the level of the descriptive (or at most mildly inquisitive). Diduck and Kaganas carried through systematically the point I often made to my students, that it was impossible to think about family law without thinking about gender, and it was impossible to think about gender without drawing on the extensive resources of feminist scholarship, which was centrally concerned with the analysis and theorisation of gender. One of those resources is the feminist legal method identified by Katharine Bartlett of 'asking the woman question', that is, considering what impact particular laws have on women, and in particular identifying instances in which laws have differential gendered impacts to the detriment of women (Bartlett 1989, p. 829).

In addition to her authorship of *Family Law, Gender and the State*, Felicity appeared in most of the major edited collections of the period (e.g. Kaganas 1999, 2002, 2006, 2009, 2013a, Kaganas and Piper 1999, 2015, Day Sclater and Kaganas 2003) and authored a series of memorable articles, taking aim at fundamental gender biases within family law. These included pairs of articles in which she revisited a theme and developed an argument over time, such as her case note on the *Re L* case (Kaganas 2000), followed

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by her feminist judgment in *Re L* (Kaganas 2010a); or her predictive critique of the presumption of parental involvement when it was first proposed (Kaganas 2013b), followed by her investigation of the way it had operated in practice, which bore out her earlier predictions, and convincingly demonstrated not only that the presumption did not achieve the objectives of its proponents, but that its only apparent effect had been to increase the risk of ongoing harm faced by children and mothers affected by domestic abuse (Kaganas 2018). Family law fads manifesting as presumptions in favour of particular outcomes were a frequent target of her questioning (in addition to those on the presumption of parental involvement, see e.g. Kaganas and Piper 2002 on shared parenting, and Kaganas and Piper 2020 on grandparent contact).

Although Felicity wasn't an empirical researcher in the sense of generating data about the family justice system from case files, interviews or court observations (an exception being Kaganas and Day Sclater 2004), she was a socio-legal researcher in that she understood law as a social institution which operated in wider political, economic and discursive contexts, and as an instrument of governmentality. She was concerned to reveal and critique the policies and agendas underlying the law – not only the overt government policies, but also the implicit judicial policies (see, e.g. Kaganas and Diduck 2004, Kaganas 2011). Through the application of discourse analysis to case law she exemplified an approach to 'black letter' law that went well beyond traditional doctrinal exegesis.

What are family courts for?

Amongst Felicity's many important publications, the one I want to focus on for the remainder of this short tribute is her Current Legal Problems lecture titled 'When it comes to contact disputes, what are family courts for?' (Kaganas 2010b). I attended the lecture itself in 2009. My memory of the event is hazy and undoubtedly unreliable. But I came away with the distinct impression that the lawyers and judges (and possibly some of the academics) present were bemused, bewildered and baffled by it. Felicity had asked the woman question and given an uncomfortable answer. In doing so, she had held up a critical mirror to the practices and norms of family courts that showed them in a light in which they weren't accustomed to being cast.

In brief, Felicity's argument was that ideas about the role of family courts – and what they understood themselves to be doing – in private law children's cases had changed over time. She traced this development from the court's role in adjudicating the rights and wrongs of divorce (from which custody decisions followed), to its subsequent orientation towards children's welfare (Kaganas 2010b, pp. 235–36). This in turn had morphed from a focus on determining welfare, to the promotion of a fixed view of welfare (continuing contact with both parents post-separation and cooperative post-separation parenting) (Kaganas 2010b, pp. 237–41, 260), to finally and most recently, the notion that it was the court's responsibility to resolve problems in the achievement or maintenance of contact (Kaganas 2010b, pp. 243–47, 251). In other words, the accepted role of the court had shifted from decision-making, to encouraging parental agreement, to problem-solving; from deciding on fault in divorce or on the child's welfare, to making contact happen by consent, to using the court's authority to make contact work (Kaganas 2010b, pp. 252, 257–58).

Accompanying this shift, the 'problem' to be solved had increasingly come to be seen as barriers to contact and cooperative post-separation parenting, which were primarily located in mothers' resistance to, obstruction of, or 'implacable hostility' towards contact (Kaganas 2010b, pp. 243–50, 266–67). Correspondingly, the tools available to the court had expanded from simply making orders, to increasingly elaborate means to enforce them, by means of punitive sanctions and, latterly, therapeutic interventions (Kaganas 2010b, pp. 252–54, 261–62). In this way, the boundaries between courts and social work had become blurred, and courts were now acting, in Foucauldian terms (my interpretation rather than Felicity's), less as institutions wielding juridical power and more as instruments of biopower, utilising processes of discipline and normalisation to achieve the desired outcomes (Foucault 1979, pp. 137–41, 170–92, 1982, see also Smart 1989, pp. 6–8, 14–20).

> What family courts are 'for', now, includes not only seeking to persuade parents (mainly mothers) to comply but also deciding to refer them to services so that they address their underlying problems. Courts have become part of a therapeutic network being deployed to change attitudes and behaviour. Conversely, helping agencies have now become part of the disciplinary framework governing families, and in particular resident mothers. These 'helping' services have in effect been incorporated into the family justice toolkit, backed up by punishment. What is happening here appears to be at least the beginnings of a blurring between adjudication and social work . . . (Kaganas 2010b, p. 270)

Felicity identified one of the key drivers for these shifts as being the fathers' rights movement, which had demanded that the family court should not simply make orders but should make those orders effective, in order to maintain its credibility with the public (Kaganas 2010b, p. 248). But as a result of conceding to these demands, the court had come to characterise and address a 'problem' that was by no means obvious:

> There is a difference between the 'problems' facing, say, domestic violence or drug courts and those facing family courts. There is some consensus that violence and addiction are generally negative in their effects but it is not so clear-cut that mothers who oppose contact are causing harm. (Kaganas 2010b, p. 270)

Indeed, to treat 'mothers as being in need of counselling to help them to become reconciled to contact is to pathologize their frequently very real and well-founded worries' (Kaganas 2010b, p. 268) for their children's safety in the context of domestic abuse, drug addiction and other problematic paternal behaviours.

Given that, in her analysis, the family courts now bore a resemblance to American-style problem-solving courts, Felicity proceeded to offer a critical review of the problem-solving court model, including concerns about the surveillance and coercion of participants, requiring participants to undertake therapeutic interventions that failed to respond to the complexity of their problems and the effectiveness of which was unproven, the possibility of harsher punishments for those who failed the programme, and detracting from the court's traditional role of fair and authoritative dispute resolution (Kaganas 2010b, pp. 264–65). In light of these concerns, she predicted that the family courts' problem-solving approach 'could be seriously detrimental to mothers and their children in many cases' (Kaganas 2010b, p. 268).

Can a problem-solving court do better?

Revisiting Felicity's critique of problem-solving courts gave me pause, having just recently proposed a full-blown problem-solving court model for private law children's cases as the answer to the very issues of the prioritisation of contact, mother-blaming and unsafe contact orders that Felicity identified. In the Harm Panel report, *Assessing risk of harm to childrenand parents in private law children cases*, the panel identified four structural barriers to the ability of family courts to take domestic abuse seriously, respond to it appropriately, and make safe and trauma-informed orders in child arrangements cases (Hunter *et al.* 2020, ch. 4). These barriers consisted of resource limitations, the courts' pro-contact culture, the adversarial process, and the courts' tendency to work in a silo rather than in a joined up way with other parts of the justice system and family and domestic abuse services. These barriers operated cumulatively to minimise domestic abuse and its effects on children and adult survivors, to silence survivors and children who expressed concerns about abuse, and to re-traumatise them through the court process and through subsequent contact orders and the enforcement of those orders. In order to overcome these barriers, we recommended that child arrangements proceedings should be fundamentally reformed, so that the pro-contact culture was replaced with a focus on safety, awareness of trauma and protection from harm; the adversarial process was replaced with an investigative, problem-solving approach based on open inquiry into what was happening for the child and their family; silo working was replaced with coordination and connection with other systems, procedures and services; and resources to deal with these cases were sufficient and used more productively (Hunter *et al.* 2020, pp. 171–72).

We proposed that the procedure in child arrangements cases should be redesigned with children's needs and wishes, the needs of litigants in person and domestic abuse and other safeguarding concerns as its central (rather than marginal) considerations (Hunter *et al.* 2020, pp. 172–73). We envisaged a three-stage procedure, commencing with an investigation and information exchange phase focused on understanding what had been happening for the child, including the impact of any abuse within their family and child and adult needs for protection from future harm. Information would be gathered proactively by the court, drawing on all relevant sources with knowledge of the family, as well as consultation with both parents and children. Parents would also be given information about issues relevant to the case, including psycho-educational work on domestic abuse. If no agreement was reached the case would be proactively prepared for adjudication. The adjudication phase, if required, would be a judge-led process focused on accurately identifying any harm and risk, problem-solving and securing future welfare. In all cases, there would be a follow-up phase, three to six months after orders were agreed or made, to see how they were working (Hunter *et al.* 2020, pp. 175–76).

It is immediately obvious that these proposals are susceptible to the critiques Felicity had made of problem-solving courts, particularly in relation to surveillance, and scope for coercion to undertake therapeutic interventions of questionable effectiveness. More generally, would a problem-solving approach really amount to a fundamental change in dealing with children's cases, or would it simply represent the logical conclusion of a trend that was already well underway? And would it really produce outcomes that were safer for child and adult survivors of domestic

abuse, or would it simply provide courts with even more powers to 'educate' parents (primarily mothers) on the virtues of contact and 'encourage' them to reach agreements?

But while the model we proposed is certainly open to these critiques, that doesn't mean that they will inevitably be borne out. In particular, the basic definition of the 'problem' to be solved is quite different from the one Felicity identified. Rather than the perceived problem being mothers' obstruction of contact, our proposal was premised on the problem established through extensive evidence set out in the Harm Panel Report of unsafe contact and the perpetuation of trauma and harm through the court process and court orders. In individual cases, the problem-solving approach requires an open inquiry into the reasons why the case has come to court, and an effort to address those reasons, rather than any a priori judgement as to what the problem will be.

The way in which this recommendation has been implemented to date would also, I hope, allay some of Felicity's fears. A pilot of the investigative/problem-solving approach under the name of Pathfinder was commenced in two family court areas, Bournemouth and North Wales, in February 2022, underpinned by a new Practice Direction, PD36Z (Family Procedure Rules 2022a). The first stage of the procedure, Information Gathering and Assessment, has the purpose of taking 'a proportionate, child welfare focussed approach to actively investigate the impact of issues presented in the application (and any additional information requested as part of this Stage) on the child – through engagement and assessment' (Family Procedure Rules 2022b, para. 12.1). The primary method of information gathering is the preparation by Cafcass or Cafcass Cymru of a Child Impact Report, which involves, at a minimum: safeguarding checks with police and the local authority; initial contact with the parties to understand their circumstances and ascertain their perspectives on what they consider to be in the best interests of the child; engagement with the child to determine their circumstances, preferences for engagement and initial wishes and feelings; completion of a DASH or equivalent risk assessment where domestic abuse is a feature of the case; and consideration of any other cases involving the child or the parties that are relevant to the case (Family Procedure Rules 2022b, para. 13.1). DASH risk assessments are administered by one of the local domestic abuse services working with the courts on the pilot (Ministry of Justice 2023a, p. 5). This process automatically puts survivors of domestic abuse in contact with a specialist support service, even if they have not previously accessed such support. It also ensures that where a mother and/or a child are opposed to contact, the court is informed of their reasons for opposition, and further information is obtained which can support those reasons.

Once the Child Impact Report is completed, gatekeeping and allocation of the case to the appropriate tier of judiciary is undertaken based on much more extensive information and evidence, including information and evidence about domestic abuse, than is the case under the current Child Arrangements Programme (Family Procedure Rules 2014, para. 9.1–9.3, Ministry of Justice 2023a, p. 7). The judge to whom the case is allocated then determines what steps are necessary to enable the case to proceed, including: whether there is a need for fact-finding; whether there is a need for an order under s 91(14) restraining further applications without leave of the court; whether there is a need for further engagement with external agencies such as schools, nurseries or GPs, to determine matters relating to the child; whether there is a need for further engagement

with the child; and whether input or further input is required from an IDVA or Domestic Abuse Support Worker (Family Procedure Rules 2022b, para. 14.2).

After any such steps have been completed, the case proceeds to stage two, when the court must exercise its discretion as to how to enable the matter to be concluded. This may include making an activity direction or recommending that the parties engage in out-of-court dispute resolution or therapeutic interventions to enable them to reach an agreement or narrow the issues (Family Procedure Rules 2022b, para. 15.1), but again, this is against the background of having obtained considerable information about the case and the child's wishes, including information about domestic abuse. Furthermore, PD36Z specifically states that:

> It is not expected that those who are the victims of domestic abuse should attempt to mediate or otherwise participate in forms of non-court dispute resolution. It is also recognised that drug and/or alcohol misuse and/or mental illness are likely to prevent parents and families from making safe use of mediation or similar services; these risk factors ... are likely to have an impact on arrangements for the child. Court Orders, including those made by consent, must be scrutinised to ensure that they are safe and take account of any risk factors, in accordance with Practice Direction 12J FPR. (Family Procedure Rules 2022b, para. 5.2)

Stage three of the process, the Review stage, takes place 3–12 months after orders are made. The format of the review is at the court's discretion, but guidance in the Practice Direction provides that the intention of the review is to determine how the order is working for the child and the parties, with a focus on the safety of the parties and children, post-order support to parties, and follow up or signposting to sources of support. The focus should not be on checking on adherence to the order, unless the court considers it appropriate, for example in the context of an enforcement order under s 11H of the Children Act 1989 (Family Procedure Rules 2022b, para. 16.2).

At the time of writing, the Pathfinder Pilot is undergoing independent evaluation, with the first evaluation report, focusing on the process and comparative costs of the model, pending. The judiciary have embraced the model (see McFarlane 2023, para. 8, McFarlane 2024), and it is now being rolled out in two larger court centres, Birmingham and Cardiff/South East Wales. The Ministry of Justice have published a progress report including very positive assessments from partners in the delivery of the Pathfinder courts in relation to the heightened focus on domestic abuse:

- Being able to engage with children and families in more depth earlier in the process, and working closely with local domestic abuse agencies, is felt to be improving the understanding of and focus on domestic abuse and harm. While domestic abuse was considered when raised under the [Child Arrangements Programme], the new model has brought a much more active focus on domestic abuse and protecting children and families from harm.
- When domestic abuse is alleged or identified as a concern within a case, a DASH risk assessment is generally completed by a local domestic abuse agency. When completed, they form a core part of assessments reviewed by the court, such as the Child Impact Report. Partners feel they are helping to bring a clearer understanding of the risks of domestic abuse to victims and survivors earlier in the court process.

- Pathfinder partners are reporting closer partnership working with local domestic abuse agencies and alongside the DASH risk assessments are providing victim survivors with access to support services. Partners feel this revised way of working is helping to support more victims to access domestic abuse services. Local domestic abuse agencies involved in the pilot have noted that they are supporting victims and children previously not known to them and continuing to provide support through their wider services. (Ministry of Justice 2023a, pp. 7-8)

Crucial to the evaluation, however, will be the perspectives of parties and children who have experienced the process. The evidence to the Harm Panel from mothers and children who had been through family court proceedings against a background of domestic abuse painted a grim picture of their experiences in court and after orders were made, very different from the court's own view of its processes. So, too, no definitive conclusions on the success of the Pathfinder courts can be drawn without the evidence of parties and children whose cases have been dealt with in those courts. Only this evidence can answer the woman question.

Felicity's article also reminds us of the need to remain vigilant about the potential downsides and risks of any reform. Given the history she outlined of the family courts' approach to contact disputes, we should be aware of the potential for the Pathfinder courts to degrade into yet another mechanism for coercing and disciplining mothers attempting to protect their children from abusive parenting, of turning mothers into the problem in response to political pressures from disgruntled fathers, and/or of restricting access to the support offered by the Pathfinder process in a renewed emphasis on keeping parties out of court and redirecting them into mediation (see, e.g. Ministry of Justice 2023b). The capacity for the gendered impact of legal processes to morph over time, with different means producing the same result, should not be underestimated. After Felicity's retirement, we should continue to follow her lead in asking the woman question in family law, and not flinching from the answers, however unwelcome, unpopular or iconoclastic they may turn out to be.

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