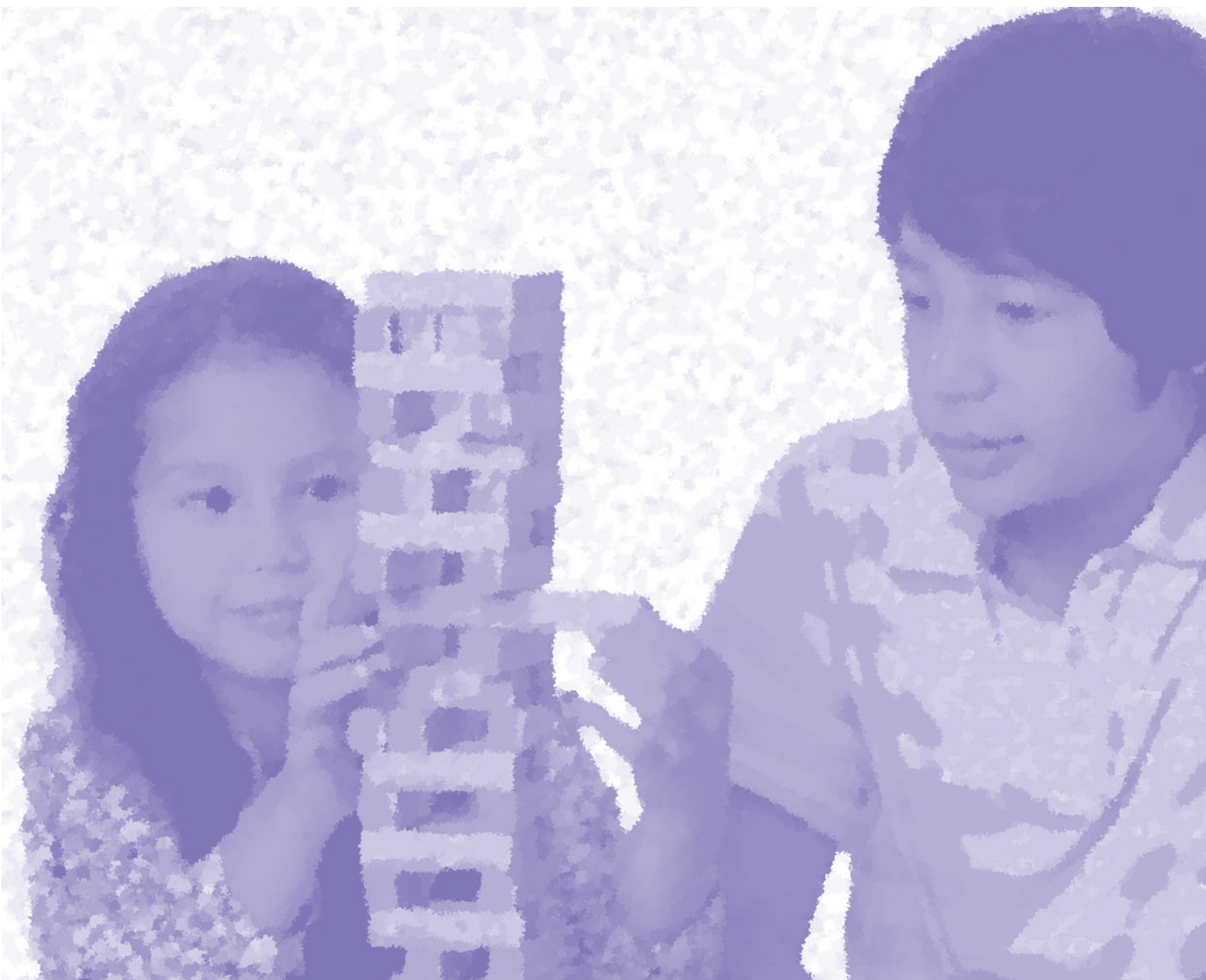


newsletter



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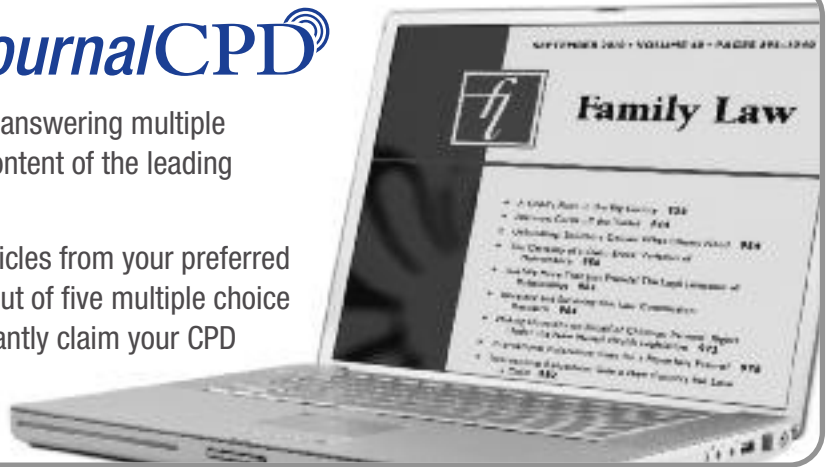
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Autumn 2010 Issue 47

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Family Law

Editorial

George Eddon Editor

During the summer, we have seen a lot of media coverage relating to the events of 1940, including Dunkirk, the Battle of Britain and the start of the Blitz, a time when when the nation fought for its survival. We have seen somewhat less coverage of the challenges facing the family justice system in 2010. The canvas on which the present-day drama is played out is smaller, and the "toil, tears and sweat" will not be accompanied by bloodshed, but the feeling of standing alone against the world is strikingly familiar.

At the time of writing, we have just heard that the Law Society has succeeded in its judicial review of the Legal Services Commission. This success reflects a huge amount of work and commitment by those involved. One feature of the profession's response to the outcome of the tendering process was the extent to which those who had been awarded contracts came out in support of those in their area who had not, notwithstanding that this was likely to be against their own commercial interests. If the profession's argument, that this issue is about access to justice and not the financial well-being of the legal profession, it is essential that we all, whether 'winners', 'losers' or, in the case of local authority lawyers, interested spectators, continue to speak with a common voice.

In the words of the then-Prime Minister, "We may permit ourselves a brief period of rejoicing; but let us not forget for a moment the toil and efforts that lie ahead". We do not yet know what proposals will be put forward to replace the scheme that has now been quashed. We do know that, whatever the details of any new scheme, it will be informed by the requirement to reduce public expenditure by around 25%. The officers of your Association will therefore be giving anything that is produced by the LSC the closest possible scrutiny and will not be assuming that it will represent an improvement on the last version.

The cuts in public expenditure will affect all parts of the family justice system and the child protection system, including local authorities. In the climate of anxiety and blame that has pervaded children's social care since 2008, local authorities will be reluctant to make large cuts to their child protection teams, but those services will not be immune. Also, it is likely that preventive services, of the kind that have the potential to keep cases out of court, will suffer significantly. It is foreseeable that, in the medium term, a larger number of cases will be allowed to reach crisis point and the overall demand for care

proceedings will increase. In its contribution to the discussions leading to the Public Law Outline, the ALC made it clear that the PLO would not achieve its aims if the pre-proceedings work was not properly funded. It was not, which is one of the reasons for the mixed results of the PLO. In a world where local authorities will have to focus on responding to crises, the future for the PLO, and for children involved in care proceedings, looks even more troubled.

We are becoming used to the "interim" arrangements for Cafcass, which have now been in place for a second period of six months. New arrangements were published on 1st October 2010 and will be in force for a year before being reviewed. There are commendable changes from the previous arrangements, including a clear statement that "*nothing in this Agreement encourages or permits the court's interference with the guardian's duties as set out in statute and court rules*" and a commitment to minimise the use of duty officers, but the timescales provide cause for concern. The agreement is stated to last for one year, twice as long as its predecessor, but is headed "*Arrangements to assist Cafcass pending implementation of the Family Justice Review*". The Review is not due to submit its interim report until Autumn 2011, so it appears that these arrangements will (subject to review) be in place for several years to come.

So, as we face the threats of funding cuts throughout the system, reduced access to justice and further years of struggle to secure proper representation for children, we can be forgiven for thinking back to the events of 1940. The reference to the Family Justice Review brings to mind an event that took place two years later, when national survival was still at stake. Government started to give thought to what British society should look like after the war. Most famously, Sir William Beveridge was commissioned to make recommendations for a new system of social security. Beveridge and others created the blueprint for the post-war Welfare State.

It is easy for us to focus on the threats that currently face us, and it is important that we do. We must, however, also raise our eyes to look at the future of the system within which we all work so hard. The Family Justice Review is likely to recommend radical changes, both to the system and to how it works. The initial call for evidence has now closed, but there undoubtedly will be further opportunities to contribute to the Review. If we focus exclusively on the short term, we will forfeit the opportunity to influence the long-term future of family justice.

'Lost Opportunities: Law Reform and Transparency in the Family Courts'

The Hershman-Levy Memorial Lecture for 2010

Lord Justice Munby

St Philip's Chambers Birmingham

Thursday 1 July 2010

There are, I suppose, few greater privileges for a family lawyer than to be asked to give the Hershman-Levy Memorial Lecture. The roll call of the illustrious judges who have preceded me on this podium is daunting. I fear I will struggle to compete. But I will do my best.

We are here this afternoon to honour two distinguished family lawyers whose untimely deaths in such quick and saddening succession robbed the profession of which they were both such distinguished ornaments, and the family justice system to which they each gave so much, of two very special people.

It was my privilege and pleasure at the Bar to appear with and against Allan in a number of interesting and important cases. He was a delightful companion and a fine lawyer with a deep knowledge and understanding of children law and practice. And he had the great knack of arguing his cases in such a way that whilst he said everything for his client that any client could have wished for yet he always kept the law and practice of the Family Division moving in the right direction.

With David I was fated to have less contact. He and I never appeared together at the Bar. Our first meeting, appropriately enough, was when I went on my first circuit to Birmingham. It was a case which I will never forget: truly a battle of the titans, for David on the one side and still then a junior was ranged against the formidable combination of Julia Macur QC (as she then was) and Michael Keehan. It was not for any lack of skill and tenacity that the local authority he was representing went down to defeat. And the same circuit sitting produced the only reported case in which David appeared before me, a case which well displayed his great knowledge and skill as a family lawyer.¹

Both Allan and David would be grieved to see the disrepute into which the family justice system is perceived, in certain vociferous, quarters as having fallen. Much of the criticism is unfair and much of it is uninformed. For that latter fact we have in large measure only ourselves to blame, for it is a consequence at least in part of our inveterate opposition to the opening up of the family courts that the outside world know so little and cares even less of what we do.

The subject of what I have to say is therefore, to use the vogue word, transparency. There are many important and pressing issues confronting the family justice system, but transparency is surely amongst the most important and the most pressing, for it goes to the root of public confidence in what we do. It is a topical issue, not least as we struggle to understand the recently enacted if as yet unimplemented Children, Schools and Families Act 2010. It is also, because of the vagaries of practice at the Bar and the happenstance of litigation, a topic with which I have had more than a passing involvement for over twenty years. So perhaps there will be something of interest in what I have to say. You will understand if I emphasise that what follows is a purely personal view. I speak neither for the judges nor as Chairman of the Law Commission.

Transparency is not, of course, something to do only with children cases, and one of my complaints, as you will hear, is that recent changes in the system do not extend as far as they should into other areas of family law. But as is appropriate on an occasion such as this, and also because in other contexts the rules of privacy seem to attract less public comment and criticism, I propose to concentrate in what I have to say on cases involving children. However I shall touch in passing on the ancillary relief and other non-children cases dealt with in the Family Division.

You will be glad to hear that I am not going to spend too much time telling you what the law is. Rather I wish to analyse what is wrong with it and what remains wrong with it despite the recent changes.

It suffices for present purposes to remind you that children cases are heard in private, that section 12 of

¹ *Re G (Secure Accommodation Order)* [2001] 1 FLR 884.

the Administration of Justice Act 1960 has the effect of making it a contempt of court to “publish ... information relating to [such] proceedings”, and that section 97 of the Children Act 1989 protects the anonymity of the children involved, though only whilst the proceedings remain on foot.² Section 12 of the 1960 Act, it may be noted, does not protect the anonymity of anyone involved in the proceedings – not even the anonymity of the children – and the recent jurisprudence shows that public agencies (local authorities and hospital trusts for example) and professional witnesses (experts, treating clinicians and social workers) cannot expect to obtain injunctions to protect their identities.³

Now what does section 12 actually do?⁴ In one sense it is very restrictive. “Publication” means publication in the sense in which the word is used in the law of libel. On the other hand, there is a significant amount that can be published even if section 12 applies, though where exactly the dividing line is to be drawn is a matter which requires detailed knowledge of an extensive, subtle and still-developing jurisprudence.⁵ I should add that, following an amendment to section 12(4) in 2004,⁶ publications authorised by the Family Proceedings Rules 1991 are excluded from the operation of section 12.⁷

But what of cases involving not a child but an incapacitated adult? If the case is in the Court of Protection, access to and reporting of proceedings is regulated by the Court of Protection Rules 2007.⁸ But what is the position in relation to the inherent jurisdiction of the Family Division in relation to incapacitated adults? Section 12(1)(b) of the 1960 Act is drafted by reference to the Mental Capacity Act 2005 and therefore applies to proceedings in the Court of Protection, but it not to analogous proceedings in the Family Division. So what is the regime which applies there? Nobody knows; nobody has even asked the question, I suspect. The answer probably is that there is no applicable regime at all. And at present we muddle along by making those

standard form orders where paragraph one says, from now on the claimant will be known as P and so on. But, as I had occasion to point out only last week,⁹ such an order is, for this purpose, scarcely worth the paper it is written on; it is not an injunction which restrains the press or anyone else from doing anything.

What about ancillary relief cases? Section 12 does not apply to ancillary relief unless you have that unusual case where it is the children’s interests which are very heavily engaged, in which case, query: does it? Nobody knows. But, in principle, section 12 does not apply. Given that section 12 does not apply, given that section 97 does not apply, what does apply? The law is not entirely clear; you need to study *Clibbery v Allan*,¹⁰ but I do not think there is anything in it to suggest that the identity of the parties is protected. There is an unresolved question as to whether the Judicial Proceedings (Regulation of Reports) Act 1926 applies to regulate the reporting of the details of ancillary relief proceedings.¹¹ And what of proceedings under Part IV of the Family Law Act 1996? What is the regime which applies to them? The answer appears to be no regime of any sort at all, except perhaps in relation to any children who may be involved and subject always to the principle (equally applicable in ancillary relief proceedings) that you cannot publish, until it has been read out in open court, material which has been extracted from the litigants under compulsion.

So much for what I may conveniently call the ‘automatic’ restraints which apply to children and other proceedings. But it is well recognised that the court – certainly the High Court and probably now, in light of the Human Rights Act 1998, also the County Court – has jurisdiction both to relax and, indeed, to increase these restrictions, not merely in children¹² but in other types¹³ of case.

In the light of that inevitably sketchy survey I want to concentrate on what is wrong with the law, what needs to be done to improve it and, crucially, whether recent reforms have actually improved matters. My initial perspective is to consider how matters stood immediately before the then Lord Chancellor, Jack Straw, announced his plans for reform in December 2008. My use of the historic present will not, I hope, confuse.

² *Clayton v Clayton* [2006] EWCA Civ 878, [2007] 1 FLR 11.

³ *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497, and *Re B, C and D (by the Children’s Guardian)* [2010] EWHC 262 (Fam), [2010] 1 FLR 1708.

⁴ See *X v Dempster* [1999] 1 FLR 894, *Re B (A Child) (Disclosure)* [2004] EWHC 411, [2004] 2 FLR 142, *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497, and *A v Ward (No 2)* [2010] EWHC 538 (Fam).

⁵ For the latest instalment see *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497, and *A v Ward (No 2)* [2010] EWHC 538 (Fam).

⁶ Prompted at least in part by my decision in *Re B (A Child) (Disclosure)* [2004] EWHC 411, [2004] 2 FLR 142.

⁷ The original such rules were introduced in 2005: see FPR rule 10.20A (now revoked).

⁸ Rules 90-93. And see now the very recent and important decision of the Court of Appeal in *Independent News & Media Ltd v A* [2010] EWCA Civ 343, [2010] 2 FCR 187.

⁹ *Re HM, PM v KH (No 4)* [2010] EWHC 1579 (Fam), paras [12]-[23].

¹⁰ [2001] 2 FLR 819, on appeal [2002] EWCA Civ 45, [2002] Fam 261.

¹¹ See on this *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416.

¹² *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497, and *A v Ward (No 2)* [2010] EWHC 538 (Fam).

¹³ *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416.

I have to tell you that the state of our law and practice as of 2008 was profoundly unsatisfactory. Let me try to explain why.

In the first place the law, as you will by now appreciate, was unnecessarily complex. We are here in an area regulated in part by statute law, in part by the common law and in part by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The statute law is a mosaic of ill-fitting pieces without any discernible overall objective. And the judge-made law is complex. There is a rich and subtle jurisprudence expounding the meaning and effect of section 12 of the 1960 Act, another rich and subtle jurisprudence explaining the circumstances in which the court can or should either relax or increase the automatic restrictions, and another rich and subtle jurisprudence identifying the various Convention interests which, typically, are engaged in such cases and explaining how they are to be balanced. Now the jurisprudence may be rich and subtle, but it is not easy either to access or to understand unless one happens to be steeped in it – which even most family lawyers are not – or one has the time and the inclination to undertake what may be quite time-consuming research.

The consequences are hardly acceptable. There are few such well-tilled areas of the law which have been so bedevilled by myths, misunderstandings and, indeed, plain errors on the part of lawyers. Thirty years of litigation have exposed many professional beliefs and assumptions for the myths and errors they always were, but it would unwise to assume that the process is yet complete. There are still people who ought to know better asserting that in this as in other contexts the child's interests are paramount. And if the lawyers have this difficulty, how is the layman – the parent, for example, caught up in the care system who wants to talk about their case, perhaps to friends and relatives, perhaps to the media – supposed to navigate the treacherous waters of the law of contempt?

Secondly, the law was far from certain. The jurisprudence on section 12 is still developing and even where it is seemingly certain it often lacks the clarity without which even the trained lawyer hesitates to advise with confidence. What is the true meaning and effect of the rubric conventionally attached to judgments¹⁴ authorised to be published anonymously? I doubt that any lawyer – dare I say even any judge – would wish to pronounce with

much confidence on the point. Is the reporting of ancillary relief proceedings subject to the full rigour of the 1926 Act?

The European Court of Human Rights at Strasbourg has repeatedly emphasised that central to the very concept of the rule of law is the requirement that the law be accessible and that it be expressed in sufficiently clear terms as to enable those affected by it to regulate their conduct accordingly. Does this area of our law meet this test? I would obviously prefer to be able to answer that question unhesitatingly in the affirmative, but I have to confess to having my doubts.

Thirdly, there was what some might think was the complete illogicality of the system. For although the County Court and the Family Division normally sit in private, other courts dealing with equally sensitive cases involving children do not. The Court of Appeal habitually sits in public – in open court – when hearing children cases, as does the Administrative Court when hearing the increasing number of cases involving children which now come before it. No harm seems to come of this, the children being adequately protected in almost all cases merely by concealing their identities. Even more anomalously, “representatives of newspapers or news agencies” have a statutory right under section 69(2)(c) of the Magistrates Courts Act 1980 to attend hearings of the Family Proceedings Court except in the case of adoption proceedings or where the court has made a specific order limiting this right. One could be forgiven for asking, if the press can safely be admitted to the Family Proceedings Court, then why on earth not also into the County Court and the Family Division?

Fourthly, and linked to the previous problem, there was a striking disjunction between the statutory framework and the principles which were increasingly emerging in the case-law, not least under the spur of the Convention. Reduced to essentials, the effect of the legislation is that section 12 of the 1960 Act makes it a contempt of court to publish any judgment given in private in a children matter though neither section 12 of the 1960 Act nor section 97 of the 1989 Act protects the children's anonymity once the proceedings have come to an end. Yet it is increasingly the view that the balance is typically best held by adopting precisely the opposite course: publishing the judgment whilst protecting the children's anonymity indefinitely. Indeed, it is striking how often when the question has to be considered by a judge the proper outcome is seen to necessitate some more or less drastic judicial adjustment of what would otherwise be the applicable statutory regime.

¹⁴ “The judgment is being distributed on the strict understanding that in any report no person other than the advocates (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.”

Fifthly, our system seemed to have lost sight of the principled basis upon which departure from the rule of open justice – justice administered in open court – can in some cases be justified. Almost 100 years ago the House of Lords recognised in *Scott v Scott*¹⁵ that cases involving children are an exception to the general rule that justice is to be done in public. But it is important to remember why this exception was allowed – and it shows what a very long way we have come since then.

What, then, is the rationale for a system which stands in such obvious and marked contrast with the ordinary principles of open justice? The classic explanation was given by Lord Shaw of Dunfermline:¹⁶

“The affairs are truly private affairs; the transactions are transactions truly intra familiarum; and it has long been recognized that an appeal for the protection of the Court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.”

As Viscount Haldane LC explained,¹⁷ in such cases the court is not so much deciding contested questions as exercising what is best described as a paternalistic, parental, quasi-domestic and essentially administrative jurisdiction.

Now that may be so of what we would today call private law cases but it surely cannot be said of public law cases, where, to make an obvious point, the State is seeking to intrude into family life and, indeed, very frequently is seeking to remove children from their families. Indeed, where the State is seeking to exercise such drastic powers as are engaged when it seeks a full care order or a placement order, it might be thought that the arguments in favour of publicity – in favour of openness, public scrutiny and public accountability – are particularly compelling. I have previously said in public that, viewed from this perspective, our present system is indefensible. I do not shrink from repeating that.

Finally, and this was a matter of crucial importance, our rules and practices were having what I fear was a damaging effect on public confidence in the family justice system. Unless a judge can be persuaded to make an order relaxing the general restraints imposed by the law, access to the County Court and the High Court by either the media or the public is impossible and there are such drastic reporting restrictions as to make even the anonymous reporting of family cases almost impossible. In practice, I suspect, applications to allow non-parties

into court are very infrequent and even more rarely successful. And, except when a judge is persuaded that a judgment may be of sufficient legal interest to be worthy of reporting in a law report, it has until very recently been rare for reporting restrictions to be relaxed, even to the extent of allowing publication of a judgment, let alone publication of anything else to do with the proceedings.

The consequence was that what went on before family judges sitting in the County Courts was for all practical purposes entirely invisible unless the case was taken to the Court of Appeal and that, apart from those judgments which were released for publication in law reports, what went on before family judges sitting in the Family Division was almost equally invisible. My impression is that, release of reportable judgments apart, relaxations in the reporting restrictions which otherwise apply to family proceedings are typically granted only after vigorous intervention by the media. The consequence is that much of what goes on in the family courts is virtually invisible, a state of affairs which merely feeds the anxieties of those who are critical and which tends all too easily to the increasingly frequent complaints that the family justice system is a system of secret, and therefore unaccountable, justice.

This fed into and fuelled another problem: that misunderstandings about how the family justice system operates were allowed to grow and fester unchecked and uncorrected. This was exacerbated by another problem which had become all too apparent in recent years. Those who without justification attack the family justice system can all too easily do so by feeding the media tendentious accounts of proceedings while hypocritically sheltering behind the very privacy of the proceedings which, although they affect to condemn, they in fact turn to their own advantage. It is all too easy to attack the system when the system itself prevents anyone correcting the misrepresentations being fed to the media. Too relentless an enforcement of the privacy of family court proceedings is simply counterproductive.

The need to maintain public confidence in the family justice system is particularly important at present. And if the focus of much public disquiet has been on care cases there are equal concerns about the private law system and, indeed, other parts of the family justice system. These may have a different focus but for present purposes they raise the same fundamental concern about what some might view as diminishing public confidence in the family justice system.

Many of the issues litigated in the family justice system require open and informed public debate in

¹⁵ [1913] AC 427.

¹⁶ *Scott v Scott* [1913] AC 417 at 483.

¹⁷ At 437.

the media, which at present, all too often, they do not get. Much of this necessary public debate is hindered – some, no doubt, would say stifled – by the restrictions I have been describing and by what some, I fear, see as the unadventurous approach of the judges to the exercise of their jurisdiction to relax these restrictions.

To sum up: By 2008 it was by no means obvious that the current statutory framework held the balance satisfactorily between the various conflicting interests which are engaged, not least under the Convention. In particular there was, I think, scope for the proposition that our rules and practices paid too much regard to the arguments in favour of privacy and confidentiality, and did not pay sufficient heed to the damage being done to public confidence in the system.

There was, in fact, another issue lurking behind all this. Even if our law is Convention compliant it does not mean that our present practice necessarily is. The Strasbourg court has pointed out that, particularly in the context of what we would call public law cases, measures as restrictive as those imposed by our statutory framework “must always be subject to the Court’s control” and that a judge must always consider whether or not to exercise his discretion to relax the normal restrictions and to sit in public if requested by one of the parties.¹⁸ The court has stressed that where there is State interference (as there is in a care case) “the reasons for excluding a case from public scrutiny must be subject to careful examination.”¹⁹ But how often does this ever happen and how often on the rare occasions when such an application is made does it receive the ‘intense focus’ which the law demands?²⁰

The reality, surely, is that recognised by Thorpe LJ:²¹ “although the ... rules confer on the judge in any case the discretion to lift the veil of privacy, there is such a strong inherited convention of privacy that the judicial mind is almost never directed to the discretion and in rare cases where an application is made a fair exercise may be prejudiced by the tradition or an unconscious preference for the atmosphere created by a hearing in chambers.”

He added, “Judges need to be aware of this and to be prepared to consider another course where appropriate.” That was some six years ago. How often does that happen? Has anything changed?

I make no apologies for repeating something that I said over six years ago:²²

“There is much wrong with our system and the time has come for us to recognise that fact and to face up to it honestly. If we do not we risk forfeiting public confidence. The newspapers – and I mean newspapers generally, for this is a theme taken up with increasing emphasis by all sectors of the press – make uncomfortable reading for us. They suggest that confidence is already ebbing away. We ignore the media at our peril. We delude ourselves if we dismiss the views of journalists as unrepresentative of public opinion or as representative only of sectors of public opinion we think we can ignore. Responsible voices are raised in condemnation of our system. We need to take note. We need to act. And we need to act now.”

Six years and more have passed. The clamour in the media has in the meantime become more frequent, more vociferous and more strident. What has been done?

This is a debate which has been going on for far too long. In August 1993 the Lord Chancellor’s Department, as it then was, embarked upon a public consultation with its ‘Review of Access to and Reporting of Family Proceedings’. The results were never published and the project of reform which the consultation had seemingly heralded disappeared without trace. All that survived was a consultation paper which is a long, detailed and valuable analysis of the law as it then stood; an analysis whose very length and complexity stands as mute testament to the complexity – the unacceptable complexity it might be thought – of an area of law which ought to be clear and relatively simple.

In February 2005 the House of Commons Constitutional Affairs Committee published its report ‘Family Justice: the operation of the family courts.’ It devoted a whole chapter to what it called transparency. It observed that “a major concern which was raised in evidence is the fact that the family courts conduct their business in private.” It noted that “the judiciary proved very receptive to this criticism” and in particular, that the judiciary “acknowledged that the lack of transparency fuelled the notion that the courts were biased against particular groups of litigants.” It recorded that “the witnesses representing the judiciary were unanimous in stating that something should be done to improve transparency.” It noted that “courts in other jurisdictions are able to be much more transparent when dealing with family law cases” adding that “the Scottish experience is particularly relevant, since it deals with a social background that is essentially

¹⁸ *B v United Kingdom* [2001] 2 FLR 261.

¹⁹ *Moser v Austria* [2007] 1 FLR 702.

²⁰ Lord Steyn in *Re S (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 FLR 591, para [17].

²¹ *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 2 FLR 823, para [55].

²² *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam), [2004] 1 FLR 1226, para [4].

the same as that in England and Wales.”²³

The Committee’s own recommendations²⁴ were clear and pretty uncompromising:

“A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge’s discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary.”

In July 2006 the then Lord Chancellor, Lord Falconer, and his Minister of State, Harriet Harman, published a Consultation Paper bearing the modestly optimistic if somewhat ambivalent title ‘Confidence and confidentiality: Improving transparency and privacy in family courts.’²⁵ It suggested that the way forward might be to allow the media access to family courts, coupled with a judicial discretion to exclude. The results of the consultation were published in March 2007²⁶ with the statement that “we will be bringing forward our proposals in due course.”

In June 2007 Lord Falconer produced a further consultation paper, his U-turn being masked by the anodyne title ‘Confidence & confidentiality: Openness in family courts – a new approach.’²⁷ The new approach involved the abandonment of the proposal for media access to family courts – “we do not intend to take forward proposals to allow the media in to family courts as of right” – and what was described in catchy phrases and fancy typography as a “focus on improving the openness of family courts not by the numbers or types of people going *in* to the courts, but by the amount and quality of information coming *out* of the courts.”

Those proposals attracted more criticism than support, even allowing for the fact that the Lord Chancellor’s critics were always likely to be more vociferous than his supporters. Much of this criticism was withering. In the Times, David Pannick QC expressed his reaction in trenchant terms which, correctly defining the issue as one of high principle, summed up the feelings of many and which seems, perhaps unsurprisingly, to have attracted much more support than even attempted refutation.

Responding in October 2006 to the original consultation paper, a “substantial majority” of the judges of the Family Division had expressed the

“broad view” that “the media should be admitted to all family proceedings, except adoption proceedings, provided the court has a wide discretion to exclude the media in the interests of justice in appropriate circumstances for the whole or part of the proceedings.” Responding to the second consultation paper the same substantial majority of the judges of the Division, having “carefully considered” the Lord Chancellor’s latest proposals, said that they “remain unpersuaded that they are the best way forward” and “adhere to the views” expressed in their earlier paper.

In December 2008 the new Lord Chancellor, Jack Straw, published ‘Family Justice in View’²⁸ which although forming the Government’s response to the consultation paper issued 18 months before by his predecessor marked another U-turn.

Now before turning to explore what that policy was and how it has since been implemented, it is perhaps time to pause and take stock. What is to be done? What is required?

Before answering that question directly, it will assist to analyse what we are talking about under three headings:

- First, *access to the proceedings.*
- Second, *reporting of the proceedings.*
- Third, and more generally, *disclosure of information out of the proceedings.*

Access to the proceedings does not involve only the question of whether the media (or indeed the public generally) should be able to go in to court and watch the proceedings. It also involves the difficult question of whether and to what extent those allowed to watch the proceedings should also be allowed access to court documents, because unless they do much of what is going on is likely to be completely incomprehensible, given how much of the relevant material nowadays is in writing and will have been pre-read by the judge.

The point arose in *Webster*,²⁹ where I had made an order permitting the media to attend the hearing of a care case and, in addition, an order permitting the disclosure to the public of the position statement prepared by the local authority’s counsel. Explaining why, I said this:

“It was appropriate for me to make the order because it was essential for me to do so if the media, and through the media the general public, were to understand what had gone on during the hearing ... , and, in particular, to understand the basis upon which [the local

²³ At paras 132, 138, 139, 143.

²⁴ At para 144.

²⁵ CP 11/06, Cm 6886.

²⁶ CP(R) 11/06, Cm 7036.

²⁷ CP 10/07, Cm 7131.

²⁸ CP(R) 10/07, Cm 7502.

²⁹ *Norfolk County Council v Webster* [2006] EWHC 2898 (Fam), [2007] 2 FLR 415, paras [41]-[43].

authority] was putting forward the interim care plan, which in the event I endorsed.”

Having referred to the increasing use nowadays of written, in addition to oral, advocacy, I continued:

“But it is vital that this wholesome move in the direction of an enhanced degree of written advocacy ... should not be allowed to damage the vital public interest in open justice. If the media are to be permitted to attend a hearing such as that which took place on 3 November 2006 (and ... it was very much in the public interest that they should be) then the very same public interest requires, in my judgment, that the media should be allowed to see documents such as [the] position statement. For if the media, and indeed the public generally, are not permitted to see [the] position statement, the ability of the media, and through the media the ability of the public, to understand what took place during the hearing would be severely compromised. This outcome would defeat the very purpose of permitting the media to be present.”

How far does one go? The journalists may say – do say – there is no point in them being in court unless they can understand what is going on. If they say, ‘can we have the bundle?’ the answer is obvious: no. But if they say ‘of course we accept we cannot see everything, but what we ought to be able to see, and, of course, it will all be published anonymously, is, for example, the care plan, the position statements, the skeleton arguments’ what then? There are very real questions and the answers are far from obvious, but the emerging jurisprudence of the Strasbourg court suggests that there may soon be powerful arguments based on Article 10 that the media will be able to deploy. The “right to receive” information protected by Article 10 was once understood as confined to receiving information from those willing to impart it, but recent case-law suggest the beginnings of an Article 10 protected right of access to official records.³⁰

The traditional system is neither principled nor, increasingly, such as to command public confidence. Surely both principle and pragmatism demand that we open the family courts, that we drastically relax the present access restrictions.

But affording access to the family courts is not alone enough. The answer, if I may be permitted to adopt

the former Lord Chancellor’s language, is that we need both more people going into the family courts and more information coming out. Each of these is essential; neither alone is sufficient.

Disclosure of information falls broadly into three categories:

- First, there is disclosure to those involved in and to the children who are the subject of the proceedings.
- Second there is disclosure to professionals and other agencies who, putting the point very generally, may be considered to have a ‘need to know’ for the purpose of carrying out their various functions even though they were not parties to the proceedings.
- Third, there is disclosure to the public generally.

This last one merges into the separate matter of the *reporting* of proceedings to which the media are afforded access.

Lord Falconer was surely right to stress the need for the family justice system to make better provision of information to those affected by its decisions – the children in particular. Many children, perhaps only when they are adults and many years after the event, will be curious to know not merely what the court did but why. Too often they are robbed of that information: judgments are not transcribed, ‘threshold documents’ and care plans – the core documents in any care case – are not preserved. Surely as a minimum requirement every substantive judgment in a care case dealing with either fact-finding or final disposal should be transcribed, so that those affected can have a permanent record. Article 8 protects, as part of one’s private and family life, the right to know about one’s origins and background; surely a child who has been adopted because a judge in care proceedings has found that their parents cannot adequately look after them is entitled to know why. After all, every such decision of the Family Proceedings Court is required by statute to be recorded in writing. Why should a child’s ability to know years later why the court decided as it did depend upon the happenstance of litigation. And although the arguments may be less pressing in such cases, it might be thought that there are corresponding arguments for transcribing judgments in many private law cases, for example, and at the very least, where residence has been in issue.

Disclosure to professionals and other agencies has traditionally been regulated by the court making specific orders tailored to meet the circumstances of the particular case – a topic on which there is a vast jurisprudence. More recently, and following the amendment of section 12(4) of the 1960 Act to

³⁰ See the landmark decisions of the Strasbourg court in *Sdruzeni Jihoceske Matky v Czech Republic (No 19101/03)* and *Tarsasag a Szabadsagjogokert v Hungary (No 37374/05)* considered by the Court of Appeal in *Independent News & Media Ltd v A* [2010] EWCA Civ 343, [2010] 2 FCR 187, paras [41]-[44] and in *Sugar v The British Broadcasting Corporation* [2010] EWCA Civ 715, para [76].

which I have referred, provision was made by rule³¹ for the disclosure of limited categories of documents to a limited class of authorised recipient without the need for prior judicial sanction. It was a matter for debate as to whether that cautious relaxation went far enough.

But much more important than that, it might be thought, is the question of disclosure to the public. The family justice system needs to make better provision – much better provision – of information to the public generally. There is no time to explore the matter in detail – and no doubt the devil will, as so often, be in the detail – but there are two steps which, I suggest, urgently need to be taken.

The first is to make more judgments – many more judgments – publicly accessible, albeit, of course, in appropriately anonymised form. And in this connection there are two points which I would wish to emphasise. First, I am not talking merely about judgments which are thought to be reportable because of their perceived legal interest. Releasing for publication only those judgments which are ‘reportable’ means that the public obtains a seriously skewed impression of the system. What one might call ‘routine’ judgments in ‘ordinary’ care cases and private law cases should surely also be published – all of them, unless, in the particular case, there is good reason not to. The second point leads on from the first. It is not only High Court judgments that should be published in this way. Why should not County Court judgments also be published?

The second step must surely be to revisit section 12 of the 1960 Act. Publication of judgments is, I believe, necessary but of itself it will not necessarily suffice. After all, a judgment contains what a judge has decided to include in it, and someone may wish to argue in a public arena, relying for this purpose upon matters not recorded in the judgment, that, for example, the expert evidence was flawed, that the judge misunderstood the evidence, or that if the judge had had access to other information the outcome might have been different. Section 12 – which, to repeat, fails to protect the anonymity which most would endorse – is in other respects surely far too restrictive. Is it not time to make a fresh start? Perhaps to abandon section 12 altogether and start again? If that approach is thought to be too radical, would it not be preferable to re-cast section 12 so that it defined a much more limited and focussed list of materials that could not be disseminated without the prior permission of the court?

A little while ago I asked: What is to be done? What is required?

The simple answer to that question is:

- radical and comprehensive reform
- embracing all the various kinds of cases dealt with in the family courts and
- replacing the existing complex and muddled system with a set of rules which are
 - principled
 - comprehensive
 - coherent
 - consistent
 - clearly and simply expressed and
 - cheaper to operate and
- arrived at by a transparent process involving appropriate public debate and discussion so that what emerges will command acceptance even by those who may disagree.

It is against that scarcely demanding list of desiderata that I return to Jack Straw’s reforms. He summarised his proposals in an oral statement in the House of Commons on 16 December 2008:³²

“It is vital that these courts, like any others, command the confidence of the public, if the public – including the parties involved – are to accept their decisions. That can best be achieved if justice in these courts is seen to be done. ... The Government have now reached their conclusion, and I am therefore announcing today that the rules of court will be changed to allow the media to attend family proceedings in all tiers of court.

Understandably, the media will be subject to reporting restrictions similar to those that apply in the youth courts. The courts will be able to relax or increase those restrictions in appropriate cases, and will have the power to exclude the media from specific proceedings altogether where the welfare of the child or the safety of the parties or witnesses requires it. The overall effect of these changes will be fundamentally to increase the openness of family courts, while protecting the privacy of children and vulnerable adults.

As well as allowing the media to attend family proceedings, there is a need to increase the amount and quality of information coming from the courts. At present, anonymised judgments of the Court of Appeal, and in some instances of the High Court, are made public, but that is not the situation for the county courts or the family proceedings courts, which deal with the bulk of family law cases.

³¹ FPR rule 10.20A.

³² Hansard Vol 485, cols 980-981

We have therefore decided to pilot the provision of written judgments when a final order is made in certain family cases. The courts in the pilot areas – Leeds, Wolverhampton and Cardiff – will, for the first time, routinely produce a written record of the decision for the parties involved. In selected cases, where the court is making life-changing decisions for a child, it will publish an anonymised judgment online, so that it can be read by the wider public.

The consequences of family proceedings are so significant that the parties involved will sometimes need to seek advice or support from a range of people, including legal advisers, family members, medical practitioners and Members of Parliament or other elected representatives. To do so, they must be able to discuss and share information about their case. In 2005, we made changes to the rules of court to allow people to disclose certain information to specified individuals, but after two years it became clear that those rules remained unnecessarily restrictive and too complicated. Following a consultation last year, the Government have now decided to relax the rules on the disclosure of information in family proceedings.

Parties and legal representatives will be able to disclose more information for the purpose of advice and support, mediation, the investigation of a complaint, or – in an anonymised form – for training and research. In more cases, the person receiving the information will be able to disclose it to others, for the purposes for which it was originally disclosed to them, without seeking the permission of the court. To protect the anonymity of children after proceedings have concluded, the decision of the Court of Appeal in *Clayton v. Clayton* will be reversed. In principle, that decision removed the protection of the court once proceedings had been completed, although that protection could be reapplied in particular cases.

Most of the key changes that I have announced today can be made in the rules of court, without the need for primary legislation, but some will require legislation, including the reversal of the effect of the decision in *Clayton v Clayton* and the potential opening-up of adoption proceedings. As regards the latter, we will consult on the most appropriate approach.”

Now as you will know, and as foreshadowed in that statement, the long-awaited reforms followed in three stages, with perhaps two more to follow.

First, and with effect from 27 April 2009, amendments to the Family Proceedings Rules were made, dealing with two separate topics: *disclosure* and *access*. They did not, as you know, deal with the

reporting of proceedings to which the media were now given access.

So far as concerns *disclosure*, rule 10.20A was revoked and a new Part XI substituted, permitting much more extensive disclosure of a much wider range of documents to a much wider class of recipients than previously, and all without the need for prior judicial permission. Whether all the consequences of, for example, rules 11.4(1)(c) and (d), were fully appreciated is a matter for speculation, though the language is broad and seemingly sweeping in its implications.³³

So far as concerns *access*, I can take matters briefly. The starting position, dare one even say it, using the word in an appropriate sense, the bias of the new system set out in the new rule 10.28, is in favour of permitting the media to be present in all family proceedings, defined for this purpose in such a way as to include, for example, not merely all children proceedings but also ancillary relief proceedings and proceedings under Part IV of the 1996 Act (though not, it is to be noted, proceedings under the adult inherent jurisdiction). So, good grounds have to be shown to exclude the media.³⁴ So far, so good. But rule 10.28 is directed exclusively to the question of access to the court room. It gives the media no access to documents. And it tells us nothing whatever about reporting of the proceedings to which the media have now been given access and does not grapple with the complicated questions which arise under section 12.

Moreover, rule 10.28 raises a rather important question to which the answer is not entirely clear. Remember that section 12 applies to proceedings held “in private.” If the media, in accordance with rule 10.28, are permitted to attend a Children Act hearing, is the hearing still “in private” within the meaning of section 12? Many assume that the hearing nonetheless remains “in private”. I confess that I am not so sure.³⁵

Be that as it may, the point thus far has proved entirely academic because media attendance in the family courts during the last 15 months has been virtually non-existent. Why? We do not know, though I suspect that the absence of access to the documents and the continued application of section 12 make the ability to sit and observe less than attractive. Indeed, some cynics say that the beauty of

³³ See *Re N (Family Proceedings: Disclosure)* [2009] EWHC 1663 (Fam), [2009] 2 FLR 1152.

³⁴ See *Spencer v Spencer* [2009] EWHC 1529 (Fam), [2009] 2 FLR 1416, and *Re Child X (Residence and Contact: Rights of Media Attendance: FPR Rule 10/28(4))* [2009] EWHC 1728 (Fam), [2009] 2 FLR 1467.

³⁵ See *Re Webster, Norfolk County Council v Webster* [2006] EWHC 2733 (Fam), [2007] 1 FLR 1146, para [121].

the scheme is that the journalists are allowed to be there but because they cannot, in fact, do anything useful they will not turn up.

The second stage of the reforms began with the introduction of the pilot in November 2009. The pilot is still under way and will need careful evaluation. So it is still too early to comment. Thus far (and the figures are as of yesterday) 40 judgments in the Family Proceedings Court and a further 21 judgments in the County Court have been published on the new dedicated BAILII websites. The numbers may appear modest, though it must be remembered that the pilot is operating in only a handful of courts. But they bear interesting comparison with the surprisingly small number of Family Division judgments which even now are put up on BAILII by the judges. However, we still have a long way to go – a very long way to go – before we reach an acceptable level of dissemination of family judgments: that is, both making them available to the parties and, in anonymised form, to the public.

The third stage of the reforms is embodied in Part 2 of the Children, Schools and Families Act 2010, not yet in force. And it is here, to speak plainly, that the real problems emerge.

Unhappily, as it might be thought, and it pains me to have to say this, the process which led to this legislation was hardly likely to inspire confidence and not best calculated to engender ready acceptance in the outcome on the part of all those affected. The irony has not been lost on many that the process of engaging with problems of transparency in the family justice system was itself, at least in its latter stages, far from transparent.

- Consultation, in a context where it might be thought that consultation would have been more than usually valuable for both pragmatic and indeed technical reasons – this is, I remind you, a highly technical subject – was limited. And such consultation as there was seems to have been viewed by those invited to participate as less than satisfactory.
- Part 2 was seemingly tacked on to Part 1 of a Bill primarily concerned with education and promoted by ministers in the (then) Department of Children, Schools and Families (DCSF). It was therefore left to ministers from DCSF, rather than Jack Straw's Ministry of Justice, to steer the Bill through both Houses of Parliament.
- Whether for this or other reasons there was astonishingly little debate in either House on the details of Part 2 of the Bill, despite the considerable opposition from many quarters to what was being proposed, much of it

voiced by the professional and other witnesses who gave evidence in committee. And little was said by ministers in any detail whether in justification of what was being proposed or by way of response to the Bill's critics.

- The Bill seemingly received the Royal Assent only because of some 'deal' done behind the scenes as part of the Parliamentary process of pre-Election 'wash up'.
- And on top of all this, there were various technical defects in the drafting of the original Bill which hinted at preparation under pressure of time.

Let me refer to three of these defects.

(1) As originally drafted, what are now sections 11(2) (a) and 12(1) of the Act (clauses 32(2) and 33(1) of the original Bill) had the effect that, except in adoption or parental order proceedings, it would not have been a contempt to publish the text or a summary of an order unless such publication had been prohibited by a restriction imposed by the court. Since an order in family proceedings invariably contains the names of the children, the effect was thus that, unless the court had imposed a specific restriction, anyone could have identified any child in any proceedings merely by quoting the order. It is hard to think that this was intended. The problem presumably arose because clauses 32(2) and 33(1) of the Bill carried forward the approach in section 12(2) of the 1960 Act whilst failing to engage with the fact that what protects identity under the present law is not section 12 (precisely because of section 12(2), it may be noted!) but rather section 97 of the 1989 Act, a provision proposed to be repealed (see clause 45 and Schedule 4 paragraph 26) without being replaced.

This problem was recognised and clause 33(1) amended to the form in which it now appears as section 12(1)(a) of the Act.

(2) As originally drafted the Bill contained a major problem with its primary definition of what could not be published. Clause 32(2) carried forward from section 12 the statutory concept of "publication of information relating to the proceedings." But whereas the 1960 Act had provided no statutory elaboration of what this meant – hence, as we have seen, the elaborate judicially crafted jurisprudence – the Bill sought, sensibly and helpfully it might be thought, to meet this omission. Clause 41(1) defined "information relating to the proceedings" as including various things. So far so good. But one of those things was "any information contained in documents filed with the court in relation to the proceedings", a provision very much wider and more

far reaching than the judicially construed meaning of the corresponding words in section 12. Under the Bill, and subject only to the defence in clause 38(2) – what is now section 17(2) of the Act – publication of such information would be a contempt of court even if the publication was not about the proceedings at all and did not even refer to the fact that there were proceedings. Thus, to take a simple example, it would potentially have been a contempt of court for a newspaper to publish a photograph of a child taking part in a play at a named local school if the child was the subject of proceedings and the fact that the child was a pupil at that school was referred to in, for example, a guardian's report.³⁶ Thus the Bill, which was presumably intended to carry forward the Lord Chancellor's stated aim "fundamentally to increase the openness of family courts", was in this respect very much more restricting of what could be published than section 12 had ever been.

The solution which in the event was adopted was the removal from the Act of the definition in clause 41(1) and the abandonment of the attempt to provide any statutory elaboration of what is meant by "information relating to the proceedings." So, in effect, the section 12 jurisprudence survives with all its problems.

(3) A third problem with the Bill as originally drafted was that what is now section 11(3) of the Act was not included in clause 32 of the Bill. Given this, and given the limitation of the court's powers under clause 33(3) – now section 12(3) of the Act – to "the purposes of this section", the effect of the Bill was to leave the court with no power to permit disclosure of papers to anyone unless this was specifically permitted by rules of court.³⁷ So the effect of the Bill was to remove the court's 'disclosure' jurisdiction. The reality being that the court often has to authorise disclosure for purposes not covered by FPR rule 11,

³⁶ Contrast the analysis of section 12 in *A v Ward* [2010] EWHC 16 (Fam), [2010] 1 FLR 1497, paras [107]-[114].

³⁷ To elaborate, for the point is quite subtle. The 'disclosure jurisdiction' does not involve the judges 'dispensing with' or 'suspending' section 12 of the 1960 in breach of the Bill of Rights or any other cognate principle. This is because section 12 (unlike clause 32(2), now section 11(2)) does not say that a certain type of publication "is" a contempt of court. What section 12 says is that publication "shall not of itself be a contempt of court except" in certain cases, and this has been authoritatively explained (by the Court of Appeal in *In re F (A Minor) (Publication of Information)* [1977] Fam 58 as meaning that the words "that it may be" are to be understood as following the word "except", with the consequence that "The section does not say when such a publication is to be a contempt ..." Conversely, and by parity of reasoning, precisely because clause 32(2) said that publication "is" a contempt "unless ...", the effect of clause 32(2) would have been to oust the 'disclosure jurisdiction' unless words such as those which are now found in section 11(3) (or words to similar effect) were included.

this would have had serious implications unless the intention was to bring into force adequately wide-ranging rules at the same time as the Act came into force, even assuming, which I would be reluctant to do, that a matter of such significance could properly be left to be provided for by mere rules. Experience has taught us that it is essential for the court to have an untrammelled 'fall back' power of the kind which is now to be found in section 11(3).

Again, this difficulty was acknowledged and section 11(3) in effect puts the 'disclosure' jurisdiction on a statutory footing.

And what of the Act itself?

You will be glad to hear that I do not propose to embark upon an analysis of what Lucy Reed of St John's Chambers Bristol has aptly described³⁸ as "complex" legislation in relation to which "one might anticipate a considerable degree of confusion particularly on the part of the media as regards the meaning and operation of the new provisions." I refer the curious to her excellent article which appears in the latest issue of Family Law.

What I do want to do is to consider whether and to what extent Part 2 of the Act meets the criteria to which I earlier referred and to draw attention to what some might think are surprising provisions to find in legislation designed to achieve what its promoter tells us he had in mind.

Let me consider first the ambit of the Act. Though far from comprehensive it is much wider in its reach than section 12, extending not just to proceedings relating to children but, subject to certain exceptions, to all family proceedings as usually defined. Thus the Act applies, for example, to proceedings under Part IV of the 1996 Act. The exceptions relate, broadly speaking, to divorce and ancillary relief. Proceedings under the adult inherent jurisdiction are not within the statutory definition of family proceedings and are thus not brought within the ambit of the Act.

For an Act presumably designed to achieve its promoter's stated ambition to "increase the amount and quality of information coming from the courts", it is important to recognise that in a number of important respects the Act actually permits *less* to be reported than under the existing law.

In relation to proceedings not at present subject to section 12 of the 1960 Act, for example proceedings under Part IV of the 1996 Act, the Act removes the general freedom to publish, including the freedom to publish orders and judgments, which at present exists under the current law.

³⁸ Reed, 'Publication of Information: Children, Schools and Families Act 2010'. [2010] Fam Law 708.

The effect of sections 12 and 13, read together with the definition of “identification information” in sections 21(2) and 21(2), is that “information relating to the proceedings”, the publication of which is ordinarily contempt of court, now includes the identities of everyone involved, with the single exception of expert witnesses.³⁹ So the present freedom to identify other professional witnesses, for example, social workers is removed. And, of course, *Clayton v Clayton* is reversed. As Lucy Reed comments, and it might be thought with justification:

“the prohibition on publication of identification information is in fact significantly broader than the current patchwork of anonymity provisions and now encompasses not just protection of the privacy of children but also of parents and indeed any other individual involved in the proceedings. Far from advancing the government’s stated aim of promoting open justice the Act further restricts the public dissemination of information about children cases.”

The effect of section 11(2) read together with sections 12(1)(a) and 12(2) is to prohibit the publication of orders and judgments in many situations where at present there would be no restrictions at all.

The effect of section 11(2) read together with sections 13(2) and (3) is that the media may publish information “relating to the proceedings” only if it has been obtained by “observing or listening to the proceedings when attending them.” Publication of precisely the same information, if obtained for instance from a party, is not permitted. Now this may seem an advance of a kind, but two questions immediately suggest themselves: Can the media afford to attend? Will the media wish to attend if they cannot have access to at least some of the documents?⁴⁰

The effect of section 11(2) read together with section 13(4)(a)(ii) is that the media may not publish “sensitive personal information” as defined in section 21(1) and Schedule 2. Given the width of that definition it would seem that much, even perhaps most, of the evidence given by professional witnesses will fall under the ban as being “sensitive” in one way or another.

³⁹ See section 13(4)(c).

⁴⁰ As Lucy Reed says (page 712): “In the context of the current national crisis in the newspaper industry it will be interesting to see how many national – let alone local – papers are able to satisfy the requirement to attend court in order to source information for the purposes of publication. It may be that in the current economic climate the journalistic resources are simply not deployed for these purposes except in very few cases. This is particularly so where there is still no change to the arrangements relating to access to documents”.

The fourth stage of the reforms, it may be, will be further amendments to the Family Proceedings Rules. Whether there will be any further changes, and if so what, is at present unclear. It would be interesting to know, for example, whether it is proposed to make any changes to the rules regulating access by the media and other third parties to court documents.

The fifth and final stage of the reforms is that provided for by the Act itself, with the ingenious (and I believe unprecedented) mechanism for self-amendment contained in section 19. Subject to the outcome of the independent review provided for in sections 19 and 20, this will enable the restrictive rules regulating the dissemination of sensitive personal information as defined in Schedule 2 to the Act to be relaxed in accordance with Schedule 1. The advantage of the device, as its supporters would see it, is that the relaxation cannot take place until the independent review has been completed; the disadvantage is that the only form of relaxation permitted is that set out in Schedule 1. How will this all work out? We can only wait and see.

It is time to draw the threads together. I end by asking two questions. Do the reforms which have taken place meet the criteria I have set out? Do they even meet the criteria identified by their architect? My answer to each question can only be a saddened and regretful No!

The new ‘scheme’, if that is what one can call it, is far from comprehensive. Divorce and ancillary relief are scarcely affected; the adult inherent jurisdiction not all. A greater degree of consistency has been achieved – the different treatment of the County Court and the Family Proceedings Court will now be a thing of the past – but at the heavy price of an *increase* in the areas covered, for the first time, by reporting restrictions. And at the same time it is far from obvious that the supposed relaxation of the reporting restrictions in children cases – surely the crux of the problem – will actually have the desired effects, if, indeed, any effect at all.

What the overall impact will be of the Act, assuming that it is ever brought into force, and more generally of the recent reforms, is difficult to predict, not least given the complexity and technicality of the new statutory provisions. One view voiced by various commentators, and a view I am inclined to share, is that if anything the Act is likely to reduce, rather than increase, the amount of information about children and other family proceedings which finds its way into the public domain.

Truly, it may be thought, a lost opportunity.

Family Legal Aid Tender Crisis

A United and Swift Response

William Simmonds, Secretary

'Unexpected' and 'devastating' are just two of the words that cropped up in the days following the 'unintended' outcome of the LSC tendering process. It quickly became clear that many reputable and hugely experienced firms had failed to obtain family contracts and that experienced children lawyers (many of who are amongst our membership) were set to be excluded from the system just when the need for them is greatest.

Despite this year's 30 percent plus rise in care proceedings, the number of family legal aid law firms was set almost to halve from this autumn, with an inevitable impact on access to justice for children and families.

The ALC has sought to act swiftly and robustly in supporting our membership at this difficult and challenging time. The ALC submitted a detailed consultation to the Legal Service Commission's consultation 'CIVIL BID ROUNDS FOR 2010 CONTRACTS' back in 2009 and in the face of the outcome of the tendering process commenced a further period of lobbying (the ALC is proud of having established a reputation that enables it to

punch well above its weight!). We also provided support to both the Law Society and others who are judicially reviewing the LSC. Amongst other things, Alan Bean, Co-Chair devoted considerable time and resources to preparing a detailed statement on behalf of the ALC in support of the Judicial Review applications. Indeed, as we go to press, Alan is attending the judicial review hearing in London on our behalf. Our Co-chairs also had a letter published in The Times on 5th August 2010 urging the coalition Government to act in the matter if it was serious about children's rights and child protection.

The ALC Executive did consider whether to make a financial contribution to those firms that had mounted their own Judicial Review but considered that its resources were better harnessed through the provision of advice, lobbying and support. We also considered that we would leave our own individual members and their firms to choose whether to provide financial support as we received legal advice that indicated that the Association may be prevented from doing so in its own right.

By the time you read this we may know more and the ALC hopes that there may be a glimmer or more of hope for, without access to justice, there can be no justice for children and families.

Family Right's Group's 2010 fundraising dinner

We're very pleased to invite you to a wonderful, entertaining night out in aid of the charity Family Rights Group.

For more information about our work please look at our website www.frg.org.uk

We are delighted that our after-dinner speaker for the evening is journalist and Channel 4 presenter Jon Snow.

Tickets cost £48 per person for an excellent 3 course meal, glass of wine and coffee. The dinner is 7pm for 7:30pm, Thursday 18th November 2010 at St Andrew, Holborn

In this very harsh financial climate, with care order applications at record levels, your support is essential in helping Family Rights Group to continue advocating for the most vulnerable parents and carers, enabling children where possible to remain living safely within their families.

Defending Child Abduction Proceedings

Ian Robbins

1 Garden Court

This article seeks to explore two aspects of the subject of child abduction, both of which arose in a case in the High Court at the beginning of the year. It is not a complete review of all reported cases relating to these issues.

The proceedings were brought under the Hague Convention the alleged abduction having been made from the Republic of Ireland to England. Two defences to a summary return were raised on behalf of the mother who had removed the child from Ireland where she had been residing with the child and where various proceedings in respect of the child including contact proceedings had been concluded. The first defence was whether an unmarried father had rights of custody under Irish law and if not then the removal could not be described as unlawful in the terms of the convention. The second defence was the 'grave risk of harm' defence, defined by Article 13 (b) and examined in many reported cases some of which will be quoted below, often raised but seldom effective.

By way of a judicial quirk at an early directions hearings it was ordered that the Article 13 (b) defence be heard first, the assumption having been made by the judge that if the defence was successful the proceedings would cease!

The burden of establishing an Article 13 (b) defence is a heavy one and it is borne by the person asserting the defence. The court must be careful when considering the defence and not fall into the trap of deciding what is in the child's best interests as it would in a Children Act 1989 application. The question for the court is whether the circumstances specifically set out in Article 13 (b) are met.

Re C (Abduction: Grave Risk of Psychological Harm)¹ sets out in clear words the degree of evidence required by a court:

"There is therefore an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial and of a severity which is much more than is inherent in the inevitable disruption and uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence".

Baroness Hale, in the leading judgment in *Re D*², acknowledged the need for a restrictive application of Article 13 (b). However, stated that if there were circumstances in which summary return would be so inimical to the child then it would also be contrary to the object of the convention to require it.

It is not necessary to establish that there has been or will be violence or abuse to the child. The effect on the mother who has lived in an abusive situation over a period of time can be sufficient as the court recognises the interrelationship and interdependence between a mother and child. This encompasses direct injury to the mother or severe adverse emotional effects which can, and do, impact upon the child.

In *Re W (Abduction: Domestic Violence)*³ Wall LJ stated;

"The second proposition with which I find myself unable to agree is the Judge's suggestion that an Article 13 (b) defence, which itself demands a high threshold as the law now stands, has no realistic chance of ever being established unless there has been violence or other specific abuse to the child himself/herself.....In my experience, it is well recognised both in the domestic and international jurisdiction that, in the context of domestic violence, the position of the child is vitally effected by the position of the mother. If the effect on the mother of the father's conduct is severe, it is, in my judgment, no hindrance to the success of Article 13 (b) defence that no specific abuse has been perpetrated by the father on the child".

¹ [1999] 1 FLR 1145

² [2007] 1 AC 619

³ [2005] 1 FLR 727

Further it has also been established that the intolerability or harm flowing from the return need not emanate from the parent who is requesting the return him or herself. In *Re D (Article 13 (b): non return)*⁴ the mother had been shot in the family home in Venezuela, by a hired gunman. Although she suspected the father he too claimed to have been attacked for political motives. The Court of Appeal acknowledged both the extremity of the violence, the strong evidence of emotional abuse and the provenance of the violence and refused to order the children's return.

The question of risk cannot be examined in isolation and the court has to also consider what steps can be put in place to protect the children. This is an important consideration as many Hague convention countries will have family law systems not dissimilar to that of our own and will have statutory provisions which can offer a high level of protection to the child and the returning parent. This is directly referred to in Article 11(4) of Brussels II Revised which provides that "a court cannot refuse to return a child on the basis of Article 13 (b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return".

In *F v M (Abduction: Grave Risk of Harm)*⁵ Ryder J stated that it would be near impossible to assert without a specific and detailed case that a Brussels' signatory's legal process is such that it, of itself, produces intolerability and it was important that the actual circumstances of the intolerability must be pleaded.

Notwithstanding Article 11(4), return has been refused in reported cases of *Klentzeris v Klentzeris*⁶ an unlawful removal from Greece to England. The trial judge considered what arrangements might be made to protect the children, pursuant to Article 11(4) of Brussels II, but concluded that this would not address the risk of psychological harm inherent in a return. The father appealed but the appeal was dismissed. *Klentzeris* is a slightly unusual case in that a welfare report was ordered and the judge was able to conclude on the basis of that report, which was challenged through cross examination, that the children would likely be psychologically and emotionally damaged by a return, and that this risk would not be diminished by the mother accompanying them.

The Court of Appeal drew attention to the requirement in Article 11(3) of Brussels IIa

Regulation⁷ requiring Convention proceedings to be dealt with within 6 weeks. Thorpe LJ held that this extended to appeal hearings and as such recommended that applications for permission to appeal should be made directly to the trial judge and that the normal 21 day period for lodging a notice of appeal should be restricted.

Further, Thorpe LJ noted that residence proceedings had commenced in Greece which would undoubtedly seek to rely on Article 11(8) of Brussels IIa Regulation. Thorpe LJ expressed a hope that the Greek court would pay due regard to the report and oral evidence of the welfare officer, as well as the assessment of that evidence by the trial court judge.

Also in *Neulinger & Shuruk v Switerzland*⁸ in respect of an abduction from Israel to Switerzland the Court noted that the promotion of the best interests of the child was central to the operation of the Hague Convention, the Court stating its support for the philosophy underpinning the Convention, which was a desire to protect children as the victims of abductions and to prevent the proliferation of abductions.

In the pleading of the 13 (b) defence the court reviewed the protection which was offered by the Israeli authorities, concluding these to be sufficient to prevent inappropriate conduct of the father. Further the court rejected arguments that the mother may face criminal charges noting that child abduction was a criminal offence in all Council of Europe states.

In the case of *Walsh v Walsh*⁹, a decision of the Appellate Court of the United States of America, the requesting state was Ireland. Significant consideration was given to whether a grave risk could be mitigated by the acceptance of undertakings and sufficient guarantees of the performance of such undertakings, it being acknowledged that part of the court's evaluation of risk under Art 13 (b) must be to evaluate the safeguards of the child's country of habitual residence. The Appellate Court refused the return and stated that factors relevant to evaluating grave risk of harm in circumstances of spousal abuse included a generalised pattern of violence, chronic disobedience to court orders, violence towards others other than the spouse and the nature and circumstances of such violence.

Is *Walsh* a broader interpretation of Article 13 than would be expected in the English courts? Perhaps

⁴ [2006] EWCA Civ 146

⁵ [1008] EWHC 1467 Fam

⁶ [2007] 2 FLR 996

⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003

⁸ INCADAT No.41615/07 HC/E/1001

⁹ No 99 – 1747. 1st Cir.July 25, 2000

not considering Wall LJ's words as quoted from *Re W* (above) and the words of Baroness Hale (*Re D* *ibid*);

"thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No one intended that an instrument designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm".

A further interesting issue, which may arise, is the manner in which the Court is to evaluate contested evidence where oral evidence is not heard, as is the case in many summary return applications. The authorities are surprisingly silent on this beyond the standard of proof being the balance of probabilities. The court cannot side step this issue but must consider the evidence supporting allegations and denials as a whole and submit it to rigorous and critical scrutiny to reach a conclusion of a grave risk of harm.

In *Re M. (Children) (Abduction: Rights of Custody)*¹⁰ Baroness Hale stated that it would be wrong to import any test of exceptionality into the exercise of discretion under the Hague Convention. The circumstances in which a return might be refused were themselves exceptions to the general rule. The manner in which the discretion would be exercised would differ depending on the facts of the case; other considerations include not only the swift return of abducted children, but also comity between Contracting States, mutual respect for judicial processes and deterrence of abductions, had to be weighed against the interests of the child in the individual case.

In the case in point, the Article 13 (b) defence was successful as the Mother was able to provide the court with evidence of domestic violence, the lack of the efficacy of the steps which had already been in place to provide protection to the mother, not through the failure of the authorities but due to the father's response to those steps, and a wider climate of violence which surrounded the child and mother.

Rights of Custody of unmarried fathers. *Notwithstanding the success of the defence the court then listed the matter to consider the issue of rights of custody and the court was aided by an expert opinion in Irish law. This course had been favoured over remitting the case to Ireland for the issue of the rights of custody to be resolved as can be requested*

under Article 15.

It was necessary for the court to resolve the issue of rights of custody as if the father had rights of custody he would have the right under Article 11(6) to (8) of the Council Regulation (Brussels II revised) to seek an order from the Irish court for the summary return of the child: the English courts would then be bound to enforce that order.

In the particular case the father had an 'access' order and there was some degree of debate due to the wording of the order as to whether the 'access' proceedings had concluded or whether the order was interim in its nature.

Article 3 of the 1980 Hague Convention provides that rights of custody:

"may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State"

The term 'rights of custody' includes 'rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence':¹¹.

The approach of the court in determining whether a parent has rights of custody is a two-stage approach. The first stage is to investigate the law of the state of habitual residence, in this case, the Republic of Ireland. The second stage involves the determination as to whether such rights constitute 'rights of custody' within the autonomous meaning of the Hague Convention, that is rights of custody are to be interpreted in line with the definitions, structure and purpose of the Hague Convention.

In *Hunter v Murrow (Abduction: Rights of Custody)*¹², Thorpe LJ stated that it is fairly said that in determining whether or not the father exercised rights of custody immediately prior to X's removal this court applies not English law but the English perception of the autonomous law of the Hague Convention."

The court should also be careful to distinguish between a parent's rights of custody and that of rights of access, the later not being a trigger for a summary return.

*Re F (Children) (Abduction: Custody Rights)*¹³ per Sir Mark Potter P quoted the speech of Baroness Hale In

¹¹ Article 5 (a) Hague Convention 1980

¹² [2005] 2 FLR 1119

¹³ [2008] EWHC 272 (Fam), [2008] 2 FLR 1239

*Re D (A Child) Abduction: Rights of Custody*¹⁴ where she said:

"In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to 'rights of custody'. To hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' altogether"

Further the distinction between rights of custody and rights of access has been one which has been acknowledged in the House of Lords in *Re D (Abduction: Rights of Custody)*¹⁵;

"The Hague Convention provides different remedies where rights of custody and rights of access have been breached. The nature and purpose of those remedies helps show why, when it comes to removal or retention across international borders, the rights to determine the child's residence is treated as a rights of custody"

Additionally as per Hale J in *S v H* stated:

"...it is a considerable step to arrive at the conclusion that the mere possibility of a parent who only has rights of access succeeding in an application to prevent the mother taking the child abroad amounts to rights of custody under the convention ...

yet it also clear from the pre amble and from the provisions of the convention itself that the contracting states deliberately intended to draw a distinction between rights of access and rights of custody"

The courts have thus made the distinction between two concepts but there has been jurisprudential wrangling of the concept of inchoate rights. An inchoate right has been argued to arise by the potential right of an unmarried father or carer. For example that sharing de facto care rather than having an identifiable statutory or other legal right of custody will be sufficient to establish a right of custody within the meaning of the convention.

For those who wish to delve into the detailed considerations of inchoate rights reference can be made to the following authorities;

- *AAA v ASH, Registrar General For England and Wales and The Secretary For Justice*¹⁶;
- *Re B (A Minor) (Abduction)*¹⁷. *Re B* did not proceed without a strong dissenting judgment

of Peter Gibson LJ who held that the rights in question must be more than de facto rights;

- *Re O (Child Abduction: Custody Rights)*¹⁸, where rights of custody were found to exist in the grandparents on the particular facts of the extent of their care of the child.
- *Re J (A Minor) (Abduction: Custody Rights)*¹⁹; and
- *Re C (Child Abduction) (Unmarried Father: Rights of Custody)*²⁰ where Munby J followed Hale J in *Re W* and refused to extend the inchoate rights doctrine to a father who shared care of the child.

It is noteworthy that there has been little support for the concept of inchoate rights internationally.

However there is authority of weight from the Irish Supreme Court against the concept: *H.I. v M.G.*²¹, where Keane J delivering the majority judgment, described such 'rights' as: "an undefined hinterland of inchoate rights of custody not attributed in any sense by the law of the requesting state to the party asserting them or to the court itself"

Most importantly is the recent decision in *Re D (Abduction: Rights of Custody)*²², where Baroness Hale, who had circumscribed the limits of the concept at first instance, defined the position in paragraph 38:

*"I would not, however, go so far as to say that a parent's potential right of veto could amount to "rights of custody". In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to "rights of custody". To hold otherwise would be to remove the distinction between "rights of custody" and "rights of access" altogether. It would also be inconsistent with the decision of this House in *Re J (A Minor) (Abduction)*"*

A wrongful removal can still occur if the right of custody is vested in the court rather than that of a parent. *Re H (Abduction: Rights of Custody)*²³ Lord Mackay of Clashfern at 380 held:

"It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular

¹⁴ (2007) 1 AC 619

¹⁵ [2007] 1 FLR 961

¹⁶ [2009] EWHC 636

¹⁷ [1994] 2 FLR 249, CA

¹⁸ [1997] 2 FLR 702

¹⁹ (1990) AC 562

²⁰ [2002] EWHC 2219 (Fam)

²¹ [1999] 2 ILRM 1, [2000] 1 IR 110 Supreme Court of Ireland, INCADAT reference HC/E/IE 284

²² [2006] UKHL 51, [2007] 1 FLR 961

²³ [2000] 1 FLR 374

case raising the issue of the custody of one or more children"

Thorpe LJ in the Court of Appeal in *Re H (Abduction: Rights of Custody)*²⁴ held that an application that in its substance seeks only the determination, definition or quantification of contact cannot vest rights of custody in court. This authority considered that to determine whether rights are vested in the court it is necessary to scrutinise the nature of the application what in the substance of the application the court may vest rights of custody in the court:

"An application that in its substance seeks the court's determination on issues of physical care, parental responsibility (to use our current statutory terminology), or the jurisdiction in which the responsibility of physical care will be exercised may or may not suffice to vest rights of custody in the court of issue. To determine whether rights are vested it is necessary to scrutinise the nature of the application, the merits of the application and the applicant's commitment to its pursuit."

Contrary authority exists in the First instance decision of *O v O*²⁵ holding that where an application is lodged with the court for both custody and access but the applicant only seeks access at the material time, the court nonetheless acquires rights of custody and actions for custody and access remain live even after custody has been determined.

A particular mention is made here of Irish jurisprudence as this was the focus of the case being considered. The parties, taking into consideration the fact that proceedings in respect of access had been issued and concluded, sought an expert report on Irish law.

The following is a very broad summary of the Irish law. A natural father can apply for guardianship despite his unmarried status under s6A of the Guardianship Act 1964. The court is not obliged to grant such status to every applicant father. The Act does not confer upon an unmarried father automatic rights of guardianship enjoyed by a married parent. The simplest manner for guardianship to be conferred on an unmarried parent is by agreement of the parents in the form of a statutory declaration.

A father's application for access is made pursuant to s11 (4) of the Guardianship Act where the father is not a guardian of the child. Once an application for access concludes it is a final order notwithstanding an ability to apply to vary. This was of note as it made it easier to rebut an argument of rights of custody vesting in the court at the time of removal.

It was arguable also that this was solely an application for access which was insufficient to vest rights of custody in the court.

The father's name being on the birth certificate does not confer any status upon the father in Irish law.

The position of the unmarried father in Ireland continues to be that he has neither a constitutional nor a legal right to the guardianship or custody of his child but merely a statutory right to apply for either guardianship and/or custody. The success of the non marital father's application very much depends upon the nature of his relationship with the child and whether it is in the welfare best interests of the child that he be involved in the upbringing of the child. In *GT v KAO*²⁶ McKechnie J held that an unmarried father had rights of custody within the meaning of Article 2 of Brussels II Revised.

Where the parents are unmarried and only one is a legal guardian of the child, the parent who is the legal guardian is the only parent who has the right to determine the residence of the child within or without of the jurisdiction. An unmarried father with no agreement or court order in his favour may find that the mother has legitimately determined the residence of the child within or outside the jurisdiction without any reference to him.

Brussels II Revised, ECHR and the Irish decision in T v O

In *T v O*²⁷ the children were residing in Ireland with the mother and father who were not married. The father played a significant role in the lives of the children and in their care. The mother removed the children to England. In April 2007 the mother informed the father of her intention not to return. The Father had previously issued proceedings for guardianship and custody in February 2007, which were served on the mother in March 2007. Given that the court were seized with pending proceedings at the time the children were habitually resident in Ireland, the mother's retention of the children was wrongful within the meaning of the Hague Convention, the children remaining habitually resident in Ireland until the mother's notification of her intention not to return.

A distinction was made in *T v O* between rights of custody of a parent under Irish law and within the meaning of such rights under Brussels II Revised allowing a finding in the particular circumstances of the case of wrongful removal. McKechnie J in *T v O* held that where an unmarried father is in a stable

²⁴ [2001] FLR 201 CA at 211

²⁵ 2002 SC 430, INCADAT reference HC/E/UKs 507

²⁶ reported as *T v O*. 2007 [2007] IEHC 326 High Court per McKechnie J and *T v O* [2007] IESC 55 in The Irish Supreme Court

²⁷ [2007] IEHC 326 High Court

relationship with the mother, indistinguishable from the conventional family unit, at the time of the removal, then it is possible that an unmarried father could have 'rights of custody' within the meaning of Article 2 of Brussels II Revised and that such a definition is capable as standing independently from Irish law.

As can be concluded from the above the definition of rights of custody is an application of the court's perception of the autonomous law of the Hague Convention

Recently in *Re K (Children) (Rights of Custody Spain)*²⁸ the Court of Appeal considered an application relating to two children born in Spain to unmarried British parents. In 2008 the mother unilaterally removed the children to England. The extent of the father's rights of custody in Spain was determined as a preliminary issue in the High Court, guided by expert evidence as to the law of Spain.

The issue came before the President of the Family Division. It was noted that under Spanish choice of law rules on parental responsibility, reference would be made to the law of the child's State of nationality. This would lead to the application of English law, which, in contrast to Spanish domestic law, would lead to the father not being attributed with parental responsibility. However, the President accepted that such an outcome would be unlikely to be accepted in Spain, on the basis that it would be deemed to contravene Spanish public policy as found in the Spanish constitution given that it would amount to discrimination as between the children of married and unmarried parents. The result would therefore be that Spanish domestic law would be applicable and the father could benefit from its more generous provisions: *Re K. (Children) (Rights of Custody: Spain)*²⁹. The mother appealed the ruling at first instance.

The Court of Appeal upheld the ruling of the President of the Family Division that the Spanish courts would hold the law of England to be contrary to public policy in reliance on Article 39(2) of the Spanish Constitution. This was not only because the result would be discriminatory as between the children of married and unmarried parents, but because the attribution of custody to the mother alone would not take into account the children's welfare interests, such as they were recognised and protected by Spanish law.

The Court further noted that the President had in a sense only ruled on the first issue, namely the custody rights which existed under the applicable law, and not the classification of those rights in accordance with their autonomous international definition. Thorpe LJ confirmed that the father had rights of custody under that definition. He further continued, in an obiter statement, that given the evolution of the treatment of unmarried fathers and in the light of the Convention's autonomous approach to custody rights, he would have considered the father to have had rights of custody within the meaning of Articles 3 and 5 of the Convention even if English law had been held to be applicable.

In the end the case being considered was compromised without a ruling on the issue of rights of custody.

This is a small dip of the toe into the wide jurisprudence of child abduction. It is clear that there is a need for comity and the operation of Hague Convention and Brussels II should be in harmony. It is an area of law that will continue to produce many reported cases as the jurisprudence continues to evolve and it is one which should be watched with great interest.

²⁸ [2009] EWCA Civ 986

²⁹ [2009] EWHC 1066 (Fam); [2010] 1 F.L.R. 57

LETTER TO THE TIMES

5 August 2010

No family justice

Experienced children lawyers are set to be excluded from the system just when the need for them is greatest

Sir, If, as David Cameron tells us, a democracy falls to be judged by how it treats the most vulnerable and disadvantaged in society, then our democratic credentials are set for an early test in October. Legal aid solicitors specialising in children law may not obviously fall within the “vulnerable and disadvantaged” bracket, but the parents and children whom they represent certainly do. Despite this year’s 30 per cent plus rise in care proceedings, the number of family legal aid law firms is set almost to halve from this October.

That is the result of a legal aid contract tendering process, run by the Legal Services Commission, that has too much to do with box-ticking and procurement dogma and too little to do with child welfare, service quality and client need. Inexcusably, many of the most experienced children lawyers in the country are set to be excluded from the system just when the need for them is greatest. Unless the Government steps in, from October the family justice system, already creaking from years of under-investment, will officially be in complete meltdown.

Numerous parents at risk of losing their children to care and adoption will find themselves unrepresented or, at best, poorly represented. The same fate will befall countless children, too. Had Baby Peter or Khyra Ishaq been subject to court proceedings and represented by an experienced court-appointed guardian and an expert childcare solicitor, they would never have died.

Government is very good at jumping on populist bandwagons when tragedies and injustices occur within the family justice system. It is historically bad at having the prescience and commitment to avoid them in the first place. If the coalition Government is serious about children’s rights and child protection, then the time to act is now. For, without access to justice, there can be no justice for children and families.

Piers Pressdee, QC

Alan Bean

Co-Chairs, Association of Lawyers for Children

The Scottish Children's Hearing System

Alan Inglis

Coram Chambers

Parliament House, Edinburgh

This is a short note on the operation of the Scottish Children's Hearing system specifically to deal with the perception that this allows children to be placed in care without Court intervention or legal representation. None of these assumptions reflects a proper understanding of how the system operates.

The Children's Hearing panel consists of three lay persons who receive referrals from a local civil servant named the Reporting Officer. He/she makes the referral where they have received information which suggests that a child may be in need of compulsory measures of *supervision* because of the existence of one of the following grounds:

- (a) Is beyond the control of any relevant person;
- (b) Is falling into bad associations or is exposed to moral danger;
- (c) Is likely –
 - (i) To suffer unnecessarily; or
 - (ii) To be impaired seriously in his health or development due to lack of parental care
- (d) Is a child in respect of whom any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 195 has been committed;
- (e) Is, or is likely to become a member of the same household as a child in respect of whom any of the offences referred to in paragraph (d) above has been committed;
- (f) Is, or is likely to become a member of the same household as a person who has committed any of the offences referred to in paragraph (d) above;
- (g) Is, or is likely to become, a member of the same household as a person in respect of whom and offence under sections 1 and 3 of the Criminal Law (Consolidation) Act 1955 (incest or intercourse with a child by step parent or person in a position of trust) has been committed by a member of that household;
- (h) Has failed to attend school regularly without reasonable excuse;

- (k) Has committed an offence;¹
- (j) Has misused alcohol or any drug whether or not a drug within the meaning of the Misuse of Drugs Act 1971;
- (k) Has misused any volatile substance by deliberately inhaling its vapour, other than for medicinal purposes;
- (l) Is being provided with accommodation by a local authority under section 25 or is the subject and a parental responsibilities order obtained under section 86 of this Act and, in either case, his behaviour is such that special measures are necessary for his adequate supervision in his interests or in the interests of others.

The Children's Hearing has no power to determine whether or not these grounds are established. If they are not admitted or understood by the child and/or any relevant person (usually parent or guardian) the Hearing must refer the case to the Sheriff Court (the equivalent of the County Court) to determine in the normal forensic process with full legal representation whether the ground cited has been made out. (s 60 Children (Scotland) Act 1995). If they are not, the Sheriff must dismiss the application.

The powers vested in the Children's Hearing therefore only arise if the grounds are understood and accepted by the child and his/her parents or are proved in the Sheriff Court.

The powers of the Children's Hearing are to impose compulsory measures of *supervision*. The directions which they can make operate as requirements to the relevant local authority to implement them. They are:

- (a) A requirement to reside at any place or places specified in the requirement;
- (b) To comply with any condition contained within the requirement;
- (c) Imposing a requirement upon a local authority to provide service;
- (d) Restriction of liberty;

¹ Children in Scotland can only be prosecuted for homicide, assaults endangering life and certain road traffic offences resulting in disqualification.

- (e) Requiring the child to submit to a psychiatric examination;
- (f) Regulating contact between the child and any relevant person.

A right of appeal against a decision of the Children's Hearing in relation to a Supervision requirement lies as of right to the Sheriff Court. The Sheriff considers the disposal afresh – *G v G* has no application North of the Border.

A supervision requirement must be reviewed by the Children's Hearing periodically and also when it is not being complied with or becomes unnecessary. The local authority does not acquire parental responsibility under this system and the power to decide where a child is placed remains with the Hearing. It is not analogous to a care order (see below). It is difficult to see a comparator in English law but the closest would seem to be old style wardship, but with the forensic process dealt with elsewhere.

The operation of the Children's Hearing operates as a potent obstacle on the local authority's discretion in circumstance where an English Court would make a Care Order and leave it up to them as to how to implement it.

The parties to the Children Hearing include the child and "relevant persons" (typically parents). As originally formulated, each could be legally represented but legal aid was not available. In 2001 the case of *S v Miller (No 2) SLT 531* the Inner House (Court of Appeal) decided that the non availability of legal aid to a child would breach Art 6 where the case was complicated or he/she was at risk of losing their liberty. As a result of the Children Hearings (Legal Representation) (Scotland) Rules 2002 legal representation is available where it is "required to allow the child to effectively participate (sic) at the Hearing" or "it may be necessary or the supervision requirement to include a requirement for the child to reside in a named residential establishment and the child is likely to meet the criteria specified in section

70 (10) of the Act and the Secure Accommodation (Scotland) Regulations 1996."

In 2009, these regulations were amended by an SI of the same name to include provision for legal representation at a Children Hearing for a relevant person if the supervision requirement would result in the child no longer living with them or regulating their contact with them or affecting their parental rights *and* legal representation is necessary to enable the person effectively to participate in the Hearing. This follows concerns about Art 6 compatibility in the case of *SK v Paterson 2010 SC 186*

I asserted above that the powers of the Children's Hearing could not be properly described as placing a child in care because the local authority did not acquire parental responsibility and decision making power remained at all times with the Children's Hearing. This analysis is supported by the fact that there are procedures in Scots Law to transfer parental responsibility to local authorities in a manner which is analogous to care orders by the making of a Permanence Order under s 80 Adoption and Children (Scotland) Act 2007. Previously this could be done by the making of a Parental Responsibility Order in favour of a local authority under ss 86-89 Children (Scotland) Act 1995. These orders can only be made in the Sheriff Court or the Court of Session. They are the only equivalents to Care Orders.

The Sheriff Court also has sole jurisdiction to make Child Protection Orders (EPOs) and Child Assessment Orders.

In conclusion it is incorrect to assert that the Children Hearing can take children into Care or that they discharge the powers which they do have in the absence of legal representation for the child or for parents. Legal representation has become available to them as a result of determinations by the Inner House that its absence rendered the process HRA incompatible.

ALC Newcomer of the Year 2010

Hersman Outstanding Newcomer of the Year Award

The Outstanding Newcomer Award for 2010 has gone to Jas Tamber of Anthony Collins Solicitors. Jas was presented with his award by Mr Justice Munby at the annual Hershman/Levy Lecture.

Nominated by Alan Bean

Jasvinderpaul Singh Tamber "Jas" qualified as a solicitor on 15th July 2005.

Jas joined Anthony Collins Solicitors in December 2005, working immediately on a predominantly public law children's caseload. Previously he had no relevant experience other than some general family work in a small West Midlands firm during the last year of his training contract. He has accordingly worked in the field of children law for four and a half years.

LEGAL EXPERTISE

Within weeks of his arrival, Jas made an impression on the then local District Family Judge, HHJ Hamilton, by explaining the procedural rules relating to termination by a Children's Guardian of a solicitor's appointment - something which the incoming solicitor, on the Children Panel, had not dealt with!

Jas showed, early on, an ability to stand his ground when placed under considerable pressure. An example of this concluded in the making of a costs order by McFarlane J, on an indemnity basis, against a local authority which threatened to, and (despite being warned off) started High Court proceedings against him personally. Over a number of days of a final hearing which he withdrew from, and thereafter, the local authority repeatedly demanded to know the detailed reasons why he and counsel had concluded that they were professionally embarrassed, and threatened to seek costs against him! Jas ceased to have conduct of the case when the letter before action was received, but remained calm, kept excellent notes, and consulted senior colleagues properly at each stage of his involvement.

Jas's caseload has, for over three years, included complex cases in the High Court, involving such



factors as serious injuries, foreign element and high cost plans. Comments about his recognised ability regularly filter back from judges, other lawyers and guardians.

CLIENT-CARE AND TEAM WORK

Necessarily, until his admission to the Children Panel as a children's representative, his clients were parents and other relatives. Many of these clients have been referred to him by Children's Guardians who have seen him in action, and who have steered unrepresented or poorly represented people to him.

Local authority social workers have sufficient respect for him as an opponent that they refer Special Guardianship and Adoption applicants to him.

The Official Solicitor's office is happy for him to deal with forced marriage cases involving young people below the age of eighteen, and has approached him directly to act for unrepresented adults on a number of occasions.

Jas's commitment to working with parents with learning difficulties has impressed our regional advocacy services, who refer their clients to him. He makes time to ensure that the client understands what is happening. Jas deals with the court hearings personally, wherever possible, to ensure continuity, and avoid clients having to adjust to another professional face. Recently Jas represented a mother who had cerebral palsy and could not use speak, read, write or use sign language. He devised visual aids to help her communicate. At the end of the case Counsel instructed took the step of writing to

the firm about the quality of representation that Jas and his team provided: "X has received exemplary representation through her solicitor, Mr Tamber and his legal assistant ... I have not seen such dedication to a client before and it is to [their] credit that they have been able to put X's case before the court in the very comprehensive and sensitive manner in which they have. The court was obviously assisted by the way in which X gave her written and oral evidence." The assessing District Judge obviously thought the same, as he assessed the bill, which included a mark up of 100%, as drawn.

Since Jas joined us we have reorganised our system of work, so as to work in teams of three (a solicitor, a paralegal/legal executive and a secretary). Jas has been proactive in this, spreading good working practices throughout the care group. He has made innovative use of the technology available within our firm, and is very much a team player. The feedback from clients in respect of the quality of representation and advice is correspondingly positive.

IN SUMMARY

There is currently great concern about the prospects for children's law practitioners. Their average age is rising and many of them may retire during the next few years. So it is heartening to see a young lawyer who demonstrates talent and strong commitment to this work. My firm acknowledged that early in 2009, when it made Jas an associate. He is currently working towards appointment as a senior associate. (Such appointments are dealt with by the firm's promotions panel, of which I am not a member, and over whose decisions I have no special influence.)

This will be the third, and last time that he is nominated for the *Outstanding Newcomer* award. But Jas's experiences over the past two years emphasise his commitment, and his staying power.

VACANCY – FAMILY JUSTICE COUNCIL

The Family Justice Council will shortly be seeking to recruit a new public law solicitor member to replace Katherine Gieve who is standing down after 5 years. The Family Justice Council is an advisory NDPB, chaired by the President of the Family Division, responsible for advising Government on the reform of the family justice system. The Council is an inter-disciplinary body and its membership reflects all the key professions working in the family justice system, including but not limited to: judges, barristers, solicitors, social workers, paediatricians, psychiatrists, psychologists, children's guardians and reporting officers, the police and relevant government officials. For further information on the Council please go to the website at www.family-justice-council.org.uk For further information on the vacancy please contact Amy Shaw on 0207 947 7950.

CHILDREN AND FAMILIES ACROSS BORDERS

CFAB is the UK branch of International Social Services. We operate effectively in 117 countries and have cooperation we are building on in a further 35 countries

We are able to commission assessments of potential carers as well as effectively pass on child protection concerns and obtain relevant information from overseas in reasonable timescales. See the flyer inside.

Delivery of Court Services to Children in Family Proceedings

On 30 July 2010 a powerful interdisciplinary Alliance, including the ALC, issued the attached joint position statement setting out the grave concerns about the services currently being provided by the Children and Family Courts Advisory and Support Service (CAFCASS).

The Alliance has offered to assist the Government in initiating a constructive exploration of possible alternative arrangements which do not pose a serious threat to the statutory framework protecting children's welfare and rights - painstakingly developed through research and evidence-based clinical practice over the last four decades.

DELIVERY OF COURT SERVICES TO CHILDREN IN FAMILY PROCEEDINGS JOINT POSITION STATEMENT – INTERDISCIPLINARY ALLIANCE FOR CHILDREN

1.1 THE ISSUES

There is now a very serious level of concern within the family justice system about the arrangements for the delivery of court welfare services. Interdisciplinary practitioners question whether the Cafcass model is either the most effective in terms of outcomes for children, or the most cost effective use of available resources, both financial and human.

1.2 Key areas of concern are:

- There are unacceptable backlogs of cases in public and private law proceedings, despite the commitment and best efforts of front line staff who have been working under great pressure for a considerable length of time.
- Cafcass' current operating priorities are now posing a serious threat to the statutory framework of children's rights and evidence-based health and welfare policies, painstakingly developed through research and clinical practice over some forty years. Two examples of this are the proposed amendment of s41 Children Act 1989 - opposed by twenty two interdisciplinary organisations in 2009 - and a recent legal note circulated by Cafcass which purports to give it authority to make changes

to the section 41 roles and responsibilities of the children's guardian.

- From August 2009 Cafcass has been on an emergency footing and has only been able to offer 'a minimum safe standard' of service delivery. A gap has opened up between organisational definitions of what constitutes a 'safe minimum' and the statutory duty to give paramount consideration to the best interests of the child. Practitioners are concerned that in complying with organisational directives they may potentially be in breach of both their statutory duties and their professional code of ethics.
- The assumption that appears to underlie operational decision-making and resource allocation within Cafcass is that what is best for Cafcass as an organisation will also be best for children. This is debatable and currently not evidence-based.
- Cafcass has become increasingly bureaucratised and this is impeding the proper exercise of the professional discretion of its practitioners.
- The framework of inspection applied by OFSTED does not appear to be fit for purpose.

1.3 The purposes of this summary are to highlight concerns about the present functioning of the organisation and initiate a constructive exploration of possible alternative arrangements.

2 INTRODUCTION

2.1 The Children and Families Advisory and Support Service (Cafcass) brought together the private law work of the former Family Court Welfare Service (broadly concerned with disputes between parents about residence and contact with children), the public law work of the Guardian ad Litem and Reporting Officer Service (concerning disputes between parents and the state about the care of children) and the children's work of the Official Solicitor's department (concerning the legal conduct of specialist children's cases such as medical treatment disputes and complex international cases).

Collectively, practitioners are referred to as Family Courts Advisers (FCAs), but each has specific statutory duties (e.g. reporting to the court under s7 Children Act 1989 and representing the interests of the child under s41 of the Act).

2.2 Cafcass is a socio legal court directed service whose welfare practitioners work at the heart of the Family Justice System and have a direct line of accountability to the court as well as to their employing body. The practitioner's primary function is to ensure that the voice and interests of the child are heard in court proceedings and that their interests are represented – independently of the views of a local authority or parent. The independent representation of children's views and an assessment of current and future needs in the light of adult allegations and evidence is an essential feature of Children Act cases and a key control mechanism representing the 'added value' to children and courts.

2.3 Central to the work of practitioners is the priority given to the welfare of children and young people involved in proceedings when courts are making critical decisions about their care and future safety. Accordingly, all the services provided by a court welfare service should be compliant with domestic law and international conventions on the welfare and rights of children (see below Principle A).

3 KEY PRINCIPLES FOR THE SERVICE

3.1 In considering appropriate organisational structures and models of services delivery, there is considerable interdisciplinary consensus about the key principles and priorities set out below.

3.2 Practice Principles

Principle A – Children's rights and interests: hearing the voice of the child in proceedings.

Services should be formulated around the framework of children's rights and interests as these are set out in domestic law and international conventions.

Principle B – Professional independence and accountability

All internal management and administrative systems should facilitate and support practitioners in the independent exercise of their professional discretion, taking appropriate account of their statutory duties and their direct accountability to the court as well as to their employer.

Principle C - The independent representation of children - continuity of appointment of a named children's guardian

In cases in which the child is a party to the proceedings, the service shall provide the courts with a named guardian working in tandem with the child's solicitor, who has continuity of appointment

throughout the case, thus ensuring that children are not procedurally disadvantaged in relation to the other parties to the proceedings and providing the oversight necessary to keep children safe and at the forefront of decision-making.

3.3 Priorities in structure and service delivery

Principle D – Services formulated around the statutory framework

The structure of welfare services must reflect and support the statutory purposes of the organisation and the underscoring principles.

Principle E - The framework of evaluation

The framework of evaluation must reflect the statutory purposes of the organisation.

Principle F - Locally delivered services meeting local demand in a timely manner

Court services for children should be geared to local demand and locally deployed in order to provide the courts with a timely and flexible service with a clear organisational emphasis on front line services.

Principle G - Effective and cost effective Services

The service must be cost effective in providing services that deliver the best possible outcomes for children in a way that provides good value for money and makes the best possible use of all the available resources, both human and financial.

Supporting organisations:

Association of Lawyers for Children (ALC)
Family Law Bar Association (FLBA)
Office of the Children's Commissioner for England
Adoption UK
British Association of Adoption and Fostering (BAAF)
Children's Rights Alliance for England (CRAE)
Women's Aid Foundation
Prof. Association for Children's Guardians, Family Court Advisors and Independent Social Work Practitioners (NAGALRO)
Together Trust
Voice
British Association of Social Workers (BASW)
National Youth Advocacy Service (NYAS)
Great Ormond Street Hospital for Children
The Trade Union and Professional Association for Family Court and Probation Staff (NAPO)
The Royal College of Paediatrics and Child Health
The AIRE Centre (Advice on Individual Rights in Europe)
The Grandparents' Association

CAFCASS

ALC Letter to Anthony Douglas

By Email

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Anthony Douglas CBE
Chief Executive
Cafcass
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26 July 2010

Dear Anthony

We are writing to express the deep concerns of our Association about Cafcass' apparent intention to attempt to manage children's guardians' caseloads by imposing restrictions on the work that they will be permitted to do between the Case Management Conference and Final Hearing in public law cases.

We write to you now because we understand that *imminently*, certainly in London, possibly in other parts of the country, Cafcass intends to require the children's guardian, following the Case Management Conference, to review with his or her service manager/contract manager "what still remains for the guardian to do in the case". A *pro forma* letter is then to be sent by the children's guardian to the solicitor for the child stating that the case has been reviewed by the guardian to assess whether any further work is needed and that as a result:

- Aside from completing any existing direction of the court the guardian proposes to suspend any active role in the case, save to take any steps necessary prior to final hearing;
- The guardian will become actively involved again if unforeseen circumstances arise;
- The children's solicitor is asked to draw this letter to the attention of the other parties and of the court.

Our concern is such that we write to advise you that the Executive Committee of our Association has resolved that:

- (1) such a policy is (a) contrary to the interests of the children we represent; (b) almost certainly in breach of rules of court; (c) likely, by virtue of (i) its blanket nature and use of *pro forma* letter and (ii) the status of Cafcass as an NDPB, which requires it to comply with the Human Rights Act and the impact of such a policy on the right of the child as a party to proceedings to have his voice properly heard, to be unlawful.
- (2) Members of the Association of Lawyers for Children should be advised of the Executive Committee's deep concerns and advised not to comply with the request in the *pro forma* letter to advise the court and other parties of the decision intimated in that letter, but rather to seek an urgent meeting with the Children's guardian in order to discuss what steps appear to the child's solicitor to be necessary and to advise the Guardian appropriately about such steps, and the risks attached to a decision to instruct the child's solicitor in such a way.
- (3) The views of the Executive Committee should be communicated as soon as possible to interested organisations, other representative bodies, members of the Children Panel who are children's representatives, the President of the Family Division and the Designated Family Judge for London.

On 25th March 2010 you wrote to us setting out your intentions at that time with regard to public law cases. We responded promptly and in detail in our letter dated 29th March 2010, but have not received any further communication from you since.

In our letter of 29th March we set out our comments on each of the fifteen points you listed in your letter to us of 25th March 2010.

We set out those points, and our responses below, for ease of reference.

“1. In areas where back logs are not an issue section 31 cases will continue to be allocated to a named practitioner and the court will be invited to appoint the practitioner as Children’s guardian.”

This, formal appointment as Children’s guardian under section 41 of the Children Act, is what we presently understand by the case being “allocated”. We think it extremely important to use very clear terminology to distinguish between cases where an appointment under s41 has been made, and cases where it has not. Otherwise it will be impossible to understand the significance of any statistical information that is collected. The members of the National Family Justice Board, Family Justice Council and other representative bodies need to be clear as to the extent to which the backlog in appointment still remains an issue. If there is no clarity on this point, how else is the President to conclude whether or not there is a continuing need for the Interim Guidance in respect of public law cases? Perhaps this needs to be recorded as “appointment” rather than an allocation.

2. Where there is no immediate appointment, each section 31 application will be allocated to either a named practitioner or on a duty advice basis to carry out intensive early work, variously called triage, a risk assessment, an initial case analysis, an early intervention or duty advice to a family court.

Given the additional funds now available, we are unclear as to why a named practitioner cannot be formally appointed as in (1) above in the great majority of cases.

Insofar as that is not possible, this needs to be described and noted for statistical purposes, for the reasons set out at (1) above, as something other than “appointment”.

3. One of the first steps we will take – by Day 2 of receipt – is to contact the appointed solicitor, to begin a joint approach to case management and case progression.

We take that as read.

4. In the early days of a case, where the local judiciary supports this, we will make contact with parties and a practitioner will see the child wherever this is possible.

We would hope that, following discussion with the child’s solicitor, identification of urgent cases would result in a formal appointment of a Children’s guardian. The Guardian would then regard seeing the child as an urgent step in any event, without prompting or permission.

5. We will keep a named practitioner involved throughout the case.

We take that as read.

6. Due to severe resource limitations, which are unlikely to fundamentally improve during 2010/11, especially as the rate of applications from local authorities remains high with no sign of dipping, we will need to divide cases into active cases and watching brief cases, once we have carried out early work defined above (see the attached flow chart).

We can only comment that, with the ability Cafcass now has to fund an additional 300,000/333,000 hours of professional time; we do not understand why the current problem is expected to continue.

We would be unable to support a proposed division of cases into “active cases” and “watching brief” cases. Most cases have periods of intense activity and periods where little work is required to be done. Each case is, as you indeed acknowledge at (9) below, unique, and crises bubble up and evaporate in an unpredictable way. We are unclear as to the purpose of categorising cases in this way, and we would be concerned that it would, in practice, operate as a straitjacket on the ability of the guardian to respond to urgent developments in a case.

7. Such a division should be discussed and agreed with the child's solicitor.

The Guardian and solicitor habitually discuss what they respectively need to do in the next stage or stages of a case.

8. Such a division must be approved by the court managing the case.

We doubt whether many judges or magistrates would have a different view from that expressed at paragraph 6 above, and would want to become involved in so categorising a case. They would be much more likely to want to deal with specific situations as they arose. Courts will continue to respond, as they do at present under the interim guidance, to requests by the parties for directions as to any particular piece of work which is thought to be essential for the guardian to undertake.

9. Whilst each case is unique, it is probable that active cases will have some of the following characteristics:

- **The child does not have a good 'team around her or him', increasing the need for a children's guardian;**
- **The child may remain in a situation of some immediate concern or danger, lacking interim safety or security;**
- **The case has considerable evidential gaps;**
- **The care plan for the child lacks credibility, resources or cohesion; or**
- **The arguments in the case are finely balanced, requiring the added professional input and value of a children's guardian to move the case forward in a positive direction for the child or young person.**

There appear to be all manner of practical difficulties and subjective evaluations which would come into play here. Is the child's solicitor to pass comment in open court as to the perceived weakness of the local authority's social worker/team manager/legal team? A child may be wrongly removed into foster care – that child might be regarded as "safe" with foster carers, but s/he could be suffering emotional damage, whether by not being placed with parents or by reason of being separated from other siblings. Almost all cases have evidential gaps in the early stages. Care plans at the start may be perfectly credible, but may simply be the wrong plan as the case develops.

10. Active cases are more likely to be: contested cases; cases where children are still at home or on the edge of being returned to the same situation they were in before their removal; s38(6) hearings; or Placement Order applications in which, for example, a Cafcass practitioner may undertake a wishes and feelings assessment of a proposed placement move as a discrete piece of work.

Almost all cases are contested in the early stages, children removed from home are frequently in urgent need of input by a Guardian (as referred to at paragraph (9) above), whilst a placement order application will come in quite late in the case usually, and will frequently not involve the Guardian in much additional work.

11. It is likely watching brief cases will have the following characteristics, post triage:

- **A robust team around the child already;**
- **Interim safety and security;**
- **Assessments complete or underway;**
- **Robust case papers, and plans;**
- **Clear-cut issues.**

As we comment at paragraph (9) above, we do not think it is at all easy, or indeed practical, to categorise a case in these ways.

12. In watching brief cases, the Cafcass practitioner will keep in touch with the child's solicitor, and between them they will plan how to work together to take account of the lack of active involvement from Cafcass. This will include agreeing how to keep in regular contact

with the key players in each case, and how to discuss further case management needs before pivotal directions hearings (CMC's, adjourned CMC's, IRH's).

This is no different from how guardians and solicitors operate normally, where a guardian has been appointed. Where no appointment of a guardian has yet been made, there is, as you are no doubt aware, Law Society guidance (recently reissued) to solicitors on acting for a child in such circumstances.

13. Cafcass commits to each case being kept under regular review with the child's solicitor, in case the status of a case needs to change from active to watching brief or vice versa – circumstances in a case can change quickly and this system recognises this.

Cafcass, or the appointed Children's guardian?

14. Specimen directions are already being used in some courts to release the children's guardian from further involvement in the case where there is no need for it, with 'no need' defined by a judge or magistrate. It is essential that the children's guardian and solicitor are content with such a step.

We doubt whether this is strictly necessary, since rules of court and the Interim Guidance already deal with such issues as attendance at hearings, and the specimen direction contained in the Thames Valley protocol merely sets out what happens in appropriate cases under the tandem model in any event. Any practitioner will tell you that this is so, and point to files where, pending receipt of key assessments, there is virtually nothing recorded on file apart from formal correspondence in respect of further evidence filed. This is perfectly normal. There is no need at such times for other work, and practitioners (whether guardians or solicitors) can concentrate on the cases they need to work on, unless and until that case "blows up"/"goes pear-shaped", which it can do at a moment's notice.

15. In private law cases, Cafcass will implement the Practice Direction being issued by the President and applicable from 1 April, subject to local implementation requirements (which can be extended to October 2010). Many local Cafcass teams and judges are seeking ways of simultaneously managing the backlogs (which have generally been reducing around the country), whilst keeping up with new work. This work has been most successful when solicitors have been involved, for example in reviewing a block of backlog cases, getting updates and identifying specific issues that might remain in need of resolution. I hope you feel able to endorse this general approach and would encourage your members, where they are involved, to play their part.

This is a sensible approach and we do not think our members would need any encouragement to respond."

As we say, we have not heard from you in response, and accordingly have no way of knowing whether you accept the points that we make, or not.

It will be apparent from the views we have expressed in answer to the 15 points above that we are wholly unable to support the policy which we understand you now intend to implement. It is neither consistent with the points you yourself set out in the correspondence we refer to, nor with rules of court. Furthermore, we would regard the use of such a standard form letter and a blanket policy to stand down the Children's guardian as potentially unlawful.

As to the points set out in your letter of 25th March 2010, may we draw your attention specifically to point (3): "...a joint approach to case management and case progression" and point (7) where, in the context of reaching decisions as to whether cases should be regarded as "active" or "watching brief" cases, you propose: "Such a division should be discussed and agreed with the child's solicitor." We can find no intention in your current proposals to confer **at all** with the child's solicitor. The discussions that are to take place appear to be entirely internal discussions between the practitioner and their manager.

As to rules of court:

- Section 41 of the Children Act 1989 provides that the officer of the service shall "be under a duty to safeguard the interests of the child in the manner prescribed by the rules".

- Rule 4.10(9) states that the appointment “shall continue for such time as is specified in the appointment or until terminated by the court”.
- Rule 4.11(1) provides for the officer of the service to have regard to the delay principle and the welfare checklist, including the ascertainable wishes and feelings of the child (considered in the light of his age and understanding). This is, in particular a matter which requires to be kept under constant review. The child is a party to the proceedings in question. As you yourself recognised at paragraph 6 of Cafcass’ submission dated 17th January 2010 to the Joint Committee of the Houses of Parliament on Human Rights:

“6. It is vital that Cafcass practitioners are able to engage effectively with young people in order to ascertain their wishes and feelings and to communicate these to the court, along with Cafcass analysis and recommendations about how the court might best promote their welfare. When undertaking casework, especially involving older children and young people, it is important to establish an open dialogue. This essential work requires care and skill, and may take some time to complete, as many young people are understandably cautious about disclosing sensitive personal information to an adult who has only recently become known to them.”

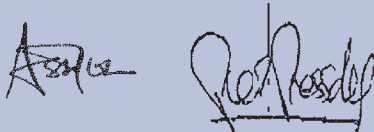
- Rule 4.11(2) provides that the officer of the service shall carry out such investigations as may be necessary for him to carry out his duties, and shall in particular contact or seek to interview such persons as he thinks appropriate or as the court directs. We observe that it is particularly difficult to see how this duty can be effectively discharged without discussion between the guardian and the solicitor for the child.
- Rule 4.11A(1) provides that the guardian shall give such advice to the child as is appropriate to his age and understanding and shall (subject to the provisions relating to competent children who are in conflict with their guardian) instruct the solicitor representing the child on all matters relevant to the interests of the child, including possibilities for appeal, arising during the course of proceedings. We observe that this is a continuing duty.
- Rule 4.11A(4) provides that, unless excused by the court, the children’s guardian shall attend all directions appointments in and hearings of the proceedings on (a range of issues, including) ...“(f) any other matter concerning which the court seeks his advice or concerning which he considers that the court should be informed.” We observe that it is for the court to excuse the guardian, not for the guardian to inform the court that he proposes to suspend work on the case. We further draw your attention to our responses to points 12 and 14 above.
- Rule 4.12 provides that a solicitor appointed for the child shall (subject to the provisions relating to competent children as above) represent the child in accordance with instructions received from the child’s guardian. We observe that this is, likewise, a continuing duty.

As to the potential unlawfulness of such a policy, general administrative law principles as to blanket policies apart, we make the following observations:

If children's guardians are to be prevented by Cafcass from carrying out any work between certain formal stages of the legal process, then children will in fact cease to be represented during that phase, and the children's solicitors will be without instructions. This is unlawful and in breach of the above statutory provisions for the independent representation of children in public law proceedings. It is prima facie a breach of the child's right to a fair hearing pursuant to Article 6 of the European Convention on Human Rights and Fundamental Freedoms. It is also prima facie a breach of Article 12(2) of the United Nations Convention on the Rights of the Child, which provides for the child's right to be heard by the court, "either directly or through a representative or appropriate body, in a manner consistent with the procedural rules of national law".

Accordingly we invite you, as a matter of urgency, to reconsider your position in respect of the implementation of such a policy. We are perfectly willing to meet with you to discuss the issues raised in this letter, if you consider that this would be helpful.

Yours sincerely



Alan Bean
Co-chairs

Piers Pressdee QC

Cc: The President's Office
The DFJ for London
Magistrates Association
Justices Clerks Society
Council for HM Circuit Judges
NAGALRO
Napo
Family Law Bar Association
Resolution
The Law Society

The Justice Select Committee's inquiry into the working of the Family Courts

Submission of the Association of Lawyers for Children

13 September 2010

This text is an extract of the ALC submission to the Justice Select Committee's inquiry into the working of the family courts. The submission, in its entirety, is available to download at www.alc.org.uk. The submission considers CAFCASS, changes to Legal Aid, alternative dispute resolution and confidentiality and openness in family courts. It highlights the depth and range of issues that the ALC has been addressing on behalf of its members over the past year.

(II) THE IMPACT ON COURT PROCEEDINGS AND ACCESS TO JUSTICE OF RECENT AND PROPOSED CHANGES TO LEGAL AID

2.1 By "recent and proposed changes to legal aid" we understand the Select Committee to refer to:

- (A) Part 1 of the family fee changes, effective October 2007;
- (B) Part 2 of the family fee changes, due to come into effect in October 2010;
- (C) the contracting changes proposed by the 2010 bid round;
- (D) other changes to the scope of funding to be introduced in October 2010 as a result of the 2010 contracts consultation, e.g. the capping of independent social work fees.

We deal with these in turn:

(A) Part 1 of the family fee changes, effective October 2007

2.2 Our members' principal complaint was that these changes failed properly to remunerate solicitors who did their own advocacy for time spent (sometimes many hours) in preparing for hearings.¹ Following considerable and productive discussions with the LSC this issue will be remedied shortly, when the Part 2 fee scheme comes into force.

¹ An absence of proper statistical information resulted in all solicitors, whether or not they did advocacy, receiving payment for preparation for advocacy as part of the standard preparation fee.

2.3 In terms both of access to justice and the impact on court proceedings, there is clear evidence from our membership that the quality of parent/ other adult party representation (i.e. work other than advocacy) in care proceedings has declined since the introduction of fixed fees for case preparation. That fee is, on the face of it, quite substantial². There has been a noticeable increase in the number of parents who are not being adequately represented, and there is a strong suspicion amongst our membership that commercial decisions have been taken to move into this market on the basis of corners being cut and a minimal service provided. This indeed is market forces at work!

2.4 There are anomalies in the scheme where a client transfers instructions to another solicitor. These could be for a wide range of reasons, including conflict of interest, the client acting in such a way as to require the solicitor to withdraw from the case, the solicitor ceasing practice or being subject to an intervention. Restrictions on the second solicitor's remuneration makes taking on such cases financially unviable. This has an impact both on access to justice and the court process.

(B) Part 2 of the family fee changes, due to come into effect in October 2010

2.5 Broadly we consider that these changes will result in improved quality of advocacy and will have a positive impact on court proceedings. By offering reasonable remuneration for complex work they will encourage providers to continue to offer publicly funded services in this field, and they can be expected to have a positive impact also on access to justice.

2.6 We would like to highlight that this scheme was developed as a result of detailed and lengthy discussions between representative bodies and the LSC over many months. It is clear evidence that such constructive engagement *is* possible, in stark contrast, unfortunately, to the history of the contracting changes, below.

² It varies between £2,621 and £5,966 depending on which region of the country and which tier of court.

(C) The contracting changes proposed by the 2010 bid round;

2.7 For public law work, the results of the family bid round are, at present, disastrous - both in terms of future access to justice and future quality of work. There are many parts of the country where provision will plainly be inadequate, and large numbers of highly experienced and very well-regarded children panel solicitors who have been excluded from taking on work under the new contract.³

2.8 It is clearly of the utmost importance to understand how this has come about. Our limited understanding of how the process developed (which includes no knowledge at all of crucial elements such as the Legal Services Commission's planning processes and decision making) is as follows.

2.9 By the final report stage of his review of Legal aid Procurement, published in July 2006, Lord Carter's brief had been extended to family law. Published simultaneously with his report was a consultation paper from the Legal Services Commission and Department for Constitutional Affairs "Legal Aid: a sustainable future". Our association's response is annexed⁴

2.10 At a meeting of the Civil Contracts Consultative Group held on 27/1/09 it was clearly articulated as being the policy of the Ministry of Justice that smaller providers should be eliminated from the 2010 bid round⁵. Some months later, in their Consultation Response, the LSC confined themselves to observing that "We would stress that five providers per procurement area will be a minimum rather than a target and that in the majority of areas we would anticipate letting more contracts than this"⁶.

2.11 In a letter dated 14/1/10 to the Law Society, Carolyn Regan (then Chief Executive Officer of the

³ The Law Society commenced an application for Judicial Review of this process on 27th August 2010. A group of 12 existing providers who had been refused family contracts were given permission by Irwin J. to intervene, on 3rd September 2010. The full hearing of the application for judicial review is listed for 21st September 2010, with judgment expected to be delivered on 24th September 2010.

⁴ *Lord Carter's Independent Review of Legal Aid Procurement. Legal Aid : A sustainable future. Submission of the Association of Lawyers for Children 12th October 2006.*

⁵ This emerged in the context of a discussion about consortia, and whether family practitioners would be permitted to form them. The MoJ were only prepared to consider consortia in the field of social welfare law, on the basis that they were satisfied with their impact assessments in the family law field and were not interested in contracting with small family practices.

⁶ *Civil Bid Rounds for 2010 Contracts :A consultation response June 2009, paragraph 4.3*

Legal Services Commission) stated that there was no intention to make significant cuts in the supplier base. She repeated that assurance to one of the signatories of this submission on 18/1/10, at a meeting of the National Family Justice Board. She envisaged that, as a result of the tender process, a few providers might drop out and a few new players might come on board, but that broadly the supplier base would remain as it had been.

2.12 We know from the Magee report⁷ that there were considerable tensions between the policy departments of the Ministry of Justice and Legal Services Commission⁸. We also know that the Ministry of Justice "won"⁹.

How then were the criteria formulated on the basis of which a substantial cut in the supplier basis was indeed achieved?

2.13 Annex A to the LSC's Consultation Response to the Civil Bids Round for 2010 contracts consultation, which was published in June 2009, set out on page 1 a summary of the minimum entry requirements for Family work. This sets out a number of requirements, including:

- minimum numbers of NMS, and the requirement to provide service at all levels;
- a quality standards which required a satisfactory peer review rating, the LSC's "Specialist Quality Mark" standard or equivalent;
- supervision requirements limited to "supervisor standard in family" - that is to say (coupled with the requirement that there be a minimum of one supervisor to each [full-time equivalent] caseworkers, one person who satisfied the Specialist Quality Mark supervision standard for a firm with 1-6 fee earners, and an additional supervisor if the firm had 7-12 fee earners, etc.

2.14 Significantly, at this stage there was *no requirement*¹⁰ for any specific panel memberships,

⁷ "Review of Legal Aid Delivery and governance" by Sir Ian Magee CB, March 2010

⁸ See paragraphs 197 to 201

⁹ Although Magee envisaged that there would be "further consideration of the case for an Executive Agency to replace the LSC" (final paragraph of Part 6 – recommendations) the Ministry of Justice not only immediately announced that the LSC would be moved to an Executive Agency of the MoJ, but stated, in a press release of 3/3/10 that "This change will be effective from Monday 8 March 2010" (notwithstanding the need for primary legislation to give effect to such change!)

¹⁰ The LSC had originally proposed that bidders for public law contracts would require to have a supervisor who was a member of the Children Panel. This was a requirement that the ALC supported for the reasons set out at paragraph 2.3 above, in order to raise quality of representation for parents, and help to prevent delay in

over and above the standard requirement that a supervisor be a member of one of a number of accredited panels operated by The Law Society¹¹ and Resolution.

2.15 There was no consultation with the ALC, and none that we are aware of with other representative bodies subsequently in the eight months between the Consultation Response and the opening of the tender as to any further requirements, beyond those set out in Annex A, page 1, or how particular requirements were to be scored. The LSC were asked for further details¹² but were unwilling to enter into any discussion as to their plans, only indicating the publication dates they were working towards. We do not know what the reasons were for not consulting in detail. Whatever the reasons, the results have been disastrous. Had there been proper consultation on the criteria which were finally adopted by the LSC and the scoring system, those criteria would almost certainly have been substantially modified¹³.

2.17 Once firms' bids had been "scored", matters were then aggravated by the LSC's system of allocation. This was a "cascade" system, in which

proceedings. In fact the LSC decided not to do this. They explained their reasoning at para. 390 of their Consultation Response, as follows:

"However, following consideration of the impacts, particularly on those public law children providers that specialise in the representation of parents and therefore may not sit on the Children Panel (our emphasis) we are not proceeding with this proposal."

The ALC (and also the Family Justice Council) queried this with the LSC and it rapidly became apparent that the LSC did not appreciate that membership of the Children Panel (formerly the Child Care panel established in 1985, and so in existence for 24 years at the time of the Consultation Response) was not limited to solicitors representing children. There is a level of qualification as a parent's representative, and a higher level of qualification as a children's representative, but most panel solicitors choose to qualify at the higher level so that they can include representation of children in their caseload. The LSC had apparently enquired of the SRA (who had been administering the Children Panel at the time of the consultation), were told that there were very few parents representatives, and so jumped to the conclusion that they would not be able to include panel membership as a requirement!

¹¹ The Children Panel was administered by the SRA between 2007 and July 2009, when it returned to the Law Society, who had administered it between 1985 and 2007.

¹² E.g. at meetings of the Civil Contracts Consultative Group (28/7/09) and Family Representative Body Meeting (13/11/09)

¹³ The original proposals of the LSC for the Family Advocacy Scheme were considered by representative bodies to be disastrous in terms of their impact both on access to justice and the workings of the courts, and, as referred to at paragraphs 2.5 and 2.6 above, was radically transformed as a result of subsequent, detailed discussions and negotiations.

those firms with the highest score were allotted all the matter starts they had bid for, irrespective of the relationship between that number and the firm's track record of case starts. Provided there were five providers in each procurement area, if those top five scorers had bid for more than, or the precise amount of available matter starts between them, then no further bids were considered or contracts let. This was a "winner takes all" approach, which inevitably encouraged overbidding.

2.18 No consideration was given to the proportion of a firm's work which was devoted to "matter starts" (i.e. legal help) as opposed to court work (certificated work). This took no account of the fact that, in public law children's cases, the work done under a matter start may only constitute 1 or 2 % of the work done altogether, and that there is no matter start at all in cases where a provider acts on behalf of a child.

2.19 There was no requirement that staff at a particular office fulfil the criteria that the LSC devised. This enabled firms to make multiple bids in different contract areas, and effectively "knock out" long established firms with highly qualified and experienced staff, who failed to score sufficient points to be considered under the cascade system.

2.20 It is beyond the scope of this brief submission to go into details of the many anomalies thrown up by this ill-conceived tick-box tender, but they include:

- contracts going to firms which fortuitously had an employee who had qualified on one of the domestic violence panels before the announcement that this would attract specific points (enabling them to score the maximum 40 points) despite the fact that other firms had undoubted expertise in that area which they could have evidenced in other ways, if the tender form had allowed anything other than the ticking of boxes, and far greater depth and experience in other areas of practice than the "successful" firms;
- contracts being awarded on the basis of speculative bids rather than track record/ability to deliver services without the need to recruit;
- no account being taken of the fact that a firm might have several highly experienced panel solicitors (over and above the minimum number of panel members required for supervision purposes);
- highly experienced children panel solicitors, many with 20 years or more practice in representing both children and parents¹⁴, practising in metropolitan areas which have the

¹⁴ See footnote 10 to paragraph 2.14 above

greatest level of social deprivation and accordingly the bulk of public law cases, and held in high regard by the courts where they practice, being unable to qualify for a contract because of the automatic classification of such areas as Integrated Services A areas.

2.21 In summary, the peculiarities of the scoring criteria, coupled with the LSC's policies on cascading, and awarding contracts to do work across the board purely on the basis on New Matter Starts, produced unexpected, irrational and disastrous results.

(D) Other changes to the scope of funding to be introduced in October 2010 as a result of the 2010 contracts consultation

2.23 The ALC's main concern in this area is the decision to cap fees of Independent Social Workers, with effect from October 2010. We strongly opposed this proposal at the time of the Consultation¹⁵ and remain strongly opposed. We understand fully the need for a review of experts' fees generally, but consideration of Independent Social Workers should have been included, with other expert's fees, in the remit of the Ministry of Justice's Central working Group on experts' fees.

2.24 In practice the LSC are already attempting to cap fees in advance of October 2010, and have, ahead of implementation, resiled from the policy in place since 2003¹⁶. The results have already been felt, with a number of very well regarded ISW's declining to accept further instructions and we have no doubt that this unwelcome change will impact seriously both upon the court process and upon access to justice.

2.25 We would support this decision being rescinded, with decisions over Independent Social Workers fees being included in the remit of the Central Working Group.

(III) THE ROLE, OPERATION AND RESOURCING OF MEDIATION AND OTHER METHODS IN RESOLVING MATTERS BEFORE THEY REACH COURT

Private Child Law

3.1 *Mediation* has been urged as an alternative to court proceedings for several years, particularly by the LSC, on the basis that it is a cheaper option. In

¹⁵ Paragraph 68 of our response, dated 27th March 2009, to the Legal Services Commission's Consultation on Family Legal Aid Funding from 2010, responding to Question 68 of that consultation.

¹⁶ LSC's Information Pack – Public Funding Issues (October 2003) esp. paragraph 7.4 : "...the Commission will ... follow the directions given by the court where it has given leave for an expert to undertake certain, specified work ... In the circumstances, the Commission wishes to discourage applications for prior authority ..."

practice this has not been borne out. Various schemes have failed due to lack of take up. Costs have been commensurate with court proceedings. Mediation is a very useful way of deflecting cases from the courts, and can lead to significantly better outcomes in certain circumstances but it is not necessarily cheaper. Mediation services need to be properly funded. The lack of available legal advice in the most common family mediation models can lead to a duplication of work, although this is more of a problem with financial mediation rather than children issues.

3.2 *Collaborative law* (where the parties agree not to go to court, but to resolve their differences in 4 way meetings with their lawyers) has some advantages over mediation in that the parties have access to legal advice. The model of being able to call on the services of family consultants and child consultants to assist with the process can be particularly helpful. The involvement of lawyers and other experts can, however, mean that collaborative law is not always affordable for all who would benefit from it.

3.3 *Early neutral evaluation*, where a jointly instructed expert lawyer provides a neutral opinion as to an appropriate resolution, or likely court order can frequently avert court proceedings and can be very cost effective.

3.4 *Conciliation* has historically been successfully employed by CAF/CASS officers as a way of resolving matters without further proceedings. This seems to be being used less now that extensive risk assessments are required prior to meeting the parents.

3.5 *Programmes of information sharing for parents* in private law cases with a view to reaching settlement through conciliation (or any other method) appear to be successful. When these require to be resourced centrally, rather than by individual legal fees, they have not been employed as extensively as they might have been. *Separated Parents Information Programmes* (PIPs) are steadily taking off. Such schemes do seem to reduce the number of child cases coming before the courts and, by making parents aware of the damage conflict causes children, limit animosity and encourage healthy resolution without the need for contested proceedings.

Public Child Law

3.6 The need to protect children and the inequality of bargaining power when a child's welfare is seriously at risk does make *mediation* and *collaborative law* difficult to use within public law. Studies and pilot schemes to promote mediation have not resulted in any significant role for

mediation within public law. Collaborative law, precluding as it does court proceedings, does not give children the protection they need.

3.7 However, the use of *family group conferencing*, *pre-proceedings conferences*, *advocates meetings* and a more inquisitorial system enables professionals (lawyers, social workers and guardians) to utilise mediation and collaborative law skills to the benefit of parents and children. The multi-party nature of public law proceedings also tends to foster a more collaborative approach to problem solving in public law cases.

3.8 However, if these alternative methods are to work effectively, experienced lawyers (representing all parties) and experienced guardians and social workers are essential.

(IV) CONFIDENTIALITY AND OPENNESS IN FAMILY COURTS, INCLUDING THE IMPACT OF THE RECENT CHANGES IN THE CHILDREN, SCHOOLS AND FAMILIES ACT 2010. 4.1

Aims/objectives

4.1 Changes to the Rules in April 2009 permitting the media to attend family hearings¹⁷, coupled with the provisions of Part 2 of the Children Schools and Families Act 2010¹⁸ aimed to increase reporting and public awareness of the work of family courts - thus addressing any failing of confidence in this field.

4.2 Various claims have been made about the benefits of press attendance and reporting of family hearings. In brief, those in favour of media access in private law cases (predominantly fathers – albeit a relatively small group) argued courts were biased in favour of mothers, while those in favour of media access in public law hearings argued local authorities have removed children unfairly.

4.3 The latter group (along with some journalists) have also been critical of the work of certain experts. In addition, some parents argued that the rules restricting on 'onward disclosure' of court papers denied them an opportunity to discuss their cases with others from whom they might be offered support. Campaigning groups depicted family courts as 'secret', arguing judges and experts are unaccountable for their views and decisions¹⁹.

4.4 Those opposed to media access to hearings

argued children's hearings were not 'secret' but necessarily private. Children and many children's organisations argued children would be able to be identified from press reporting – even if names were not published. There was however an acknowledgment that more information about the system and the decision making process should be more easily available to the general public but that this information could not be achieved through the mechanism of press reporting – given other concerns and complexities.

4.5 Major concerns of children's organisations focused on the impact on children and their unwillingness to disclose abuse and discuss wishes and feelings, and on family courts, in terms of increased delay and cost.

4.6 A further concern was that the media would only be interested in reporting sensational and salacious aspects of cases; the media are a commercial enterprise and this type of information sold newspapers/increased viewer ratings. People's rights to privacy about the most intimate details of their family life would thereby be infringed, and some of society's most vulnerable children would suffer further harm and risk through public exposure of intimate details of parents' disputes and failures leading to neglect and maltreatment. Children would be identifiable in local communities and would suffer further.

4.7 It was also argued that restricting attendance and reporting in family cases facilitates full and frank disclosure from parties and thus early settlement of cases. In cases of domestic violence and forced marriages women would be reluctant to seek the protection of the court if told of the potential for press attendance at a hearing in which painful and difficult information has to be shared.

Evidence from other jurisdictions

4.8 Most of these issues have been rehearsed in other similar common law jurisdictions²⁰.

4.9 It is noteworthy that allegations about 'secrecy', family courts as a 'star chamber' and judicial bias against fathers continue in these jurisdictions despite for example the fact that the Federal Family Court of Australia has been open to the press (and the public) for well over 20 years.

4.10 Other jurisdictions have accordingly sought different ways of enabling the public to have access to better and more detailed information about

¹⁷ unless otherwise directed by the judge

¹⁸ to facilitate reporting of family cases and the naming of experts

¹⁹ Brophy J with Roberts C (2009) Openness and transparency in family courts: - other jurisdictions and messages for reforms in England and Wales, Briefing Paper No 5, Dept. of Social Policy and Social Work, University of Oxford.

²⁰ . e.g. family courts of Canada and Australia and more recently, New Zealand. See, *Brophy with Roberts (2009)* – see note 33 above.

modern family courts and how judges make difficult decisions about the care of children.

Changes to family court rules (April 2009) and Part 2, Children Schools and Families Act 2010

4.11 Many who support increased media access and reporting of children cases and those who opposed Part 2 of the Act, argue that in practice, the provisions are largely unworkable.

4.12 Both groups argue that, if implemented, Part 2 of the Act will result in adjournments²¹, increased costs and delay. For the family justice system this would occur at a time when the system is already close to meltdown.

4.13 Journalists argue that they are now²² even more unclear about what information they can report. Editors remain unclear about what may be published and will not risk limited resources sending out reporters to cover cases where media resources may become tied up in applications to resolve this.

4.14 The Act is thus unlikely to meet the needs of either group or the policy objectives set out by the (then Labour) Government. It will, however, have substantial resource implications.

4.15 For children's lawyers and others the implications are even more complex²³.

4.16 The ALC (along with some 22 key children's groups making up the *Interdisciplinary Children's Alliance*) is concerned that the legislation will not be sufficient to protect the welfare and safety of children. This is a key concern not only for children's lawyers but also for social workers and doctors. The legislation undermines key ethical principles underscoring work with children²⁴.

²¹ while judges determine on a case-by-case basis what information can be reported from children cases in order to safeguard their interests

²² following the Children Schools and Families Act 2010. The Act sets out information that if published, will be deemed 'identification' information and thus a breach of confidentiality; it also sets out 'sensitive personal information' which if published would also be in breach of the Act. Despite the fact that the government did not set out an evidence base and did not consult on this latter provision, the Act allows - all other things being equal - for the restriction on publishing 'sensitive personal information' to be lifted at a future date.

²³ They have to explain to children and young people that (post April 2009) (a) a reporter might be in court and subject to the judge's agreement may be permitted to remain, and, (b) what information the reporter should and should not report. They cannot of course guarantee anonymity in any subsequent reporting - nor can they necessarily second-guess the outcome of an application by the press to publish certain information 'in the public interest'.

²⁴ This point was made in evidence at Committee stage of the Bill by children's organisations, childcare lawyers, judges

4.17 Welfare, legal and clinical practitioners have all argued that information about media attendance in court will affect the willingness of children and young people to disclose/discuss further serious abuse and neglect by a parent/carer, and their own wishes and feelings with professionals - and will further undermine their trust in adults and family courts to protect them.

The views of children and young people

4.18 The above concerns were substantiated in recent research with children and young people.

4.19 An independent study of 51 children and young people with regard to press access to family courts²⁵ found almost all children and young people²⁶ were opposed to the decision to permit reporters into family court hearings. The major reason was that court hearings address issues that are 'private'. They concern events that are painful, embarrassing and humiliating for children and an overwhelming majority said this detail was not the business of newspapers or the general public.

4.20 Almost all children interviewed (96%) said once children are told a reporter might be in court they will be unwilling/less willing to talk to a clinician about ill-treatment or disputes about their care, or about their wishes and feelings.

4.21 These findings indicate substantial problems²⁷ and raise a range of concerns regarding

and the Royal College of Paediatrics and Child Health. All argued that when talking to children who are deemed able to understand, professionals have to explain that the media may be in court. And it may be in the child's interests for the professional to advise them not to say anything further in the light of possible attendance and press reporting.

²⁵ Brophy J (2010) Media access to family courts: views of children and young people. London: Office of the Children's Commissioner for Children - England

²⁶ 79% in the public law sample, 91% in the private law group

²⁷ Where children and young people are unwilling/unable to talk about what has happened to them, judges/magistrates may be faced with making difficult and often life changing decisions about a child in the absence of, or with incomplete, 'sanitised' or changed evidence from the child, and limited or no information from clinicians. Children and young people said clinicians must inform them about press access to hearings at the start of an assessment interview - and *before* any substantive issues are addressed. This will enable young people to make informed choices about whether/how to proceed; they said any other approach would be dishonest and a betrayal of children's trust.

With regard to what information from cases and judgments might be published, children felt much information about them (their age, schools, interests and activities, religion, etc.) and about the content of cases (the allegations and concerns) by their very nature would allow for the identification of families. Crucially they are unconvinced that formal rules prohibiting publication of identifying information will automatically protect them. They do not trust reporters, they felt information would get out,

compliance with Article 12 of the UN Convention on the Rights of the Child and General Comment 12 (conditions for the realisation of rights for children under Article 12).

4.22 The research data indicates that, in the construction of new rules and legislation regarding media access and reporting in children cases, crucial elements were ignored - the views of children and young people, their concerns about privacy, safety and self esteem, and the ethnical and *practical impact* of new provisions.

allowing them to be identified, shamed and bullied.

Most children questioned about a sample judgment said children would not be happy for *any* information in the judgment to be reported in newspapers (79% in the public law group and 91% the private law sample). A minority of children in the public law group felt some information from a judgment could be published but without exception these children selected statements vindicating children of blame or responsibility for events leading to care proceedings: they wanted it known that they were not 'bad' or 'naughty' children and that they had done their best in awful circumstances.

With regard to whether there was any information in the judgment that it might be helpful for the general public to know, most children (and 91% in the private law group) said 'no' - and some were doubtful or cynical of a public education role on the part of newspapers.

The views of children/young people regarding their *privacy* and implications for their safety and welfare in their schools, homes and communities (notwithstanding respect for private and family life under Article 8 of the ECHR) – is thus somewhat different to that articulated by some adults and policy makers in government.

Young people also said judges/magistrates should seek the views of relevant children before deciding whether to admit the press to a hearing. This view - coupled with children's rights to be heard in any judicial and administrative proceedings (under Article 12, UNCRC) indicates welfare and legal representatives must seek their views in preparation for a hearing.

Objections to parents talking to the press about a case (even though children should not be identified in reporting) were strongest in the private law group: 92% objected to this during proceedings, 45% still objected once proceedings were concluded (and those who though parents could then perhaps be permitted to talk to the press, added conditions including seeking the agreement of the child concerned).

In the public law group 37% said parents should not be permitted to talk to the press during or after cases were completed; following completion, 41% felt parents could - but also added further conditions. And almost all young people (96%) said where children are capable of expressing an opinion parents should seek their *permission* before talking to the press.

Children and young people said the press sensationalise information, or construct bold headlines that do not reflect the content of cases, and will 'cherry pick' information. They are mostly doubtful that the press will print a truthful story and are doubtful - some cynical - about an educational function.

4.23 At the point at which children feel most vulnerable and powerless it is not perhaps surprising to learn that the research indicates they may in effect 'vote with their feet', *'play safe, and say nothing'*.

That may expose children to further abuse and places professionals and family court judges in an untenable situation.

4.24 In the light of these findings careful, more detailed, less rushed and a proper consultation needs to be undertaken and alternative options that increase information about the work of family courts – in a format that is user friendly - but which does not expose already vulnerable and often damaged children to further risks. Foremost in this is the need to provide anonymised judgments. A pilot scheme has begun²⁸ and this is to be welcomed. It is however very early days and we await the evaluation report, which is essential before moving forward in this area of family justice.

Children fear 'exposure'; they are afraid that personal, painful and humiliating information will 'get out' and they will be embarrassed, ashamed and bullied at school, in neighbourhoods and communities. This expectation is not limited to children in rural communities; it is equally likely in urban communities and is particularly relevant for children within ethnic minority communities. As indicated in evidence by children's organisation and clinicians during the Committee stage of the Bill, children are unconvinced about the capacity of laws and adults to protect them.

Some saw a role for public education in dispelling myths that children involved in care proceedings and those in long-term foster care are somehow 'at fault' but they did not generally think these issues could or should be addressed by reporting from real cases where the focus was on details that might put children at risk.

Most children and young people said newspapers should not be permitted to name professionals – unless a professional agreed. As to whether there might be a public interest in doing this, most rejected that view – they said there were other ways to achieve this.

Respondents were also strongly opposed to reporters having access to reports for courts (96% in the private law group). They said this would be a breach of their trust and privacy.

28 The Family Court Information Pilot (pilot courts being Leeds (FPC), Cardiff (CC and FPC) and Wolverhampton (CC and FPC) will provide anonymised judgments, these to be placed on dedicated space in the British and Irish Legal Information Institute (BAILII) website – see <http://www.le.ac.uk/li/digital/BritishandIrishLegalInformationInstitute>

LETTER TO THE GUARDIAN

18 August 2010

Graham Cole (letters, 13th August) suggests that the family courts should save money by cutting down on court directed assessments, as these “often reach the same conclusions social workers arrived at when cases began”. His letter follows Barnardo’s call for a “guillotine” to ensure cases are dealt with in under 30 weeks (Lead story, 9th August). Marion Davis, Chair of the The Association of Directors of Children’s Services recently stated that Independent Social Workers should stop playing any part in court cases, on the basis they undermine social workers’ professional judgement.

In the current climate when so much depends on finding a way forward for vulnerable children that protects their welfare and their rights, it is imperative that those speaking publicly about this issue move beyond anecdotal evidence.

There is little published work that specifically addresses how often social workers’ original views are overturned (or perhaps more accurately, shifted on certain aspects of parenting behaviours) following an independent social work assessment – or the ways in which their views are shaped by subsequent evidence. The DfE recently requested some deep drilling of existing data sets which could throw some light on this issue - but would not provide the funding.

However some information is already in the public arena. For example, we know from the largest national sample of cases involving experts (557 cases concerning just under one thousand children) – that 23% of cases involved parenting skills assessments commissioned within proceedings – and in some regional and more contemporary studies the figure is higher. To place that finding in context, we also know from research that many cases (latest figure is about 40%) get to court without the local authority having undertaken a core assessment (despite the fact that families are well known to children’s services and where there have been long standing concerns about children) - and despite the fact that at the point of proceedings many children (over 50%) are already living apart from birth parents under voluntary arrangements. In those circumstances, it is perhaps unsurprising that in the interests of the child and indeed parents, a court requests an independent comprehensive family assessment – how can it proceed otherwise?

Of course, anyone involved in care proceedings will know a case where an independent social work assessment of a failing parent was undertaken to ‘prove’ in a transparent way that the trial process was fair to a parent faced with losing a child. But as existing research evidence indicates, anecdotal evidence is not a basis for making changes on which children’s futures depend – and deep drilling of existing data might well throw further light on the changes which are achieved for children during proceedings.

To demonstrate this point the first writer reviewed the 23 cases he dealt with over the last year. In 14 cases the court had directed either an independent social work assessment or a residential assessment. In 10 of those cases the plan for the child changed as a result. In other words, in about 60% of the overall sample questions were raised as to the validity of the original social workers’ judgement, and in over 40% of the sample their judgement was overturned. Independent assessments meant that the children were able to live with a family member rather than coming into the care system or being adopted.

Immediate and radical measures that save money in the short term may seem attractive to local authorities at present. But change must be based on independent evidence within a system where not only parents but also local authorities are made accountable.

Alan Bean

Co-Chair, Association of Lawyers for Children.

Dr Julia Brophy

Centre for Family Law and Policy
University of Oxford

Practice Guidance:

McKenzie Friends (Civil and Family Courts)

Lord Neuberger of Abbotsbury,
Master of the Rolls

Sir Nicholas Wall
President of the Family Division

12 July 2010

1) This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts.¹ It is issued as guidance (not as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends) (No 2)* [2008] 1 WLR 2757, which is now withdrawn.² It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

The Right to Reasonable Assistance

2) Litigants have the right to have reasonable assistance from a layperson, sometimes called a

¹ References to the judge or court should be read where proceedings are taking place under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, as a reference to a justices' clerk or assistant justices' clerk who is specifically authorised by a justices' clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the Family Proceedings Courts (Children Act 1989) Rules 1991 they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).

² *R v Leicester City Justices, ex parte Barrow* [1991] 260, *Chauhan v Chauhan* [1997] FCR 206, *R v Bow County Court, ex parte Pelling* [1999] 1 WLR 1807, *Attorney-General v Purvis* [2003] EWHC 3190 (Admin), *Clarkson v Gilbert* [2000] CP Rep 58, *United Building and Plumbing Contractors v Kajla* [2002] EWCA Civ 628, *Re O (Children) (Hearing in Private: Assistance)* [2005] 3 WLR 1191, *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] 2 Lloyd's Rep 535, *Agassi v Robinson (Inspector of Taxes) (No 2)* [2006] 1 WLR 2126, *Re N (A Child) (McKenzie Friend: Rights of Audience) Practice Note* [2008] 1 WLR 2743.

McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

What McKenzie Friends may do

- 3) MFs may:
- i) provide moral support for litigants;
 - ii) take notes;
 - iii) help with case papers;
 - iii) quietly give advice on any aspect of the conduct of the case.

What McKenzie Friends may not do

- 4) MFs may not:
- i) act as the litigants' agent in relation to the proceedings;
 - ii) manage litigants' cases outside court, for example by signing court documents; or
 - iii) address the court, make oral submissions or examine witnesses.

Exercising the Right to Reasonable Assistance

- 5) While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.
- 6) A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.
- 7) If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.

- 8) When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.
 - 9) Where proceedings are in *closed court*, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.
 - 10) The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.
 - 11) A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.
 - 12) The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:
 - i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing;
 - ii) The litigant appears capable of conducting the case without assistance;
 - iii) The litigant is unrepresented through choice;
 - iv) The other party is not represented;
 - v) The proposed MF belongs to an organisation that promotes a particular cause;
 - vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs
 - 13) A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.
 - 14) Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.
 - 15) Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.
 - 16) Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.
 - 17) The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.
- Rights of audience and rights to conduct litigation**
- 18) MFs do **not** have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e., a lay individual including a MF), the court grants such rights on a case-by-case basis.³
 - 19) Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be

under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.

20) Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.

21) Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are:

- i) that person is a close relative of the litigant;
- ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative;
- iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.

22) It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.

23) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however **only** be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.

24) If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.

25) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.

26) Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

Remuneration

27) Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.

28) Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.

29) Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.

30) Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).

Personal Support Unit & Citizen's Advice Bureau

31) Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at cbps@bello.co.uk or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

Association of Lawyers for Children Notice of Annual General Meeting

To be held at the 21st National Conference, at the
DeVere Grand Harbour Hotel, Southampton at 15:00
Thursday 25th November 2010.

Agenda

1. Approval of minutes of last Annual General Meeting held on 19th November 2009.
2. Matters arising.
3. Election of ordinary Committee members and Officers of the Association.
4. To decide on the subscription levels for membership of the Association.
5. Report from the Co- Chairs on the work of the Association since the previous Annual General Meeting.
7. To consider the accounts of the Association.
8. To consider plans for the Association for the following year.
9. To consider motions and any other business proposed and seconded by 2 full members of the Association and notified in writing to the Secretary at least 28 days before the AGM.
10. Any other urgent business.

William Simmonds
Secretary

The overarching objects¹ of the Association are:

- (a) To promote justice for children and young people ('children'), primarily in the family justice system.*
- (b) To influence the development of the law of the jurisdiction relating to children so as to ensure that the law evolves and progresses in a manner consistent with the welfare of children and the right of children to comprehensive and effective legal protection and redress.*
- (c) To improve the knowledge and professional practice standards of those who are charged with applying that law so as to ensure that children receive comprehensive and effective legal protection and redress within the justice system.*

¹ Constitution as amended (2009)

Committee Members

“IT COULD BE YOU...”

Have you ever thought about joining the Executive Committee? Well even if you haven't perhaps you should and now could be your moment. Read on...

A number of vacancies will be arising on the Executive Committee this November and we are looking for members to put themselves forward. All are welcome regardless of age, background or location as enthusiasm, skills and energy to promote the Association are the essential criteria. We are particularly keen to hear from more recently qualified practitioners, local authority lawyers and members of the bar.

The ALC is an increasingly influential voice on behalf of children's lawyers and the interests of our vulnerable clients. For the Association to prosper and continue to fight these battles it needs new people step up to the plate to share these responsibilities. None of this will happen in future without a new generation of active Executive Committee members.

The Executive Committee meets at least three times a year (usually in London) although most work takes place outside of those meetings. Ordinary committee members are usually expected to lead in a particular field and/or to chair a sub-committee. A role on the Executive Committee can be challenging, stimulating yet immensely rewarding. Having a set of able and committed candidates is crucial to the success of the Association.

We are also interested in hearing from members who may not want to join the Executive this year but would like to get involved in the work of supporting the association with a view to gaining experience of the role and joining it in future. We are also really keen to hear with anybody who may be able to help in further developing our new web site.

The closing date for nominations is 25th October 2010. If you are interested in putting yourself forward please do contact myself or the Administrator as soon as possible for a nomination form at admin@alc.org.uk . You can also e-mail or call me for an informal discussion.

William Simmonds,
Secretary
william.simmonds@gov.gg
01481 259016

Notice of Elections

Annual General Meeting

25th November 2010 at 15:00hrs

The Committee consists of the Officers and ordinary committee members. The Officers shall include the Chair (or Co-Chairs), Vice-Chair, Treasurer Secretary and such Officers as may from time to time be considered appropriate.

OFFICERS

Under the constitution the Chair (or Co-Chairs) and Vice-Chair hold office for two years (extendable for one year). All other Officers hold office for one year (renewable without limit).

Co-Chairs

Alan Bean was elected as Co-Chair at the 2009 AGM and remains in post.

Piers Pressdee was elected as Co-Chair at the 2008 AGM and does not seek to extend his tenure. Piers stands down as Co-Chair at this AGM and this post becomes vacant.

Vice Chair

Nicola-Jones King was elected as Vice Chair in 2009 and remains in post.

Secretary

William Simmonds has been Secretary since 2008 and seeks re-election.

Treasurer

Pauline Troy was elected as Treasurer in 2009 and seeks re-election.

Ordinary members of the Committee

The term of office is for three years. The following are nominated for election as Ordinary Members of the Committee:

1. Frances Judd QC (2007)

The following members remain in post (date last elected)

1. Barbara Corbett (2008)
2. George Eddon (2009)
3. Caroline Little (2009)
4. Julia Brophy (2009)
5. Pauline Troy (2009)
6. Claire O'Rourke (2009)
7. Martha Cover (2009)
8. Debbie Singleton (2009)
9. Maud Davis (2009)
10. Martina Longworth (2009)
11. Stephen Mannering (2009)
12. Nicola-Jones King (2009)
13. Alan Bean (2009)
14. William Simmonds (2009)
15. Barbara Hopkin (2009)

Liz Goldthorpe is an Honorary Lifetime Vice – President, having been so elected in 2009.

Resignations

The following Committee Members will resign from the Committee or are not standing for re-election at the AGM:

Alistair MacDonald (2008)
Piers Pressdee (2008)

Nominations

There are currently two vacancies on the Committee for which nominations are invited

William Simmonds
Secretary

Book Reviews

John Ford, Mary Hughes, Karen May (2010), 3rd Edition

EDUCATION LAW AND PRACTICE

London, Jordans Publishing

£65.00 Paperback ISBN 978 1 84661 166 7

This book aims to provide a practical guide to this complex area of law. Though it does not attempt to deal with all aspects of education law, it is a very comprehensive reference book aimed at lawyers and advisers. It carefully considers the most common problems affecting pupils, parents and their families including the key issues of admissions, attendance, exclusions as well as discrimination and complaints and remedies

It starts with a brief history of Education in England and Wales and moves on to more detailed chapters on the key players, the structure of the school system, the school curriculum, special educational needs, special cases, further and higher education and judicial review. The chapter dealing with judicial review and statutory appeals is an excellent snapshot of the outcome of more than 150 recent cases dealing with judicial reviews on admissions, exclusions and school transport. The chapter also deals with cases brought under the Human Rights Act 1998 and the European Convention.

Being new to this area of law, I found the practical guidance throughout the book particularly helpful. It includes a comprehensive chapter on the practical considerations when running an education case from identifying your client to costs and funding. It also provides a checklist of the key points to consider when advising a client as well as many valuable precedent letters and relevant consolidated statutory materials.

The book is predominately aimed at the private lawyer acting for parents, pupils and families as it looks at the law and practice from the viewpoint of consumers of educational services rather than the providers. However, as a local government lawyer, this book is nonetheless an excellent practical guide offering checklists and precedents, which makes this book essential reading for any practitioner dealing with this complex area of law.

Nahida Kayum

North Yorkshire County Council

Roger Bird (2009), 7th edition

ANCILLARY RELIEF HANDBOOK

London, Jordans Publishing

£67.00 Paperback ISBN 978 1 84661 181 0

This book is an essential text for the busy ancillary relief practitioner and is a valued and thoroughly used part of our library.

It is a well structured, easy to read book which comprises comprehensive chapters on a wide range of topics and includes a detailed analysis and application of the most recent case-law, for example in relation to pre-nuptial and post-nuptial agreements.

The text contains a particularly helpful chapter on the difficult area of pensions, giving the reader an in-depth guide to the various options available, such as considering pensions as a resource, pension attachment, pension sharing and offsetting and gives clear information as to the implementation of pension orders.

Finally, it also has a particularly useful chapter of precedents, including a complex Mesher Order and forms relating to pensions.

Jenna Stevens
Blackfords LLP

Elizabeth Walsh and Gillian Geddes (2010), 3rd Edition **WORKING IN THE FAMILY JUSTICE SYSTEM**

The official Handbook of the Family Justice Council
London, Jordans Publishing

£35.00 Paperback, ISBN 978 1 84661 112 4

Having spent the last six months road testing in this book I would suggest that the subtitle be changed to: "The essential Handbook for anyone practising in the family justice system." In simple terms, it is a wonderful book. My copy is now well thumbed and well used both as a general read and as a source of immediate practical day-to-day information. I wish it had access to such a book panel when I first became involved in public law children proceedings and when I made my application to the children panel. It seems that I am in good company Stephen Cretney endorses the book as being "indispensable to everyone involved in the family justice system whether an experienced practitioner or trainee."

On opening the book, I warmed immediately to the authors. It is dedicated: "to all those working selflessly in the family justice system." The forward by the Right Honourable Lord Justice Thorpe and introduction by the authors reflects the reality of the dedication and professionalism of those working in the family justice system in difficult times. In the minutiae of legal argument and the need to pay the bills, it's sometimes easy to forget our common concerns.

The book is organised logically and systematically into six chapters dealing with: the Family Justice Council; the professionals; the systems; core principles of law; core information and inter-professional issues. There are also two useful appendices listing other publications and useful contacts. It is not a heavy tome or a legal textbook, but an interesting and easy read with information given clearly and concisely and set in a social historical political and legal context.

The layout of the book with side notes rather than footnotes make it an accessible reference book. Sources are acknowledged (the magistrates guidelines have been particularly useful.) Signposts to other sources of information including telephone numbers and websites next to the relevant paragraph save useful time for busy practitioners as well as satisfying the lawyer's instinctive requests for relevant authorities.

It has been used to aid my memory in answering such questions as what exactly is the difference between a welfare checklist in section 1 of the 1989 act and the 2002 act. To answer a colleague's question about the term "schedule one offender" and another about what information can be disclosed without a court order. It has been used to find references to other organisations including finding a telephone number for the Principal Registry of the Family Division. More recently, I used it as the ideal source book when delivering a talk to counsellors at the local branch of Relate.

The majority of our work as family lawyers at present seems to involve children. The majority of the book is dedicated to this area of law. There is also some information on and consideration of marriage, cohabitation, civil partnership the breakdown of those relationships and financial disputes arising as a result including reference to mediation and collaborative law.

As a children lawyer parts of the book I found particularly useful were the sections on instructing experts, how to find the expert, what questions to ask and what the difference is between different types of expert. (For example clinical and forensic psychologists.)

This is not a legal textbook. There are no long discussions and comparisons of case law. Leading cases, practice directions and regulations and statutes as well as procedural tables are all included and there at the finger tips. It is not a replacement for Children Law and Practice by Hershman and McFarlane but an additional useful tool for the jobbing family lawyer.

There are constant changes in the field of family law and at children law there are bound to be developments to be included in the next edition. I fully expect my copy of this one to be worn out by the time the fourth is published

Martina Longworth
Moody and Woolley

His Honour Judge John Mitchell (2009) 1st Edition
ADOPTION AND SPECIAL GUARDIANSHIP, A Permanency Handbook
London, Jordans Publishing

£52.00 Paperback ISBN 978 1 84661 114 8

I could not agree more with the foreword by the Rt Hon Lord Justice Thorpe that *“readers will not be disappointed ... an essential addition to every family lawyer’s library ... the balanced text offers valuable insight”*. This book is comprehensive, well laid out and would be of real benefit to anyone practising in this area. It provides more than enough information to enable you to be competent and up to date. I especially liked the fact it covers both adoption and special guardianship in one book as it really emphasises the link Special Guardianship Orders should have, and be perceived as having, with permanency.

The law and the procedure are covered with an examination of recent case law and policy, as well as socio-legal research on how the law operates and social research on the needs of children. This is a complete point of reference for the busy practitioner.

Sarah Whitby
Child Law Partnership

Paul Ridout (2010), 2nd Edition
CARE STANDARDS A PRACTICAL GUIDE
London, Jordans Publishing

£50.00 Paperback ISBN 978 1 84661 199 5

Now in its second edition, this book provides a detailed guide to the various regulatory requirements placed upon residential care in registered homes. The new edition has been extensively redrafted to reflect the updates to the law, in particular the implications relating to the enactment of the Health and Social Care Act 2008.

This book explains the regulations and national minimum standards in plain language, which is easily understood whilst remaining comprehensive. An excellent point of reference for those who are familiar with, the sometimes complex, Care Standards legislation and those who are coming to this area anew. It will be of particular use to health care lawyers, care home providers, the Care Standards Commission and the Care Standards Tribunal, and child lawyers

Jenna Stevens
Blackfords LLP

Jane Wilson (2010), 1st Edition

DOMESTIC ABUSE, Practice and Precedents

Law Society

£49.95 Paperback plus CD-Rom ISBN 978 1 85328 838 8

The handbook brings together all of the relevant legislation in respect of application for protection from violence within the family setting. It provides a basic guide to relevant legislation, current practice and procedure and is accompanied by a useful CD containing documents like the police disclosure protocol, information as to how MARAC operates and useful checklists to assist both practitioner and victim. There is also a chapter addressing the basic issues arising in Children Act applications for contact where there has been a history of domestic abuse.

It is a useful, basic, introduction to this area of practice for someone looking to develop his or her knowledge of the area. It also covers the basic legislation in relation to Forced Marriage Act applications and the procedure that applies.

Nicola Jones-King
McMillan Williams

John Platt, Mathu Asokan, Lorna Findley, Delia Truman (2009) **INJUNCTIONS AND ORDERS AGAINST ANTI-SOCIAL AND OTHER INDIVIDUALS**

London, Jordans Publishing

£55.00 Paperback plus CD-Rom ISBN 978 1 84661 184 1

The law relating to violent and anti-social behaviour is something of a patchwork. There are a number of different remedies available, but few lawyers are familiar with all of them, which can make it difficult to identify the most appropriate one. This book, written by three civil judges and a barrister, sets out to describe all of the options and give details of the relevant criteria, procedures and remedies. It will be a useful guide to keep close to hand for those situations (for example, where the parties are not 'associated persons' with the meaning of Pt IV Family Local authority Act 1996) that are outside the usual scope of day-to-day practice. An example arose while the writer was reviewing the book, when he was instructed in relation to his first (and so far only) forced marriage case.

The volume is divided into chapters, each of which deals with one type of proceedings:

- Anti-social behaviour order
- Anti-social behaviour injunction
- Local Government Act injunction
- Protection from Harassment Act
- Family Law Act 1996 Pt IV injunction
- Forced Marriage Protection Order

Each chapter contains details of the legal criteria, procedures and the court's powers, summaries of the applicable case law and practical tips. The chapter then concludes with relevant forms and precedents, which are duplicated in the included CD-Rom. The forms and precedents vary in nature from chapter to chapter. For example, there are detailed (and, in parts, highly entertaining!) precedents in relation to the Protection from Harassment Act and Local Government Act, but the chapter on FLA 1996 injunctions only contains copies of the relevant court forms. Curiously, the chapter on ASBOs states that most such orders are granted by magistrates, but all of the forms and precedents relate to the County Court.

Child law practitioners would have benefitted from the inclusion of a short section on the use of injunctions under the inherent jurisdiction, but this is a minor quibble, given the breadth of the target audience. The book would also be improved by a brief overview of the available remedies (perhaps in the form of a flow chart) to guide the reader to the correct chapter.

This is not primarily a book to read from cover to cover, although the writer picked up some useful tips when he did so, nor is it likely to be consulted every day by the experienced practitioner. It is however highly recommended for two reasons. First, it provides an excellent vade mecum for the new practitioner in the field. Secondly, even if consulted only occasionally, it will more than earn its keep on the few occasions (usually Friday afternoons) when something out of the ordinary hits the desk.

George Eddon
North Yorkshire County Council

Training

INAUGURAL CONFERENCE OF BASPCAN ALL WALES BRANCH

WORKING WITH VULNERABLE TEENAGERS: ADDRESSING SUBSTANCE MISUSE, SELF HARM AND SUICIDE

Thursday, 18th November 2010
The Medical Institute, WREXHAM

Confirmed Speakers Include:

- Michael Murphy - School of Social Work, Psychology and Public Health, University of Salford
- Dr Karen Rodham - Lecturer, Health Psychology, University of Bath
- Dr Jonathan Scourfield - Reader in Social Work, Cardiff University
- Dr Helen Spandler - Senior Research Fellow, University of Central Lancashire

This conference will seek to explore and address how professionals can work constructively with teenagers to minimise the risks they face from their presenting behaviours and vulnerabilities, including substance misuse, self harm and the increasing numbers of suicides in this age group.

Fee: £140 BASPCAN members, £190 Non-member, £205 Joining membership

For further information please contact:

BASPCAN, 17 Priory Street, York YO1 6ET or fax to 01904 642239
www.baspcan.org.uk

WHAT FUTURE FOR CHILDREN AND YOUNG PEOPLE'S CIVIL RIGHTS? **Children's Rights Alliance for England**

19th November 2010
Oval Conference Centre, London SE11 5SS

Confirmed main speakers:

- **Sarah Teather MP**, Minister of State, Department for Education. Leads within the coalition Government on the Convention on the Rights of the Child.
- **Dr Penelope Leach**, psychologist and author of best-selling 'Your Baby and Child'. Longstanding advocate of the rights of infants and young children.
- **Harriet Wistrich**, solicitor at campaigning law firm Birnberg Peirce representing children detained in immigration removal centres. Represents the family of Jean Charles de Menezes, the Brazilian electrician shot dead by police on a tube train in 2005.

Fee: £140 plus VAT CRAE members; £205 plus VAT non-CRAE members

For further information visit: www.crae.org.uk

VIABILITY, RISK AND CAPABILITY ASSESSMENTS

London: Friday, 10 December 2010, 9.30 am – 4.30 pm

The course will seek to address the issues raised when urgent provision of a Family or Friends placement is required, or an opinion regarding the viability of birth parents resuming care of a child following changed circumstances. It will take account of different stages and depth of assessment depending on the time scale for the work and the requirements. The needs of the child will be paramount and techniques included for discovering the child's perspective. The assessment of potential carers will take account of their experience, history and attachment profile, including research on the benefits and complexities of family placements.

Trainers: Carol Platteuw, Play Therapist and Independent Social Worker and Kathy Butcher, Children's Guardian and Independent Social Worker

Fee: £95.00 - £145.00

For application forms and further details please contact NAGALRO:

01372 818504 or nagalro@globalnet.co.uk www.nagalro.com



Association of **Lawyers for Children**

Promoting justice for children and young people



Let's hear it for the child

Lawyers for Children 21st Annual Conference

Thursday 25th – Saturday 27th November 2010

De Vere Grand Harbour Hotel, Southampton

Keynote Speaker: Mr Justice Coleridge

Family Division Liaison Judge for the Western Circuit

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