‘LOST OPPORTUNITIES: LAW REFORM AND TRANSPARENCY IN THE FAMILY COURTS’

THE HERSHMAN-LEVY MEMORIAL LECTURE FOR 2010

given by LORD JUSTICE MUNBY

at ST PHILIP’S CHAMBERS BIRMINGHAM

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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.

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

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 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

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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).

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

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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.

County Court – has jurisdiction both to relax and, indeed, to increase these restrictions, not merely in children[12] but in other types[13] 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.

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

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.

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 judgments[14] 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

[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."

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.

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 familiam; and it has long been recognized that an appeal for the

[15] [1913] AC 427.
[16] *Scott v Scott* [1913] AC 417 at 483.

> 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

[17] At 437.

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 fueled 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 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]

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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].

> "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

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

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 the same as that in England and Wales."[23]

The Committee's own recommendations[24] 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 2007[26] 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."

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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.

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.

[28] CP(R) 10/07, Cm 7502.

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 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."

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

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.

[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].

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 which I have referred, provision was made by rule[31] 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

[31] FPR rule 10.20A.

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

[32] Hansard Vol 485, cols 980-981

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.

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.

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[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.

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 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.

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

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, 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).

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[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.

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 described[38] 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

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

freedom to publish, including the freedom to publish orders and judgments, which at present exists under the current law.

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]

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[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 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.

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.