Association of Lawyers for Children

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The Hon Mr Justice Ryder, Judge in Charge of the Modernisation of Family Justice

Family justice is rightly in the public spotlight and the reasons for anxious scrutiny, whether from the media, in the political process or by academic and practitioner analysis ought to cause us to examine with care what we do, why we do it and whether we have outcomes that are at least no worse than and one would hope add value to the lives of those who are the subjects of proceedings.

In adversarial terms there are rarely win, win solutions to family problems. In family justice, the only winner should be any child of a relationship; for everyone else new concepts of the aim and purposes of justice need to be explored and described if we are to minimise both the damaging consequences of emotional disruption or relationship breakdown and the harm that is often caused by the delay in subsequent decision making.

You will be well aware that reform of family justice is a concern of Government, the Judiciary and many if not all of the public sector agencies and professionals who try, indeed strive, to work together in what is only in the loosest sense a family justice system. There is a clear parliamentary and public consensus for change and so the question will not be whether but to what extent change will occur. Please remember, however, whatever cooperation we should and do try to foster the proposals made by Government are different and quite distinct from those made by the judiciary.

We are also at the end of another 30 year justice cycle where it is right that we seriously examine whether our principles and processes are fit for the social norms of our time and indeed for the foreseeable future.

I use that phrase deliberately – our social norms. If I am right about the engagement of that concept in its European Convention Article 8 sense, the nature and extent of those very real

influences upon family justice may well help us define our theoretical principles and describe our operational processes.

I want to suggest to you that there is a model of family justice which is sustainable and capable of adding value to family life.

Before I sketch out the parameters of the model and its possible implications for judicial decision making may I highlight the problem to be solved?

In stark terms, the problem is the possible denial of effective access to justice that is one of the sequellae of delay in decision making. One must not forget that delay is also and usually inimicable to the welfare of a child (and indeed to the interests of many adult parties). I need look no further for that than the conclusions of the recent Family Justice Review conducted under the chairmanship of David Norgrove. It is worth recollecting that there have been a considerable number of previous reviews, inter departmental bodies and working parties (at least 23 to my knowledge) since the commencement of the Children Act 1989 but as yet a solution to the problem has evaded us.

The intention of the architects of the 1989 Act was that we should aim to complete children proceedings including care proceedings involving parents and the State within 12 weeks of issue: that was based on the pre-existing quasi criminal statutory process in the Magistrates Courts and was a reflection of legal policy that the courts should be moving away from interference in the operative discretion of the local authority – as had been the norm in wardship proceedings before the seminal decision of their Lordships' House in A v Liverpool CC.

By 2008 when we came to draft what is now Practice Direction 12A, the Public Law Outline, which is our main case management tool, we thought we would be doing well if we could stabilise care cases at 52 weeks from issue. We reckoned without the tragic case of Baby P (Peter Connolly) which in England and Wales led to a 50% increase in the number of children involved in care proceedings from 20,000 in 2008 to just under 30,000 by the end of

2011. By the time of the Family Justice Review the average time taken to complete a care case was 57 weeks rising to more than 61 weeks in the High Court and County Court.

The eagle eyed among you will have noticed that only this week the Education Select Committee has reported on the need to protect even more children more quickly.

There are of course some complex cases, where time helps to make a positive decision e.g. those involving a teenager whose views will be a dominant factor or novel medical causation or treatment cases which of necessity take time to resolve. For the significant majority of cases, however, waiting for over a year often before the child begins the journey into long term placement, is, I would suggest, wholly unacceptable.

We must not forget that alongside these cases are the financial remedy and private law disputes between parents where delays are quantatively smaller but equally problematic causing families in dispute to wait too long for their finances, accommodation and child care responsibilities to be reconstituted by the court. This group of litigants will lose public funding from the Legal Services Commission from 1 April next year (save in domestic violence and some child abuse cases). The age of the Self Representing Party will then be upon us requiring, I would suggest, new approaches to problem solving where the party in front of you is not only emotionally fraught but also without the basic knowledge of procedure or practice, and without advice upon the law, the merits of their position, their application or either their own expectations or the expectations of the court.

These parties will not be able to afford expert reports to assist them, leaving the court with very few options to obtain the advice that it needs to resolve disputes.

From the Government's perspective, family cases have grown exponentially longer as they have increased in volume. They have become much more expensive. The increasing practice of asking for multi-layered expert evidence in care cases also contributes the most significant element to the time any case takes to resolve. Longer cases involve more hearings which utilise more sitting days, the judicial unit of currency.

In England and Wales over the last 2 years we have taken 8000 sitting days from our civil judges (which at approximately 200 days a judge, is 40 judges) and given them over to family. We have little leeway to improve on that position. Civil and criminal litigants are also entitled to access to justice and the judiciary have a role in facilitating that access particularly at a time of financial stringency and reducing resources.

The need to do something significant; to find more proportionate procedures and processes is patent.

The judicial imperative is to help design those procedures and processes without damaging the quality of judicial decision making. If possible, we would like to improve that quality in what is a costs neutral environment. That is not necessarily easy. Despite our hierarchical structures and traditions, directions from the centre tend to inhibit rather than promote good practice. In any event, some would argue that we already suffer from a surfeit of direction.

The 1989 Act contains mandatory timetabling provisions as do the rules and practice directions. Furthermore, the concept of welfare, although arguably too subjective, necessarily imports into almost all children decision making under the Act, the concept of the timetable for the child: the corollary of the imperative that delay is usually harmful.

Within the Family Procedure Rules there is embedded a further case management principle relating to the effective use of the court's resources, the overriding objective, the intention of which is to bind parties into proportionate working practices.

So why, when we have the technical scaffolding to support the substantive law, do we feel unable to move more quickly? One of the factors, I would suggest, is that every case is seen to be unique and complicated and that becomes a self fulfilling prophesy. Another is that the quality of output is determined by the quality of input: poor or missing assessments and analysis leads to delay because an expert has to be instructed to provide for it. But there is also another factor: the art of advocacy is adversarial; we build our litigation in the image of

those who participate in it. The question needs to be asked: how do we use their valuable skills to help us to solve our problem?

In the modernising family justice programme we have developed two central themes to try and improve process and we have obliquely suggested that between the two pillars there should be a new way of working in court. Let me deal briefly with the two pillars or good practice frameworks which are described in the report which was published in July.

There will be a framework of leadership and management for those judges who will in future control the workload of the new statutory Family Court that Parliament is expected to create. That will be a framework that allows leadership judges to plan, to allocate or distribute business between the judges of the court including the magistrates and their legal advisors, who for the first time will be equal judicial participants. In that way we can prioritise and monitor what we are doing. We may even (eventually) develop effective peer review mechanisms. We can try to match judicial resources to cases and use the overriding objective in a much more pro-active way.

There will also be a framework of good practice. We want judges to be able to make case management decisions knowing what effect their decision will have on the welfare of the child. That requires a much more rigorous focus on the quality of evidence and analysis and also a knowledge of what works: by use of peer reviewed and accepted research into outcomes. By that route welfare becomes much more predictable, less subjective and more child focussed. We will create good practice pathways signposting how best outcomes can be achieved in a timetable that reflects the needs of the child in the proceedings.

We make no apologies for having taken the idea of clinical good practice pathways from the best healthcare environments. It seems to us that to constantly inform good judicial practice by evidence based research and standards or expectation agreements with those other professionals with whom we regularly work, will help to improve the quality of analysis on which the court depends and thereby reduce the number of time consuming and expensive

experts' reports which are sometimes used to undertake work that has already been done by skilled and experienced professionals.

Not surprisingly the most recent research pilots such as the tri borough project and Liverpool protocol demonstrate that quality assurance of evidential materials and management supervision of pre-proceedings work with families significantly reduces the need to re-validate the work that has already been done and reduces the time that is taken by the court in proceedings. By these mechanisms we hope to improve outcomes and we have put in place trial management information systems to provide the judiciary with data so that we can see what works and what does not, particularly in the context of delay.

For my part, I do not believe that these mechanisms will be sufficient unless they are accompanied by a significant change of culture which would need to be embraced by everyone in the system. It is this change of culture which is at the heart of the jurisprudential hypothesis I want to examine.

There is a thread running through almost all our legislation and precedent based materials in family justice (reflected also by the way in which a criminal court considers its determinations) and that is the welfare of the child who is the subject of or affected by the proceedings. If we are to pay more than lip service to the rights of the child as enshrined in the UN Convention of the Rights of the Child we need to be clearer and firmer about how and when children obtain effective access to justice. Welfare is not something that is just done to a child. Some of the improvement that is necessary is procedural and will be addressed in legislation and subordinate materials but a key aspect of the problem to be solved is the way we conduct family justice.

I am going to suggest that the bridge between the two pillars that are the evidence based frameworks has to be an investigative rather than an adversarial system of justice. The judge has to be more than the referee on a playing field where the parties (often without any direct involvement with the child affected) decide what issues they want to litigate and what evidence they are going to present.

In future the judge should be the arbiter of what the key issues are that need to be decided so that the ultimate problem can be solved by the court and the judge should decide what evidence he or she needs. That may involve preventing parties litigating disputes that are not key i.e. where they are only marginally relevant and where it is not proportionate for the dispute to be resolved because the resolution of that dispute is not necessary for the ultimate decision that needs to be made.

That in classic terms is an inquisition and the implications of such a process need to be understood in that, subject to all the proper procedural safeguards about allegations and fact finding, the judge controls the questions to be asked, at least in a strategic sense. In private law disputes involving Self Represented Parties some of whom will be vulnerable and/or inarticulate, the judge may be the only person asking the questions.

The model I describe is not new. In one form or another you will see examples of it in the problem solving courts in the United States and in particular in Australia. There are also very interesting examples of therapeutic or community justice where the judge utilises the skills of or co-operates in a problem solving arena with other professionals: a development beyond the evidence based research framework I have so far postulated or recommended.

These models have detractors as well as supporters and academic and practitioner papers on these models tend to focus not just on whether problem solving courts produce better i.e. immediate and sustainable outcomes; a wholly valid enquiry where costs are very much in play, but also on the more theoretical criticisms of the bases upon which these courts work.

Many of you know that problem solving therapeutic justice was the model used in the creation of the Family Court in Australia in the 1970s. The model didn't work entirely as its architects intended and Australia retreated from the experiment by making family justice more formal and traditional. In more recent times specific pilot courts have successfully re-visited some of the more adventurous aspects of therapeutic justice.

The problem can be described as how to retain respect for the court as the decision maker while involving professionals and families in the decision making process so that the family and their own community take responsibility for the problem to be solved and the solution identified, making the age old problem of compliance or enforcement of family justice a community and family based endeavour.

The principal criticism is that judges get side tracked from their role as decision makers by the way they work in a problem solving environment, which can be collusive and a threat to their independence. Especially where that collusion involves executing social welfare principles that are not articulated in the law but are in reality no more than the fashionable hypothesis of the time or the edicts of local or central Government undoubtedly influenced by resources or other political expedients.

In other words for problem solving to work you need to be very clear about the pro-active role and functions of the judge vis-à-vis others including advisers, counsellors and service providers and you need to ensure that only evidence based good practice is used by judges. That we can ensure by publication of and training in the leadership and skills frameworks.

But in moving into the problem solving arena I move judges from the Hartian fount of authority, the Zeus who applies fixed rules to Dvorkin's Hercules – the arbiter not only of rules as principles but also other overt principles that can be ascertained out of what the Supreme Court and towards the end of its days the House of Lords started to describe as 'legal policy'.

As the jurisprudents among you will realise, that provides an exciting theoretical opportunity. Not only can the debate be widened to considering what are the legal policies we use to deduce principles which we apply but we can also debate whether those principles adequately provide for the social norms that exist around us.

Let me give you a snapshot of progress so far. Primary legislation is before the House of Lords, The Crime and Courts Bill creating the single family court and pre-legislative

scrutiny of what will become the Children and Families Bill dealing with Government's welfare proposals in both public and private law cases. The judiciary has accepted an invitation to give evidence to 2 select committees on 20 and 27 November 2012 dealing with this proposed legislation. There will be 16 Statutory Instruments with associated rule and practice direction changes to create the new court and deal with important questions such as allocation i.e. the distribution of the business of the court, and the destination of appeals including case management appeals. There is a one year programme designed to ensure the Family Procedure Rules Committee can scrutinise all of those materials and where appropriate provide an opportunity for consultation on proposals.

The first rule and PD change will be that relating to experts. The test in part 25 FPR will change so that an expert can only be used where that is necessary rather than reasonable. The new experts rule and associated PDs will come into force in January. There is likely to be guidance to accompany the new rules to emphasise the appropriate use of experts i.e. to help resolve a discrete issue beyond the skill and expertise of the court and the witnesses already before it or to undertake an overview in the most complex cases where more than one professional discipline is in play or to fill a gap caused by a missing analysis or assessment.

Within the skills framework there will be a series of pathways and the first to be published at the end of the year will be for private law with a wide range of supporting materials for SRPs. That will be followed by the public law pathways: standard or 26 week cases, exceptional cases and urgent cases including the removal of children.

There will also be 5 or 6 expectation documents – these are agreements between agencies and the Family Justice Board and/or the judiciary to provide minimum standards. They will include:

- Local Authority social work evidence and Cafcass analyses
- Experts standards
- LSC on funding
- OS in re incapacitated adults

- HMCTS: the blueprint for the operation of the new court
- Lawyers' materials including threshold analysis and case summaries.

In time we hope to involve healthcare providers and third parties from whom disclosure is most frequently sought. The experts' standards document is now out for consultation. The next set of documents are expected to deal with Local Authority and Cafcass evidence for the court.

Finally in the skills framework, there will be publication of peer reviewed research of which all courts should have knowledge. The first compilation was published last week and is on the Family Justice Council website and deals with child development and the effect of delayed decision making on children.

In the leadership framework there will be guidance on allocation and control of work, appeals, the use of data in particular from the Care Monitoring System (CMS) and deployment i.e. judicial continuity, patterning, listing and the specialisation of the judiciary.

Training for the judiciary will begin in December with leadership and management training for all Family Division Liaison Judges and Designated Family Judges and then between April and July next year there will be skills training for 600 ticketed public law judges and key legal adviser trainers for the magistrates. Cascaded training for all magistrates and legal advisers will follow. My sincere wish is that we will be able to have a multi-disciplinary roadshow for all practitioners to which you will all have access and where training can take place on the same materials.

I should not leave you without looking at the Government's proposal to have a 26 week deadline and to limit scrutiny of the care plan. I am not going to comment on the Government's published clauses: it would be inappropriate for the judiciary to do so now that they are before the House of Lords. Let me examine however the practical effect.

The Government proposes a 26 week deadline for care and supervision cases. The Judicial proposal is to fix timetables by reference to evidence about welfare at the beginning of every

care case. We believe that can be achieved within 26 weeks in many more cases than hitherto. The real question is how long should the timetable be for the rest. That involves questions of policy. Is it the function of the state and/or the court within care proceedings to improve inadequate parenting? Like all questions it is not susceptible of one answer and the context is vital but the Supreme Court has already provided a clue to the answer at least once. It is not a parent's right inherent in Articles 6 and 8 to have their parenting improved by the state in care proceedings in every case and certainly not at the expense of the child. Family Courts must apply the law. A considerable number of adjournment applications and so called planned and purposeful delay cases fall foul of the Supreme Court's legal policy formulation. Whether a parent will be available for a child within the child's timescale is a matter for evidence and analysis by the children's guardian in every case. In each case every application for an adjournment to repeat an existing assessment to obtain expert evidence or to allow a parent time to demonstrate their capability will in future be the subject of the children's guardian's analysis and advice. The children's guardian must give that advice from the perspective of the child, not the parent. Parent's advocates are more than capable of setting out with clarity what they want. The children's voice in the present system can get rather muted. That advice must balance the harm to the child from delay, often a sub-optimal placement or contact and consequential emotional damage as against the benefit of the adjournment proposed.

Let me move then to the scrutiny of care plans. It is implicit in the debate about timescales that one knows what the placement options are in each case when the timetable is set. Sadly, that is still the exception rather than the rule. The judiciary's aim is to get placement options being transparently canvassed from the beginning of proceedings and in the first social work statement, reflecting whatever good practice pre-proceedings work has taken place particularly where that includes family group conferencing or similar work.

The practice of the court scrutinising every detail of a child's proposed life in care is, I would suggest, not appropriate. It never has been. That conflicts with the principles upon which the Children Act 1989 were based i.e. the operational independence of a local authority

within the statutory care regime. One only has to go back to A v Liverpool CC to understand that.

What is behind the concern that a court will not be able to say whether re-habilitation, kinship placement, adoption, long term fostering or specialist placement are appropriate?

It should not be forgotten that the purpose of care proceedings is to vest controlling parental responsibility in the local authority without extinguishing the parental responsibility of the parent i.e. to make the decision whether the child should be a looked after child. Where parents are not capable of exercising their parental responsibility and there are no alternative care arrangements that can be put in place without a care order then it is likely that a care order will need to be made and that should be sooner rather than later. The elephant in the room is the fact that courts are asked to consider in principle what amounts to a final adoption placement decision at the same time.

I have a personal view and this is a developing judicial opinion that although on the facts of many cases a concurrent placement and care order decision is appropriate, there are some cases where placement options are either not fully investigated or assessed and concurrent final hearings of both applications may not be appropriate.

We also know that a strict application of the adoption and care planning statutory instruments mean that an adoption agency decision maker cannot in many cases make a decision in under 26 weeks and that assumes placement order proceedings are issued with care proceedings which often they are not.

There is an obligation on the court in placement and adoption proceedings to timetable its process and the court cannot do that in such a way as to prevent the agency decision maker from coming to a decision based upon a proper permanency report which itself identifies and analyses all placement options within and outside the family whether or not those options were relevant to the question whether the parents were capable of exercising parental responsibility on their own.

In a perfect world the court in placement order proceedings should scrutinise the permanency report. That is a separate exercise from scrutiny of the care plan because a decision of a different quality is or should be being made by the court. If that means placement decisions are dealt with after a care order is made in some cases then so be it. That may well be Parliament's intention properly construed. In other words the real question is not whether there is adequate scrutiny of the care plan, it is whether there is proper scrutiny of an adoption proposal. Placement proceedings have their own timetable and that will not necessarily be the same timetable as the care proceedings, whether 26 weeks or longer.

I would suggest that to the extent that we assume the court only makes one decision and that will do for both the care and placement proceedings, we are wrong in law and the Court of Appeal has been saying that for some time. There are two decisions even if they are being taken at the same time.

To say care proceedings will be different in future is right: the whole system will be different and I hope not for the worse. The practice of judges and HMCTS will change in the new court. The practice of local authorities needs to change, particularly pre-proceedings. The practice of guardians and expert witnesses will change to become focussed and more not less responsive to the needs and voice of the child.

The judicial aim is to improve the quality of outcomes by improving our process and that includes improving the quality of evidence and practice.

It is a brave new world – but it's worth it – for the child's sake.