



JUDICIARY OF
ENGLAND AND WALES

**A Lecture in Honour of Professor Mervyn Murch,
Delivered by Lord Justice Nicholas Wall at the University of Cardiff**

“Whattaya Mean – ‘Quo Vadis?’”

1: Thoughts and Aspirations for the Future of Family Justice

30 November 2006

It is, of course, customary on these occasions for the speaker to say how honoured he or she is to be invited to give the lecture in question. I do not propose to depart from that tradition, because, quite simply, I am. In my case, however, there are equally large measures of both surprise and pleasure in being asked to give a lecture to celebrate Mervyn’s work. The pleasure, of course, is the opportunity briefly to escape from London, to renew friendships and to find time to think outside the box, which, in judicial terms means outside the scope of the next case in the list.² The surprise is because I find myself, an unashamed practitioner most of whose professional life has been spent exclusively in the courtroom, speaking to such a distinguished academic audience. I am also very grateful to Gillian Douglas, who has not confined me to one topic, but has allowed me to take the opportunity to express my thoughts and aspirations for the future of family justice.

My first acquaintance with Mervyn was not a face to face meeting, but it gives rise to an anecdote which, in its very minor way, helps to explain much of what has happened (and much for which Mervyn is responsible) over the past thirty or so years. It is the early 1970s. I was a very junior barrister in chambers then situated at 1, Mitre Court Buildings in the Temple in London. My head of chambers was the late Joseph Jackson QC, a very remarkable man, and one who was, even in those days, both interested and active in the interdisciplinary field. He returned to chambers late one afternoon from a meeting. Over tea he made the following announcement to the assembled barristers: “I’ve just met an extraordinary fellow called Murch”. (Pause). “He believes in talking to people” (another, longer pause). “He believes in asking litigants what they think about the system”. (General astonishment).

I now realise that this conversation can be placed some time after the initial Dartington Family Courts Conference attended by Scarman J (as he then was) in 1971, when Mervyn was engaged on his Social Science Research Council study of the circumstance of families in divorce. I recall discussing that research with Mervyn on a number of occasions. I also recall Joe Jackson telling me of one petitioner who had provided a wholly fictitious account of her non-existent children. When asked why she had done so, her response, as I recall was: “What’s it got to do with them?” By them, I am confident that she meant the judiciary. It is a question which I have carried with me onto the

bench, and which I have endeavoured to keep in my mind every time I have been giving a judgment.

The fact that what was extraordinary to the practising lawyer in the early 1970s is now not only accepted but commonplace is, I think, a tribute to Mervyn and those like him have firmly installed academic analysis and legal / sociological research into the mainstream of family justice. The result is that the concept of inter-disciplinarity (or the multi-disciplined approach to issues in family justice, as I would prefer to describe it) is now a given, as is the recognition of the importance to the legal profession and to the judiciary of evidence based practice founded on research.

My first venture into the field, in 1995 / 6 was to edit the book entitled ***Rooted Sorrows***³, which was the record of the first of the Dartington conferences organised by Mathew Thorpe on behalf of the President's Interdisciplinary Committee. Five such conferences followed, the results of all of which were published. Even then, I do not think that I fully appreciated the proper role of research, or the value of the different perspectives which academics such as Mervyn, Douglas Hooper, Gillian Douglas, Nigel Lowe – amongst very many others - have brought to family justice. In mitigation, I suppose it can be said that the committee's first Dartington conference was, primarily, for judges and mental health professionals, and designed, amongst other purposes, to familiarise the latter with the former's expectations, as well as to encourage them to undertake work in the field of public law child protection litigation. Eleven years on this is as live an issue as ever – if not even more so – and I will return to it later in this paper.

I cannot, however, begin my short ***tour d'horizon*** without talking a little bit more about Mervyn. It will, I think, be for others to measure his academic achievements. I am not competent even to begin that assessment. However, in the first of what I hope will be a series of lectures in his honour, I want, both for myself and my successors, to emphasise that for me, engaging and working with Mervyn on any project has always been, not just rewarding, but immensely enjoyable.

Mervyn, of course, has an inexhaustible flow of ideas. He also has that vital quality, shared by all great teachers, of indefatigable enthusiasm, undiminished by external indifference or political rebuff. To add to these qualities, he has a rich experience of professional life in many modes; but – above all in my view – he has a wonderful sense of humour, combined with great anecdotal skills.

One of my happiest memories of Mervyn is a dinner at Dartington during one of the six multi-disciplinary conferences to which I have referred, during which all of us at our table spent most of the meal convulsed with laughter at Mervyn's wide range of stories about his experiences (inter alia) in the navy and as a probation officer. The mood Mervyn created was infectious, and in turn provoked equally humorous responses from other people at the table. Christopher Sumner told a wonderful story about that distinguished jurist, Professor Guest, who, as a young man, was serving out the last weeks of his national service as an NCO in the Army Legal Services, based in Cyprus and was told by a superior officer that the Government ceding the Hashimite Kingdom of Jordan, and urgently needed a draft treaty. As he was a lawyer, Guest was ordered to produce one. All he had with him was a volume of landlord and tenant precedents, and so he selected one in which the tenant (of the first part) surrendered his leasehold interest in the demised premises, to the landlord (of the second part). Wherever the

word “tenant” appeared, he substituted the words “the Government of the United Kingdom”, and wherever the words “demised premises” appeared, he wrote in “the Hashimite Kingdom of Jordan”. The ensuing treaty was duly ratified. I relish that story, as a wonderful example of how the law operates in reality.

Inspired by Mervyn, everyone at the table produced a story. I remembered my visit to a rural county court on judgment summons day. As each case was called on, the same solicitor got up, announced that he was for the judgment creditor, and told the judge the amount outstanding. The county court judge then turned to the usher. The usher then told the judge about the debtor’s circumstances and suggested a weekly figure for the debtor to pay. “That all right?” said the judge to the solicitor. “Yes, your Honour” was the invariable reply. However, after about five of these cases, the usher’s reply was: “Sorry, your Honour, this is a new one for me”. The judge turned to the solicitor: “Adjourned for seven days – that all right?” “Yes, your honour”.

My wife, who is not a lawyer, but was at the time the Chair of the Board of Visitors at Wandsworth, told of going to listen to a case in which the issue was whether or not it was lawful to allow a prisoner on hunger strike to starve himself to death. She found a courtroom with law books piled high on the benches, and learned argument in process until one of leading counsel’s clerks rushed in, tugged his leader by the gown and whispered that the defendant had eaten a biscuit. Application adjourned *sine die*, and another example of how the law actually operates.

There was also the story of the court usher telling the young recorder that he would have a hung jury because, when he had sent them out to consider their verdict at 12.00 noon on a Friday, he had unwisely told them not only that they should take their time, but that if they were hungry, they could place an order for sandwiches with the usher. There is a wonderful oath, taken by ushers in their capacity as the jury bailiff, which from memory goes along the following lines namely “ I will take his jury to some quiet and convenient place. I will not speak to them, nor suffer any person to speak to them this day save to ask them if they are agreed upon their verdict”. Well, that oath plainly does not prevent the usher from asking the jury if they are agreed upon their sandwiches, and this particular usher, more it has to be said in sorrow than in anger, informed the Recorder that, in her experience, a jury which had not been able to agree on its sandwiches would prove equally incapable of reaching a unanimous verdict. She was, of course, correct, as ushers always are about everything. I also recalled being told by the usher who greeted me at the Kingston upon Thames Crown Court on my first morning as an Assistant Recorder with the immortal words: “You do realise don’t you, that it’s a new jury panel, and you wont get a conviction before Thursday: they don’t get the hang of it until then”. She was right too.

Finally, there emerged Mathew Thorpe’s splendid story of his first experience of the Court of Appeal. Being shown the refurbished quarters in the East Block of the Royal Courts of Justice (originally, you will be pleased to know, the wing in which prisoners were detained) Mathew, as a committed cyclist, commented favourably on the installation of showers in the new block. “Showers?” commented one of his senior colleagues mournfully: “Showers? What do we want showers for? After all, Pontius Pilate only washed his hands”.

A sense of humour, to my mind, is as essential a qualification for survival in the Family

Justice System. Mervyn has that quality in abundance, and so I have tried not to fall into the error depicted in the famous Max Beerbohm cartoon in which the child Miss Mary Augusta says to her beaming uncle, Matthew Arnold: “Why, Uncle Matthew, oh why will not you be always wholly serious?”

I cannot imagine Mervyn making that particular mistake. I recall one of my colleagues, now retired, saying to me shortly after I was appointed that his most damning criticism of any colleague or acquaintance was that he could not imagine him or her “convulsed with laughter”. I have spent much of my time with Mervyn in that condition, and I have not needed psychometric testing to know the extent to which I have benefited from it.

I turn to the topics which I wish to address. It may seem somewhat strange to this audience, that as somebody who has been a practitioner throughout his career, and as one for whom academic respectability is a lost goal, I begin by expanding upon my recognition of the major contribution which academic learning and research have made to family justice over the past 30 years.

I do not see family law either now or in the future as a system which is judiciary led, and on which academics and researchers simply comment. More than that, I would like to encourage an ever closer relationship between practising lawyers and the academic world, giving the latter its widest possible definition. On a mundane level, I would like to encourage academics to sit as JPs and Recorders. I also welcome them onto the bench or into practice as permanent fixtures. At the highest level, for example, how much poorer would the world of family jurisprudence be if Brenda Hale had not been made a judge in the Family Division and then rapidly progressed up the judicial ladder? Professor Jack Beatson is now a judge in the Queen’s Bench Division. I can think of many other more mundane, but nonetheless extremely valuable instances – Professor Christina Lyon sitting as a Recorder on the Northern Circuit, Mary Hayes in Sheffield, and Rebecca Bailey Harris joining my old chambers and finding out what life is really like when trying to advance novel propositions of law to a weary district judge on a wet Friday afternoon in a dismal county court far from home.

I make the point lightly, but it is a serious one nonetheless. Long gone, I hope and think are the days when there was a chasm between the academic and the practising worlds. Mervyn, like many others, bridges the two, and the world is richer for it. Nigel Lowe’s work in the international field in particular, to pluck just one example from the air, has been of enormous value to practitioners and politicians alike.

In the Court of Appeal, there are regular meetings organised by the Judicial Studies Board, to which academics and practitioners from other fields are invited to speak. I find these very valuable. Judges also have, I think, something to offer. We do not have sabbaticals, but I would welcome spending a few weeks every five years in a university or college, giving myself a breathing space in which to think, attending seminars and perhaps giving the odd lecture. When I was on circuit, particularly in Liverpool, I greatly enjoyed having Christina Lyon’s students with me in court. I found their perceptions of the process illuminating: I think they benefited from seeing a court in action. Family judges at every level should, in my view, have regular updating through the JSB or by attending multi-disciplinary events, such as the Dartington conferences to which I have already referred.

The real key to all this, in my view, are the Family Division Liaison Judges and, more particularly, the Designated Family Circuit Judges in the various care centres up and down the country. Dynamic leads from them - such as arranging training for doctors and social workers, or taking an active interest in the work of groups in their area operating domestic violence courses, or even, at a more mundane level ensuring good practice amongst local practitioners (including CAFCASS and local authorities) are of the utmost importance in the maintenance of a dynamic system. We have had to struggle long and hard to achieve the creation of the Family Justice Council, which has just produced its first annual report. I pay tribute to the work of the previous President, Baroness Butler-Sloss (now, of course, her Majesty's Deputy Coroner for Surrey) and to Mathew Thorpe – in particular the latter - for their tireless and dogged persistence in pursuit of the goal now achieved. I would also like to thank Mervyn and many in this audience for their industry and support to the same end. But in my view, the existence of vibrant and innovative local family justice councils is as important as the existence of its national parent. I see the FJC, both locally and nationally, playing a large role in the future development of the Family Justice System.

However, when looking to the future, there is a first and fundamental principle which the government and the legal profession in particular have jointly to address. It can be expressed in stark and very simple terms. For family law to flourish, there must be a viable family justice system in which practitioners can practice, and in which academics can participate, research and analyse. That system, however, will not exist unless the resources necessary for its existence are provided.

My experience both at first instance and in the Court of Appeal has invariably been; (1) that the practice of family law requires a particular expertise and sensitivity in its participants; and (2) that there is a direct relationship in public law care cases under the Children Act in particular between, on the one hand, the quality of the lawyers, social workers, guardians and experts in a given case, and, on the other, the efficiency with which a case is managed and the clarity with which the issues in the case emerge for decision. I cannot. Of course, say that the most difficult cases which I have had to try have been rendered easy by efficient and skilful presentation and preparation, but I am in no doubt at all that the process of decision making has been rendered clearer, swifter and – dare I say it – less costly both in emotional and financial terms by competent advocacy and case preparation.

I am very pleased to note that the Minister for Family Justice at the DCA, Harriet Harman QC, recognises the special quality required for practitioners in the family justice system. In a speech in May 2006 cited in the October 2006 Newsletter of the Association of Lawyers for Children (the ALC) she was speaking to the title “The need for good public funding for family legal work” and she is reported as saying : -

I regard the protection of children and making decisions that cannot be agreed between warring parents as of the greatest importance and as a Member of Parliament I have a long-standing interest in the work of the family courts It is not acceptable that despite more than a 33% increase in the legal aid budget since 1997, and an overspending in that budget currently running at £150 million a year, publicly funded family law is being squeezed When [cases do come to court], I recognise the great importance of the high quality legal preparation and representation that the family solicitors and the family bar provide I will ensure that the attention of the Carter Review and my ministerial colleagues does

not wander from the importance of the provision of a good supply of good family solicitors and barristers.

The Minister said much the same at a conference in London on 30 October 2006, organised by NAGALRO and CAFCASS to address the consultation paper “**Confidence and Confidentiality: Improving transparency and privacy in family courts**” at which I also gave a paper. As will be apparent, I fully agree with what she said on both occasions about the need for good quality family lawyers. I also support the Minister in her wish to achieve greater transparency in family justice – a topic to which I will return shortly.

What the Minister said, however, has a significant corollary, which needs to be expressly stated, and it is simply this. If publicly funded family law is to survive as a viable service to parents and children, let alone if it is to flourish, its participants must be properly remunerated.

The government has, of course, stated that it will re-think its initial response to Lord Carter’s Review of Legal Aid Procurement, although I was concerned to see in Tuesday’s **Times** that the Lord Chancellor was reported as saying to solicitors that they must “knuckle down and work out how it will work out in practice” and that the government was “absolutely committed to getting Carter”. These are remarks which, I anticipate, solicitors undertaking publicly funded children work will find deeply dispiriting.

I cannot, in my 24 years of practice at the bar and my 13 years on the bench recall any proposal by any government of either political persuasion which caused such consternation as Lord Carter’s “**Legal Aid: A Market-Based approach to Reform**”. From the President of the Family Division downwards, the response has been clear, well informed, powerful and unanimous. There is unanimity amongst the profession and the judiciary that the implementation of Lord Carter’s proposals would have a devastating effect on the practice of Family Law.

I have, of course, been privy to a number of the responses, but others are in the public domain. The ALC for example, an organisation for whose work I have a profound regard, did not, in my view, put the matter too highly when, in the same October 2006 Newsletter, it described the proposals as causing consternation, and as “a bitter blow”. It also said, and I agree with every word of this: -

We do not exist to advance the interests of our members but to promote effective access to justice for children and young people. We naturally see ourselves as integral to that process and little thought that we would have to fight for our own existence in order to preserve it. It is a measure of the threat posed by the Carter review that the ALC is now engaged in an extensive campaign to persuade the government that a payment scheme that further reduces the number of specialist solicitors able to run economically viable practices representing children and families is an entirely false economy, is bad for children, bad for society, and bad for the country as a whole.

The ALC was not a lone voice. The Family Justice Council's response was equally critical, as were the views of the judiciary. I agree with all those who have said that the implementation of Carter would make the current unsatisfactory situation much worse; that it would both weaken and undermine judicial control of necessary work because there were no task based fees deriving from effective case management, and because it provided for fixed advocacy fees which took no account of the number of inter-related separate hearings that had to be funded from the one fee.

I also agree with those who have said that the preferred suppliers, the dedicated children law solicitors upon whom both litigants and the judiciary have come to depend, would be priced out of the market and would simply abandon the work. Many in this audience, like myself, will have had the direct experience of being told by solicitors whom they respect (and in my case upon whom I have come to rely) that the introduction of Carter would cause them to abandon their practices - indeed, there are some for whom even the prospect of implementation has proved the final straw. This is not window dressing. I know of one South London firm which is closing in the new year after many years of valuable service to children and to the court. The two principal partners have simply had enough. I propose to read two extracts from the letter I received from one of the partners concerned. The first makes the point on which I have already touched, namely: -

... if the academics do not contribute to the opposition to legal aid changes, they will in due course find that their work is diminished. Already, the profile of interest in family law is low.....

The second explains that his firm will close its offices in March 2007, and that he and his partner are not longer prepared to carry on, despite having hoped that the practice they had built up over 20 years could have been taken over and developed. The letter concludes: -

Whilst we will find somewhere else to do some more limited consultancy work, redundancies from our firm are inevitable. I fear there will be many other closures or redundancies, unless the Government moves quickly to reverse its policy. My main worry with the Carter proposals now, as far as family law is concerned, is that even if, as seems quite possible, they accept that they have fouled up, no doubt in more subtle political terms, all they will do is agree the need for a reappraisal. That will not reverse ten years of neglect, nor the diminution of firms willing to do legal aid.

There is already a severe reduction in the number of lawyers entering the profession who are opting for the work. Who can blame them? Only 0.8% of child panel members are under 30, and only 7% of trainee solicitors in 2004 wanted to pursue social welfare law. I am in no doubt at all that, if implemented, the proposals would accelerate the reduction of 20% which has already taken place between 2001 and 2006 in the number of solicitors on the children panel.

The corollary to the anticipated dearth of child solicitors is a likely increase in the already large number of litigants in person, with the consequential increase in the time spent by the court on each case, and the equal if not greater decrease in the number of settlements.

From the citation I have made, it is clear that the Minister has a good grasp of the issues

involved. The family justice system must therefore look to her and to the Department to live up to her words. I have not said anything about Carter which is either original or is not common to all family practitioners. There is, however, a fundamental discrepancy which the government appears unwilling to acknowledge between the Minister's recognition of the importance of good quality family and children lawyers, and the need to remunerate them properly. Nobody who has any experience of the family justice system believes that solicitors practice in its publicly funded sector in order to make money or to milk the system.

I genuinely fear the disappearance of many valuable firms and competent family practitioners. It is not too late for the government to draw back, but if it does not do so, my fears for the practice of family law in the public sector are profound. If a raft of expertise is lost, who is to say when or how it will be replaced?

However, I do wish this evening to make some wider points about funding, although it may be that, in the light of the government's attitude towards Carter, this audience will think that I am whistling in the wind. The first, of course, is that it is not just the lawyers who need to be properly funded. The same principles apply throughout the family justice system. I have made it clear on a number of occasions that there is much of what is currently litigated that I would wish to see taken out of the courtroom. Many private law parental disputes, notably over children, and perhaps most notably in relation to contact are, in my judgment, better dealt with out of the court room by education, conciliation and mediation. But if the resources to fund the necessary programmes and facilities are not made available, our aspirations for a proper service for separating or disadvantaged parents and children will remain aspirations, with no prospect of implementation.

What has impressed me throughout my career in family law has been the profound interest, dedication and enthusiasm which practitioners from every discipline bring to their work. Everywhere I went, particularly on the Northern Circuit, I found a quite extraordinary degree of interest and enthusiasm, and a plethora of good ideas. The creation of a register of expert witnesses on the Northern Circuit, ***Pro Contact*** in Manchester, a contact centre which was geared to longer term, child focused work between difficult parents and children; ***Child Concern***, the multi-disciplinary body initially chaired by Iain Hamilton; the many local contact centres, the medico-legal societies, concurrent planning in adoption and the numerous domestic violence project in the North West spring to mind, all running on a shoe-string and held together largely by altruism and good will.

In the private law field, in my view, there is a crying need for parental education and support, and for children to have ready access to services which can assist them make sense of their parents' disputes. The Children and Adoption Act 2006, which derives very substantially from the work of CASC, will give the courts wide powers to direct parents to out of court facilities. But the statutory provisions will be of no use if there are no programmes to which to direct parents or children, or if CAFCASS cannot undertake the work because it does not have the resources to do so.

CAFCASS is, in my view, the paradigm. Its creation presented an opportunity for the

provision of a properly funded, dynamic and wide ranging family support system. That opportunity was, frankly, squandered. Quite apart from its “cost neutral” funding difficulties, the consequence of the fiasco which led to the proceedings for judicial review over the guardians’ contracts was a devastating haemorrhage of talent, and an acute shortage, particularly in London, of competent guardians in public law cases. Under its present chair and chief executive, CAFCASS is beginning to establish its identity, but the aspirations which I and others had for it remain unfulfilled. My simple point is that nothing which I want the family justice system to achieve will work unless there is the political will and the resources to put it into effect. I would like to see – for example - CAFCASS having the facility to provide a whole range of out of court services and facilities for children and families. I would like to see CAFCASS officers spending more time with the children whose views they seek to give to the court, and undertaking specific longer term court directed work. They should not be having to do this at the expense of the cases which need reports or in private law cases which need separate representation.

I would like to be part of a system in which the first instance court could say to a parent or to a child - you don’t need to be here: you would be better off with a CAFCASS Officer or a different professional, or taking part in a particular programme designed to address your difficulties and help you through them. Alternatively, I want judges to be free to say to children in appropriate cases that they will ensure their arrange separate representation, without having to fight a system which says it is too expensive, or that the resources to achieve the aim are not available. I will return to this point when I discuss the government’s consultation paper *The Separate Representation of Children* at the end of this lecture.

The resource issue is, of course, crucial to everything I am going to say this evening. In the time remaining, however, I am going to attempt briefly to address four other topics, namely (1) the question of transparency in family justice; (2) the question of expert evidence in family proceedings; (3) the need to reform the law of divorce; and (4) the separate representation of children in the particular context of what is currently rule 9.5 of the Family Proceedings Rules.

I deal with transparency first, because it is a subject on which I have made my position clear in two public lectures – the Levy / Hershman Memorial lecture in Birmingham in June, and in a paper to the NAGALRO / CAFCASS conference on 30 October to which I have already referred. In summary, my position is that I am in favour of giving the media – and in practice this means the Press - access to family proceedings, provided that there are clear ground rules about what they can and cannot report. In practice this is mostly going to mean the extent to which, if at all, they are to be at liberty when reporting the proceedings, to identify the parties, and, in particular, the children concerned.

In addition to giving the press the right of admission to our first instance courts, judgments and reasons in family cases should, in my view, be routinely given in open court in anonymised form. In some cases of particularly sensitivity and where anonymity is in practical terms impossible, it may be necessary for the court, in the interests of the children concerned, to exclude the Press altogether, although in my view the court’s judgment should, nonetheless, be made publicly available. In such cases, and in other less sensitive but nonetheless controversial or “high profile” cases, judges

should prepare and issue press releases, so that the public can have immediate access to and understand the essence of what they have decided, and their reasons for the decisions they have reached.

In my view, there needs to be an ongoing dialogue between the higher judiciary, the press and the media generally about family justice and how it is administered. We - that is the specialist judiciary and practitioners - have nothing to fear from public scrutiny: indeed, we should welcome it.

Unlike the Constitutional Affairs Select Committee,⁴ I do not favour, indeed I am opposed to, the admission of the public into family courts, even given the qualification which the Select Committee envisages, namely that there would be a judicial discretion to exclude the public in certain circumstances.

The balance which has to be struck, it seems to me, is clear. On the one side, there is the undoubted need to protect family privacy and to encourage frankness in family proceedings, particularly those which relate to children. Public exposure militates against both concepts. On the other side, there is the need to have a system which is understood by, and accountable to, the public. Speaking for myself, I see no reason why the tension between the need for a media presence and the need to respect privacy and confidentiality cannot be satisfactorily resolved. We are likely, I think, to need a new Statute, although there is a great deal we can go by amendment of the Family Proceedings Rules, by Practice Directions and by the creation of fresh Family Procedure Rules, a task which is already underway, and which is overseen by the Family Procedure Rules Committee, a body chaired by the President and on which I sit. However, what is clear to me is that we undoubtedly need to engage in a dialogue with the media about the change.

I remain of the view that the government and the judiciary will need to negotiate a system of accreditation with the Press, possibly along the lines of the Crime Reporters' Association. At its most basic level, if the general public is not to be admitted to the courtroom, judges and magistrates will need to know who the other people in their courts are. I hope it will prove possible to negotiate an appropriate system of accreditation, and that it would be self-regulating. In its consultation paper, the government proposes strict punitive measures for those parts of the Press which break the rules. This is not a path down which I am keen to go unless it is absolutely necessary. The Press must be free, within appropriate constraints, to report what they see fit to report. The Press cannot be subject to judicial editorial control. But press reporting must be accurate and not tendentious.

In the light of what I have to say this evening about resources, I would like to add this to what I have said on other occasions. One of the reasons I favour increased transparency is that I positively want the public to see and to understand the difficulties with which we are all wrestling on a day to day basis – the inadequate resources, the shortage of judges, generally the frustrations we all feel at a system which is not serving children

well. I am confident that when that happens – and if the Press report it fairly and fully - the attacks on “secret justice” will cease, and questions will begin to be asked about why we are being put in this position; why was a guardian not appointed promptly in a care case? Why was it not possible for that child to be separately represented? Why did it take so long to produce that CAFCASS report? – and so on. It is, in my view, positively in the interests of the family justice system to show the world its workings, and the difficulties with which it has to grapple on a day to day basis.

That is all I propose to say this evening. We must now await the outcome of the consultation, and the government’s response to it..

On experts, there have recently been two highly significant developments, both of which I welcome. The first the decision of the Court of Appeal in ***The General Medical Council v Professor Sir Roy Meadow (Her Majesty's Attorney General intervening)***⁵, to which I will refer as ***GMC v Meadow***. The second is the report by the Chief Medical Officer, Sir Liam Donaldson entitled ***Bearing Good Witness – Proposals for Reforming the Delivery of Medical Expert Evidence in Family Law Cases***⁶, to which I shall refer as “the Report”.

I do not propose to discuss the Court of Appeal’s decision in ***GMC v Meadow*** in any detail, although I greatly look forward to reading academic analysis and criticism of it. Its effect, as I read it, is that the law returns to the state in which we thought it to be prior to Collins J’s judgment. That is to say that whilst experts enjoy immunity from civil proceedings relating to anything which they have said in court, they do not enjoy effective immunity from proceedings before their respective professional bodies in relation to opinions given in or reports written for, court proceedings. On this point, the Court of Appeal was unanimous. In the Court of Appeal, the GMC did not seek to reinstate the order made by the Fitness to Practice Panel (FPP) that Professor Sir Roy Meadow should be struck off, and the majority took the view that his ill-advised excursion into statistics, whilst representing professional misconduct, did not constitute serious professional misconduct warranting the attraction of any sanction. As an aside, it is interesting to observe from the judgment of Auld LJ the extent to which Professor Meadow’s statistical evidence was not the subject of any substantive challenge under cross-examination at the hearing in the Crown Court. It is also, in my view – another aside – quite extraordinary that the FPP appear to have decided the case without having before it either of the two judgments given by the Court of Appeal Criminal Division.

To this audience I commend the judgment of Thorpe LJ and his observations of the impact of both Mrs. Clark’s case and the case of ***R v Cannings***⁷ on the willingness of experts to give evidence in Family Proceedings. As with Carter, the word crisis, in my view, is apt. I do not, this evening, have the time to analyse Thorpe LJ’s judgment. I simply derive three points from it, none of which will surprise this audience or, I think, be in any way controversial. The first is the critical importance of medical evidence in the area of child protection, and the substantial reliance which the court places on the professional integrity of the experts who advise it. Secondly, the self-evident fact that in the field of family justice, demand for expert evidence exceeds supply. The system is thus very sensitive to increasing or newly emerging disincentives. The third point is the

reluctance of suitably qualified doctors to become involved in giving evidence in public law cases under Part IV of the Children Act 1989. Quite apart from all the well known disincentives - the time-consuming nature of the work, the inconvenience of fitting it in with other clinical responsibilities, the need to travel long distances to give evidence, the risk that the case may not have been properly time-tabled in order to accommodate the expert's evidence - comes the risk, high-lighted in the case itself, that experts will be reported to their professional bodies by disaffected parties or their adherents.

I equally do not have time this evening to catalogue the efforts which the profession and the judiciary have made to counter these difficulties, nor need I say anything about the quality of family justice in this field apart from the fact that, following the review of cases involving potential miscarriages of justice announced by the Attorney General post *Cannings*, only two family cases were referred to the Court of Appeal, both of which were dismissed.⁸

This is, however, aside from the main point I wish to make, which is that the Report is to be warmly welcomed, In my judgment, it both addresses and proposes solutions for the principal issues relating to expert evidence in family proceedings. Time, once again, does not permit a detailed analysis of the Chief Medical Officer's proposals. In summary, however, as you will, of course, be aware, the Report addresses the fundamental problem of supply and demand by proposing that the provision of medical expert evidence should be delivered as a public service. NHS Organisations (Trusts, Foundation Trusts and even Primary Care Trusts) with substantial paediatric, child psychology and psychiatry and / or adult psychology and psychiatry services should provide medical expertise to the family courts through the formation of groups or teams of clinicians within the same specialty or on a multi-disciplinary basis. These teams, the Report proposes, could include other specialisms such as radiology or ophthalmology as well as clinicians who have retired within the last two years from active clinical practice. The main contract or service level agreement for providing medical expert evidence to the family courts should be held by one or more of such NHS Organisations, and delivered by specialty or multi-disciplinary teams, rather than individual named clinicians.

At the same time, the instruction of an expert from outside the area or for one working as a private individual would not be precluded. This latter point strikes me as an important consideration for those who fear that evidence from a team within an NHS Organisation might not be truly independent.

A crucially important recommendation, in my judgment, is that the knowledge and skills needed in all court settings should be taught as part of basic and continuing medical education. This, if effectively implemented, will go a long way towards demythologising the family justice system, and removing many of the anxieties felt by expert witnesses about giving evidence in court. The Report also recommends that the quality of instructions to experts should be reviewed by the Law Society, the Academy of Royal Medical Colleges and the GMC. It proposes that the Family Justice Council and relevant government departments should work with the GMC to investigate all possible

ways of dealing with complaints to the GMC about the expert evidence given by a doctor, so as to ensure that routes of appeal through the courts are used when they are appropriate. All this is powerful good sense, and very welcome.

This inadequate sketch of a summary cannot, and does not pretend to do justice to the proposals in the Report. No doubt much work will be required on the detail. But the essence of what is being proposed seems to me to be of great value.

I also see the Report in its interdisciplinary context. It is crucial to the status of the system that experts retain their independence, and that their duty to the court (not to the parties, or to the relevant NHS organisation) to advise it to the best of their ability in the interests of the children concerned remains paramount. Any suggestion of danger from a form of institutionalised, uncritical and time-serving advice structure must be negated by active collaboration between the participants in care proceedings, and in particular between the experts concerned and the court; and it will, of course, be for the courts, exercising their case management powers, to see that the right evidence is obtained, and that the ECHR Article 6 rights of the parties (and particularly the parents of the children concerned) are fully accommodated.

I therefore see the proposals, if fully and properly implemented, as providing a coherent structure for the provision of reliable and high quality expert evidence in family proceedings. Of course, everything, as always, depends on the proposals being acceptable to, and funded by, the government. They involve a substantial organisational and financial shift. But the emphasis in the report is on child protection, and for all the reasons I have given, child protection seems to me a major function of government. I hope very much, therefore, that the Chief Medical Officer's recommendations will be warmly welcomed both in Whitehall and in Westminster.

My two final topics have a link which, I anticipate will strike a chord with this particular audience. The first of them relates to the law of divorce. I would like to see, as part of any fundamental review of family law, the abolition of the current law of divorce, and the introduction of a children and finance focused no fault divorce law

As to this, I have, of course, to declare an interest. I was a member – indeed the only judicial member – of the Lord Chancellor's Advisory Board on Family Law – to which I have already made reference. This was a multi-disciplinary body set up in order to advise the Lord Chancellor of the day on the implementation of the Family Law Act 1996. Having carefully examined the issues over a period of approximately two years – perhaps longer - we duly advised implementation. However, the government decided, as was, of course, its right, that not only would it not implement the Act, but also that it would not seek to put anything else in its place. We are, accordingly, it seems, stuck with the present law for the indefinite future.

In my judgment, the present law of divorce is unsatisfactory for a number of reasons, of which I will select four. The first is that it has, in practice, become an administrative process which, nonetheless, pretends to be judicial. Thus if you want to get a divorce in a hurry, all you have to do is fill in a form and make some allegations of behaviour which may or may not be either true or exaggerated. There is – a defended case apart – no real mechanism for any assessment of the truth of the allegations contained in a divorce petition. A district judge then ticks some boxes, and a decree nisi of divorce is pronounced.

My second objection follows from the first. Whilst the law in financial proceedings between spouses discourages the litigation of allegations of behaviour – see, as the most recent example, the decision of the House of Lords in *Miller v Miller*⁹, the divorce process promotes allegations of behaviour as the easiest basis (two years separation and consent apart) for obtaining a decree.

Thirdly, the process does nothing to make those who embark upon it think about the consequences of what they are doing either for themselves or, more importantly for their children.

Fourthly, and perhaps most importantly, the divorce process does little to protect the interests of children.

In the case of the Family Law Act 1996, a well constructed and carefully crafted Law Commission Bill was hastily considered and badly mauled and weakened in Parliament in the dying days of the Major Administration. That was the price of getting it onto the Statute Book. I recognise, I think, that we will not be able to go back to the 1996 Act, and there are arguments which indicate that we should not in any event. Nonetheless, the principles behind it seemed to me sound. First and foremost, of course, it provided for no fault divorce. The criteria for a divorce order were the irretrievable breakdown of the marriage and the passage of time. Secondly, the Act provided potential applicants for divorce with information both about the process itself and the likely consequences and effect of divorce on themselves and their children. This audience will recall that a party to a marriage could not take divorce proceedings before attending an information meeting, at which the process was explained, and at which he or she was provided with practical and helpful information about the services to which parties could gain access together with the advice they were likely to need and could obtain. I attended two such meetings, and was impressed by the quality both of the information provided, and the providers themselves.

Thirdly, the process allowed periods for reflection and consideration, which, whilst not likely to lead to reconciliations, would have enabled the parties both to think about what they were doing and to make proposals for the future regulations of their lives, and the lives of their children.

Fourthly the applicant did not obtain a divorce unless and until he or she could satisfy the court that the family's financial arrangements for the future had been resolved, either by consent or after a contested hearing. In theory the Act also intended that questions relating to the parties' children had also been resolved, but, speaking for myself, I was not satisfied that this was how the Act would work in practice.

Leaving mechanisms to one side, I am quite satisfied that we badly need a no fault divorce system, and one, moreover, which positively helps parties resolve their differences by means other than court proceedings. I would therefore like to see a structure in place which addresses these issues, and in addition provides – in terms - information, education and advice both for parents and children.

There is a neat point of conjunction between divorce reform and my final topic, since one of the ostensible reasons for the government's decision not to implement the Family Law Act 1996 was its expressed dissatisfaction with the outcome of the research

conducted for the purposes of implementation by Newcastle University. This caused a great deal of legitimate indignation amongst both academic and practicing lawyers at the time, and it has some echoes, it seems to me in the government's treatment of the published research undertaken by Gillian Douglas, Mervyn, Claire Miles and Lesley Scanlan entitled ***Research into the operation of Rule 9.5 of the FPR 1991***, which I will call "the research". Once again, I have to declare an interest, since I had the privilege of chairing the small Advisory Committee set up to monitor the progress of the research.

The research falls to be discussed, of course, in the context of the government's consultation paper ***Separate Representation of Children*** which closes in about a week's time on 8 December 2006. I should make it clear at the outset that, unlike the consultation paper on transparency, which I thought, on the whole, well argued and persuasive, I have a very poor opinion of the consultation paper ***Separate Representation of Children***, and I propose to say so in my response to it. I will therefore preface this part of the lecture with my headline criticisms.

At the very heart of the consultation paper there seems to me to be an important tension which is, I think, encapsulated in the following two consecutive sentences from the executive summary: -

Section 122 of the Adoption and Children Act 2002 amended the Children Act 1989 to allow court rules to be made to provide for children to be separately represented in all section 8 private law cases by making such cases "specified proceedings" in line with public law proceedings. However, the Government has always been clear that such provision is only relevant for a small proportion of children who are involved in private law proceedings arising from parental conflict.

In other words, what is apparently being said is: "We are changing the law to allow for separate representation in any private law case, but, of course, you must not so interpret it or seek so to use it". I have no quarrel with the proposition that not every case requires the child to be separately represented. What I object to is the clear implication in the paper that far too many children are being separately represented, and that this trend needs to be reversed. I also find it unacceptable that the research appears to be prayed in aid in reaching these unacceptable conclusions.

The same summary goes on to refer to the effect of the research. The paragraph which follows that which I have already cited states: -

While the research did not provide evidence to support the extension of the provision of separate representation to ***all*** section 8 cases, it has served to inform the proposals set out in this consultation paper

I can understand why the authors of the research are concerned by this remark, which is repeated in several places in the consultation paper, usually in conjunction with the suggestion that "bringing the child into the proceedings could be stressful and put too much responsibility onto the child". It needs, I think, to be remembered that the primary purpose of the research was to sample children's views of separate

representation, and to ascertain whether or not the service provided by solicitors and guardians was perceived by children as being satisfactory. The strong message of the research, as I read it, is that the majority of the children found separate representation beneficial. It was not within the research's terms of reference to conduct a representative survey of all children who had been subject to private law proceedings, and in my view the research should not be used to support the conclusion that party status and separate representation were not of benefit to all such children.

Before I develop my criticisms, however, let me say what I agree with in the consultation paper. I agree with the proposition that children should not have to go to a High Court Judge to make an application for permission to apply for an order. The introduction of this measure in 1993 was a classic reaction to the "floodgates" fear. In practice, despite the somewhat alarmist tone of the consultation paper, there has not been a "flood". Applications by children are, in my experience rare, except perhaps in Hague Convention cases, and these are hardly run of the mill.

I also agree that judges at every level should be able to make orders for separate representation and give children permission to make applications. This is plainly sensible and a good means of combating delay. But if the power is to be given, why is it not to be used? Why give it, otherwise? And if cases where children are separately represented are perceived to be capable of being tried in the Family Proceedings Court, is this not yet another argument for the wider, rather than the narrower use of the power?

Apart from the points on which I have already touched, my principal objections to the paper can be summarised as follows:

(1) The consultation paper recommends that separate representation is required "only if there are legal issues to be resolved". The only example, however, which is given, and which appears as a form of *mantra* throughout the report is "where the child has evidence or a legal submission to make that cannot be given by another party".

I have to acknowledge that I simply do not understand this recommendation. I do not, frankly, know what the phrase "legal issues to be resolved" means. The only hint I get from the paper itself is a reference to a case in which a child's ECHR Article 6 or 8 rights are engaged. That itself, I find difficult, since Articles 6 and 8 are engaged in every case under the Act.

In my judgment, the basis upon which separate representation falls to be considered is fully and properly set out in the carefully considered Practice Direction issued by the President on 5 April 2004¹⁰. Its terms will be familiar to this audience, and I will not set them out. Paragraph 3 of that Direction, however, makes it clear that the decision will always be exclusively that of the judge, made in the light of the facts and circumstances of the particular case. That, in my view, is as it should be.

(2) The consultation paper proposes that where the decision has been made to give the child party status, the appointment of a CAFCAS guardian should be the

preferred choice of the court over independent practitioners. The sentence which follows on page 13 of the Consultation Paper states: “This will enable CAF/CASS to take the lead on deciding when to recommend that party status is required, for example, where the child has evidence or a legal submission to make that cannot be given by another party”.

In an ideal world, if CAF/CASS had the resources (including the manpower) swiftly and regularly to supply guardians in private law proceedings, I would, I think, have no objection to the first limb of this proposal, although my profound disagreement with CAF/CASS “taking the lead” on whether party status is required would remain. But every practitioner knows full well that CAF/CASS does not have the manpower and the resources reliably to supply guardians in private law proceedings. Furthermore, it seems to me that representation needs to be geared to the needs of the particular child, and to the case in which he or she is engaged – as the Practice Direction states. It may be, for example, that what is required, as in *A v A11* is proactive, out of office hours social work designed to ensure that an order for visiting contact actually takes place. Cases may well provide other features better catered for by the independent sector than the CAF/CASS guardian. In this regard I do not only have in mind cases in which the family or the child has fallen out with (or no longer has any confidence in) CAF/CASS. The child may simply need help and access to resources which CAF/CASS simply cannot provide.

The proposition that CAF/CASS should “take the lead on deciding when to recommend that party status is required” is, frankly, the tail wagging the dog. It is simply not acceptable. Of course, any judge will wish to consult CAF/CASS and take its views into account, but, as the Practice Direction makes clear, the decision to grant separate representation must be that of the judge.

(3) My third objection flows from this. The Consultation Paper reports a substantial increase in orders for separate representation. The clear inference from the paper is that this is undesirable. Why? I do not see it suggested in the paper that the cases selected by the judiciary for separate representation should not have been selected, nor does the research so suggest. What the rise in appointments shows, to my mind, is that there are many more children who need separate representation than we have previously recognized.

The clear message of the paper, however, is that if this trend is not reversed, “the situation of rising costs and overburdened CAF/CASS resources will not be conducive to the representation of children in these and other cases”. If we do nothing, the doom laden scenario envisaged by the Consultation Paper is that – amongst other things - the ability of CAF/CASS to allocate officers to cases most in need will be compromised and the current backlog of CAF/CASS public law cases will remain or increase.

I think we have to ask ourselves in this situation a very simple question. Who is responsible for the incapacity of CAF/CASS to meet the needs of children as the judiciary perceive those needs to be? I have to say I strongly object to the

suggestion that it is the judiciary which is responsible, and to the equally clear and unacceptable implication that the delays, stresses and lack of resources in the system are all our fault. I ask myself another simple question. Would not a system which sought to promote the need for the voice of the child to be properly heard in cases falling within the Practice Direction welcome the judiciary's initiative in ensuring greater representation for children? And why are the resources of CAFCASS not being increased to accommodate this additional need?"

In my view the paper here raises a fundamental issue about child protection, and the state's duty to ensure that the voice of the child is properly heard. If a responsible judiciary is specifically given the power by Parliament to make decisions about children, and if that responsible judiciary – applying the President's Practice Direction - decides that a particular child needs separate representation in a particular set of proceedings, it is, in my view, for Parliament to provide the resources to enable that to be done. Anything else is an abnegation of responsibility.

Judges do not make children parties to proceedings willy-nilly, nor do they grant them separate representation unless they think it strictly necessary in the interests of the children concerned in the particular circumstances of the particular case. Such children, in my view, have both a strong case on the merits for separate representation, and are, in my view, entitled to it. Why did Parliament pass section 122 of the 2002 Act, if it did not intend it to be used?

(4) I would also like to say a word about the National Youth Advocacy Service (NYAS) and the way NYAS is treated in the Consultation Paper. I should make it clear that I have a very high opinion of the quality of the service provided by NYAS based on my experience of cases both at first instance and in the Court of Appeal. As recently as Tuesday of this week, we reversed the decision of a High Court Judge who had refused to appoint NYAS to represent children in a case in which they and their mother needed professional help in order to explain to the children that their father had undergone gender reassignment and was now a woman. The expert witness in the case, a psychiatrist, had expressly advised that NYAS should be appointed. It was plainly work which neither the local CAHMS nor CAFCASS was able to undertake.

It will, of course, be for NYAS to make its own response to the Consultation Paper. As I have already made clear, I have no difficulty with the President's Guidance of 25 February 2005, which states that CAFCASS should be consulted first to see if they can undertake the work which the court requires to be undertaken in the children's interests, or with the Protocol made between CAFCASS and NYAS in December 2005. However, I part company from the consultation paper when it suggests that NYAS should only be appointed in cases where there is a breakdown in the relationship between CAFCASS and the family. This is not what rule 9.5 says, nor is it what the Protocol says. It is simply one example of the situation in which it may be appropriate to appoint NYAS. Our case in the Court of Appeal on Tuesday is another. I therefore strongly resist any suggestion that if CAFCASS cannot do the work, and NYAS can, the court

should not be free to use NYAS.

I agree with NYAS that rather than reducing the number of rule 9.5 appointments by changing the court rules, and in so doing depriving children of legal representation and access to justice in processes that shape their future, there is an urgent need for funding to establish a “joined up” approach.

Like the judiciary when making appointments, NYAS does not take cases “willy-nilly”¹². It provides an extremely valuable service in cases in which it takes the view that it can make a proper contribution. It would, in my view, be a serious loss to the vulnerable children who need to be separately represented if access to NYAS’ services were restricted in the manner which the Consultation Paper contemplates. In a letter written to a number of the senior judiciary, NYAS has expressed both surprise and dismay at the statement in the Consultation Paper that “the overall impact of the proposals on competition is minimal”. It asserts that the proposals would have a significant impact on both children and upon NYAS’ ability to represent them in proceedings using the tandem model.

These are anxieties which I share. This is not the place to go into the detail, but in paragraphs 39 to 42 of the Partial Regulatory Impact Assessment which accompanies the Consultation Paper, the suggestion is made that the average cost of a case involving NYAS is approximately 53% higher than when CAFCASS is involved. It is, however, immediately apparent from comparing the statistical tables in the document, that like is not being compared with like. The average figure quoted for NYAS (£5,143) includes both the cost of legal representation **and** case worker input. The CAFCASS cost per case is given at £3,440 **without** legal representation. As the paper shows that the average cost for legal representation is at least £3,330 per case, it is immediately apparent that NYAS at £5.143 is **cheaper** than CAFCASS at £6,770. The difference, of course, is that with CAFCASS, the legal services commission is only paying for the legal representation. With NYAS, it is paying for both legal representation and the social work costs of the guardian.

I wish to make it as clear as I can that I would strongly deprecate any suggestion by the Legal Services Commission that it should not pay for the guardian in a case where a judge has appointed NYAS, and where the judge takes the view that the work of the guardian is of critical importance to the successful outcome of the case – as in *A v A* and in Tuesday’s case in the Court of Appeal.

Question 7 posed in the Consultation Paper reads: “Are there any circumstances when NYAS or other independent practitioners should be used instead of CAFCASS to act as the guardian. My answer to that question will be: “Yes, many”.

There are several other points in the Consultation Paper which I do not have time to discuss. For example, almost as an aside, the Consultation Paper invites comments on the proposition that judges should talk directly to children. The coverage of this wide and important topic is, in my view, perfunctory and inadequate.

My personal views on the question of separate representation owe much to Mervyn. In a paper which he gave to the conference with the German Judiciary here in Cardiff in 2004. Mervyn made a very good point – so good, that I thought I ought to incorporate it into a judgment – which I duly did. The case is called **Mabon v Mabon** and you will find it in the Family Law Reports at [2005] 2 FLR 1011. This is what Mervyn said: -

‘... notwithstanding the entrenchment of the welfare principle, traditionally under English law, children’s futures have been decided on the views of adults, that is the parents and the professionals ... The common law adversarial mode of trial which still forms the basis of our civil family proceedings, although modified and in continuous development, makes it difficult for all but the most confident and competent children to participate effectively.’

I agree. The case itself is an interesting one against which to consider the **Consultation** Paper, FPR 9.5 and the corresponding rule 9.2A(6). Six children were represented in private law Children Act proceedings by the same guardian. The three youngest children were living with their mother. The three older children (aged respectively 17, 15 and 13) were living with their father. These three children did not feel that the guardian was properly representing their views. They applied for separate representation in order to instruct their own solicitor and to dispense with the guardian. The judge refused to do so. We reversed him. The leading judgment was given by Thorpe LJ, who reviewed the existing authorities and cited sections 6 and 7 of the New Zealand Care of Children Act 2004, which effectively render mandatory the appointment of a lawyer to act for the child by stating in section 7(2) that the court must make such an appointment “unless it is satisfied that the appointment would serve no purpose”. Thorpe LJ concluded that **Mabon** provided:

..... a timely opportunity to recognise the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally. The rules are sufficiently robustly drawn to accommodate that shift. In individual cases trial judges must equally acknowledge the shift when they make in individual cases a proportionate judgment of the sufficiency of the child’s understanding.

I used the case to express my own views about the separate representation of children. I referred disapprovingly to the current need for a child to apply to a High Court judge for permission to make an application in the proceedings, despite the fact that the Statute gives the child a unqualified right to apply. For ease of reference, I will repeat what I said in paragraphs 40 to 44 of the judgment: -

[40] The Children Act 1989 and the Family Proceedings Rules 1991 provide the two methods by which children can be separately represented in proceedings relating to their welfare as identified by Thorpe LJ in his judgment. I am in no doubt at all that in the overwhelming majority of cases in which it is appropriate for children to be separately represented, what has become known as the ‘tandem model’ of representation serves the interests of those children extremely well. The child has the input of expertise from the different disciplines of lawyer and guardian, who are able, with the court’s permission, to call on additional expertise and advice where necessary. In public law proceedings, s 42 of the 1989 Act gives the guardian sweeping powers of investigation on the child’s behalf. At the same time, the child concerned is protected from the corroding consequences of adversarial litigation. Children are not required to

give evidence and be cross-examined: they do not have access to the sensitive documentation generated by the case. This system is, of course, paternalistic in approach, but it usually works well, in my experience, even in cases where the child has sufficient understanding to participate in the proceedings concerned without a guardian.

[41] However, the 1991 rules sensibly make provision for the circumstance in which the guardian and the children concerned fall out, as has happened in this appeal. In these circumstances, r 9.2A(4) gives children the right to apply to the court for permission to prosecute or defend the remaining stages of the proceedings without the guardian, and r 9.2A(6) makes it clear that the court must grant that permission and remove the guardian if it considers that the children concerned have sufficient understanding to participate in the proceedings concerned without a guardian

[42] The judge's reluctance to remove the guardian in the instant case it seems to me, was motivated by two particular considerations. The first was his laudable desire to protect the three children from the effects of the litigation. The second was his belief that the children were not, in reality, expressing their own views, but those of their father. In those circumstances, the strength and validity of their views were, in the judge's eyes, substantially if not entirely devalued, and could be advanced by the guardian.

[43] My difficulty with that approach is that the judge seems to me, with all respect to him, to have perceived the case from the perspective of the adults. From the boys' perspective, it was simply impossible for the guardian to advance their views or represent them in the proceedings. He would, no doubt, faithfully report to the judge what the boys were saying, but the case he would be advancing to the judge on their behalf would be (or was likely to be) directly opposed to what the boys were actually saying.

[44] In these circumstances, I do not agree with the judge that the only advantage from independent representation was 'perhaps the more articulate and elegant expression of what I already know'. That analysis overlooks, in my judgment, the need for the boys on the facts of this particular case to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge.

In my judgment, the decision in *Mabon* is a good example of how the system should work in practice. Were there "legal issues" to be resolved? I do not think so. The children needed their own solicitor – on the facts of the case – for the reasons we gave. We were utilizing the powers Parliament had given to ensure not just that the voices of these three children would be heard, but so that the children could be assured that their position had been independently represented and their perspective fully advanced to the judge. We exercised our discretion on the facts of the individual case, and by addressing the needs of the particular children for independent representation.

In my judgment, the judiciary can and should be trusted to operate the rules sensibly. Well, I would say that, wouldn't I? But I go further. If the specialist judiciary which hears these cases takes the view that separate representation in a given case is

necessary, Parliament should either accommodate that view, or remove the option.

The current ***Practice*** Direction is, in my judgment, an eminently sensible document. Equally, sensible operation of the ***Practice*** Direction and the system generally can be overseen by the Court of Appeal and, if need be in a sufficiently important case, by the House of Lords. But as long as we have a system in which the welfare of children is determined by an adversarial process overseen by a judge, it seems to me inevitable that it will be for the judiciary to regulate the extent to which separate representation is to be permitted. In this regard, of course, and to return to my earlier theme for a moment, I hope and believe that the judiciary will be properly guided by research and by international conventions, such as the ECHR and the United Nations Declaration on the Rights of the Child.

In short, therefore, my overall view is that if we are to ensure that children are properly represented in proceedings between their parents, or in proceedings which they themselves have instituted, we simply must have the flexibility to use the available tools to ensure that this is done. I make no secret of the fact that I would like to see a much wider range of cases in which children were given their own voice. But I accept, equally, that this need not necessarily be by reference to the tandem model. A child may need a guardian but not a solicitor. A child may need the advice and assistance of a CAFCASS officer over a period of time, rather than in a one off interview. If the Act and the rules give us the powers, we must be trusted to use them as we think fit. ***Mabon***, to my mind, is simply an example of the Court of Appeal correctly reflecting the position, reinforced by research, that teenage children in the circumstances of the three children concerned required their own voice.

If, contrary to my view, Parliament decides that it does not want to give the judiciary the powers currently contained in the Act and the FPR, it should say so. What is impermissible, in my view, is the stance taken by the Consultation Paper which is, in effect, that the powers exist, but they are not to be used. That will be the essence of my response to the Consultation Paper.

May I end on a truly visionary note? Mervyn's paper to the German judiciary can, I think, be taken further. I leave you with this thought, no doubt to be taken up by Mervyn's successor. If the adversarial, adult based system is inapt to provide for decisions relating to the welfare of children, why do we not change it? Why should we not recognise its unsuitability, tear it up, and start again? Why should we assume that children should adapt to the inappropriate rules we make for them, rather than adapt the rules to fit their needs?

Watch this space! Mervyn may be retiring, but there is still much work for his successors to do.

Thank you very much.

NOTES

¹ With apologies to Schulz and to Peanuts

² Alan Ward once memorably described the Court of Appeal as the nearest thing to a

treadmill outside a penal institution.

³ The Publishers have told me that this book has the best title (selected, I hasten to add, by my wife) and the worst and longest sub-title (mine) in legal publishing history. The latter reads: “Psychoanalytic Perspectives on Child Protection, Assessment, Therapy and Treatment, Being Papers given to a conference for judges and mental health professionals at The Dartington Hall Conference Centre, Dartington Hall, Devon between 22 and 24 September 1995, together with a record of the discussion taking place in the plenary sessions of the conference and additional papers on related subjects”. The sub-title notwithstanding, the book remains in print, and at least it defied the firm who refused to publish it on the grounds that the publication of conference papers was “the kiss of death”.

⁴ See its Fourth Report (*Family Justice – the operation of the family courts (HC 116-1)*) and the more recent report entitled *Family Justice: the operations of the family courts revisited (6 June 2006, HC 1086)*

⁵ [2006] EWCA Civ 1390, handed down on 26 October 2006

⁶ Published by the Department of Health on 31 October 2006

⁷ [2004] EWCA Crim 01; [2004] 1 WLR 2607.

⁸ See ***Re U (Serious injury; standard of proof); Re B*** [2004] EWCA 567, [2004] 2 FLR 263; and ***Re U (Re-opening of appeal)*** [2005] 2 FLR 444. The reasons for this are, I think, not far to seek. Expert evidence in care proceedings in the Family Division is invariably subjected to rigorous scrutiny by the advocates and the judge. The process is quasi-inquisitorial / investigative, and a relaxation of the strict rules of evidence allows the judge to follow leads and ask questions not permitted in a criminal trial. Furthermore, the most difficult cases are heard either by the highly experienced High Court judges of the Family Division, or by Circuit judges and Recorders, most of whom have been empowered to sit in the High Court, and, all of whom, in addition to their experience as advocates, have been through specific training relating to the hearing of care proceedings. In addition, of course, the judge rarely reaches a conclusion in care proceedings on the expert evidence alone. The whole picture, which includes findings of fact and assessments of credibility, has to be assessed. Finally, the judge in Family Proceedings must give a judgment, explaining the conclusions the court has reached, and the role expert evidence has played in that conclusion.

⁹ [2006] 1 FLR 1186

¹⁰ Reported at [2004] 1 FLR 1188

¹¹ [2004] 1 FLR 1195

¹² See my comments in ***Re H (A child)*** [2006]EWCA Civ 896 at paragraph 10