



PRESIDENT OF THE  
FAMILY DIVISION

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**RESOLUTION INAUGURAL ANNUAL LECTURE**

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I am both pleased and flattered to have been invited by Resolution to give this Inaugural Lecture. Since my appointment as President of the Family Division almost three years ago, I have had regular contact with Resolution, as the body representing and largely comprehending the Family Law Specialists in the solicitors' profession and the medium for development among them of a non-confrontational approach to family law, particularly so far as children are concerned.

As I understand it, in this its Anniversary year, Resolution is launching a new "Children First" initiative and, in that context, has asked me to address the question "Does the Family Justice System serve the needs of children". I am happy to do so, subject to two qualifications which I should state at the outset.

First, it is no secret that I came three years ago as a relative, though not total, stranger to the Family Justice System, having ceased, after eight years or so in practice as a barrister to take family cases, and with some limited first instance experience of care cases when a Presiding judge on the Northern Circuit. Thus anything I have to say which is useful is likely to derive from freshness of observation, rather than deep learning or the long experience in family law which most of my audience no doubt possess.

Second, I propose to limit my consideration to those aspects of the Family Justice System for which the courts are responsible, rather than the Family Justice System in the wider sense to which so much media attention is presently directed. Just as media criticisms are made of the Criminal Justice System, which in truth relate to treatment accorded to persons prior to trial or following sentence, rather than to the court process, so parents and children being dealt with in the family courts - in particular in public law proceedings - are in truth being dealt with simply at one stage of a continuum, in which the long term problems and solutions lie elsewhere and beyond the court's control. Thus, my observations will be largely (though not solely) limited to what happens during the court process with reference to recent developments on the ground.

I emphasise process, rather than the substance of the law, because the substantive law which our courts apply, could hardly adopt a more favourable attitude towards the needs of children. The position is that simply stated in s.1 (1) of the *Children Act 1989*, namely that, when a court determines any question with respect to the upbringing of a child the child's welfare shall be the court's *paramount* consideration.

Some have suggested that the unqualified paramountcy accorded to the welfare principle is non-compliant with the requirement under the European Convention on Human Rights to respect the right to family life of the parents as well as the child under article 8 of the Convention. However, the judiciary have found little difficulty in rejecting that suggestion. Not only does the paramountcy principle apply whenever the court is

called on to determine any question about child's upbringing under the Children Act; it also applies to proceedings, including *non-convention* child abduction cases in the exercise of the High Court's inherent jurisdiction.

The attitude of the court was most clearly stated by Thorpe LJ in *Payne v Payne* [2001] 1FLR1052 in the context of leave to remove a child from the jurisdiction as follows:

“whilst the advent of the 1998 Act requires some revision of the judicial approach to conclusion, as a safeguard against an inadequate perception and application of a father's rights under arts 6 and 8, it requires no re-evaluation of the judge's primary task to evaluate and uphold the welfare of the child as the paramount consideration, despite its inevitable conflict with adult rights.”

Lord Nicholls observations in *Re B (adoption: natural parent)* [2002] 1FLR196 at para [31] were to similar effect in the context of adoption.

These statements, echoed elsewhere in the authorities and, in particular, by Wall J, as he then was, in *Re H (contact order)* (No2) [2002] 1FLR22 at para [59] have been the subject of academic criticism on the grounds that they involve a dismissive approach to the European Convention which cannot be reconciled with the demands of the Convention's normative standards or the Strasbourg Jurisprudence; see *J.Herring* [1999] CFLQ223; *Harris-Short* [2005] CFLQ329. Nonetheless the English courts have held firm in their view and it appears that, while starting from a different standpoint, the view of the ECHR moved close to the domestic position in *Yousef v Netherlands* [2003] 1FLR210 at para [73]:

“that in judicial decisions where the rights under Art 8 of parents and those of the child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail...”

Assuming therefore, as I do, that the Children Act 1989 provides a fundamentally sound, child-orientated structure and process for the resolution of Private Law disputes in respect of children, and for actions by the Local Authority for the protection of children suffering or likely to suffer significant harm, what are the principal areas in respect of which concerns are presently being voiced as to whether the court's processes of adjudication sufficiently serve the needs of children and what is currently being done about them?

There is no doubt that the principle concern is that of delay, particularly in resolving Public Law Care proceedings.

In the case of *Re G (interim care order: residential assessment)* [2006] 1FLR601, Baroness Hale contrasted the original statement of expectation when the Children Act 1989 was implemented in 1991 that it would take an average of twelve weeks for care cases to be resolved, with the reality of the average time now taken which in many cases is in excess of forty weeks, the period provided for in the Public Law Protocol. She observed that “experience has shown that the original expectation was always a forlorn hope” and identified as a principal cause for delay the length and complication of medical or psychiatric assessments undertaken in the course of the proceedings, as a result of the blurring over the years of the intended division of decision making responsibility under the 1989 Act as between the Court and the Social Services of the Local Authority. As stated by Lord Nicholls in *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 1FLR815 at para [28] the intended division of responsibility was that:

“the court operates as the gateway into care, and makes the necessary care orders when the threshold conditions are satisfied and the court considers a care order would be in the best interests of the child. That is the responsibility of the court... then it is the responsibility of the Local Authority to decide how the child should be cared for.”

However, Baroness Hale then went on to trace with a realism born of her own experience that there had been good reasons over the years why that simple dichotomy was not observed. The reality since the passage of the Children Act has been, and remains, that there is a constant battle between competing demands made upon the diminishing resources of Local Authorities, not simply in terms of money, but because of the ongoing crisis of recruitment and retention in the Social Services of people qualified to do the difficult and demanding work of safeguarding children from neglect and harm, and of taking them into care when harm has been done. As she put it at paragraph [50],

“the courts are only too well aware of some of the problems of the care system, not least because they tend to see the problems rather than the successes. They also see those problems in the context of the legal system which has always tried, and is now required, to respect the rights of both parents and child of their family life together, unless there are compelling reasons to interfere... Since the early 1970s, social work practice, too, has quite rightly been concerned to plan a permanent future for the child, whether that lies at home with her family or elsewhere with another “forever family”. No one wants a child, especially a young child, to be left indefinitely in care, with no “real” parents other than a public authority.”

The concern of the court, and the gateway to its legitimate preoccupation with the nature of the care plan proposed by the Local Authority, lie in the fact that the court is not simply concerned with the adjudication of whether or not the threshold conditions relating to risk of harm have been established but is obliged, when deciding what, if any, order to make, to have regard to the welfare checklist and not to make an order sought by the Local Authority unless it considers that doing so would be better for the child rather than making no order at all. In this context the court inevitably has concerns about its lack of control over the implementation of a care plan once made, and a corresponding concern that the plan should be as full clear and precise as possible before the court makes its order. This inevitably puts back the point at which the court has been ready to make the final order and relinquish control to the Local Authority (See *re B* at paras [54]-[55]).

S.31 (3A) of the 1989 Act, introduced by the *Adoption Children Act 2002*, which was implemented in December 2005 but reflected former practice, requires the Local Authority to prepare its care plan within a timescale set by the court and, while its application is pending, to revise the plan or make a new one if of the opinion that some change is required. It will, and I do not doubt that it should, remain open to the court, if it is not satisfied that the plan, as drawn, is in the child’s interest, to suggest changes and, if these are not accepted, to refuse to make an order. What it cannot do, however, is to keep the Local Authority plans under review by the device of making a conditional care order, nor does it have control over whether the plan is subsequently implemented. This was of course made clear by the decision of the House of Lords in *Re S* [2002] AC291 and represents a substantial limitation upon the court’s powers in respect of children’s needs.

Following that decision, s118 of the *Adoption Children Act 2002* was passed to amend s.26 of the 1989 Act so as to require Local Authorities to keep care plans under review and to appoint a Reviewing Officer to monitor the functions of the authority and (if considered appropriate) to refer the care plan to a Cafcass Officer, who in turn has power to refer the matter back to the court. How far his measure has proved effective in practice is questionable. What is clear is that since the scheme came into effect, only one reference to CAF/CASS has been made, following which the matter was dealt with without resort to the court.

s.1(2) of the 1989 Act requires the court in any Children Act Proceedings “to have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.” The Law Commission Report which preceded the Act observed that “prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty it brings to them, but also because of the harm it does to the relationship between the parents and their capacity to operate with one another in the

future". This has achieved the status of a truism over the years and needs no emphasis in this Lecture, subject to the proviso that in Public Law proceedings it is of course the case that, in particular circumstances, planned and purposeful delay may well be beneficial, for the purpose of enabling parents to prove their fitness to retain the care of their child. However, it is generally the case in both Public and Private Law Proceedings that the matter is best dealt with expeditiously and that the court should be robust in ensuring that timetables are adhered to.

It is to serve that general need that, following trial in various initiative centres across the country, the Public Law Outline will be introduced into the practice of the courts nationwide in April 2008 in the wake of the *Review of the Child Care Proceedings System*, conducted by the DCA and DFES in May 2006, which identified the various causes of delay contributing to the unsatisfactory average length of section 31 applications in both the FPCs and care centres. Essentially, these were (1) delays and deficiencies in the procedure and documentation on the part of local authorities prior to the beginning of proceedings, in which respect the review recommended the introduction of pre-proceedings statutory guidance to local authorities to ensure that, so far as practicable in each case which comes to court, various social work steps have been taken and recorded, including the preparation of a core assessment. (2) Delays in obtaining expert evidence where necessary in the course of proceedings (3) Insufficiently effective case management of proceedings and (4) Judicial resources.

The PLO, in combination with the DfES guidance since issued, has been able to address the question of pre-proceedings steps and improved case management by the court. It has of course been unable to address the endemic delays in obtaining expert evidence from a restricted field of busy experts or the question of judicial resources. Efforts, which are bound to take time, are now being directed by government towards remedying the difficulties over expert availability by inter-departmental examination of the proposals of the government Chief Medical Officer made to general approbation in Bearing Good Witness. However, progress in this direction is unlikely to be swift, bearing in mind the various organisational and contractual problems to be solved in this regard within the National Health Service. Nor, regrettably, is improvement to be expected in respect of crowded lists. Rather is the court system faced with resource restrictions on the number of judges and in particular on the judge days available to meet the increasing demands upon the system.

Nonetheless, it is to be hoped that the position will be considerably improved as the Outline begins to take effect, and perhaps the first point to emphasise in the context of this lecture is that the Outline is focused firmly upon the needs and time table of the child.

The Outline (now available as a user friendly glossy) represents the development and refinement of the Public Law Protocol which was introduced in 1993. It simplifies procedure and reduces the 6 stages under the Public Law Protocol to 4 stages: Issue and First Appointment, Case Management Conference (CMC), Issues Resolution Hearing (IRH), and Trial. It should also operate to reduce the documentation required in Public Law Proceedings.

The essence of the Outline is to promote efficient and child focused case management for Public Law proceedings in a manner which has not been sufficiently achieved under the Protocol. However, it is not just a procedural guide. It represents recognition that Child Care proceedings are not "a voyage into the unknown" or to be treated as an extended opportunity for social workers to do work or carry out assessments which should have been undertaken prior to proceedings. It aims to achieve improvement in the outcomes of children by the minimisation of delay, drift and uncertainty.

Whilst the Outline recognises that it is the Judge who controls the proceedings, this is balanced by the clear expectation and stated object that all Parties should cooperate to secure the best outcome for the child.

The feed-back from the initiative areas is generally positive and the advantages reported are these:-

- a) By reason of the imperative to file check-list documentation in the generality of cases (i.e. those which do not commence by way of emergency application) there is front-loading of information and the consequence is that the Court and the Parties are better informed as to the nature of the proceedings, the key issues and the purpose of the proceedings.
- b) In particular, parents have more realistic expectations as to what the key concerns have been, how they have failed to change and what is required of them.
- c) Social Work professionals are now more issue focused and analytical. Social work practice has generally improved by reason of the requirement to provide check-list documents evidencing the fact that they have done the requisite social work prior to proceedings.
- d) Guardians are producing issue-focused reports concentrating on an analytical approach which is child-focused and alerts the Court to the timetable for the child.
- e) Advocates are better prepared, in that the information is available for them to co-operate in the analysis of issues and resolution of issues. The Advocates' meetings written into the Outline generally achieve agreement of issues where feasible.
- f) By reason of analysis and a concentration on what can be agreed, there is a saving of resources particularly in terms of Court time. Final hearings are only being listed where there is a real issue to determine.
- g) In consequence delays have been reduced.

The check-list documentation is set-out clearly at page 9 of the Practice Direction. It is of course recognised that there may be circumstances where the safety and welfare of the child will be jeopardised if the start of proceedings is delayed until all of the documents appropriate to the case and referred to in the pre-proceedings check-list are available. Plainly, some of the documentation may not exist and indeed may never be necessary in the circumstances of the case. Account will be taken of that.

It is an important aspect of the Outline that, on issue, the Local Authority is required to prepare and file a Timetable for the Child containing the Local Authority's allocation proposal (para 5.2, p6). This information will enable the Legal Adviser in the FPC, in consultation with the appropriate judge in the relevant Court Centre, properly to allocate the case to the appropriate tier at the outset. In the initiative areas this has enabled allocation to be swiftly determined and transfers are taking place much earlier and more appropriately.

In England, National Standards have been issued by CAFCASS to ensure the work of CAFCASS officers supports the Public Law Outline and a revised Experts' Practice Direction has also been issued and became publicly available just over a week ago on the HMCS and Judicial websites.

One matter of concern in relation to the Timetable for the Child is the delay which can occur in care proceedings where the care plan is for adoption. The position is, of course, that if during care proceedings the Local Authority is satisfied that the child ought to be placed for adoption, it is obliged by section 22 of the Adoption and Children Act 2002 to issue an application for a placement order. The procedures to be followed, before the Local Authority becomes satisfied that in its view adoption is the right outcome for the child, are necessarily rigorous and time-consuming. The court will therefore be concerned to avoid any delay and wherever possible to determine any placement order application along with the section 31 Children Act proceedings.

This is not dealt with specifically within the Outline Practice Direction, though it is dealt with to an extent in the Local Authority Guidance. It may be that a new Practice

Direction will be needed to clarify the procedural steps to be taken by the Local Authority to achieve this end, for example, that the Local Authority will be required to file its report under Rule 29 and Annex B of the Family Procedure (Adoption) Rules 2005 at the same time as its application for a placement order. The court should then list the placement order application within the timescale set for the care proceedings, appoint the children's guardian in the placement order application, and consider whether it is appropriate for the guardian to make a composite report dealing with all applications together.

However, for the time being, it is agreed that by April 2008 the DCSF will write to Directors of Social Services setting out those expectations and the nature and timing of the social work steps necessary to be taken in the adoption proceedings. The letter will be circulated to practitioners, judges and magistrates for their information.

I do not propose to take you through the 4 stages of the proceedings as now clearly set out. No doubt those here whom it affects are receiving training at the moment whether of your own devising or by attendance at the number of training conferences being convened by Child Law UK under the sponsorship of HMCS to give inter-agency training in the workings of the Outline.

So far as this lecture is concerned, a critical feature of the Outline is the pre-proceedings assessments to be completed by the Social Worker and the relevant Social Work steps to be undertaken prior to the issue of proceedings.

There is also an important change by introduction of the requirement for a "Letter Before Proceedings".

Once the Local Authority Social Worker/Team Manager makes a decision, in principle, to apply for a care or supervision order, but the level of urgency of Local Authority concerns does not require immediate application to the court, the Social Worker/Team Manager will issue and send to the parents the "Letter Before Proceedings" (see Annex A of "The Children Act 1989 Guidance and Regulations: Volume 1: Court Orders).

The letter tells the parents what concerns there are as to the care of the children; what the children's services have done to date to try to help; and by what steps the parents may yet avoid proceedings. They are asked to come to a meeting with their Legal Advisers to address those concerns, and they are further advised that they should consider the question who can look after their child if the Court were to decide that it is no longer safe for the parent to do so. That letter triggers the parent's right to legal aid and pre-proceedings advice.

At the outset of proceedings (i.e. at stage 1: Issue and First Appointment) the Local Authority is required to file a Case Summary, (Annex B of the Practice Direction) confirming the relevant and important information to the Court. It describes the applications which have been issued and defines the arrangements for the children both in terms of living arrangements and contact arrangements. It also defines the key issues and findings sought in the case and requires the Local Authority to state which of the findings are agreed.

At this early stage, the Local Authority is required to state whether an application for placement for adoption is amongst the range of options to be considered and to set out in terms the directions it seeks so that at First Appointment there will be an order for other parties to file Case Summaries, and/or if appropriate, Witness Statements.

Those case summaries must contain the parties' proposals for the long-term future of the child and their answer to the Local Authority schedule of proposed findings.

Further, at that very early stage the Parties are required to give details as to the identity of any family or friends who could act as a potential carer, in order to avoid the

inevitable delay which arises in the emergence or late nomination of a proposed carer.

An important innovation is that, at the First Appointment, there is a requirement for the court to order a CAFCASS analysis from the guardian. This will be not be a discursive or repetitive document. It will be an issue focused document analysing what the evidence is, what gaps there are in the evidence what are the realistic options for the child, what are the needs of the child, and what are the child's wishes together with the relevant analysis of the Timetable for the Child. It is an evolving document, an update of which will be required for the CMC and the IRH. Internal Guidance has now been drawn up and circulated within CAFCASS in relation to the form and content of the CAFCASS analysis at the relevant stages.

I shall leave the Outline there, save that I wish to make one point clear which requires clarification by reason of a link apparently made in the recent Government consultation paper containing the proposal dramatically to increase the fees payable by Local Authorities to commence and carry on care proceedings. There is and never was any such link so far as I am concerned. The Outline was embarked upon and developed as a judicial initiative long before any suggestion of such an extraordinary increase was ever a gleam in the governmental eye. My only comment in the context of this lecture is the obvious one that any measure which may operate as a damper upon the ability or the inclination of a Local Authority to perform its statutory duty by taking care proceedings under the provisions of the 1989 Act has nothing whatever to do with serving the needs of children. Those are the needs the Outline seeks to further by the reduction of delay and its focus upon the Timetable for the child.

Being essentially concerned with the speedy progression and effective disposal of care proceedings, the Outline has nothing to say about hearing the Voice of the Child in the proceedings. That is because, with our enviable system of tandem representation of children in care proceedings, it is assumed that their interests will be well represented and, so far as their wishes and feelings are concerned, the courts are content to rely on the expertise of the officers of CAFCASS or any other guardian to elicit the wishes and feelings of children who are old enough to express them and to bring them top the attention of the court. Of course it is the case that, in the majority of care proceedings, the court is dealing with a child or children who are not sufficiently mature to express their views or are in a situation where their own preference, so far as they express it, may well be a desire to stay in the very home in which the threshold of harm has been breached and from which the issue of removing the child will depend upon other welfare considerations. However, in cases which proceed to the final hearing in respect of a child old enough for its views to be taken into account judges should consider carefully any direct or indirect request from the child to see the judge or any suggestion by the child's guardian solicitor or court appointed specialist that he should do so. In my view, as a matter of routine, in cases of children old enough to express their views and take an intelligent interest in the proceedings, judges should always consider whether there will be a positive benefit to be gained from seeing the child or at least giving him or her the chance to be present during any part of the proceedings should they wish to do so.

This brings me generally to the topic of the Voice of the Child and, whether or not, in one way or another, it is sufficiently heard and respected in our justice system.

The requirement for the court to ascertain and take into account children's own wishes and views is now generally accepted and is firmly embedded in English Family law. Under the Children Act it exists in public law proceedings as an ingredient of the welfare checklist and is achieved by the evidence and representations of the children's guardian. In adoption proceedings the obligation lies both on courts and adoption agencies by s.1 (1) and (4) (a) of the *Adoption and Children Act 2002*. It is similarly imposed in all contested private law proceedings as an ingredient of the welfare checklist. (see s.1 (4) (a)) However, if the adult parties to private law proceedings are agreed upon the action to be made (i.e. there is no contest) there is no express requirement either that the adults should have consulted the children about their proposals or that the court should have regard to their

wishes or feelings. This is undoubtedly a lacuna in the law which would have been amended by s.11 of the Family Law Act 1996, had its provisions been implemented. However, save in that respect, English law is broadly compliant with Article 12 of the United Nations Convention on the Rights of the Child 1989, which requires that contracting states should ensure that a child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child; and which specifically provides for a child to have the opportunity to be heard in any judicial proceedings which affect him, either directly or through a representative or appropriate body in a manner consistent with procedural rules of national law.

I will come to the question of the child addressing the court directly in a moment. So far as representation is concerned, the “appropriate body” in our law is of course CAF/CASS, or in Wales CAF/CASS Cymru, whose statutory obligations include giving advice to any court about any application made to it in any family proceedings; making provision for children to be represented in proceedings; and providing information advice and other support for children and their families.

Following its difficult history and beginnings, CAF/CASS now enjoys the steady hand upon its tiller of Anthony Douglas its current director. He is in the course of revising its national standards and procedures in various respects. This is proving challenging, given the strain upon CAF/CASS resources as a result of its requirement to provide representation for children as guardians in public proceedings; the steady rise in the demands of the court in private proceedings for welfare reports under s.7 (1) of the 1989 Act; and requests by the court for the service of one of its officers to assume the role of guardian ad litem under rule 9.5 of the Family Proceedings Rules.

I turn first to Rule 9.5 whereby a child may in appropriate circumstances be made a party to private law proceedings and consequently be separately represented. The rule itself is short and sweet and the test for its application is simply whether it appears to the court that it is in the best interests of the child to be made a party to the proceedings, in which event the court may appoint a CAF/CASS officer or (if he consents) the Official Solicitor or some other proper person such as NYAS to be the guardian *ad litem* of the child, with authority to take part in the proceedings on the child’s behalf. By the President’s direction of 2004 it is made clear that the decision to make a child a party should only be taken in cases of “significant difficulty”. The first of the criteria is that where a CAF/CASS officer has notified the court that in his opinion the child should be made a party. The remaining nine criteria principally contain examples of cases involving particular complexity. However 3.2 and 3.4 refer respectively to the position where the child has a standpoint or interest which are inconsistent with, or incapable of being represented by, any of the adult parties and where the views and wishes of the child cannot be adequately met by a report to the court. As such they are reflective of a “Voice of the Child” based approach.

However, as observed by Douglas, Murch *et al* in their *Research into the operation of Rule 9.5 of the Family Proceedings Rules (DCA, March 2006)*, the reported case law generally reflects the view that welfare is the primary rationale for making separate representation appointments and, in particular, the desire to ensure that a conflict of interests to the parents does not obscure the real needs of the child. This is motivated less by a concern to hear the Voice of the Child than to explore conflicts of evidence or hear arguments that neither adult party wishes to put forward.

As is well known, in the light of a dramatic increase in the number of appointments made following the issue of the 2004 Practice Direction, my predecessor issued a further practice direction restricting the power to make appointments for circuit judges save in exceptional cases. This appears now to have led to a levelling off of the number of appointments in some areas where an exceptional number appeared to be being made and I am about to issue a Practice Direction restoring the original position. This step has been delayed while consideration was being given by government to the possible extension of rule 9.5 to proceedings in the Family Proceedings Courts as well as

an adjustment to the wording of the original Practice Direction. However the decision has now been taken to postpone any such extension of jurisdiction at least to the end of 2010 and any change to the original wording requires careful thought and negotiation in relation to the appointment of guardians other than CAFCASS. I have therefore decided that it is appropriate shortly to repeal the second practice direction and leave over till later in the year any adjustments in wording to the original direction.

It was suggested in a recent government consultation paper (CP/20/06: Separate Representation of Children 2006) that there was a case for reducing the power, or at any rate tightening the criteria, for the judiciary to make 9.5 appointments, the basis for such reasoning being principally rising legal aid costs and overburdened CAFCASS resources. As Lord Justice Wall pointed out in his article "Separate Representation of Children" (2007) Fam Law 124, this implied that CAFCASS' present difficulties were attributable to the judiciary's growing enthusiasm for giving children party status, whereas the strain on CAFCASS time and resources largely arises from the gradual extension of its duties from providing court welfare reports to servicing the greatly expanded dispute resolution procedures underpinning parental disputes to which I will shortly turn, Cafcass is also preparing for the position later this year when it will acquire considerable new responsibilities in relation to the contact enforcement procedures introduced by the *Children and Adoption Act 2006*.

In the light of the almost unanimous storm of protest which greeted the proposal in the consultation paper, the suggestion is not being taken further by the government, at least for the time being.

Speaking for myself, I have seen no evidence that the criteria in the original practice direction have been misapplied, let alone that they have led to over-representation in otherwise intractable cases in which it has proved useful. Furthermore, so far as the Voice of the Child is concerned, snapshot research by NYAS of 95 children represented under rule 9.5, published in Family Law January 2005, revealed that in 89% of the cases the child's wishes coincided with the outcome of the case and in 96% of cases the child or children's views had a significant impact on decision making. This underlines the position that the Voice of the Child, quite apart from its right to be heard, can be a key element in resolution of parental disputes and furthermore that the proper use of rule 9.5 in otherwise intractable cases should be recognised as having the potential to decrease cost as well as the damage to children which is involved in repeated court hearings.

Having touched upon the needs of the child in Public Law Proceedings, I turn to consider the position in Private Law in which the need to hear the Voice of the Child requires to be considered at two stages, namely the stage governed by the Private Law Programme conciliation scheme for court based dispute resolution now operative nationally and at the stage of the hearing itself in cases where such resolution is not achieved.

So far as the Private Law Programme is concerned, its essence is the fixing of an early dispute resolution appointment after 4-6 weeks at which the judge and Cafcass family court adviser in combination seek to broker an agreement between the parties without the necessity for a section 7 Report or a full court hearing.

In this respect it has achieved a high degree of success and it is safe to say that, without it, the state of the court lists would be a far worse position than they are today.

The success of the programme has however depended upon the availability of Cafcass resources in the area of the individual court centres, as well as physical conditions in those court centres or any local Cafcass Office where the conciliation takes place. Three years on, there are a variety of different but broadly similar schemes operating at court centres across the country and, where Cafcass have the resources, the scheme has been extended to a number of Family Proceedings Courts, where the Legal Advisers are available to conduct the conciliation process in place of the District Judge.

However, save where, in some court centres such as the PRFD, the scheme involves attendance of the child with the parents at the conciliation appointment, it is open to the valid criticism that, agreements may be reached and approved between parents which leave out of account the wishes and views of the children involved. This is a problem which plainly needs addressing.

In this respect, I have in the last few days received for my blessing a new Family Dispute Resolution Programme (Datrys) devised by Cafcass Cymru for use in Wales which offers parents, prior to the first directions appointment, the opportunity to improve their ability to communicate with one another more effectively concerning their children and to reach agreement over the issues in dispute. The programme incorporates elements of education and advice regarding the impact of separation on the children on similar lines to those developed, but sadly never implemented, in the ill-fated Family Resolution Pilot Project at Wells Street in 2005. It also involves children being seen separately and their views being incorporated into the plans being made by the parents for the care of the children. It is an expansion and improvement upon an early intervention scheme devised and operated in Birmingham since before the national recognition of such schemes in the Private Law Programme. Datrys was piloted in North Wales with the approval of the FDLJ for Wales and with the cooperation of Judge Michael Farmer, the Designated Family Judge and is the subject of an impressive evaluation by the Social Inclusion Research Unit of the University of Wales.

Datrys is proposed to operate as follows. As soon as the C1 application form and the C7 response have been received they are immediately screened by the DJ or Legal Adviser and automatically referred to Datrys unless there are obvious concerns about the safety of the children or about one of the parents. Following the carrying out of Police and other checks by Cafcass, the parties then receive a letter from Cafcass Cymru with a date for the first of three meetings, usually arranged at a local CC branch away from the formality of the court. Before the first meeting the parties are sent a DVD and other information about the process. At the first meeting, both parents are asked to talk about their children and there is definition and discussion of the issues with an effort to agree the principles of contact and interim contact arrangements. A second meeting is arranged at which the child or children are present, with both parents if possible. The family court adviser will have written to the children (where age appropriate) to explain the purpose of the meeting and that the adviser will wish to see them alone as well as with the parents and the session lasts sufficiently long to establish the wishes and feelings of the child. At the third session the adviser feeds back the children's views to the parents, narrows the issues, defines the final options and seeks to obtain the agreement of the parties. If agreement is reached it is conveyed to the court at the first conciliation hearing which will have been fixed for a date six weeks from receipt and allocation. The adviser may decide to suspend the conciliation programme at any time if it appears that the child's welfare is at risk, or if it becomes clear that the parties are not able to reach an agreement.

If agreement is reached, the details are communicated to the court in the form of a brief report and appropriate orders are made at the first hearing. If no agreement is reached, the report provided will define the outstanding issues and recommend ways in which these could be addressed. This may be a recommendation for further consideration or mediation. However where the recommendation is for a section 7 report, such report will be limited to the central issues which have emerged between the parties and any issues relating to the welfare or safety of the child.

The evaluation of the scheme is generally very favourable. Agreement was achieved in some 64% of disputes. On the other hand, it must be noted that among the drawbacks of the scheme was the fact that "the process is resource intensive and, given the demand in more densely populated areas, may therefore present a challenge to rollout the model across all Wales."

Here in England, where more densely populated areas abound and Cafcass

resources are considerably more stretched than in Wales (where the service is funded by the Welsh National Assembly), it is presently unclear how far such a resource intensive scheme can realistically be implemented on a nationwide basis. However, Anthony Douglas and a Cafcass team are presently engaged in a review of Cafcass procedures and resources on the lines of a "Pathway" model as it is called, designed to achieve dispute resolution work with the parties prior to the first hearing rather than simply meeting the Cafcass officer for the first time at court, in the course of which is intended that children and young people are seen by Cafcass and their wishes and feeling properly understood and made clear in some kind of family conference. In several areas, with the approval of the local DFJ's, Cafcass are already moving towards a Pathway solution. However, generally speaking, there is a degree of judicial reserve that the present level of Cafcass resources would make for patchy implementation on any nationwide rollout and there is proper caution on the part of DFJ's towards agreeing changes in their current local schemes where, as is generally the case, high disposal rates by agreement are being achieved by the presently more summary methods. I am currently engaged in discussion with Anthony Douglas, reviewing both the Private Law Programme and the proposals in the Pathway in time for judicial consideration and comment on a national basis at my President's Conference in May.

The key to significant advances in practice on lines such as those in Datrys is of course resources, and I use this occasion to repeat what I have stated publicly to the Constitutional Affairs Sub Committee and elsewhere, namely that in an under-resourced family system, the action by which the greatest benefit could be achieved for the least proportional increase in resources would be by expansion of the budget of Cafcass to the benefit of the children whose welfare it promotes, the parents whom it seeks to advise, and the overall saving of court time, cost and stress to the parties which are achieved where parental disputes are settled by agreement rather than extended conflict.

Following publication of the results of the famous Cardiff University Study carried out by Professor Gillian Douglas and her team on behalf of the government, the relevant Minister Harriet Harman QC stated in a written ministerial statement that the research report would be used to inform the making of rules of court under sub-section 122 of the Adoption and Children Act 2002, which would enable applications for residence and contact orders to be subject a requirement to appoint a Cafcass Officer in every case unless satisfied it were not necessary to do so. However, no such action has since been taken; nor does it appear to be contemplated, let alone budgeted for.

I now turn briefly (because the issues are so well rehearsed) to the Voice of the Child in Private Law proceedings which are not resolved by agreement, but proceed to trial by the court. This is a difficult area in which to make the progress which I have no doubt needs to be made both to give a child who so wishes, the opportunity to have a voice, or at least a sense of participation in the proceedings, and to understand better what is going on as well as the reasons why a particular decision was reached in the respect of a matter fundamentally affecting his upbringing and happiness.

The debate concerning the age at which a child should be entitled to express his or her views is an interesting one. Although the Private Law Programme provides 9 as a suitable age, I would advocate that any child capable of expressing a sensible view should be able to do so at whatever age. My personal preference would be to adopt the age of 7 rather than 9 as a rule of thumb. Of course the court has the final decision and it will place what weight it sees fit on the wishes and feelings expressed by the child after having taken in to account all the evidence.

That in turn raises the question of the reluctance of the English judge to talk to children in private as is regularly done on the continent of Europe. As Wall LJ observed in *Mabon v Mabon* [2005] 2FLR 1011, this English reluctance is rooted in the rules of evidence and the adversarial mode of trial; in the fact that what is said in private by the child to the judge cannot be tested in evidence or in cross-examination; and that the judge cannot promise confidentiality to the child, because of his duty to inform the parties of

issues which trouble him as a result of what the child has said, so that the parties may address them before judgment. Nonetheless it is my view that, in an effort to ensure the welfare and happiness of children, and to listen to their voice first hand, we should encourage judges to talk to children who wish to do so, provided that the burdens of the child's concerns are made available to the parties. The difficulties in achieving this in practice and the circumstances in which it may be done are set out at length in the response of the Judges of the Family Division to the Consultation Paper "Separate representation of Children" (CP20/06) and I will not elaborate them here.

I know this question causes concern in various quarters not least among the judges. In particular the point is made that judges, with insufficient training, with no opportunity for preliminaries, with only a short time at their disposal, and with varying degrees of approachability, sensitivity and caution in respect of their task, may (a) form untrustworthy impressions or (b) may unfairly seem to place the burden of dispute resolution upon the child.

I understand those concerns but I believe they could be met by appropriate training. Again however, in this respect, there are substantial resource implications for the Judicial Studies Board. In the majority of cases, it will no doubt remain unnecessary for the judge to see the child personally because the CAFCASS officer will have recorded the child's views and the veracity of the report as to the child's stated views will not be challenged by the parents. However, in three categories of case at least, I consider it desirable. First, where it is suggested by the child's guardian, solicitor or court appointed specialist that the child should see the judge. Second, where for whatever reason, there is cause to question whether the reporting officer or guardian's expression of the child's views is sufficient or correct. This may arise as a result of challenge or allegations of coaching by one of the parties, by reason of doubts expressed by the Guardian him or herself, or simply from the form of the report. Third, it may arise in a case where the child without a guardian has himself conveyed a wish to speak to the judge. In the absence of good reasons I do not think any judge should refuse such a request.

Of course, many (probably most) children old enough to express their views will have no desire to see the judge. Most families and children find the court process very difficult and all the child wants is for the dispute to go away, let alone to participate in it.

In 2001 Lady Justice Hale (as she then was), identified that the question of the Voice of the Child is not simply, or indeed primarily, the question of the child speaking to the judge. She stated in *Re A.* [2001] 1FLR7 "The evidence is now quite clear that children whose parents are separating, especially if the parents are in conflict with one another, need someone who is able to listen to anything they wish to say and tell them what they need to know. Sometimes they need more than that and that is someone who is able to orchestrate an investigation on their behalf".

Like Lady Justice Hale, the Cardiff research concluded, "What really stands out is the importance to the child of having a person from the family justice system who can establish a positive trusting relationship with them; a neutral person who explains things clearly and checks that it is properly understood; a person who keeps the child informed as the vagaries of the litigation develop. When such a supportive relationship can be established, the effect can be experienced as strengthening. In its absence, the child can feel lost and confused. It is clear that it is the quality of the professionals – whoever they are - as skilled and trustworthy persons that matters the most to children, not the label they are given or the legal role under which they work."

So far as you, the professionals are concerned, the message of the Cardiff research could hardly be clearer.

Until, one way or another, the family justice system is able to ensure that all children caught up in parental conflict have access to a figure able to fulfil that role, the needs of children in that respect will not be fully served. It is not a role which the judge

can fulfil. Perhaps the best that judges can or should do is to follow the suggestion made by Sir Nicholas Wilson in his compelling Herschman/Levy Memorial Lecture in June last year that, in the case of age appropriate children, and in particular children who lack a guardian in Private Law Proceedings, judges should be prepared to explore, and provide where possible, the opportunity for the child to meet the judge after his decision, so that the judge may provide a simple and sympathetic explanation of his reasons for a decision which he knows or suspects may be unpalatable to the child.

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