



## **The Bridget Lindley OBE Memorial Lecture 2017**

### **Holding the risk:**

### **The balance between child protection and the right to family life**

### **Lord Justice McFarlane**

Bridget Lindley was an exceptional individual who, as Cathy Ashley has just reminded us, dedicated nearly 30 years of her career to the work of the Family Rights Group. As a highly intelligent and focussed lawyer, Bridget could have succeeded in any field of legal endeavour to which she had set her mind, no doubt earning accolades and significant financial reward for herself in the process. The fact that she chose not to pursue personal success, but to devote her working life to the cause of family law and its improvement was to the great benefit to all of us who knew her but, more importantly, to the benefit of countless children and families.

It is no surprise that one of the two people who were invited to join the newly formed Family Justice Review, under the chairmanship of David Norgrove, to present ideas at the Review's very first meeting was Bridget Lindley. Her authoritative contributions, both at that important first meeting and throughout the process commanded the attention and respect of the entire panel.

I regarded Bridget as a superb children's lawyer, whose views on policy and how key policy aims might be met were always as sound as they were clear. I admired her greatly as a fellow professional and enjoyed her company as a friend. It is so desperately sad that her life ended so suddenly when she was still at the peak of her powers. She is greatly missed and The Family Justice Council are to be congratulated for instigating this series of lectures in her memory.

## **Introduction**

In preparing this lecture over recent weeks I have had the benefit of conversations with a number of friends and colleagues who have been kind enough to offer their views on the question of whether or not we currently have the balance “right” as between, on the one hand, the need to protect children from harm and, on the other, the need to respect the right to family life. More than once during these conversations I have had cause to recall the memorable scene in “Monty Python’s Life of Brian” where the chief conspirators in a plot to overthrow the Roman State, “Reg and Stan”, meet with others to discuss the revolution. The response to Reg’s, presumably rhetorical, question “And what have the Romans ever given us?”, is a whole list of helpful suggestions from his mild-mannered co-conspirators leading to the following concluding exchange:

Reg: “Alright ... alright, but apart from better sanitation and medicine and education and irrigation and public health and roads and a fresh water system and baths and public order ... what *have* the Romans done for *us*?”

Xerxes: “Brought peace!”

Those of us who practise regularly in the field of family law may be forgiven if we put forward discreet issues which may currently be at the tipping point of the balance referred to in my title because these are, indeed, current points of interest and importance. This is indeed what I am about to do in this lecture, but it is crucial that we do not lose sight of the big picture. The big picture is, in my view, that, in our jurisdiction Parliament, informed by the Law Commission, the courts and practitioners (legal, social work, and medical) have, over the course of three decades, developed a highly sophisticated system which affords very significant regard both to child protection and to human rights.

Indeed, it is because of the high level of knowledge and experience that has been developed within our system over all these years that we can contemplate the need for any fine, or as I may tentatively suggest in my conclusion gross, further tuning that may now be needed.

In order to make good the claim to sophistication that I have just made, and to describe in broad terms the overall landscape within which this debate sits, I propose

to spend a short time colouring in the major background features relating to child protection and human rights before descending to certain specific current issues.

### **Child Protection**

In relation to child protection I make no apology for rekindling a theme that I have developed elsewhere in the past. The understanding that some children may suffer significant harm as a result of the actions of those who should be caring for them is, astonishingly, a relatively new idea. It was only in the 1960s and 1970s – that the occurrence of physical abuse of children came to be accepted as a cause for injury by experts and the public at large.

In the opening paragraph of their seminal book “Child Abuse” published in 1978 by Kemp & Kemp the following appears:

“A book on child abuse could not have been written 100 years ago. If an investigator from the 1970s were to be transported back to the 19<sup>th</sup> Century so that he could survey the family scene through modern eyes, child abuse would be clearly visible to him. In the past, however, it was largely invisible to families and their communities. Before it could be acknowledged as a social ill, changes had to occur in the sensibilities and outlook of our culture.”

The ability of a society to acknowledge and begin to understand unpalatable truths, about how life is lived by some of its members, is a sign of maturity that only comes with time and the result of a long road carefully travelled. Thus it was only in the middle of the 20<sup>th</sup> century that it came to be accepted that a parent might physically ill-treat their child and the victim of, what had hitherto been described as, “unexplained infant trauma syndrome”, came to be recognised as “a battered baby”.

It is, I understand, recognised that a society’s ability to contemplate, understand and then accept the existence of more subtle, or even less palatable, categories of abuse takes time and follows on from the first stage, which is the entry level acceptance of physical abuse. The spectrum of abuse is broad and the shading within its various categories may be subtle, opaque and multi-faceted. It includes, as basic categories, neglect, sexual abuse and emotional harm, but, within each of these broad categories, like the sub-divisions of the roots of a plant, the many and various individual manifestations of harmful behaviour multiply and only fall to be understood by professionals on a progressive basis over an extended period of time.

The snapshot provided by the work of Kemp & Kemp in the 1960s and 70s illustrating the moment when the idea that some parents might physically harm their children is replicated by another snapshot paragraph, this time from the opening section of the “Report of the Inquiry into Child Abuse in Cleveland 1987” – the Butler-Sloss Inquiry – which reads as follows:

“Child abuse, the non-accidental injury of a child, received increasing attention in this country in the 1960s and followed upon its recognition in the United States. Public awareness of its nature and frequency grew in the 1970s. The background, early attitudes towards and subsequent general recognition of non-accidental injury has been set out in detail in various early reports on child abuse. A parallel can be drawn between the reluctance to recognise physical abuse in the United Kingdom in the 1960s and the reluctance by many to accept the reality of certain aspects of child sexual abuse in the 1980s ... It is obviously important to recognise that the categories of abuse are not closed.”

Whilst noting that there is some historical evidence, for example from Paris in the 1860s, of abuse of older children and, following the passing of the Incest Act in 1908, of sexual assault within the family, the Cleveland Report goes on to state “there is perhaps a new recognition that younger children are also subject to abuse and their plight has only just come to light.”

The audience for this lecture and those who may subsequently read it are likely to be well versed in the details of the history lesson that I could now go on to give. Whilst I will, therefore, spare you the detail, the fact that our understanding of child abuse has developed to such an extent and at such a pace over the course of the last 40 years remains, to my mind, astonishing.

Our understanding of child sexual abuse has now, one hopes, settled down, albeit that it is inevitably constantly developing. The heady days of the 1980s, represented by the events leading to the Cleveland Inquiry, are long past. But, they represented, I would suggest, both necessary and inevitable swings of the professional pendulum between under-diagnosis and over-diagnosis, whilst the doctors, psychiatrists and psychologists came to settle on a well-informed understanding of what the available evidence in any particular case might indicate. The fruits of this important process of

professional oscillation are well known and are now an entrenched part of our everyday work in this field.

The guidelines for the structure and content of achieving best evidence (“ABE”) interviews, for example, which we now take for granted, did not just fall from the sky but resulted from a period of intensive work by a number of gifted and insightful professionals over the course of years.

The first edition of the Royal College of Physicians “Physical Signs of Sexual Abuse in Children”, published in 1991, is a small A5 paperback running to well under 100 pages. The most recent 2015 Edition now published jointly with the Royal College of Paediatrics and Child Health and the American Academy of Paediatrics is a very substantial A4 size 300-page document.

Similar examples of the development of our understanding can be given across the board. Determining whether signs in a baby’s brain and eyes are diagnostic, or at least highly probative, of the child experiencing an unacceptable degree of force remain, to an extent, controversial. In particular, the degree of force required to produce bleeding in the brain and eyes remains something of an open question simply because of the impossibility of conducting clinical testing and producing an outcome which is acceptable across the mainstream of experts in biomechanics.

In other fields families in which it may be said there has been “factitious illness”, “parental alienation syndrome”, “ME”, “ADHD”, “spiritual abuse”, and many other circumstances in which children may have suffered significant harm have had their time in the spotlight and remain an aspect of our everyday caseload.

More recently, the identification of a standard list of ACE’s [‘Adverse Childhood Experiences’] and the understanding that the more ACE’s a child has experienced the greater is the impact on their welfare, both as a child and as an adult, has added to our understanding but, in doing so, has necessarily focussed on yet more children who may need protection from having been exposed to a cocktail of adverse experiences.

The diligent professional work over decades by those in the medical profession and elsewhere who have developed an understanding of what is, and also what is not, harmful to children has produced a body of knowledge which can only be seen as

highly sophisticated when compared to that available in, say 1970. This is plainly beneficial in general terms to the protection of the children that we seek to serve in this jurisdiction. There is, however, a further important point to make. The fact that I, as a lawyer, wholly untutored in the medical world, can speak to you of these disparate and complicated matters and that each and every one of you, the lawyers in this audience, know precisely what I am talking about and have your own professional experience of dealing with individual cases that have engaged with these topics in granular detail, to my mind, speaks volumes and marks our system out at least from those others across the world, of which I have some little knowledge.

At the risk of speaking in a manner which may well be wholly unjustified, but, I fear is not, and with apologies to those in other jurisdictions who may be justly offended by what I now say, it is my belief that the degree to which we investigate potential child abuse within our family court system is on a wholly different basis and scale from that undertaken elsewhere. Across Europe the decision to take a child into care is largely an administrative determination overseen by tribunals and an administrative court structure. The idea of “fact finding” to determine whether or not abuse has occurred seems to be rare. The concept of ‘permanency planning’, which is at the centre of UK social work is, I understand, not a feature on the Continent.

It is no part of my pitch to you to adopt an arrogant position and suggest that the approach in this jurisdiction is “right” and other jurisdictions are “wrong”. My point is simply that it must be wholly beyond argument that we attach a high premium to understanding and, where it exists, identifying circumstances where children are, or are likely to be, experiencing significant harm. Secondly, this is not a one-sided process. One of the great benefits of our system, driven, as it is by the regard afforded to the human rights of the family and those accused of abuse, is the degree to which we not only tolerate but welcome robust and informed challenge to the detailed evidence in an alleged abuse case. Comparisons are sometimes made between the Legal Aid bill for child protection cases in this jurisdiction and that which is provided elsewhere. Whilst in fiscal terms that such a comparison is made is understandable, but, as I have attempted to illustrate, it is in no manner comparing like with like.

Again, with more than an eye to the human rights’ component, a cardinal benefit that arises from the court steeping itself in a very detailed understanding of the harmful events that the child has experienced in the past is that a bespoke and proportionate plan can be established for the future and, in particular, so that that plan may, in the

right circumstances and despite the past occurrence of abuse, contemplate the child being brought either with her parents or, at least, elsewhere in the natural family.

One example of this comes clearly to mind. Ten or fifteen years it would be expected that, following a finding that a baby had been shaken, the care plan would not contemplate returning the child back home to the parents' care. Now it is not infrequently the case that a detailed understanding of precisely what has occurred in the moments that it took to inflict such an injury renders the case amenable to intervention, support and therapy so that the child can be returned to the care of the family in the expectation that life will, henceforth, be lived in a different way so as to avoid the circumstances that led to the shaking.

### **Family Life**

Turning, more shortly, to the second half of the “big picture”, namely respect for the right to family life, it is my belief that, in like manner but obviously different terms to that achieved for child protection, we have developed a sophisticated understanding of what is needed in order to afford full respect to each individual's “right to family life” under ECHR, Article 8. I am taking this important aspect shortly because the history of its development and the fruits thereof are well known and, indeed, are expressly referred to in virtually every determination by a family court in child care proceedings relying upon the judgments of the Supreme Court in *Re B (A Child)* [2013] UKSC 33. I recently devoted an entire lecture to the topic of “Nothing Else Will Do” ([2016] *Family Law* 1403) and I do not intend to repeat one word of that lecture on this occasion.

Drawing matters together in terms of the big picture, I consider that as a result of the professionalism, dedication and experience of very many who have been involved in this work over the past two or three decades, not least, of course, Bridget Lindley, whose memory we celebrate tonight, we have developed, and are continuing to develop, a system which seeks to afford full regard to the need to protect children from significant harm but, at the same time, respects the human rights of those directly affected by the decision. It is at least adequate, I hope, in every single case. In the high-end cases, as has been said to me, it must be seen as “a Rolls Royce process” with high quality judges, free legal aid, the highest standard of legal representation, world class experts, and with the voice of the child being separately represented by a team of equal standing to the other parties.

There is, however, no room for complacency. Despite the deployment of high calibre resources, the courts sometimes get it wrong and must not be afraid so to find if that is the case. Recent examples, on either side of the line are the case of the Webster family [*Webster v Norfolk CC* [2009] EWCA Civ 59] and, more recently, the decision of the family court to return young Ellie Butler home, only for her to be murdered by her father 11 months later.

These individual tragedies, which undoubtedly they are, are also tragedies for society in general. The consequences of them underline just how high-risk the decision may be in a child protection case. The court order may remove a child from his or her family for the rest of their natural life, when, in truth, there is no justification for doing so, or, the court may decide to send a child home, believing that there is no continuing risk of harm when, awfully, the contrary is the case. That these high profile failures, when compared to the courts' annual child protection case load of around 15,000 are few is no justification for complacency. Magistrates and judges who are making these important decisions case by case on behalf of society in general, carry a heavy burden. In terms of who in society "holds the risk" in these cases, the answer is that, more and more often, it is the magistrates and the judges.

Despite the very positive description that I have given of the "big picture", thus far, there are three topics which have caused me to hesitate and to hold back from simply concluding that all is well, ending my lecture here and sitting down. Before turning to these three "buts", as I shall call them, I propose to take a different tack at this point and offer a few short suggestions as topics for fine tuning of the system as it is at the moment.

### **Six Short Points**

#### *(1) Neglect and Resources*

The first point relates to neglect cases. I do not have statistics, but it must be the case that low to medium level cases of persistent neglect make up the majority of care and adoption cases before the court. In such cases reference is had, and rightly so, to Mr Justice Hedley's dicta in *Re L (Care: Threshold Criteria)* [2007] FLR 2050. In every case there is a line to be drawn, or as a matter of strict legal structure, two lines in deciding (a) whether the threshold criteria in CA 1989, s 31 are met and (b) whether the child's welfare requires placement away from the family.

It is easy to describe the structure, it is easy to refer to *Re L*, but in these cases, which sit on the very cusp, making the decision whether to remove a child from home or leave her there is often far from easy. Where is the line? Who is drawing it? There is no neat Court of Appeal authority to help with the nitty gritty question as it falls to be decided case by case. A good deal must turn on the value judgment of the court, assisted by professional evidence as to what may or may not cause significant harm to a child. Courts are schooled to avoid 'social engineering'; in *Re B*, Baroness Hale construed Lord Templeman's well known dicta in *Re KD (A Minor)* [1988] AC 806 as 'public authorities have no right to improve on nature' [para 179]. Nor do they, yet in this field the danger of seeking to do exactly that is plain to see. 'Social engineering' and 'child protection' plainly sit on the same continuum; discerning where the line is drawn between the two is far from plain.

In *Re B* Baroness Hale, after referring to Hedley J in *Re L*, stated [para 182]:

'But clearly we do remove *some* of those children. The difficulty is to identify what it is that tips the case over the threshold. Although every parent, every child, every family is different, and, as Hedley J put it, 'significant harm is fact specific and must retain the breadth of meaning that human fallibility may require of it', there must be some consistency in the approach of both local authorities and the court.'

Into this complicated mix, we must introduce the impact of resources, or the lack of them. In a neglect case, where permanent removal is a borderline decision, the question of what resources can be introduced into the home to support the parents may be determinative of the outcome. Resources have never been limitless and in the current times they are often scarce. Where, prior to court proceedings, the available support to a family is considered by social services to be insufficient, but a risk of significant harm to the child has been identified, then that risk cannot be left unaddressed. If there were doubt about this prior to the case of *Baby P*, there is none now. The risk is therefore transferred to the court by issuing proceedings and the case moves on down what might be called 'the lack of resources tunnel'.

In such a case the court is faced with an application to remove the child because the resources are not there to support a continued placement at home. The court, despite, no doubt, investigating the alternatives, may find itself hemmed in (in the same 'tunnel') by the lack of resourced options, with removal as the only 'safe' prospect. Whilst I do no more than flag this scenario up, without offering any solution, I fear

that it is typical of many cases up and down the land, often heard by the more junior members of the family judiciary, where finding the balance between child protection and family life is a very real and pressing daily issue and where guidance as to just where 'the line is drawn' and how the risk may be held is thin on the ground. In this regard, the fresh thinking in books such as *Re-imagining Child Protection* by Professor Brid Featherstone and others (University of Bristol 2014) may offer a way forward.

(2) *Post-adoption Contact*

My second short point relates to post-adoption contact. When the Adoption and Children Act 2002 came into force there was some expectation that the previous approach to post-adoption contact, which heavily relied upon a 'closed' adoption model with, at most, modest 'letterbox' contact, might change. In *Re P (A Child)* [2008] EWCA Civ 535, relying upon the earlier priority placed on post-adoption contact by Baroness Hale in *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36, Wall LJ contemplated a possible sea change under the 2002 Act. Now, a decade later, the answer is that there has been no sea change. Even the introduction by the Children and Families Act 2014 of bespoke provisions for contact in adoptions following a placement order [ACA 2002, ss 51A + 51B] do not seem to have moved matters on.

Dr Elsbeth Neil and others at UEA have recently concluded a long term research project on the effects of post-adoption contact<sup>1</sup>; it should be required reading for us all. Recognising, whilst planning an adoptive placement for life, that the adopted individual will have other ongoing support needs, particularly in adolescence, is very important. Planning for, building on and supporting contact, possibly with relatives other than those in the immediate centre of the care proceedings, can be very helpful in the long term. It goes without saying, and here I do think that there has been a change, that the need for continuing contact between siblings should be prioritised.

I wonder if, in this regard, the old case law based [reaffirmed in *Re T (Adoption: Contact)* [2010] EWCA Civ 1527] can stand. Is it right that the views of the adopters should hold such sway? In all other respects, those before the court who hold a contrary view on any topic are told that 'what is best for the child' must prevail. Why, if face to face contact would benefit a child, not necessarily now but in some time

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<sup>1</sup> <https://www.uea.ac.uk/contact-after-adoption>

after she has settled down, should the adopter have an effective veto? The new powers under ACA 2002, s 51A are wide. The court may make a contact order at the time of adoption or 'at any time afterwards'. In the right case, there may well be justification in this power being used for the issue of contact to be set down for review, may be in a year or more after adoption to see if, in some way, provision of contact may provide the adopted person, the soon to be adult, with some bridge back to her roots.

*(3) Benefits from focussing on parents*

My third short point concerns interventions such as FDAC [the 'Family Drugs and Alcohol Court'] and 'Pause' and it is simply to ask two questions:

- (a) Why did it take us so long to get to FDAC and Pause, when they are plainly so beneficial in the right cases?
- (b) What other models of intervention should we now be considering?

These are initiatives which, by focussing for a time on the parent, rather than exclusively on protecting the child, offer a way for some of breaking the cycle of vulnerability, addiction, confrontation with authority and failure which is so often the hallmark of families who come back and back before the family courts because, without intervention, they are placing their children at risk.

*(4) Special Guardianship Orders*

My fourth short point relates to Special Guardianship Orders. SGO's are now not infrequently put forward, often at a late stage, as a solution which may keep a child in the family as opposed to moving off to an out of family placement. In the right case they have much to offer, but there is a fear, certainly amongst some of those to whom I have spoken, that they may be being over-used in cases where there has been inadequate time to assess the special guardian thoroughly. If problems occur down the line, and further court proceedings take place between family members, they will be private law proceedings and they are unlikely to attract Legal Aid.

The pressure to conclude proceedings within 26 weeks, during which the candidate for special guardianship may not have stepped forward until a late stage, adds to the feeling that, in some cases, making the order in some haste may give cause to repent at a later stage. In this regard the recent beefing up of the Special Guardianship Regulations 2005 by the 2016 Amendment Regulations and associated statutory

guidance in January 2017<sup>2</sup> is welcome, as is the Viability Assessment Toolkit, which was one of the many brainchildren of Bridget Lindley, and which has been recently launched by FRG.

(5) *Domestic Abuse*

Fifthly, 'domestic violence'. Because of the focus that I have chosen for this lecture, I have, reluctantly had to reduce other topics for no more than short mention rather than offering the in-depth consideration that they deserve. But, as my aim is in part to stimulate debate, and it is better for this very important topic to be included rather than not mentioned at all, it comes in here.

In short terms, and in the context of the balance between child protection and family life, I really wonder if we are getting it right with respect to domestic violence. From my prospective locked in the 'audit department' in the Court of Appeal, I no longer see any of the cases, and so I would readily bow to those who know more directly of these matters.

The prevalence of domestic abuse, and it may not necessarily include direct physical violence, has sadly not abated. Domestic abuse is a feature, I am told, in the majority of calls to the FRG Helpline. This is a topic which, rightly, has priority in No 10 Downing Street with a list of initiatives having been announced during the past few months. But how are we, in the courts, measuring up to achieving the best outcome for children and families?

Whilst resort to a refuge may in some cases be inevitable, surely it is better for children to stay at home under protective measures and with support. I wonder whether courts are using the power to make exclusion orders alongside an interim care order [CA 1989, s 38A] as often as may be necessary. And, in terms of the victim, I wonder if we are as clear in our analysis and our understanding of her joint roles as both victim and parent. Finally, is there a contradiction between the approach taken in child protection proceedings where, in bald terms, the message may be that there is to be absolutely no contact between the perpetrator and the child, as compared with private law proceedings where the emphasis may be upon contemplating some contact notwithstanding that domestic abuse has taken place.

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<sup>2</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/586406/Special\\_Guardianship\\_Statutory\\_Guidance\\_20\\_January\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/586406/Special_Guardianship_Statutory_Guidance_20_January_2017.pdf)

Further, in this context, it may be that the family system needs to make sure that it is up to speed with developments in criminal law where, under the Serious Crimes Act 2015, s 76, it is now a criminal offence for one person who is connected with another person to engage in ‘controlling or coercive’ behaviour towards the other so as to have a serious effect on them.

As with some of the other points that I have raised, I realise that I am asking questions whilst offering no answers, but they are nevertheless questions which, in my view, deserve to be raised.

*(6) Independent Reviewing Officers*

In terms which are, I am afraid, equally brief, I finally wish to mention Independent Reviewing Officers. Those with a memory of 15 years ago will need no reminding of the ‘starred care plan’ case which went to the House of Lords in 2002 [*Re S; Re W* [2002] UKHL 10] in which the Court of Appeal sought to ensure that key (in human rights and welfare terms) provisions in a care plan were monitored and brought back to court if circumstances changed. Judicial legislation of that order was struck down by their Lordships, but, in the aftermath, the role of ‘Independent Reviewing Officer’ was established by regulation and guidance in 2005 to act as a guardian of the care plan and, where necessary, trigger a return to court. My understanding is that there have been no occasions when an IRO has brought a case back to court under this provision. Anecdotal accounts from around the country indicate that IRO’s are now rarely seen to be independent of the local authority and I have heard a litany of other causes for concern. If this key aspect of our system is indeed falling short of what was expected of it, what can be done to improve the situation?

A further concern in this respect, I understand, arises from a practice, in some areas, of LAC [‘Looked After Children’] Reviews being held in the foster home, with the result that parents are often excluded from the review meeting.

**Three reasons to hesitate:**

**1. ‘But is adoption still the best option?’**

Now I come back to the three “Buts” to which I referred earlier. The first is in the form of a question. A system which has adoption against the wishes of the natural family as an outcome, which is regularly chosen as best meeting the lifelong welfare needs of young individuals, must have confidence that that model of adoption does

indeed normally best meet the lifelong needs of individuals who cannot safely be returned to their families during their childhood.

My general thesis that the current balance between child protection and human rights is largely sound is only tenable if adoption is, indeed, the most beneficial arrangement for the young people for whom it is chosen by the courts. My question, in short terms, is “But is it?”. If adoption was once the best outcome for children in these cases, does that continue to be the case today?

Before proceeding further, I need to make clear that this is a genuine question asked by me, and in no manner an indication that I, either as an individual or as a judge, have any concluded view one way or the other. It is, however, a question that I do think should be asked. Adoption has changed in a number of important respects over the past two decades and a number of the characteristics of adoption, and the assumptions upon which it hitherto has been based, have shifted.

As is well known, statutory adoption, introduced by the Adoption Act 1926, provided for the adoption of very young babies given up, with consent, by their mothers. The ability of the court to dispense with consent came later and, as a result Houghton Committee Report in 1972, adoption began to be used more actively as an option in the field of child protection, but the cohort of individuals who were adopted largely remained, as I understand it, very young babies. Prior to Houghton (figures for 1968) less than 10% of adopted children came from the care system.

The use of adoption in child protection achieved further impetus following the publication in the late 1970s of “The children who wait” (Rowe and Lambert) a ground-breaking work identifying the need to make better and more effective long term provision for the children who simply “waited” in long term foster care or children’s homes for periods of years without ever achieving a stable family base during their childhood. Thus, the age at which children were considered as candidates for adoption gradually rose over the years.

Once an adoption order was made, however, both the law and practice went to great lengths to achieve a total separation between the child and his or her natural family. Whilst the possibility of tracing natural family members once the adopted individual became an adult existed, the reality was that many years, if not lifetimes, would go by without any contact being made.

In more recent times social work practice, spurred on by consistent impetus from the highest level, for example the initiative of the Blair Government in 2001 and the coalition in 2011 to increase the number of adoptions, has led to the age at which children may be considered as candidates for adoption regularly encompassing youngsters of the ages of 5, 6, 7 years or older [currently 20% of actual adoptions are for children over 4 years old<sup>3</sup>].

The older a child is when he or she moves on to an adopted home, the more knowledge and understanding they will have about their life to date and the individuals that make up their natural family. Where that family has been dysfunctional, abusive or dangerous, the more that young individual will have suffered and the more likely it is that some deep-seated long-term harm will have been caused to their psychological makeup and personality. No matter how strong, skilled and loving the placement in their adoptive home may become, it must remain likely that the consequences of their earlier experience will be played out as they come to terms with the sense of their own identity whilst traversing the choppy waters of adolescence in the adoptive home.

The difficulties facing adopters and adopted children in this regard have been made significantly more difficult in recent years with the ever-increasing facility to trace and make contact (in an uncontrolled way) with individuals over the internet or via social media. Dame Eleanor King addressed this topic in detail when giving the Hershman/Levy Memorial Lecture in June 2013 (*May I be your Facebook friend?: Life stories and social media* [2013] Fam Law 1399). The challenges identified by Dame Eleanor four years ago have certainly not diminished and are likely to increase and become yet more sophisticated as the irreversible march of technological developments in this area of our lives continues.

I have recently become aware, and made contact with, an organisation called 'POTATO', standing for the "Parents of Traumatized Adopted Teens Organisation". The stories that these adoptive parents tell of the difficulties they have encountered in this technologically advanced time in coping with teenagers who have been traumatized by their earlier experiences are striking. They give an account of only having received partial and inadequate information as to the harm suffered by the young people prior to their placement, a lack of therapeutic support in the early

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<sup>3</sup> Department for Education 2015

months and years of the placement and, when problems erupt during the teenage years, the adopters typically feel viewed by Social Services in the same light as failing “parents” in ordinary care proceedings. Not infrequently, where there is a crisis, resort is had to accommodation under the Children Act 1989, s.20.

It must be stressed that the POTATO parents are but one, relatively small, group. Whether their experience is typical of adopters in general, I do not know. There will, no doubt, be adoptions that have run an altogether smoother course without the need for support and intervention in the teenage years. Additionally, even if the adoptive placement has been troubled, that does not mean that any other form of placement would have been more effective.

Looked at from another angle, if adoptive families are now being used to provide ‘therapeutic’ intervention, then this should be fully recognised in terms of:

- (a) The recruitment, training and briefing of adopters;
- (b) Provision of support (including from CAMHS) at the time of placement;  
and
- (c) Long-term support on into the teenage years and beyond.

It is, I believe, easy for professionals and courts who are dealing with children, understandably, to focus on the need to protect the child whilst he or she *is* a child. The welfare provision in the Adoption and Children Act 2002, s.1, however, requires primary consideration to be given to the welfare of the child “throughout his life”. Whilst the determinations made by courts in these cases must necessarily look to provide safe and good enough care for the child day by day during their childhood, the task in hand is, actually, bringing up an individual who is going to be an adult at the end of the process. A major justification for adoption has always been said to be, and rightly so, that the additional lifelong commitment made by adopters is likely to provide a child with the most secure and stable base for their development throughout their childhood and beyond. Our approach in the case law continues to be on the basis that this is so. There has been, however, a radical change in a number of the fundamental elements of our model of adoption in recent years:

- the characteristics of the young people who are now seen as candidates for adoption,
- the degree of support, or lack of it, that is afforded to them and their adopters once a placement has been achieved, and

- the erosion in the hitherto impermeable seal around the adoptive placement created by social media.

These changes are, in my view, sufficient to raise the question of whether our model of adoption continues to be as valuable to each of the individuals concerned as we have hitherto held that it is.

This discussion takes place in the light of our growing knowledge, assisted by academic research (particularly that of Dr Claire Fenton Glynn) to the effect that our deployment of adoption, contrary to the wishes of the family, in child protection cases is rare across the world.

I know that consideration is being given in some circles to arrangements that might fall short of full adoption, yet provide a young person with a sufficient base during childhood, whilst maintaining a bridge with their natural family. Long-term foster care, but with a planned rehabilitation to a member of the natural family in the lead up to adulthood, or the idea of 'lifelong links' where a young person who cannot actually live in the natural family is actively encouraged to develop a relationship in late teens with a family member are but two such ideas. In each case the family member might not necessarily be a particularly close relative of the individual.

Data and research on whether or not our model of forced adoption in child protection cases has indeed met the needs of individuals on, indeed well on, into adult life is not readily available. In any event, because of the changes that I have identified that have taken place in the last decade or so, such research based on older adoptions may be of limited value. Data that is available as to adoption "break down" is also unlikely to be of great assistance. My understanding is that the concept of "break down" is given quite a narrow meaning. For example, in cases such as those involving some of the POTATO families, where the young adopted person is received into section 20 accommodation, that is not regarded as a "break down". If the adopted parents' relationship breaks down, but the adoptee remains living with one or other parent, then, again, this is not, an "adoption breakdown", even if the impact of the young person's presence in the family may have had a considerable contribution to the ending of the couple's relationship.

Having posed the question as to whether adoption is the best arrangement for these older children who have experienced the adverse impact of dysfunctional family life and abuse, I am entirely clear that it is not for me, and not for judges and lawyers in

general, to provide an answer. If, however, the question is a valid one, it can only be answered by substantial research by suitably qualified experts. Such research is, in my view, sorely needed.

## **2. ‘But how do we know it has worked out alright?’**

The second “But” that I believe exists is related to the first. Magistrates and judges up and down the country on every day of the week are making these highly intrusive draconian orders removing children permanently from their natural families on the basis that to do so is better for the child and that “nothing else will do”. But, I ask rhetorically, “How do we *know* this is so?”

Family judges receive almost no feedback upon the outcome of the decisions that they make. The only feedback that does occur is haphazard and normally arises because the case in one form or another happens to come back to court at a later date. There is no regular system of keeping the judge informed with the progress of events six months, a year, five years, ten years, down the line. I don’t anticipate that any judge who made the adoption orders in relation to the POTATO family cases know what has occurred. The last the judge normally sees or knows of a case is to preside over the happy celebratory hearing that typically marks the making of an adoption order.

Even when an adoptive placement formally breaks down, the judge is not informed. My understanding is that in such cases a formal “break down review” is undertaken by the relevant Social Services department. It would be both unnecessary and inappropriate for a judge to play any part in that review process itself, but a short report of the outcome sent to the judge would, in my view, be nothing but beneficial.

Fifteen years or so ago, the Lord Chancellor’s Department, as it then was, recruited a consultant with business and managerial experience to conduct a short term review of family justice. I well recall his incredulity that the system was paying a high salary to important decision makers, i.e. the judges, yet those decision makers were given absolutely no information as to whether their decisions had been effective; a situation that would be completely unheard of in any commercial management structure. In my mind, I liken the present situation to one where an individual who is learning to become a proficient darts player is instructed to throw the darts behind him, over his shoulder, without any sight of the dart board and without anyone telling him whether he had even hit the wall, let alone the board or the bulls eye.

So my first two “Buts” are related. Without sound, wide-ranging research as to outcomes, and without detailed individual feedback as to the progress of particular cases, it is difficult, indeed logically it is impossible, for judges to have confidence that the current balance between child protection and human rights, which favours a massive erosion of the right to family life because it is “necessary” to do so to protect the child, is indeed justified.

### **3. Transparency: the need to shine a light on what we do**

The third “But” is more of a catch all, to which the label “transparency” might generally be applied.

As soon as I mention “transparency” I suspect that you will immediately have focused in on the narrow, but obviously important, topic of whether or not the public and the press should be allowed in to family court hearings. Whilst I have been for years on record as being generally in favour of greater transparency in that context, it is plainly a complicated issue upon which polarised and strongly held opinions are held by people whose views I respect. I am also aware that the President is soon to receive the fruits of a number of consultation exercises in order to consider the next step forward in this regard. I am therefore deliberately not going to say anything more on the topic of allowing public or press access to the family court in this lecture. Not to do so has the benefit of allowing us to consider other aspects of transparency, which is an altogether wider topic than one that simply focuses on the reporting of family court cases.

Whilst the observations that I am about to make are my own, I am extremely grateful to the Transparency Project and, in particular Lucy Reed and Sarah Phillimore, two of the driving forces behind that project, who generously gave time to discuss these matters with me.

‘Transparency’ is much more than simply allowing passive public scrutiny of our processes and outcomes. Those of us in the system need to be proactive in shining a light on our work, both in general and, if necessary, in particular cases, so as to generate a far greater understanding amongst the public of what lies behind the important decisions that are taken about children by the courts, as an arm of the State, in the public’s name.

Delivering effective change in this regard is likely to require innovative thinking “outside the box”. Positive steps are necessary to engage the mainstream media to carry material which accurately describes the family court process. A neutral account of the system, possibly backed up by video content, should be readily available online.

Before descending to detail, it is helpful to step back and take a wide view. There is little point in having a child protection/family justice system which affords proper respect to the human rights of children and family members if those individuals whose rights are to be respected do not know of them or understand how they may achieve access to the justice system in a way that permits them to benefit from that level of respect. Respect for human rights is only likely to be as effective as the ability of the individual involved to engage with the process and gain access to that respect.

Parents who are drawn into child protection proceedings for the first time are unlikely to have any understanding at all of the processes that are about to be deployed, as they will see it, “against them”. Ignorance of the system, both in general terms and with respect to its detailed provisions must massively erode the ability of any individual to take part in the various pre-proceedings and court processes in a way which maximises the potential for their rights to a fair process and family life to be respected. The worse we are at explaining what is involved at the pre-proceedings stage, the less a parent is likely to be able to engage effectively with the process.

That this is so is, in part, due to the high level of ignorance and misunderstanding that I believe there is in the population in general as to the operation of the family justice system. This is part of a wider point that can be made as to the woeful level of public education and awareness as to the legal system in general. The family court, which sits in private, and which is not often the subject of portrayal in television drama to the extent of, say, the Crown Court, is no doubt even less well understood by the general public than other areas.

Unfortunately, the vacuum created by the lack of sound and accurate information about the system provides a space into which ill-informed, and at times deliberately incorrect, commentary and advice can be introduced. Regular ill-informed and deliberately partial press commentary must have an impact upon the perception of the public in general. Targeted “advice” by some semi-professional McKenzie friends and other lay organisations to vulnerable individuals who find themselves the subject of care proceedings has the effect, in some cases, of moving those individuals directly

away from engaging effectively in the court process or achieving access to a system which, I believe, would respect their right to a fair process and to family life. In a system which, in current times, puts a priority upon parents being able to accept where their parenting may have fallen short in the past, display insight into what needs to be done for them to live life in a safer way in the future and a willingness to co-operate with the professionals in achieving that change, it is, to put it neutrally, a very high risk strategy for some parents to disengage entirely from the process, refuse to be assessed by independent experts, dispense with the expert lawyers freely provided by the State and, in some extreme cases, flee with their children to Ireland, France or further afield.

From what I have been told from a range of sources, and from my own exposure on a daily basis to litigants in person seeking to appeal child care decisions, there is a significant and growing distrust shown by some parents in child care lawyers and judges. This is deeply worrying and needs to be addressed if it is not to lead to yet more parents disengaging from working with professionals and the process in a way which can, in my view, only damage their interests rather than enhance them.

I could go on, but the point must be plain. To achieve the benefit of respect for human rights, it is necessary to engage fully with the process within which respect for those rights is embedded. To do the contrary, either through general ignorance or as a result of targeted advice, fundamentally compromises the ability of the system to deliver that respect and is likely to reduce significantly the prospect of that parent achieving any outcome which they might consider to be favourable.

Having flagged up the problem, I do not, in this lecture, offer a comprehensive solution but the following headline suggestions can be made;

- (a) significantly raise the level of public education and awareness as to the way in which the family system operates;
- (b) ensure that parents are exposed to accurate and sound legal advice at the earliest stage, including any pre-proceedings activity such as a formal social work assessment, suggested accommodation under CA 1989 s.20 or family group conferences.

In an ideal world, my reference to pre-proceedings legal advice would be followed by an expectation that legal aid would readily be extended so that a parent may gain access to bespoke legal advice whenever it is needed. In the current climate, however,

we cannot anticipate any extension of legal aid but the absence of legal aid does not prevent the provision of detailed general legal advice, which can be accessed by a parent from other sources.

The Transparency Project website, for example, contains a number of accessible explanations of the law and procedure aimed at the non-lawyer under the general title “Children Law for Dummies!”.

The Bristol Family Court has established a “Family Court Information” website aimed at families who find themselves involved in proceedings. It gives straightforward down to earth descriptions of the process, together with links to videos and other material available elsewhere, for example, the FRG website. This is an excellent resource and if social workers were required to refer parents to it in any case where proceedings were being contemplated, the gap between ignorance and achieving full-on legal representation once the proceedings start may, to an extent, be bridged. I am told that the cost of establishing the Family Court Information website is under £1,000 per court centre. I cannot understand why it has not been replicated by each and every one of the other 40 or so family hearing centres around the country.

Another angle of approach to the same problem is demonstrated by the regular, almost daily, blogs or articles which appear on the Transparency Project website and, elsewhere, by individual bloggers such as ‘Pink Tape’, ‘Secretbarrister’, and ‘Suesspiciousminds’. Such articles may take a general point of public interest, or even more usefully, pick up a news item on a particular family case and comment upon it from an informed perspective, having researched the transcript of the judgment, if available, and any other resource. The purpose is to seek to explain the case, for all to read, in an open and accessible manner.

These innovative and important initiatives are valuable, but they are by no means enough to open up the family court and knowledge of our processes so as to provide the sort of general transparency which I consider is both justified for the public in general and desperately needed for the individuals who find themselves at the focus of child care proceedings. It is not enough for the rest of us to leave the heavy lifting to a handful of volunteer, well-motivated, commentators whose output may or may not be picked up by those who need to read it. There is a need for all of us in the system to consider how we, individually or collectively, can improve awareness of what we do, and how our processes can be effectively navigated in order to achieve

full respect for the human rights of all involved. This all involves extra work over and above the day job which is already over borne with demands on the time of each individual, under-resourced and under, almost untenable pressures of time. The response “I am simply too busy to do any of that” is entirely understandable. But, how much of the busy-ness of our respective professional lives is taken up with unpicking the results of steps taken by those who have been ill-informed of what is required of them at an earlier stage. Time spent in making our processes much more transparent and accessible must surely go to reduce the ultimate complexity and burden of cases further down the line as well as achieving the higher aim of improving access to justice.

### **Conclusion**

Who holds the risk, how risk is assessed and how brave or risk averse those who make decisions for children at risk of significant harm may be, are central issues in every child protection case.

Increasingly it seems that, for a range of understandable reasons, social workers are passing the decision making to the courts and it is the judges and magistrates who are being called upon to determine whether children should remain with their families or be placed elsewhere. The increased caseload is not cases of high-end gross abuse involving serious physical injury or sexual abuse; these have always come to the courts. The ‘new’ cases tend to be those involving long-term neglect as a result of inadequate parenting or other slow-burning, but none the less harmful, family dysfunction leading to emotional harm.

As I have explained, I consider that our system of investigating child abuse, protecting children and affording respect for the value of family life is one which has many excellent qualities and one which is likely to strike the balance of risk correctly in most cases.

It is right to stress that the outcome for children who cannot safely live in their families must always be to achieve security and permanence in another home throughout their childhood; the question is how best that can be achieved in each individual case.

The hesitation that I have expressed in the concluding part of this lecture is borne from an awareness that, in various ways and at an increasing pace, the world is

changing in terms of the characteristics of some of the young people who are chosen for adoption, the range of problems that they may exhibit in years to come, the ability of those who are adopted and their natural families to trace each other and keep in contact via technology and the need for support for adopters in dealing with the fall-out from these problems often many years down the line.

For 30 years and more, since the move to adopt children from care took off, the courts have accepted and worked on the principle that adoption with little or no contact with the natural family provides the best option for the upbringing of a child who cannot be cared for in her family for her childhood and beyond. The stability and security provided by adoption is said to provide a quality of care which far outstrips any other model that might be available. The change in the adoption landscape that I have described now leads me to question whether that still remains the case for some, at least, of the children for whom we have hitherto taken it as a given. A future which may include reception into s 20 accommodation or even care, placement breakdown, relationship breakdown, unstructured (and possibly unknown) contact with the natural family, upset and confusion seems a long cry from the sunny upland of a happy, settled, secure future with a 'forever family' which has been the traditional goal of those making adoption orders to date.

If I am right in raising this question, it cannot be answered by lawyers or judges. It can only be addressed by research, and it would need to be fairly extensive research, into current adoption placements some years after orders have been made and, separately, research into the long-term outcomes for those who were adopted 20 or more years ago.

Judges and magistrates are asked to make these decisions by choosing which outcome is best when measured against the individual's whole lifetime. Whilst these are decisions taken in child protection proceedings, they are not just to do with child protection. Indeed, I would say, the adoption decision is not even largely to do with child protection. Making an adoption order radically shifts the tectonic plates of an individual's legal identity (and those of others) for life. That is a very big thing to do in order to protect that individual from harm during their formative years. Is an order of that magnitude necessary? How do we know that it is indeed the best outcome for the young person whose future life is being decided by the court? And, if I am right that we can no longer be certain that it is, how is it possible to say that by making adoption orders, particularly in the middle to low range of abuse cases, we

are indeed getting the balance right between child protection and the right to family life.

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