



4 May 2017

**‘Two Point One Children’:**

**Why There is No Typical Family in the Family Court**

Professor Jo Delahunty QC

Parents that become involved in care cases are, of course, unique, as are their children who are the subject of litigation. But, in the main, there are three threads that unite them:

**Poverty:** whether of income, education or opportunity. Few middle class families end up in litigation. They have the education, confidence and ability to ask for help (and pay for it if needs be) when they are in crisis (whether it be psychiatric, educational support or additional child–care assistance) and where problems cannot be contained within the family unit, parents have the social skills and confidence to engage with social work professionals on a more equal footing. There are of course, exceptions to this rule. And so there should be, because child abuse is not something that does not happen in more affluent families. However, in the main, care clients come in to the care system at a disadvantage.

**Vulnerability**. Parents in care cases often have personal issues of their own that have contributed to their difficulties in parenting their child. Drug addiction, alcoholism, victims of domestic violence, victims of abuse themselves as a child; all of these issues and more have an impact on their parenting if they are not identified, acknowledged and addressed before parenting suffers and a child is exposed to adult issues from which they need protection.

**Disability**: how much more complicated is the situation when the parent, otherwise loving and desperate to parent their child, has a disability that is innate. Something that is integral to them. Mental health, learning difficulties, or physical disability such as blindness or deafness does not, and should not debar one from raising ones child. Nor can each of these issues be neatly quarantined from one another and their impact on a child. Often there is an overlap between mental health and drug addiction; learning difficulties and physical or sexual exploitation, deafness and isolation and depression.

This lecture will explore vulnerable parties and children in the Family Court, especially where the common denominator is frequently one of poverty - in education, income and opportunity. The range of disabilities that can be encountered in court will be considered, and the way that law and practice responds to seek to protect an affected person's rights. The general principles which the court has to address if it is to deliver a fair system to the most vulnerable will be outlined.

**The Fulcrum Upon Which Risk May Turn in a Family?**

If one had to try to breakdown the risk and protective factors that might tip a family into involvement in the care system then the factors set out below provides as good an overview as any.

It was set out in ***Finding of Facts) NAI : Re BR ( Proof of Facts) (2015)EWFC 41 ( 11.5.15****) by*Jackson J and was taken from NSPCC guidelines , Government guidance to social work and health professionals known as ‘the Common Assessment Framework’ and the Patient UK Guidance for Health Professionals

It is a check/balance sheet that makes explicit that which many social workers will have in mind when evaluating what to do when a child is referred to them as potentially being at risk at home.

Risk factors

* + Physical or mental disability in children that may increase caregiver burden
  + Social isolation of families
  + Parents' lack of understanding of children's needs and child development
  + Parents' history of domestic abuse
  + History of physical or sexual abuse (as a child)
  + Past physical or sexual abuse of a child
  + Poverty and other socioeconomic disadvantage
  + Family disorganization, dissolution, and violence, including intimate partner violence
  + Lack of family cohesion
  + Substance abuse in family
  + Parental immaturity
  + Single or non-biological parents
  + Poor parent-child relationships and negative interactions
  + Parental thoughts and emotions supporting maltreatment behaviours
  + Parental stress and distress, including depression or other mental health conditions
  + Community violence

Protective factors

* + Supportive family environment
  + Nurturing parenting skills
  + Stable family relationships
  + Household rules and monitoring of the child
  + Adequate parental finances
  + Adequate housing
  + Access to health care and social services
  + Caring adults who can serve as role models or mentors
  + Community support

But do remember, as Jackson J was at pains to make clear,

*‘The presence or absence of a particular factor proves nothing. Children can of course be well cared for in disadvantaged homes and abused in otherwise fortunate ones. As emphasised above, each case turns on its facts. The above analysis may nonetheless provide a helpful framework within which the evidence can be assessed and the facts established’*.

I could say a lot more about the rights and wrongs of this list. One might say it emphasises a resource bias which impacts on deprived families far more than the middle classes.

I will leave it to the Gresham reader to ponder.

**The States Duty to Support a Child in Need**

The local authority has a duty, under section 17 of the Children Act 1989 [[1]](#footnote-1)to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

But, there is often a mis-match between the state’s ability (and willingness) to provide support to a family and a family’s ability to make use of it to effect the changes needed for the child.

When a gulf develops between the harm a child is at risk of suffering and parental ability to provide ‘good enough’ parenting, the local authority may take the decision to go to court pursuant to section 31 of the Children Act to seek orders in relation to that child[[2]](#footnote-2).

Orders might involve a Child Assessment Order, a Supervision Order (under both scenarios the child may stay at home) or a Care Order (which might require the permanent placement away from home in a foster placement) or, at the most extreme end, an Adoption Order.

To put this in context we start with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [[3]](#footnote-3) and its interplay with The Children Act 1989 [[4]](#footnote-4)and The Adoption and Children Act 2002[[5]](#footnote-5).

The overarching principle remains as explained by Hale LJ, as she then was, in ***Re C and B*** [[2001] 1 FLR 611](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2000/3040.html), para 34:

*"Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child."*

To this we may add what the Strasbourg court said in ***YC v United Kingdom*** [(2012) 55 EHRR 33](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/2012/433.html), para 134:

*"Family ties may only be severed in very exceptional circumstances and … everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing."*

In this connection it is to be remembered [[6]](#footnote-6) that the United Kingdom is unusual in Europe in permitting the total severance of family ties without parental consent.

Adoption should be ordered only when ‘nothing else will do’ and the consent of parent to it can only be dispensed with[[7]](#footnote-7) if the welfare of the child "requires" this. "Require" here has the Strasbourg meaning of necessary,

"*The connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable"[[8]](#footnote-8):*

This is a stringent and demanding test.

Behind all this there lies the well-established principle, [[9]](#footnote-9)that the court should adopt the 'least interventionist' approach. As Hale J, as she then was, said in **Re O (Care or Supervision Order) [1996] 2 FLR 755, 760:**

*"The court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary."*

There are a number important points that underpin this approach[[10]](#footnote-10) see ***Re B (A Child) [2013] UKSC 22***

* The courts paramount consideration is, pursuant to s 1(2) 2002, the child’s welfare ‘throughout his life. ‘Nothing else will do’ is to be seen in that context.
* ‘*Nothing else will do’* involves a process of deductive reasoning. It does **not** require there to be no other realistic option on the table. It is **not** a standard of proof. It is a consideration of all the **realistic** options so there is no comparable option that will meet the best interest of the child[[11]](#footnote-11).
* Although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests **include** being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible.

In other words: wherever possible, consistent with their welfare needs, children deserve an upbringing within their natural families [[12]](#footnote-12) But the child’s welfare remains the paramount consideration and the relationship between parent and child is **one factor** to be taken into consideration . Putting it bluntly: being the parent does not ‘trump’ all other options by virtue of that biological fact.

* The court **"must"** consider all the options before coming to a decision. It is "necessary to explore and attempt alternative solutions"[[13]](#footnote-13).
* What are these options? That will depend upon the circumstances of the particular cases. Only realistic options that are in the child’s interest to be considered.
* They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order[[14]](#footnote-14).
* There is no hierarchy in these alternatives. The benefits and negatives of each realistic possibility fall to be considered and the child’s welfare is the deciding factor.
* **The court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer.**

**This last point is significant**: before making an adoption order the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support (*is that different in The Royal Borough of Kensington and Chelsea verses the London Borough of Hackney one might ask?).*

In this connection it is worth remembering what Hale LJ had said in *Re O (Supervision Order)* [[2001] EWCA Civ 16](http://www.bailii.org/ew/cases/EWCA/Civ/2001/16.html" \o "Link to BAILII version), [[2001] 1 FLR 923](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2001/16.html), para 28:

*"It will be the duty of everyone to ensure that, in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act 1989 always hoped that it would be made to work. The local authorities must deliver the services that are needed and must secure that other agencies, including the health service, also play their part, and the parents must co-operate fully*."

This was underscored by Sir James Munby , President of the Family Divisions, in ***Re B-S children [2013] EWCA Civ 1146 (para 29):***

*‘It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking.*

**The Courtroom Framework: Law and Practice**

In terms of the Human Rights Act, the State owes parents duties under the Human Rights Act. It owes parents article 6 rights to fair trial (which is not limited just to Court, but involves fairness in all decisions). Moreover, interference by the State with a parent’s Article 8 rights to private and family life can only be done where it is PROPORTIONATE and NECESSARY.

The requirement before any Children Act 1989 Section 31 orders may be made is that the court must be satisfied that the threshold test set out in Section 31(2) is met either by agreement or by findings. Namely, that at the time protective measures were put in place, A was suffering and/or was likely to suffer significant harm and that harm, or likelihood of harm, was attributable to the care given to her (or likely to be given to her if an order was not made) not being what it would be reasonable to expect a parent to give. As I have explained a number of times in previous lectures: in relation to any findings sought by a local authority the standard of proof they must prove the allegations to is the civil standard, i.e. the simple balance of probabilities.

Establishing the facts and their relevance to the Section 31 threshold criteria is a hurdle that must properly be overcome by the Local Authority if it seeks to argue it has a right, as a representative of the State, to interfere with a family’s Article 8 rights to a private family life. When considering whether the alleged facts, if proven, amount to significant harm the court must be alert to the wide standards of parenting that are acceptable. Threshold criteria looks to significant harm.

Wherever possible, consistent with their welfare needs, children deserve an upbringing within their natural families **(*Re KD [1988] AC 806; Re W [1993] 2FLR 625).***But the child’s welfare remains the paramount consideration and the relationship between parent and child is one factor to be taken into consideration.

The family court must be sure there is no practical way that the authorities or other agencies can provide the requisite assistance and support which would allow her to be cared for by at least one of her parents***(Re B-S*** *(Children) [2013] EWCA Civ 1146*).

**But NOTE: there is no right, per se, to bring up one’s own child if, to do so exposes that child to the risk of significant serious harm, abuse or neglect and that risk cannot be ameliorated adequately by support**. If there is at risk of that happening then the state will apply to the court for a decision to be made as

1) whether the child has suffered significant harm or is at risk of so doing and

2) if so, whether that child can or should live with the family that have caused that harm or if the harm is so serious as to require the permanent placement of the child.

**Measures to Address Disability in the Courtroom: An Insider Guide**

Next to no one outside the court system (and far too few within it in my experience) know that there are ‘toolkits’ available that provide advocates with general **good practice guidance** when preparing for trial in cases involving a witness or a defendant with communication needs

<http://www.theadvocatesgateway.org/toolkits>

I attach the links here because there is a public service in distributing them as widely as possible. They are invaluable

**My ‘Go-To’ List**

Identifying vulnerability in witnesses and parties and making adjustments[[15]](#footnote-15)

General principles when questioning witnesses and defendants with mental disorder[[16]](#footnote-16)

Vulnerable witnesses and parties in the family courts[[17]](#footnote-17)

Vulnerable witnesses and parties in the civil courts[[18]](#footnote-18)

Witnesses and defendants with autism: memory and sensory issues[[19]](#footnote-19)

Planning to question someone with an autism spectrum disorder including Asperger syndrome[[20]](#footnote-20)

Planning to question someone with a learning disability[[21]](#footnote-21)

Planning to question someone with ‘hidden’ disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD (H) D[[22]](#footnote-22)

Planning to question someone who is deaf[[23]](#footnote-23)

**Looking at a Particular Type of Vulnerability: taking Learning Disability as an Illustrative Example**

To cover each of the vulnerabilities I mentioned at the outset of this lecture: whether it be learning disability, deafness, blindness, mental health, autism etc., would take up a lecture series in itself. There is not the time in one hour to do each complex issue justice; hence I have honed in on learning disabilities to illustrate this talk. But the principles I have set out above, and turn to under this section cross over between each category of disability (in theory[[24]](#footnote-24)).

There has been a mind shift in understanding in relation to parents with learning disabilities in the higher courts in recent years. This was set out recently very clearly by the President of the Family Division in Re ***D (A Child) (No 3) [2016] EWFC 1.***

In it Munby P set out key principles to consider in cases involving parents with learning disabilities. He made plain that:

* too narrow a focus must not be placed exclusively on the child’s welfare without addressing a parent’s needs arising from their disability which might impact adversely on their parenting capacity, and
* The court must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professional ineffectiveness in engaging with the parent in appropriate terms.

There are a number of important points of principle either highlighted or endorsed in the judgment, as to how to approach cases where the parents have learning difficulties:

* Munby P endorsed at [25] what is said in **Y v United Kingdom (2012) 55 EHRR 33, [2012] 2 FLR 332, para 134:**

"…*It is not enough to show that a child could be placed in a more beneficial environment for his upbringing*…"

* Munby P endorsed at [26] the approach of Hedley J in ***Re L (Care: Threshold Criteria) [2007] 1 FLR 2050***, para 50:

"*Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent ... it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done*."

* Munby P highlighted for the first time at [27] '*the profoundly important of observations'* of Gillen J, as he then was, sitting in the Family Division of the High Court of Justice in Northern Ireland, in ***Re G and A (Care Order: Freeing Order: Parents with a Learning Disability) [2006] NIFam 8***. Gillen J set out some key points of principle that 'must be taken into account by courts when determining cases such as this involving parents with a learning disability particularly where they parent children who also have a learning disability.'

"(1) an increasing number of adults with learning difficulties are becoming parents. The Baring Foundation report records that whilst there are no precise figures on the number of parents with learning difficulties in the population, the most recent statistics come from the First National Survey of Adults with Learning Difficulties in England, where one in fifteen of the adults interviewed had children. Whatever the figure it is generally recognised that their number is steadily rising and that they represent a sizable population whose special needs require to be adequately addressed. The Baring Foundation report refers to national policy in England and Scotland committing government to "supporting parents with learning disabilities in order to help them, wherever possible, to ensure their children gain maximum life chance benefits." Nonetheless the courts must be aware that surveys show that parents with learning disabilities are apparently more likely than other parents to have their children removed them and permanently placed outside the family home. In multidisciplinary jurisdiction such as the Family Division, it is important that the court is aware of such reports at least for the purposes of comment. It is important to appreciate these currents because the Children Order (Northern Ireland) 1995 places an emphasis on supporting the family so that children can remain with them and obligations under disability discrimination legislation make public services accessible to disabled people (including parents with learning difficulties). Moreover the advent of the Human Rights Act 1998 plays an important role in highlighting the need to ensure the rights of such parents under Articles 6 and 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention").

(2)  People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasizes the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens and must be enabled to use mainstream services and be fully included in the life of the community as far as possible. The courts must reflect this and recognise their need for individual support and the necessity to remove barriers to inclusion that create disadvantage and discrimination. To that extent courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. They must be supported in ways that take account of their individual needs and to help them to be as independent as possible.

(3)  It is important that a court approaches these cases with a recognition of the possible barriers to the provision of appropriate support to parents including negative or stereotypical attitudes about parents with learning difficulties possibly on the part of staff in some Trusts or services. An extract from the Baring Foundation report provides a cautionary warning:

"For example, it was felt that some staff in services whose primary focus was not learning difficulties (e.g. in children and family teams) did not fully understand the impact of having learning difficulties on individual parents' lives; had fixed ideas about what would happen to the children of parents with learning difficulties and wanted an outcome that did not involve any risks (which might mean them being placed away from their family); expected parents with learning difficulties to be 'perfect parents' and had extremely high expectations of them. Different professionals often had different concepts of parenting against which parents were assessed. Parents' disengagement with services, because they felt that staff had a negative view of them and 'wanted to take their children away' was also an issue, as were referrals to support services which were too late to be of optimum use to the family – often because workers lacked awareness of parents' learning difficulties or because parents had not previously been known to services".

(4)  This court fully accepts that parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties. The extended family can be a valuable source of support to parents and their children and the courts must anxiously scrutinize the possibilities of assistance from the extended family. Moreover the court must also view multi-agency working as critical if parents are to be supported effectively. Courts should carefully examine the approach of Trusts to ensure this is being done in appropriate cases. In particular judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents. Courts must be acutely aware of the distinction between direct and indirect discrimination and how this might be relevant to the treatment of parents with learning difficulties in care proceedings. In particular careful consideration must be given to the assessment phase by a Trust and in the application of the threshold test.

(5)  Parents must be advised by social workers about their legal rights, where to obtain advice, how to find a solicitor and what help might be available to them once a decision has been taken to pursue a care application. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. Parents with learning disabilities should be advised of the possibility of using an advocate during their case e.g. from the Trust itself or from Mencap and clear explanations and easy to understand information about the process and the roles of the different professionals involved must be disclosed to them periodically. Written information should be provided to such parents to enable them to consider these matters at leisure and with their advocate or advisers. Moreover Trusts should give careful consideration to providing child protection training to staff working in services for adults with learning disabilities. Similarly those in children's services need training about adults with learning disabilities. In other words there is a strong case to be made for new guidelines to be drawn up for such services working together with a joint training programme. I endorse entirely the views of the Guardian ad Litem in this case when she responded to the "Finding the Right Support" paper by stating:

"As far as I am aware there are no 'family teams' in the Trusts designated to support parents with a learning disability. In my opinion this would be a positive development. The research also suggests that a learning disability specialist could be designated to work within family and childcare teams and a child protection specialist could be designated to work within learning disability teams. If such professionals were to be placed in the Trusts in Northern Ireland they could be involved in drawing up a protocol for joint working, developing guidelines, developing expertise in research, awareness of resources and stimulating positive practice. They could also assist in developing a province-wide forum that could build links between the Trusts, the voluntary sector and the national and international learning disability community."

(6)  The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them. Advocates can play a vital role in supporting parents with learning difficulties particularly when they are involved in child protection or judicial processes. In the current case, the court periodically stopped (approximately after each hour), to allow the Mencap representative to explain to the parents what was happening and to ensure that an appropriate attention span was not being exceeded. The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system including LAC reviews. All parts of the Family justice system should take care as to the language and vocabulary that is utilized. In this case I was concerned that some of the letters written by the Trust may not have been understood by these parents although it was clear to me that exhortations had been given to the parents to obtain the assistance of their solicitors (which in fact was done). In terms therefore the courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professional’s ineffectiveness in engaging with the parents in appropriate terms. Courts must not rush to judge, but must gather all the evidence within a reasonable time before making a determination. Steps must be taken to ensure that parents have a meaningful and informed access to reports, time to discuss the reports and an opportunity to put forward their own views. Not only should the hearing involve special measures, including a break in sessions, but it might also include permission that parents need not enter the court until they are required if they so wish. Moreover the judges should be scrupulous to ensure that an opportunity is given to parents with learning disabilities to indicate to the court that something is occurring which is beyond their comprehension and that measures must be taken to deal with that. Steps should also be taken throughout the process to ensure that parents with learning disabilities are not overwhelmed by unnecessarily large numbers of persons being present at meetings or hearings.

(7)  Children of parents with learning difficulties often do not enter the child protection system as the result of abuse by their parents. More regularly the prevailing concerns center on a perceived risk of neglect, both as the result of the parents' intellectual impairments, and the impact of the social and economic deprivation commonly faced by adults with learning difficulties. It is in this context that a shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully and why their children should often be taken into care. At its simplest, this means a court carefully inquiring as to what support is needed to enable parents to show whether or not they can become good enough parents rather than automatically assuming that they are destined to fail. The concept of "parenting with support" must move from the margins to the mainstream in court determinations.

Munby P entirely endorsed those paragraphs, to the extent that he appended them in full to the end of his judgment, saying at [28]

'*I commend his powerful words to every family judge, to every local authority and to every family justice professional in this jurisdiction*.'

The keen Gresham reader might ask how this squares with the directive to avoid delay when determining the future of a child and to conclude proceedings within a 26 week trial timetable: and any application to extend will be subject to rigorous judicial scrutiny, must be necessary and an applicant must demonstrate why it is essential and may affect the courts final decision.

**Key points emerging** in case law and practice in the higher courts are as follows:

* + - * 1. People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives.
        2. Parents with learning difficulties can often be "*good enough*" parents when provided with the ongoing support they need. The concept of "*parenting with support*" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties.
        3. Judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents.
        4. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity.
        5. The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them…The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system.
        6. All parts of the Family justice system should take care as to the language and vocabulary that is utilized.
        7. The courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals' ineffectiveness in engaging with the parents in appropriate terms.
        8. A shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successful. The concept of "*parenting with support*" must move from the margins to the mainstream in court determinations.

**My view:** If it is possible to extract one principle above the others from Gillen J's paragraphs and Munby Ps appraisal of them it is the importance of the concept of '*parenting with support*.'

Munby P addresses this specifically at, saying the concept is '*crucial'*, and represents the positive and broad obligation upon the state to provide the specific support that is needed for parents to retain the care of their child (ren).

The question would then become whether the parents, if provided with all the necessary support and services, would be able to provide their child (ren) with adequate care and parenting in a setting which promotes their welfare and does not cause harm.

Where focus is put on whether the child needs '*good enough'* parenting or '*better than good enough'* parenting Munby P preferred not to rely on this distinction and instead explained that in circumstances where a child has needs beyond those of a normal child then what constitutes '*good enough'* parenting, for that particular child, is different from what it might be in other cases.

In essence the approach to be taken by social services and the family court system amounts to this: a child should not be removed simply because the package of support in place is so extensive that a substantial amount of the practical parenting tasks are shared with professionals.

'*Reasonable adjustments'* may be very extensive, but '*the fact that such adjustments are made, and that such parents may be receiving a high level of help and support, does not, they say, mean that they are not bringing up their children*.'

For Munby P two issues required underlining:

*“People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasizes the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens …*

*This court fully accepts that parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties … judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents."*

**A Tentative Conclusion: Parents with Learning Difficulties**

The last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice. This policy is right, not only for the individual, since it gives due respect to his or her personal autonomy and human rights, but also for society at large, since it is to the benefit of the whole community that all people are included and respected as equal members of society. One consequence of this change in attitudes has been a wider acceptance that people with learning disability may, in many cases, with assistance, be able to bring up children successfully. Another consequence has been the realisation that learning disability often goes undetected, with the result that persons with such disabilities are not afforded the help that they need to meet the challenges that modern life poses, particularly in certain areas of life, notably education, the workplace and the family.

To meet the particular difficulties encountered in identifying and helping those with a learning disability in the family, the government published in 2007 "Good Practice Guidance on Working with Parents with a Learning Disability".[[25]](#footnote-25)

Good practice guidance was required because there is little evidence of effective joint working between adult and children's services and practitioners in each area rarely have a good working knowledge of the policy and legislative framework within which the other is working. Local authorities frequently do not take account of the fact that, if children are to be enabled to remain in their own families, a specialist approach to a parent with a learning disability is absolutely central to any work that is done, any protection which is offered and any hope of keeping the family together.

The 2007 guidance pointed out that a specialised response is often required when working with families where the parent has a learning disability; that key features of good practice in working with parents with a learning disability include:

(a) Accessible and clear information,

(b) Clear and co-ordinated referral and assessment procedures,

(c) Support designed to meet the parent's needs and strengths,

(d) Long-term support where necessary, and

(e) access to independent advocacy; that people may misunderstand or misinterpret what a professional is telling them so that it is important to check what someone understands, and to avoid blaming them for getting the wrong message; that adult and children's services and health and social care should jointly agree local protocols for referrals, assessments and care pathways in order to respond appropriately and promptly to the needs of both parents and children; and that, if a referral is made to children's services and then it becomes apparent that a parent has a learning disability, a referral should also be made to adult learning disability services.

The guidance also stresses that close attention should be paid to the parent's access needs, which may include putting written material into an accessible format, avoiding the use of jargon, taking more time to explain things, and being prepared to tell parents things more than once.

**Why Is this Important?**

The range of powers the court possesses for intervention in, and possible deprivation of, a family’s private life are wide-ranging and can be life-long. That is why we properly have a statutory barrier to consider before state intervention is permitted.

## Care isn’t a panacea, nor is adoption.

Long term foster care involves being a ‘looked after child’: the state is the corporate parent. The state’s parental responsibility ‘trumps’ the parents. A Local Authority delegates parenting to a foster carer. The child will be subject to statutory visits from the local authority, undergo health medicals, and be identified as a child in care on official forms, in education for example. They will not be living with a ‘mum/dad’ like other school friends are. There may be tension between a birth family who continue to see their child but aren’t allowed to look after the child they see in contact and the child is asking why and wanting to go home. Foster placements break down. Other children may move in that change the dynamic of the household. Foster carers are paid professionals, it is a job they undertake to do, there are various standards of skills and support and, hence, how good they are and how good a fit with the child they can be. Foster carers perform a hugely important role in society and the demands on them cannot be under estimated.

By the time care proceedings are coming to an end and adoption is a realistic possibility, the flaws of the parents and extended family have been explored and flaws laid bare. But what of the family the child is to move to? Is it going to be a match that works? How old is the child? Can it transpose its attachments made (to parents, to temporary foster carers) to another family? How much damage has been suffered by the child already? Are there issues under the surface that may break and shatter the adoptive parent’s hopes of creating a stable and loving family unit for ever? When adoption works it is, without doubt, a phenomenally positive experience for a child who would otherwise be in state care or in an unsafe family home for a child who would otherwise be irreparably harmed by abuse or neglect and enter adulthood ( and parenthood) disadvantaged by their own experiences as a child.

Adoption can provide a rich, rewarding, loving, nurturing ‘forever’ home. But adoption places a child who has already experienced change and potential neglect with carers who , often have had no direct experience of bringing up a child yet they are taking on a vulnerable child who may come to them with inherited problems that they have not, frankly and fully, been made aware of. The support open to adopters is variable. Placements can be placed under acute stress in adolescence when identity may become an acute. Adoptions can fail.

## Very recently one of our most senior and respected family judges considered the issues of adoption in **The Bridget Lindley OBE Memorial Lecture** **2017 entitled ‘Holding the risk: The balance between child protection and** **the right to family life’.**

## I urge you to read it. Please. It is thoughtful and thought provoking and searingly honest about issues that need to be addressed when making choices about permanent separation of a child from their family and what the future holds for them.

## [Lecture by Lord Justice McFarlane: Holding the risk: The](https://www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf) balance between child protection and the right to family life:

<https://www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf>

The fundamental principle, as explained in *Re B*, is, and remains, that, where there is opposition from the parent(s), the making of a care order with a plan for adoption, or of a placement order, is permissible only where, in the context of the child’s welfare, “nothing else will do”. As Baroness Hale of Richmond said in **Re B, para 198**:

*“The test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child’s welfare, in short, where nothing else will do”.*

It is wrong and unacceptable for society to allow children to languish in care, being moved from carer to carer rather than being found a new permanent home, when it is clear that their parents are incapable of looking after them. But reaching this conclusion, given its profound and irreversible consequences for parent and child, requires decision-making of the utmost rigour because adoption is permanent. It legally severs the tie between the biological parent and the child. It is rare for any direct contact post adoption to be recommended. It is certainly almost never (if ever) ordered by the court against the wishes of an adoptive family.

When a decision is made to remove a child from its family it is because that family cannot offer ‘good enough ‘parenting to that child. The court must not look for perfect parenting. Sometimes it may well be below par. Parents make mistakes and parents can bring many flaws to the parenting process the question is whether their action (or inaction) exposes the child to the risk of serious harm that cannot be dressed by protective measures.

As Baroness Hale explained in the celebrated Supreme Court decision ***In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33:***

*We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the state does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical and mental illnesses or who espouse antisocial political or religious beliefs.*

Detractors of the Human Rights Act – and the Convention – focus invariably on obstacles to deporting foreign preachers or proponents of hate. It is possible to acknowledge such frustrations and but it is worth taking pause to contemplate that there is a good deal more to the Human Rights Act. In these cases, Article 8 is deployed to moderate the exercise of a draconian state power (what decision could matter more to a parent than the loss of their child?), and to provide those on the receiving end – especially the inarticulate or the unpopular – with the means to challenge its use. In an honest appraisal of the Human Rights Act, this line of jurisprudence must surely be counted as a plus.

**Closing Remarks Transparency: the End of Year 1**

My motivating factor in taking on this Professorship was to walk you through the corridors of the Family Justice System, introducing you to some of the most emotive and complex issues which have to be grappled with within its court rooms. My seminar programme this year centred on the theme of ‘transparency’- endeavouring to open the door to the family court so that the public gains a greater understanding of those it serves and how it functions. That motivation will underscore all I say in subsequent lectures.

The common thread that unites all the decisions made in a family court is the welfare of the child. It is the courts paramount consideration. Anyone that does this type of work does it as a vocation. It exposes you to graphic images and tales of abuse that you would not dream any person was capable of inflicting upon a vulnerable child.

Child abuse is the stuff of nightmares: just as being falsely accused of harming your child is.

As I said at the outset of this series and have sought to underscore in those delivered since: We no longer live in an age where a child can be treated as a chattel. From the point of its birth the child has rights of its own to live a life without being subjected to significant harm and abuse within its family. That ‘right’ matters more than the ‘right ‘of his or her parents to care for their child if by so doing the child has or may suffer serious harm which has or may blight its healthy development.

The legal aid lawyers involved in these cases play a crucial part in enabling the court to come to best decision for a child. If we are acting for the accused parents we face a case where the Local Authority has already persuaded the court that they have reasonable grounds to be in proceedings. The parent can’t walk away unless they walk away from having any role in their child’s future. We, their lawyers, have to gain their respect and trust out of court to deliver the best representation in court. We may have to move from simple ways of communicating with a client with profound disabilities outside court and shift to specialised language in court when we cross examine the experts: the barrister seeks to become a mini expert in ophthalmology, pathology, neuro pathology, osteo-pathology, radiology, genetics, burns and bites, psychiatry and psychology. We are the bridge of communication between client, their case and the court room.

As I said at the outset when introducing my working world to you, the Gresham audience, the world of serious child abuse that I work in is stressful, chaotic, unpredictable, sometimes sordid and brutal, often sad, sometimes tragic. What you read, see and hear as can tarnish and even scar you. But what I and my colleagues do and who we do it for can also inspires us and make us proud to do the work we do.

I hope that this opening series of lectures have done a little to open the court room door and that it has triggered an interest that will encourage you to return for my next series starting in September when intend to explore diversity in the family jurisdiction.

You can review the whole series of my lectures at

<https://www.gresham.ac.uk/series/when-worlds-collide-the-family-and-the-law/>

Or individual lectures below:

<https://www.gresham.ac.uk/lectures-and-events/sex-death-and-witchcraft-what-goes-on-in-the-family-court-room>

<https://www.gresham.ac.uk/lectures-and-events/is-one-individuals-radicalism-anothers-right-to-free-speech>

<https://www.gresham.ac.uk/lectures-and-events/when-legal-worlds-collide>

<https://www.gresham.ac.uk/lectures-and-events/guilty-until-proven-innocent>

<https://www.gresham.ac.uk/lectures-and-events/expert-witness-a-zero-sum-game>

© Professor Jo Delahunty QC, 2017

1. www.legislation.gov.uk/ukpga/1989/41/section/17 [↑](#footnote-ref-1)
2. Please see my previous lecture ‘Sex Death and Witchcraft’ and Crime and Punishment lectures 1 & 2, for an explanation of the stages and terms of such applications [↑](#footnote-ref-2)
3. See three key decisions***, K and T v Finland***[(2001) 36 EHRR 18](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/2001/465.html), **R and H v United Kingdom** [(2012) 54 EHRR 2](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/2011/844.html), [[2011] 2 FLR 1236](http://www.bailii.org/cgi-bin/redirect.cgi?path=/eu/cases/ECHR/2011/844.html),[[1]](http://www.bailii.org/ew/cases/EWCA/Civ/2013/1146.html#note1) and **YC v United Kingdom (2012) 55 EHRR 967**, are set out by the Supreme Court in *In re B* ***(A Child) (Care Proceedings: Threshold Criteria)*** [[2013] UKSC 33](http://www.bailii.org/uk/cases/UKSC/2013/33.html), [[2013] 1 WLR 1911](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKSC/2013/33.html). [↑](#footnote-ref-3)
4. <http://www.legislation.gov.uk/ukpga/1989/41/contents> [↑](#footnote-ref-4)
5. http://www.legislation.gov.uk/ukpga/2002/38/contents [↑](#footnote-ref-5)
6. as Baroness Hale pointed out in ***Down Lisburn Health and Social Services Trust and another v H and anothe****r* [[2006] UKHL 36](http://www.bailii.org/uk/cases/UKHL/2006/36.html), para 34, [↑](#footnote-ref-6)
7. Pursuant to , Section 52(1)(b) of the Children and Adoption Act 2002 [↑](#footnote-ref-7)
8. *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [[2008] 2 FLR 625](http://www.bailii.org/cgi-bin/redirect.cgi?path=/ew/cases/EWCA/Civ/2008/535.html), paras 120, 125. [↑](#footnote-ref-8)
9. derived from s 1(5) of the 1989 Act, read in conjunction with s 1(3)(g), and now similarly embodied in s 1(6) of the 2002 Act, [↑](#footnote-ref-9)
10. See Lord Neuberger in *Re* B (A Child) [2013] UKSC 22. (paras 77, 104), [↑](#footnote-ref-10)
11. As Ryder LJ made plain in Re CM v Blackburn with Darwen BC (2014 EWCA Civ 1479 [↑](#footnote-ref-11)
12. (Re KD [1988] AC 806; Re W [1993] 2FLR 625). [↑](#footnote-ref-12)
13. As Lady Hale said (para 198) [↑](#footnote-ref-13)
14. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long. [↑](#footnote-ref-14)
15. [A LOCAL AUTHORITY v X & 5 ORS (2015)](https://www.lawtel.com/UK/Searches/5252/AC0147415) It would be inappropriate to delay a decision whether to make placement orders in respect of three siblings under three years old in order to carry out further parenting work with the mother who had mental health difficulties. Any further work would not improve her ability to parent the children herself and she would require professionals to provide such levels of daily support that they would effectively be doing the parenting.

    <http://www.theadvocatesgateway.org/images/toolkits/10-identifying-vulnerability-in-witnesses-and-parties-and-making-adjustments-2017.pdf> [↑](#footnote-ref-15)
16. <http://www.theadvocatesgateway.org/images/toolkits/12-general-principles-when-questionning-witnesses-and-defendants-with-mental-disorders-2014.pdf> [↑](#footnote-ref-16)
17. <http://www.theadvocatesgateway.org/images/toolkits/13-vulnerable-witnesses-and-parties-in-the-family-courts-2014.pdf> [↑](#footnote-ref-17)
18. <http://www.theadvocatesgateway.org/images/toolkits/17-vulnerable-witnesses-and-parties-in-the-civil-courts-2015.pdf> [↑](#footnote-ref-18)
19. <http://www.theadvocatesgateway.org/images/toolkits/15-witnesses-and-defendants-with-autism-memory-and-sensory-issues-2015.pdf> [↑](#footnote-ref-19)
20. <http://www.theadvocatesgateway.org/images/toolkits/3-planning-to-question-someone-with-an-autism-spectrum-disorder-including-asperger-syndrome-2016.pdf> [↑](#footnote-ref-20)
21. <http://www.theadvocatesgateway.org/images/toolkits/4-planning-to-question-someone-with-a-learning-disability-141215.pdf> [↑](#footnote-ref-21)
22. <http://www.theadvocatesgateway.org/images/toolkits/5-planning-to-question-someone-with-hidden-disabilities-specific-language-impairment-dyslexia-dyspraxia-dyscalculia-and-adhd-141215.pdf> [↑](#footnote-ref-22)
23. <http://www.theadvocatesgateway.org/images/toolkits/11-planning-to-question-someone-who-is-deaf-2016.pdf> [↑](#footnote-ref-23)
24. [↑](#footnote-ref-24)
25. Many local authorities have adapted and updated this in subsequent years [↑](#footnote-ref-25)