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The 30th Anniversary of The Children Act 1989:
Is it Still Fit for Purpose?

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To anyone who is interested in the rights of a child, the value of 'family' and the many ways in which children can be pushed and pulled between adults (whether they be carers or professionals) the Children Act is the 'go to' piece of legislation that the courts look to resolve disputes. The Act was introduced into Parliament in 1988 and received Royal Assent in autumn of 1989. 2019 marks its 30th anniversary.

The Act has seen the coming and going of six Prime Ministers (4 Conservative, 2 Labour), and six Presidents of the Family Division. [1] In three decades it has straddled periods of fiscal wealth smothered by sustained austerity affecting the financial support for the Act that is required to translate its principles into good practice. Perhaps more significantly, The Act has lived through three decades of change marked by seismic shifts in the composition of the family within society that the Act seeks serve. As Baroness Hale said[2] , "The Act was crafted to serve all children, not just those who suffer neglect and abuse." The concept of the nuclear "family" that was the norm in 1989 is now a diverse reality. We have surrogacy, same sex marriage, civil partnership, and sexuality is no longer binary. We have had to face the challenges posed to children by the explosion of the internet affecting our children's exposure to sexuality and religious extremism.

In this lecture I intend to explore whether the principles that underpinned the Act's legislative structure have withstood the test of time and the challenges it has faced. If it has failed to protect children, is that the fault of those behind the drafting of the legislation or is it an illustration of how the infinite potential for human error and ill treatment tests the limits of a professional's ability to properly apply the legislation?

My oral delivery of this lecture is to be seen as a companion to this written piece of work. The two overlap but are designed for two, complementary purposes.

This document sets out the thinking behind the Children Act, its craftsmanship, its key components and contrasts them with the legal and societal challenges it has faced since it became law. It is a research-heavy piece of work[3]. The oral lecture is intended to pick out key points of principle, practice and politics, so as to throw out issues for debate in a way that can engage the interest of the public as well as the lawyers who live and breathe the Act.

I hope that you will access both mediums.

This written lecture offers a four part analysis:

Part I: The Development of the Children Act 1989

Part II: Key Features of the Children Act

[1] 11.1.188, Sir Steven Brown, 11.10.99< Dame Elizabeth Butler-Sloss, 7.4.05 Sir Mark Potter, 13.4.10 Sir Nicholas Wall, 11.1.13 Sir James Munby and our incumbent President Sir Andrew McFarlane

[2] "In Defence of the Children Act" Archives of Disease in Childhood 2000 vol 83, issue 6 463

[3] With thanks to Frankie Sharma, research assistant of 4 PB, for his excellent assistance.

Part III: Major Reforms to the Children Act

Part IV: The Outcome: Has the Children Act Stood the Test of Time?

PART I: The Development of the Children Act 1989

(i) Its Genesis

- In their report "Children in Care" (1984), the Social Services Committee recommended a review of the body of statute law, regulations and judicial decisions relating to children.[4]
- The Conservative Government responded by setting up the Inter-Departmental Working Party on the Care of Children (IDWP) to identify options for the codification and amendment of the public law governing the protection of children.
- During 1985, IDWP, with the aid of the Commission's legal analysis, produced 12 interim discussion papers and finally the "Review of Child Care Law" which made 233 detailed proposals for reform of the public law.
- The "Review of Child Care Law"[5] was a joint venture produced collaboratively between a team from the Department of Health and the Law Commission, represented by Rupert Hughes and Brenda Hale (now President of the Supreme Court) respectively
- In 1988 the Government published its conclusion on public law in a White Paper while the Commission produced its final recommendations in the 'Review of Child Law, Guardianship and Custody' report. It contained a draft Bill which, in addition to covering the private law, also demonstrated how a comprehensive and coherent code on the upbringing and protection of children, which fused the public and private law, might be achieved.[6]
- The Children Bill, which was based on that draft, was introduced into Parliament in the autumn of 1988 and received Royal Assent in autumn of 1989.

(ii) Its Aims: [7] "To consolidate, clarify and reform"[8]

Lord Chancellor (Lord Mackay of Clashfern):

> *"**The Bill in my view represents the most comprehensive and far reaching reform of child law which has come before Parliament in living memory**. It brings together the public and private law concerning the care, protection and upbringing of children and the provision of services to them and their families."*[9]
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> *"Almost a hundred years ago the Prevention of Cruelty to, and the Protection of, Children Act 1889 put on a statutory basis for the first time a series of offences against children. During the century since then parts of our present framework have been constructed and developed but usually in a rather uncoordinated way. All those provisions of the main Acts which are still extant are reflected in the Bill with the exception of adoption, which is a specialised subject. Necessarily there will be some Acts concerning children, such as legislation relating to employment of children and specialised disablement provisions, with*

[4] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c488 [https://api.parliament.uk/historic-hansard/lords/1988/dec/06/children-bill-hl]
[5] "'Review of Child Care Law: Report to ministers of an interdepartmental working party" (1985) [https://archive.org/stream/op1275285-1001/op1275285-1001_djvu.txt],
[6] Much of this detail regarding the history of the creation of the Act is taken from Peter G Harris excellent article "The Making of the Children Act: A Private History," December [2006] Fam Law [1054-5]
[7] *Hansard: Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 cc487-540, 3.14 p.m.*
[8] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c496
[9] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c488 [https://api.parliament.uk/historic-hansard/lords/1988/dec/06/children-bill-hl]

which we deal by reference, but by far the greater part of the statute law will be here in a form which is ***simpler, more accessible*** *to those who work with it and* ***more comprehensible****."*[10]

In setting out the "**guiding principles for reform of the public law on children**", the Lord Chancellor identifies them as follows:

"The prime responsibility for the upbringing of children rests with the parents, but in cases of need the State should be ready to help, especially where doing so lessens the risk of family breakdown. Services to families in need of help should be arranged in voluntary partnership with the parents, and the children enabled to continue their relationship with their families where possible. Parents' legal powers and responsibilities for caring for a child should only be transferred to a local authority following a full court hearing and then only where there has been harm or there is risk of harm to the child. Though the interests of the child are the primary concern, parents should be able to be properly represented and should therefore be full parties in court proceedings in addition to the child. Emergency powers to remove a child should be of short duration and subject to court review. Finally, the legal responsibilities of local authorities caring for a child taken away from home should be clear. The powers and responsibilities of parents in these circumstances should also be clear."[11]

The Bill will, in particular, ***establish a framework of rights and responsibilities, with which to see that children in need receive the care, upbringing and protection they require, and that parents and others with an interest in the child play a full part in those crucially important decisions.****"*[12]

(iii) The Political Context: Child abuse scandals and the Inquiry into Child Abuse in Cleveland 1987

Baroness Hale, in a lecture marking the 40th Anniversary of the Family Rights Group in 2014, discussed the social and political backdrop to reform[13]:

"Throughout the 1980s the headlines screamed in two directions. There were terrible scandals, such as those of Jasmine Beckford, Kimberley Carlile and Tyra Henry, where vulnerable children had been returned to or left at home to die at the hands of their parents or, more often, their parents' partners. Social workers were not doing enough to protect them. There were studies showing that, if a child was in the so-called voluntary care of a local authority for 6 months or more, the chances of that child ever returning home were slim, but not enough was being done either to find a permanent new family for her or to find a way of returning her safely to her family"

"This was not a climate in which it was easy to argue that children were members of families, that the whole family was important to them and that the family might be a valuable resource in providing the care which for whatever reason the parents could not provide.*"*

"Then, perhaps fortunately from this point of view, along came the Cleveland Child Abuse scandal. This showed that social workers and other professionals could sometimes be ***over-enthusiastic in taking children away from their families*** *and pointed up all the weaknesses in the legal position,* ***including that children could be removed without notice to a place of safety and kept there for up to 28 days with nothing that they or the parents could do to challenge it.*** *The European Court of Human Rights also contributed some important decisions emphasising* ***the need for procedural safeguards*** *when interfering in family life. The climate swung in favour of law reform."*[14]

Per Lord Justice Butler-Sloss:

"We were told of the inadequacy of the present child care legislation and its ***failure to balance the interests of the child and the rights of parents.*** *The shortcoming in the legal framework was seen by the Associations to have an effect on the way in which public opinion reacted to issues related to child abuse."*[15]

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[10] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c488
[11] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c489
[12] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c496
[13] Baroness Hale of Richmond 'FRG 40th Anniversary ' (2014) Fam Law 1658
[14] Baroness Hale of Richmond, "FRG 40th Anniversary", [2014] Fam Law 1658
[15] Lord Justice Butler-Sloss, "Inquiry into Child Abuse in Cleveland 1987", p.216, paragraph 13.31, quoted in Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c496

(iv) What the Children Act replaced

At least 5 Acts were consolidated in the passage of the Children Act 1989: the Children and Young Persons Acts of 1933, 1963 and 1969; the Children Act 1975; and the Child Care Act (a consolidating Act) of 1980[16]. Prior to 1989 it was complicated for practitioners to identify which statutes were in force, as neither of the two major Acts (1969 and 1975) had been fully implemented and several sections of the 1933 and 1963 Acts had still to be taken into account with cross-references between statutes. In recommending a review of child care law, the Select Committee stated that its aim should be "the production of a simplified and coherent body of law comprehensible not only to those operating it but also to those affected by its operation. **It is not just to make life easier for practitioners that the law must be sorted out; it is for the sake of justice that the legal framework of the child care system must be rationalised."**[17]

Baroness Hale sent a chill down her audience's spines in her lecture marking the 40th Anniversary of the Family Rights Group when she reminded them of what The Children Act had replaced:

1. **"Care proceedings were modelled on criminal proceedings against a juvenile delinquent.** So the child was a party to the proceedings but the parents were not. It was assumed that the parents would represent the child, but their interests might be very different, as the tragedy of Maria Colwell showed.

2. **Local authorities could assume parental rights over the children in their so-called 'voluntary care' simply by the councillors passing a resolution to do so, without consulting or involving the parents or the family at all**. Their right to challenge this pre-emptive strike in a juvenile court was not much use.

3. Local authorities had **no obligation to consult the child or the family about their decisions, for example, as to where the child should be placed, or whether to keep the child in touch with her family.** There was no way of challenging even the total refusal of all contact between them, until a limited right was introduced in the 1980s.

4. Wider family members, such as grandparents, aunts and uncles, had no part to play in all of this. They were not consulted, had very little opportunity to make their voices heard, and were generally thought to be part of the problem rather than part of the solution."[18]

Proposals for Reform could no longer be allowed to gather dust in the corridors of Whitehall. The Children Bill passed into our statute books.

PART II: Key Features of the Children Act 1989

This is a purely personal take on key points; they are invariably influenced by my practice and the reasons I chose to specialise in child protection public law. I was called to the Bar in 1986 and can well remember the chaos of going to the Juvenile court and the struggle to get magistrates to switch between a frame of mind focussed on juvenile delinquency and adult defendants where "guilt' was the issue, to the concept of harm and need within a family struggling to cope or in denial. There was a chasm between judgment at the sharp edge and then the grandeur of the High Court. The only common feature was the sense that the State held all the cards. A trip to the Strand became the well-trodden path to Wardship for local authorities to (over)use.

[16] "Review of Child Care Law: Report to ministers of an interdepartmental working party", September 1985 [https://archive.org/stream/op1275285-1001/op1275285-1001_djvu.txt] [p. 2, para. 1.6]
[17] "Review of Child Care Law: Report to ministers of an interdepartmental working party", September 1985 [https://archive.org/stream/op1275285-1001/op1275285-1001_djvu.txt] [pp. 3-4]
[18] Baroness Hale of Richmond, "FRG 40th Anniversary", [2014] Fam Law 1657-8

(i) The Child as An Independent Entity

My over-riding memory of the pre-1989 court experience was how the child was squeezed into parts made for adults: adults spoke over and for them. They had no status. They were talked about, over; not with.

For me, the most important step taken by the Act was giving the child in public law proceedings separate party status from the parents and the State, complemented by high quality representation through the Guardian Ad Litem Service and independent legal advice that went with their inclusion in proceedings. Meanwhile, in private law proceedings, scope was given for the joining of the child if necessary for the fair resolution of the issues. I've dealt with the ways in which 'hearing' the child is now addressed in my lecture in the 2017/8 series **'The Child in the Family Court Room: Whose Child Is It Anyway.'**[19] I won't repeat those points here but they are to be read into this lecture.

To avoid repetition I will instead look at some of the factors that exemplify the Act's core ethos that the child's welfare is paramount and must be kept at the centre of the court's deliberations: it is not an accident of design that Section 1 is the 'Welfare Principle'.

(ii) The Child's Welfare

Section 1 of the **Children Act** sets out three general principles: the welfare of the child is paramount; delay is likely to prejudice the welfare of the child; and the court shall not make an order unless to do so would be better for the child than making no order (the 'No Order' Principle).

As the Lord Chancellor explained to Parliament:

> *"There is the prohibition in subsection (4) against courts making any order under the Bill unless that would be better for the child than making no order. There is a danger that a child may be put in local authority care because of inadequate home circumstances but without evidence that the order would improve the situation. And in family proceedings the Law Commission noted a tendency to make orders simply as part of the divorce package. This provision aims to discourage both those practices."*[20]

Sir Andrew McFarlane described the introduction of this principle as being "**a powerful indicator that the old days of judicial paternalism were well and truly over.**"[21]

(iii) Children Are Not 'Possessions' Over Which A Parent Has 'Custody': The Concept of Parental Responsibility

The introduction of the concept of "parental responsibility" marked a change in the way the Act conceived children in relation to their parents. The Act moved *away* from seeing one parent as having greater "rights" over a child than another, and the child as a possession to be fought over. "Parental responsibility" removed the discourse of possession inherent in the suggestion that one parent can have greater "rights" over a child than another. Both parents now had a responsibility to allow the involvement of the other parent in the child's life.[22] As the Lord Chancellor told Parliament:

> *"The fundamental concept in this area of law is no longer to be expressed variously in terms of rights, duties, authority or even powers of parents, but simply as "parental responsibility." The phrase, recommended by the Law Commission, is apt to my mind.* ***It emphasises that the days when a child should be regarded as a possession of his parent – indeed when in the past they had a right to his services and to sue on their loss—are now buried forever."***[23]

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[19] April 2018: https://www.gresham.ac.uk/lectures-and-events/the-child-in-the-family-court-room-whose-child-is-it-anyway

[20] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c490

[21] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014 [https://www.judiciary.uk/wp-content/uploads/2014/06/speech-by-rt-hon-sir-andrew-mcfarlane-memorial-lecture.pdf]

[22] Cf Sir Andrew McFarlane notes that whilst the definition of "parental responsibility" under Section 3 includes "rights, duties, powers responsibilities and authority," these rights refer to "rights as between parents and non-parents." He notes: "They are the right to exercise the responsibility and do not include the right to override the status of the other parent."

[23] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c490

If we look to one of the architects to explain the concept, Baroness Hale said:

> *"[T]he [Act] assumes that bringing up children is the responsibility of their parents and that the State's principal role is to help rather than to interfere. To emphasise the practical reality that* ***bringing up children is a serious responsibility, rather than a matter of legal rights,*** *the conceptual building block used throughout the [Act] is "parental responsibility." This covers the* ***whole bundle of duties towards the child, with their concomitant powers and authority over him, together with some procedural rights for protection, against interference*** *[…] it therefore* ***represents the fundamental status of parents."***[24]

(iv) Custody? Access? Parental Responsibility through the Child Arrangement Orders: Section 8 Orders

This is worthy of a short history lesson: I found it a salutary reminder of how far we have travelled in terms of fairness and equality (that's not to say we don't have further to go). I fail to see how anyone could challenge the advances that The Children Act introduced. As Sir Andrew McFarlane has said, "*The words "custody" and "access" are devoid of emotional content; they defined a rigid physicality and have little or nothing to do with the psychological and emotional relationship between parent and child.*" [25] They were replaced by 'parental responsibility' and 'spending time with' a parent.

- At the beginning of the 20th century, the father of a legitimate child had exclusive right to exercise parental authority over his child. If the child was illegitimate, it was the mother who had sole parental authority.
- A divorced wife could acquire legal authority by court order (however if she had committed adultery, she would have no prospect of being granted authority).
- If a dispute over a child came to court, the court would award "custody" to one or other parent. Sir Andrew McFarlane put the matter in plain terms: "*The word "custody" has* ***strong connotations of possession and control****. I might place my valuable goods into the 'custody' of the bank manager; if I were a policeman I might arrest you and place you in custody.* ***Custody is a process or an arrangement that happens to things or to people whose freedom of choice has been removed following arrest."***[26]
- The other parent would generally be awarded rights of "access." Sir Andrew McFarlane noted: *"Again, the word "access" has strong physical connotations, I have a right of access across your land, or I wish to have access to the valuable goods that are in the custody of the bank.*"[27]
- The Guardianship of Infants Act 1925 gave the court a wider and more flexible jurisdiction to attribute rights to a mother with respect to a legitimate child. On divorce, the court had the power to determine issues between the parents, and for the first time stated the court was to have "the child's welfare as its first and paramount consideration."[28]
- Only the passing of Guardianship of Minors Act 1973 gave authority to both parents to act together, or autonomously, and the rights and authority of a mother and father were equal.
- Sir Andrew McFarlane described the paternalistic mind-set in how the court approached custody and access:

> "*The requirement in every divorce case for the parents physically to attend before a judge who would audit the arrangements for their children was, to my mind, as a matter of principle, highly questionable, if not downright wrong. This 'Nanny knows best' approach in any event became very draining on the resources of the court and in many cases was little more than a largely symbolic*

[24] Baroness Hale quoted in "The Children Bill: the Aim" [1989] Fam Law 217, quoted in Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[25] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[26] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[27] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[28] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014

application of the judicial rubber stamp. The requirement to attend a 'children's appointment' and for the court to express itself as 'satisfied' with the arrangements for the child was repealed by the Children Act 1989."[29]

We have now moved beyond the 1989 Act itself by introducing the concept of a child arrangement order through the reform of the Children Act 1989 on 22nd April 2014 by the Children and Families Act 2014.

"The court no longer has jurisdiction to make "residence" or "contact" orders. In their place is the more neutrally entitled "child arrangements order". This is much more, so much more, than simply an altering of labels. Firstly, it is a return to, what I perceive to be, the ***original intention of those who drew up the 1989 Act****. The new order will simply be the setting out of the nuts and bolts arrangements as between the parent for the care of their child. It should have no attribution of enhanced, or diminished, status attached to it. Parental status comes with parental responsibility and, where it is shared, it is and will always be a status of equal with one parent required to respect the status of the other."*[30]

"These changes should, and in my view must, mark the end to what I call the "Catherine Tate approach to post-separation parenting", *where the parent who holds all the trump cards, because the child is currently living with them, simply shrugs her shoulders and says to the other parent, who merely wants to see his child, "Am I bothered?" The system, the law, now requires them to be bothered. They have a responsibility to be bothered and if they persist in abdicating from that responsibility they can expect all those they encounter in and around the court system to bring them up short."*[31]

(iv) Part iii & Schedule 2 Children Act 1989: The Principle That The Best Place For A Child Is In Its Home, With Support If Necessary When The Family Are Struggling To Offer Adequate Care

The aim of the Bill: "Part III sets out the principal responsibilities of local authorities to children in their area who are in need and their families, and to children whom they look after. **It brings together in one statute the main local authority responsibilities to families with children**, including those at present set out separately in supporting the family. **Local authorities will have a new duty to promote the upbringing of children in need by their families so far as this is consistent with their welfare duty to the child himself."**[32]

Schedule 2 was designed to help children in need to continue to live with their families and generally to prevent the breakdown of family relationships.

As Baroness Hale has explained "*Partnership with parents based on agreement so far as possible will be the guiding principle."* This also applied where children are provided with accommodation under voluntary arrangements (s20 accommodation) because, for example, the parents were unable to provide suitable accommodation or care themselves.

The legislators were conscious that **"The present arrangements for reception into care often carry unwarranted association with parental shortcoming. Provision of accommodation in these circumstances should be seen as a service to the family without any stigma."**

Parents no longer have to give notice before withdrawing their children from voluntary arrangements, and authorities were no longer able to assume parental rights over children by administrative resolution.

Give these aims, how can we justify such appalling breaches of the Children Act's ethos of partnership with the pressure and imbalance of power that we see emerging in court? Two cases serve as lessons in what not to do.
Herefordshire Council v AB [2018] EWFC 10[33]

[29] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[30] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[31] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014
[32] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c491
[33] All notes adapted from summary in Family Law Week [https://www.familylawweek.co.uk/site.aspx?i=ed188876]

Keehan J considered the accommodation of two young people by Herefordshire Council under Section 20 Children Act 1989 for a period of 8 years (CD) and 9 years (GH) respectively[34][35].
CD had been accommodated by the local authority from October 2009, when he was 8 years old. Care proceedings were only brought in September 2017. GH had been accommodated from birth to the age of 9, when care proceedings were also brought in September 2017.

Keehan J criticised what he considered to be ***"two of the most egregious abuses of section 20 accommodation"*** by Herefordshire Council [1] he had encountered as a judge.

He set out the failures:

- In relation to both children, there had been several instances when care proceedings could have been started but were not, and where legal advice should have been sought by the local authority and was not.
- No clear explanation for many of these decisions was provided. Keehan J found that such *"complete inertia [was] inexplicable"* and that *"[s]uch gross failings by a local authority [were] intolerable"* [45].
- A particular decision in CD's case on 5 May 2011 that not to issue proceedings "seeking a care order would not make a significant difference to CD's care given he had been accommodated for some time" was *"fundamentally misconceived and fundamentally wrong*" [23-24].
- GH's mother had, effectively (and inappropriately), been side-lined from his life. She was 14 when she had given birth to GH, and had needed at that stage the "greatest possible" advice, support and consideration, which she had not been given [54].
- In terms of parental consent, a further failing arose in the authority's failure to give consideration to GH's mother's age when she had GH or the impact her age might have had on her ability to give informed consent to his accommodation [47].
- Further, in retaining CD in local authority accommodation after his mother had given notice to seek that he be returned to her care, the local authority had acted unlawfully and retained CD unlawfully [48].

I return to this case under Part IV: consider this a trailer.

(v) The Grounds For Making Care And Supervision Orders

This is the subject closest to my heart given that the world of child protection is where I have chosen to spend my professional life.

When I am sitting and need to reflect on the evidence I have heard and its implications for the decisions I will make, the welfare check list continues to impress me by its perspicacity and relevance. If readers need a reminder of what the s31 removal criteria is and how it is applied then scroll back to my opening series of lectures: '*When Worlds Collide: The Family and the Law'*.[36]

S31 and the s1 welfare checklist are two superb pieces of legislative drafting in my view, illustrated by contrasting and comparing practice before and after the Children Act 1989.

The Law Before The Children Act 1989

[34] http://councillors.herefordshire.gov.uk/documents/s50063232/Appendix%201%20-%20Court%20Judgment%20WR0086%2017%20and%20WR0007%2018.pdf
[35] http://councillors.herefordshire.gov.uk/documents/s50063233/Appendix%202%20-%20Court%20Judgment%20WR18Z00057.pdf
[36] https://www.gresham.ac.uk/lectures-and-events/when-legal-worlds-collide

A history lesson befitting a former academic and formidable lawyer was given by Baroness Hale in her Munkman Lecture 2013[37]. She reminded the audience that before the Children Act 1989, local authorities had "three broad avenues to compulsory intervention."[38]

1. A parental rights resolution under the Children Act 1948, later the Child Care Act 1980. These dated back to Poor Law Acts of 1889 and 1899 and enabled the poor law guardians to assume parental rights over the pauper children in their care by resolution, initially without any legal process, in cases of parental death, desertion, imprisonment, disability or unfitness...[39]

2. Care proceedings to remove a child from her home under the Children and Young Persons Act 1969. These had two main sources:

    - The Industrial Schools legislation of 19th Century which catered for children who were falling into bad associations, exposed to moral danger or beyond parental control, children who might not yet have committed criminal offences but were seen as much as a risk to society as at risk themselves.
    - The Prevention of Cruelty to and Protection of Children Act 1889, which created the offences of child ill-treatment and neglect later contained in section 1 of the Children and Young Persons Act 1933. On conviction of the parent, the court could commit the child to the care of relative or anyone else willing to have her. The 1933 Act brought these two strands – the naughty and neglected/ill-treated – under one umbrella as children in need of care and protection. The requirement of a conviction as a necessary pre-condition for intervention in cases of neglect and ill-treatment was not removed until the Children and Young Persons (Amendment) Act 1952.

    The grounds for intervention under the Children and Young Persons Act 1969 in relation to child abuse and neglect concentrated on the present tense: "his proper development **is being** avoidably prevented or neglected or his health **is being** avoidably impaired or neglected or he is being ill-treated" (s1(2)(a)). It was only possible to bring proceedings in respect of future harm if it was probable this would happen in the future, having regard to the fact either that another child in the same household had already been harmed (s1(2)(b)) or that a "schedule 1 offender" was or might become a member of the household (s1(2)(bb)).[40]

3. Committing the child to the care of a local authority in wardship or matrimonial proceedings. This was first provided for in matrimonial proceedings, and extended to wardship by s7(2) of the Family Law Reform Act 1969.

I needed to return to Baroness Hale's history lesson to be remind myself what the criterion for removal was: "there must be *'exceptional circumstances making it impracticable or undesirable for'* the child to be under the care of his parents or any other individual". This was vague enough, but the Court of Appeal held that even this did not apply where the local authority was promoting a placement with foster parents. Then according to Omrod LJ, the decision did "*turn upon what [the judge] called the 'relative merits' of the present foster parents and the mother 'in the ideal parents' stakes"* (in Re CB (A Minor) [1981] 1 WLR 379, 386, [1981] 1 All ER 16): a recipe for social engineering if ever there was one.

Some local authorities began to find wardship in the High Court an altogether more flexible and welcoming jurisdiction than care proceedings in the juvenile courts."[41] I remember the imbalance of power well from my early days at the Bar. It wasn't just going to the High Court that was intimidating for the parents (and myself) but the sense that it was a '*them and us'* regime; the local authority and the judge (the State) against the inadequate and failing parent where request for support might as well be whistles in the wind: removal was the remedy. It was an overused route to removal.

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[37] at BPP Law School, Leeds

[38] Lady Hale, "What are Care Proceedings for?", Munkman Lecture 2013 at BPP Law School Leeds, 5 September 2013, p.4 [https://www.supremecourt.uk/docs/speech-130905.pdf]

[39] Lady Hale, "What are Care Proceedings for?", Munkman Lecture 2013 at BPP Law School Leeds, 5 September 2013, p.4

[40] Lady Hale, "What are Care Proceedings for?", Munkman Lecture 2013 at BPP Law School Leeds, 5 September 2013, pp.4-5 [https://www.supremecourt.uk/docs/speech-130905.pdf]

[41] Lady Hale, "What are Care Proceedings for?", Munkman Lecture 2013 at BPP Law School Leeds, 5 September 2013, pp. 5-6

The Changes Introduced By The Children Act 1989

Lady Hale remarks that "the Review of Child Care Law was tasked with bringing some order into this confusion of processes and criteria which would **achieve an acceptable balance between respects for family autonomy and protecting the child from harm**."[42]

The resulting "threshold-criteria" of s31(2) of Children Act 1989 required:

(1) That the child is either suffering or likely to suffer significant harm; and

(2) That that harm is attributable to the care given or likely to be given to the child not being what it would be reasonable to expect a parent to give to him or to the child being beyond control.

The Act set a threshold for compulsory state intervention in family life which is more precise but wider than that of the Children and Young Persons Act 1969 and the Child Care Act 1980. It allows for intervention on the basis of future as well as actual harm. Furthermore, such harm need only be a serious possibility (rather than a probability) to pass the test."[43] As she explained:

> *"In a society governed by the rule of law (to say nothing of the European Convention on Human Rights), compulsory intervention in the lives of children and their parents must be authorised by a court after due process of law. It is not and should not be open to social workers, doctors, teachers, or anyone else simply to decree that a child should be removed into public care or adopted into another family. In several respects,* ***procedures before the Children Act were condemned by the European Court of Human Rights and needed to be amended****."*[44]

Local authorities have required regular reminders from the High Court that engaging in social engineering is not the (or a) function of the courts.

Re B - Lord Wilson (§27), Lady Hale (§179-181) [2013] UKSC 33

> *"[Counsel] seeks to develop Hedley J's point. He submits that: 'many parents are hypochondriacs, many parents are criminals or benefit cheats, many parents discriminate against ethnic or sexual minorities, many parents support vile political parties or belong to unusual or militant religions. All of these follies are visited upon their children, who may well adopt or "model" them in their own lives but those children could not be removed for those reasons.' I agree."*

Re A - Munby P [2015] EWFC 11. Wherein the (then) President expressly approved the judgement of His Honour Judge Jack in *North East Lincolnshire Council v G & L* [2014] EWCC B77 (Fam) where he said:

> *"The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts."*

(vi) Emergency Protection

"Part V of the Children Act introduced major reforms in emergency protection. The legislators sought to strike a balance between the need to protect children from harm in emergencies and the need to allow aggrieved parents to challenge action taken in respect of their children – the need for which was graphically illustrated by what happened in Cleveland. The holder of the emergency protection order was placed under a duty to take only such action as is necessary – which could leave the child where he is – and a duty to return him if his continued removal process to be unnecessary."[45]

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[42] Lady Hale, "What are Care Proceedings for?", Munkman Lecture 2013 at BPP Law School Leeds, 5 September 2013, p.6
[43] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 463 [https://adc.bmj.com/content/83/6/463]
[44] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 465
[45] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c492

The structure of the act and its wording enabled clear guidance to be given by Munby P (as he then was) on the use and abuse of EPOs. In my view the skill of the drafters and the application thereof has enabled the sections to be interpreted by judges to reflect what needed to happen in practice. When errors have been made, it is not the Act that is at fault in this as in many cases; it is the failure of those charged with applying it that leads to excessive or inadequate decision making.

Take this case as an illustration: **Re X (Emergency Protection Orders)[2006] EWHC 510 (Fam)Family Division: McFarlane J (16 March 2006)**. This case concerned care proceedings in relation to X, a 9-year old child. Previously, the local authority had held two Child Protection Case Conferences where professional concern for X was such that only a low level of intervention was proposed. On 23 November 2004 a further case conference took place to review the progress of the work undertaken and to consider whether care proceedings should be issued. At the conclusion of the meeting, there was no suggestion that the child should be removed, either immediately or at all. However, after the conference the social worker received information that the mother was at a local hospital requesting that X be seen by a doctor, despite the triage nurse concluding there was no cause for concern. Within two hours of the case conference concluding the social work team leader was giving evidence before lay magistrates in support of an application for an EPO. This application was made without notice to the parents and was granted by the justices. The child was removed from the mother's care and remained in foster care for the following 14 months under a series of interim care orders.

The LA and magistrates had failed to cite let alone apply Munby J's *X Council v B guidance* and had totally failed to have regard to respect the mother (and child's) fundamental rights under Articles 6 and 8 on an EPO application of the European Convention on Human Rights (directly applicable to the local authority's and the court's decision-making under the Human Rights Act 1998). At no stage in the proceedings did the local authority acquire medical evidence to support the allegations of induced or fabricated illness. One year after X was taken into care, the local authority abandoned its reliance upon this allegation to support care proceedings; the case proceeded on the basis of emotional abuse solely. The judge found significant flaws in the overall care proceedings, specifically the local authority's actions in obtaining an EPO. A good practice guidance in relation to EPOs is incorporated into the judgment (together with guidance on cases of induced illness and how to deal with confidential information at case conferences).

Part III: Major Reforms of The Children Act 1989 by Children and Families Act 2014

Sir James Munby:

> *"The family, though fundamental to society, has undergone dramatic changes in recent decades. There has been a striking decline in marriage. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent. Their parents may or may not be their natural parents. They may be the children of parents with very different religious, ethnic or national backgrounds. Some children are brought up by two parents of the same sex. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family."*[46]

He also heralded two key statutory reforms in particular: the eradication of unnecessary expert reports and the imposition (subject to a narrowly defined exception) of a statutory maximum of 26 weeks for the hearing of any care case.[47][48]

(i) 26 weeks

The Children and Families Act 2014 introduced the 26 week time limit on the length of cases. Section 14(3) of the Act makes numerous additions to section 32 of CA 1989.

The new section 32(3) of CA provides when drawing up a timetable for the child, the court must have regard to:

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[46] Sir James Munby, "The Family Justice Reforms", 29 April 2014 [pp.2-3]
[47] Sir James Munby, "The Family Justice Reforms", 29 April 2014 [pp. 5-6]
[48] Sir James Munby's remarks in "The Family Justice Reforms" on 29 April 2014.

(a) the impact which the timetable would have on the welfare of the child; and

(b) The impact which the timetable would have on the way the proceedings are to be conducted.

The Act included provision in s32(5) for proceedings to be extended by 8 weeks at a time (s32(8)) if the court considers it is "necessary to enable the Court to resolve the proceedings justly." Section 32(6) sets out the factors the Court must have regard to in granting an extension.[49]

(ii) Time limits for Interim Care and Supervision Orders

- Previously Interim Care and Supervision Orders could only be made for a maximum of 8 weeks initially, renewals to last no more than 4 weeks.
- Time limits (from section 38 Children Act 1989) were removed by the new Act.
- The court will be able to decide the length according to the circumstances of the case.[50]

(iii) Instruction of Experts

- It was previously routine for independent experts to be instructed to provide reports such as psychological/ psychiatric assessments of parents and children, and parenting assessments by independent social workers.
- The introduction of Rule 25.1 Family Procedure Rules (Amendment) (No.5) Rules 2012 (came into force 31 January 2013) restricted expert evidence in care proceedings to that which is "**necessary** to assist the Court to resolve the proceedings."
- Paragraph 25.6 Family Procedure Rules 2010 set out that when a party wishes to apply for permission to instruct an expert, a written C2 application must be made (and sets out the relevant information to include).[51]

Sir James Munby in April 2013 said that it was crucial to:

> *"Get a grip on the expert problem. The problem does not, of course, lie with the experts themselves. It lies in the use we make of them….Three things are needed: first a reduction in the use of experts; second, a more focussed approach in the cases where experts are needed; and, third, a reduction in the length of expert reports."*[52]

(iv) Scrutiny of Care Plans by the Court

A care plan is the document which a local authority files with the court, served on the parties, setting out its plans for the child's future, if placed under that local authority's care or supervision. The plan would embrace issues such as therapy, placement needs, contact with the birth family and support services for both the child and the birth family.

S15 Children and Families Act 2014 replaces s121(1) Adoption and Children Act 2002 and s31(3A) Children Act 1989 (which set out the court shouldn't make a Care Order until it considered the local authority's care plan for the child with the following):

> "(3A) A Court deciding whether to make a Care Order:
> (a) Is required to consider the permanence provisions [i.e. who the child is to live with long term/ adoption?] of the Care Plan for the child, but
> (b) Is not required to consider the remainder of the Care Plan, subject to s.34(11) (which requires the Court to consider the arrangements for contact with the child before making a Care Order

[49] Adapted from: https://www.creighton.co.uk/news/2014/05/28/the-children-and-families-act-2014-changes-to-public-law-care-proceedings
[50] Adapted from: https://www.creighton.co.uk/news/2014/05/28/the-children-and-families-act-2014-changes-to-public-law-care-proceedings
[51] Adapted from: https://www.creighton.co.uk/news/2014/05/28/the-children-and-families-act-2014-changes-to-public-law-care-proceedings
[52] Sir James Munby, "View from the President of the Family Division: The process of reform", April 2013 [https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/pfd-update-process-of-reform.pdf], [p. 3]

I believe this was a retrograde step. The care plan is the passport for the child as they pass into care and through the 'care' system. The child is expected to withstand multiple changes of professionals working with them, of varying degrees of competence and knowledge of their background. The care plan is the touchstone document that ensures that core welfare aims, vital for the child's development under corporate parenting, do not get lost with the passage of time. Given that the making of a care order grants the local authority parental responsibility and the parents share it (in theory), the local authority is, in reality, the dominant partner and their decisions are unilateral and final.

One cannot expect parents to be able to hold the local authority to account when promises in a care plan are not fulfilled, particularly given it is likely that the parents' parenting capabilities themselves are flawed (which is why the care order was made in the first place). That is why we have Independent Reviewing Officers: to keep a watchful and independent eye on the conduct of the care management of the child. Independent Reviewing Officers need the care plan to keep track of how the child's needs are met. The care plan is a critically important document for the child.

I was and am pleased to see that despite the legislative change above (to saying the court's scrutiny of the care plan should extend principally to contact issues), I am not the only judge who looks at all components of it to ensure that the plan is fit for purpose.

See further the President in the RE X 5 judgment in Part IV of this lecture: the President and all the parties agreed a care order was required but the case continued because the Guardian and the Court considered that the local authority's proposed care plan would place the child at life threatening risk of harm: the care plan was very much part of the judicial process of scrutiny. The phrase 'don't do as I do, do as I say' springs to mind.

(v) Introduction of Fostering for Adoption

S22C Children Act 1989 provides that when children are looked after by the local authority, the local authority must make arrangements for the child to live with a parent, a person with parental responsibility, or a person who has held a Residence Order/ has had residence of the child by way of a Child Arrangement Order immediately before the Care Order was made.

A new subsection (9A) was inserted into s22C by the Children and Families Act 2014, imposing a duty on the local authority to consider placing the child in a 'fostering for adoption' placement when adoption is being considered for the child. Its aim was to reduce the number of potential placement moves for the child by placing them with carers who were approved prospective adopters.

A local authority must first consider placing the child with an individual described in s22C(6)(a) Children Act 1989 – i.e. a relative, friend or other person connected with the child who is also a local authority foster parent. If deemed inappropriate, it must consider a fostering for adoption placement.

Where a local authority has applied for a Placement Order and the application has been refused, there is no requirement for the LA to consider fostering for adoption placements.[53]

In addition to statute and precedent we also have a library of guidance issued by The President's Office[54].

[53] Adapted from: https://www.creighton.co.uk/news/2014/05/28/the-children-and-families-act-2014-changes-to-public-law-care-proceedings

[54]

1. The Process of Reform [Crime and Courts Bill and the creation of a new single Family Court; Children and Families Bill];
2. The Process of Reform: The Revised PLO and Local Authority [the revised PLO];
3. The Process of Reform: Expert Evidence [reducing the use of expert, creating a more focused approach and reducing the length of expert reports];
4. The Process of Reform: An Update [the single Family Court; the PLO; transparency; family orders; bundles];
5. The Process of Reform: London [the Family Court in London; designated family judges; hearing centres];
6. The Process of Reform: Latest Developments [the single Family Court; the PLO; transparency; family orders];
7. The Process of Reform: Changing Cultures;
8. The Process of Reform: Private Law;

PART IV: Has the Children Act 1989 stood the test of time?

My conclusion is that the Act was an extraordinary creative act and its terms have survived the decades in most major respects.

1. Stumbling Blocks

When the system has failed children, it has not been due to a failure in drafting. Standards have not been met, in my view, because of:

(i) a lack of local authority resources earmarked for child protection and vital support services such as specialist adolescent mental health units, therapeutic placement and secure units
(ii) lack of funding for the administration of justice itself
(iii) the failure of local authorities and courts to apply the law and guidance correctly in accordance with the spirit of the Act
(iv) human behaviour that has exceeded the type and level of harm that the Act had in contemplation in 1989

(i) Resources: Meeting the Act's Ideals?

The Hansard debate in 1989 shows some clear scepticism as to whether the increased responsibilities being placed on local authorities in the Act were capable of being met, given the level of government funding being provided to local authorities.

Lord Mischcon was aware of the financial effects of the Bill but unafraid to make the clear demand that it be adequately funded:

> "*It sends a shudder down the spine of some noble Lords when we hear about resources being made available to local authorities for welfare, general purposes and other matters of great social concern. I also looked with fear and trembling at the commencement of the Bill, where it deals with the financial effects. I read these words: "The full annual cost of the Bill will therefore be between £,4 million and £,11 million of which £,4 million will fall to local authorities and between £,0 and £,7 million to courts administration and legal aid. There may also be one-off training costs for local authority staff training".* ***My second plea to the Government is that of all matters being dealt with in the financial programme they should not stint on children****."*[55]

When considering whether the high ideals set by the Children Act 1989 have been met, it is impossible to do so without recognition that in today's political climate, access to the rights and entitlements envisaged by the Act have been limited as a result of the chronic underfunding of our public services.

In 2014 Baroness Hale said:

9. The Process of Reform: Where are we?
10. The Process of Reform: The Beginning of the Future [passage of the Bills; the Family Court; the PLO 2014; the Child Arrangements Programme 2014; transparency; bundles];
11. The Process of Reform: On the Cusp of History [the revolutionary nature of the reforms];
12. The Process of Reform: Next Steps [post-implementation of reforms, in particular Child Arrangements Programme 2014; children and vulnerable witnesses; FDAC; orders];
13. The Process of Reform: an update [working groups; Legal Aid; divorce];
14. August 2016 update [rise in new care cases; settlement conferences; the 'tandem' model];
15. Care Cases – The Looming Crisis (September 2016 update
16. Children and vulnerable witnesses – where are we? (January 2017 update) [Children and Vulnerable Witnesses Working Group; children and vulnerable witnesses; special measures]
17. Divorce and money – where are we and where are we going? (May 2017 update) [advances towards digital courts; divorce reform];
18. The on-going process of reform – Financial Remedies Courts (January 2018 update)

[55] Children Bill [H. L.] HL Deb 06 December 1988 vol. 502 c497

> "***The old certainty I had throughout my professional life that things were getting better, and were going to go on getting better, has been knocked apart by recent events***. *[…] I mean the reduction in those children's services which might prevent these problems arising in the first place and allow children to stay and to develop safely with their families. I mean the reduction in access to legal services and expert advice which is a vital part of making the right decisions for vulnerable children. I mean the acceptance that child poverty is and will be a continuing reality.* ***We know that times are hard and savings have to be made, but somehow we did not expect that these would be made at the expense of the most vulnerable children in our society."***[56]

The Act provides the powers and the duties, but how are the ideals of the Act supposed to be met without the resources? They can't be, is the answer.

Re X (A Child) (No 4) [2017] EWHC 2084 (FAM), [2018] 1 FLR 1072

Re X is a coda to 5 cases : ***In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam)**, [2017] Fam 80, [2017] 2 FLR 1717, ***Re X (A Child) (No 2)* [2017] EWHC 1585 (Fam)**, [2018] 1 FLR 1041, ***Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam)**, [2018] 1 FLR 1054, ***Re X (A Child) (No 4)* [2017] EWHC 2084 (Fam)**, [2018] 1 FLR 1072, and ***Re X (A Child) (No 5)* [2017] EWHC 2141 (Fam)**.

This case was heard by the President over the course of 2 years, concluding with this coda in May 2018: it hit the headlines. X was a very disturbed teenager, excessively prone to self-harming behaviour, including many suicide attempts. The President was appalled and driven to public anger by the impossible position he was placed in, in trying to make arrangements to place a desperately unwell child in secure accommodation to protect her from harm and others from her. She was not within her parent's control: the State had assumed responsibility for her care but was not only incapable of discharging that duty but, for want of a suitable placement, were at risk of placing her at risk of life-threatening harm.

The local authority's care plan set out three contingency plans, each involving a return to the community. The guardian supported the making of a care order, but not on the basis of the care plans currently before the court. She considered that the plans were tantamount to negligence, were unmanageable, unrealistic and dangerous, and against the view that professionals had expressed with regard to X's high risk of suicide. The local authority had not given thought to the possible need of a secure placement following discharge from the current unit at the end of the Detention and Training Order. There was no plan of where X would go and what support would be in place. If there was no effective, realistic and safe plan in place for X when she left the current secure unit, the consequences, given her suicidal intent, did not bear thinking about. The advice of the Unit was stark: "The entire staff group's opinion was that ***"X's goal is not to go to [her home town] it is to kill herself."***

The President expressed his concern that without an appropriate plan, there would be little left but the police taking her into custody before she could harm herself irreparably:

> *"The final point is this. If there is no effective, realistic and above all safe plan in place for X when she is released from ZX, the consequences, given her suicidal ideation, do not bear thinking about. If the fears of ZX are well-founded – and this, for the time being, is the basis upon which we* must *proceed – we should be left with little but the hope that the police would have had occasion to take X into custody before she was able to cause herself irreparable harm. Is that really the best the care system and the family justice system can achieve?"*

Eventually X was transferred, in accordance with s47 Mental Health Act 1983, from the wholly unsuitable secure accommodation in which she had previously been detained under a Detention and Training Order imposed by the Youth Court to the clinical setting of a Tier 4 (adolescent) low secure unit at ZZ which she so desperately needed and which, we know from the coda, she thrived in. Her outcome would have been very different if judicial pressure had not been brought to bear on her care plan and placement needs.

[56] Baroness Hale of Richmond, "FRG 40th Anniversary", [2014] Fam Law 1659

Without the President's sustained interest in X's wellbeing, one questions whether she would have been so fortunate. So many other children aren't; their cases don't get heard by the President or a senior judge of the Family Division.

Mr Justice Keehan made the same point in an address to St Ives Chambers' Child Care Conference 2018:

> *"During the course of my long vacation duty in late August 2018, a circuit judge on the Midland Circuit requested I list four cases before me. In each one the local authority plan had been to place the young person or the mother and baby, as the case may be, in a residential unit. After repeated hearings where the local authority searches had failed to identify a suitable placement, the cases came before me […] The day before the first case was listed before me, an appropriate residential placement was identified which I approved. Two days later the second case was listed. The afternoon before I was to hear the case, a placement was found and I approved it. The following week I heard the third case, the afternoon before the case was listed before me, an appropriate placement was found and I approved it. Two days later, the fourth case came before me. On the morning of the hearing a placement was found and I approved it.*
>
> *I was pleased a placement had been found in the first case, I was surprised when a placement was found at the 11th hour in the second case. I became sceptical in respect of the late identification of a placement in the third case and was on brink of becoming cynical at the identification of a placement at the 11th hour and 59th minute in the fourth and final case.*
>
> *I bear in mind Sir James' words of the dangers of falling in the fallacious trap of post hoc ergo propter hoc. Aside from being cynical, I express no view, at this stage, on whether the listing of these four cases before me was in any way material to the identification of appropriate residential units. If it was, then in Sir James' words 'it is, of itself, yet a further cause of concern.' If it was not, serious concerns remain because a local authority had had to expend a huge amount of time, personnel and resources in attempting to identify appropriate placements for these children and young people in contacting a huge number of units which have a diminishing capacity to accommodate, supervise and care for disturbed and vulnerable children and young people."*[57]

The situation faced by Munby P (as he then was) and Keehan J were not isolated cases: the children were lucky with who their cases were determined by. The dire situation encountered by these judges is a direct result of the lack of funding for treatment for children with severe mental health issues: it is a growing problem, not an isolated one. The Children Act could only provide that adequate support and treatment was to be given as a matter of principle; it could not control and allocate the budgets of a drained healthcare service, which has suffered under austerity, to ensure these were provided.

(ii) Funding: LASPO 2012 and the increase of unrepresented Litigants

A key facet of the Children Act 1989 was that the introduction of the concept of "parental responsibility" and s8 orders was designed to promote *shared* decision-making regarding arrangements of children. It intended to make profound changes to the adversarial process. But there is a wide gulf between the way lawyers perceive relationship breakdown and the reality for carers when it divides their home. Emotions run high, families take positions, the child is 'piggy in the middle'. That warring mind set requires skilled advice and advocacy to achieve a change and constructive dialogue.

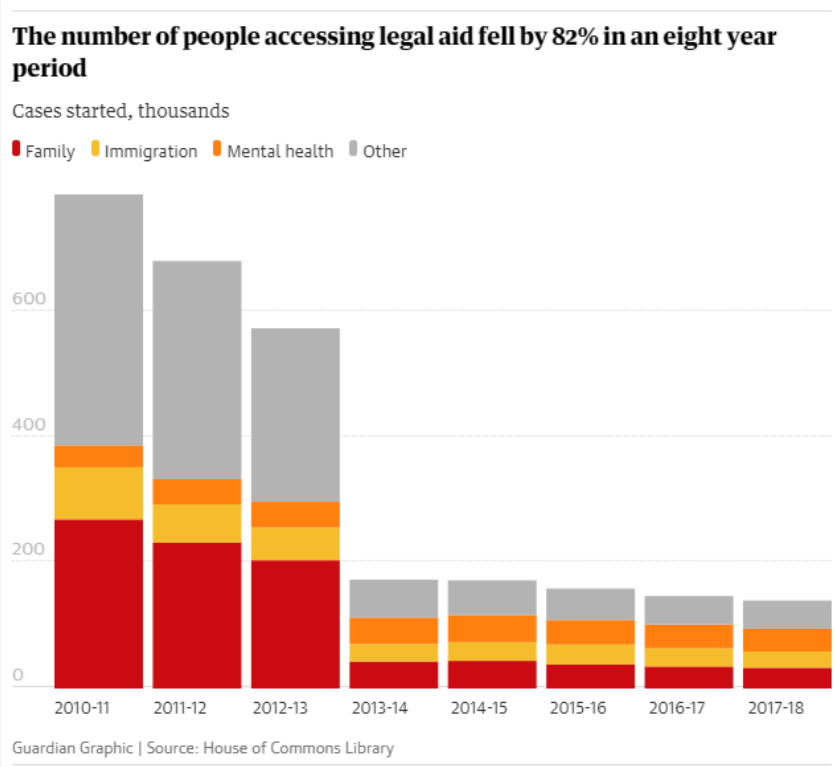
The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (hereafter 'LASPO') limited the availability of legal aid in family cases. Most private family law matters became ineligible for legal aid, except in specific circumstances such as domestic abuse.

The Guardian article *'Revealed: legal aid cuts forcing parents to give up fight for children'* by Owen Bowcott, Amelia Hill and Pamela Duncan makes for stark reading, but reflects the reality that the court service faces on a daily basis.

- Funding has been reduced to the legal aid system by about £950 million a year in real terms.
- The article concludes that cuts to legal aid have:

[57] Mr Justice Keehan, "Reflections of a Judge of the Family Division," December [2018] Fam Law, 1515

- Swamped the family courts with unrepresented litigants, discouraging many from continuing with proceedings. The number of people accessing legal aid in family matters has fallen 88% in seven years.
- Exposed more victims of domestic violence to cross-examination by ex-partners.
- Prevented hundreds of thousands of people from pursuing justice in other areas such as housing, debt, employment, clinical negligence, immigration, welfare payments and education.
- Failed to update financial eligibility thresholds, which lawyers say has resulted in few defendants in work being able to claim legal aid in criminal cases and consequently raised fears of miscarriages of justice.
- Forced expert lawyers, deprived of funded work, to give up specialisms, creating "advice deserts".



The industry's own data supports this analysis; according to *Family Court Statistics Quarterly*:[58]

- in general, cases where either both parties or the respondent only had legal representation took longer to be disposed than those cases where only the applicant was represented or where both parties were without legal representation
- the removal of legal aid from many private law cases in April 2013 resulted in a change in the pattern of legal representation over time
- April to June 2018, the proportion of disposals where neither the applicant nor respondent had legal representation was 38%, an increase of 21% since April to June 2013; and
- the proportion of cases where both parties had legal representation dropped by 16% to 19% over the same period.

The judge tries to mediate between 'he says/ she says' but the judge is not an advisor, let alone a counsellor (and often lawyers need to be both to achieve trust).
Progress towards a mediated, agreed outcome has, I believe, been stalled (if not eroded) by the lack of access to legal advice post LASPO and, in particular, the lack of early legal help. I'm not alone in that view. Our President, Sir Andrew McFarlane, is acutely aware of the problem:

> *"Making these reforms [the introduction of the child arrangements programme in 2014] a living and working reality will not be easy.* ***The task has been made more difficult by the removal of legal aid and the very substantial***

[58] All statistics and chart from "Family Court Statistics Quarterly, England and Wales, April to June 2018", Ministry of Justice, 27 September 2018 [https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2018] [p. 6]

rise in the number of litigants who appear in person. *For them, rather than going to a solicitor and receiving sound advice on the merits of their case and, in all probability, being referred to mediation rather than to court, the first port of call has now become the court office with an attempt to issue an application for an order."*[59]

It isn't just the breakdown of a marriage, division of assets and child care arrangements that cause stress and distress. In a significant number of relationships, issues of domestic violence, sexual oppression and abuse arise. Sometimes it simply isn't appropriate to mediate: serious allegations require a robust trial to resolve them. As Mr Justice Bodey remarked at his retirement ceremony in 2018: *"I find it shaming that in this country, with its fine record of justice and fairness that I should be presiding over such cases*." He explained he sometimes had to help litigants in person by cross-examining witnesses on their behalf.[60]

We await the response to the Draft Domestic Violence Bill published on 21.1.19 to see whether the travesty of victims being cross-examined by the person they have accused of abusing them will addressed and if so, how this will be funded so as to achieve fairness for both parties.

For my part, I don't think we can ignore the strain on the court service caused by the deprivation of legal aid to the public in private law cases. Unrepresented litigants in the court room have a knock-on effect on the availability of judicial time. There is only so much time in a day: court sitting time can't be conjured out of the air. Analysis from the most recent *Family Court Statistics Quarterly* show the average time for a care or supervision case to reach final disposal was 30 weeks in April to June 2018, which is two weeks up from the same quarter in 2017 and the highest average since 2014. Only 48% of cases are being disposed of within 26 weeks, which is down 8% over the same period for 2017.[61]

(iii) Human Misjudgement and Professional Errors

In a follow-up to the Keehan J cases cited above (*Herefordshire Council v AB* [2018] EWFC 10[62]), it is worth noting how the local authority concerned responded to the excoriating judgments upon their conduct and competence when abusing the accommodation powers under s20 Children Act 1989.

The failings were accepted by Herefordshire Council. In the wake of the judgements, on January 18th2019, the Council called an Extraordinary General Meeting.[63] The briefing minute to the meeting[64] is a shocking document to read. It baldly sets out the following flaws in the conduct of the child protection department:

- Lack of adherence to the court-approved care plan to pursue foster placement together for a three-month period
- Lack of completed and signed social work "Together / Apart" assessment to inform decision making to separate twins
- Inappropriate paraphrasing of the psychologist report in the social work assessment, altering the original psychologist opinion on separation
- Lack of Independent Review Officer challenge to the decision to separate the twins and to ensure adherence to the court-approved care plan.
- Poor, delayed case recording, in some instances up to two years out of date
- Lack of management action to address the delay in case recording
- Apparent deletion of vital information pertaining to the children, so that information was not disclosed to prospective adopters

[59] Rt Hon Sir Andrew McFarlane, "Association of Lawyers for Children: The Hershman Levy Memorial Lecture 2014", Thursday 26 June 2014

[60] https://www.theguardian.com/law/2017/oct/13/senior-judge-warns-over-shaming-impact-of-legal-aid-cuts

[61] All statistics and chart from "Family Court Statistics Quarterly, England and Wales, April to June 2018", Ministry of Justice, 27 September 2018 [https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2018] [p. 1]

[62] All notes adapted from summary in Family Law Week [https://www.familylawweek.co.uk/site.aspx?i=ed188876]

[63] I am indebted to Louise Tickle for her commentary on it[63] and for being prepared to raises the profile of the cases beyond the legal commentator by publishing an article described as 'provocative"' the State has a Terrible Secret: it kidnaps our Children' , The Guardian: https://www.theguardian.com/commentisfree/2018/may/03/state-secret-kidnaps-children-herefordshire-council

[64] http://councillors.herefordshire.gov.uk/documents/s50063265/Appendix%203%20-%20Member%20Briefing%20presentation%2020%20Dec%202018.pdf

- Delay in providing all the relevant paperwork to the court

None of these failings could be laid at the door of the Children Act. They were all the fault of foreseeable, avoidable and inexcusable human miscalculation and misjudgement fuelled by a lack of resources, training and skill.

At the EGM, councillors were told that a review of the service by Doncaster Children's Services Trust was underway. It was said that it is *"important to understand how the system had failed"*, and it was added that staff had faced heavy fluctuating caseloads and that checks and balances were *"in place but not functioning*". During the meeting it was revealed that, despite internal unfilled posts since 2015, the largely rural council had not received an external application for a permanent social worker role in 18 months. The director of Children's Services informed councillors at the meeting that during spring and summer 2018 the authority had struggled even to appoint agency workers...

It was said at the meeting that the council was not aware of further negative judgments in the pipeline but that ***"only a fool"*** would promise they could never happen again, added that the council's legal team had also been bolstered.[65]

This case led to an article in the Guardian by Louise Tickle who brought the matter to the attention of the wider public in her article 'The State has a terrible Secret: it Kidnaps Children' [66]. Far from receiving complaints about the language she used, I think Ms Tickle warrants credit for bringing the problem to public attention and language counts in doing that. BAILII reports are read by few and mainly by lawyers. We cannot hope to achieve constructive change unless we are prepared to engage in an open dialogue with the public about what works in our child protection system and what is failing.

Sadly, this was not a one-off instance of failings under the legislation. In *Williams and another v London Borough of Hackney* [2018] UKSC 37, Lady Hale said:

> *"[The] cases illustrate a number of problems with the use of section 20: separation of a baby from the mother or shortly after birth without police protection or a court order, where she has not delegated the exercise of her parental responsibility to the local authority or been given in circumstances where it is questionable whether the delegation was truly voluntary; retention of a child in local authority accommodation after one or both parents have indicated a desire to care for the child or even formally asked for his return; and a lack of action where the perception is that the parents do not object to the accommodation, even though this means that no constructive planning for the child's future takes place. They also illustrate the dilemma posed to the local authority: something has to be done to look after the child but there are serious doubts about whether the parent can validly delegate the exercise of her responsibility. Equally, they illustrate the dangers if the local authority proceed without such delegation or obtain it in circumstances where the parents feel that they have little choice. There are none of the safeguards and protections for both the child and parents which attend the compulsory procedures under the Act. Yet, rushing unnecessarily into compulsory procedures when there is still scope for a partnership approach may escalate matters in a way which makes reuniting the family more rather than less difficult."*[67]

She continues:

> *"Care proceedings have obvious advantages for the child. They involve a rigorous scrutiny of the risk of harm to her health and development if an order is not made, of the assessment of her needs and of the plans for her future […]* ***Section 20 must not be used in a coercive way: if the state is to intervene in family life, it must seek legal authority to do so****. Thus although it is not a breach of section 20 to keep a child in accommodation for a long period without bringing care proceedings, it may well be a breach of other duties under the Act and Regulations or unreasonable in public law terms to do so. In some cases there may also be breaches of the child's or parents' rights under Article 8 of ECHR.*[68]*"*

[65] https://www.communitycare.co.uk/2019/01/22/local-authority-iro-service-slammed-judge-reviewed/
[66] https://www.theguardian.com/commentisfree/2018/may/03/state-secret-kidnaps-children-herefordshire-council?CMP=share_btn_tw
[67] Williams and another v London Borough of Hackney [2018] UKSC 37, [34]
[68] Williams and another v London Borough of Hackney [2018] UKSC 37, [51-2]

Caroline Lynch notes that one of the headline findings from the Family Rights Group 'Knowledge Inquiry' is that a practice of **'soft' coercion** was being used by local authorities:

> *"Many parents described coming under significant pressure from practitioners to agree to s20 arrangements being instigated or continuing […] Younger, care-experienced parents were found to be among those particularly at risk of experiencing 'soft' coercion."*[69]

If I reflect on what went wrong in Hereford and Hackney, I consider that it was not the Act that was lacking, far from it; the Act set out clearly the duties of all parties concerned. The Act can't legislate for incompetence. It was the ignorance (or arrogance) of those employed to deliver the service to the family who were at fault. Sadly this case is but one of the many we are aware of where the local authority has failed to consider the limitations on its s20 powers and has taken children into care on less than adequate (or no) proper consent on the parent's part. This is a particularly acute issue because many parents caught in this situation are vulnerable (e.g. because of learning disabilities or mental health issues) and are seriously unlikely to understand what they are 'consenting to', let alone their ability and right to challenge the local authority or to seek legal advice. To those who want to read further into this issue, please see my lecture '*Vulnerable Clients in the Family Justice System*'[70] from February 2018 in my Transparency series.

(iv) Human behaviour that has exceeded the type and level of harm that the Act had in contemplation in 1989

Have we left behind the likes of Jasmine Beckford, Kimberley Carlile and Tyra Henry?

No. Think of Peter Connelly (Baby P), Victoria Climbie[71] and David Pelka[72]. What of the Rotherham sex exploitation scandal?

I have asked myself if these failures arose out of a misplaced bias towards parental care or a skill/judgment deficit within the child protection teams. There will always be debate about whether the law (and application of it) has fallen one side or the other of failing to protect children from abusive care by propping up failing parents at the expense of a child's health and safety.[73]

In strident terms it has been said that *"At a stroke, the Children Act has reinvented the sanctity of the blood link, although not in so many words. This ideological basis [i.e. the fact children are generally best looked after within their birth family] is central to the Act and its defects […] this resurgence of blood link ideology should be regarded as based on nothing stronger than a mixture of sentiment, political convenience, superstition, and wishful thinking."*[74] I don't agree with that complaint. Nor did Baroness Hale, as is clear in her robust argument in rebuttal to the attack on The Children Act. As she spelt out[75]:

> *"The Act is concerned with all children, and not just the abused and neglected. One of the Act's main aims was to integrate all the law relating to the upbringing of children, including disabled children. Any civilised society has to start from the proposition that children are best brought up in their own families:* ***it is the bedrock of society that children belong in families and not to the state."***[76]

> *"The Act was designed to improve rather than to reduce the protection available to such children, drawing a clear distinction between them and the great majority of children who have not been subject to severe abuse or neglect, who will be better off at*

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[69] Caroline Lynch, "Cooperation or coercion? Children coming into the care system under s 20 voluntary arrangements," February [2018] Fam Law, [193]

[70] https://www.gresham.ac.uk/lectures-and-events/vulnerbale-clients-and-the-family-justice-system

[71] Lord Laming report advises complete overhaul of child protection policies. Most of his 108 recommendations become law in 2004 Children Act.

[72] https://www.independent.co.uk/news/uk/crime/the-missed-chances-victoria-climbie-baby-p-now-daniel-pelka-how-could-it-happen-again-8742828.html

[73] Raised as early as 2000 by Nigel Speight and Jane Wynne, "Is the Children Act failing severely abused and neglected children?"[73]

[74] Nigel Speight and Jane Wynne, "Is the Children Act failing severely abused and neglected children?", Arch Dis Child 2000; 82; 193

[75] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 463 [https://adc.bmj.com/content/83/6/463]

[76] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 463

home but who may need some help from social services, or who will be better off with their extended family with appropriate help and support."[77]

The Act provides a clear framework for removal when the balance tips from retention of the child at home towards removal. That doesn't mean to say that making the decision is easy: but making it is nonetheless the court's responsibility. Subject to s20 consent, a child can only be removed from home by a local authority *if* an application is made to the court to do so *and* the court grants that application. If no application is made by the local authority, then the court never becomes seized of the matter and one has to presume that is because a decision has been made not to do so by the social work team having taken legal advice. The Children Act 1989 does not give the court the authority to interfere in local authority managerial decisions. That is part of the separation of powers. One works on the basis that the local authority is competent to perform its statutory duties. Social workers are hard pressed and underfunded – they have to make difficult decisions; they are "damned by the press if they intervene too soon or too often, and damned if they intervene too little or too late."[78]

In a society governed by the rule of law, compulsory intervention in the lives of children and parents must be authorised by the court after due process of law.

As Baroness Hale said, and I agree,

> *"We can all benefit from acknowledging how difficult child care practice and decision-making is, recognising when we have got it wrong, and trying to learn from those mistakes to do it better next time.* ***It is us, not the Act, who are to blame if seriously abused children are not receiving the protection they deserve."***[79]

2. Where We Can and Should Do Better

(i) The Voice of the Child

Mr Justice Cobb provides some extremely useful thoughts.

> *"In contemporary society, the increasing autonomy and moral authority of young people is more widely recognised; its influence over and contribution to our lives is genuinely welcomed. Surely our forebears would not for one second have contemplated that a Nobel award, recognising an extraordinary contribution to global rights of young people, could be made to a 17 year old, as it was in 2014. Remarkable and inspiring though that achievement is, it does not disguise the fact that* ***many young people feel that they are not appreciated, they are not heard, even on matters which affect their daily lives, and which materially and adversely affect their emotional and physical well-being****."*[80]

Mr Justice Cobb explicitly asked the question, 'Does our legislative framework adequately provide for the voice of the child to be heard?', and answered it thusly:

> *"The Children Act 1989 has been* ***extremely effective****, in my view in responding to societal change and expectation over the last 23 years. The paramountcy principle has proved robust, and the welfare checklist adaptable to accommodate (indeed embrace) the manifold different permutations of family life with which it has had to grapple. In any welfare review, prominence is given – by virtue of its position at the head of that statutory checklist – to the 'ascertainable wishes and feelings of the child concerned… in the light of … [his/ her] age and understanding.*[81]

> *"I believe, as a former practitioner and now judge in this field, that judges, lawyers and professionals have found the 'views of the child' the most potent and challenging of the checklist factors to work with in practice. Judges not infrequently wrestle with the* ***exquisite tension between the powerfully held views of an older child operating in conflict with the wider 'best interests' assessment.***

[77] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 464
[78] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 465
[79] Dame Brenda Hale, "In defence of the Children Act", Arch Dis Child 2000; vol. 83, issue 6; 465
[80] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 144
[81] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 145

I think it is right to ask if we now have effective mechanisms in place to 'hear' the child who is the subject of family dispute ***out of court****."*[82]

The downturn in private law applications to court following LASPO means that many children, who prior to 2012 would have had their situation considered by a Judge, Cafcass or another professional are no longer receiving this sort of attention.

As Cobb J points out:

> *"While recognising that family litigation brings with it many disadvantages for children, I nonetheless have a concern that those former private law cases on the cusp of public law (where there are safeguarding elements) are escaping without scrutiny, potentially exposing children to the risk of harm. For this category of child, the answer to the question, I fear, is No.*
>
> *And what of the parallel question: are effective mechanisms in place to 'hear' the child who is the subject of family dispute at court?"*[83]

The two methods we 'hear' children are through Cafcass guardians, and in some cases by giving a child party status. As Cobb J says:

> *"While we must be vigilant not to overload or burden children and young people with information, we must recognise that the message which children give us will only be authentic and informed, and therefore have meaning, if they themselves possess sufficient relevant information to form a view. We need to respect young people's wishes to have relevant information at all stages of the proceedings […] young people want more honesty from professionals and more accurate information about processes and decisions regarding their lives. Striking the right balance in each case is a challenge."*[84]

Cobb J was focusing on private law cases; my practice is in public law. In my lecture *'The Child in the Family Court Room: Whose Child is it Anyway?'*, I identified the flaws in the application of the principle that a child is entitled to be and *should* be heard in the pubic law field, when addressing the tension between the child's article 6 and 8 rights (rights to a fair trial and a private family life under the European Convention on Human Rights). Both must be read into the application of the Children Act in practice in our courts, thanks to the Human Rights Act 1998. The significance of s1(3)(a) Children Act 1989 has been "buttressed by the ratification of a number of international conventions and instruments which give particular prominence" to the child's views.[85] These include Article 12 of the United Nations Convention on the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights.

Too few children, competent to give instructions and to take a contrary view to their guardians are (in my view) nonetheless represented through their Guardian when they could have the benefit of a direct voice to court, via their solicitor, without the filter of their guardian. The professional guardian voice would still be there: their role continues, but the divergence between the professional welfare view of the child's needs versus the child's wishes would be visible and could therefore be transparently assessed.

In my view, respecting the child's voice is a challenge we have yet to rise to, certainly in public law for older children.

(ii) Evolving Concepts: Family, Best Interests and Harm

Re M (Children) [2017] EWCA Civ 2164[86]

This case saw a transgender woman bring an application for contact with her five children after being forced to leave the North Manchester Ultra-Orthodox Jewish community after being shunned as a result of her trans status.

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[82] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 145
[83] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 147-8
[84] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 154
[85] Mr Justice Cobb, "Seen but not heard?" February [2015] Fam Law, 146
[86] https://www.familylawweek.co.uk/site.aspx?i=ed184412

Whilst the first instance Judge (Mr Justice Peter Jackson, as he then was) decided that the community's threat to ostracise the children posed a risk of psychological harm to them so they should be limited to receiving letters from her 4 times a year, the Court of Appeal overturned the decision. I have been profoundly impressed by the humanity of their reasoning. The inquiry into the child's best interests was applied in a nuanced way, balancing different facets of harm that, I think, were likely to have been out-with the contemplation of the legislators in 1989. The principles set out in the Act were applied to the demands of the sexually diverse and tolerant society within which we aspire to live in harmony. This reasoning is evident in their approach to the case. The judge hearing the matter must act as a "judicially reasonable parent" judging the child's welfare by the standards of reasonable men and women of today; that is, people who are "receptive to change, broadminded, tolerant, easy-going and slow to condemn." Applying that standard, the Court of Appeal said that the judge should have asked himself a number of pertinent questions before reaching his decision, including "How can the order give proper effect to the reality, whether the community likes it or not, that the father, whether transgender or not, is and always will be the children's father and, as such, inescapably part of their lives, now, tomorrow and as long as they live?". The Court of Appeal was robust in saying that the judge had failed to address 'head on' the human rights and discrimination issues that arose in the case as he should have done, asserting, "Even secluded religious communities within society are not above the law of the land".

The tension between established norms, the stigma of challenging social, religious and sexual 'norms' and the freedom to define one's own sexuality by choice and not by birth are complex matters. Being the judge required to adjudicate upon cases of such exquisite sensitivity and complexity is not a job for the timid. When will the court have to grapple with deciding whether a transgender child may take hormone blockers to delay the onset of puberty (and the accompanying gender-based body dysmorphia) when that is opposed by one parent? Times are changing and the concept of 'best interests' will evolve on a case by case basis in a way that The Children Act legislators could not have predicted but which their drafting has made possible.

AB v CD, EF, GH and IJ [2018] EWHC 1590 (FAM)[87]

Parenthood is no longer simply a matter between man and woman; a case in point: surrogacy.

I have cited this case because it is one where the Children Act 1989 was not able to provide for the resolution that the judge thought was in the child's best interest, surrogacy not being within the contemplation of the draftsmen in 1989.

In this case Keehan J was concerned with twin children born in October 2010 following a surrogacy arrangement. Keehan J had to consider whether the court had the power to make a **parental responsibility order in respect of a subject child** but concluded with some frustration that he could not. He set out the law under the Children Act thus:

> *"46. The provisions of s.4 of the Children Act 1989, dealing with the acquisition of parental responsibility, and the making of parental responsibility orders, exclusively refer to the term 'father' and not in addition or alternatively 'a biological parent'. In law, the second respondent is not the father of the children and thus he cannot acquire parental responsibility as provided for by that section, nor can the court make a parental responsibility order in his favour.*
> *47. The provisions of s.4 (a) of the Children Act 1989, dealing with the acquisition of parental responsibility by a step parent, provide:*
>
> > *'One, where a child's parent, parent A, who has parental responsibility for the child, is married to or a civil partner of a person who is not the child's parent, the step parent, (a) parent A, or if the other parent of the child also has parental responsibility for the child, both parents may, by agreement with the step parent, provide for the step parent to have parental responsibility for the child, or b) the court may, on the application of the step parent, order that the step parent shall have parental responsibility for the child'."*

Neither section assisted the child as *"The applicant in this case is not married to a person who is, in law, the mother or the parent of the children. Accordingly, the court has no power to make a parental responsibility order in his favour."* Accordingly, the court had no power to make a parental responsibility order, in respect of any of the parties. The Children Act

[87] With thanks to Andrew Powell for his insightful article on this case: it is his summary I reproduce here

1989's drafting simply did not foresee such a problem arising. In concluding his judgment, Keehan J went on to observe that the law created an "absurdity" in not recognising the first and second respondents at the twins' parents and that the losers were "predominately the children who do not have their biological parentage recognised in law."

Finally, Keehan J observed:

> *"76. I find myself extremely frustrated, as no doubt are the first and second respondents, that I am prevented, without any obvious good, legal or policy reason from making orders which explicitly recognise them as the legal mother and the legal father of these children. Instead, I am forced, as have other judges before me, to construct a set of orders to secure the welfare of the children which fall very far short of the transformative effect of a parental order."*

We need statutory reform.

An evolving concept of harm: radicalism cases

This is one area where the Children Act 1989 has been supplanted on occasions by its senior relative: Wardship, the 'Rolls Royce' of protective measures. Through wardship, a subject child is made a Ward of Court. Day to day decisions can be delegated by the court to a nominated person or body, but no important decision can be taken for the Ward **without** the court's approval. It cannot be used to achieve what the Children Act 1989 can provide nor to circumvent the provisions of the Children Act.

If wardship was intended to be confined to the forgotten corners of the High Court annals with the introduction of the Children Act, that was no deterrent to Hayden J when he boldly reached out and dusted it off to provide bespoke, flexible protection for the (allegedly) radicalised teenagers whose cases came before him in 2015. Headlines announced, *"Model Pupils fleeing to be Brides of ISIS"* and "*Three Girls on Half Term Flee UK to Join ISIS*". Urgent creative action was needed to prevent them from going to a war zone and placing their lives at risk for ideological and religious ideals. An early view on this development was provided in March 2015 by Hayden J:[88]

> *"The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past."*

I explored this issue in my lecture, ***'Is One Person's Radicalism Another's Right to Free Speech?'***[89] Wardship re-emerged as a "light-touch" intervention. The use of wardship brought with it the advantage of allowing the Court to reserve specific aspects of the exercise of parental responsibility to itself whilst delegating residual matters – with which the Court is not concerned as they do not give rise to the issue of risk – to the child's parents. Did this represent a failure of The Children Act 1989? I do not think so. The court was faced with a new type of risk of harm where the child was the driver of their own misfortune with no blame attached to the parent for that risk arising. The child was not beyond parental control in the way the Children Act 1989 envisaged.

Rather than representing a failure of the Children Act I would rather think of the use of Wardship as an additional tool in the armoury of the High Court judge. Cases that began as wardship could often be transitioned to Children Act protection. The two were complementary, not competitive.

Concluding Remarks: 'Are We Nearly There Yet?'

We in the family justice system have the right framework in the Children Act 1989 to continue to make progress for the most vulnerable members of society, of which the child is the most needy of all. However, we could easily be derailed if the Government fails to redress the years of underfunding of the court and local authority child protection departments. Local authority social workers are working under pressure in a service deprived of respect, training and managerial support. The court service is overwhelmed with work and is, along with legal aid lawyers,

[88] ***London Borough of Tower Hamlets v M & Others [2015] EWHC 869 (Fam)*** paragraph 57
[89] https://www.gresham.ac.uk/lectures-and-events/is-one-individuals-radicalism-anothers-right-to-free-speech

near to (if not at) breaking point. Practitioners struggle in a system where we run to keep up with the ever-changing nature of the society we seek to serve. There has been a decline in religiosity overall, greater religious and cultural diversity and an increase in cross border families. That has resulted in the vibrant internationalism of cases introducing cultural practices which may enhance, but can also be at odds, with UK norms in approaching a child's right to be protected from ill treatment. Science continues to evolve, and with it brings challenges to the field of alleged physical abuse such as EDS, Vitamin D deficiency and genetic disorders that can mimic or mask physical abuse. We struggle to get the experts we need in such specialist fields because we can't pay them enough to attract them to do the complex work required: legal aid rates just don't match private fees. We search for expert assistance in an increasingly shallow pool.

Without the right experts, we risk miscarriages of justice. Without passionate advocates, we risk miscarriages of justice. Without enough time in court, with judges not ground down by the demands on their time, we risk miscarriages of justice.

None of this is the fault of the Children Act 1989. That Act represented, I believe, the best that legislators, academics and lawyers could offer when given the freedom to identify wants and needs and the ways to meet them. Gaps in the legislation are far and few between. What needs to develop is not the legislation but the willingness of government to provide the funds for the training, community and court services that are essential to enable us, 30 years on, to live up to its ethos.

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NEXT LECTURE: 7.3.19 POLITICS AND THE LEGAL PROFESSION

Cuts to legal aid, the concept of online justice, diversity within the legal profession and the judiciary, the independence of the Judiciary from the State, the impact the press can have on perceptions of fairness of justice: this lecture explores the controversial issue of how the politics of the day or decade can affect the way in which the Justice system functions in private and is perceived by the public.

Read more at: https://www.gresham.ac.uk/lectures-and-events/politics-and-legal-profession