

Resolution National Conference 2009

Key Note Address

Mr Justice McFarlane

Introduction

As some of you may know, I am a great fan of donkeys. A good donkey seemingly combines the deep-seated primitive qualities of warmth, wisdom and naughtiness in varying measures. Watching donkeys as they go about the business of their day is for me a fascination. They seem to move slowly, or not at all, but if you take your eyes off them, they are miraculously transported to another corner of the field and to a different activity. When I say 'different activity' that is something of a misnomer: the activity is always eating, the difference is that it is in, at that moment, the choicest part of the field.

I would encourage each of you to take time to watch donkeys when the opportunity next presents itself. But it is not an activity for those in a hurry. There is an old Australian proverb to the effect that 'If you are going to watch donkeys; don't forget to bring your chair'.

I see that, through great foresight of the management, you have each been provided with a chair this morning. What is more, we have the best part of an hour set aside before the next engagement. Ideal conditions, I suspect, for donkey watching; time to sit back, take stock and think about what is going on. Sadly, I have to report that there are no donkeys available in Bristol this morning. All you have to look at is me! But to redeem the situation, I suggest that we take a leaf out of the donkey watching book and spend a bit more time than any of us

habitually has to look at and think about what is going on in two different areas of the field called Family Justice. I will turn in due course to look at 'Making Parental Responsibility Work' but my first topic is 'Transparency'.

Transparency

On the 6th March, Times journalist Camilla Cavendish welcomed the Lord Chancellor, Jack Straw's decision to open all family courts to the media from April 2009. Ms Cavendish concluded that this new openness would provide 'the ability to see who is involved' in family cases which 'will allow campaigners to track whether some experts and councils routinely jump to questionable conclusions'. In an earlier piece, Ms Cavendish also applauded Mr Straw's 'heroic decision ... to end the gagging of parents who wish to speak out about their cases'. She considered that the reforms would allow the media to scrutinise experts and their evidence and would let parties disclose court documents to outside experts without a judge's permission. The impression given by these articles is that, from April the press will be able to attend and freely report upon family court proceedings, and parents will be at liberty to discuss their case before a wide public audience. This view seems to be widely shared by the media in general with the result that from an early stage after the Lord Chancellor's announcement, court offices have been receiving calls from journalists seeking information about any newsworthy family cases that are due for hearing after the beginning of April.

As this watershed date approaches (and it is now only 10 days away), it is necessary to ask whether Ms Cavendish and her colleagues are right in their view and, if so, what the consequences will be for those of us who work within the Family Justice System and, more particularly, for the children and families whose lives are the subject matter of our proceedings.

In order to understand the significance of the Lord Chancellor's announcement on family court openness made in December 2008 in the document 'Family Justice in View' it is necessary to step back and briefly survey the process that led up to it.

The debate, so far as the government's position is concerned, commenced with the minister, Harriet Harman QC MP, announcing at The President's Conference in May 2006 that the government proposed opening up all hearings to both the media and to the public in general. There was, however, to be a consultation, and when the first consultation paper came out in July 2006, whilst it maintained a default position of the media being free to attend hearings, the proposal that the general public were also able to do so had been dropped.

The title of that first government consultation process, '**Confidence and Confidentiality: Improving transparency and privacy in family courts**', shows at a glance the conflicting tensions in play in this debate: **Confidence** (in the sense of greater knowledge about and therefore trust in the system) AND **confidentiality** with respect to the individuals involved in each case; improving both **transparency** AND **privacy**. On any view, the prospect of squaring this particular circle in a manner that achieved both of these sets of objectives was a very tall order indeed.

One only has to look at this extract from the executive summary to see the problem:

 *'We want to make the family courts more open, but we want as well to ensure people's anonymity.'*

The senior judiciary generally supported the media proposal, as, predictably, did the media respondents, but it received a very negative reception from other levels of judiciary, other agencies and, in particular, young people whose views had been canvassed in a number of ways. One such, Rocky, put it succinctly as follows:

“Who wants to be in the papers? It would not be very nice for everybody to read about your life in the papers. Some people are great, but some are horrible. Some things are private in the family, and it’s better like that. The family comes together to help out in bad times. What would other people do? Just be noseey.”

Having considered these responses, the government produced a second consultation paper ‘**Confidence and Confidentiality: Openness in Family Courts: A New Approach**’ in June 2007. In his Foreword, Lord Falconer in terms said that the government had changed its mind and its approach to these issues. No longer was the emphasis to be on people coming **in** to the family court, but upon information going **out** from the court by means of far greater use of anonymised judgments and/or summaries of decided cases. One welcome by-product of such a scheme would be the routine provision of ‘later in life material’ which would be available to the subjects of the proceedings to read once they were mature enough to do so.

In terms of the announced starting point, namely both media and public attending all family hearings, it is plain that the consultation had moved the government view to a very significant degree.

Whilst the current Lord Chancellor, Jack Straw’s, announcement in December 2008 represents yet a further radical change of position with regard to media attendance, Lord Falconer’s proposals for a very substantial increase in anonymous information coming out of the family court by way of judgments or summaries remains part of the package of measures. It is to be taken forward through pilots in three areas over the next six months.

This requirement, if it is brought in, will represent a substantial additional burden upon the courts, and in particular the judges, to produce approved and fully

anonymised versions of their judgments in the majority of cases, or to take the not inconsiderable time to produce a carefully worded summary. There is also the need to consider the problem of producing a suitable document following the making of a consent order. At a time when all are concerned with reducing delay in getting cases before judges for determination, introducing a major additional call upon judicial time in completing current cases would seem to pull in the other direction. One anticipates that the planned pilots will highlight these issues.

Despite those obvious difficulties in implementing such a scheme, the proposal for greater access to judgments is, in my view, welcome and should go some way to reduce the charges of there being a 'secret justice system' by making the reasoning of judges clear to the public in the ordinary run of cases.

Having digressed on the subject of publishing anonymous judgments, I return to the headline issue of media attendance in court and freedom for the parties to publicise their case. After a period of over a year following consultation upon Lord Falconer's proposals, Jack Straw made the Ministry of Justice's conclusions known in December 2008 in 'Family Justice in View'. Part of the Foreword of which reads:

'The media will be allowed to attend family proceedings; but the court will have the power to restrict both attendance and what can be reported. We will increase and improve the quantity and quality of information being made available. We will ensure a child cannot be identified, even after the conclusion of a case. And we will allow those involved in proceedings to share information to get the help and support they need.'

At first blush, those words would seem to support the view that the media was being permitted to attend and report upon what goes on within family proceedings, subject to the court having power to restrict their attendance and/or

reporting of a particular case. However, matters are not, as we shall see, that straightforward.

The meat of the new regime is described at page 31 of the MOJ document in these terms:

‘We have therefore come to the conclusion that we must increase the volume of information available about the family courts AND open up the courts; but a right of access to proceedings cannot mean an untrammelled right to report anything and in any manner regardless of its impact on the children involved.

We propose to change the law to allow access to the court so that family justice can be seen. The family justice system is not secret, it has nothing to hide, but it does need to be private to safeguard and protect children and their families.

The media have a role to play. Their reporting must be responsible and honest, providing information about the system without endangering the identities or welfare of children. We believe that they could be a positive influence in increasing understanding of the work of the courts.’

That passage begins to give the flavour of what is actually being proposed:

- no untrammelled right to report anything and in any manner;
- allow access ‘so that family justice can be seen’;
- the system does need to be private (as opposed to ‘secret’);
- the media will be ‘providing information about the system’ in order to increase ‘understanding of the work of the courts’.

If the above passage gives the flavour, what follows it is explicit. Having referred to journalists wishing to run human-interest stories where the parties and children are identified, the MOJ response is plain that ‘the rules limiting reporting are there for the good of children experiencing a very difficult situation.’ And then this:

‘While the media will **not** be able to identify parties or the child subject to proceedings, they will certainly be able to discuss in a more informed way how the system works.’ [MOJ emphasis]

Later it is said that journalists will be able to report sufficient outlines of several cases to ‘allow the reader to understand the gist of proceedings but without identifying those involved’.

From those passages we can see that the Government do not propose that the statutory regime, which underlies the rules limiting reporting, will be altered or relaxed, so as to give the green light to the reporting of human interest stories.”

Under the Lord Chancellor’s scheme the role of the attending media is seen as becoming informed so that they may discuss how the system works in a more informed way and to permit their readers to ‘understand the gist of proceedings’ rather than the detail of an individual case.

With regard to ‘reporting restrictions’ the MOJ statement points out that there are at least 10 current statutes that set out what the media may or may not report in different types of proceedings. In due course the aim is to revise the law so as to make reporting restrictions consistent across all tiers of court for all types of proceeding, and to do so in a manner which would simplify the legislation so that it is readily accessible and easily understood. Whilst the MOJ commit themselves to undertake this revision of the statute law on reporting restrictions ‘as soon as parliamentary time allows’, it is plain that that is not going to happen prior to April and that therefore the current law on reporting restrictions will remain in force and un-amended to accommodate the insertion of the media into the courtroom.

It is therefore necessary to look in short terms to the principal provisions of the current law governing what may or may not be reported. First and foremost in any list must be the Administration of Justice Act 1960, s 12, the effect of which is to prohibit 'the publication of information relating to proceedings before any court sitting in private ... were the proceedings:

- (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
- (ii) are brought under the CA 1989 or the ACA 2002; or
- (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor'.

S 12(2) excludes the publication of all or part of, or a summary of, any resulting court order.

The current interpretation of AJA 1960, s 12 (which is to be found in the decision of Munby J: *Re B (A Child) (Disclosure)* [2004] 2 FLR 142; and of the Court of Appeal in *Clayton v Clayton* [2007] 1 FLR 11) is that s 12 is apt to prevent publication or reporting of the substance of, or the evidence or issues in, the proceedings (save as may be permitted by the court) by rendering such publication a contempt of court. AJA 1960, s 12 prohibits publication of an account of what has gone on in front of the judge sitting in private, or of any of the court documents (other than the order) or extracts from, or a summary of, those documents. S 12 does not prevent the fact that a particular person was a witness in relevant proceedings being reported.

Identification of a child as being involved in a children's case, which is not itself prohibited by s 12, is rendered unlawful by CA 1989, s 97. Similar, but somewhat broader, protection is also provided by the Children and Young Persons Act 1933, s 39(1).

Far fewer restrictions apply to family proceedings conducted in private which do not directly involve a child, in particular domestic violence proceedings under Family Law Act 1996, Part IV or proceedings for financial relief following divorce.

Consideration of the restrictions relating to children cases provides an understanding for the careful wording of the MOJ document and seems to confirm that, whilst accredited journalists can now expect to be permitted to sit in on a private court hearing relating to children, they will face tough sanctions if they report any detail of the particular case that they are observing. Reporting will be limited to the process and the gist of proceedings, rather than the detail of any particular case. In other words the reporting will be about **system** rather than **substance**.

Of course, the landscape that I have described thus far relates to proceedings which are currently in progress. The legal position following the close of proceedings is different and was clarified in *Clayton v Clayton* (above). The prohibition in CA 1989, s 97 preventing the identification of a child as being involved in a children case no longer applies after the end of the case. Post-hearing restrictions on identification fall to be dealt with on a case-by-case, welfare based, basis by prohibited steps orders. Parties and journalists are still however bound by AJA 1960, s 12 from publishing what went on during the court process itself.

The MOJ has stated its intention to reverse the effect of *Clayton v Clayton* so that ‘the identity of children will be automatically protected beyond the conclusion of a case, unless the court otherwise directs’. For the present, however, the current law as described in *Clayton* remains with the result that publication may be made of the fact that a particular child, or parent, has been involved in children proceedings, albeit that the substance of what was put before the court may not.

The brave new world post-April following the ‘opening up of the Family Courts’ therefore seems to be far more sophisticated and restricted than may at first sight have been understood by some journalists, the public at large and, for that matter, the legal profession.

How will it work in practice?

In order to implement the Government’s decision amendments are to be made to the court rules to widen the list of those who may attend an otherwise private hearing to include duly accredited representatives of the media. A scheme of accreditation is under discussion. One assumes that the extension will not apply to FDR hearings or conciliation hearings in private children cases and that at any stage the court may direct (either on its own motion or on application) that a media representative is to be excluded.

The rule changes will be supported by a Practice Direction dealing with the attendance of the media, which will spell out that the basis of the new scheme is that media representatives now have a right to attend family proceedings throughout, save and to the extent that the court exercises any discretion to exclude them from all or part of the proceedings.

With regard to the second limb of the MOJ initiative, which is to widen the pool of those to whom parties in private family cases can disclose information from the proceedings, amendments are to be made to the rules, probably in the form of a new Part of the rules entitled ‘Communication of information in proceedings relating to children’. A party, or their legal representative, will be permitted to communicate information relating to the proceedings to a wider range of people to enable that party to obtain support, advice or assistance in the conduct of the proceedings. The range of people to whom communication may be made is not defined, but by implication it will include Members of Parliament and local councillors. Whether the permitted communication extends to disclosing

documentation and whether disclosure can be made to journalists under these rules may need to be clarified. Further, there is no express provision that permits a party to disclose information to an outside expert without the court's permission, as envisaged in Camilla Cavendish's recent article.

The present talk is billed as a 'Key Note Address'. Thus far it has largely been a law lecture on the new scheme without more than a hint of the speaker's own views. It is therefore no doubt past time for a slice of dynamic commentary on the point that we seem to have reached on this important issue. What follows is my own personal view and is not proffered as representing the opinions of anyone else.

The starting point is that I have long associated myself with the more prominent statements of Wall LJ, Munby J and others on the legitimate need for a means of access by the press and, through them, the public to the family court. The work that is undertaken by the family justice system on behalf of the public and the state is of genuine public interest. The public is entitled to expect that the system approaches these often difficult and emotionally delicate issues in a thorough and professional manner by adopting a process that is both fair and just. Whilst these cases are conducted in total privacy, commentators are left to conjecture as to the process that is adopted and, of more concern, can only fall back on the anecdotal accounts of those who feel that they have been badly dealt with by the system. The result has led to some astonishingly ill-informed descriptions of the approach of the family courts particularly to care cases with, in one striking example, a Times leading article criticising a system which regularly removes children from parental care for life without even disclosing to the parents any of the evidence upon which the court decision is based. You and I know that such a description could not be further from the truth, but journalists who are not permitted to observe our work, and the public who read such commentary, have no means of knowing whether it is accurate or not.

In relation to specific cases, how is a journalist or an MP to know whether the detailed complaint which they are being given by a parent about a past court case has any validity or not if they have no means of seeing beyond the court order.

There has therefore been, in my view, not really a question of whether the family court should be opened up, but how that can be achieved whilst at the same time meeting all the conflicting and valid reasons for maintaining the essential confidentiality of the process as a whole.

One way of considering this is to ask 'what are the justifiable goals that transparency should be seeking to achieve?'

One such goal must be to better inform public knowledge of the family justice system and how it operates. To that end the current MOJ changes, if utilised by the media, are likely to be of real value. It should no longer be possible for a serious investigative journalist to write in general terms about the work of the family courts in ill-informed and down-right incorrect terms.

But the current changes will do little, I fear, to address the very real difficulty that journalists face when confronted, for the first time, **after the end** of the court case with a parent who is complaining about a miscarriage of justice. Such parents are, I would suggest, highly unlikely to tip a journalist off **before** the case starts and invite them to exercise their right to attend and observe the proceedings. Under the new scheme, the journalist is in no better position than they are now to evaluate the validity of the complaints that they are hearing.

There is a need for some mechanism that permits accredited journalists, MPs and others to have access to such material from past court proceedings as would enable them to audit the family justice process against the complaints that they are

hearing from the parent. Such a process, which might simply involve the receipt of an anonymised copy of the judgment, would do no more than expose material in written form that the journalist would have had access to had they attended the original oral hearing. Unless the anonymised judgment was already available in the public domain, the journalist would be obliged to apply to the court for permission to have access to the material. Whilst, no doubt such an application could be made by a journalist under the current law, and it has surprised me that there is no reported occasion when such an application has been made, it is obviously much more efficacious if there was an express provision catering for a post-hearing disclosure application. Any disclosure would no doubt be subject to whatever reporting restrictions would apply to attendance at the oral hearing, but such a process would at least allow serious journalists to check upon the basis of the complaints that they were hearing from parents. Without a facility such as this, it seems to me that the source of much of the critical comment made to and by journalists and certain MPs cannot either be confirmed or refuted by them prior to publication.

If the pilot project on the provision of anonymised judgments or summaries proves that such a scheme is viable, then it may well be that through this method the media will gain access, at least to the judgment, in cases where they have received a complaint of injustice after the close of the proceedings.

Turning to a different line of thought, the public reaction to the cases of Baby P and of Shannon Matthews in the criminal courts was very pronounced. There was a degree of public astonishment and genuine dismay which went beyond the particular details of the individual suffering of each of those unfortunate children and centred simply on the way that life was being lived in the two 'families' in which P and Shannon lived. If the public belief was that the model of family life and family structures demonstrated in these two cases was in some way extraordinary then I must report that that belief, very sadly, would be erroneous. As

Coleridge J so tellingly described at this very lecture last year, in some of the more heavily populated urban areas of the country family life is in:

‘... meltdown or completely unrecognisable: the general collapse of ordinary family life, because of the breakdown of families, is on a scale, depth and breadth which few could have imagined even a decade ago.’

Against that background, whilst I very much welcome the response to it that has taken place, it is hard to understand quite why Baby P’s case received the degree of public scrutiny and reaction that it did, when the cases of other young children who die as a result of the culpable actions of their parents or carers (some as brutally as P) are largely passed over by the media. The context for that observation is that, according to OFSTED some 210 cases of children dying from abuse or neglect were reported to local authorities in the 16 months between April 2007 and August 2008; 21 of those 210 were babies. This appalling statistic equates to three children each and every week dying as a result of abuse or neglect; hence my question of why Baby P’s case received such blanket publicity, whereas these very many others do not.

It is however easy to identify one clear reason why this should be: Baby P’s case was heard in a criminal court which was open to the press, whereas many of the cases involving other children may only be considered in private in the family system. There is a legitimate case to be made, in my view, for the press not only to have access to, but to actually be informed in advance of, family cases where a child has suffered very serious injury or death. In this manner the reality of just how abusively life is being lived in a significant number of families and communities across England and Wales might be brought home to the public through the press. If the true picture of abuse could be seen by this means then one would hope that both public and politicians would gain a far more informed view of just what it is that social workers are facing day in and day out, with the result that a far more rounded and accurate view of the value of the social work

profession may be achieved and the need to provide yet greater resources to improve their ability to protect children would be likely to be established in the public mind.

A further issue, which is not without significance, is the question of whether attending journalists should be permitted to see any of the documents used during a hearing. The April scheme is clearly going to work on the basis that they do not see any documents. It must therefore be questionable whether the right to observe the process will thereby be compromised, given that much of what transpires during family proceedings does so via the written word rather than orally. The case opening, the evidence in chief and, importantly, the expert evidence are all reduced to writing and effectively 'taken as read'. The experience of a 'fly on the wall' journalist in a family court will therefore be very different to that of attending a criminal hearing either in the adult or youth court where a very great deal of the process is conducted orally and can be readily followed. On one view, if (as I hope that we are) we are serious about permitting the media to gain an effective insight into the workings of the family court, then consideration will need to be given to permitting journalists to have access to some or all of the written material. There are however grounds for treading very cautiously in that direction. Despite the need for caution, the issue is nevertheless one that, in my view, requires serious consideration.

Allied to those considerations is that of the potential for a journalist, who has had no previous contact with a parent, attending a hearing, identifying who the parent is and then befriending them outside the courtroom. Some parents may welcome such a connection; others most certainly would not. As I have said, it is not clear whether a journalist will be a person to whom a parent may disclose information from the proceedings for the purpose of obtaining support, advice and assistance with the conduct of the case. A parent thus approached outside court is therefore potentially in a very difficult and vulnerable situation. This may

well be an issue that needs to be monitored and addressed with the parents and the media on a case by case basis as the new scheme beds in.

A further issue which is easy to describe, but may be far more difficult to resolve, will arise where there are parallel criminal and care proceedings. If, for example, the care case goes first and the media attend and therefore know what evidence the parents gave to the family court and that the family judge concluded that they are culpable, they may then also sit through and report upon the later criminal proceedings. If, for example, the parents do not give evidence, or give different evidence, to the criminal court and are subsequently acquitted, the journalistic urge to be able to publish detail from the care case can be easily understood, the two processes seemingly having come to conflicting outcomes with the result, again for example, that the parents had been found 'not guilty' by the crown court, yet the county court had made care orders and authorised the placement of the children for adoption.

Of course, any discussion of the difference between the two processes would have to involve consideration of the difference in the scope of the admissible evidence and the standard of proof, but complex though it may be, I believe that it is a discussion that ought not to be prevented from taking place. There is a legitimate public interest in the public knowing of the difference between the two court processes and understanding why the outcome may be different with respect to the same basic allegations.

Under the law as it will be post April, a journalist in the situation that I have just described, who has been a fly on the wall in both the care and the criminal cases, will be unable to report any of the substance of the care proceedings, other than possibly the outcome, once the proceedings have fully concluded. This fictitious future case may be one that commands a level of national interest of the order of Baby P or Shannon Matthews, yet the journalist who has been fully privy to the

care case will be unable to report any of the detail of that process. The professional difficulty for the journalist is all too easy to contemplate. The potential for the less scrupulous writer to allow information from the care case to seep into the media either by way of un-attributable background or via the internet is also easy to foresee. Again if a case such as Baby P's were to occur in the future, where there has been serious political debate about the ramifications of what has occurred, there must be a legitimate argument to be made for the press to be able to report upon any parallel care proceedings. Under the present law it is always open to the court to lift reporting restrictions if to do so is justified. I believe that, now that journalists can sit through the family case, there may well be a significant increase in applications from the media for those restrictions to be lifted on a case by case basis. For the reasons I have sketched out, I can see that such applications should certainly not be dismissed without careful consideration.

Despite my personal view that the Government reforms may not go far enough and that they will not deliver the ability to report that certainly some in the media believe has been granted, this partial opening up of the system does bring with it some substantial benefits. In particular it will, it is hoped, put an end to ill informed criticisms of the manner in which this important work is undertaken.

Making Parental Responsibility Work

Those few of you who have been very observant will have spotted the change. The rest of you, like me, will now suddenly realise that the donkeys have moved to a completely different part of the field. No longer interested in Transparency, we are now chewing over the topic of 'making parental responsibility work'.

You will all know very well that the seminal inquiry and resulting blueprint for the approach to private family law disputes following the implementation of the CA

1989 was that led by Sir Nicholas Wall in 2001 under the title 'Making Contact Work'. That initiative was followed up by a very successful conference in London in 2003 (on the day of the big anti Iraq war demonstration), which was addressed by Sir Nicholas and others, under the same title. Finally, earlier this year at another Resolution conference, Sir Nicholas Wall undertook a review of 'Making Contact Work' in the light of developments, in particular the extension of the court's powers under the Children and Adoption Act 2006 amendments.

Nothing in what I am about to say is intended to disagree with or detract from the focus of the 'Making Contact Work' discourse, which was deliberately focussed upon the all important ability of the courts and the wider family justice community to deliver workable and practical outcomes in contested cases, with a consequent consideration of contact centres, Family Assistance Orders, separate representation of children, the Domestic Violence Practice Direction and related topics.

My present intention is to focus not so much on outcomes in or after contested cases, but to look at what is being done and can be done to support intervention at a much earlier stage with the aim, hopefully, of achieving the resolution of potential issues without a contested hearing.

In this regard, in my view, the key concept, rather than 'contact' is 'parental responsibility' and how that is to be exercised. To understand the basis of my approach it is necessary, very briefly, to walk through the historical pathways that led to the private law scheme that is to be found in Parts I and II of the CA 1989.

Prior to the 1989 Act the legal focus was on rights of 'custody' and 'access'; terms which brought with them ideas of rights, possession and control, on the one hand, and, on the other, a more limited role of simply having access to the child who was in the custody of the other parent.

Latterly, prior to the reform, courts frequently sought to even up the parents' status by awarding them 'joint custody' but, in the same breath, giving 'care and control' to one and, again, merely 'access' to the other.

The Children Act sought to move away from concepts of rights and possession and replace them with the concept of 'parental responsibility'. Writing in 1989¹ Professor Brenda Hoggett, as she then was, said:

'The [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'. ... It ... represents the fundamental status of parents.'

A further important change was to replace custody and access orders with the new range of powers in s 8 of the 1989 Act. The seasoned commentators, White, Carr and Lowe² (and who better) describe the hope that many of us had for these new provisions:

'These powers are more flexible than the former and are intended to be less emotive. To this end they are drafted in clear and simple terms designed to settle practical questions ... and not to confer abstract rights. In this way it was hoped that the symbolism of victory that had come to be attached to custody and related orders would not be associated with these new s 8 orders'.

The use of the past tense in that extract from the 2002 edition of 'The Children Act in Practice' suggests that the writers shared my own view that the very

¹ 'The Children Bill: The Aim' [1989] Fam Law 217.

² 'The Children Act in Practice' [3rd Edn: 2002] para 1.17.

laudable hope that the 'symbolism of victory' would not attach to 'residence' and 'contact' orders had not been realised during the first 11 years of the Act. Matters have certainly not improved since that time.

The reality is that, in the eyes of some, one second class citizen, 'the non-custodial parent' has been replaced by another, 'the parent who only has contact'. That this should be so is a major matter of concern and is, in my view, profoundly unhelpful in the context of parents who have a joint and equal responsibility for their children.

To a degree, the ever increasing use of shared residence orders in recent times may be seen as an attempt to redress this drift away from the equality of parental status envisaged by the architects of the 1989 Act.

Under the law, parents who share parental responsibility have equal status. For me, that is the starting point in every such case. Whether the parent is a father or a mother, their status is equal. Their personality, aptitude, other characteristics, circumstances and the family history may make them more suited to contribute to their child's welfare in different ways, but those factors should not detract from the need for each of them (and the court) to see the other as of equal status.

With hindsight, or certainly with sight that I for one did not possess at the time that we all rallied round 'Making contact work', that very title has embedded within it the assumption that one parent has residence and all that the other parent is being considered for is 'contact'. In legal terms those labels are certainly not incorrect; they flow from the Act. But in the eyes of the 'non-resident parent' such an approach starts off with the expectation that all he or she may achieve is a contact order, in other words an order of a different level or status to that of the parent who has the 'gold star' status of a residence order.

This perception, which was not intended by those who crafted the CA 1989 and is not to be found in the words of judges who have dealt with these cases, has never the less crept in and re-created, albeit in different terms, the very difficulty that the move away from 'custody orders' was intended to solve.

That this should happen at a time when in fact the courts are, in my view, much more open to acknowledging and respecting the role of both parents than was even the case 10 or 15 years ago, is all the more frustrating.

I believe that many of us who have tried to move forward on improving the manner in which our system facilitates the resolution of private family law disputes have, if anything, unwittingly bought into this unhelpful mindset by concentrating on the outcomes of our process and on 'making contact work' without also concentrating on the equal status of parents and requiring the parents to face up to their joint responsibility for their child in a manner that both reflects and respects this joint and equal status as they move forward in a life that no longer sees the family living under the same roof.

Nothing in what I have just said is intended to be overtly critical of anything within our approach to these complex issues in the past. If there is criticism to be made then I, for one, am in the firing line. I have been in many of the rooms where these issues have been discussed during the past 15 and more years. I was, for example, one of the joint organisers of, and a speaker at, the 2003 'Making Contact Work' conference. So, if there is a 'crime scene', then my dabs are all over it and I put my hands up. But as I said a short time ago, I do not detract from any of the discussion that has travelled forward under the 'making contact work' banner. My modest purpose today is to suggest that that work needs to be complemented by an equal and earlier focus on 'Making Parental Responsibility Work'.

In this regard, I have become increasingly persuaded about, and am now a total convert to, the concept of 'Early Intervention' in resolving potential disputes between parents. As a phrase and as a set of ideas, it has now been around for some time. It was supported by Dame Margaret Booth and championed by the late Dame Joyanne Bracewell and DJ Nick Crichton. It did not benefit, however, from becoming institutionalised within a government pilot scheme ('The Family Resolutions Pilot Project') which ran with only limited success at a handful of court centres in 2004.

But since then, on the ground in individual courts and in separate initiatives by a number of the different arms of our multi-limbed system, it is the approach that is being adopted and is the philosophy behind the work that is being done in case after case. After many years of being a concept more talked about than seen, it is now, I believe, an idea that has truly found its time.

Examples of what I am speaking about are to be found in the long-standing scheme for conciliation hearings at the PRFD, at other similar more recent 'first appointment' schemes at different courts, in the CAFCASS private law pathway model and in the practice of some individual judges.

Of particular note in very recent times are three significant initiatives. Firstly Resolution's very own baby 'Parenting after Parting'; a baby delivered by a team headed by Chief Midwife, James Pirrie! The Resolution scheme, with its emphasis on giving key information on a child centred approach 'at the earliest possible stage' is very much in line with the concept of early intervention and is in my view a very welcome development. The concluding observation of the introduction to the Resolution booklet is to the effect that 'given that you will always be the only Mum and Dad your children ever have, the choices you make

at this time will mean everything to your children', rightly focuses upon the parents having the responsibility, both of them, for making choices for their child.

The second important recent initiative is the overhaul of the President's 2004 'Private Law Programme' by a team under the chairmanship of Hogg J and HHJ Altman. The new programme, which is about to begin a three month trial at pilot courts, aims to build on the success achieved by the joint working of judge and CAFCASS officer at the first hearing under the current Private Law Programme and also to incorporate recent changes in legislation, and in particular the new statutory duty upon CAFCASS and CAFCASS Cymru to undertake risk assessments. The entire of focus of the PLP is 'the first hearing' which will take place some 3 to 4 weeks after the issue of the application. The first hearing will be attended by a CAFCASS Family Court Adviser (and if available a mediator) and will consider a range of dispute resolution, risk assessment, case management and other issues. Once again, the theme of 'early intervention' is writ large throughout the proposed process.

The third initiative of which I speak is that taken by the family judges and magistrates in the Midlands who have developed a one page statement of 'judicial expectations' for all those who seek to come to the court for the resolution of private law disputes. You have a copy of this modest document in your conference packs. If you have looked at it you will see a list of really very unremarkable statements relevant to parents who are or may be in dispute about their children. What is important about this document is that it comes from the very judges who would have to determine any issues should they require determination in due course. It is a statement of what the judges will expect from the parents. It is written on the basis that it is the parents who share responsibility for their child and not the court. The judges therefore expect the parents,

whatever they may feel about each other as adults, to respect each other's equal status as parents.

The provenance of the Midland document is that it was presented and discussed at two one-day conferences in the autumn which were confined solely to a consideration of these issues and were attended by nearly every full time and part time family judge who sits in the Midlands, together with the chair of each Family Panel and their chief legal adviser. There was genuine widespread support both for the concept of issuing such a statement and also for the content. Since its launch in January of this year, the document has been sent out by each Midland court to every party to private law proceedings. It is a working tool used by Midland CAFCASS officers. Family lawyers in the Midlands are becoming familiar with it. And, above all, it sits on the desk of every judge or magistrate conducting a private law hearing.

It seems to me that for parents who are separating for the first time to be told at the earliest opportunity what the Court expects from them for their child can only be helpful. To do otherwise, as we have done over the years, with parents simply understanding that the child's welfare will be the court's paramount consideration and that each case is decided on a case by case basis has been, I believe, correspondingly unhelpful in that it allows parents a freedom to contemplate an outcome (and become entrenched in that view) when that outcome may be far away from that which a court will be contemplating. On one level it is a truism to answer the question 'why do parents go to court' by saying 'parents go to court to find out what the court's judgment will be for their child', but if that is indeed the case then the sooner the parents are exposed the court's general expectations the better.

In that regard, there is an argument for the courts going even further than the current text in the Midland Statement of Expectations and actually presenting

various models to divide up a child's time that are likely to be seen as 'reasonable' or 'appropriate' in different circumstances.

Whilst each private law case is determined on its own facts and by affording the welfare of each individual child the court's paramount consideration, the reality is that in a straightforward parental dispute, where there are no complicating features of domestic or child abuse, the court will be looking to afford the child a substantial amount of time with both father and mother.

There are only so many hours in each day and so many days in each week. The year is divided into school days, weekends and school holidays. There is a very finite limit to the number of schemes by which these blocks of time may be divided up in order to give the child a substantial amount of time with each parent. With a youngish child, the paradigm division of time is for her to spend time with the parent who is not her main carer on alternate weekends together with some shorter weekday visits during term time and half of all holidays. With an older child, a position of true equal division may be achieved by a 'week on – week off' scheme or even a '5/2-2/5' pattern.

Once it is accepted that the child will benefit from a substantial amount of time with each parent, the division of the weekly timetable involves the parents, and if need be the court, looking at these various models together with practical arrangements driven by geography, transport, extra-curricular activities and the like and then moulding a pattern that best fits the child's circumstances.

Against that background, some go even further and argue that the black letter law of the Children Act should enshrine a 'presumption' of reasonable contact into the statutory scheme. A recent article by Eliza Hebditch and Hannah Garner in Resolution Review reports that the State of Wisconsin is considering a statutory presumption to the effect that 'the court must presume that a placement schedule

that equalises to the highest degree the amount of time the child may spend with each parent is in the child's best interest'. The presumption may be rebutted by clear and convincing evidence that an equal split would not be in the child's interest.

As a matter of law, in our system, it seems to me not possible to impose a 'presumption' about one aspect of a child's welfare on to the statutory principle that the child's welfare as a whole is the court's paramount consideration. But, whilst the statement of a 'presumption' as to the arrangements for a child post-separation is legally not possible, that does not mean that a statement of the court's expectations of the outcome cannot be made where all other things are equal and the case is uncomplicated by issues of domestic violence or other abuse.

A helpful analogy here is that of a skeleton. The skeleton is the 'form' or 'framework' upon which the 'content' in any individual case will hang. Every human being is different, but our skeletons are remarkably similar. Every design of motor car is different, but the basic form is the same. Taking the analogy forward, it is a myth for parents to believe that the family courts do not have an underlying framework by which they approach the determination of private family law disputes, with every case being different. Hitherto, however, the framework has been developed by different agencies and different courts in different locations and in different ways.

In this regard national developments such as the President's revised Private Law Programme and Resolution's 'Parenting after Parting' are important because they are not localised or piecemeal. Part of the Early Intervention's philosophy is that if parents know from a very early stage the structure within which their decision making will be facilitated, and the thought processes by which it will be informed, then the goals that they seek are likely to be adapted to ones that are realistic

within those parameters. Having a national structure and a national approach are therefore, in my view, very important.

Against the background of our early experience in the Midlands, I would argue that the value of the current national initiatives would be improved by the development of a national statement of judicial expectations along the lines of the Midland prototype. Such a development can only be effective if it is judge driven and driven by judges alone. It must, as it is in the Midlands, be positively supported and owned by the community of family judges and magistrates. As I have already suggested, I would go further and say that such a statement could also include, again in general terms, what the judges anticipate would be reasonable arrangements for the division of a child's time in different basic circumstances.

At the end of the day, as family lawyers, we all know that the private law disputes relating to children that our courts are called upon to deal with are not, in reality, legal issues; they are issues to do with human relationships and emotions. They are far better determined, if possible, by the human beings directly involved within each family. All that the law can do is to provide a structure and a framework within which those decisions can, if necessary, be argued out and, if it comes to it, provide a decision maker other than the parents who can impose a decision upon them which can then be enforced.

In conclusion, I believe that it is of the utmost importance, at the earliest opportunity, to ensure that each parent thinking of coming to the court understands:

- (a) that each of them, and not the court, has equal responsibility for making arrangements post-separation for their child;
- (b) that the court has a firm national structure in place which is aimed at focusing their attention at the earliest stage on

discharging that responsibility by trying to agree those arrangements;

- (c) that, although they may be facing these issues for the first time themselves, many others have travelled the path before them and the received wisdom of others has been distilled and is available to them in the form of nationally accepted advice on 'Parenting after Parting';
- (d) that, the judges themselves (rather than being blank ciphers) have expectations of how a parent should discharge their responsibility in these circumstances.

If we can achieve that we will have achieved a situation where parents will be channelled through a structured process to focus upon and confront their responsibility to make, if possible by agreement, arrangements for their children at the earliest opportunity. I hope that by standing back and taking a longer look at what is going on, it is possible to see that each of these various initiatives has 'early intervention' as a common theme. We ought to see them as connected and, I would suggest, we ought to look at how they work together both now and in the future under the thematic title of 'Making Parental Responsibility Work'.

[Address Ends]