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SW Good morning, everybody. Thanks for coming and braving the tube strike. I'm Stephen Ward, Head of News, for anyone who doesn't know me. Just a couple of… Could I explain the piece of paper on your chairs? Have you all got copies of this? This is remarks that Sir James Munby, President of the Family Division, is… he's going to make these later today. The status of this is this actual speech is embargoed until the time it says on the top but anything in it that you want to ask about now, anything that is said now, is for immediate use. So that's fine. So if you [inaudible], that's it's latest. This will be the speech this afternoon to judges and others in the professions about family law. Just a couple of ground rules. When you ask a question, if you can put your hand up and I'll indicate for you to go next as usual and if you could identify yourself with name and publication and [ask about?] any aspect of family justice and family justice reforms, but obviously the President is not able to talk about cases which either he has heard or colleagues have heard. That's a standard process for judges as you will know.

So we've got… The President has to stop at half-past, so if we start now, and he has another appointment unfortunately so let's go. Martin.

MB: Martin Bentham from "The Evening Standard." Could I ask you about the paragraph in the speech about divorce and, in particular, the point where you say, "We should [at least?] consider whether the process of divorce still needs to be subject to the usual supervision." Do you mean, therefore, that two people who agree to divorce should be able to do it by filling in a form and consenting to it without it having to go to court? Could you explain exactly what you mean by that and what effect it would have?

JM: Well, elsewhere there are countries where the system is that a divorce which is by consent and where there are no children is treated as an administrative matter dealt with by what, using our terminology, one might describe as the registrar of births, deaths, marriages and divorces. It seems to work. Well, by consent, obviously, not if there's dispute. All I'm suggesting is we might at least consider whether it would be appropriate, sensible to move forward and at least to consider that but I would not contemplate it in cases other than cases where there is consent and cases where there are no children of the family.

SW: Joshua.

JR: Joshua Rozenberg. Following on from that question, you say there would be, in cases where there are no children, but obviously there are financial matters to be sorted out. Would the weaker spouse come under pressure to sign the consent and fill in the online form which goes off to the registrar in those circumstances? Wouldn't it make divorce too easy and serve to continue to undermine marriage?

JM: Well, it would make divorce no easier than it is at present. The reality is that we have and have had for quite some time in this country divorce by consent in the sense that if both parties wish there will be a divorce if they're able to establish the grounds for divorce which is very easy to establish. The process, as you will know, Joshua, is an essentially bureaucratic administrative process, albeit one

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conducted by a district judge. Part of my thinking is that we should uncouple the process of divorce from the process of financial remedies and ancillary relief, as it used to be called, following divorce in the way in which the recent changes have actually finally uncoupled the process of divorce from the process of dealing with child disputes consequential upon the divorce.

JR: So which comes first? I mean, do you have to sort out the financial matters between the spouses and the children before the divorce or would the divorce take place by consent and then the parties would sort out their financial affairs with the assistance of the courts if necessary but then the divorce would have gone through and the weaker party would have less leverage to get the stronger party to agree to make the payments that are required?

JM: Well, I'm not sure the divorce process, as a process, gives either party, whether the weaker or the stronger, any leverage in the financial disputes. Divorce is at present merely a pre-requisite to the court embarking upon the resolution of any financial disputes and that would remain unchanged whether the process of divorce was one conducted by one state bureaucrat, a district judge, or by another state bureaucrat, the registrar of births, deaths, marriages and it might be divorces. Quite apart from the divorce process, we are moving into a world where, as you will know, there is considerable pressure, considerable enthusiasm for encouraging parties to resolve their financial differences following divorce on a consensual basis and with minimal involvement by the court. That in part is driven by the recent decision of the Supreme Court in Radmacher case which points to the autonomous decision-making of the parties. It is reflected in the Law Commission's recent proposals, although obviously we have to recognise that in many cases there will be economic imbalance as between the two parties. The process of resolving financial disputes may ultimately require a court order as only the court can actually sanction a binding arrangement. That does not mean that the process has to involve full-blown ancillary relief proceedings before a judge. If the parties can resolve their differences, whether by mediation or by arbitration or in some other way, then unless there's some good reason to believe that the agreement they have come up with is badly skewed, unfair, the result of the infliction of undue pressure by one party on the other then, as I said earlier this year in the judgment I gave, it is the function of court to uphold the autonomous decision-making of the parties rather than to condemn them to a controversial litigious process.

SW: Frances and then Clive and then Steve.

FB: Frances Gibb, the Times. I just want to clarify, sorry, I have to linger on the topic but are you saying, would this change the status of divorce as a legal contract?

JM: Not at all. It would have no effect on either the status of marriage or on the legal status or consequences of divorce. It is merely a suggestion that we consider, no more than that, a suggestion we consider, a change in the process which some might see – and this is not an idea for which I can claim the authorship – some might simply see as the culmination of the process of divorce law reform which has been going on in this country since my predecessor, Sir Gorell

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Barnes, chaired the Royal Commission on the subject as long ago as 1906 and which we have subsequently seen in the Statutes of 1937 and 1969 and, indeed, the more recent procedural reforms following the 1969 Divorce Law Reform Act which underlie the existing essentially, as I call it, administrative or bureaucratic process of obtaining a divorce.

SW: Clive.

CC: Clive Coleman from the BBC. Can I ask you about the preceding paragraph? You talk about the long running problem of cohabitants' rights—

JM: Yes.

CC: —and you talk about the fact that many women are condemned to injustice under the current arrangements. What would you like to see happening?

JM: Well, the problem has been around as long as I've been in the law. It was a problem identified as such by judges, as I recall, as long ago as 1973 and 1974. It is a long running issue. The Law Commission, before I became Chairman of the Law Commission, did a major piece of work on it and recommended reform. Thus far nothing has happened. There are various models of how a reform could work. On one model one simply applies with necessary adjustments the regime which currently applies to divorced couples. On other models, and the Law Commission went into this in great detail, one would have a system which in effect compensates, let us say, the wife from the adverse financial consequences of the collapse of the relationship but does not give her greater rights, the rights she'd have on divorce if she were married. Something has got to be done. That seems to be to be inescapable and in saying that I'm saying no more than judges have been saying for 40 years. What precisely should be done is a different matter on which I have no particular views either as a judge or as a previous chairman of the Law Commission.

CC: Can you just say a little bit about how much the current injustice troubles you and your fellow judges?

JM: Well, the essential problem you have, and we know of such cases, is a case where for some reason or another, and it may be, one has to remember, no more than the refusal of a wealthy man to marry, a relationship which has lasted for many, many, many years and one is aware anecdotally at least of cases of cohabitation which have lasted 20, 30, 35 years and then break down where there are children of the relationship and where the woman has made precisely the same career sacrifices, precisely the same financial sacrifices as many women do as a consequence of marriage. At the end of that process the children, if they're below the age of 18, are entitled to certain forms of financial relief but the woman in that case is entitled to nothing at all and she may be, to use the vernacular as it were, "thrown on the scrapheap" at a time when she has lost her earning potential because of her age and because of the time she has been out of employment where there is no way she can rebuild her career, in circumstances where, had the parties been married, she would have had a very

significant claim to very significant financial relief. This is not… and the Law Commission have looked into this twice in recent years. There was the big cohabitation report which preceded my time as Chairman and more recently the Law Commission looked into the question in the context of reform of the law of intestacy. One of the issues the Law Commission grappled with is should there be a minimum qualifying period before a cohabitant could claim rights? And the Law Commission took the view, yes, there should be, and then came up with certain suggestions as to how long that qualifying period might be. So there's a lot of scope for debate as to what the qualification should be for bringing such a claim; what the basis of the claim might be and so on and so forth, but that something needs to be done, it seems to me, is the key point.

CC: Do you sense any political will on this or is it not the case that governments will simply say to make the changes you're suggesting would undermine the institution of marriage?

JM: Well, you are in as good a position as I am to understand where politicians are coming from; where they may be going. All I would say is I think I remember correctly that when Lord McNally, the then junior minister, was asked a question about this about a year or two ago in the House of Lords by a peer who was interested in this problem, his answer was, as I recall, "The Government has no intention to legislate in this Parliament." What one reads into that, I don't know.

SW: Steve Doughty.

SD: Just to press that point, have you discussed these matters with ministers at all?

JM: No.

SM: Owen and then Catherine.

OB: Owen Bowcott from "The Guardian." You talk about the role of judges becoming more inquisitorial. Do you think it's going to be completely transformed when judges have to work [inaudible] [are unrepresentative?]

JM: Not completely. I mean, can I be quite clear about this? I am not suggesting for a moment that we go over, even in the Family Court, to a continental style inquisitorial system. That's the first point. The second point is that the debate has moved on and I do not, with respect to anybody else who may frame it in this way, see the debate as very helpfully being framed in terms of do we have an adversarial system or an inquisitorial system? The fact is we have an adversarial system but – and it's a very big but – it is a system which, particularly in the Family Court, is infinitely different from the adversarial system we had when I started out 40 years ago as a young barrister. The fact is the modern system is critically dependent upon robust and vigorous case management by the judge. The parties no longer set the agenda. The judge decides what the issues are which the parties are going to be allowed to argue. Critically the judge decides what evidence he is going to hear. Forty years ago the judge had no discretion to exclude evidence. The only question was, is it relevant? Is it

admissible? If yes, he had to sit there and listen to it. So we have very vigorous, robust case management which has in a very significant way transformed the system, so the system we have already is in part inquisitorial in the sense that it's the judge who sets the agenda. It is adversarial in terms of the actual process in the courtroom where the parties adversarially argue out on the agenda set by the judge.

The new thing we've got to grapple with, given that there is so little legal aid now in private law cases, whether children cases or money cases, is that the adversarial system assumes axiomatically that the litigants will be represented, at least if they wish to be represented. The big change now is that we have litigants in person who, in contrast to litigants in person of previous years who chose to be unrepresented, are litigants in person who do not want not to be represented and would wish to be represented but cannot be; therefore litigants in person who are less qualified by wish, by ability, by personality to represent themselves in court. And in relation to that it seems to me inevitably it's going to have an impact upon the way in which the judge handles the case. I mean, it's a slight parody but when I began there were judges who sat there sphinx-like and said nothing until they gave judgment. Well, in the modern world if you have two litigants in person arguing a family case that simply will not work. It will not produce justice. It is simply a recipe for injustice and it seems to me inevitable that in that sense the process in court before the judge, where there are litigants in person, has got to become more inquisitorial than it has in the past. So I think that is, as it were, a development in a process which has been underway for quite some time. That doesn't mean we're going to end up with a continental inquisitorial system but we are already a long way removed from the traditional adversarial system.

CB: Catherine Baksi, Law Society Gazette. Figures from the MoJ show, as you've already alluded to, a huge increase in litigants in person, declining in mediation and an increasing number of cases actually going to court as a result of the legal aid cuts. Are you concerned that the legal aid cuts will undermine the reforms that you're trying to do with the family justice system because all the changes that you indicate here, a more inquisitorial system, greater mediation, greater training in case management of judges, will take time and many lawyers believe the Family Court is in crisis? It's already taking two years to get a final hearing at the Principal Registry. Are you concerned that your reforms will be undermined by the cuts?

JM: The simple answer at present is no. The reduction in the number of mediations is not caused by the withdrawal of legal aid. It is caused by other factors, many of which should have been but were not actually foreseen by government. Steps are now being taken to remedy that. Those steps should have been taken some time ago. We are in a very serious situation in relation to mediation but there is some hope that things are now being taken in hand. I think we can see in the coming months an increase in the use of mediation, partly because under the reforms it is going to be compulsory to at least consider mediation before you come to court and partly because effective steps are about to be taken to ensure that mediations are made available and that the public money which is available

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for them, which is not currently being taken up, is actually taken up. I think that's a slightly separate issue. The way one squares the circle between the increasing number of cases, the increasing time that cases take if there are litigants in person, and everybody's agreed that they do take longer, and the availability of finite resources, is in principle simple and I believe achievable. The entire process of reform, whether in public law cases, in private law cases, where the problems you mention are particularly acute, or in financial cases, is driven by the need, not merely a bureaucratic and administrative need, but a need in the interests of children and family to have a quicker and more streamlined process which, critically, cuts out unnecessary directions hearings, unnecessary review hearings. We are already seeing the fruits of that process in the public law cases where the number of hearings is being reduced and where, as a result of robust case management, the changes in relation to experts and so on and so forth, the hearings which are taking place are taking less time. I'm confident we can achieve the same in private law cases, that is to say, in each case fewer hearings and hearings which are shorter. That will free up and is in the public law context already freeing up a significant amount of court time and that freed up court time will enable us to achieve two things: first, accommodating the fact that litigant in person cases may take longer than cases where the parties are represented, and also tackling the still, in some areas of work, some areas of the country, unacceptable delays in getting hearing dates.

SW: Grania and then Jane.

GLD: Grania Langdon-Down. Just to go back to the mediation, would you see a [inaudible] [driven?] response being made if compulsory for them to attend as well?

JM: I don't have a strong view on that one way or the other. I think that in a sense, like so much of what we're trying to do in the family law reforms, this is actually a question of changing mind-sets, changing cultures, getting a message over. Once the message gets over that mediation is available; once the message gets over that mediation is mediation, it's not the things that people think it is; it's not, for example, conciliation; once the message gets over that it works; once the message gets over that it takes less time to arrive at a decision as a result of going to mediation than going to court; once the message gets over that you can, by mediation, sometimes achieve a solution, a tailor-made crafted solution which better meets the needs of you and your children than the court can; once we get to that point there'll be a general enthusiasm to take up mediation and one hopes that once we get to that point, the need for compulsion will become less important than it is at present. The problem is that we have not yet – when I say "we," the system as a whole – has not yet sold to the general public; has not yet sold to those who potentially could benefit from it; what mediation is; the availability of mediation; how they go about getting it and the advantages of mediation. That is why I think we are in the almost crisis situation we are at present, but if we can get that message over, and we're about to start doing that, I think, once we can get that message over it will become a very attractive option.

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GLD: Do you expect judges… I know there was talk about [this?] under your [lists?], do you expect judges to be more robust in maybe having cost sanctions if people don't mediate?

JM: Well, the trouble is cost sanctions tend not to work if one's dealing with what I might call ordinary people, typical people, in private law cases. They often don't have the money and a cost sanction imposed on the application of one side is likely to make matters worse than better. Part of the reform arrangements embodied in the Child Arrangements Programme is an additional emphasis on the obligation of judges at every stage in the process to address their minds to the need for mediation and, where appropriate, to push the idea of mediation before the litigants, in front of them. And the Child Arrangements Programme, which is the template for private law cases for the future, spells out that it's for the judges at every stage in the process as now identified to consider whether, even if mediation has been tried hitherto, whether they should not be encouraging the parties to mediate and even in appropriate cases simply adjourn the case so that mediation can take place.

SW: Jamie has been waiting. Probably one more after that and I think that will have to be it.

JG: Jamie Grierson at the "Press Association." You talk about tackling the charge that you operate a system [inaudible]. My colleagues, especially if you work exclusively in the courts, have asked do you… [how are you planning?] to split the system to alert court reporters to, say, a case of public interest or perhaps when a judge is going into open court on a family case, will they be alerted because, as they say, at the moment it's kind of down to luck when they stumble across one of interest.

JM: Well, as I think you know and I have made this very clear in the past, we have got to make radical changes. Rightly or wrongly, I have taken the view we need to proceed incrementally, step by step. That, I think, gives us the best chance of achieving what I believe to be desirable over an acceptable timescale rather than trying to go from A to Z in one massive leap which may not be acceptable. I'm about to go out to consultation on proposals for what the next steps may be. One of the next steps on which I'm going to consult is whether the media should not be entitled, subject to appropriate safeguards and conditions, to access to at least some of the court documents so that we can overcome the problem that the reforms of four years ago, the reforms of April 2009 which entitled the media to attend Family Court proceedings, have proved completely futile, both from the media's point of view and from every other point of view. Because without access to any of the documents it's almost impossible for the media to understand what is going on and that seems to me to be a major problem on which we need to move forward and I'm proposing to… I intend to bring forward proposals on that in the very near future. I'm very conscious of the other problem that, as you say, it's very hit and miss and various ideas have been floated as to how one might better communicate to the media what is going on in the courts and I am likely to bring forward proposals on that, again in the fairly near future. One of the problems is, as I discovered to my perhaps rather naïve

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surprise, is that things which we treat as obvious are not so obvious to the outside world. In fact family cases all have numbers and the number is according to a system which identifies the type of case so that the typical number for a case in the High Court would be FD, for the Family Division, 14, 2014, C – that means care – then a number. C stands for care case; P stands for a private law case; D stands for divorce, in other words financial remedies, and so on and so forth. So in fact even the entirely anonymised court list does enable one to work it out and the court, each court, has its own code so that if you know the code you can tell that if the thing begins PO that means it's a Portsmouth case; BH, I think, is Brighton; FD is Family Division. So that if you understand the system you can actually tell from the anonymous list that what the judge is dealing with is a care case from Portsmouth.

In my naivety, I assumed everybody understands that. It just shows how naïve I am but you raise a very serious point and I think the reality is that we have got to make effective the reform which everybody agreed on four years ago that the media has got to be able to come into the family courts and, subject to restrictions, report what's going on and there are two great obstacles to that at present. One is they don't know what's going on before they get there – it's a completely anonymised list – and the second is, even if they are there, what's going on is not very helpful because we have a process which is increasingly based upon pre-reading of documents. So that whereas in the old days, and still in the Crown Court, everything is oral, counsel now stand up and says, "If your lordship would look at page 59, tab 5 in bundle C you'll see what's said in paragraph 6." Well, what does that mean to any of you? Nothing at all. How one goes about the process of having a more informative court list while maintaining the proper privacy of the children and the other parties is a technical matter. It's a difficult matter. It's an important matter but one we have got to overcome.

SW Are you out of time? It's half-past. I think we can take one more.

JM: One more. Two more.

PH: I'd quite like to ask a public law question.

JM: Yes.

PH: Philip Hoult from Local Government Lawyer. The question I have is recent rulings on adoption from the judiciary implies that what's said, from the steer, that adoption should be a last resort where nothing else will do. The government is saying to councils, "We want you to place more children for adoption," and they're threatening to remove local authority powers if they fail to do so. Do you have any advice for councils in that situation?

JM: Well, I stopped giving advice when I left the bar 14 years ago. All I would say is that it is the Supreme Court, very recently in a case called "Re: B" which used the phrases which you've just mentioned. Last resort and so on and so forth. Under our system Parliament makes the law in passing a statute. Parliament, I emphasise; not the Government. It's Parliament that legislates. It is for the

judges to decide what the statute means. The Supreme Court has ruled what it believes the statute means and under our system that is the definitive judicial view but of course under our system the relevant statutes can be changed as Parliament wishes to do so. I'd be foolish not to acknowledge as I do that there is a clear tension between what the Supreme Court said in "Re: B" in I think the summer of last year and what the Government had said in guidance which it issued only a few months before in the spring of last year, the tension being that whereas the Supreme Court said that adoption is the last resort, the Government, as I recall in the guidance it gave, said that local authorities should get away from the idea that adoption is the last resort. So there is a tension there but under our system Parliament makes the law; the judges interpret the law and if the Parliament does not agree with the judges' interpretation of the statute they passed, then the remedy is for Parliament to change the law. In saying that I think I've acknowledged that there is that tension there. But I appreciate that on the ground, as it were, for the directors of social services; for the social workers dealing with adoption cases; it must be slightly difficult to know exactly what they should be doing given that tension. One more.

SW: Frances has been waiting longest.

FG: Can I bring you back to divorce? No fault divorce? What difference, what impact, will it have to take fault out of divorce and do you think as some critics have said that might undermine notions of responsibility in marriage?

JM: Well, in practical terms it will make very little difference. The reality is we have and have had in this country for the best part of 30 years now divorce by consent. I think the fact is that under the law at present, although the only ground for divorce technically is irretrievable breakdown of the marriage, you can only establish that ground if you can establish adultery, unreasonable behaviour, and separation for two years with the consent of the Respondent or five years separation without the consent of the Respondent. Well, it's not very difficult, bearing in mind the current concept of unreasonable behaviour, to come up with some petition containing what in a more robust era would have been called anaemic allegations of misconduct. The reality is that many divorces go through by consent in the sense that the parties have actually agreed the grounds of alleged unreasonable behaviour before the petition is issued. If they don't want to do that and there's been two years separation, then it goes through by consent so the reality is we have divorce by consent. Defended divorces, contested divorced are almost invisible. They hardly ever happen nowadays so in that sense, Frances, all one's doing is actually bringing a bit of intellectual honesty to the situation and getting rid of an unnecessary process which simply makes life more complicated because the district judge under the present system has to go through the ritual of considering whether the anaemic allegations contained in the petition drafted by agreement do or do not amount to unreasonable behaviour. Most of the time the district judge says, "Yes." Occasionally the district judge says, "No," throws the petition back and the petitioner then goes to the other party and they agree to put in slightly more robust allegations. Of course that is not a sensible process. I do not on the other hand see how this in any way undermines marriage or the sanctity of

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marriage. It is simply recognising the reality of where divorce law reform has got to and indeed the reality of where divorce law got to about 30 years ago, 30 or 40 years ago.

SW: I think that's…

JM: I think… very, very quick.

SW: A very quick sentence.

SD: We are currently in the course of falling divorce numbers, falling divorce rates. In 1969 when reform was produced, a very great increase in divorce numbers. Do you think there's a possibility any new reforms will produce a large increase in divorces? Would that worry you?

JM: The short answer is no. I not think it will and therefore the second question doesn't arise

SM: Right. Thank you very much.

JM: Thank you very much indeed. I'm sorry I've got to leave you but the Lord Chief Justice requires my attendance at another meeting very shortly.

SM: There will be a transcript later in the day. I'll send it round when we've got it.

[End of recording]