

**Speech by The Rt Hon Sir Andrew McFarlane
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Association of Lawyers for Children

The Hershman Levy Memorial Lecture 2014

Thursday 26th June 2014

As a young barrister, when I first understood the importance of the decisions being made which might, or might not, lead to a child being removed from her family for ever and placed for adoption, there was but one 'go to' expert barrister in the field: it was Allan Levy. Allan was, to my eyes, the role model of all that I aspired to be. He was a consummate expert on child law and adoption, an excellent advocate who was utterly in tune with the emotional and social work perspectives of his cases. Above all, he was the author of the only practitioners' text book on adoption. As the years went by he achieved national prominence through the Pindown Inquiry, regular appearances in serious radio and television discussions and, of course, as counsel in every single leading case in the field for a decade or more.

David Hershman, about whom I have spoken and written on other occasions, was one of life's dynamos; he was a game-changer. His contribution to child care law and practice continues to be felt today, not only in the case law that he helped to develop, not only through 'The Book' [*Children: Law and Practice* (Family Law: loose-leaf)], not only through the style of legal lecturing that he and I developed but also, and he would I feel be most proud of this, through the success of the many pupils and younger barristers that he formally or informally influenced over the years.

This is the tenth and final memorial lecture to mark the untimely deaths of Allan Levy QC and David Hershman QC, my dear friend and colleague, during the summer of 2004. Given my admiration for Allan and my very close relationship with David, I am pleased, daunted and honoured in equal measure to be standing here this evening.

The ALC's generosity in holding this event over the past decade has been greatly appreciated by all of us who were close to Allan and to David. It has meant a lot to us to have a focus once a year around which to gather, to remember them and to listen to a lecture which has sought, each year, to provide greater understanding of the area of law that they both considered to be the most important and to move the game on, as they each, in their time, succeeded in doing. The list of speakers has (at least until this evening) been of the highest order; no less than three Hershman/Levy Lecturers are current members of the Supreme Court; four others were or were about to be President of the Family Division; and the remaining three of us are mere High Court or Court of Appeal judges. Not a bad memorial for two barristers!

The gratitude that we in the profession have to the ALC is echoed and surpassed by Abi Hershman and David's family; particularly the girls, now each a young woman, Alice, Issy, Martha and Florence. After such a strong and impressive run, Abi and the ALC now feel the time is right to draw this sequence of lectures to a close. I agree. Those many of us who remember Allan and David so well and so fondly, and still, a decade later, feel their loss so keenly, will not forget them or the place that they had in our lives. For me, David was as a brother and I have missed his presence in my life so much throughout the last ten years. Ten years seems such a long time when set

out in stark numerical terms. Much has happened in those years, but for me, my time with David still feels as if it were just yesterday.

Making parental responsibility work

On 22nd April this year radical reform was introduced to the law and practice with respect to disputes between parents regarding their children. Given the high level media campaign arising from the protests of angry parents and the apparent general public interest in the manner in which parental disputes are resolved, it was surprising that very little news of the implementation of these changes appeared in the public press. That this was so may be explained by two reasons. Firstly the changes to the resolution of parental disputes were but one part of a wide ranging more general reform of the entire family justice system. There was, in short, simply too much material for the press to digest and do more than simply flag up the headlines. Secondly, such reporting that did take place did little more than simply record that the labels on the court doors and the court orders were changing. The labels have indeed changed, but, as I hope to show during the course of this talk, they are but symptoms of a much more fundamental shift in the approach that is now to be taken to post-separation disputes between parents about their children.

Prior to 22nd April frenzied activity took place in producing the necessary subsidiary structures and documentation to support the changes. Now that the dust is beginning to settle I hope it is possible to step back and look more widely at the thinking behind the changes and the reasons why there is, in my view, real ground for hope that many more children and their parents will achieve a sensible, settled, stress free and simply ordinary relationship with each other after separation as

opposed to the highly conflicted, deeply harmful failed outcomes that so often hit the headlines.

Although this lecture is delivered to a gathering of lawyers and other legal enthusiasts, and although the first part of what I have to say, which sets the historical context, may be of interest only to them, it is my hope that the description that I will go on to offer of the changes themselves and the changed philosophy behind them will be of wider interest to those who, most unfortunately, find that their own family is having to deal with the consequences of parental separation or divorce.

The message that this part of the legal landscape underwent a sea change on 22nd April 2014 needs to become general common knowledge. Unless parents, and I would say all parents, grandparents, friends and other family members understand that the approach of the law and the courts to these issues has changed, and, more importantly, why they have changed, there is a real danger that the reforms will not improve the lot of children and their parents for the better and 22nd April 2014 will, with the eye of history, simply be seen as the day upon which the labels were changed on the court door and the court orders.

Historical perspective

I propose to set the context for my description of the new law by offering an historical perspective looking back over the last 100 years. In this regard I have, as on many previous occasions, gratefully turned to Stephen Cretney's masterful account of "Family Law in the 20th century" (Oxford 2003).

At the beginning of the 20th century the legal structure around the roles of a mother or father of a child was rigid, straightforward and, from the point of view of public administration, had the advantage of identifying only one parent of the two who had sole and complete legal authority with respect to a child. It was the father of a legitimate child who had the exclusive right to exercise parental authority over his son or daughter. Where a child was illegitimate, it was the mother who had sole parental authority. A divorced wife might acquire legal authority by court order, but in this context the grounds of divorce were relevant and where, for example, it was established that the wife had committed adultery, she would have no prospect of being granted parental authority over her child.

All this sounds so alien to our ears, but I am describing a situation that existed less than 100 years ago and in which the role of women had for centuries been either ignored or grossly undervalued by the law. For example, it was not until 1928 that all women over 21 were given the vote at general elections.

Women were not the only family members to be undervalued or ignored as individuals within the law at that time. If a dispute over a child did come to court, for example following a divorce, the dispute would be resolved by the court awarding “custody” to one or other parent. 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.

Where custody was ordered in favour of one parent the court would normally award rights of “access” to the other. 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.

Both custody and access tell you something about the person who holds the right of custody or the right to access, but little about the position of the child at the centre of any custody or access order. The words “custody” and “access” are devoid of emotional content; they speak in rigid physical terms and have little or nothing to do with the psychological and emotional relationship between a parent and a child.

Although, as we shall see, the words “custody” and “access” disappeared from the statute book with the implementation of the Children Act 1989, it is still not uncommon now, a quarter of a century later, to hear these very phrases used in television drama, media reporting and, even, political debate. If a significant part of the population still thinks in terms of rights of custody and access then the reforms of 2014 will indeed seem to them to be most radical and the need for wider public education on these matters is all the more important.

Going back to the historical time-line it is hard to understate the importance of the Guardianship of Infants Act 1925. There had been a developing head of steam for reform of the “one parent automatically has sole authority” position. Change was resisted by government and civil servants partly, as I have mentioned, because, to the administration, it was attractive to have a model where only one single parent had sole authority. A second ground for concern was that if parental authority were shared it would be inevitable that disputes between parents would be brought to court. Intervention by the courts in what was essentially private life was thought to be intrinsically undesirable and might introduce an element of discord between

parents which could never be eradicated. Finally, and this point is a theme to which I will return, there was a strong view that issues relating to children were not really justiciable at all. In a select committee report during the passage of the 1925 Act Sir Claud Schuster said

“[courts are] concerned...with the definite ascertainment of the rights of the parties, a party on one side and a party on the other, and if they can ascertain what the right is then the court is inevitably led to its decision. There are no rights here. It is a question of discretion. To take a ridiculous instance, a dispute whether a child is to go to one school, or to another school – how on earth is the court going to deal with that?”

Those of us in this room who are judges will display a rueful smile at that observation recalling, as we all will do, the number of occasions when we have had to sit and listen to disputes on precisely that topic.

The resistance of Sir Claud and others was overcome and 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. The Act did not give the wife rights during the existence of a marriage, unless she obtained a court order, but, on divorce the court had power to determine issues between the parents and, for the first time, the Act of Parliament stated that the court was to have “the child’s welfare as its first and paramount consideration”. The court was expressly instructed not to take any account of whether the claim of the father was superior to the mother, or vice versa. As a result of the 1925 Act the courts had a greatly increased role in determining issues regarding a child’s upbringing. Initially the number of cases brought to court was low, but had risen to 6,000 or so by 1948.

The parents of an illegitimate child had to wait 34 years for the Legitimacy Act 1959 to achieve similar access to a court with respect to their child.

It follows from the description I have given of the 1925 Act that, during the currency of a marriage, unless she obtained a court order, a child's mother still had no legal authority with respect to her child. She could not consent to surgery, make decisions about the child's finances, apply for a passport or even give consent for him to attend a school trip. That situation did not change until 1973. 1973: as someone who was already aged 19 in 1973 I find it stunning that it was only at that time that parents were afforded equal authority and legal standing with respect to their child.

The 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. Under the Guardianship of Minors Act 1973 the court was given jurisdiction to determine any issue as between the parents whether or not there was a subsisting marriage.

I have, thus far, described the development of a jurisdiction for the courts to determine issues between parents which developed, albeit against the initial reticence of the then government and administration, in order to resolve disputes if they occurred. Separately, and for different reasons, a more paternalistic approach developed during the middle of the 20th century and blossomed during the deliberations of the Royal Commission on Marriage and Divorce in 1956 (the Morton Commission). The Morton Commission took a strong view that divorcing parents could not be relied upon to establish arrangements that were necessarily in the best interests of the children. As a result they recommended that responsibility be placed

on the court to scrutinise the arrangements for the child in every divorce case, whether or not the parents were actually in dispute with each other. The Matrimonial Proceedings (Children) Act 1958 was passed to enshrine the court's role as paternalistic overseer with every divorcing couple being required to file a "statement of arrangements" for their child, which required approval by the court, before the divorce could be granted. Even when the Special Procedure for divorce made the process of dissolution of a marriage far more straightforward, the need to file a statement of arrangements and to attend an appointment about those arrangements before a judge, continued.

This process can only have led to many more court orders, and many more disputes between parents, than had hitherto been the case. It also, in my view, must have added real substance to what must have been a growing understanding in the population at large to the effect that if there is a dispute about our children we have to go to a judge to sort it out. If that was the consequence, and I am sure it must have been, one does not need to think for long to guess what Sir Claud Schuster's reaction would have been had he lived long enough to observe it.

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 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. However, the need for parents to file a 'statement of arrangements' continued, with the court retaining a power, under the Matrimonial Causes Act 1973, s41, in exceptional circumstances, to hold up the grant of a decree of divorce or nullity until necessary court orders for the children had been made.

One of the April 2014 reforms is the total repeal of MCA 1973, s41 thereby bringing finally to a close the 50 year period of judicial paternalism that had originally been set in train by the Morton Commission.

Children Act 1989

In a world in which there is widespread cynicism as to the conduct of public affairs and matters of State, it is refreshing to note that, on some occasions, the right thing happens at the right time for the right reasons. My choice of the word "happen" is misplaced. If ever proof were needed of the old adage that "time spent in reconnaissance is never wasted" such proof is to be found in the genesis of the Children Act 1989. Over the course of years in the 1980's two separate 'drains to roof' reviews of public child protection law and, separately, the private law relating to children, had been undertaken and completed. Despite each commanding widespread support, they sat gathering dust in the "pending" tray until a haphazard, unlooked for, political moment might arise and justify Parliamentary time being afforded to the necessary statutory reform. That moment came, as is well known, following the Butler-Sloss report into child abuse in Cleveland in 1987. The proposed reforms of public law and private law were masterfully grafted into one unified statute and the Children Act 1989 became law.

For the purposes of this address, which focuses upon the resolution of disputes between parents as to the arrangements for their children, I propose to highlight three separate aspects of the Children Act which are of particular relevance:

- a) The concept of “parental responsibility”;
- b) “Residence” and “contact” orders; and
- c) The no order principle.

I hope that the very brief historical overview that I have given will have teed up in the listener’s mind the striking contrast between these three concepts and the philosophy which had underpinned the earlier law.

“Parental responsibility”

The title of this address is “Making Parental Responsibility Work” and it is therefore helpful to spend a moment at this point looking at what that term, introduced by the 1989 Act, means. Before dipping below the label itself, however, I would lay the greatest stress upon the words “parental responsibility” themselves. They are a far cry from the overtones and undertones generated by a word such as “custody”, or its second division counterpart “access”. Although, as we shall see “parental responsibility” includes parental “rights”, the emphasis of this concept is upon “responsibility” rather than “rights”.

Interestingly, and I would say wisely, the 1989 Act does not attempt a jot and tittle definition of what is meant by “parental responsibility”. Section 3 of the Act, under the heading “*Meaning of parental responsibility*” states that “parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.

Baroness Hale, who was the principal architect of the Children Act 1989, has described the policy that underpins the concept of “parental responsibility”:

“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”. 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”.¹

This address is not intended to be comprehensive law lecture on the private law provisions of the 1989 Act. It is not therefore necessary to spell out how, in different circumstances, parents who are not married can and will obtain parental responsibility for their child. Suffice it to say that the modern law, both in statute and by case law, provides that in virtually every case in which the father is identified and, in the absence of automatic recognition, shows sufficient commitment to the child, he, together with the mother, will have parental responsibility.

A point I would stress is that where two people share parental responsibility each has an entirely equal and equivalent status with the other. In terms of status there is nothing to choose between them.

Next I would observe that, although the statutory definition of parental responsibility includes reference to “rights” and “powers”, I cannot identify any part

¹ “The Children Bill: the Aim” [1989] Fam Law 217

of the law that gives one parent an automatic right as against the other parent with respect to their child. Parental rights do exist, but they are rights as between parents and non-parents. They are the right to exercise the responsibility and do not include the right to override the status of the other parent. Similarly, any parental “powers” involve the power to exercise parental responsibility and not a power to determine important matters irrespective of the status of the other parent who has joint, co-terminus and equal parental responsibility for the same child.

I have in recent times referred to such matters in the course of a number of judgments in the Court of Appeal. In the case of *Re: W (Direct Contact)*² we allowed an appeal from a father who had been denied contact with his two young children by the children’s mother for no apparent reason other than her refusal to engage in the process. Under the heading “Shared parental responsibility” at paragraphs 45 to 48 of my judgment I stressed that:

“The CA 1989 does not place the primary responsibility of bringing up children upon judges, magistrates, CAFCASS officers or courts; the responsibility is placed upon the child's parents.”

I stressed that there was benefit in stepping back from a focus on the court’s role in resolving disputes, to seeing the function of the court in the wider statutory setting within which the primary responsibility for determining the welfare of a child, and then delivering what that child needs, is placed upon both his parents and, importantly, is shared by them. When considering the definition of “parental responsibility” I suggested that:

² [2012] EWCA civ 999; [2013] 1 FLR 494

“it must be the case that where two parents share parental responsibility, it will be the duty of one parent to ensure that the rights of the other parent are respected, and vice versa, for the benefit of the child.”

In a postscript to the judgment, at paragraph 72 onwards, I once again, stressed that, along with the rights, powers and authority of a parent, come duties and responsibilities. At paragraph 75 I spelt out what that meant by saying:

“In all aspects of life, whilst some duties and responsibilities may be a pleasure to discharge, others may well be unwelcome and a burden. Whilst parenting in many respects brings joy, even in families where life is comparatively harmonious, the responsibility of being a parent can be tough. Where parents separate, the burden for each and every member of the family group can be, and probably will be, heavy. It is not easy, indeed it is tough, to be a single parent with the care of a child. Equally, it is tough to be the parent of a child for whom you no longer have the day-to-day care and with whom you no longer enjoy the ordinary stuff of everyday life because you only spend limited time with your child. Where all contact between a parent and a child is prevented, the burden on that parent will be of the highest order. Equally, for the parent who has the primary care of a child, to send that child off to spend time with the other parent may, in some cases, be itself a significant burden; it may, to use modern parlance, be "a very big ask". Where, however, it is plainly in the best interests of a child to spend time with the other parent then, tough or not, part of the responsibility of the parent with care must be the duty and responsibility to deliver what the child needs, hard though that may be.”

Where it is established that it is in the best interests of a child to have a meaningful relationship with both parents:

“the courts are entitled to look to each parent to use their best endeavours to deliver what that child needs, hard or burdensome or downright tough though that may be. The statute places the primary responsibility for delivering a good outcome for a child upon each of his or her parents, rather than upon the courts or some other agency.”

I concluded, at paragraph 78 with these words:

“Parents, both those who have primary care and those who seek to spend time with their child, have a responsibility to do their best to meet their child's needs in relation to the provision of contact, just as they do in every other regard. It is not, at face value, acceptable for a parent to shirk that responsibility and simply to say 'no' to reasonable strategies designed to improve the situation in this regard.”

Having sat through many legal lectures given by judges who quote their own judgments, I know what you are all secretly thinking at this very moment. I plainly like the sound of my own voice and the form of my own words! I hesitated for some time before including those quotations, but have done so because they are at the very core of my thinking on this important topic. And, given my role as the legal member of the small panel under David Norgrove’s chairmanship that conducted the Family Justice Review (November 2011) which in turn has been accepted by Parliament and enacted in the April 2014 reforms, I anticipate that my observations

in *Re: W* in 2012 may provide some insight into the thinking that led to the Family Justice Review recommendations in this regard.

Drawing matters together under the heading of Parental Responsibility it may be that many of us have, certainly until recently, failed to grasp the importance and the utility of the concept of parental responsibility that was introduced to our law by the Children Act 1989. It would seem that it has taken most of us over 20 years to catch up with Baroness Hale's original concept. So often the phrase 'parental responsibility' appears in the case law simply around the question of whether or not a particular individual has "parental responsibility"; it is a tick in a box. Once the box is ticked, the concept is not looked at again. Thereafter the focus, in a disputed case the "fight", moves to consideration of what order the court is to make and whether it is a "residence" or "contact" order. Where such orders are seen in the eyes of one parent or another, or both, as being necessary, they can only be provided by a court and so any parental discussion as to the upbringing of the child becomes drawn into the court arena. On my reading of the 1989 Act and the Law Commission's work that led to it, that was not intended to be the consequence of the 1989 reforms.

"Residence" and "contact"

As is well known the 1989 Act provided a range of four orders within section 8 designed to cover the various determinations that might be made with respect to a child's welfare. They are a residence order, a contact order, a prohibited steps order and a specific issue order.

The Law Commission's original recommendations did not include provision for a residence or a contact order; the only two orders suggested were the prohibited steps and specific issue orders. It was only following consultation with the judiciary

and the profession, that the Commission (I suspect reluctantly) came to accept the need for 'residence' and 'contact'.

As Baroness Hale has explained³ the section 8 powers were intended to concentrate both the courts' and the parties' minds on the practical issues arising with respect to a child, rather than on the allocation of theoretical rights and duties. A residence order is no more than "an order settling the arrangements to be made as to the person with whom a child is to live". And a contact order is no more than an order requiring the person with whom the child lives to make express provision for the child to have contact with another person.

Despite the good intentions of the drafters of the legislation, and given the fact that the terms "residence" and "contact" were, to a degree, hoisted upon them by the consultation process, it is regrettably the case that, over time, the labels "residence" and "contact" did indeed become free-standing matters of parental status, one first class and the other second class. The perceived status of a residence order therefore became yet another factor that disputing parents came to court to fight about. In some cases, in order to neutralise the perceived status of a residence order and emphasise the equal status of two parents, the courts increasingly came to make what were known as "shared" or "joint" residence orders. To my mind, helpful though they may have been in individual cases, looked at as a matter of law such orders were a nonsense. A residence order does no more than settle the arrangements for where a child is to live. Both parents, in such cases, already have shared and equal status as joint holders of parental responsibility. In those

³ "The Children Bill: the Aim" [1989] Fam Law 217

circumstances the making of a shared or joint residence order adds nothing. Worse than that, the advent of shared or joint residence orders had an adverse impact in those cases where no such order was made and the non-resident parent simply was afforded a contact order. In such cases the perception that one parent, 'the residence order holder', had an enhanced status and, where that parent had to be relied upon to facilitate the contact order of the other, had, in some cases, a profoundly, unnecessary and unwelcome effect.

No order principle

In keeping with the general policy behind the Children Act 1989, section 1(5) provided that a court shall not make any order under the Act "unless it considers that doing so would be better for the child than making no order at all". The "no order principle" is entirely compatible with Article 8 of the ECHR which provides that any intervention by the state, in this case the court, in the private or family lives of individuals should only occur as a matter of necessity.

I do not wish to dwell on this point unduly, but, when looking back at the historical context that I have described, the no order principle, shortly stated though it is, represented a powerful indicator that the old days of judicial paternalism were well and truly over. The no order principle is well known to family lawyers and judges and has, over the ensuing 23 years, become part of our professional DNA. However, at a time where now legal aid has been removed entirely from this area of the law and the courts are encountering the majority of cases where neither party is represented by a lawyer, there is a need for this principle to be re-stated and, indeed, to become part of the DNA of the wider public at large. My fear is that the

older conception of the judge being the first port of call where there is a dispute as to the upbringing of a child continues to hold sway in the minds of many.

Making Contact Work

On Saturday 15th February 2003 a major one day conference took place at the Queen Elizabeth II Conference Centre in Westminster. Its title was "Making Contact Work".

I remember the day well. Outside the calm of the conference centre, a major protest march was taking place against the invasion of Iraq that was then being proposed. I recall that during my own address some of the audience left the conference, took part in the march, and returned for the closing speeches. The keynote speaker was Sir Nicholas Wall, then still a High Court judge. The conference provided a public platform for the drawing together of a range of proposals that had been developed by the Children Act Sub-Committee under his Chairmanship. Sir Nicholas' paper makes good reading. It encompasses many of the initiatives which came to fruition during the succeeding decade and now form part of the approach taken by courts and others to assist in the resolution of parental disputes. I wish to quote but one or two observations from the introductory section of his address which remain as important and sound now, as they did then. He said this:

"it will be a theme of this paper (as was the view of CASC) that arrangements for contact stand more prospects of enduring if they are consensual; and that wherever possible, contact disputes should be dealt with outside the courtroom. I think we are realising more and more, that although the court, as the only body able to *impose* contact on a reluctant residential parent, undoubtedly has an important role to play, the adversarial court system is not well suited to contact disputes, and the powers of facilitation and

enforcement currently available to the court are limited and are not designed to deal with breaches of contact orders.”

Having made it “absolutely clear” that, in a difficult contact case, “the judiciary needs all the help that it can get from the legal profession” – an echo, sadly, now of a bygone era, Sir Nicholas went on to say:

“In many cases as we all know, the application for contact is not actually about ensuring that the children retain a proper relationship with their absent parents; it is an ongoing, lingering power struggle between the parents, in which the children are both the ammunition and – mixing the metaphors – the victims. In the overwhelming majority of cases, it is the parents who create the problems by failing or refusing to understand that the continuing acrimony between them is damaging their children and seriously dividing their loyalties”.

Sir Nicholas cautioned against too great an emphasis on the detail of contact orders as there is a risk ‘that both the lawyers and the judge treat the symptoms and not the illness’.

A central theme of Making Contact Work” was upon the transmission, at the earlier stage, of information to separating parents who “are often totally unprepared for the emotional maelstrom, which strikes them on separation.” ‘Parents’, said Sir Nicholas, ‘need to understand what is happening to them and what they can do about it’. And he went on to recommend not only the use of leaflets and information packs, but the development of face to face courses and meetings that

parents might attend in order to understand what separation means for them, but more particularly for their children.

Amongst other topics he stressed the importance of avoiding delay and ensuring judicial continuity. All themes which have developed and formed part of the arrangements now embodied in the new regime.

The Family Justice Review

Against the background that I have described, I arrived to the start of the Family Justice Review process with an understanding of the work that had gone before and with a conviction that, despite the real progress that had been achieved, there remained much more that could be done to improve the experience and the outcome for children and their parents after separation.

In particular, whilst deprecating some of their tactics, I had, in the course of a number of meetings, sat down in calm circumstances and listened to the stories of a number of fathers who considered that they had been profoundly let down by the system. Whilst it might be that there are genuine, child focused, reasons why individual members of the various fathers' groups have been denied contact, that could not be said of most of the individuals I have met in that context over the years. There is, in my view, a core validity to the essential complaints that these fathers make. I should stress that it is wrong not to record that there are a, albeit smaller, cohort of mothers who have found themselves in the same situation of being excluded from the life of their children.

The progress of the Family Justice Review, the evidence we received and the recommendations that we made are well recorded and have been discussed in full on other occasions and I am not going to repeat that detail here.

What I do wish to do, however, is to stress what this is all about and the reason why it is so important. That reason is not, despite what I have said, primarily about being fair to fathers or to mothers, it is not actually about the adults at all, although it is naturally the adults who publicly complain about the process. The reason that this is so very important is because it matters a very great deal to each and every child who finds themselves in the middle of the disintegration of their family. They deserve, and as a matter of their general welfare, they need, if it is safe and possible, to grow up with a full and rounded knowledge of, and relationship with, both of their parents. Research, and even basic common sense, demonstrates that a failure to provide such a balance for a child is likely to cause emotional harm and to imbalance that individual's development as they move forward to adulthood. Where such a failure is surrounded by distress, high emotion and by attempts to manipulate the child's feelings, the potential for the adult who has experienced this dysfunctional parenting to be seriously screwed up is only too plain to see. That is why this is so important and that is why those who have developed the new approach and those of us who work to deliver it, take it so seriously.

Making Parental Responsibility Work: The 2014 Reforms

And so, I come, at last you will say, to the 2014 reforms and the emphasis that I place upon the need to breathe life into the concept of parental responsibility in order to improve the outcome for children. As Sir Nicholas Wall presciently said in 2003 there is sometimes a feeling that the professionals and the judges are treating

the symptoms rather than the illness. I very much agree. Focusing upon arrangements for “contact” falls very much into the “symptom” category whereas, I consider, focus upon getting parents to do what is right for their child, hard though it may be for them, by facing up to their responsibility may go nearer to the core of any problem.

It is neither necessary nor appropriate in an address such as this to do more than point to the headlines and leave the detail of the new provisions and the Child Arrangements Programme to professional training courses for those who have to operate the system. The headlines are as follows.

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 parents 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 equals with each parent required to respect the status of the other.

Secondly, the child arrangements order is designed to mirror and be at one with another central element in the new regime, namely the Parenting Plan. Experience shows that when parents are able to sit down and contemplate the practical arrangements for their child, the matters that need to be determined are relatively few, mostly mundane and are placed a long way away from matters of status and

power. They are simply the ordinary stuff of the everyday arrangements in the life of a child. Faced with a piece of paper and a list of topics, including a weekly timetable for the child, and, if possible, armed with a “do as you would be done by” approach, the temperature often goes down within the parental dispute, and a working arrangement that suits the individual child can hopefully be agreed.

As paragraph 2.5 of the new child arrangements programme states:

“The parenting plan should cover all practical aspects of care for the child, and should reflect a shared commitment to the child and his/her future with particular emphasis on parental communication (learning how to deal with differences), living arrangements, money, religion, education, health care and emotional well-being.

2.6 A parenting plan is designed to help separated parents (and their families) to work out the best possible arrangements for the child”.

The child arrangements order, if required, is intended to be no more than the court filling in those discrete aspects of the parenting plan upon which, despite intervention, the parents have been unable to agree for themselves.

A key factor in the ability of the new system to deliver a different experience for parents and children, will be the degree to which it is possible to focus and manage parental expectations at a very early stage. A number of valuable interventions are now in place. I simply list them here:

a) a basic Google search involving the two words “parent” and “separation” should immediately bring up a range of websites sponsored by the government or voluntary agencies which contain a wealth of useful

information. The information is not merely technical and factual but includes substantial components designed to assist a parent gaining insight into their own emotional reaction to separation and the emotional needs of their child. Some of these websites are contain very helpful short embedded videos of individual parents talking about the experience of going through separation.

b) CAFCASS and other organisations put on separated parent information programmes (SPIPS) designed to deliver to groups of parents insight into the likely effect of separation on their child and support in achieving a low-conflict resolution of any potential dispute;

c) Any parent who now makes an application for a court order with respect to their child will not be allowed to proceed with the application unless they have attended a Mediation Information and Assessment Meeting (MIAM) with a trained mediator and the court will expect the other parent also to attend either the same or a different MIAM. The court process will now check whether or not a MIAM has occurred at no less than three stages: at the desk when the application form is issued, on paper when the case is allocated to one or other level of judiciary and at the First Hearing and Dispute Resolution Appointment (FHDRA) when the parties will first encounter a judge or bench of magistrates. The expectation, very firmly, is that all parents will attend a MIAM unless the case falls into one of the narrow excepted categories, where there is evidence of domestic violence, mental illness or drugs/alcohol.

e) FHDRA. This first hearing before a judge will also be attended by a CAFCASS officer. It will occur 4 to 6 weeks after the application has been

issued. Basic child protection/safeguarding checks will have been completed. Unless there has been an earlier urgent/emergency hearing, neither party will be permitted to file any evidence before this hearing. The hearing will provide an opportunity for the parties to be helped to an understanding of the issues which divide them and to reach agreement. If there is agreement then it may be embodied in the form of a court order.

At each of the stages that I have described the focus of the professionals involved will be upon assisting the parents to develop a bespoke parenting plan for their child or children. CAFCASS have produced an excellent, straightforward workbook for parents to use in developing a parenting plan.

A statistic which is often quoted, but hard to pin down, is to the effect that only 10% of all the couples who separate ever come to the Family court with a parental dispute. The aim of the new reforms is radically to reduce the proportion of those cases so that only the most conflicted of such cases, and they will, in my view, tend to be the very cases where domestic violence, mental health or substance abuse is a significant feature, come before the court. In order further to improve the prospects of couples sorting matters out themselves, and not entertaining the idea that the court will provide some golden solution which in some way will obliterate or radically reduce the importance of the other parent in the life of the child, both the legislation and the child arrangement programme are explicit in their terms. As a result of amendment by the Children and Families Act 2014 section 1 of the Children Act 1989 now contains the following two sub sections:

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

That provision, which is likely to be implemented later this year, applies (under section 1(6)) if the parent concerned "can be involved in the child's life in a way that does not put the child at risk of suffering harm" and a parent is to be treated as such "unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement."

Within the child arrangements programme, paragraph 4 of PD 12 J states "The Family Court presumes that the involvement of a parent in a child's life will further the child's welfare, so long as the parent can be involved in a way that does not put the child or other parent at risk of suffering harm."

In each of these various ways a consistent and clear message is to be delivered to parents who find themselves in the emotionally bewildering circumstances of separating and thereafter developing a relationship with their child, and with the other parent, on an entirely different basis from what has hitherto been the case.

Delivering the message, managing expectations and focusing on the nuts and bolts arrangements for children will not cater for every case and much has to be achieved to improve the effectiveness of any intervention by the court in those cases which travel further than the First Hearing and Dispute Resolution Appointment.

In this regard the radical cultural changes that have been delivered within the Family Justice system under the leadership of the President during the past 12 months will have a major impact. For too long mere lip service has been paid to the idea of “judicial continuity”. I recall one father telling me at a meeting in Birmingham some time ago that he had been to court on a dozen different occasions, each time encountering a new judge who simply adjourned the case rather than grappling with the issues and making a substantive order. In this way well over a year went by. I heard him and I believed him. Those of us in the system, at whatever level, have seen the case files and been in the very cases where this has happened on far too frequent an occasion. Lip service is meaningless. It is now a requirement of the system within the new Family court that, once a case is allocated to a particular judge, that judge keeps the case until its conclusion. The advantages of judicial continuity are many and are plain. A judge who knows that he or she has ownership of a case, can, and should, develop in their minds a strategy for their intervention. The parties will know the judge they have and experience the judge’s approach to the case and know that the identity of the judge will not change at subsequent hearings.

The case will be fixed for a dispute resolution appointment following receipt of the CAFCASS welfare report. The aim will be to resolve or narrow the issues, identify the evidence needed and case manage the case to a final hearing.

The final hearing will be a “final” hearing. This sounds obvious, but it is in fact another radical change from what has gone before. Too often cases have limped on with the judge making an order as to the arrangements for the child and then being

encouraged to list the case for “review” in 6 months time to see how it is going with the expectation that the parties will, once again, trot back to court with a list of complaints about each other and the hope that the judge will, on this next occasion, produce a different result that favours more closely the outcome that they each seek. To my eyes that approach, with which we have lived for so long, should be confined to the waste bin as having no place in the modern system. Such an approach, in which cases limped from review hearing to review hearing over the course of years, reeks of the judicial paternalism, which I hope is now a thing of the past, and effectively seeks to turn the judge into the child’s third parent, which plainly he or she is not.

Time is running on and I do not propose to dwell on the issue of enforcement.

Given the topic under discussion, namely the maintenance of relationships within a fractured family, post-separation, many of the more ordinary strategies and powers for a court to enforce its order, which apply in ordinary civil proceedings, are simply inappropriate in this context. In the right case at the right moment courts are becoming more willing to produce a radical change in a child’s living arrangements by removing the child from the care of an intransigent parent, but deploying such a blunt instrument, which can only cause short term emotional harm to the child, will only be justified in a narrow, but not unimportant, group of cases.

By mentioning 15th February 2003, I have already made an oblique reference to Tony Blair. I now do so again in the context of enforcement by saying that the key to the

success of these reforms is not going to be found in “enforcement, enforcement, enforcement” but rather in “education, education, education”.

Making these reforms 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 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 a court order. With this in mind, much of the material, including the court rules, has been drawn up so as to be more readily digestible by a lay person.

Conclusion

In conclusion I hope it is now apparent why these changes are to be regarded as radical and a very far cry from the still commonly held perception of a judge deciding every issue about a child and then awarding some gold star status to one or other parent by attributing the badge of “custody” or even “residence”. As the President, Sir James Munby, has said, this is all about making a reality of parental responsibility and making parents take responsibility for their own children. It is an end of the paternalistic expectation that the court is available on demand to sort out parental disputes. Where, post separation, a child lives with one parent, it is hard to underestimate the expectation that the system will now place upon that parent to respect and to meet the need for the child to have a good, sound, ordinary relationship with the other parent. To pick up the theme delineated in the words

that I have quoted from my judgment in *Re: W*, it is the “responsibility” of that parent to do so.

These changes should, and in my view must, mark the end to what I might 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.

The Rt Hon Sir Andrew McFarlane

Lord Justice of Appeal

26th June 2014

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