

Introduction

No sooner had our 2011 edition been issued than, to our delight, Mr Justice McFarlane was elevated to the Court of Appeal. We are privileged that Sir Andrew has agreed to continue contributing to this book while maintaining the leading work of Children Law and Practice.

This good news comes at a time when it is hard to recall the economic and social expectations across most of the community being so low. In the aftermath of the riots in the late summer of 2011, the Government asserted that we are members of a fractured society. Unhappily, parallels might be found in the legal landscape. The Minister described, at the lower extreme as it were, housing estates and families where generations have become more used to benefits than employment, depicting families with little hope, resenting their “have not” status but without the means or energy to “have” anything better. They are socially, economically and educationally deprived, and one might imagine that the remarkable term “managed decline” retains a singular resonance 30 years after it was first uttered. But what would the Minister make of the top end, at which the Royal Courts of Justice entertain diamond-encrusted fisticuffs between Russian oligarchs, absorbing months of Court time and seven-figure legal fees?

Neither scenario brings credit to our legal or social community when under-resourced social workers are beset by regulations and protocols on one side and belligerent parents on the other, the Courts Service faces continued cuts to personnel as it strives, with little success, to meet expectations of listing cases that typically, in public law, have increased year on year by as much as 40%, and legal aid lawyers struggle with savagely reduced fees and clients with no entitlement to help.

If the Government recognises the challenges presented by redundancy, unemployment, inflation and historical deprivation, there seems to be little global acceptance or planning to address the consequences. Two examples of frustrated protests by ministers give an insight into Government responses: in summer 2011, the Prime Minister expressed something close to outrage at the time it has taken some local authorities to place children for adoption; then in November, the Minister responsible for education and, it will be noted, Cafcass, described his contempt for “Judges who have enjoyed all the advantages of a privileged upbringing [who] take for ever to decide the fate of the most disadvantaged children in the country”. Raging against the “leisurely timetables of the courts, with late starts, early finishes and long holidays” taking precedence over children’s needs, the Minister adopted what might be thought to be a particularly combative position against “the legal establishment” in general and the “leisurely procrastination” of judges in particular.

Subscribers might hope for a more informed and overarching approach to the family justice system – early and properly funded intervention to support parents who cannot, rather than refuse to, provide good enough care for their offspring and better recognition of the enormous damage to children not only during

but before the still, but necessarily, painstaking care system is engaged. Government must embrace (and fund) all of the agencies which must recognise their dual roles – of support and of alert. Health visitors, playgroups, Sure Start, social workers, probation officers, domestic violence units, nurseries – the list goes on, but crucially, they are identified by their positions at the foundation of our community. And into that group fall legal aid lawyers who also give crucial support to parents and, above all, the children who are at risk in their infancy, in trouble in their youth and alienated in their adulthood.

In 2011, the Family Justice Review identified an easy target – delay in the passage of public law applications through the courts. One of the drivers of the Public Law Outline is the avoidance of delay, but it is this very driver that is now threatened by legal aid reforms. While it is suggested that public law cases should be concluded within 6 months, the removal of legal aid from all private law disputes (save cases that feature proven domestic violence) will seriously affect public law proceedings. When parents face conflict that, they assert, can only be resolved through the courts, they will (as already happens in a minority of cases) proceed even without representation, framing and presenting their application and response without professional advice. The time that judges will need to nurse cases from their beginnings to their otherwise thoroughly confused endings will take its toll on lists and waiting times, and on the endurance of judges, Cafcass personnel and court staff. The effect on court lists will be huge. When each case will still require an allocation hearing, at least one management hearing and an issues resolution hearing (remembering that a final hearing is not to be fixed until the outcome of that latter hearing), listing officers will be unable to accommodate public law cases within anything like 6 months.

Criticising delay in the court process overlooks the need, endorsed by Parliament, to achieve a best outcome for a child – that of a return to its birth family. Permanency away from a birth parent, through fostering or adoption, is a second best and must be measured by careful, sympathetic and expert assessment by the court, assisted by a children's guardian who is not so overloaded that illness, exhaustion or lack of time cause delay in investigation and reporting.

There is a tension, a balance, that must be recognised – that of a child's right to have his future determined without delay, without his need for love and security being damaged irreparably by moves within and through accommodation in foster care, against his right to a full analysis of his birth parents' ability to embrace him within the birth family, with proper support. The child will in adulthood be forgiven for looking back and questioning that balancing exercise. If he is damaged owing to its delay and inadequacy, who are we to blame him for the consequences and who is to blame for the failure to observe and address the cracks in the foundations of that child's life – foundations which, by extension, apply across the fractured housing estates that the Minister described in his post-riot utterance?

The analytical process which the court must undertake to establish a parent's ability to care for a child cannot simply be measured as a number of weeks. Residential, psychological and community

assessments are all examples of exercises that must be considered when addressing a child's passage into adulthood, in the care of either his parents or a replacement family. Each case is fact-specific and few are susceptible to a cut-off or target. The solution, or part of it, has to be in adequate personnel and funding. If there are not enough courts available, then more family judges must be appointed. If there are too few guardians, then Cafcass needs money for more qualified personnel. If nursery places are unavailable, then more must be set up and local authorities must have the funds – and so on.

And what of the legal aid lawyer? What part does a specialist and experienced advocate and adviser have to play? Our subscribers do not have to be told. Government does it seems, yet it is deaf. Expressions of anxiety over its determination to remove legal aid from private law and dramatically reduce funding in public law, far more erudite than the concerns expressed in this and past Introductions to this work, have been presented by judges of the Division, the President, the Family Bar and the Law Society and have, it seems, been ignored.

Save that, at the end of 2011, the Government announced a 6-month delay before implementing its intentions. Is there a glimmer of wiser counsel prevailing? Let us hope – indeed let us pray – that there is.

Anthony Cleary, January 2012

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