

**Child-centredness in Decision Making in Public
Child Law Proceedings in England and Wales:
Perspectives of the Judiciary**

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PhD

Child-centredness in Decision Making in Public
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Perspectives of the Judiciary

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Abstract

The aim of this research was to identify the core components of child-centred decision-making in public child law proceedings from the perspectives of judges in England and Wales. In the context of this study, child-centredness includes the elements of, transparency, being informative, child-friendly and respectful of children, inclusive, safe and sensitive to risk. This aim was achieved through exploring with judges their perceptions of what represents a child-centred public child law system, by identifying those factors, such as, human, legal, cultural and systemic, which present both enablers and barriers to a transparent child-accessible and child-friendly process and system. Judges' views were also obtained on the principles underpinning legislation that may conflict with child-centred decision-making.

This is a qualitative research study and involved carrying out one-to-one semi-structured interviews with 30 judges from the high, county and district courts (*now the Family Court*) throughout England and Wales. The inclusion criteria for this study was that the participating judges had experience of and were currently involved in presiding over public child law proceedings. The interviews were recorded using a digital voice recorder for the purposes of accuracy and subsequent analysis. Underpinning the qualitative approach chosen for this study, is the paradigm of interpretative phenomenology, the goal of which, in this study, was to describe and interpret accurately the lived experiences and perspectives of judges.

Judges in this research were deeply committed to making the right and just decision for children in terms of their welfare and development. The principle of paramountcy guided them in their decision-making. This research found that children's views, wishes and feelings were mainly communicated to the court via proxy accounts of the child's appointed Guardian. For the most part, their direct voice in proceedings was silent, as judges very rarely met with the child. Children's direct participation in their proceedings was neither promoted or encouraged by judges. On the rare occasions it did occur, it was instigated by the child's Guardian. Judges felt that Guardians were spending less time in working directly with the children they represented due to a lack of available time, formal working practices and statutory timescales for the completion of proceedings, all of which impacted on the quality and analysis of evidence and information presented to the court.

The research indicates that obtaining the child's perspective of their lived experience and circumstances is not a priority. The centrality of the child's position in their proceedings has been supplanted by legal, procedural and administrative requirements. The system itself has attained the status of paramountcy. The lack of transparency and inclusiveness distances the child from their proceedings.

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The approval of the President of the family division of the High Court, Sir James Munby, enabled access to potential research participants and for this, I was most grateful. I would also like to thank the staff in the Ministry of Justice who facilitated my application for approval and for helping me to reach potential research participants through their publicising of my proposed research via the judicial intranet. Your help, support and advice was much appreciated.

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Legislation list

Poor Law Act 1601

Poor Law Amendment Act 1834

Infant Life Protection Act 1872

New Poor Law (Children) Act 1889

An Act for the Prevention of Cruelty to, and Better Protection of Children Act 1889

The Prevention of Cruelty to Children Act 1904

Children Act 1908

The Industrial Schools Act 1857

The Industrial Schools Act 1861

Children and Young Persons Act 1933

Children and Young Persons Act 1963

Children and Young Persons Act 1969

Local Authority Social Services Act 1970

Children Act 1975

Adoption Act 1976

Child Care Act 1980

The Children Act 1989

The Human Rights Act 1998

Care Standards Act 2000

Adoption and Children Act 2002

Children Act 2004

The Childcare Act 2006

The Safeguarding Vulnerable Groups Act 2006

The Children and Young Persons Act 2008

Children and Families Act 2014

Social Services and Well-being (Wales) Act 2014

Children and Social Work Act 2017 (*yet to become law*)

List of statutory instruments

Family Proceedings Courts Rules (*Children Act 1989*) Rules 1991, SI 1991/1395

Family Proceedings Rules 1991 r 9.2A (1) (*Child's right to request independent representation*)

Family Procedure Rules 2010. SI 2010/2955 (*and accompanying Practice Directions*)

Case Law list

B (a Child) (Threshold Test) [2013] UKSC 33

North East Lincolnshire Council v G & L [2014] EWCC B77 (Fam) (*poor analysis of facts*)

L (Threshold Criteria) [2007] 1 FLR 2050

S-B (Children) (Care proceedings: Standard of proof): SC 14

M v Croatia (2017) 65 EHRR 9 (*ignoring child's wishes*)

B (Children) (Care Proceedings: Standard of Proof) [2009] 1 AC 11 (HoL)

B-S (Children) (leave to oppose the adoption) [2013] EWCA Civ 1146

Re MM (long-term fostering: placement with family members: wishes and feelings) [2013] EWHC 2697 (Fam)

A v UK (Corporal Punishment) [1998] 2 FLR 959

W (Children) (Family Proceedings: Evidence) [2010] UKSC 12

Mabon v Mabon and Others (*Independent representation of articulate teenagers under FPR 1991, rule 9.2A*) [2005] EWCA Civ 634

P-S (Children) (Care proceedings: Oral evidence of separately represented child) [2013] EWCA Civ 223, [2013] 1 WLR 3831

Lancashire County Council v M and Others [2016] EWFC 9 [2016]

A : Letter to a Young Person [2017] EWFC 48. (*judgment in the form of a letter*)

E (A Child); E v Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission and others intervening): HL [2009] 1 AC 536

D (A Child)(Abduction: Foreign Custody Rights) [2006] UKHL 51 para 57

Canadian Foundation for Children, Youth and the Law v Canada (*Attorney General*) [2004] SCC 4, [2004]1 SCR 76

R v Secretary of State for Education and Employment and Others [2005] UKHL15 [2005] 2 FLR 374

C v XYZ County Council [2008] 1 FLR 1294 (*Right to identity*)

List of publications based on this research

James, H. and Lane, D. 'The Child's Guardian – Listening and Giving Weight to Children's Views' (2018) 26 International Journal of Children's Rights 117.

Lane, D. 'Judicial Perspectives on Child-centred Decision-Making in England and Wales: Challenges and Opportunities' (2018) January International Association of Youth and Family Judges and Magistrates Chronicle 50.

Lane, D. 'Child-centredness in Decision Making in Public Child Law Proceedings in England and Wales – Perspectives of the Judiciary' (2017) July International Association of Youth and Family Judges and Magistrates Chronicle 69.

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Chapter 1

Introduction

There are 72,670 look-after children in England¹ and 5,662 in Wales,² most of whom have been subject to decisions made in public child law proceedings (*Care and Adoption*). In the past five years there has been an overall increase in the number of children in care due to abuse or neglect in England and Wales.³ 60% of all looked after children in England are looked after as a result of abuse or neglect. In Wales, this figure is 68%.⁴

Children who are involved in public child law proceedings are among the most vulnerable in our society and, therefore, they need the professionals who protect them, those who represent them in proceedings and those who make life changing decisions about their lives, to have a real, consistent and meaningful presence in their lives. There is evidence⁵ that a poor legal process and a failure to place children at the heart of that compounds significantly children's vulnerabilities. Judges could play a key role in addressing children's vulnerabilities and empower their voice in this context by endorsing a genuinely child-centred approach. A core element of such an approach is the need to listen to the child's voice to understand their lived experiences. One young person who took part in a House of Commons Care Inquiry stated:

'I've been in care since I was six and one of the things that really bugged me and annoyed me about social workers is that they think they know how you feel and they say "I know what you're going through" but they don't know what you're feeling. I think that everyone needs to listen properly to children and not make assumptions'.⁶

¹ Department for Education, Children Looked After in England (including adoption), year ending 31 March 2017 (National Statistics 2017).

² Statswales, Adoptions, outcomes and placements for children looked after by local authorities as of 18 October 2016 Accessed on: 11 October 2017 stats.pss@wales.gsi.gov.uk

³ H Bentley, O O'Hagan, A Brown, N Vasco, C Lynch, J Peppiate, M Webber, R Ball, P Miller, A Byrne, M Hafizi and F Letendrie, *How safe are our children?* (NSPCC 2017).

⁴ *ibid* 66.

⁵ *ibid*.

⁶ J Tunnard and M Ryan, *Making not Breaking: Building relationships for our most vulnerable children – Findings and recommendations of the Care Inquiry* (House of Commons 2013) 26.

Another young person who participated in this inquiry, highlighted the need to improve the present system rather than just passing laws in the hope that children's position in the care system will improve:

'I think what's important is for the Government to stop making new laws and work instead with what we have already and try and develop it for the better. What's important is for them to try and find ways of catering for all of us as individuals so that we grow up and become successful young people who were in care, not young people who are not successful because they were in care'.⁷

Decisions made by judges in public child law proceedings affect profoundly the lives of children and their families. Judges play a pivotal role in the public child law system as they are the ultimate decision-makers, and, therefore, it is crucial to gain an insight into their perspectives on what they consider constitutes child-centred decision-making. The data obtained in this research provides rich and nuanced material that gives an insight into the world of judicial decision-making. This research will show that although we have a plethora of legislation and an abundance of accompanying regulations and guidance, children continue to remain on the periphery of a system that makes far reaching decisions about their lives. Less time is being spent by professionals in getting to know the children they have responsibility for protecting and representing. An enquiry into the role of social workers in adoption revealed: 'Structures within organisations mean it is difficult for one person to really get to know the child'. The enquiry recommended that social workers 'should follow the child rather than being system-led'.⁸

The child's true voice is being diluted significantly and at times smothered by the requirements of the system, in the name of managerial efficiency. In the reality of practice, the child has become the object of the system, with the system occupying a position of paramountcy, rather than the welfare and best interests of the child. Direct participation of children in their proceedings

⁷ Tunnard and Ryan (n 6).

⁸ Featherstone B, Gupta A, Mills S, *The role of the social worker in adoption – ethics and human rights: An Enquiry* (British Association of Social Workers 2018) 20.

is neither encouraged or promoted by judges. Proxy accounts of the child's views through their Guardian and local authority social worker are considered by judges to be the most appropriate way of hearing children's views. The child in effect is virtually invisible in the system.⁹

There is a lack of research on the perspectives of judges about what constitutes child-centred decision-making. This study interviewed and explored with District, County and High Judges (*now part of the family court*) in England and Wales, the core factors and elements of child-centred decision-making in public child law proceedings including their perspectives on children having a more direct level of participation in these proceedings (see copy of Interview Guide / Focus Areas in Appendix 1).

1.1 Research Question and Objectives

The research question underpinning this thesis was: what are the core elements of child-centred decision-making in public child law proceedings from the perspectives of judges in England and Wales? To answer this question, the research had three objectives. First, to explore with members of the judiciary their perceptions of what represents a child-centred public child law system. Second, to identify the human, legal, cultural and systemic factors, which may present barriers to a transparent, child-accessible and child-friendly public child law system. Third, to obtain from judges their views on the principles underpinning legislation that may conflict with child-centred decision-making.

Whilst children in public child law proceedings in England and Wales, under the Children Act 1989, are surrounded by a great variety of professionals and experts and have the right to be legally represented via a children's Guardian and lawyer or independently, they rarely have the opportunity to speak directly with the judge dealing with their case to express their wishes and feelings. It is, therefore, important to find out from the judges themselves

⁹ J Munby, 'Unheard voices: the involvement of children and vulnerable people in the family justice system'. The annual lecture of the Wales Observatory on Human Rights of Children and Young People at the College of Law, Swansea University delivered on 25 June 2015.

their views on what constitutes a child-centred approach to their decision-making in Care and Adoption Proceedings. Whilst there exists some research in other jurisdictions, notably, Raitt's study¹⁰ among members of the Scottish Judiciary in the area of private law and Birnbaum and Bala,¹¹ where they compared the perspectives of American and Canadian Judges in relation to custody and access cases, there is a dearth of research on public child law proceedings in England and Wales, with a specific focus on child-centred decision-making from the perspectives of the Judiciary. Although there have been notable contributions to the literature in respect of this area of law from experienced members of the Judiciary (Baroness Hale of Richmond¹² and Crichton¹³), it remains an area where there exists a real gap in research. This research contributes to filling this gap.

1.2 Methodological approach

This study is located within a broad interpretation of the paradigm of phenomenology. While this research locates itself within the broad principles of a phenomenological approach, it departs from Husserl's principle of 'pure description'¹⁴ in that analysis is seen as necessary, given the applied nature of the research subject area and the need to inform future development in this area in relation to policymaking, professional practice and future legislation¹⁵. Underpinning the qualitative approach chosen for this study, is the paradigm of interpretative phenomenology,¹⁶ the goal of which, in this study, is to describe and interpret accurately the lived experiences and perspectives of judges presiding over public child law proceedings in relation to what they consider to be a child-centred public child law system. In the context of this study, child-centredness includes the elements of,

¹⁰ F E Raitt, 'Hearing children in family law proceedings: can judges make a difference?' (2007) 9 (2) *Child and Family Law Quarterly*.

¹¹ R Birnbaum and N Bala, 'Judicial Interviews with Children in Custody and Access Cases: comparing experiences in Ontario and Ohio' (2010) 24 (3) *International Journal of Law, Policy and the Family* 300.

¹² B Hale, 'Can you hear me Your Honour?' (2012) *Family Law* January 2012.

¹³ N Crichton, (2006) 'Listening to children' (2006) *Family Law* October 2006 849.

¹⁴ E Husserl, 'Pure phenomenology, its method and its field of investigation' in D Moran and T Mooney (eds.), *The Phenomenology Reader* (Routledge 2002).

¹⁵ J D Crist and C A Tanner, 'Interpretation / Analysis methods in hermeneutic interpretive phenomenology' (2003) *Nursing Research* 52 (3) 202.

¹⁶ J A Smith, P Flowers and M Larkin, *Interpretative Phenomenological Analysis: Theory, Method and Research* (Sage 2012)

transparency, being informative, child-friendly and respectful of children, and acting in a manner that is inclusive, safe and sensitive to risk.¹⁷

The research sample for this study was a purposive sample of 30 judges in England and Wales involved in public child law proceedings (*care and adoption*). Judges were invited to take part in the study on the basis of their expertise, knowledge and experience in presiding over child protection cases. Judges' experience in and knowledge of the area of public child law proceedings were crucial to this research. The research method chosen for this study were one-to-one semi-structured interviews with individual judges (see Chapter 3).

1.3 Contribution of this research

Ultimately, it is hoped that obtaining and analysing the perspectives of the judiciary in this important area of public child law will inform judicial practice and make a contribution to the development of judicial practice, particularly in the area of direct communication with children who are subject to care and adoption proceedings. Given the dearth of research in this area, the study will make a contribution to the review of current and future guidelines in relation to judicial practice in this area, as well as contributing to ongoing academic enquiry and debate in this area of law and will inform current and future legal and policy reforms.

The research will contribute to current attempts in encouraging a more positive¹⁸ and transparent¹⁹ experience for children who are subject to care and adoption proceedings as recommended by the Family Justice Review²⁰ and the proposals of Ryder L J²¹ for the modernisation of family justice. The research will provide a basis to develop effective child-friendly and child

¹⁷ Committee on the Rights of the Child (2009) *General Comment No. 12 – The Right of the Child to be heard* (United Nations 2009)

¹⁸ J Munby, 'Unheard voices: the involvement of children and vulnerable people in the family justice system'. The annual lecture of The Wales Observatory on Human Rights of Children and Young People at the College of Law, Swansea University delivered on 25 June 2015.

¹⁹ A E McFarlane, The Bridget Lindley OBE Memorial Lecture 2017 'Holding the risk: The balance between child protection and the right to family life' (Family Justice Council).

²⁰ Family Justice Review Panel, *Family Justice Review: Final Report* (The Ministry of Justice, Department of Education and the Welsh Government 2011).

²¹ E Ryder, *Judicial Proposals for the Modernisation of Family Justice* (HMSO 2012).

accessible ways, which facilitate children in exercising their right to be heard in public child law proceedings.

The research will make a contribution to facilitating communication between all parties involved in public child law proceedings and judges, around the core elements of what constitutes a child-centred approach in proceedings. This research attempts to map out what a model of child-centred decision-making would look like. Potentially, this could reduce undue delay in the conduct and completion of proceedings, while at the same time ensuring adequate time and space is provided for children to contribute actively their perspectives of their lived experience to their proceedings.

The research makes a contribution to the development of current legislation by putting forward a number of amendments and additions that will strengthen the status and position of children in proceedings, with the aim of ensuring that their true voice is heard throughout the course of proceedings including directly if children so wish.

1.4 Structure of Thesis

This thesis consists of eight chapters. Chapter 1 is an introductory chapter outlining the research question, locating it in available relevant research. The contribution of this research to public child law is then identified in terms of its benefits in relation to the development of current and future legislation, policy practice and ongoing academic enquiry and debate, with a particular focus on moving to a more child-centred decision-making process and system.

Chapter two outlines and explores the legal and policy context of the current public child law system. Current child care Acts are discussed in relation to their stated purpose and contribution to the welfare of children. Relevant policies and formal guidance are explored in relation to how they relate to and reflect the spirit of current legislation in England and Wales, with particular reference to what is considered child-centred practice. This chapter also provides a brief summary of the main relevant legislative history,

which has contributed to the development of current legislation.

Understanding these historical roots and how important concepts and ideas, such as the child's welfare and development, children's best interests were shaped and developed through both positive and tragic events, gives us a greater knowledge and understanding of current legislation. The spirit of legislation can be a useful guide for the application of current principles enshrined in legislation in relation to professional practice and decision-making.

The adopted methodological approach and method for this research is discussed in Chapter three. This chapter explores the rationale for choosing a qualitative approach for this study including, the need for accurate recording of judges' views for subsequent analysis. The need for the analysis and discussion of the findings to remain anchored firmly in the raw data to ensure an accurate, fair and balanced representation of judges' perspectives, is discussed with reference to the broad principles underpinning the paradigm of interpretative phenomenology.

The concept of child-centredness is discussed critically from a theoretical perspective in Chapter four. The origins of this concept are identified and located in relevant and related literature and research including, historical research²² and current formal national²³ and international²⁴ practice guidance. This chapter then focuses on how this concept is perceived and represented in current legislation and formal policy. Discussion highlights significant inconsistencies in this area, between theoretical conceptions and legal expression, particularly in relation to current legislation and in relation to how children who are subject to proceedings are viewed and treated.

Chapter five explores judges' perspectives on the concept of child-centredness. The discussion is supported by data from the research in the

²² S Chung and D J Walsh, 'Unpacking child-centredness: a history of meanings' (2010) 32 (2) *Journal of Curriculum Studies* 215.

²³ H M Government, *Working Together to Safeguard Children* (The Stationery Office 2015).

²⁴ International Association of Youth and Family Judges and Magistrates (IAYFJM), *Guidelines on children in contact with the justice system* (IAYFJM 2017).

form of direct quotes from interviews with judges. Relevant and related literature and research inform discussion. This chapter reveals a wide range of judicial perspectives on this concept, from the traditional views that adults know best when it comes to making decisions about children's lives, to more reflective and inclusive approaches to children's participation in the decision-making process.

Judicial interpretation and application of child-centredness in the reality of proceedings is discussed in Chapter six. The chapter focuses on judges' thinking and reasoning in the process of making decisions about children's lives and the extent to which this process is compatible with a child-centred approach. As in Chapter five, a wide range of perspectives emerge, from resignation to the reality of a lack of resources within the system, both in terms of a lack of time and personnel, to a perspective that challenges this deficit of resources and an unwillingness to compromise in applying what they perceive to be the right and just approach in the best interests of children.

Chapter seven discusses the potential to move to a more child-centred model of decision-making within the current public child law system. Judges in this part of the research were invited, notwithstanding the limitation of resources and finance, to propose their ideal public child law system. Judges engaged readily in this process and proposed a range of options, which mainly involved retaining the structure of the current system. The first part of this chapter discusses the perceived barriers and enablers in creating a more child-centred system. The second part of this chapter puts forward a model for a more child-centred decision-making process and system, supported by a number of amendments and additions to current law and policy.

The chapter concludes with an adapted version of a commentary on an existing case *Re P-S*²⁵, to illustrate how a child-centred perspective can be achieved in public child law cases. This commentary was part of an international children's rights judgments project.²⁶

Chapter eight reflects on the expectations and the realities of the current system and on what could be achieved by a more child-centred model for decision-making in public child law proceedings. The chapter concludes by suggesting a number of areas for future research in the area of public child law.

²⁵ D Lane, 'Commentary on *P-S* (Children) Care Proceedings: Right to give evidence' (2017) in H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments from Academic Vision to New Practice* (Hart 2017) 159.

²⁶ *ibid.*

Chapter 2

Making decisions about children's lives: Legal and Policy Framework

2.1 Introduction

The purpose of this chapter is to outline the legal and policy framework within which child care professionals and judges make decisions about children's lives when a child is identified as being at risk of significant harm. It is appropriate and relevant to the subject area of this research to consider briefly the path that has led to the current system. The historical relevance of this path contextualises the development of children's position within the welfare and legal systems and informs the basis of current principles upon which professional practice and judicial decision-making in the field of child protection is based. The chapter then moves on to outline and discuss current public child law and relevant formal policies and guidance, which influence professional practice and the spirit of legislation and its application in the public child law system.

2.2 Summary of the Pathway to Current Legislation and Policy

2.2.1 Children's lives and survival

The roots of our children's services and public child law today can be traced back to the Poor Laws of 1601²⁷ and 1834.²⁸ The Poor Laws of 1601 and 1834 were concerned with abandoned, orphaned and destitute children. At the time these laws were introduced, children were the property of their parents regardless of the quality of care being provided. While both parents were considered as responsible for the care of their children, it was the children's father who had sole custody of his children. The property rights of parents prevented the State from intervening in the lives of children, save that of providing poor families in their homes with some of the basic necessities for life, mainly food and clothing, while orphaned and abandoned

²⁷ *Poor Law Act 1601* Eliz.1 c.2.

²⁸ *Poor Law Amendment Act 1834* 4 & 5 Will.4 c.76.

children were to be apprenticed out to learn various trades.²⁹ However, a very small number of children were apprenticed out, due to very high mortality rates caused by a lack of food and clean water.

The practice of 'baby farming' gave rise to a large number of infant deaths. Children being born out of wedlock or the mother felt she was not in a position to rear the child, 'farmed out' their child to a 'nurse' who was paid to take care of the child. When the limited amount of money ran out, the child was left to die or was suffocated by their paid 'nurse' and left on a side street of London. This practice came to be known as 'baby farming'³⁰ and led to the Infant Life Protection Act 1872.³¹ This Act required nurses to formally register with the authorities, to ensure their standards of care could be monitored. Very few nurses registered, and as there were very limited resources to enforce the Act, its effectiveness was minimal.³²

2.2.2 Emergence of State intervention

The New Poor Law (Children) Act 1889 gave power to Poor Law Guardians to assume parental responsibility for children in their care, if they considered their parents to be irresponsible.³³ This Act marks the beginning of State intervention into the lives of vulnerable children and to a very limited extent introduces the notion of a 'threshold' for statutory intervention in the lives of children and their families, based on the standard of parental care.

Further and more direct State intervention came with the Protection of Children Act 1889, which gave the authorities the power to prosecute parents for abusing and neglecting their children.³⁴ Prosecutions under this Act could be brought by anyone, whereas previously, only Poor Law Guardians could institute such proceedings. Discussions on the Bill, which led to this Act, in both Houses of Parliament indicate that there was the hope that this Act

²⁹ G Newman, *English Social Services* (Collins 1941).

³⁰ J F B Tingling, *Social Reform: What? and by Whom?* (The Christian Union for Social Service 1906).

³¹ *Infant Life Protection Act 1872* 35 & 36 Vic. c.38.

³² Tingling (n 4).

³³ *New Poor Law (Children) Act 1889*.

³⁴ *An Act for the Prevention of Cruelty to, and Better Protection of Children Act 1889* 52 & 53 Vic. c.44.

would reduce the necessity of having to remove children from their parents.³⁵ This appears to be the beginning of a formal recognition of the concept of prevention of intervention through a legislative deterrent. However, this Act was primarily about the prosecution of criminal neglect of children and did not focus on prevention in the broader sense in terms of the State providing the resources needed to support parents. This focus was intensified in the Prevention of Cruelty to Children Act 1904.³⁶ This Act gave the Local Authority the power to remove children from their parents' care. When the Local Authority had to intervene, parents were seen to have failed morally in the basic care of their children. The concept of a 'fit person' was introduced and this added to the moralistic tone of this piece of legislation. The Children Act 1908 followed soon after, and while it did nothing to change significantly the tone of previous legislation, it did set up for the first time separate Juvenile Courts for children under the age of 14 who had committed a crime. This Act also abolished the practice of sending children to adult prisons.³⁷ Children were now sent to industrial schools and reformatories, which were established earlier by the Industrial Schools Acts of 1857³⁸ and 1861.³⁹ Up to this time children were seen and treated as 'mini adults' in the criminal courts. While children within the juvenile justice system is outside the scope and focus of this thesis, it is nevertheless appropriate and important to acknowledge the very real tensions that this area generates between the welfare and punishment of children. Such tensions between child welfare and criminal justice where children who commit an offence and are subject to the jurisdiction of the criminal court, Goldson sees as complex and 'finely balanced,' and influenced by both political considerations and ideologies and the changing moods of public opinion.⁴⁰ Writing eight years later, Goldson

³⁵ House of Commons, *Bills, Public: Bill for the better Prevention of Cruelty to Children (505) Session: 21 February 1889 – 30 August 1889* Volume 1 (HMSO 1889).

³⁶ *The Prevention of Cruelty to Children Act 1904.*

³⁷ *Children Act 1908* Edw.7 c.67.

³⁸ *The Industrial Schools Act 1857* 20 & 21 Vic. c.48. This Act gave powers to Magistrates to sentence homeless, poor and neglected children between the ages of 7 and 14 years, who were brought before the courts for juvenile vagrancy, by removing them from their home environment and placing them in a boarding school.

³⁹ *The Industrial Schools Act 1861* 24 & 25 Vic. c.113. This Act strengthened and extended the sentencing powers of Magistrates to include children under 14 years who were found begging or receiving alms or found in the company of thieves. Also included were children under 12 years who committed an offence punishable by imprisonment or less and children under 14 who were beyond parental control.

⁴⁰ B Goldson, 'Children in need' or 'young offenders'? Hardening ideology, organizational change and new challenges for social work with children in trouble' (2000) 5 (3) *Child and Family Social Work* 256.

was not optimistic about a change of perspective in relation to these tensions stating, 'However, there is little evidence to suggest that the mood of 'toughness', and the punitive and retributive priorities that characterise contemporary responses to children in trouble, will be immediately surpassed', highlighting the ambiguous state of children in our society.⁴¹ Such ambiguity continues to the present time, despite the long established requirement in legislation of having regard to a child's welfare in all matters in relation to children.⁴²

2.2.3 The child's welfare and the conception of public child law

With the Children and Young Persons Act 1933 came the beginning of a significant break with previous legislation, both in relation to focus and language. The modern conception of public law care proceedings date from this Act. While retaining the 'Fit Persons Order', the concept of the welfare of the child was introduced, as was a Schedule of offences that may be committed against children.⁴³ This Schedule, although it has been amended and extended through the years, has remained part of the legal framework to this day. The Act also placed a duty on Local Authorities to board-out children in foster care, following removal from their families, where their parents are considered unable to care for them.

The Children Act 1948 heralded the first serious attempt to focus legislation on prevention of abuse of children, guided by the principle of working in the best interests of the child. The Act itself came about as a result of the Monckton Inquiry⁴⁴ into the death of Dennis O'Neill, a 12 year old child who was brutally beaten by his foster carers⁴⁵ and in response to the reports of the Curtis and Clyde⁴⁶ Committees, which were highly critical of Local

⁴¹ B Goldson, 'Children, Crime and the State' in B Goldson and M Lavalette (eds) *Children, Welfare and the State* (Sage 2008). For Goldson, 'Childhood is conceived as an ambiguous state, and children (at least some children) are variously understood as 'victims' who need protection, nurturing and care, or 'threats who require correction, discipline and control. Herein lies the 'welfare justice' relation which, as we have seen, has applied to juvenile justice policy for the best part of two centuries'.

⁴² *Children and Young Persons Act 1933* s 44.

⁴³ *ibid* Schedule 1 offences; offences committed in respect of children.

⁴⁴ W Monckton, Report on the Circumstances which led to the Boarding Out of Dennis and Terence O'Neill at Bank Farm and the steps taken to supervise their welfare (Home Office 1945).

⁴⁵ The National Archives, *Protection of Children: Adoption and Foster Care* (HMSO 2010).

⁴⁶ J Clyde, Report of the Committee on Homeless Children (HMSO 1946).

Authorities' care of children in England and Scotland and highlighted significant shortcomings in the areas of communication, supervision of foster care placements and administrative procedures.⁴⁷ Childcare functions, which were spread over a number of government ministries, were brought together and unified, and separate children's departments in Local Authorities were created for children at risk.

The 1948 Act emphasised the importance of keeping families together and if this was not possible, the placement of a child outside of the family was seen as both supportive for the child's parents and as a short-term measure, as there was a duty placed on Local Authorities to rehabilitate children with their birth families. This Act was significant in the reform of services for vulnerable children including, the tightening up of boarding-out regulations and the employment of a trained Children's Officer in each Local Authority to be responsible for children in care. However, it did not focus on preventative work with the family or address the problem of children being abused within their own families,⁴⁸ mainly due to a disbelief on both the public and politicians' part that such actions would take place within the child's own family. This disbelief along with the respected sacredness of the family domain combined to deter State intervention. New developments in psychology in relation to children's needs, including Bowlby's holistic perspective on children's needs,⁴⁹ influenced the provisions of the Act, which emphasised the different types of needs of the whole child; physical, emotional, psychological, social, and educational. Bowlby's holistic perspective in relation to children's needs has had a significant influence on the development of statutory child care services including the current 'Framework for Assessment of Children in Need and their Families', which will be discussed later in this chapter. This Act parted company with the attitude enshrined in the Poor Law Acts of 1601 and 1834, which prevailed up to this time, of just providing minimally for vulnerable children, mainly their physical needs. The importance of children's growth and development was

⁴⁷ M Curtis, *Curtis Report on the Care of Deprived Children* (HMSO 1946).

⁴⁸ The National Archives (n 45).

⁴⁹ J Bowlby, *Child Care and the Growth of Love* (Penguin 1953); J Bowlby, *Maternal Care and Mental Health* (Schocken Books 1967).

now recognised as an important factor in relation to the welfare of children.⁵⁰ It signalled a more child-centred approach and children in care were to be treated as individuals and have access to the same facilities as other children,⁵¹ particularly in the areas of health and education.

The main focus of the children's departments created under the Children Act 1948 was children in care. Their role in the provision and development of welfare services for families was both specific and quite limited,⁵² based on the patriarchal nuclear family and full male employment. The assumption was that most of the welfare work was undertaken within the family itself using the family's income and the children being cared for by their mother. The focus of welfare was to support not replace or enhance this assumed family position.⁵³ In the 1950's there was an increased awareness of the need to intervene much earlier in the lives of children and their families to prevent children having to come into care. Waiting until children came into care before the State took any action was no longer accepted as being in the best interests of children.⁵⁴

Poverty was still regarded as a major contributory factor in child neglect and there were also links made between 'deprived families' and juvenile delinquency. This link however had been established in the legislation and in the development of the industrial schools since the 1860's, and which has been referred to previously in this chapter. Such awareness and thinking led to two significant Acts, The Children and Young Persons Acts of 1963 and 1969 had a dual approach to children's welfare: prevention combined with an increased level of State intervention. This duality of approach was not without tensions. While the Children and Young Persons Act 1969 gave legislative support in making provision, both in cash and in kind, to support families, with the aim of avoiding the need to take children into care,⁵⁵ Local

⁵⁰ H Hendrick, *Children, Childhood, and English Society 1880-1990* (Cambridge University Press 1997).

⁵¹ J Packman, *The Child's Generation* (Blackwell and Robertson 1981).

⁵² N Frost and N Parton, *Understanding Children's Social Care: Politics, Policy and Practice* (Sage 2009) 9.

⁵³ *ibid.*

⁵⁴ J Packman, 'From prevention to partnership: child welfare services across three decades' (1993) 7 (2) *Children and Society* 183.

⁵⁵ *Children and Young Persons Act 1969* s 1.

Authorities were more willing to intervene on a statutory basis if parental care of children did not improve.

2.2.4 Early intervention in children's lives

The main emphasis of the Children and Young Persons Act 1963 was on the care and protection of children. The powers of Juvenile Courts to make orders were reduced, with Care Orders and supervision being preferred to orders that were seen as a punishment for crimes committed. The age of criminal responsibility was raised from eight to ten years.⁵⁶ This is an early example in the development of the child welfare paradigm of what Goldson termed the duality of the conceptualisation of children, with welfare and punishment being both finely and precariously balanced.⁵⁷

While the Local Authority's powers to intervene were extended in cases of parental neglect, this provision was balanced with a more preventative approach to reduce the need to receive children into or keep children in care. Throughout the 1950's the children's departments created under the Children Act 1948 found their role too limited and narrow, the main focus of their interventions being on the period following reception into care. This strategy came to be seen as failing children and doing too little too late.⁵⁸ Intervening much earlier in the lives of children and their families to prevent the need to take children into care was viewed as being more in the best interests of children. This perspective, which was informed by Kempe's work, 'The Battered Child Syndrome',⁵⁹ began to inform and shape practice, with more support and services being channelled into families. This was given formal recognition in this Act under Section 1, which provided Local Authorities with the statutory power to provide such services, both financial and in kind, and marked the beginning of real resources being ring-fenced for preventative action to maintain children in their families.

⁵⁶ *Children and Young Persons Act 1963*.

⁵⁷ Goldson (n 15).

⁵⁸ Frost and Parton (n 51).

⁵⁹ H C Kempe, F N Silverman, B F Steele, W Droegemueller and H K Silver, 'The Battered-Child Syndrome' (1962) 181 (1) *Journal of the American Medical Association* 17.

Under Children and Young Persons Act 1969, the concepts of 'care' and 'control' were further brought together. A child who committed a criminal act could be made the subject of a care order. The Act outlined threshold criteria under which a Local Authority could institute care proceedings, the essence of which remain in current child protection legislation.⁶⁰

Leading up to the Act during the 1960's there was the belief that by reorganising and bringing together Local Authority children's and welfare services, a more effective service could be provided to children and families. Following the Seebohm Report in 1968,⁶¹ Local Authority social services departments came into existence in 1971, with the Local Authority Social Services Act 1970 providing their statutory basis.⁶² The focus of these new departments was the family and the community, but there was also a specific focus on what was termed 'problem families', which were seen as the cause of much of the crime committed by children.⁶³ While the Children and Young Persons Act 1969 focused on meeting the needs of children in their families and communities, the State itself through this Act and the newly formed social services departments, saw itself as a reservoir of knowledge on what could be considered good-enough parenting. Such an attitude was reinforced in subsequent legislation, through giving the State more power to intervene in the lives of children and their families.

2.2.5 Permanence and the prevention of 'drift' in children's lives

The need for permanence in children's lives and the prevention of 'drift' in care were the main drivers of the Children Act 1975,⁶⁴ followed by the Adoption Act 1976,⁶⁵ which provided a new legislative framework for the adoption of children including, much tighter regulations in relation to the assessment of prospective adopters and the placement of children in adoptive families, than had been the case with previous legislation. Such

⁶⁰ *Children and Young Persons Act 1969*.

⁶¹ Seebohm Committee, Report of the Interdepartmental Committee on Local Authorities and Allied Personal Social Services (HMSO 1968).

⁶² *Local Authority Social Services Act 1970*.

⁶³ A F Philip and N Timms, *The Problem of the Problem Family* (Family Service Units 1962).

⁶⁴ *Children Act 1975*.

⁶⁵ *Adoption Act 1976*.

assessments became much more detailed and covered a much broader range of areas in relation to the lives and capacity of the prospective adopters. While Local Authorities had been given increased powers to intervene in the lives of children, there were many children in the care system at this time without care plans regarding their future permanent care, within or outside of their birth families.⁶⁶

Both the Children Act 1975 and the Adoption Act 1976 followed the report of the inquiry into the death of Maria Colwell, killed by her step-father and who, at the time of her death, was the subject of a Supervision Order. The inquiry report highlighted a lack of attention and priority given to Maria's needs over those of her parents.⁶⁷ Provisions in this Act included that of giving the Local Authority the power to assume parental rights on the grounds of the length of time a child had been in care on a voluntary basis. This represented an attempt albeit a heavy-handed one, in terms of the additional powers given to Local Authorities, to redress the balance between the needs of children and those of their parents. The Act was also influenced by a growing questioning of the importance of the need to preserve the 'blood-tie' between mother and child,⁶⁸ following the death of Maria Colwell. There was a recognition that following serious physical abuse it was not always possible or desirable to reunite a child with her or his birth family. However, the importance of children being brought up in a family continued to be emphasised through a policy of providing permanent placements in substitute families.

During the late 1970's there was an increase in the number of children removed from their parents' care amid a growing disquiet about the protection of children following the death of Maria Colwell and a public mood swing towards doing whatever was needed to protect children from abuse. Such developments shaped the focus of the next major piece of child care legislation in the Child Care Act 1980.

⁶⁶ J Rowe and L Lambert, *Children who wait: A Study of Children needing Substitute Families* (Association of British Adoption Agencies 1973).

⁶⁷ Secretary of State for Social Services, *The Report of the Committee of Inquiry into the Care and Supervision Provided in relation to Maria Colwell* (HMSO 1974).

⁶⁸ Bowlby (n 48).

2.2.6 Voice of the child in proceedings

While the main focus of the Child Care Act 1980 was on promoting and safeguarding the welfare of the child throughout her or his childhood, it also continued to reinforce the power of Local Authorities to make quite serious and far-reaching decisions about children's lives including the assumption of parental rights after three years in Local Authority care. However, this Act did herald a real move forward in representing the voice of the child in public law proceedings, with increased emphasis and focus being put on the need to listen and give due consideration to the wishes and feelings of the child.⁶⁹ Such representation was given a statutory basis by this Act, through the appointment of Guardians-ad-Litem, who were experienced social workers appointed by the court to represent children in care and adoption proceedings. Although not implemented until 1984, and even then, not all children who were involved in care and adoption proceedings had a Guardian-ad-Litem appointed to independently represent their views. The independent representation of children in public law proceedings was driven to a significant degree by the findings of the Maria Colwell Inquiry Report, which highlighted the need for vulnerable children to have a voice of their own.⁷⁰

Up to this point in terms of the development of the child care legislation system, children were the subjects of a system and proceedings within which actions were done for and to children, with very superficial attention being paid, if any at all, to the child's perspective of their lived experiences. It was not until the Children Act 1989 that a serious legislative attempt to incorporate a child-focused approach to children's welfare through the introduction within this Act of a welfare checklist, which included the duty to obtain the wishes and feelings of the child.⁷¹

⁶⁹ *Child Care Act 1980.*

⁷⁰ *Maria Colwell Inquiry.*

⁷¹ s 1(3) *The Children Act 1989.*

2.3 Current Legislation

2.3.1 Paramourncy of the child's welfare

The main piece of child protection legislation for England and Wales is the Children Act 1989.⁷² This Act became law on 19th October 1991 and was accompanied by nine volumes of guidance and regulations, addressing and regulating a wide and varied range of areas in the public care and welfare of children including, child protection, family support, representation for children in care and adoption proceedings, day care, foster care placements, private fostering, adoption issues, educational provision for young children, disability and independent schools.

A number of these volumes of guidance and regulations have been replaced or amended, as new pieces of legislation have been introduced⁷³. Under the Children Act 1989 public law, which relates to family services provided by the State and to the protection of children, and private law, with its main focus being on resolving disputes between parents in separation and divorce proceedings, in relation to their children's upbringing and welfare, were brought together under one piece of legislation.

The Act is based on a number of principles including, the child's welfare being paramount⁷⁴ when the Court determines any issue in relation to their welfare and development. The principle of no delay⁷⁵ is to ensure that decisions about the welfare of a child are made without unnecessary delay, as undue delay is considered detrimental to a child's welfare and development. Working in partnership with parents is a principle that focuses on achieving the best outcomes possible for the child,⁷⁶ while the no order principle says that no order should be granted by the court unless it is shown

⁷² *The Children Act 1989* (n 70).

⁷³ Department for Education, *Statutory Guidance on Court Orders and Pre-proceedings for Local Authorities* (The Stationery Office 2014). This guidance replaced the Children Act 1989 Guidance and Regulations: Volume 1- Court Orders and Chapter 8 of the statutory guidance on Adoption July 2013.

⁷⁴ *Children Act 1989* s 1(1).

⁷⁵ *Children Act 1989* s 1(2).

⁷⁶ Department of Health, *The Care of Children: Principles and Practice in Regulations and Guidance* (HMSO 1991); Department for Education, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (The Stationery Office 2015).

to be in the child's best interests. In addition to these principles that underpin court proceedings, the Act placed significant emphasis on the need for proceedings to be less adversarial and more inquisitorial,⁷⁷ an area that will be discussed further in Chapter 4.

The welfare checklist contained in the Act⁷⁸ is a list of criteria the court must take into account in contested in care proceedings⁷⁹ and contested applications for section 8 orders.⁸⁰ The list includes the duty to obtain the child's wishes and feelings. However, this duty does not take priority over nor is it given explicit equal status with the other factors contained in the welfare checklist, it is simply one area that needs to be considered in relation to the child's welfare. This is an area that the thesis will return to both in Chapter 4 and in Chapter 7, which advocates moving to a more child-centred model of decision-making.

The Act sets out the threshold criteria for formal intervention by the State in the lives of children and their families.⁸¹ At the core of these criteria is the concept of 'significant harm'. Formal intervention by the State can only be justified if a child is considered to be suffering or likely to suffer significant harm or is beyond the control of parents at the time an application for an order is made and that such a level of harm is the result of the quality and standard of care being provided for the child or is likely to be provided for the child were the order not made. Harm is defined as ill-treatment or the impairment of health or development.⁸² To meet the threshold, the evidence has to prove all elements of the threshold on the balance of probabilities.⁸³

⁷⁷ Department of Health (n 75).

⁷⁸ *Children Act 1989* s 1(3) The Welfare Checklist includes, the wishes and feelings of the child, the child's physical, emotional and educational needs, likely effect of a change of circumstances, harm suffered or at risk of suffering and the capacity of parents to care for their child.

⁷⁹ *Children Act 1989* s 25 and s 119 Social Services and Well-being (Wales) Act 2014. The one exception within the Act is in relation to a Secure Accommodation Order, which has its own threshold criteria based around the child absconding or the likelihood of absconding and being a danger to themselves or others. It is acknowledged that this section does not fit comfortably with the principles of the Act and is a measure that is seen as a last resort when all other available services and support have been unable to meet the young person's needs. Applications for secure accommodation are outside the scope of this research.

⁸⁰ *ibid* Section 8 Orders include, Child Arrangements Order, (*formerly residence and contact orders*), introduced by the Children and Families Act 2014, Specific Issue Orders and Prohibitive Steps Orders.

⁸¹ *Children Act 1989* (n 44) s 31(2) (a)(b).

⁸² *ibid* s 31(9).

⁸³ *re B (a Child)* [2013] UKSC 33 para 51. Baroness Hale dissenting, agrees with the approach of Hedley J in *re L. Lady Hale* in this case did not agree that the evidence before the court proved all of the elements of the threshold test.

The standard of acceptable care is assessed against that which one would expect a reasonable parent to provide for their child. Cobley and Lowe have raised the question of how rigorous the threshold test should be, given that courts have discretion in this area at the welfare stage of proceedings. They point to the dilemma between protecting the child and protecting the family from undue intervention.⁸⁴ However, they also make the point that having a 'rigorously applied threshold' could potentially fail to protect some children.⁸⁵ Hedley J in *Re L* stated that: '... significant harm is fact specific and must retain the breadth of meaning that human fallibility may require ... It is clear that it must be something unusual; at least more than the commonplace human failure or inadequacy'.⁸⁶ In relation to standards of parenting and statutory intervention by the State, Hedley J maintains:

'Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done'.⁸⁷

In the same vein, His Honour Judge Jack in *North East Lincolnshire Council v G & L* said:

'The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So, we have to have a degree of realism about prospective carers who come before the courts'.⁸⁸

⁸⁴ C Cobley and N V Lowe, 'The statutory threshold under s.31 of the Children Act 1989 – time to take stock' (2011) 127 *Law Quarterly Review* 417.

⁸⁵ *ibid.* 419.

⁸⁶ *re L (Threshold Criteria)* [2007] 1 FLR 2050.

⁸⁷ *ibid* para 50.

⁸⁸ [2014] EWCC B77 (Fam).

The following extract from one of the judges who participated in this research highlights the realities in applying the application of the threshold for State intervention in the lives of children and their families:

“The case law on threshold criteria under Section 31 of the Act (Children Act 1989) before the State is justified on intervening, emphasises the broad range of eccentric parenting that should be seen as eccentric parenting rather than harmful. If you couple that with the extreme shortage of social child service resources, then that result is that there is not intervention in a vast range of families where there ought to be intervention and where intervention would improve the outcomes for the children. We have struck a balance. On the one hand, it is an economic balance, we do not have the money to spend on it and on the other it is a principled balance. We have decided that parents can beat their children to a degree so long as they don’t go too far that inhibits best outcomes for children, because otherwise you may have to take (20%) of children from their parents. You would also intervene a lot earlier than you do at the moment”. (County Court Judge)

Cleland believes that the current threshold of significant harm for State intervention in the lives of children and their families is too high a legal test, and that the circumstances of most children would not meet the current legal test.⁸⁹ This, according to Cleland results in late intervention to support the family, a consequence of which may not ensure a safe outcome for the child and therefore does not promote the child’s well-being. However, Lady Hale in *Re SB* in relation to the likelihood of future harm stated: ‘Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventative action’.⁹⁰

The above views from case law and this research reflect a resignation to the fact that you cannot provide comprehensive protection for children, some harm is inevitable and acceptable in law. While the aim may be to have transparent, consistent and principled procedures in place to deal with these issues, the potential implications of intervention highlighted prevent the system securing a level of protection and safety that is consistent with article

⁸⁹ A Cleland, ‘A Long Lesson in Humility? The inability of Child Care Law to Promote the Well-being of Children’ in E Sutherland and L A Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 131.

⁹⁰ *Re SB* [2010] 1 A.C. 678 para 9.

3 of the ECHR⁹¹ and articles 19 and 37 UNCRC.⁹² This was highlighted in a case before the European Court of Human Rights (ECtHR) in *M v Croatia*.⁹³ Albeit in a different domestic jurisdiction, this case has pertinence here as an example of how in particular article 3 (child's best interests) UNCRC is applied and interpreted.

The child's father had been granted custody of his daughter, who was nine and a half years old when proceedings commenced. The child's mother brought proceedings to have the custody order reversed, due to allegations made by her daughter of physical abuse against her father. The child wished to live with her mother. The father was charged and pleaded guilty to bodily injury against his daughter. Attempts by the mother to bring proceedings for child abuse were unsuccessful. As a consequence of her abuse, the child started self-harming. Following a psychological assessment, a recommendation was made for the child to return to the care of her mother to prevent further harm, particularly in relation to the consequences of continuous abuse. The threshold of severity required under Article 3 ECHR in relation to the child's allegations was met and therefore the State had an obligation to prevent further ill-treatment.⁹⁴

While the ECtHR found the State in breach of its obligation to carry out an effective investigation into the allegations made by the child, in *M v Croatia*, it found there was no violation by the State in relation to the prevention of further ill-treatment. The court also found that the child's wishes to live with her mother were ignored and that her best interests were not served by the court in the initial proceedings through not hearing from the child herself and by the lengthy proceedings (over four years). The young person was 13½ when the proceedings came to an end. The ECtHR considered the child as having the capacity to form and express her views as to which parent she wished to live with and, therefore, by not respecting the child's views on this

⁹¹ UNCHR Article 3 – Right to be protected from torture, inhuman or degrading treatment or punishment.

⁹² UNCRC Article 19 - Right to protection from abuse, neglect and exploitation and Article 37 - Right to be protected from torture, cruel and inhuman or degrading treatment and punishment.

⁹³ *M v Croatia* (2017) 65 EHRR 9.

⁹⁴ *ibid* para 135.

matter in the circumstances of this case, infringed her right to respect for her private and family life under Article 8 ECHR. In this case, the ECtHR viewed the lengthy proceedings alone sufficient to find the State had not discharged its positive obligation under Article 8 in relation to the child and her mother. In their judgment, the ECtHR also highlighted the need in this case for a more attentive approach given the trauma and mental anguish suffered by the child, which resulted in her self-harming behaviour.

The above case raises a number of serious questions about whether domestic legislation and professional practice is centred on the child's welfare and best interests or whether their application in reality is one of expediency, when faced with overwhelming consequences. The requirements of the threshold for significant harm and its impact on the lives of children presents significant challenges to creating a more child-centred public law system, not least the inherent contradiction between such a high level of accepted harm to children⁹⁵ and the primacy of place in the Act given to the paramountcy principle.⁹⁶ Such challenging issues will be explored and discussed throughout the chapters of this thesis (see Chapters 4-7).

Hardiker states: 'The Children Act 1989 nonetheless reflects a belief that the great majority of parents want to meet their responsibilities and can and should be helped to do so'.⁹⁷ It also reflects the State's attitude towards the family and children, which is one of keeping its distance unless or until there is a crisis that affects significantly the welfare of a child. The focus of the Act itself is on prevention, supported by a much stronger provision of services for children in need,⁹⁸ compared to that of the previous Children and Young Persons Act 1969. In addition, the duty of a local authority to investigate a child's circumstances under section 47, where there is reasonable cause to suspect a child is suffering or likely to suffer significant or if the child is already the subject of an emergency protection order or is in police

⁹⁵ Cleland (n 88).

⁹⁶ The Children Act 1989 s 1(1).

⁹⁷ P Hardiker, 'Children still in need, indeed: prevention across five decades' in O Stevenson (ed.) *Child Welfare in the UK* (Blackwell Science 1999); *R (on the application of G) v Barnet LBC* [2004] 1 All ER 97 – Art.8 ECHR and the obligation to provide resources to children in need.

⁹⁸ Children Act 1989 s 17.

protection, supports an early intervention approach. However, Cleland asserts that the concept of 'significant harm' '...mandates late intervention'.⁹⁹

The approach adopted by the Children Act 1989 is not only influenced by the threshold of significant harm¹⁰⁰ but also by the right to respect private and family life enshrined in the European Convention of Human Rights 1950 under Article 8 and incorporated into English law by the Human Rights Act 1998. The role of the threshold criteria is to ensure that State intervention in families' lives is proportionate and determined by the circumstances of each individual case.¹⁰¹ This is strengthened further by the introduction into the Children Act 1989 of the presumption of contact, both direct and indirect, between the child and their family, even within acrimonious care and adoption proceedings, provided such contact is not detrimental to the welfare of the child,¹⁰² an issue that led to significant reform in the Adoption and Children Act 2002. However, getting the balance right between a child's right to have contact in such cases and their welfare and safety can be finely balanced. More often than not, it is the adults involved in these cases who decide on the level of risk involved, without exploring fully the child's perspective of their situation.

2.3.2 Adoption: A cultural change

The Adoption and Children Act 2002 heralded a major reform of adoption law since the Adoption Act 1976 and is the key piece of legislation in the field of adoption in England and Wales. It also made a number of amendments to the Children Act 1989, the most significant being the amendment and addition to the definition of significant harm; the impairment of a child's health and development as a result of witnessing the ill-treatment of another person either by seeing or hearing such ill-treatment.¹⁰³ The main driver and force behind this amendment were a number of research studies into the effects of

⁹⁹ Cleland (n 88) 133.

¹⁰⁰ *ibid* s 31.

¹⁰¹ B (Children) (Care Proceedings: Standard of Proof) [2009] 1 AC 11 (HoL) – s.31(2) is compliant with HRA 1998 and ECHR.

¹⁰² s 34(1). Contact with a child in care. Presumption of a reasonable level of contact.

¹⁰³ Adoption and Children Act 2002 s 120.

domestic violence on children and their parents, mainly mothers.¹⁰⁴ This amendment was strengthened further by the Domestic Violence, Crime and Victims Act 2004, which established the post of Commissioner for Victims and Witnesses. One of the Victim Commissioner's functions is to, 'promote the interests of victims and witnesses'.¹⁰⁵ There are however restrictions placed on the exercise of the commissioner's functions, which limit their independence including, not having the power to carry out enquiries in respect of individual cases and not being able to look at the conduct of particular proceedings.¹⁰⁶

The Act reflects not only significant legislative changes and developments in child care law in relation to adoption, but also cultural and value changes in society over the period since the previous adoption Act in 1976. The Adoption Act 1976 was not 'welfare checklist' compliant, particularly in relation to the welfare principles contained in the Children Act 1989. The Adoption and Children Act 2002 principles are now consistent with those contained in the 1989 Act but reflect issues in relation to adoption. A consistent approach is important between adoption and care proceedings, as adoption, where it is considered to be in the child's best interests, generally follows on from care proceedings.

Under the 2002 Act, the courts and adoption agencies in the exercise of their powers must have as their paramount consideration the child's welfare throughout their life.¹⁰⁷ While the adoption process itself has been made more open and transparent under this Act including, greater sensitivity and attention being given to attachment issues¹⁰⁸ and more support for both natural and adoptive families,¹⁰⁹ it retains a very strong focus on the primacy

¹⁰⁴ L Kelly, 'The interconnectedness of domestic violence and child abuse: Challenges for research, policy and practice' in A Mullender and R Morley (eds) *Women Violence and Male Power* (Whiting and Birch 1994); L Kelly, 'The interconnectedness of domestic violence and child abuse: Challenges for research, policy and practice' in A Mullender and P Morley (eds) *Women Violence and Male Power* (Whiting and Birch 1994); L Kelly, 'When woman protection is the best kind of child protection: Children, domestic violence and child abuse' (1996) 44 (2) *Administration* 118; M Hester and C Pearson, *From Periphery to Centre: Domestic Violence in Work with Abused Children* (Policy Press 1998); M Hester, C Pearson and N Harwin, *Making an Impact: Children and Domestic Violence – A Reader* (Jessica Kingsley 2000).

¹⁰⁵ H M Government, *Domestic Violence, Crime and Victims Act 2004* (The Stationery Office 2004) s 49(1)(a).

¹⁰⁶ *ibid* s 51(a)(b).

¹⁰⁷ Adoption and Children Act 2002 s 1(2).

¹⁰⁸ *ibid* s 1(4).

¹⁰⁹ *ibid* s 3(1).

of adoption and the need for legal permanency in a child's life, as it was felt that Local Authorities are leaving children too long in neglectful and abusive families.¹¹⁰ This strong emphasis on one permanency option almost to the exclusion of other less legal permanent options, risks excluding an option that may be more consistent with a child's experience, stage of development and need such as long term foster care. However, included in the national minimum standards for adoption agencies, issued under the Care Standards Act 2000, which was amended in 2005, to ensure compatibility with the Adoption and Children Act 2002, is an acknowledgement that children, where possible, are best cared for by their own birth family.¹¹¹ The priority given to children's lives by the present government is reflected in the document, 'Putting Children First' where they state:

'The fundamental purpose of children's social care is to make sure that our most vulnerable children – those who have been abused and neglected, or face other significant challenges such as a disability – can have a safe, dependable foundation from which to grow and flourish. This is achieved by supporting parents to provide the best possible care for their children or, where this is not possible, by giving them a stable and nurturing alternative home'.¹¹²

Importantly, in the context of the focus of this thesis, Section 1 of this Act places a duty on both the courts and adoption agencies to ascertain the wishes and feelings of the child regarding the decision to place for adoption. This duty indicates a move towards making the decision on the option of adoption more child-centred, although potentially the option of adoption given its pre-eminent status within the child protection system, may exclude equally appropriate options for a child's long-term care. It is an issue that judges in a number of cases, for example, *Re B-S*¹¹³ and *Re MM*¹¹⁴ have felt the need to remind local authorities of the importance for the child to maintain attachments with their birth family and extended family members and of the need to evaluate in an open and balanced way other realistic options for the

¹¹⁰ M Narey, *The Narey Report: A Blueprint for the Nation's Lost Children* (Department for Education 2011)

¹¹¹ Care Standards Act 2000 (amended 2005) s 23(1) and s 49(1).

¹¹² Department for Education, *Putting Children First* (The Stationery Office 2016) 8.

¹¹³ *Re B-S (Children)* [2013] EWCA Civ 1146.

¹¹⁴ *Re MM* (long-term fostering: placement with family members: wishes and feelings) [2013] EWHC 2697 (Fam).

child's long-term care. This issue will be discussed in Chapter 6 (section 6.4).

Reflecting a more child-centred approach in adoption in relation to meeting children's needs and circumstances, the Act widened the range of people eligible to adopt to include unmarried and same sex couples.¹¹⁵ In relation to step-parent adoptions, only the step-parent is now required to make an application, while the natural mother retains all her rights during the adoption process.¹¹⁶ These changes in adoption law also reflect and are an acknowledgement that society has developed a wider and richer perspective on the composition of families and their lives. It also reflects a further move toward putting children's needs at the centre of policy and legislation rather than continue to adhere to discriminatory legislation and a system that reduced potential permanent care options for children, should such an option be considered in the child's best interests.

2.3.3 Working together for all children to achieve best outcomes

Following Lord Laming's inquiry into the death of Victoria Climbié,¹¹⁷ the government of the day produced a green paper in September 2003, 'Every Child Matters', which set out its vision for children's services. It introduced five national outcomes in respect of every child, namely, being healthy, staying safe, enjoying and achieving, making a positive contribution and economic well-being. The green paper proposed provision of greater emotional and practical support for parents and carers, early and more effective protection, greater and more transparent accountability and integration locally, regionally and nationally and a reform of the workforce involved in the provision of children's services.¹¹⁸

¹¹⁵ Adoption and Children Act 2002 s 144(4).

¹¹⁶ *ibid* s 51.

¹¹⁷ H Laming, *The Victoria Climbié Inquiry Report* (The Stationery Office 2003).

¹¹⁸ Department for Education and Skills, *Keeping Children Safe: The Government's Response to the Victoria Climbié Inquiry Report and Joint Chief Inspector's Report Safeguarding Children* (The Stationery Office 2003).

The Children Act 2004 was introduced to provide a statutory basis for the implementation of the changes to children's services recommended in 'Every Child Matters' including, inter-agency working at local and national level and significant structural and organisational changes in the way children's services are provided and placed a duty on all statutory agencies involved with children and young people to work together to ensure children are adequately protected from abuse and neglect.¹¹⁹

The 2004 Act established Local Safeguarding Children's Boards (LSCB), replacing the area child protection committees. Their main role was to safeguard and promote the welfare of children.¹²⁰ Membership of these boards was to be from a much wider range of professions and agencies than was the case with the previous committees, with the expectation of more contact and involvement with frontline child care / protection services to ensure safeguarding policy was informed and shaped by the realities and challenges of safeguarding and protecting children. The LSCBs have now been replaced with Child Safeguarding Practice Review Panels under the Child and Social Work Act 2017,¹²¹ whose role is monitor more closely frontline safeguarding practice, as it was felt that the LCSBs were too far removed from frontline practice and therefore from the experiences of children in the child protection system.

Under the 2004 Act, the statutory post of Director of Children's Services in each Local Authority was created, vesting in that person legal responsibility for children's safety and welfare.¹²² Children's services authorities were established, with a lead member from the local council being appointed for children's services.¹²³ These new authorities are tasked with producing a Children and Young People's Plan based on the five national outcomes outlined in Every Child Matters.¹²⁴ The Act introduced a closer level of scrutiny at local and regional level with the introduction of joint area reviews

¹¹⁹ B Mitchels and H James, *Child Care and Protection: Law and Practice* (Wildy, Simmons and Hill 2009) 11.

¹²⁰ s 14 Children Act 2004.

¹²¹ s 16(a) Children and Social Work Act 2017.

¹²² s 18 Children Act 2004.

¹²³ *ibid* s 19.

¹²⁴ *ibid* s 17.

of children's services between relevant statutory and non-statutory agencies / organisations, the aim of such reviews being to improve the well-being of children.¹²⁵ At a national level, separate performance rating for children's services in each local authority was introduced, with performance being measured against the five national standards and the authority's children and young people's plan.¹²⁶

The 2004 Act also established the post of Children's Commissioner for England, their role being to promote awareness of children's views and interests, particularly in relation to their safety.¹²⁷ The Act however did not give the Commissioner the power to investigate individual cases. The Commissioner however does have the power to carry out an enquiry where there is an issue of public policy, which is relevant to other children,¹²⁸ but must consult the Secretary of State responsible for children, prior to carrying out such an enquiry.¹²⁹ However, the Children and Families Act 2014 changed and strengthened the role and responsibilities of the Children's Commissioner. It gave a legal mandate for the Commissioner and their office to promote and protect children's rights.¹³⁰ Under this Act, which amended section 8 of the Children Act 2004, the Commissioner and their office are empowered to provide advice and assistance and represent individual children or groups of children, where there is a risk of their rights being disregarded.¹³¹ The 2014 Act strengthens the position of the child's voice in relation to accessing and exercising their rights. This piece of legislation brings the role of the children's Commissioner in England in line with the Commissioners for Wales, Scotland and Northern Ireland.

Significantly, the Children Act 2004 added a new subsection to Section 17 of the Children Act 1989,¹³² requiring Local Authorities to ascertain the child's wishes and feelings and give due consideration to them when determining

¹²⁵ s 20 The Children Act 2004.

¹²⁶ s 21 The Children Act 2004.

¹²⁷ s 2(3)(b) The Children Act 2004.

¹²⁸ s 3(1) The Children Act 2004.

¹²⁹ s 3(3) The Children Act 2004.

¹³⁰ Children and Families Act 2014.

¹³¹ s 8(a) inserted into the Children Act 2004.

¹³² Children Act 1989 s 17 a child in need.

services and resources for a child in need. This requirement in legislation reflects a move to a more child-focused approach by obtaining children's views earlier in the process of service provision. Similarly, the Act imports this requirement into a Local Authority's investigation of a child's circumstances where there is a concern about the child's welfare under section 47 of the Children Act 1989.¹³³

The 2004 Act removed the defence of reasonable chastisement in respect of a charge of an assault on a child, while at the same time introducing the concept of the 'moderate slap',¹³⁴ making it an offence for a parent to smack their child in a way that causes physical or mental harm to the child. Such an offence is punishable by up to five years in prison. Harm under this Act is defined as causing bruising, scratches, reddening of the skin, mental harm or if a parent uses an implement. The introduction of the moderate slap into legislation is not consistent with the basic ethos of a child-centred, child protection system and belittles the dignity of children as human beings with rights including, the right to be protected from degrading treatment and punishment.¹³⁵ In the case of *A v UK*¹³⁶, where a 9 year-old child was beaten with a garden cane which was applied with considerable force by his step-father, who claimed the defence of reasonable chastisement and was acquitted by the court, the ECtHR held that the beating constituted 'inhuman and degrading punishment'¹³⁷ and was in breach of Article 3 of the ECHR. The ECtHR also held that the UK's domestic law at the time had failed to provide adequate protection for the child. The UK Government in this case accepted that the law required amending.¹³⁸ However, the Children Act 2004 still supports parents using a 'moderate slap'¹³⁹ as a means of disciplining their children.

¹³³ s 47 Duty placed on local authorities to investigate where there is cause to suspect a child may be suffering or likely to suffer significant harm.

¹³⁴ s 58(1) Children Act 2004.

¹³⁵ ECHR and UNCRC.

¹³⁶ *A v UK* [1998] 2 FLR 959.

¹³⁷ *ibid* para 24.

¹³⁸ *A v UK* (n 135).

¹³⁹ s 58(1) Children Act 2004. This legislation removes the defence of 'reasonable chastisement' in respect of a charge of assault, i.e. hitting a child, but allows moderate smacking. Under this legislation it is an offence for a parent to smack their child in a way that causes physical or mental harm to the child, harm being defined as, causing bruising, scratches, reddening of the skin, mental harm or if a parent uses an implement. Such an offence is punishable by up to 5 years imprisonment.

The Act attempts to regulate more tightly and provide closer scrutiny of services for children, and of relevance to one of the core elements of this thesis, it endeavours to involve children in decision making regarding the services they are provided with including the family justice system. While the Children Act 2004 rightly focused on children's welfare and best interests, it is quite narrow in its perspective of children's lives, ignoring for the most part the much wider service provision for children and their families, for example, health, particularly mental health services for children, and education services.

2.3.4 Inequality in children's lives

Unlike the Children Act 2004, the Childcare Act 2006 adopted a much broader and long-term approach to children's services. It requires local authorities and their NHS and Job Centre Plus partners to work together to reduce inequalities in children's lives and improve outcomes for children under five, by providing integrated and accessible services delivered through having Sure Start Children's Centres in every community.¹⁴⁰ The Act also required local authorities to provide sufficient childcare for working parents and those parents starting work for the first time, with a particular focus on low income families and those with children who are disabled.¹⁴¹ Local authorities are required to take the strategic lead in planning, supporting and commissioning childcare.¹⁴² The main focus of this Act is on raising the standards and quality of childcare in the broadest sense and to make it more accessible for all families.¹⁴³ In the context of this research, this preventative approach of the Childcare Act 2006 has the potential for reducing the number of children entering the public child law system as a result of parents not being able to provide their child with good-enough care (see Chapters 5 and 6). Research¹⁴⁴ has shown that inequality, particularly that of poverty, is a significant contributory factor in children entering the care system. Children in the poorest communities of the UK are over 10 times more likely to enter

¹⁴⁰ The Childcare Act 2006 (The Stationery Office 2006) s 4.

¹⁴¹ *ibid* s 6(1)

¹⁴² *ibid* s 11.

¹⁴³ The Childcare Act 2006 s 3.

¹⁴⁴ P Bywaters, *Identifying and Understanding Inequalities in Child Welfare Intervention Rates* (Nuffield Foundation 2017).

the care system than those from the wealthiest areas. One in every 60 children who live in most deprived communities were in care as compared to one in every 660 in the least deprived.¹⁴⁵ The Act extended the existing duty of local authorities to be pro-active and to provide parents and prospective parents with a full, comprehensive and accessible range of information they need to bring up their children through to their 20th birthday.¹⁴⁶

While the focus of this Act is to raise the standard and quality of childcare, it also simplified the framework by integrating the regulation and inspection of early education and child care in the hope of reducing bureaucracy. The Childcare Act 2006 also reflects a change of perspective in relation to the changing role of carers and families. The provision of childcare has been linked to securing female participation in the labour market as well as changing perception on the role and responsibility of both parents in the parenting and care of children. Chan welcomes State intervention in this area if its aim is to increase choices and improve access to job opportunities for women in the labour market.¹⁴⁷ However, she does not feel that such intervention has the right to impose choices on women.¹⁴⁸ Of relevance to the subject area of this thesis, within the context of State child-centred policies generally, is Chan's view that such a policy not only needs to facilitate women with children gaining access to the workforce but that it also needs to: '...accommodate the long-recognised contribution that good parenting makes to the lives of children, both as children and as future citizens.'¹⁴⁹

This Act removes the legal distinction between childcare and education in the early years of a child's life (0-5 years), reflecting how young children learn and develop.¹⁵⁰ Under the Act, the Birth to Three Matters Foundation Stage and the National Standards for under 8's Day Care and Childminding are brought together under a new Early Years Foundation Stage (EYFS), the aim

¹⁴⁵ Bywaters (n 143).

¹⁴⁶ s 12 The Childcare Act 2006.

¹⁴⁷ W Chan, 'Mothers, equality and labour market opportunities' (2013) 42 (3) *Industrial Law Journal* 224.

¹⁴⁸ *ibid* 279.

¹⁴⁹ *ibid*.

¹⁵⁰ s 18 The Childcare Act 2006.

being to provide integrated and high quality early education and care for children from birth to the age of five. To support this development, a new Early Years Register for service providers was set up.¹⁵¹ For those providing services for older children, an Ofsted Childcare Register (OCR) was introduced.¹⁵²

The Childcare Act 2006 marks a significant shift in the history of childcare legislation, away from a welfare oriented service for children to a much more educationally focused perspective, where children's development and levels of achievement are being continuously monitored and assessed. However, while the Act aims to bring together child care and education, the system it has created is much more driven by standards rather than welfare principles and values including, best interests and paramountcy principles, enshrined in the Children Act 1989. Rutter in her survey of childcare costs highlights how these costs can be a barrier for some parents resulting in them having to leave their employment when they have children. One of the consequences of such a move is that the family is 'pushed into poverty',¹⁵³ which in turn undermines the welfare principles enshrined in legislation, particularly the principle of children's best interests in relation to their welfare and development.

2.3.5 Safeguarding, rights and supporting children

The Safeguarding Vulnerable Groups Act 2006 was introduced due to concerns regarding the vetting of people who applied to work with children and vulnerable adults. The Act was also informed by the publication of the Bichard Inquiry in 2004, which was set up following the conviction of Ian Huntley for the murders of two school girls, Jessica Chapman and Holly Wells. The inquiry found fragmented information systems, which often did not communicate with each other about individuals who posed a risk to children.¹⁵⁴

¹⁵¹ The Childcare Act 2006 (n 71) s 52.

¹⁵² *Ibid* s 52(2).

¹⁵³ J Rutter, *Childcare Costs Survey 2015* (Family and Childcare Trust 2015) 26.

¹⁵⁴ H M Government, *The Bichard Inquiry Report* (HMSO 2004) 101.

The Act established the Independent Safeguarding Authority (ISA). Its role was to establish and maintain a 'barred list' of individuals considered a risk to children and vulnerable adults.¹⁵⁵ The main focus of this Act is to reduce the risk of harm to children and vulnerable adults, through establishing a national centralised vetting process.¹⁵⁶

Children and Young Persons Act 2008 was focused on ensuring that children within the looked after system and those leaving this system receive high quality care and support including, emotional and financial support, independent visitors, and personal advisers for care leavers continuing their education or training up to the age of 25.¹⁵⁷

In relation to the protection of children, section 30 of the Act amends section 45(9) of the Children Act 1989 by omitting subsection 9, revoking the 72-hour restriction on applications to discharge an Emergency Protection Order by a parent, a person with parental responsibility, the child herself or anyone with whom the child was living at the time the Order was made. This amendment was introduced to ensure the legislation is compatible with Article 6 (*Right to a fair trial*) and Article 8 (*Right to privacy and family life*) of the European Convention on Human Rights. The next section of this chapter now moves on to a different but a related theme in the context of this research, that of accessing the justice system. The cutbacks in the legal aid budget resulting in a reduction of legal representatives available to represent parents in public law proceedings, will impact on children parents' right to access the justice system.

2.3.6 Access to justice

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) followed a review by Lord Justice Jackson of litigation costs, the report of which was published in 2009.¹⁵⁸ The objective of the review was to

¹⁵⁵ H M Government, *The Safeguarding Vulnerable Groups Act 2006* (HMSO 2006) s 2(1).

¹⁵⁶ *ibid* sch 3 part 1.

¹⁵⁷ H M Government, *The Children and Young Persons Act 2008* (The Stationery Office 2008) This Act under s 15 introduced s 23ZA to the Children Act 1989.

¹⁵⁸ Lord Justice Jackson, *'Review of Civil Litigation Costs: Final Report'* (The Stationery Office 2009).

recommend ways to control costs, while promoting access to justice. The review report made 109 recommendations across 45 subject areas and put forward a range of reforms relating to each of these areas. Following the Jackson review, the Ministry of Justice in 2010 put out for consultation a set of proposals for legal aid reform, including fixed fees for legal aid work.¹⁵⁹ The key aims of the proposals were to, ‘discourage unnecessary and adversarial litigation at public expense, target legal aid to those who need it most, make significant savings in the cost of the legal aid scheme and deliver better overall value for money for the taxpayer.’¹⁶⁰ There were 5,000 responses submitted regarding the proposals outlined, the majority of which rejected the Government’s proposals. Nevertheless, the Government went ahead and implemented their reforms.

A report by the Bar Council one year on from LAPS0 becoming law, highlighted a number of major concerns among barristers including, cutting costs being seen as more important than providing access to the courts for individuals to exercise their legal rights.¹⁶¹ It also highlighted the real probability of a decreasing number of family practitioners, due to the impact of the reforms on the viability of their practice in the long-term. One of the possible consequences is a reduction in the pool of legal representatives available to represent parties in public law proceedings and in particular, the representation of the child’s parents before the court. In his forward to the Bar Council’s report, Nicholas Lavender, chairman of the Bar Council, maintains that, ‘Without a properly resourced system of justice many citizens, including some of the most vulnerable in society, will be unable to obtain advice or to access the courts to uphold their legal rights’.¹⁶² In the context of public child law, it is an issue that judges in this research have identified, with one county court judge remarking:

“The problems of legal aid mean that there are fewer and fewer solicitors available and although the children’s representatives, children panel members, are of a very high standard generally, the

¹⁵⁹ Ministry of Justice, ‘Proposals for the Reform of Legal Aid in England and Wales’ (The Stationery Office 2010).

¹⁶⁰ Ibid 16.

¹⁶¹ S J Bennett, The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On: Final Report (The General Council of the Bar 2014) 11.

¹⁶² Ibid 3.

parents struggle to get really good representation sometimes, not always obviously, but you get people who are perhaps less experienced representing the parents and that can cause problems. The Children Panel has had problems for years in that its population is ageing. Legal Aid practice is extremely difficult. I do not know how any solicitors are surviving frankly and that causes huge problems obviously, so that is going to be a difficulty across the board, mainly for parents because there are dedicated children panel solicitors who fortunately soldier on regardless”.

2.3.7 Justice versus timescales

The relevance of the Children and Families Act 2014 to this research is discussed in more detail in Chapter 4, which looks at child-centredness within the public child law system. Nevertheless, in the context of this chapter it is appropriate to outline the main changes that this piece of legislation has introduced, particularly those changes which will have significant implications for the representation of parents, highlighted in the above abstract, in the context of the introduction of a 26-week timescale for the completion of proceedings.

The purpose of this Act was to reform services and provide support for vulnerable children including, look-after children, young carers, children with special educational needs, parent carers and children in residential care. Under the Act, children in foster care will have the option to remain in their placement until they are 21, under ‘staying put arrangements’.¹⁶³ Young Carers are given clearer rights to having their needs assessed by local authorities and to receiving adequate and appropriate support to meet those needs.¹⁶⁴ This Act introduced reforms to the provision of residential care for children, to ensure the homes providing such care are safe and secure for children.¹⁶⁵ Children with special educational needs are provided under this Act with a system, which is to be designed around their needs and offer them support up to the age of 25.¹⁶⁶

¹⁶³ H M Government, *The Children and Families Act 2014* (The Stationery Office 2014) s 98(2)(6) and s 108(3)(i) Social Services and Well-being (Wales) Act 2014.

¹⁶⁴ *ibid* s 96(1)(a)(b) and s 24(4)(d) and s 5(c)(i)(ii) Social Services and Well-being (Wales) Act 2014.

¹⁶⁵ *ibid* s 105(2).

¹⁶⁶ *ibid* s 114(6).

The Children and Families Act 2014 introduced two measures aimed at reducing delay in public child law proceedings. As part of its Public Law Outline (PLO) the Act introduced a 26-week limit for the completion of court proceedings, to avoid unnecessary delays.¹⁶⁷ This can be extended by a further eight weeks, but only in exceptional cases.¹⁶⁸ This measure was introduced due to cases taking on average, one to two years to complete. The second measure is restricting the number of experts appointed in cases.¹⁶⁹ The criteria for the appointment of an expert was changed to one of necessity to resolve the case justly,¹⁷⁰ rather than the previous appointment criteria, which was desirability of expertise. The reason for such a measure in large part was the belief that such expertise already existed within the system, mainly, but not exclusively, in the persons of the local authority social worker and the children's Guardian. Health and education professionals also possess expertise in health and the development of children and young people.

Watson however raises a number of serious questions about whether justice can be achieved within the 26-week deadline, given that the PLO usually requires the Local Authority to file their final evidence and care plan by week 16 for an issues resolution hearing (IRH) by week 20.¹⁷¹ She maintains that the slimming down of the evidence base presented to the court including, statements of no more than 20 pages, restricted chronologies, less independent experts and a lack of Local Authority resources could risk depriving all parties, including the child, of a just hearing.¹⁷² For Watson, the system requires: '...investing in, valuing, and facilitating conscientious skilled professionals to provide the court with the evidence and fair analysis needed to deliver justice to the child, in a timely fashion'.¹⁷³ This area will be the subject of further and more detailed discussion in Chapter 4.

¹⁶⁷ The Children and Families Act 2014 s 14(2)(i)(ii).

¹⁶⁸ *ibid* s 14(5).

¹⁶⁹ *ibid* s 13(1).

¹⁷⁰ *ibid* s 13(6).

¹⁷¹ N Watson, 'Achieving justice in no more than 26 weeks: the role of the local authority' (2014) Family Law 830.

¹⁷² *ibid* 831.

¹⁷³ *ibid* 829.

There have been specific developments in Wales, not reflected in the law of England because of the competence of the devolved Welsh Assembly in respect of child care legislation. The Social Services and Well-being Act (Wales) Act 2014 became law on 6th April 2016 and therefore outside the period in which this research was conducted. Nevertheless, for the sake of completeness and currency in relation to current legislation, a brief summary on the Act is included in this chapter. Where relevant, the equivalent sections to those of the Children Act 1989 have also been included in this chapter.

This Act brings together in one piece of legislation social care provision for both adults and children. It defines well-being as, physical and mental health emotional protection from abuse and neglect, education, training and recreation, domestic, family and personal relationships, contribution made to society, securing rights and entitlements, social and economic suitability of living accommodation, child's welfare and physical, intellectual, emotional, social and behavioural development.¹⁷⁴ Generally, these elements of the child's welfare are contained in the welfare checklist of the Children Act 1989.¹⁷⁵

In the context of this research and thesis, the legal status of children who are in the care of a local authority under a care order of the Children Act 1989¹⁷⁶ is unaffected by the Social Services and Well-being Act (Wales) Act 2014. Provisions for looked-after children are contained in Part 6 of the Act.¹⁷⁷

The Act establishes a national independent safeguarding board for adults and children,¹⁷⁸ the purpose of which is to strengthen the provisions for keeping children and adults safe from abuse and neglect. In relation to children, the role of the national board is to advise and support local safeguarding boards and report on their effectiveness.

¹⁷⁴ H M Government, Social Services and Well-being (Wales) Act 2014 (The Stationery Office 2014) s 2(a-h) and s 3(a)(b).

¹⁷⁵ Children Act 1989 (n 34) s 1(3).

¹⁷⁶ *ibid* s 31.

¹⁷⁷ Social Services and Well-being (Wales) Act 2014 (n 96) s 74(1)(a)(b).

¹⁷⁸ *Ibid* s 135(i)(a)(b).

Importantly, the Social Services and Well-being Act (Wales) Act 2014 strengthens further the status of the UN Convention on the Rights of the Child within public child law in Wales, by placing an overarching duty on Local Authorities to have due regard to the Convention when exercising their functions in relation to the care and protection of children.¹⁷⁹ The strengthened status of the UN Convention within this Act reflects a greater integration of the Convention into Welsh legislation than is the case in England. It is also reflective of a more children's rights perspective in the application of legislation, decision-making processes and in professional practice, thereby facilitating the development of a more child-focused system.

2.3.8 Improving professional standards

The Children and Social Work Act 2017, which has yet to come into force, introduces a new regulator (*Social Work England*) for the social work profession in England.¹⁸⁰ The new regulator however, must obtain approval for professional standards from the Secretary of State for Education¹⁸¹ who will also have new powers to set improvement standards for social workers and introduce assessments for registered social workers.¹⁸²

Under this Act, children leaving the care system, will be provided with personal advisers until they reach the age of 25.¹⁸³ This is linked to the set of 'corporate parenting principles', contained in the Act.¹⁸⁴ The principles include, acting in the best interests of children, promoting the physical and mental health and well-being of children and young people, encouraging children and young people to express their views, wishes and feelings and for professionals to take these into account when working with and providing services for children and young people. Enabling children and young people to access and make the best use of services provided by service providers, is seen as part of the Local Authority's corporate parenting role, as is promoting

¹⁷⁹ Social Services and Well-being (Wales) Act 2014 (n 95) s 7(2).

¹⁸⁰ H M Government, Children and Social Work Act 2017 (The Stationery Office 2017) s 36(1).

¹⁸¹ *ibid* s 41(3)(b).

¹⁸² *ibid* s 41(4).

¹⁸³ *ibid* s 3(a) and s 114(5)(a) Social Services and Well-being (Wales) Act 2014.

¹⁸⁴ *Ibid*.

high aspirations for young people, particularly in relation to educational outcomes. Under the Act, empowering children to feel safe and secure in their home lives and in their relationships and working life is viewed as an important element of the responsibilities of local authorities. Preparing young people for adulthood and independent living is included as a core element of corporate parenting. The Act lists a number of areas in this regard including, health and well-being, relationships, education and training, employment, accommodation and participation in society, including direct involvement.¹⁸⁵ Such involvement includes all forums where decisions are made about children's lives or have an impact on the quality of a child's life, an area pertinent to this research.

Both the historical path to current legislation and the development of current public child law represents a journey from the Poor Law, when the support provided to children, in the form of food and shelter, was simply to keep them physically alive, to the notion that children require a holistic approach to welfare rather than just providing very basic physical care. Children's physical, social, emotional, health and educational needs came to be recognised and accepted as essential for a child's welfare and development. The journey is ongoing, with children being acknowledged and respected as human beings with rights and the right to exercise their rights. However, as will be argued in this thesis, children remain on the periphery of a system that makes decisions, which have life changing consequences in relation to children's lives.

2.4 Current Policy and Guidance

Formal policy and guidance in relation to children's welfare reflects the priorities of the government of the day and play a significant part in influencing decisions made about children who are subject to proceedings. It is therefore important to look at the main details of current policy and guidance, particularly in terms of their focus on the areas of professional practice, which impact significantly on the lives of children and their families.

¹⁸⁵ Children and Social Work Act 2017 (n 91) s 1(1)(a)-(g).

This section will look at the three main documents informing and guiding the practice of child care professionals, namely the Framework for Assessment of Children in Need and their Families, the Common Assessment Framework (CAF) and Working Together to Safeguard Children.

2.4.1 Framework for the Assessment of Children in Need and their Families

Although this framework remains the current guidance for the assessment of children and families' needs, it needs to be understood in conjunction with guidance issued in 'Working Together to Safeguard Children 2015'. The Framework for the Assessment of Children in Need and their Families was published in 2000 and encompasses three interconnected systems; the child's developmental needs, family and environmental factors and parenting capacity, as shown in Figure 1 below.

The Assessment Framework

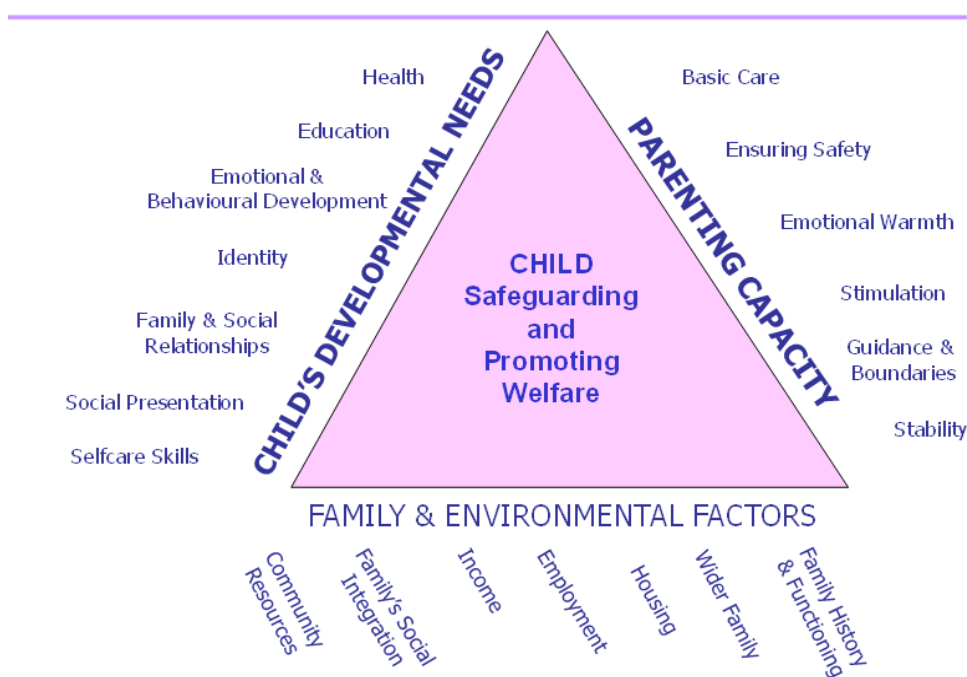


Figure 1

Source:
Department of Health, Framework
for the Assessment of Children in
Need and their Families
(HMSO 2000)

The framework is based on the principle of working together in partnership with children and families to gather information and identify both the positives

and the difficulties in the child's life, their family and in the community in which they live. It is meant to be a systematic way of gathering and analysing information about the needs of children and their families, but with the capacity to discriminate between different types and levels of need. For example, a child who has a physical disability and requires adaptations to be made within their home is quite different from the needs of a child who is being abused and neglected. It puts the child's welfare and safety at the centre (*Figure 1*) and endeavours to adopt a holistic approach to the assessment of need and risk.¹⁸⁶ However, this framework was developed without any input from children¹⁸⁷ and very little consideration was given to enabling children to become involved in the assessment process.

Research carried out 17 years ago by Cleaver et al found that professionals using this framework were to a very limited degree obtaining the views of children about their situation, evidenced by the exclusion of their views in four fifths of the core assessment records included in Cleaver's research.¹⁸⁸ The issues identified by Cleaver and her colleagues are similar to Ofsted's findings in their report on children's social care in 2016, which found that inadequate time and attention was being given to listening to children's views.¹⁸⁹ While the framework has as its central focus the child's welfare and safety, the voice of the child continues to receive very limited attention. Given that the assessments carried out under this framework are used to formulate care plans for children and are used as evidence in proceedings, the child's views of their circumstances and needs would seem not to be the central focus of a system that informs and influences the decision-making process within proceedings.

¹⁸⁶ Department of Health, *Framework for the Assessment of Children in Need and their Families* (HMSO 2000).

¹⁸⁷ M C Calder, 'The Assessment Framework: A Critique and Reformulation' in Calder, M. C. and Hackett, S (eds) *Assessment in Child Care: Using and Developing Frameworks for Practice* (Russell House Publishing 2003).

¹⁸⁸ H Cleaver, S Walker and P Meadows, *Assessing Children's Needs and Circumstances: The Impact of the Assessment Framework* (Jessica Kingsley 2004).

¹⁸⁹ Ofsted, *The Report of Her Majesty's Chief Inspector of Education, Children's Services and Skills 2016: Social Care* (The Stationery Office 2016).

2.4.2 Common Assessment Framework (CAF)

The Common Assessment Framework aims to help practitioners working with children, young people and families to assess children and young people's additional needs at a much earlier stage, specifically needs, which are not being met by the current services being provided to the child and their family. The framework also aims to help professionals develop a common understanding of those additional needs and ways to work together to meet them, through '...sharing information legally and professionally.'¹⁹⁰ It is '...a shared assessment and planning framework for use across all children's services and all local areas in England'.¹⁹¹ In Wales, similar provisions to those included in the 'Common Assessment Framework' are contained in the Social Services and Well-being Act (Wales) Act 2014.¹⁹²

While this framework was developed to identify additional needs of children and not for children at risk of harm, its assessment approach has much to offer child-centred decision making within a range of forums including, public child law proceedings. Among the factors that make good assessments, and of particular relevance to the subject of this thesis, it includes the empowering of children and young people and their families to engage and participate and take responsibility for their contribution to the assessment, facilitating a collaborative approach.¹⁹³ It places importance on the assessment having validity in terms of evaluating the child's needs rather than the parents' needs.¹⁹⁴ The approach adopted is one of transparency, having a clear purpose for the assessment and facilitating open and honest discussion with no hidden agendas.¹⁹⁵ The framework embraces inclusivity, ensuring that the views of the child and the family are each reflected in the assessment in their own language and expressions without bias.¹⁹⁶ This framework overall in relation to carrying out assessments of children's

¹⁹⁰ Department for Education and Skills, *Common Assessment Framework* (HMSO 2004) 6.

¹⁹¹ *ibid* 8.

¹⁹² Social Services and Well-being Act (Wales) Act 2014 s 21(1)(b).

¹⁹³ Department for Children, Schools and Families, *The Common Assessment Framework for children and young people: A guide for practitioners* (Children's Workforce Development Council 2009) 23.

¹⁹⁴ *ibid*.

¹⁹⁵ *ibid*.

¹⁹⁶ Common Assessment Framework (n 189).

additional needs, tries to ensure that the child's views and experiences are given full expression within an environment that enables the child to feel comfortable and safe, with reassurance that their views are taken seriously and respected.¹⁹⁷ Piper however maintains that assessment frameworks in relation to children's needs, should be: '...designed and used with extreme care so that they are, and remain, a tool to guide professional judgement, not to determine what that judgement should be'.¹⁹⁸ Professionals still need to reflect on their recommendations and decisions and their impact on a child's life, ensuring that the outcome is child-centred rather than based solely on the requirements of the framework.

2.4.3 Working Together to Safeguard Children

The guidance contained in 'Working Together to Safeguard Children'¹⁹⁹ lays heavy emphasis on the need for professionals to adopt a child-centred approach in their work with children and their families. The delivery and provision of services must be based on a clear understanding of the needs and views of children.²⁰⁰ Importance is placed on making sufficient time available to listen to children and to take their views seriously. Such an approach should inform and guide professionals to work with children in a collaborative manner when making decisions about how their needs are met and supported.²⁰¹ The guidance highlights the value children place on establishing a stable and trusting relationship with their social worker.²⁰² However, research and professional practice reflect a system that is only able to give a very limited amount of time for listening to children, due to Local Authority social workers having to deal with high caseloads²⁰³ and children's Guardians who represent children in proceedings²⁰⁴, being asked

¹⁹⁷ Common Assessment Framework (n 189).

¹⁹⁸ C Piper, 'Assessing Assessment' [2004] Fam Law 743.

¹⁹⁹ H M Government, Working Together to Safeguard Children (The Stationery Office 2015) 9.

²⁰⁰ *ibid.*

²⁰¹ *ibid* 23 and s 53 Children Act 2004 and s 163(3)(a-c) Social Services and Well-being (Wales) Act 2014.

²⁰² *ibid* 10.

²⁰³ C Pemberton, 'Community Care survey exposes how rising thresholds are leaving children in danger' (2013) 19th November *Community Care*.

²⁰⁴ The Children Act 1989 s 41.

to work within an operating framework²⁰⁵ that requires a safe minimum amount of time to be spent getting to know the child they represent.²⁰⁶

The guidance sets out what it considers high quality assessments of children's needs and circumstances including the principles and parameters of such assessments. While supporting a working in partnership with parents approach, the guidance emphasises the need to ensure that the best interests of children prevail where there is a conflict of interests between children and their parents.²⁰⁷ The guidance recommends that the carrying out of assessments of children's needs and those of their families, should be done in a transparent manner and open to challenge by all parties involved in the assessment.²⁰⁸ The introduction of the 26-week limit for the completion of proceedings²⁰⁹ allows very limited time for realistic challenges to be made.

The guidance is clear about valuing the importance of research based practice particularly in relation to the impact of abuse and neglect on children's lives. It highlights the need for social workers and managers to reflect on the latest research in this area and on the findings from serious case reviews,²¹⁰ all of which highlight the need to listen to children and for agencies to work together effectively when assessing and analysing children's level of need and risk.²¹¹

2.5 Conclusion

This chapter provides the legal and policy backdrop to subsequent chapters of this thesis and to the findings of this research. It is the framework that judges work within when they adjudicate on public child law proceedings, and what is presented to them in court is influenced by the policies and decisions made much earlier in the process (see Chapters 4 – 8).

²⁰⁵ Cafcass, Cafcass Operating Framework (Cafass 2014).

²⁰⁶ S Cappleman, T Thomas and R Green, *The Work of Children's Guardians in Care Cases* (Cafcass 2013).

²⁰⁷ Working Together to Safeguard Children (n 105) 21.

²⁰⁸ *ibid.*

²⁰⁹ The Children and Families Act 2014 s 14(2)(i)(ii).

²¹⁰ P Sidebotham, M Brandon, S Bailey, P Belderson, J Dodsworth, J Garstang, E Harrison, A Retzer and P Sorensen, *Pathways to harm, pathways to protection: a triennial analysis of serious case reviews 2011 to 2014 Final Report* (Department for Education 2016) 14.

²¹¹ *Ibid* 24.

The development of legislation in the area of public child law and its accompanying guidance and policies, outlined in this chapter, reflect a growing awareness, knowledge and understanding of children's needs and development. This development also reflects a family justice system that endeavours to place the child's best interests in a position of paramount importance, as defined mainly from the perspectives of adults. While guidance and policy advocate a child-centred approach to assessing and meeting the needs of children,²¹² this thesis will explore further how the public child law system itself remains distant from the lived experiences of children who are subject to proceedings. The principle of paramountcy in relation to the child's welfare,²¹³ is the core principle underpinning current legislation and professional practice and yet the child's presence and status within the system is one which has been described by Munby P as almost 'invisible'.²¹⁴ The public child law system has made significant progress since the time of the Poor Laws in protecting children from harm and neglect, with acknowledgment of the importance of the child's voice, but the acknowledgement and acceptance of the direct voice of the child in proceedings needs to be considered in practice. The current system of public child law needs to be proactive, supported by amendments to current legislation, in empowering children to participate in all areas of the system, so that decisions made on their behalf are child-centred, rather than just being both adult and system-centred.

The next chapter discusses the methodological approach and research method adopted to achieve the aim and objectives of this research in examining the application of the principles outlined in this chapter.

²¹² Working Together to Safeguard Children (n 22).

²¹³ The Children Act 1989 s 1(1).

²¹⁴ J Munby, 'Unheard voices: the involvement of children and vulnerable people in the family justice system'. The annual lecture of The Wales Observatory on Human Rights of Children and Young People at the College of Law, Swansea University delivered on 25 June 2015.

Chapter 3

Methodological Approach to identifying and exploring Child-centredness in decision-making in Public Child Law Proceedings from the Perspectives of Judges

3.1 Introduction

In this chapter the chosen research strategy and method are discussed. The qualitative research methodology is outlined and explained including the theoretical and philosophical underpinnings of the selected methodological approach. The strengths and limitations of the chosen method are also considered. The process of obtaining the research sample and the rationale for the selection of the participants is discussed including the relevant ethical issues and the validity and reliability of the research data. The chapter concludes by outlining the methods of data analysis and use of NVivo.

3.2 A Qualitative Research Approach

The qualitative approach underpinning the research strategy of this study explores with judges what they consider to be key elements of child-centredness when making decisions and directions in public child law proceedings. Underpinning this qualitative approach is the paradigm of interpretative phenomenology, the goal of which is to describe and interpret: ‘... accurately a person’s lived experience in relation to what is being studied’.²¹⁵ Judges’ experience and perception in the area of public child law proceedings are crucial in this respect. A phenomenological approach was therefore considered an appropriate research strategy to use for this research study, as it will facilitate gaining an understanding of how judges view and understand their decision-making role in relation to children in public child law proceedings.

²¹⁵ P Balls, ‘Phenomenology in nursing research: methodology, interviewing and transcribing’ (2009) *Nursing Times* 105 (32) 30.

The approach adopted for this study is located broadly within the paradigm of phenomenological research, which seeks to identify the core elements of human experience in respect of a particular concept or issue.²¹⁶ Denzin and Lincoln define a research paradigm as a: ‘... basic set of beliefs that guide action’.²¹⁷ For Balls a phenomenological approach explores and examines: ‘... the qualities of the experience, allows us to identify its essence’.²¹⁸ Husserl, the father of phenomenology, felt the most important thing is to always return to the things themselves,²¹⁹ to the world as lived and experienced by the research participants.²²⁰ The focus of phenomenology is: ‘... on the intentional dimensions of human action and the social world’.²²¹ Moran describes a phenomenological approach as primarily descriptive, seeking to illuminate issues in a radical, unprejudiced manner, paying close attention to the evidence that presents itself to our grasp or intuition’,²²² while Hughes sees: ‘One of the tasks of phenomenological philosophy is to describe this everyday experience of the “life world”, the world, that is, as given in immediate experience independent of and prior to any scientific interpretation’.²²³

Lester maintains that: ‘Phenomenological methods are particularly effective at bringing to the fore the experiences and perceptions of individuals from their own perspectives ...’.²²⁴ Moustakas sees phenomenological research as an interactive process, using open-ended comments and questions,²²⁵ but this approach according to Finlay, is not unproblematic: ‘The challenge for phenomenological researchers is twofold: how to help participants express their world as directly as possible; and how to explicate these dimensions such that the lived world – the life world – is revealed’.²²⁶ Husserl viewed the phenomenological method as one of pure description, without analysis, as he

²¹⁶ C Moustakas, *Phenomenological Research Methods* (Sage 1994) 26.

²¹⁷ N K Denzin and Y S Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Sage 2000) 157.

²¹⁸ Balls (n 214) 30.

²¹⁹ E Husserl, *Logical Investigations* (Translated by David Carr) (Humanities Press 1970).

²²⁰ Moustakas (n 215) 26.

²²¹ H Y Jung, (1972) ‘An introductory essay: The political relevance of existential phenomenology’ in H Y Jung (ed), *Existential Phenomenology and Political Theory: A Reader* (Henry Regnery 1972) 35.

²²² D Moran, ‘Editor’s introduction’ in D Moran and T Mooney (eds.), *The Phenomenology Reader* (Routledge 2002) 1.

²²³ J Hughes, *The Philosophy of Social Research* (Longman 1990) 140.

²²⁴ S Lester, (1999) *An introduction to phenomenological research* (Demon 1999) 2.

²²⁵ Moustakas (n 215).

²²⁶ L Finlay, ‘Debating Phenomenological Research Methods’ (2009) *Phenomenology and Practice* 3 (1) 6.

felt such analysis would dilute and even smother the true description of the participant's views or actions.²²⁷

One philosopher who is quite critical of Husserl's phenomenological method is Jacques Derrida, questioning whether such 'purity' is possible:

'When this consciousness is forced to enter the world in order to communicate with others, this meaning, formerly accessed by a pure, indeed mystical intuition, must be articulated, and this means split up into concepts and expressed in words. Now at this point, potential misunderstandings creep in, and a certain lack of transparency enters into the meaning of the words and this will mean that signification infects meaning, that meaning will always already involve signification'.²²⁸

Derrida's perspective identifies correctly that language is in itself a social construct and therefore people's views and the significance they give to the language they use are, to an extent, determined by the structures and cultures within which they live and work. It is also acknowledged that in the analysis and interpretation of the participants' views, signification will inevitably occur, given that qualitative analysis involves making judgements about data, which are unavoidably subjective and which are influenced by the researcher's own professional background, in this case as a former Local Authority child protection social worker and as a children's Guardian.

'Heidegger thinks that there is a basic articulation of one's situation which gets expressed in language in such a way that by an examination of language it is possible to grasp the structural determination of one's situation, thereby revealing the constitutive elements of any possible experience'.²²⁹ In this study judges' structural situation including, relevant legislation and case law, court rules and judicial guidance, as well as their own personal values and principles, contribute significantly to their thinking and experience and therefore it is important to gain an understanding of this, as reflected through their views on what elements constitute child-centred decision-making.

²²⁷ E Husserl, (2002) 'Pure phenomenology, its method and its field of investigation' in D Moran and T Mooney (eds.), *The Phenomenology Reader* (Routledge 2002).

²²⁸ M Lewis and T Staehler, *Phenomenology – An Introduction* (Continuum 2010) 214.

²²⁹ *Ibid* 99

While this research locates itself within the broad principles of a phenomenological approach, it departs from Husserl's principle of 'pure description' in that analysis is seen as necessary, given the applied nature of the research subject area to inform future development in this field in relation to policy making, professional practice and future legislation.²³⁰ The above critique of Husserl's concept of a pure description may be valid, but it does not take from one of the core principles of his phenomenological approach. Being faithful to the research participants' perspectives and meaning is what lies at the heart of the approach adopted for this research study. Such an approach facilitates maintaining the integrity of the raw data and it requires that the interpretation of such data reflects accurately the views of the participants. 'The aim should be to be faithful to the participants, and to be aware (*in so far as is possible*) of biases being brought to the inevitable editing, which is needed ...',²³¹ to avoid distortion or misrepresentation of the participants' views, which according to Plummer would be 'treachery'.²³² Groenewald highlights the need for balance between serious reflection on what is being said and '...descriptive notes, such as hunches, impressions, feelings, ...'²³³ Maintaining this balance in this research is particularly important, given the researcher's own professional background in child protection and in representing children in public child law proceedings as a children's Guardian.

Interpretative phenomenology maintains that it is impossible to remove from the research process the researcher's own knowledge, experience and pre-conceptions about the area being researched. This phenomenological approach, also known as the hermeneutic tradition, was developed by Heidegger with the belief that it is not possible to be completely neutral in carrying out research, as our knowledge and experience forms part of the research process in interpreting and explaining data.²³⁴ Interpretative

²³⁰ J D Crist and C A Tanner, 'Interpretation / Analysis methods in hermeneutic interpretive phenomenology' (2003) *Nursing Research* 52 (3) 202.

²³¹ Lester (n 223) 4.

²³² K Plummer, (1983) *Documents of Life: An Introduction to the Problems and Literature of a Humanistic Method* (Unwin Hyman 1983).

²³³ T Groenewald, (2004) 'A phenomenological research Design illustrated' (2004) *International Journal of Qualitative Methods* 3 (1) 14.

²³⁴ M Heidegger, (1962) *Being and Time* (Harper and Row 1962).

phenomenologists also suggest that we use our experience to develop and influence our research questions. It is acknowledged that such experience has influenced both the choice of the research area in this study and the content of the interview focus areas schedule in this research project.

Although writing in relation to the nursing profession, it is equally relevant to this research and the researcher, Koch points out that as researchers we are interpreting data about areas within which we ourselves exist and therefore it is not possible to have a totally detached standpoint.²³⁵ Neither is this desirable, as caring about the research and realising its value is important, as well as encouraging participation in the study. However, Balls notes: '... that those conducting interpretative phenomenological research will need to show how their own experiences have shaped the choice of the research topic, the questions and their interpretations.'²³⁶

In discussing research design, Creswell outlines the essential aspects of a qualitative research process: 'Qualitative researchers tend to collect data in the field at the site where the participants experience the issue or problem under study'²³⁷ and: 'In the entire qualitative research process, the researcher keeps a focus on learning the meaning that the participants hold about the problem or issue, not the meaning that the researchers bring to the research ... '²³⁸ Creswell sees the main task of a qualitative researcher as trying to: '...develop a complex picture of the problem or issue under study. This involves reporting multiple perspectives, identifying the many factors in a situation, and generally sketching the larger picture that emerges'.²³⁹ In discussing where a qualitative research interview is most appropriate, Robson states: 'Where a study focuses on the meaning of particular phenomena to the participants ..'.²⁴⁰ In this study, the focus is on judges' perspectives of the concept of child-centredness as it relates to their decision-making. In relation to interviews, Robson feels that the interview: '

²³⁵ T Koch, (1995) 'Interpretive approaches in nursing research: the influence of Husserl and Heidegger' 1995 Journal of Advanced Nursing 21, 827.

²³⁶ Balls (n 214) 31.

²³⁷ J W Creswell, *Research Design: Qualitative, Quantitative and Mixed Methods Approaches* (Sage 2009) 175.

²³⁸ *ibid.*

²³⁹ *ibid*176.

²⁴⁰ C Robson, *Real World Research* (Blackwell 2002) 271.

... has the potential of providing rich and highly illuminating material'.²⁴¹
 Bryman in relation to the focus of qualitative interviewing maintains that: '... there is much greater interest in the interviewee's point of view ...'²⁴² and the researcher: '... wants rich, detailed answers ...'.²⁴³

A qualitative approach, as opposed to a quantitative methodology, provides a deeper and a more nuanced understanding of the concept of child-centredness as it relates to decisions made by the Judiciary in public child law proceedings in England and Wales.²⁴⁴ According to Guba and Lincoln: 'Human behaviour, unlike that of physical objects, cannot be understood without reference to the meanings and purposes attached by human actors to their activities. Qualitative data, it is asserted, can provide rich insight into human behaviour'.²⁴⁵

In his critique of qualitative research Bryman²⁴⁶ like Robson,²⁴⁷ highlights a number of limitations of a qualitative approach including, being time consuming, too subjective, difficult to replicate, problems with generalisation of the results and a lack of transparency. However, Bryman feels that a key area that can address limitations in qualitative research is transparency, particularly in the research design and in the analysis of the results. He concludes that: 'There is no necessary reason why qualitative research cannot be employed to investigate a specific research problem'.²⁴⁸

3.3 Research Method

In relation to the choice of method, Hughes maintains that: 'Researching a problem is a matter of using the skills and techniques appropriate to do the job required within the limits set; a matter of finely judging the ability of a

²⁴¹ Robson (n 239) 273.

²⁴² A Bryman, *Social Research Methods* (4th edn, Oxford University Press 2012) 470.

²⁴³ *Ibid* 471.

²⁴⁴ G D Bouma and G B J Atkinson, *A Handbook of Social Science Research: A Comprehensive and Practical Guide for Students* (Oxford University Press 1995).

²⁴⁵ E G Guba and Y S Lincoln, 'Competing paradigms in qualitative research' in S N Hesse-Biber and P Leavy (eds), *Approaches to Qualitative Research: A Reader on Theory and Practice* (Oxford University Press 2004) 19.

²⁴⁶ Bryman (n 241).

²⁴⁷ Robson (n 239).

²⁴⁸ Bryman (n 241) 407.

particular research tool to provide the data required'.²⁴⁹ For May: '... the selection of a method ought to depend on the purpose and circumstances of the research, rather than being derived from methodological and philosophical commitments'²⁵⁰ and she highlights the relationship between the position of the researcher and the chosen research method and how this relationship influences strongly the way a researcher approaches the framing of questions.

The research method chosen for this study was one-to-one interviews with individual judges in district, county and high courts throughout England and Wales, who were involved in public child law proceedings. These three levels of court have now been combined to form the Family Court, into which all care and adoption applications are lodged,²⁵¹ although the distinct levels of court remain in place. The research sample for this study was a purposive sample of 30 judges in England and Wales from the District Court, County Court and High Court involved in public child law proceedings. The purposeful selection of participants enabled the researcher to include participants that have the expertise, knowledge and experience to achieve the aim of the study.²⁵² These courts deal with the vast majority of child protection cases and in particular with the determination of fact hearings where children's participation is most central. Focusing the research on these courts was important, as they are at the 'coal face' of public law proceedings.

In this study, it was important to gain an understanding of judges' perspectives on child-centred decision-making and how they apply their perspectives to the decisions they make in court and whether their idea of child-centred decision-making values and includes children's involvement, including direct involvement in court proceedings. Gaining such an understanding will enable the researcher to identify divergences and

²⁴⁹ Hughes (n 222) 11.

²⁵⁰ V May, (2007) 'Use of mixed methods in a study of residence and contact disputes between divorced and separated parents' (2007) *International Journal of Social Research Methodology* 10 (4) 295, 297.

²⁵¹ Children and Families Act 2014.

²⁵² Creswell (n 236); Bryman (n 241).

consensus of views between members of the judiciary and current relevant legislation, formal guidance, literature and research.

This research study entered a specific area of practice where, as we have seen in the previous chapter on the legal and policy framework, there has been a significant increase in public child law legislation and policy within the last 27 years. It is an area that requires an 'up-close' and sensitive research method²⁵³ to explore with members of the Judiciary their perspectives of what lies at the heart of child-centred decision-making. The research method needs to be both flexible and focused to facilitate the gathering of in-depth data with many nuances.²⁵⁴

Bell maintains that interviews can provide rich material and provided the interview is focused,²⁵⁵ it enables the participants the freedom to talk about what is important to them.²⁵⁶ The research questions / focus areas explored with judges the specific contexts in which they work and make decisions about children's lives, identifying barriers; human, legal, cultural, systemic and structural that get in the way of achieving a public child law system that is transparent for children, child-friendly and child-accessible. The research also obtained judges' views on whether there are principles of the law that may conflict and collide with child-centred decision-making. Such an approach permitted the researcher to gain insight into and an understanding of the working world of the Judiciary in this area.²⁵⁷

The semi-structured open-ended interviews were audio-recorded, using a digital audio-recorder, to ensure accuracy of recording of the participants' responses for the purposes of subsequent analysis. The questions were open-ended, to facilitate space for and flexibility of responses from the participants.²⁵⁸ The interviews took place in the Judge's chambers in their

²⁵³ Robson (n 239).

²⁵⁴ J D Brewer, *Ethnography* (Open University Press 2002).

²⁵⁵ J Bell, *Doing Your Research Project – A Guide for Part-time Researchers in Education and Social Science* (3rd edn, Open University Press 1999).

²⁵⁶ N Fielding, 'Qualitative interviewing' in N Gilbert (ed.), *Researching Social Life* (Sage 1995).

²⁵⁷ Creswell (n 236).

²⁵⁸ Bryman (n 241).

respective courts, on a mutually convenient pre-arranged date and time. There was one exception, where a judge requested to be interviewed in their home. Interviews lasted one hour on average.

3.4 Research Sample

Access to potential participants for this study was limited, so a priority for this research was to secure the required number of participants by the most effective means possible.²⁵⁹ The research proposal itself, in addition to gaining ethical approval from the University of Liverpool, required approval from the Ministry of Justice and the President of the Family Division of the High Court (see Appendix 5). On granting approval, the Judicial Office helpfully informed judges involved in public law proceedings of the proposed research, via the judicial intranet, and invited interest in participating in the study. In addition, contact was made with potential participants through existing contacts via the Liverpool Law School and through the researcher's own contacts in the field. Through these contacts more potential participants were identified, a process commonly referred to as 'snowballing'.²⁶⁰ Such an approach, alongside the Judicial Office's invitation secured a sample of 30 participants. It is acknowledged that such sampling methods, while being flexible, restrict the potential sample of participants to a limited network of individuals. However, every effort was made to secure a sample across a wide geographical spread within England and Wales, obtaining as far as possible, a varied range of court locations, level and practice (see Appendix 6 for table of participants' level, gender and national location).

Following the identification of potential participants, each was given a participant information sheet (see Appendix 2), outlining the nature and purpose of the study and the time commitment involved. Contact details of the researcher (*telephone and email address*) was included on the participant

²⁵⁹ Robson (n 239).

²⁶⁰ R Waldinger and M Lichter, *How the Other Half Works: Immigration and the Social Organisation of Labour* (University of California Press 2003).

information sheet, as was the contact details of the researcher's supervisor, to facilitate a reply indicating their willingness to take part in the study.

3.5 Ethical Considerations

The research was carried out in accordance with the University of Liverpool's Research Ethics Policy.²⁶¹ Ethical approval for this research was granted by the University of Liverpool on 14th May 2012 (see Appendix 4). Prior to each interview the researcher confirmed with each participant that they understood the nature and purpose of the study and the time commitment involved, and that they were still willing to take part in the research. Each participant was guaranteed anonymity and were informed that their responses would be kept in a secure place for one year following the completion of the PhD thesis, before being destroyed. Prior to the interview commencing, the researcher requested the participant to read and sign a pre-printed consent form (see Appendix 3).

Given the nature of this study and the status of the sample, no adverse effects were anticipated in respect of the participants or in respect of the researcher. However, it was important to ensure that the participants in this study felt safe and comfortable in giving their true opinions of what for them constitutes child-centredness in the course of making a decision about a child's welfare. It was also important for the integrity of the study to ensure that the interviews obtained data that was both sufficiently in-depth and rich, the aim being to obtain: '... fresh, complex, rich descriptions of a phenomena as it is concretely lived'.²⁶²

3.6 Pilot Study

It was necessary for this research to carry out a pilot study as there are no validated interview schedules or questionnaires available for data collection in this specific research area of public child law including judges.²⁶³ A small

²⁶¹ University of Liverpool, *Policy on Research Ethics involving Human Participation* (University of Liverpool December 2006).

²⁶² L Finlay, 'Debating Phenomenological Research Methods' (2009) *Phenomenology and Practice* 3 (1) 6.

²⁶³ Bell (n 214); Robson (n 239); Creswell (n 236).

purposive sample of five judges were selected for interview. The purpose of the pilot study was to find out from judges whether the language and questions used in the interview schedule and focus areas were clear, comprehensive and pertinent.

The participating judges in the pilot study were happy with the range and focus of the interview questions and did not recommend any changes. The pilot study interviews yielded very full and complete responses. The researcher on reflection felt that the content and sequence of questions and focus areas facilitated detailed and informative responses from judges. Judges engaged readily with the questions, making the interview process smooth and fluent. It was, therefore, decided that these completed interviews would be included as part of the full sample.

3.7 Validity and Reliability

Hesse-Biber defines validity as:

‘Validity refers to whether a measure is actually measuring what a researcher thinks it is measuring’ and reliability as, ‘... to whether or not the measure produces the same result each time it is used to measure the same thing’.²⁶⁴

In this study, relevant literature and research and the findings of the pilot study informed the final design and wording of the research questions / focus areas, to ensure that the interview schedule / focus areas had the capacity to achieve the stated objectives of the research. This is an essential component of validity.²⁶⁵ For Oiler, the question that needs to be asked, as a test of validity is: ‘Are the findings recognised to be true by those who live the experience?’²⁶⁶ Following the transcription of each interview, the complete transcript was forwarded to the participant to check for accuracy and to amend and / or add to, if they considered it appropriate to do so. The final

²⁶⁴ S N Hesse-Biber and P Leavy, *Approaches to Qualitative Research: A Reader on Theory and Practice* (Oxford University Press 2004) 538.

²⁶⁵ Bryman (n 241); Creswell (n 236).

²⁶⁶ C Oiler, ‘The phenomenological approach in nursing research’ (1982) *Nursing Research* 31 (3) 178, 181.

transcript was then agreed with the participant, ensuring that the content is a true and accurate record of the participant's views.²⁶⁷

Given the nature of this study, the ever-changing landscape of public child law and the sample size, it is acknowledged that there are limitations in terms of repeatability of the study.²⁶⁸ However, Hesse-Biber in relation to reliability in qualitative research maintains that: 'Being more explicit about the procedures used to analyse data can make secondary analysis / replication of research studies of qualitative data more possible'.²⁶⁹ Close attention was given in this research to being consistent and transparent about the procedures used to code and analyse the data.

3.8 Analysis of Results

In qualitative research, according to Hesse-Biber and Leavy: 'There is no one right way to proceed with analysis'. They further state: 'There is no wrong or right way to synthesize data, and often the researcher jumps back and forth between collection, analysis and writing'.²⁷⁰ The analysis in this study was inductive, where themes and ideas emerged following an in-depth engagement with and exploration of the data: 'Qualitative researchers build their patterns, categories, and themes from the bottom up'.²⁷¹ Such an approach is consistent with the paradigm of phenomenology, which in itself is an 'inductive methodology'²⁷² with themes and experiences emerging, generated from the spoken words of the participants.²⁷³

Ritchie and Spencer outline the essential elements of a qualitative analysis: 'Qualitative data analysis is essentially about detection, and the tasks of defining, categorizing, theorizing, explaining, exploring and mapping are fundamental to the analyst's role'.²⁷⁴ In relation to methods of data analysis,

²⁶⁷ Koch, T. 'Interpretive approaches in nursing research: the influence of Husserl and Heidegger' (1995) *Journal of Advanced Nursing* 21 827.

²⁶⁸ Creswell (n 236); Bryman (n 241).

²⁶⁹ Hesse-Bieber and Leavy (n) 539.

²⁷⁰ *ibid* 415.

²⁷¹ Creswell (n 236) 175.

²⁷² Finlay (n 52) 15.

²⁷³ Balls (n 214).

²⁷⁴ J Ritchie and L Spencer, (2000) 'Qualitative data analysis for applied policy research' in A Bryman and R G Burgess (eds.) *Analysing Qualitative Data* (Routledge 2000) 176.

Balls states: '... whichever method is chosen, it involves categorising participants' experiences into themes using their own words. In phenomenology, these are presented often in relatively extended quotes, to illustrate the themes' thus ensuring that researchers, '... remain true to participants' words and meanings and to represent their experiences'.²⁷⁵

Following the transcribing of the audio-taped interviews, themes and patterns were identified and explored. With a large volume of qualitative data, it is both cumbersome and time-consuming to carry out this task manually. A qualitative data computer assisted analysis package met this need as it: '... allows the researcher to electronically mark with key words or titles, passages of stored free-format text. Occurrences of the same theme in large volumes of text can later be retrieved easily, via a keyword search'.²⁷⁶ While Hesse-Biber acknowledges that: 'There exists the fear that machine technology will separate the qualitative researcher from the creative process', she nevertheless sees the advantage of using such packages: 'Automating the time-consuming labour-intensive aspect of doing qualitative work, that is, the time it takes to code, index, retrieve, and store data, allows the researcher to concentrate on the generation and testing of theory'.²⁷⁷

Conrad and Reinharz in discussing the balance to be struck when using computer packages in the analysis of qualitative data make an important point when they suggest that: '... the computer should be used to enhance, not control, the work of the investigator ... If we compute first and think later we may well lose the essence of qualitative sociological work'²⁷⁸ and Mason asserts: 'But computers cannot perform the creative and intellectual task of devising categories, or of deciding which categories or types of data are relevant to the process being investigated ...'.²⁷⁹

²⁷⁵ Balls (n 10) 32, 33.

²⁷⁶ A Bradshaw, (1997) 'Sense and sensibility: debates and developments in socio-legal research methods' in P A Thomas, (ed.), *Socio-Legal Studies* (Dartmouth Publishing 1997) 118, 119.

²⁷⁷ S N Hesse-Biber 'Unleashing Frankenstein's monster?: The use of computers in qualitative research' (2004) in S N Hesse-Biber and P Leavy, *Approaches to Qualitative Research: A Reader on Theory and Practice* (Oxford University Press 2004) 536, 542.

²⁷⁸ P Conrad and S Reinharz, 'Computers and qualitative data: editor's introductory essay' (1984) *Qualitative Sociology* 7, 10.

²⁷⁹ J Mason, *Qualitative Researching* (Sage 2000) 108.

The analysis of the research results in this study was facilitated by the use of the qualitative computer analysis programme, NVivo 10. This particular programme was chosen to aid a thematic analysis of the data, identifying the main themes, ideas and issues emerging from the participants' responses,²⁸⁰ which are explored and discussed in the following chapters under sub-headings that represent the main findings of this research.

In relation to the analysis of data, the researcher needs to engage actively with and constantly reflect on the data to, as Finlay puts it: '... dwell with the data and interrogate it, for example asking: If a person has said this, what does this suggest of their experience of the world?' The key is to try to capture the complexity and ambiguity of the lived world being described'.²⁸¹ Accordingly, each demands or is owed the attentiveness proper to it.²⁸²

The perspectives of the participating judges, based on their responses, forms a significant part of the critical discussion included in the chapters of this thesis, particularly in Chapter 4 on Child-centredness in the Public Child Law System, Chapter 5 on Judges' Perspectives of Child-centredness, Chapter 6 on The Reality of Judicial Practice and Chapter 7 on Towards a Child-Centred Public Child Law System.

The process of analysis consisted of two stages:

First, the transcribed interviews were imported into NVivo to facilitate the identification of the main themes, issues and concepts emerging from the participants' responses. Second, the main themes, issues and concepts were identified through the use of nodes i.e. themes identified by participants. This process was undertaken at two levels. First, descriptive nodes were identified. These nodes have a clear and close link with the interview text, using words that appear in the text itself. Secondly, following a more in-depth exploration and interpretation of the data by the researcher, the nodes

²⁸⁰ P Bazeley and K Jackson, *Qualitative Data Analysis with NVivo* (Sage 2013).

²⁸¹ Finlay (n 62) 10.

²⁸² P Davies, 'Withholding Evidence: phenomenology and secrecy' in B Hopkins and Crowell (eds.), *The New Yearbook for Phenomenology and Phenomenological Philosophy* (Noesis Press 2006) 257.

became much more focused and analytical²⁸³ based on the researcher's insights and understanding of the text. Denzin calls such interpretation of qualitative data more of an art, rather than a technical skill, 'I call making sense of what has been learned the art of interpretation'.²⁸⁴

Both levels of analysis are necessary in qualitative research and complement each other, ensuring that interpretation and analysis never lose contact with and are grounded in the original text of the interview. These levels of coding are also necessary to generate theories and draw conclusions from the data,²⁸⁵ identifying consistencies and consensus between the participants in relation to themes and issues as well as difference of perspective, in relation to child-centred decision-making.

The results from the above analysis were integrated into a detailed review of the socio-legal literature, the legal and policy framework, children's rights, principles and theory and relevant case law and are discussed throughout the chapters of this thesis. In relation to the analysis of the data, the factors identified and put forward by children who had knowledge and experience of how the system affected their lives and of the legal framework underpinning the child protection system, provide an important contribution to the discussion (see Chapter 4).²⁸⁶

Throughout the thesis, the discussion of the results are informed and enhanced by the inclusion of direct quotes from the participants' responses and from relevant case law judgments. Back is very critical of qualitative researchers who use long quotations and who feel they can stand on their own without analysis. He sees this as the researcher neglecting their responsibility to provide an analysis of the data.²⁸⁷ In relation to the use of direct quotations in the analysis of qualitative data, Smart makes a valid point in this regard, posing the question, do we: '... chop them up too much into

²⁸³ Hesse-Bieber and Leavy (n 276).

²⁸⁴ N K Denzin, (2004) 'The art and Politics of interpretation' in S N Hesse-Biber and P Leavy, *Approaches to Qualitative Research – A Reader on Theory and Practice* (Oxford University Press 2004) 447.

²⁸⁵ Hesse-Bieber and Leavy (n 276).

²⁸⁶ Department for Education (n 22).

²⁸⁷ L Back, *The Art of Listening* (Berg 2007).

manageable bite-size pieces, or whether we use them too much as simple illustration rather than points of departure for deeper thinking'.²⁸⁸ In this thesis, the length of the direct quotations from the participants will be determined by their relevance to the critical discussion of the themes, issues, concepts and theories emerging from the analysis of the data. It is important in the discussion of qualitative data that the critical analysis of such data is very much connected to the source material: the participants' perspectives as expressed in their responses and to the aim and objectives of the study. The inclusion of direct quotes, long or short, facilitate a deeper exploration and richer understanding of the main themes and issues emerging from the analysis. This is very much in line with one of the main principles of a phenomenological approach, that of, returning to the things themselves.²⁸⁹

3.9 Limitations of research

This research is a qualitative study involving 30 judges involved in public child law proceedings throughout England and Wales. The research sample provides a wide range of judicial views on what constitutes child-centred decision-making in the reality of everyday practice within care and adoption proceedings. The research solely focused on judges and did not include the perspectives of other professionals and parties involved in proceedings. The perspectives of children did not form part of this research aside from that reported in other existing research. The rationale for focusing only on judges was firstly, the lack of research in this area generally and secondly, judges were considered a pivotal group within the public child law system, as they have the responsibility for making significant and far reaching decisions in the lives of children and their families.

Gaining approval to access members of the judiciary for the purposes of research is not an easy task and is a process that requires sensitivity and understanding, given the nature of the work involved and the issue of security around members of the judiciary. Gaining access to 30 judges who were

²⁸⁸ C Smart, 'Shifting horizons: reflections on qualitative methods' (2009) *Feminist Theory* 10 (3) 5.

²⁸⁹ Husserl (n 234).

front-line practitioners in this area was considered an adequate and an appropriate sample for this PhD research study. The one-to-one interviews provided rich and detailed information about what the judges considered to be child-centred decisions.

The research did not collect biographical information on the participating judges, the sole focus and priority being on gaining an insight into and an understanding of judicial thinking in relation to how they make decisions about children's lives. However, the importance of variables such as gender, age, ethnicity and their influence on areas like values is acknowledged. For this research, see Appendix 6 for tables containing the number of judges, their judicial level, gender and national location. A larger study in the future would enable comparisons to be made in relation to the impact these variables may have on child-centred decision-making (see section on areas for future research in Chapter 8).

3.10 Conclusion

The core aim of this research was to explore with judges their perspectives of what constitutes child-centred decision-making in public child law proceedings (*Care and Adoption*). The broad phenomenological approach adopted for this research facilitates the maintaining of a direct link between the exploration, interpretation and discussion of themes and issues and the raw data from which they emerge. This ensures that judges' perspectives are represented accurately and that discussion of the data is balanced and makes a worthwhile contribution, in terms of deepening, extending and enriching knowledge of judicial views on an area in which major decisions are made about the lives of children and those of their families.

The following chapter explores and discusses child-centredness, setting out the conceptual framework from the perspectives of both judges and the public child law system itself, in relation to children who are subject to proceedings.

Chapter 4

Child-centredness in the Public Child Law System

4.1 Introduction

The focus of this chapter is on the elements of what is considered to be child-centredness within the public child law system of England and Wales, defined by current child care legislation, formal practice guidance and relevant international conventions. This chapter builds on the legal and policy architecture presented in Chapter 2.

It is not a chapter on child-centredness as a universal concept, as there is no worldwide consensus as to what constitutes this concept. It is a concept that is both defined and constrained by a huge range of interrelated factors, such as culture, religion, history, social norms, values and professional, legal, economic and welfare contexts. This thesis explores critically child-centredness through the prism of the public child law system, underpinned by both the spirit and letter of legislation and formal guidance, applied and translated through professional practice. All cases that are subject to proceedings originate from the child protection system and therefore it is necessary to look at how both arenas engage with the concept of child-centredness, given that they inform and are informed by each other in relation to decisions regarding the welfare and best interests of children. The concept of 'child-centredness' identified from the values in the child protection system will also underpin the analysis in the remaining chapters of the thesis.

The chapter will firstly outline briefly the historical background from which the term child-centredness emerged. This chapter builds upon the historical background presented in Chapter two from which the term child-centredness emerged and evolved. Current professional perception and understanding of this concept as represented and applied in the public child law system is then explored and discussed. The key components underpinning a child-centred approach in practice are identified including the principle of paramountcy in relation to the best interests of the child. Factors that impact on the

paramountcy of the child's welfare including, expediency, accountability, transparency and the child's own wishes and feelings, will be considered in relation to the challenges and tensions such factors pose in the application of this core principle within public child law.

4.2 Child-centredness and child participation

The term '*child-centred*' has its roots in the field of early year's education. It was first used by Froebel²⁹⁰ in 1826 in relation to early-years education in the United States and placed the child at the centre of everything in her / his life, with the child viewing everything only in relation to herself / himself. Chung and Walsh²⁹¹ in tracing the history of the term child-centred in relation to early year's education in the United States, found that there was much debate about what constituted the nature of child-centredness. They highlight a number of perceptions of the concept by various groups involved in early years' education down through the years, including, learning based on children's interests, children's participation in decisions regarding their learning, an emphasis on children's developmental stages and the development of individual potential. Generally, despite different perceptions, the child's own experience of their world was placed at the centre of the system and seen as a core element of child-centredness. However, Chung and Walsh²⁹² in tracing the history of the concept of child-centredness, posed the question: 'Of what is the child the centre?' In the context of this research, the following chapters of this thesis will explore and analyse through the responses of the judges, current legislation, policy and formal guidance, as well as relevant literature and research, the reality of the child's position within the public child law system. Although this core element of child-centredness emerged in the early 1800's, current legislation,²⁹³ literature²⁹⁴ and research²⁹⁵ continue to highlight the importance of seeing the child in the

²⁹⁰ F Froebel, *The Education of Man* (translated by W N Hailmann) (Dover Publications 2005) 97.

²⁹¹ Chung and Walsh (n 21)

²⁹² *ibid.*

²⁹³ Children Act 1989 s.1(1) Paramountcy and s.1(3) Welfare Checklist.

²⁹⁴ E Munro, *Munro Review of Child Protection: Final Report - A Child-Centred System* (The Stationery Office 2011b).

²⁹⁵ P Sidebotham, M Brandon, S Bailey, P Belderson, J Dodsworth, J Garstang, E Harrison, A Retzer and P Sorensen, *Pathways to harm, pathways to protection: a triennial analysis of serious case reviews 2011 to 2014: Final Report* (Department for Education 2016).

centre of their world as one of the core elements that should form the basis on which child-centred decisions are made in both the child protection system and in public child law proceedings.

Placing a child's own experience of their world at the centre of decision-making processes and having such an approach accepted as a core element of child-centred decision-making, has become an integral part of the language of children's rights and child-friendly justice today.

Article 12 of the CRC²⁹⁶ states:

1. 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.
2. 'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law'.

In relation to Article 12 the UN Committee on the Rights of the Child assert:

'... States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity'.²⁹⁷

The Committee²⁹⁸ places great importance on children being able to participate in decision-making processes, the outcome of which will affect their lives. The Committee asserts that such participation must not be momentary, but needs to be meaningful, intense and ongoing throughout the entire process.²⁹⁹

²⁹⁶ Article 12 (1) and (2) UN Convention on the Rights of the Child Adopted by the General Assembly of the United Nations on 20 November 1989.

²⁹⁷ Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be heard* (United Nations 2009) para 20. General Comment 12 presents a legal analysis of the two paragraphs of Article 12, 1. right to express views freely and 2. right to be heard.

²⁹⁸ Ibid.

²⁹⁹ Ibid para 13.

In relation to vulnerable children who need protection in relation to the status of their rights, the UN Committee makes clear that a child's right to be protected from abuse and neglect does not relegate the standing of their other rights to a subordinate position.³⁰⁰ The right to be heard and participate in decision-making processes in the meaningful and intense way, as outlined by the UN Committee, and the right to express their wishes and feelings throughout such processes should not be given any less importance than their need for and right to protection from harm. According to the UN Committee, parties need to presume a child has the capacity to form a view and that a child should not have to first prove their capacity.³⁰¹ There is no age limit attached to Article 12 and the UN Committee discourages States parties from introducing age limits in legislation.³⁰² For the UN Committee, children should always be at the centre of processes and systems that make decisions about their lives.³⁰³

However, just listening to the views of children is not enough to characterise an approach as being child-centred. Their views must also be given serious consideration.³⁰⁴ Of relevance to this research, the Council of Europe's guidelines on 'child-friendly' justice, which reflect the approach adopted in General Comment Number 12, cautions against a tokenistic approach in the application of Article 12 of the UNCRC. In relation to processes for hearing children, the Council of Europe outline the essential elements that should characterise child-friendly processes; transparent (*to the child*), informative, voluntary, respectful, relevant, child-friendly, inclusive, carried out by trained staff, safe and sensitive to risk, and, finally, accountable (*to the child*).³⁰⁵ Both the UN Committee on the Rights of the Child and the Council of Europe stress the importance of children's rights being accessible, thus enabling children to use their rights. The decision whether a child wishes to exercise their rights is solely the child's and is under no obligation to do so.

³⁰⁰ Committee on the Rights of the Child (n 296) para 18.

³⁰¹ *ibid* para 20.

³⁰² *ibid* para 21.

³⁰³ *ibid*

³⁰⁴ *ibid* para 28.

³⁰⁵ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice and their Explanatory Memorandum* (2011) Retrieved on: 28th March 2012 www.coe.int/childjustice Explanatory Memorandum para 117.

Guidelines adopted and ratified by the International Association of Youth and Family Judges and Magistrates (IAYFJM) present a global approach in relation to children who are involved in justice systems.³⁰⁶ The guidelines are based on children's rights, as contained in the UNCRC and the Council of Europe Guidelines on Child-friendly Justice. Within these guidelines, children are acknowledged as having rights in their own right and are not seen as objects where their rights take second place to those of adults. One of the fundamental principles of the guidelines is, 'The right to be treated according to the rule of law, which must recognise children as subjects of substantive and procedural rights'.³⁰⁷ In relation to ensuring that children are aware of what is going on in proceedings, principle 8 of the guidelines state that judges should show sensitivity and communicate with the child and indeed with all parties, in a manner 'adapted to their level of understanding'.³⁰⁸ The IAYFJM sees this principle applying to all justice officials and professionals involved in proceedings. The guidelines stress the need for a child-centred focus, both throughout proceedings and in the processes and procedures that have led up to the proceedings. These guidelines complement the Council for Europe guidelines in offering clarification to judges and magistrates about how to give effect to these children's rights principles in practice.

The guidance on judges meeting children³⁰⁹ was put forward by the Family Justice Council as representing good practice in the area of public child law. The Council in their guidelines for judges meeting children, outline why such meetings are important for children, the main purpose being to help children feel more involved in their proceedings and to be reassured that the judge has understood their wishes and feelings.³¹⁰ The guidance makes clear that the purpose of a meeting between child and judge is not to gather evidence, as this is role of the child's Guardian and the child's Local Authority social

³⁰⁶ International Association of Youth and Family Judges and Magistrates, IAYFJM Guidelines on Children in contact with the Justice System (IAYFJM 2017).

³⁰⁷ *ibid* 8.

³⁰⁸ *ibid* 31.

³⁰⁹ Family Justice Council, *Guidelines for Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872.

³¹⁰ *ibid*.

worker. It emphasises that the responsibility for making the final decision in a case is the Judge's and not the child.

Prior to such meetings taking place, either the child's legal representative or the child's Guardian will explain to the judge from the child's perspective, the purpose of the meeting. The judge needs to be assured, usually by either the child's Guardian or legal representative, that such a meeting is in the best interests of the child.³¹¹ The other parties involved in the case have the right to make representations regarding such a meeting.³¹² The age of the child and their level of understanding of the circumstances are factors taken into account by the judge, but are not determinative of the judge's decision as to whether or not he will meet with the child. If the judge decides not to meet with the child, there is an expectation that the judge will communicate his reasons in writing to the child.³¹³

The above guidance was followed by guidelines in relation to children giving evidence in Family Proceedings.³¹⁴

The two primary legal considerations that a judge needs to take into account are:

- i) the possible advantages that the child being called will bring to the determination of truth balanced against;
- ii) the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence

The child's wishes and feelings are taken into account by the judge irrespective of whether or not they are willing to give evidence. If the child is not willing to give evidence, they rarely would be obliged to do so.³¹⁵ A wide range of factors are taken into account before a child is asked to give

³¹¹ Family Justice Council (n 309).

³¹² *ibid* 2.

³¹³ Family Justice Council, *Guidelines in Relation to Children Giving Evidence in Family Proceedings* [2012] 2 FLR 456 2.

³¹⁴ *ibid*

³¹⁵ *ibid*.

evidence including, their needs and abilities, the quality and importance of the child's evidence, the level and quality of support they have available. The guidelines outline a number of procedural and practical issues that need to be taken into account by the court:

- a. giving the child the opportunity to refresh his memory;
- b. the appropriate identity of the questioner;
- c. matching the skills of the questioner to the communication needs of the child;
- d. where the questioning should take place;
- e. the type and nature of the questions;
- f. advance judicial approval of any questions proposed to be put to the child;
- g. the need for ground rules to be discussed ahead of time by the judge, lawyers (and intermediary, if applicable) about the examination; and
- h. how the interview should be recorded.³¹⁶

These latter guidelines in relation to children giving evidence, were issued following the Supreme Court decision in *Re W (Children) (Family Proceedings: Evidence)*,³¹⁷ where it was held that there was no longer a presumption, or even a starting point, against children giving evidence in family proceedings. In her judgment Lady Hale set aside the presumption against children giving oral evidence in public child law proceedings, citing Article 6 ECHR³¹⁸ which requires that proceedings should be conducted in a fair manner and this includes the opportunity to challenge the evidence presented. Lady Hale acknowledged that a balance needs to be struck in care proceedings between the impact on the child of giving evidence and ensuring a fair trial. An assessment of the factors involved in each case needs to be made, the outcome of which should determine if it is in the interests of justice and in the best interests of the child. Both sets of guidelines and case law indicate a growing awareness of the need to adopt a more child-centred participatory approach.

³¹⁶ Family Justice Council 2011 (n 314) 5.

³¹⁷ [2010] UKSC 12.

³¹⁸ *ibid* para 22.

4.3 Child-centredness and effectiveness – a double-edged sword

There is a perceived tension that exists between Article 12 (*Children's right to express their views*) and Article 3 (primacy of the child's best interests) of the UNCRC.³¹⁹ In essence, it is a tension between the child's welfare and their right to participate. Fortin's view is that children have a moral right to have their capacity to make decisions promoted through consultation, while not giving them: '...complete responsibility for choice'.³²⁰ Children have a variety of rights, with Fortin remarking that a child may need care and protection in one situation while their right to autonomy and self-determination needs to be respected in another.³²¹ For Fortin, it is important that the substance of children's rights are acknowledged and respected, rather than being embroidered through what she calls: 'spin', "...while at the same time failing to deliver what children really require'.³²² However, Fortin views the UNCRC as having two major weaknesses. First, the rights themselves are aspirational and second, the lack of means for formal enforcement.³²³ In England and Wales, UNCRC is not part of domestic legislation, although Wales is further on than England in terms of integrating the spirit of the articles of UNCRC into their legislative framework in terms of the importance placed on enabling the child to express their views on all matters that may affect their lives (see Chapter 2).

The balance that needs to be struck between protecting the child and respecting their right to express a view, is an area addressed by the UN Committee on the Rights of the Child. The Committee in General Comment 12 states: 'Article 12 manifests that the child holds rights, which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision)'.³²⁴ The family court system as presently constituted, sees such tension being resolved in favour of the child's welfare and by the indirect participation of children in

³¹⁹ United Nations, *United Nations Convention on the Rights of the Child* (United Nations 1989)

³²⁰ J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press 2009) 88.

³²¹ *ibid* 3.

³²² J Fortin, 'Children's Rights – Substance or Spin' [2006] *Family Law* 759, 653.

³²³ J Fortin, 'Children's rights – flattering to deceive?' [2014] 26 (1) *Child and Family Law Quarterly* 52.

³²⁴ General Comment 12 para 18.

proceedings. This approach is restrictive and limits children in their exercise of their rights, notwithstanding their vulnerable position. David Archard makes an important and relevant comment in this regard:

‘We can better protect children. Children will become better participants if we give their views weight. The world as a whole is better managed, and the overall outcomes are better ones, if we allow children to have some say in what happens to them’.³²⁵

Ang et al focusing on the support needed to enable children to participate maintain that, adults should: ‘.... learn to speak and understand the ‘language of childhood’ and to develop empathic communication skills’.³²⁶ The issues outlined by Ang and her colleagues, were also highlighted in the Family Justice Review Panel Report: ‘Children’s interests are central to the operation of the family justice system. Decisions should take the wishes of children into account and children should know what is happening and why’.³²⁷ The review panel were of the view that an effective family justice system is one that, ‘... provides children, as well as adults, with an opportunity to have their voices heard in the decisions that will be made’.³²⁸

Carol Smart³²⁹ makes the point that having a voice is considered in developed societies as being a basic human right and she questions whether participation is possible without having a voice and an environment where that voice can be expressed. Given the findings of the Family Justice Review, which found that courts were scary and daunting places for children,³³⁰ child-centredness therefore requires the child’s voice to be heard at all stages of proceedings, including before the judge. For Smart, this is merely a small first step and in relation to space, this space needs to be created within the legal process and the judicial system itself to enable children speak if they wish, with confidence. Smart places a lot of emphasis

³²⁵ F Ang, E Bergmans, L Cattrijsse, I Delens-Ravier, M Delplace, V Staelens, T Vandewiele, C Vandresse and M Verheyde, *Participation Rights of Children* (Intersentia 2006) viii.

³²⁶ *ibid* 16.

³²⁷ Family Justice Review Panel (n 369) 6.

³²⁸ *ibid* 41.

³²⁹ C Smart, ‘From children’s shoes to children’s voices’ (2002) 40 (3) Family Court Review 307.

³³⁰ Family Justice Review Panel (n 369).

on children being given the time to be able to: ‘... try out their thoughts and to change their minds’.³³¹

The ‘*capabilities approach*’ developed by Dixon and Nussbaum,³³² lays great emphasis on opportunities for children’s level of functioning and choice in whatever arena children find themselves and state that, ‘... all human beings possess equal and inalienable human dignity, whatever their attainments, talents, or potential ...’.³³³ Dixon and Nussbaum’s perspective is encapsulated powerfully in the following abstract from one of the judicial interviews in this research. It captures the true essence and spirit of child-centred participation in practice:

“ *even really severely disabled children who maybe can’t communicate other than, just with a flicker of their eye or just touching you, but they have a view and even if that is simply wanting to be there, just to see what you look like, to make sure you have not got two heads, that is really important*”. (County Court Judge)

Nolan attributes the insufficient attention paid to the voice of the child in proceedings to the fact that children are ‘non-voters’ and therefore have very little opportunity to apply pressure on ‘... the policy-making process’ and by implication, the legal process and system.³³⁴ Space on the political agenda for children’s issues is more often than not achieved through what Nolan describes as, the ‘... emotive effect of child-related discourse’. Sadly, on occasions, such child-related discourses come about at the cost of the value of life itself and results in a child’s death, as was the case of Victoria Climbié³³⁵, which led to the Children Act 2004. In relation to Article 12 of the UNCRC³³⁶, an article that should have been to the fore in relation to Victoria, since she was a child who was well able to express her views, Lundy has argued that this article will only be implemented successfully when the

³³¹ Smart (n 329) 307.

³³² R Dixon and M C Nussbaum, ‘Children’s Rights and a Capabilities Approach: The Question of Special Priority’ (2011) 97 Cornell Law Review 549.

³³³ *Ibid* 9.

³³⁴ A Nolan, ‘The child as “democratic citizen”: challenging the “participation gap” (2010) Public Law 767, 768.

³³⁵ H Laming, *The Victoria Climbié Inquiry Report* (The Stationery Office 2003).

³³⁶ Article 12 (Child’s right to express a view) United Nations, *United Nations Convention on the Rights of the Child* (UNCRC) (United Nations 1989).

factors of space, voice, audience and influence are given serious consideration.³³⁷

For Lundy, children need to feel they are in a safe environment, which is welcoming of their presence and of their right to express views freely and have their views listened to and acted on appropriately. Lundy stresses the importance of providing children with a range of ways to express their views and of being given adequate, age appropriate and accurate information with which to make choices including the choice not to express a view. Children need to be assured that their views are reaching and influencing those who have the power to effect change in their lives. Influence according to Lundy, needs to be seen as an integral part of the application of Article 12 UNCRC, which reflects the value of respecting the dignity of the child.³³⁸ Of relevance in the context of this chapter is the factor of children's influence within the legal system, which Nolan would argue is one area that the UN Committee on the Rights of the Child has engaged far less in compared to their proactive stance in relation to space, voice and audience.³³⁹

The Irish Government endorsed and incorporated Lundy's model of participation into their 'National Strategy on Children and Young People's Participation in Decision-making'.³⁴⁰ This strategy follows on from their 'Brighter Futures Programme', which sees children connected, respected and contributing to decisions which are being made about their lives.³⁴¹

Participation within this strategy is defined as: '...the process by which children and young people have active involvement and real influence in decision-making on matters affecting their lives, both directly and indirectly'.³⁴² For such participation to be meaningful, genuine and sustainable, the strategy places importance of seeing participation as an

³³⁷ L Lundy, (2007) 'Voice' is not enough: conceptualizing Article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 (6) British Educational Research Journal 927.

³³⁸ *ibid.*

³³⁹ Nolan (n 334).

³⁴⁰ Department of Children and Youth Affairs, *National Strategy on Children and Young People's Participation in Decision-making, 2015 – 2020* (Government Publications (Irl 2015) Available at: www.dcy.a.ie 22.

³⁴¹ Department of Children and Youth Affairs, *Better Outcomes, Brighter Futures: The National Policy Framework for Children and Young People, 2014-2020* (Government Publications (Irl) 2015) Available at: www.dcy.a.ie

³⁴² *ibid* 20.

ongoing process and not a one-off event, which needs to be supported by time and resources.³⁴³

4.4 What is considered Child-centredness in the public child law system

Current guidance from the Department for Education,³⁴⁴ the purpose of which is to provide advice on best practice for professionals working with children and families, adopts the view that an effective working together system is synonymous with being child-centred. The concept of effectiveness is equated with the concept of child-centredness. The system is considered effective if it meets the needs of the child and protects the child from abuse and neglect. Where appropriate and necessary, court proceedings are initiated, conducted and managed in a timely manner without undue delay, meaning that all proceedings should be concluded within a 26-week period.³⁴⁵ This deadline is part of the Public Law Outline (PLO) 2014, and has the legislative backing of the Children and Families Act 2014 (see Chapter 2).

Equating the effectiveness of the current working together system with being child-centred is an assumption that is very much open to challenge, given the tenuous nature of children's involvement in the system, an issue that was highlighted at length by Munro throughout her review of the child protection system.³⁴⁶ Munro was commissioned in 2009 to carry out an independent review of the child protection system with a view to improve child protection practice. The then Secretary of State felt there was a need to reform front-line social work practice in the area of child protection, to enable social workers to have more freedom by having less bureaucracy and regulation, to make well-informed judgements, based on up-to-date evidence in the best interests of children.³⁴⁷ Munro's review followed Lord Laming's progress

³⁴³ Department of Children and Youth Affairs (Ireland) (n 340) 23.

³⁴⁴ HM Government *Working Together to Safeguard Children; A Guide to Inter-Agency Working to Safeguard and Promote the Welfare of Children* (Department for Education 2015) 8,11.

³⁴⁵ Children and Families Act 2014 s.14(2)(ii) (26-week rule).

³⁴⁶ E Munro, *Munro Review of the Child Protection System: Part 1 – A systems Analysis* (The Stationery Office 2010).

³⁴⁷ *ibid.*

report on the protection of children in England,³⁴⁸ since the death of Victoria Climbié.³⁴⁹

It is from the child protection system that all proceedings emerge and within which children find themselves subject to a range of professional actions, decisions, perspectives and opinions in relation to their case. Masson³⁵⁰ in her critique of the Public Law Outline notes that the reform of the public child law system was based on the principle of ‘*enhanced judicial management*’, not on what constitutes child-centred proceedings. While the reforms were meant to have a much greater focus on the child by reducing the time taken to complete court proceedings, three significant developments took place around the same time. First, the introduction of fixed legal aid fees for lawyers representing children and parents,³⁵¹ which has had the effect of reducing the number of experienced lawyers, as their firms found this area of work had become financially unsustainable. Such a development has the real potential to undermine the quality of representation and raises concerns around the whole area of justice for children and parents.³⁵² In relation to children’s rights, Wall LJ in the case of *Mabon v Mabon and Others*, stated in relation to the adversarial nature of public child law proceedings:

‘Without the benefit of representation by those experienced in encouraging the involvement of children and young people, the rights afforded to children under Article 12 are in danger of slipping away’.³⁵³

Secondly, there was an increase in court fees for care applications. It increased ten-fold to £5,000 at a time when local authorities’ budgets were being cut significantly due to the prevailing global economic crisis. The new fee was payable in stages, rewarding early completion of proceedings.

Thirdly, the Children and Families Court Advisory and Support Service (Cafcass) produced a new work model for children’s Guardians and family

³⁴⁸ H Laming, *The Protection of Children in England: a progress report* (The Stationery Office 2009).

³⁴⁹ H Laming, *The Victoria Climbié Inquiry Report* (The Stationery Office 2003).

³⁵⁰ J Masson, Third (or fourth) time lucky for care proceedings reform? (2015) 27(1) *Child and Family Law Quarterly*.

³⁵¹ Cafcass, *Cafcass Operating Framework* (Ministry of Justice 2014).

³⁵² Masson (n 350).

³⁵³ [2005] EWCA Civ 634.

court advisors to enable them to provide the courts with advice early in care proceedings. This model also introduced the concept of proportionate working, which required Guardians to only do what was necessary to provide the courts with advice and information about the best interests of the child.³⁵⁴

Masson maintains that the 26-week rule and the above three parallel developments are much more to do with control and management of timetables and court processes than with adopting a child-centred focus to proceedings, with the purpose of achieving the best welfare outcomes for children.³⁵⁵ In effect, such developments limit significantly the time professionals can spend getting to know and understand the child's perspective of their circumstances. One of the consequences of a lack of time spent with the child is that the quality of information, in terms of detail and depth and the analysis of this information, is limited in terms of its usefulness to the court, in enabling the judge to make the right and best decision for the child. This area has been highlighted by Brandon et al³⁵⁶ in relation to serious case reviews who found a number of concerning issues relating to the system including, a lack of critical thinking in relation to the analysis of evidence, lack of professional experience and lack of engagement with the child and their family. This situation continues to prevail, as Ofsted in their annual inspection report in 2016 found that children continue to have too many changes of social worker, children not being seen alone during home visits, lack of analysis in assessments and social workers having high caseloads, which impact significantly on the amount of time they can spend with children and their families.³⁵⁷ For judges in this research, these factors are real barriers to child-centred decision-making. These issues will be discussed in more detail in Chapters 5 and 6, particularly the lack of time for professionals to get to know the children they are working with and representing in proceedings.

³⁵⁴ Cafcass (n 351).

³⁵⁵ Masson (n 350).

³⁵⁶ M Brandon, P Sidebotham, S Bailey, P Belderson, C Hawley, C Ellis and M Megson, *New Learning from Serious Case Reviews* (Department for Education 2012); Sidebotham et al (n 131).

³⁵⁷ Office for Standards in Education, Children's Services and Skills (Ofsted), *Annual Social Care Report 2016* (The Stationery Office 2016) 25.

4.5 Key components underpinning a child-centred approach

4.5.1 The principle of paramountcy and welfare of the child

In public child law the principle of paramountcy, as contained in s.1(1) of the Children Act 1989, is accepted by judges and lawyers and by child care professionals in the field including, social workers and children's Guardians, as the over-arching principle that should guide and inform all decisions made by the court in relation to the welfare of a child. The Act states:

When a court determines any question with respect to:

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration

The purpose of the paramountcy principle is to place the child at the centre of proceedings and is the basis of child-centredness within our current public child law system. In addition to the principle of paramountcy, there is the 'welfare checklist',³⁵⁸ which lists a number of areas that need to be taken into account when considering the welfare and best interests of children including, obtaining the child's own wishes and feelings.

The principle of paramountcy is supported by Rule 8 of the Family Procedure Rules (FPR) 2010, which has inserted in rule 4.14A of the FPR 1991 a definition of the timetable for the child in proceedings for Care and Supervision Orders:

4.14A – (1) The court shall set the timetable of the proceedings in accordance with the timetable for the child

(2) The timetable for the child means the timetable set by the court in accordance with its duties under sections 1 and 32 of the CA 1989 and shall

³⁵⁸ s.1(3) The Children Act 1989 Welfare Checklist – Child's wishes and feelings, Physical, emotional and educational needs, Likely effect of change of circumstances, Age, sex, background, relevant characteristics (*race, culture, religion and language*), Actual or potential harm, Capability of parents / relevant others to meet the child's needs and Range of powers available to the court.

- (a) Take into account dates of the significant steps in the life of the child who is the subject of the proceedings and
- (b) Be appropriate for that child

This principle however does not extend to affording the same status to the voice of the child. The child's wishes and feelings is but one element contained in the welfare checklist and does not take priority over the other elements.³⁵⁹

The UN Committee on the Rights of the Child in General Comments 12³⁶⁰ and 14,³⁶¹ talk about the interrelationship between the child's best interests (Article 3) and the right to express a view (Article 12). The Committee emphasises that any assessment of a child's best interests must include respect for the child's right to express their views freely and for these views to be taken seriously in all decisions that impact on a child's life. The requirements of Article 3 UNCRC are not satisfied if the child's right under Article 12 UNCRC is not respected and given due consideration. The Committee sees the roles of both Articles as having complementary roles; achieving the child's best interests and providing a way to facilitate the child's active inclusion in the process.³⁶² The UN Committee in relation to babies and very young children state:

'Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view'.³⁶³

The above paragraph from General Comment No 14 makes clear the inclusive nature and requirements of Articles 3 and 12 UNCRC in relation to

³⁵⁹ s 1(3) The children Act 1989.

³⁶⁰ UN Committee on the Rights of the Child General Comment 12.

³⁶¹ UN Committee on the Rights of the Child General Comment 14.

³⁶² *ibid* para 43.

³⁶³ *ibid* para 44.

all children including children who are not in a position to exercise their rights and children who exercise their right to not express their views. In the context of a child's welfare and vulnerability, areas pertinent to this research, the UN Committee makes an important point about a child's rights in the context of these areas and the requirements of children's rights in relation to any balance that needs to be struck between a child's vulnerability and their right to express their views:

‘The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests’.³⁶⁴

The UN Committee acknowledges that in situations of vulnerability, the child's needs require assessment and support, particularly emotional support, to ensure both their full participation in the assessment of their needs and in the decision-making regarding the identification of what is in their best interests.³⁶⁵ The UN Committee makes clear that if a child has not been given the opportunity to express their views and have those views taken seriously in relation to their best interests, this represents a lack of respect for the child's contribution to, ‘...influence the determination of their best interests’.³⁶⁶

Thorpe LJ in *Mabon v Mabon and Others*³⁶⁷ maintained that a child's right to express their views and participate directly in proceedings should take precedence over a paternalistic assessment of the child's welfare. However, the principle of paramountcy of a child's best interests in itself, within the context of care proceedings had for one district judge, real limitations in terms of outcomes for children:

“Paramountcy of best interests – Let us put it another way; the outcome for a child is almost always, as far as the court is concerned,

³⁶⁴ UN Committee on the Rights of the Child (n 296) para 54.

³⁶⁵ *ibid.*

³⁶⁶ *ibid* para 53.

³⁶⁷ [2005] EWCA Civ 634.

the least worst outcome. You don't get care proceedings with a best outcome". (District Court Judge)

In this research one county court judge provides a good summary of the core realities underpinning the above issues, with a comparison being made were an adult to be treated in the same way in a different life situation:

"There is a greater onus when we are talking about a legal system, which is making decisions about a child's life, because we really can't make decisions about a child's life and leave them powerless in the process. Decisions about a child's life include such matters as, whether a child or when a child sees the absent parent, if a child should live with a particular parent or with their family at all. These have massive repercussions. If we took that forward and said that somebody may lose their job, be summarily dismissed and the tribunal system that considers them thereafter, in so far as there is any tribunal system at all, won't hear from that person, except through the medium of another person, and will make a decision about them, and they won't even be present at the proceedings, we would regard that as sort of a nightmare. When we think about what in fact we decide about children, it is all being done in their absence and often contrary to their wishes and feelings. I don't think we have signed up to the idea that there is anything wrong with that. ... I think we have a faith that we will get to the right answer, but sometimes the right answer would be better informed and might be a better answer if there was more of an input from the child in question". (County Court Judge)

While the principle of paramountcy, the welfare checklist and Rule 8 all have a clear focus on the child and their individual needs, the introduction of the 26-week rule³⁶⁸ under the Children and Families Act 2014, where all public child law proceedings are required to be completed within this timescale, appears to be inconsistent with the notion of proceedings being child-centred and conducted at the child's pace. The introduction of this rule seems to ignore the uniqueness of each child's circumstances, despite the Family Justice Review Panel³⁶⁹ having already highlighted significant deficiencies in the system in relation to the treatment and experiences of children during periods of their lives when they are feeling very vulnerable and powerless. Discussion on the Family Justice Review is part of the following section of

³⁶⁸ The Child and Families Act 2014 26-week rule.

³⁶⁹ Family Justice Review Panel, *Family Justice Review: Final Report* (The Ministry of Justice, Department of Education and the Welsh Government 2011) 29. The Review found that children themselves feel courts are daunting and scary places.

this chapter, which examines the reality of child-centred transparency and accountability, drawing on relevant research, formal reviews and empirical data.

4.5.2 Child-centred transparency and accountability

Munro's second report³⁷⁰ (*Interim Report*), focused on the child's journey through the child protection system, from the point of referral to exiting the system and beyond. Munro places a strong emphasis on the need for the child protection system to be child-centred, meaning a recognition and an acknowledgement of children as people with rights³⁷¹ including their right to be part of the decision-making process,³⁷² particularly when major decisions are being made about their lives.³⁷³

The Family Justice Review was commissioned by the Government to make the family justice system more coherent, effective and accessible to children and families. Part of its brief was also to look at how the system could be made more cost effective while at the same time improve case management to avoid undue delays. At the time care proceedings were taking on average 56 to 61 weeks to complete.³⁷⁴ This was considered to be far too long with the potential to damage further children's welfare and development.³⁷⁵ The Ministry of Justice was aware that the system was confusing for children and parents, who were unsure about what was happening in relation to their case and therefore a much greater level of transparency was needed within the system.³⁷⁶ Part of the Family Justice Review's brief was to explore options for a more inquisitorial system rather than it being predominantly adversarial. Such a re-balancing of approach would facilitate a system that would be more open to listening to all parties, including the child, rather than pitting views against each other. The recommendations of the Review were

³⁷⁰ E Munro, *The Munro Review of Child Protection – Interim Report: The Child's Journey* (The Stationery Office 2011a) 19, 25, 39.

³⁷¹ Article 12 UNCRC.

³⁷² s 1(3) Welfare Checklist Children Act 1989.

³⁷³ s 17 Children Act 1989 as amended by the Children Act 2004 Requirement to consult children about the provision of statutory / public services. This requirement was also imported into s 47 Local Authority's Duty to investigate a child's circumstances.

³⁷⁴ Family Justice Review Panel (n 369) 5.

³⁷⁵ *ibid* 13.

³⁷⁶ *ibid* 6.

designed to work in tandem with both Munro's recommendations from her review of the child protection system³⁷⁷ and the work of the Social Work Reform Board.³⁷⁸ Munro's findings will feature significantly in this thesis, as care proceedings are initiated by the Local Authority's child protection system.

The Social Work Reform Board was set up to enable social work practice to deliver better support and better outcomes for children including, much earlier identification of the needs of children and their families.³⁷⁹ However, the Local Authority's children's services were under severe pressure at the time, having to contend with increased caseloads, while at the same time experiencing significant cuts to their budgets. In addition, the social work profession faced negative media attention, which led to the creation of a 'blame culture', resulting in experienced practitioners leaving the profession.³⁸⁰ In 2016 the Government put forward a set of proposals to address these issues, which included, reduced caseloads, better working conditions and strategies for the retention of experienced social work practitioners.³⁸¹

4.5.3 Inclusivity and independent representation

Guardians are appointed by the court to represent the views of the child.³⁸² Part of the role of the children's Guardian is to explain to the child in age appropriate language what is happening throughout the proceedings. The child also has the right to request to be represented independently of the Guardian, appointing and instructing their own legal representative.³⁸³ This does depend however on an informal assessment by the Guardian and the child's legal representative of the child's level of understanding of the issues involved and their age. The appointment of a Guardian under s. 41 of the

³⁷⁷ Munro (n 293).

³⁷⁸ House of Commons Education Committee, *Social Work Reform: Third Report of Session 2016–2017* (House of Commons 2016).

³⁷⁹ *ibid* 38.

³⁸⁰ *ibid* 25.

³⁸¹ *ibid* 24.

³⁸² s 41 Children Act 1989.

³⁸³ Family Proceedings Rules 1991 r 9.2A (1) re P-S (Children) EWCA Civ 223, [2013] 1 WLR 3831.

Children Act 1989 was introduced to ensure children's views are heard, respected and taken seriously.

For children to feel that their views are really heard, respected and taken seriously, they need to understand the system into which their views are channelled and how it works for them. This requires the system to be transparent. Achieving such transparency for children and their families is not without its challenges. Lord Justice McFarlane in his Bridget Lindley Memorial Lecture 2017³⁸⁴ considered the issue of transparency in the Family Justice System. He raises a number of issues in relation to this research, particularly the lack of knowledge about rights and as a consequence, children and their family not knowing how to access and become involved in the system:

‘There is little point in having a child protection / family justice system which affords proper respect to the human rights of children and family members if those individuals whose rights are to be respected do not know of them or understand how they may achieve access to the justice system in a way that permits them to benefit from that level of respect. Respect for human rights is only likely to be as effective as the ability of the individual involved to engage with the process and gain access to that respect’.³⁸⁵

McFarlane LJ focuses the spotlight on the non-inclusive and opaque nature of proceedings, particularly in relation to children and brings into question the fairness of the process itself:

‘Ignorance of the system, both in general terms and with respect to its detailed provisions must massively erode the ability of any individual to take part in the various pre-proceedings and court processes in a way which maximises the potential for their rights to a fair process and family life to be respected’.³⁸⁶

The Family Justice Review Panel³⁸⁷ placed the child at the centre of the operation of the family justice system, with children being supported in an

³⁸⁴ A E McFarlane, The Bridget Lindley OBE Memorial Lecture 2017 ‘Holding the risk: The balance between child protection and the right to family life’ (Family Justice Council).

³⁸⁵ *ibid* 20.

³⁸⁶ *ibid*.

³⁸⁷ Family Justice Review Panel (n 369).

age appropriate manner to express their views, including been given age appropriate information that will explain what is happening during the course of proceedings. To achieve this the review outlined in some detail the tasks of a child's Guardian including entering the world of the child to understand what the child is going through from the child's perspective. This approach is very much in line with Froebel's idea of child-centredness, that of seeing and understanding the child within their world from the child's perspective.³⁸⁸ It also emphasised the importance of Guardians building relationships with children to fulfil their role of representing accurately the child's views.

Children who contributed to the Munro Review found the child protection process confusing and did not feel it was a transparent system.³⁸⁹ This does not facilitate children and their families feeling comfortable, safe and confident in expressing their views and where appropriate, giving evidence.

The issue of transparency is not confined to pre-proceedings and the proceedings themselves, it extends to post-proceedings in relation to the publication of judgments. The President of the Family Division has issued guidance³⁹⁰ including, guidance around the need for a thorough anonymisation of judgments to protect the identity and privacy of children and their families. However, there is a body of opinion that views such anonymisation as dehumanising children.³⁹¹ (see discussion of Jackson J's approach in the next section of this chapter).

While one of the main purposes of this guidance is to educate and inform the general public about the Family Justice System and how judgments are reasoned, it is an area that can potentially cause difficulties for children and their families, particularly in relation to the issue of privacy. Brophy et al carried out research³⁹² among a group of young people who had concerns

³⁸⁸ Froebel (n 289).

³⁸⁹ E Munro, *The Munro Review of Child Protection – Interim Report: The Child's Journey* (The Stationery Office 2011a) 42.

³⁹⁰ J Munby, *Transparency in the Family Courts - Publication of Judgments: Practice Guidance* (The Stationery Office 2014).

³⁹¹ Stalford (n 427).

³⁹² J Brophy, K Perry, and K Harrison, *A Review of Anonymised Judgments on Bailii: Children, privacy and jigsaw identification* (Association of Lawyers for Children (ALC) and National Youth Advocacy Service (NYAS) 2015).

about the risk of 'jigsaw' identification³⁹³ and the intrusive nature of the detail included in published judgments placed on the BAILII database.³⁹⁴ There is also the issue of children and families feeling reticent about giving information and evidence to professionals and the court³⁹⁵ knowing that there was a possibility of their case being published, albeit in anonymised form. The difficult balance between the court's need to have full and frank evidence to ensure a fair trial³⁹⁶ and the need to respect the child's privacy and family life,³⁹⁷ is one that potentially could lead to a level of disengagement with the system.

An evaluation involving children and young people, of responses to the guidance on the publication of family court judgments and its effects found that there was no guidance or training provided for children's Guardians to advise and inform children about the possibility that their judgment may be published,³⁹⁸ which indicates that 'transparency' is normally analysed from an adult perspective. In their response to the evaluation, Cafcass Young People's Board expressed their strong opposition to the routine publication of judgments.³⁹⁹

Transparency for children encompasses a public child law system that children can understand, access and feel welcomed by. They need to know clearly and in age appropriate language, what is going in the system throughout proceedings, a system that is acting on their behalf, to reach a decision that will be in their best interests. However, transparency of the system does not extend automatically to exposing children's lives and those of their families to the public at large, even if judgments are thoroughly anonymised to prevent 'jigsaw' identification.⁴⁰⁰ Equally important with a

³⁹³ Jigsaw identification is where there are pieces of information about parties and / or the proceedings, which have not been adequately anonymised and make it possible to identify parties to the proceedings.

³⁹⁴ BAILII is the British and Irish Legal Information Institute.

³⁹⁵ J Doughty, 'Confidentiality and the Family Courts: Ethical dilemmas for health and social work practice' in N Prialx and A Wrigley (eds.) *Ethics, Law and Society* Vol 5 (Ashgate 2013) 313.

³⁹⁶ Article 6 Right to a Fair Trial ECHR.

³⁹⁷ Article 8 Right to Privacy and Family Life ECHR.

³⁹⁸ J Doughty, A Twaite and P Magrath, *Transparency through publication of family court judgments: An evaluation of the responses to, and effects of, judicial guidance on publishing family court judgments involving children and young people* (Nuffield Foundation 2017) 86.

³⁹⁹ *ibid.*

⁴⁰⁰ Jigsaw identification (n 393).

thorough anonymisation of the judgment is the child's consent to publication, otherwise their right to privacy and family life is being dis-respected under Article 8 ECHR. There is a legitimate perspective⁴⁰¹ that views anonymisation as belittling the dignity of the child by replacing their name with a letter from the alphabet. Here lies a potential conflict between openness and transparency and upholding children and their families' rights under Article 8 ECHR. The resolution of this conflict will require in each case bespoke approaches, which needs to include the child's voice being valued, respected and given real weight in relation to the level and extent of transparency that the child would feel comfortable with.

4.5.4 Child's narrative of their world

Those who are entrusted with protecting children and those who are appointed by the court to ensure that their voice is heard throughout proceedings, do not have adequate time to listen to children and assess and understand their needs. Such a situation is not consistent with the perspective of the Family Justice Review, placing children at the centre of the system nor is it consistent with the role of the Guardian outlined by the Review earlier in this section.

Rawls' theory of justice talks about the duty of 'mutual respect'⁴⁰² defining it as, '.... to show a person the respect which is due to him as a moral being, that is, as a being with a sense of justice and a conception of the good'.⁴⁰³ For Rawls, part of mutual respect is a willingness to, '.... see the situation of others from their point of view'⁴⁰⁴ and therefore it is important for judges to listen to children's views, rather than hear an interpretation of their view or at best a few sentences in a report or statement about what their stated wishes and feelings are. By listening to children, we get an understanding of how they experience and make sense of their lives.⁴⁰⁵ Koh Peters⁴⁰⁶ lays great

⁴⁰¹ Stalford (n 427).

⁴⁰² J Rawls, *A Theory of Justice* (Oxford University Press 1992).

⁴⁰³ *ibid* 337.

⁴⁰⁴ *ibid*.

⁴⁰⁵ B Mayall, *Towards a Sociology for Childhood: Thinking from Children's Lives* (Open University Press 2002).

⁴⁰⁶ J Koh Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* (Bender 2007) 12, 155.

emphasis on adults allowing themselves to be taken into the world of the child and to find out about and understand that world from the child's perspective through listening to the child's story, which requires giving the child enough time and space to tell their story. She feels it is important for the child, in terms of affording enough time and space to communicate their story and for professionals to meet the child where they are in their life and enabling them to make the difficult transition between their world and the world of court proceedings. For Eekelaar,⁴⁰⁷ equality of rights between adults and children should be the focus of the whole child welfare system and that children should have the right 'to begin writing the script of the way their life is to unfold'. Macdonald⁴⁰⁸ goes further than Eekelaar, holding the view that the voice of the child should be given priority over adults and that their voice should be central throughout the entire period of State intervention in the child's life, reflecting the reality of the child's journey through the child protection and family justice systems.

For judges, listening to a child is generally considered to be an integral part of being child-centred in terms of our attitudes and actions toward children. The ability to listen is considered one of the core judicial values.⁴⁰⁹ For one county court judge in this research, the need to listen rather than create barriers to children expressing their views directly to the judge was important:

"I don't know, but I can be fairly sure that if a child is telling their legal representative, if they have got one, "I really want to see the Judge", that it is important to that child. They are not feeling so overwhelmed that they cannot face the idea, and so I should not be barring my door because it might make me feel less comfortable about the decision I am going to make". (County Court Judge)

Raith⁴¹⁰ asserts that this would facilitate the construction of a child-centred narrative around the individual child's life where the starting point is always the child's perspective of their situation. Munro sees children as the 'key

⁴⁰⁷ J Eekelaar, 'Beyond the welfare principle' (2002) 14 (3) Child and Family Law Quarterly 237.

⁴⁰⁸ A Macdonald, 'The voice of the child: still a faint cry' (2008) July Family Law 648.

⁴⁰⁹ European Network of Councils for the Judiciary, *Judicial Ethics - Principles, Values and Qualities* Working Group Judicial Ethics 2009-2010 Retrieved on: 14th November 2014 www.encj.eu 1.

⁴¹⁰ F E Raith, 'Hearing children in family law proceedings: can judges make a difference?' (2007) 19 (2) Child and Family Law Quarterly.

source of information' about what is going on in their lives and about how statutory intervention is affecting their family. It also increases the accuracy of the professional's assessment of the child's situation.⁴¹¹

The Committee on the Rights of the Child in General Comment Number 12,⁴¹² state clearly that there should not be the assumption that a child is not capable of expressing a view. They further state that it is not up to the child to prove that they are capable of understanding their proceedings. However, it is clear that there are significant barriers within the current public child law system limiting opportunities for children's voices to be heard, with Ackers and Stalford⁴¹³ asserting that, '... the age and capacity test entrenched in legislation is rarely interpreted as a presumption in favour of participation ...'

Macdonald⁴¹⁴ acknowledges that the child's voice is often ignored and silent. Munro's review found that direct contact with children was given a low priority within the child protection system for the same reasons that Pemberton found i.e. high caseloads and lack of resources.⁴¹⁵ Munro noted that one of the main criticisms in reports of inquiries and serious case reviews into child deaths is that people did not speak to children enough. This continues to be a significant issue within the system according to the most recent research on serious case reviews,⁴¹⁶ which looked at 292 cases between the years of 2011 and 2014 and highlighted the importance of providing children with 'safe and trusting environments' so that children are enabled to speak freely about their situation and be listened to.

Research however by Daly et al⁴¹⁷ found that children in the context of participating in justice systems prefer to be supported by family and friends rather than those in authority, as they did not feel confident that they would be believed and that confidentiality would not be respected. Nevertheless,

⁴¹¹ Munro (n 293).

⁴¹² Committee on the Rights of the Child (n 296).

⁴¹³ L Ackers and H Stalford, *A Community for Children?: Children, Citizenship and Internal Migration in the EU* (Ashgate 2004) 40.

⁴¹⁴ Macdonald (n 408).

⁴¹⁵ Pemberton (n 202).

⁴¹⁶ Sidebotham et al (n 209) 14.

⁴¹⁷ A Daly, S Ruxton and M Schuurman, *Challenges to Children's Rights Today: What do Children think?* (Council of Europe 2015).

they very much wished to participate in justice systems that have an impact on their lives. This research, which was a desktop study, included the findings of a large-scale consultation by the Council of Europe with 3,700 children from over 25 European countries about their views and experiences of justice systems.⁴¹⁸ The participants completed a questionnaire and data was also obtained through focus groups. The Council of Europe report highlights, ‘... the huge challenge for those who aim to provide services to children at risk, in particular concerning the question of how to develop and maintain positive relationships of trust with them’.⁴¹⁹ Just over a third (36%) of the participating children felt that their views were taken seriously, which Kilkelly maintains, ‘... can lead to children being not only ill-positioned to participate, but actually nervous concerning what the hearing is about’.⁴²⁰ Daly et al in relation to children’s participation concludes:

‘Clearly, better efforts need to be made so that proceedings are conducted in a way that children can attend, understand what is going on, and feel that their participation is both possible and welcome’.⁴²¹

It is not possible to be child-centred in making decisions about children’s lives and welfare without meaningful participation including, that of having direct input into in any forum, system or process, official or unofficial. The following quote from one of the participating judges in this research reflects the reality of a child’s position in the current public child law system:

“I accept that you therefore might get a situation, and we probably do in most cases, where all these discussions taking place in court about the child, who is not there at all and has no way of putting a direct input and yet, that is whom the case is about. The child is subject and often the object and how do you turn the object of the proceedings into somebody who can actively and properly participate?” (County Court Judge)

In relation to legal systems, Habermas⁴²² makes an important and relevant observation that:

⁴¹⁸ Daly et al (n 417).

⁴¹⁹ *ibid* 20.

⁴²⁰ U Kilkelly, *Listening to children about justice: Report of the Council of Europe’s consultation with children on child-friendly justice* (Council of Europe 2010) 21.

⁴²¹ Daly et al (n 417) 21.

⁴²² J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

'... the legal system is a recursively closed circuit of communication that self-referentially delimits itself from its environment, with which it has contact only through observations'⁴²³ and he goes on to suggest that, '... legal communication is robbed of its socially integrative meaning'.⁴²⁴

Here, Habermas points to the fact that, very often, legal proceedings are detached from the realities of the participants, and this is particularly true of children. In public child law proceedings, judges are far removed from the realities of the lives of the children with whom they are entrusted to make decisions on what is in their best interests. Being so far removed is much valued by the judicial system, being perceived as facilitating greater objectivity and fairness, but it is a distance which ensures that the child's own voice rarely impinges on the conduct of the proceedings or on the outcome of such proceedings. Connolly and Masson⁴²⁵ make a relevant observation here, '... Court practice illustrates how adversarial practice allows professionals with little or no direct relationship with the child and family to shape the process and determine the outcome'⁴²⁶ and yet for Sutherland, 'There is a sense in which listening to the child's views is simply the right thing to do, since it represents recognition of, and respect for, the child's separate identity'.⁴²⁷ In their discussion of the importance of and reason for judges adopting a children's rights approach in their decision-making, Stalford and Hollingsworth state: 'It is thus children's invisibility and vulnerability within the law and their lack of political voice that gives even greater legitimacy to the explicit judicial adoption of a children's rights perspective'.⁴²⁸ In proceedings where children's best interests are being decided, Daly's view is that the child's autonomy should be given priority, which she sees as resulting in the following benefits: 'Children will genuinely become the most important individuals in proceedings concerning them. True

⁴²³ Habermas (n 422) 49.

⁴²⁴ *Ibid* 50.

⁴²⁵ M Connolly and J Masson, 'Private and public Voices: Does family group conferencing privilege the voice of children and families in child welfare?' (2014) 36 (4) *Journal of Social Welfare and Family Law* 403.

⁴²⁶ *ibid* 409.

⁴²⁷ E Sutherland, 'Listening to the child's voice in the family setting: from Aspiration to Reality' (2014) 26 (2) *Child and Family Law Quarterly* 155.

⁴²⁸ H Stalford and K Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in H Stalford, K Hollingsworth and S Gilmore (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017) 22.

influence on outcomes will be enjoyed'.⁴²⁹ This perspective accords with the central position of children in the system, as envisaged by the Family Justice Review.⁴³⁰

4.5.5 Communicating with children

In a relatively recent case⁴³¹ however, Jackson J wrote his judgments in a manner that was age appropriate, so that both children and parents could understand the reasoning and thinking behind his decisions. The case involved four children, aged 10 months to 12 years, all of whom were in foster care. There was a risk that the children's father, because of his extreme views, would take his children to a war-torn country. Of relevance to this research, is the manner in which the judge went about outlining the main issues of the case, in language that would enable both the children's parents and the two older children (*aged 10 and 12*) to understand the final decision. This child-centred aspect of the case is particularly evident in the clear, accessible and age-appropriate language used by the judge to explain what 'significant harm' is in the context of this case,⁴³² a concept that can challenge even experienced professionals. The following abstract from the judgment serves as an example of this:

'After thinking carefully about this and listening to everyone, I do not agree with Mr A at all. People are not out to get him. His problems are his own fault. I do not know why he was trying to buy guns and whether he is dangerous to everyone. The jury will decide about that. What I am clear about is that he is dangerous to the children and their mother because of the way he behaves and because the mother is not able to stop him. There is a good side to Mr A – everyone has a good side – and this makes it hard for H and A and their mother to see what he is really like'.⁴³³

In a later judgment, albeit in a private law case, but has equal relevance to public law, Jackson J took his child-centred approach to another level, writing his judgment in the form of a three-page letter to the young person Sam, who

⁴²⁹ A Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill 2018).

⁴³⁰ Family Justice Review (n 368).

⁴³¹ [2016] EWFC 9.

⁴³² *ibid* para 21.

⁴³³ *ibid* para 14.

was 14 years old.⁴³⁴ This case centred around a dispute between Sam's parents regarding residence and contact. Sam's own wish was to go and live with his father in a Scandinavian country. His mother and step-father did not think this would be in his best interests.

Jackson J allowed Sam to give evidence, which lasted half an hour at the start of the proceedings. The prepared questions from both his parents were put to Sam by the judge.⁴³⁵ The striking feature about this judgment is the age appropriate and warmth of language used by the judge, while not glossing over the real issues involved. Jackson J went out of his way not to belittle Sam's parents, while at the same time keeping the issues to the fore. He wrote of their positive qualities in language that was down to earth and affirming.⁴³⁶ An example of this is when he mentioned in his letter how he shared with Sam's father their love of the film, 'My Cousin Vinny', albeit for different reasons. Such a sensitive approach respects the dignity of both Sam and his family. This judgment heralds a real beginning in making proceedings accessible to and welcoming of children's participation throughout. This judgment also was attentive to Sam's feelings on completion of the case, as the outcome was not what Sam had wished for, with the judge giving Sam the option of replying to his letter.

4.5.6 Perspectives on the Child's voice in proceedings

Tobin puts forward a range of approaches adopted by Judges in relation to children's rights when making decisions about children's lives; invisible, incidental, selective, rhetorical and superficial, which fall short of what he terms a 'substantive rights approach'.⁴³⁷ Such an approach is where children are acknowledged and respected as individuals with rights in their own right rather than what Freeman⁴³⁸ describes as relying on 'noblesse oblige' hoping that those with responsibility and power will be cooperative and attentive to

⁴³⁴ [2017] EWFC 48.

⁴³⁵ *ibid* para 2.

⁴³⁶ *ibid* para 4.

⁴³⁷ J Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?' (2009) *Legal Studies Research Paper No. 456* 33 (2) Melbourne University Law Review 579.

⁴³⁸ M Freeman, 'Why it remains important to take children's rights seriously' (2011) in M Freeman (ed) *Children's Rights: Progress and Perspectives* (Martinus Nijhoff 2011) 23.

their views. For Tobin, seeing proceedings through the eyes of a child is essential. Lady Hale's remark in a case relating to an allegation against the Royal Ulster Constabulary, that they did not provide adequate protection for schoolgirls caught up in a street riot on their way to school, is relevant here.⁴³⁹ Such confrontations according to Lady Hale are often viewed and analysed from an adult's perspective and she reminds us that seeing a confrontation through adults' eyes is quite different to seeing it through the eyes of a child. Court proceedings, particularly public child law proceedings, are essentially a series of confrontations, making courts, 'scary and daunting places for children'.⁴⁴⁰ In the case of *Re D (A Child)(Abduction: Foreign Custody Rights)*, Lady Hale outlines cogent reasons for listening to children:

'There is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views'.⁴⁴¹

The following abstracts from judges in this research highlight contrasting perspectives on children expressing their views directly to the judge. One county court judge in relation to listening to children's views stated:

"They must not think that coming to see me they are going to persuade me one way or another because what they want to say will come through the Guardian and the solicitor. I am not there to do what they want, although their wishes and feelings of course are very important to me and one of the factors in the Welfare Checklist that I must take account of". (County Court Judge)

One district court judge however saw benefits for both child and judge, *"It is empowering for the child. It is a useful exercise for the Judge because no longer is this child or these children names on documents. You have got a*

⁴³⁹ [2009] 1 AC 536, 543

⁴⁴⁰ Family Justice Review Panel (n 368).

⁴⁴¹ [2006] UKHL 51 para 57.

picture of the child". These responses represent range of judicial views on enabling child-centred participation. The culture of proceedings is an area that judges reflected on in this research. Judges made reference to the historical roots of proceedings including their adult-centric nature and professional attitudes. The following selection of extracts from judicial interviews in this research shines a light on this culture:

"The culture is deep seated in that you distance the children from the proceedings. The rules are quite labyrinthine about the involvement of children within the proceedings, even where separately represented, whether they should attend the hearings and all the rest of it, raise all sorts of separate questions of their own. It is because of that historical, cultural thing, which has fed into a regime and rules which, it is not a presumption but it has stuck. Now when you look at the Family Justice Council's papers on it, all hedged around with a considerable degree of cautionary thinking. (County Court Judge)

In terms of trying to involve them, I think the whole process is very adult-centric. The way professionals work, it is this old thing that Dame Butler-Sloss said about children, the object of concern rather than the subject of the proceedings and whereas if they really were the subject you would be saying 'right how are we going to involve the child in this?' We don't, it is all very much adults in rooms talking and deciding about the child. There is this historical and perhaps natural tendency not to think about involving the children and just say this is going on for you, you don't need to come. It is a lazier way of working and it is adults just dealing with adults. Part of the structure is to intimidate people, isn't it? That is a natural barrier as well". (County Court Judge)

"I think it might be a perception that the Judge is unapproachable and a long-standing practise that has perhaps developed as a result of a message from the judiciary over the years". (District Judge)

" I suspect that a lot of the professionals in child care cases have perhaps absorbed a message that; that the courts are very busy; the Judge is very busy; the child might be over-powered by the thought of going to see the Judge; the child themselves might get the message that you don't ask to see the Judge; "You tell me all about it and I will tell the judge for you" and many children prefer that I suspect". (District Judge)

The public child law system is a system that quite rightly is protective in nature but this can and does exclude children from the process. One county court judge reflected:

“I think the difficulty is; that as the process is intended to be largely protective, and one cannot expect the subject of the proceedings to understand the broad and detailed nature of the concerns about their parents and what implications those concerns may have for their well-being”. (County Court Judge)

4.6 Conclusion

The principle of paramountcy is accepted as the core child-centred principle in public child law.⁴⁴² An essential element in the application of this principle is establishing a meaningful and trusting relationship with the child to gain insight into and an understanding of the child’s world from the child’s perspective.⁴⁴³ However, the evidence from formal reviews⁴⁴⁴ and research⁴⁴⁵ indicate that the child’s own view of their world and their lived experience do not occupy a central position within the system. These challenges and barriers within the current system will be explored critically throughout the remaining chapters of this thesis including, through the perspectives of judges in this research in relation to child-centredness and in the interpretation and application of a child-centred approach in decision-making.

⁴⁴² s 1(1) Children Act 1989.

⁴⁴³ Pemberton (n 202); Cappleman (n 205).

⁴⁴⁴ Family Justice Review (n 368); Munro (n 293).

⁴⁴⁵ Masson (n 349); Brophy (n 391).

Chapter 5

Judges' Understanding of Child-Centredness

5.1 Introduction

In this chapter the focus is on how judges perceive the concept of child-centredness in the context of their decision-making within public law proceedings and how child-centredness fits within established judicial practice and thinking. The findings of this research study gives an insight into judicial reasoning around such perspectives.

While the need for a child-centred approach within public law proceedings is not in dispute among the participating judges in this study, their perspectives are much nuanced and multi-faceted in nature, particularly in relation to making decisions, which affect significantly the lives of children and their families. It is important therefore, to first explore the judicial values which inform such perspectives, as such values are often implicit in a judge's decision. The interrelationships between judicial values and child-centredness can serve to facilitate or limit significantly the extent to which child-centred decision-making can take place. Secondly, public law proceedings are part of the child protection system and the values of this system are inextricably linked to the public law system. This chapter will explore critically how these systems coalesce in terms of their respective approaches to child-centred practice. The chapter will conclude by bringing together the main divergent strands of judicial child-centredness emerging from this research alongside the realities of the child protection system. Such realities form the core of Chapter 6, which looks at judicial interpretation and application of child-centred approach in decision-making.

5.2 Judicial Values and Child-Centredness

Within the literature,⁴⁴⁶ judicial values are often listed as broad concepts and notions and are very much seen as umbrella terms under which there exists

⁴⁴⁶ European Network of Councils for the Judiciary, *Judicial Ethics - Principles, Values and Qualities Working Group Judicial Ethics 2009-2010* Accessed: 14th November 2014 (www.encj.eu) 1.

a range of contextual and situational values. In public child law proceedings, such values are often expressed in terms of what is in a child's best interests or the paramountcy of the child's welfare⁴⁴⁷ (see Chapter 4). Identifying and interpreting these values is challenging, as they are often a combination of professional and personal values, where the dividing lines between the two have long since disappeared and are underpinned by legal principles enshrined in legislation such as the 'no delay' principle⁴⁴⁸ and the paramountcy principle, to name just two.⁴⁴⁹ Both principles govern and inform proceedings and decisions.

In this research, judges were very much aware of and acknowledged their personal and professional values and the difficulties in distinguishing between the two. One High Court Judge said,

"You cannot without a degree of peer review and independent critique, discern whether you are acting only on professional values rather than personal values, but you should at least make your decisions transparent, so that, not only the parties, but the public can deduce that. Whether it is research we are relying on, whether it is a combination of principles, I think you should set them out clearly in judgement for everybody to be aware of them".

While a County Court Judge felt, her personal values were her 'non-objective' input into the case:

"Professional value; that would be the judge's value, which is one of balance and fairness. Personal values; obviously, I cannot escape the fact that I have got personal values, they are my non-objective input into the case, what I know about families and how they operate from my experience of my own family ...".

In her research Cahill-O'Callaghan in relation to personal values of judges, highlights the significance of judges' personal values and the implications for judicial decision-making and found there was an interplay between a number of factors, including values, which influence the decision-making processes

⁴⁴⁷ s 1 (1) The Children Act 1989.

⁴⁴⁸ *ibid* s 1 (2).

⁴⁴⁹ Department of Health, *The Children Act 1989 - The Care of Children: Principles and Practice in Regulations and Guidance* (Her Majesty's Stationery Office 1991).

of Judges: 'Personal values influence and are influenced by political ideology. Personal values are associated with attitudes, moral judgements, and activism, each of which have been implicated in judicial decision making'.⁴⁵⁰

Singh lists some of the main values of the judicial role. He sees the law as a system of values stating, 'Without attempting an exhaustive list I think that most observers of our legal system would acknowledge that its values include the concepts of fairness, equality, democracy and the rule of law'.⁴⁵¹

The European Network's list is more extensive, 'Independence, integrity, impartiality, reserve and discretion, diligence, respect and the ability to listen, equality of treatment, competence and transparency are the common values identified as essential to the judicial role'.⁴⁵²

These judicial values stem from the Judicial Oath, which all judges and magistrates take on appointment. This Oath is enshrined in different Acts of Parliament, depending on the level of court. For High Court Judges, it is section 10(4) of the Supreme Court Act 1981, Circuit Judges and Recorders, section 22 of the Courts Act 1971, District Judges, section 76(1)(a) of the Courts and Legal Services Act 1990 and for Magistrates it is Promissory Oaths Act 1868. The Oath itself reads as follows:

'I... do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of..., and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God'.

Doing right to all manner of people without fear or favour, affection or ill will is very much linked to and based on the values of fairness, justice and equality. The values of fairness and justice in respect of children and parents, who often are faced with pressures from powerful professionals and agencies involved in court proceedings, who may have quite different agendas in relation to what they consider the best interests of the child, is an area that

⁴⁵⁰ R J, Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) *Journal of Law and Society* 40 (4) 6.

⁴⁵¹ R, Singh, Law as a system of values – 'The Jan Grodecki Lecture' at the University of Leicester 24 October 2013 20.

⁴⁵² European Network of Councils for the Judiciary (n 102).

concerns Eekelaar and Maclean, 'There must also be concern that the values of the legal process, namely holding public authorities to account, showing respect for all individuals by treating them fairly and upholding the human rights primacy of seeking family reunification may be under threat'.⁴⁵³ They further state that there is a, '... real concern that the ethos that respects these values of the legal process are seen as a source for criticism, and that solutions are seen almost entirely in terms of managerial efficiency'.⁴⁵⁴ An example of such efficiency, namely the 26-week rule governing the length of all public law proceedings, has already been discussed in Chapter 4.

In this research a number of participating judges highlighted the importance of achieving the best outcomes possible for children, underpinned and driven by the values of justice and fairness. A county court judge saw his role as,

"The role has an ultimate outcome, which is to achieve better outcomes for children, but it has obligations along the way, fairness is the most obvious courtesy to litigants".

It also needs to include the following elements as well as particular challenges, which were outlined by a district judge:

"The right to family life, the right to respect for privacy and personal identity, personal integrity, the right to a fair hearing and a fair trial. I think that is actually sometimes quite a struggle to make sure that people really get a fair hearing and a fair trial. I hope that that is the value that really does drive me".

Judicial values and the reality of a child's quality of life, can present real challenges. A high court judge highlighted his predicament in this regard:

"... you are perpetually doing the best you can in the circumstances and my test in those circumstances is, can I leave this child or this incapacitated person in a better place than I found them. If I can then I will engage with it, if I can't, we are all wasting our time".

⁴⁵³ J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart 2013) 154.

⁴⁵⁴ *ibid.*

Leaving children in a better place, particularly very vulnerable children who are subject to proceedings is not always easy to discern. The findings from a Council of Europe consultation with almost 4,000 children, which documented their views and experiences of the justice system, found that a fifth of the children who took part in this consultation would not tell those with responsibility for their safety and welfare if they were being neglected or abused for fear of what might happen to their family. They said they would prefer to handle it on their own.⁴⁵⁵ It is as if children are aware of their powerlessness in a system that is meant to consider their best interests as being paramount. The values of fairness, justice, equality of treatment, respect for the dignity of the child would appear to ring hollow here. In the author's own research a county court judge felt it was important for all parties including, children to feel that they have been heard and was of the view that judges need to be pro-active in this regard:

"I do think it is important that the legal system enables people to be properly heard and that sometimes requires work from a Judge to make that happen, particularly in the days of reduced public funding".

On a related issue and one that has the potential to make judicial decision-making more difficult and challenging was highlighted by a district judge who felt that,

"As a Judge you don't always know because you never know whether you are actually getting all the information and all the evidence, that is one of the problems".

The judge is mainly concerned with making a just, fair, good and right decision for the child. In this research, judges in their responses capture the complex and conflicting situations in which they find themselves, particularly in relation to being fair to the child's parents in terms of affording them opportunities to show they can provide adequate care for their children.

⁴⁵⁵ U Kilkelly, 'Supporting Children's Access to Justice' European Union Agency for Fundamental Rights Accessed: 14th November 2014 www.fra.europa.eu

However, they also felt that being fair to parents needs to be balanced with the 'no delay principle'.⁴⁵⁶ For one high court judge, the principle of paramourncy may also present challenges in balancing justice for children on the one hand and justice for parents on the other, requiring in some cases a compromise in respect of this principle. The following extract relates to the issue of contact between a child and their parents:

“Paramourncy has slight problems in it. Let us take the example of a parent who is a seriously questionable parent for contact, not because they are bad, but because of a mental health issue or some such thing like that. There are circumstances in which the paramourncy of the child’s welfare may just yield to justice to the parent if it makes the difference between a little contact and no contact. Quite often for example, I’ll hear myself saying I am not prepared to decide contact on the basis of whether this child needs contact or not, because the child may not, I am going to do it on the basis of, is this contact consistent with the needs of this child, and if it is, then it ought to happen in fairness to the parent. That gets quite near tinkering around paramourncy, although I think most of this would probably be articulated on the basis of the long-term best interests of the child. If you can have some kind of relationship you should”. (High Court Judge)

The above extract is an example of a judicial decision-making approach in practice, in balancing and reconciling the needs of children and those of their parents in terms of justice and fairness while applying the paramourncy principle. Archard and Skivenes⁴⁵⁷ view the commitment to the perspective of the child in relation to their best interests and the adult perspective of best interests as the pulling in different directions, with the adult’s perspective prevailing in the final decision in this ‘tug-of-war’ arena. In discussing the procedural constraints in relation to hearing the child’s voice and the use of narrative to ‘centralise children’s experiences’, Stalford and Hollingsworth maintain that: ‘The adoption of this children’s rights method to judging depends upon understanding the experiences and lives of the children involved which in turn depends on hearing the child in compliance with Article

⁴⁵⁶ s 1(2) The Children Act 1989.

⁴⁵⁷ D Archard and M Skivenes, ‘Balancing a Child’s Best Interests and a Child’s Views’ (2009) 17 International Journal of Children’s Rights 45.

12.⁴⁵⁸ Yet, throughout legal proceedings, the voices of children are excluded, silenced or distorted, hindering the ability of the most willing judge to produce a ‘children’s rights judgment’.⁴⁵⁹ This is compounded, as has already been highlighted in Chapter 4, by the lack of time and resources available to professionals⁴⁶⁰ to enable them to get to know the child and their perspectives of their circumstances.⁴⁶¹ Ofsted in their report on the state of social care of children in 2016⁴⁶² also found that high caseloads resulted in a lack of time spent listening to children a significant issue in their inspection of children’s services, stating: ‘Social workers need time to spend with the children and families on their case list’.⁴⁶³ The report highlights the importance of getting decisions right for children as: ‘The consequences of decisions about children’s lives can be enormous...’.⁴⁶⁴ In their report, Ofsted focuses attention on the importance of social workers having time to reflect on and review their practice, particularly in relation to the decisions they make about the lives of children, so that they feel confident about their professional judgements in respect of children who are subject to proceedings.⁴⁶⁵ In relation to achieving high practice standards in this area, Ofsted places great importance on sufficient time being devoted to direct work with children and their families, making the observation: ‘Where good work with children and families is common practice, social workers have manageable caseloads’.⁴⁶⁶ However, research already highlighted and discussed in Chapter 4, among social workers themselves, found high levels of physical exhaustion, due to high caseloads, which militated against opportunities for reflective practice, with social workers feeling a lack of confidence about making the right and best decision for children on their caseload.⁴⁶⁷

⁴⁵⁸ UNCRC Article 12 Right to express a view.

⁴⁵⁹ H Stalford and K Hollingsworth, ‘Judging Children’s Rights: Tendencies, Tensions, Constraints and Opportunities’ in H Stalford, K Hollingsworth and S Gilmore (eds) *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice* (Hart 2017) 45.

⁴⁶⁰ Pemberton (n 202).

⁴⁶¹ Capleman (n 205).

⁴⁶² The Office for Standards in Education, Children’s Services and Skills (Ofsted), *The Report of Her Majesty’s Chief Inspector of Education, Children’s Services and Skills: Social Care* (The Stationery Office 2016).

⁴⁶³ *Ibid* 7.

⁴⁶⁴ *Ibid* 21.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ *Ibid* 22.

⁴⁶⁷ Pemberton (n 202).

Henaghan argues that: 'Decision-making that is truly in the best interests of children is less about whether a child's best interests should be paramount, or primary or something in-between, and actually about considering the particular child and his or her own way of seeing the world'.⁴⁶⁸ Regarding the child's view of their world Henaghan asserts: '...only giving such matters superficial consideration, (*feelings, aspirations and concerns*), makes a mockery out of the claim that the decision is based on the best interests of the child'.⁴⁶⁹ The application of the best interests principle however should, as far as Eekelaar is concerned, be accepted as a child's right rather than just being seen as a duty of decision-making authorities.⁴⁷⁰ Having a child's right approach in the application of this principle can: '...reduce the risk of its application from solely an adult perspective'.⁴⁷¹

Abeit in a different jurisdiction, the following case has relevance in this regard. In a case from the Supreme Court in Canada, about whether parents had the right to physically discipline their children,⁴⁷² the majority were of the view that, while acknowledging the best interests of children was an important legal principle, is not fundamental to society's concept of justice and therefore not a principle of fundamental justice. In this case the right of parents to discipline their children was upheld.⁴⁷³ This case serves to illustrate a lack of integration of children's rights with the core principle of justice and therefore a child's rights can be overridden in favour of the rights of adults, justified by Article 18 UNCRC,⁴⁷⁴ which sees parents as the main guardians of their child's rights and respects parental responsibilities in this regard. Article 18 UNCRC states:

'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may

⁴⁶⁸ M Henaghan, 'Final Appeal Courts and Article 3 of the United Nations Convention on the Rights of the Child: What do the best interests of a particular child have to do with it?' in E E Sutherland and L A Barnes Macfarlane (eds.), *Implementing Article 3 of the United Nations Convention on the Rights of the child: Best Interests, Welfare and Well-being* (Cambridge University Press 2016) 82.

⁴⁶⁹ *Ibid* 83.

⁴⁷⁰ J Eekelaar, *Family Law and Personal Life* (Oxford University Press 2017) 59.

⁴⁷¹ *Ibid* 60.

⁴⁷² *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] SCC 4, [2004]1 SCR 76.

⁴⁷³ *Ibid* para 10.

⁴⁷⁴ Article 18 Respect for Parental Authority UNCRC.

be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern’.

However, in the case of *R v Secretary of State for Education and Employment and Others*,⁴⁷⁵ the House of Lords considered whether a ban on the corporal punishment of children in schools was in breach of the right to freedom of parents’ religion. In this case the child’s parents supported use of corporal punishment. Lady Hale in her judgment makes reference to a number of the articles in the UNCRC including, Article 3 (Child’s best interests), Article 37 (Right to protection from abuse, neglect and exploitation) and Article 37 (Right to be protected from torture, cruel and inhuman or degrading treatment and punishment). She stated: ‘If a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise’.⁴⁷⁶

In his discussion on values and their influence on judicial decisions, Hedley’s view is that, ‘The difficulty today is in determining what those values are to which society generally (not just particular parts of it) subscribes. That really can sometimes seem like a chasing of the wind’.⁴⁷⁷ Hedley sees three sets of potentially competing values at play when the court exercises discretion, including in the area of the child’s best interests; society’s values, the values of the family involved in the case and the judge’s own values. Hedley acknowledges that a judge’s values are part of what he calls the, ‘welfare pot’.⁴⁷⁸

The decision which emerges from such a process is one that may have the best interests of the child in mind, but it is a decision that is without the in-depth perspective of the child. The child’s voice needs to be a central part of judicial values and of the decision-making process and not just a passive recipient of the outcome of their proceedings.⁴⁷⁹

⁴⁷⁵ [2005] UKHL15 [2005] 2 FLR 374.

⁴⁷⁶ *ibid* paras 81-84.

⁴⁷⁷ M Hedley, *The Modern Judge: Power, Responsibility and Society’s Expectations* (LexisNexis 2016) 6.

⁴⁷⁸ *ibid* 51.

⁴⁷⁹ M Freeman, ‘Disputing Children’ (2000) in N Sanford, J Katz, J Eekelaar and M Maclean, *Cross Currents: Family Law and Policy in the US and England* (Oxford Scholarship Online).

As discussed in Chapter 3, the judge relies heavily on the child's Guardian for advice and guidance. Given the diminishing time Guardians spend with children, an issue highlighted by judges in this research and by the 'proportionate working' adopted by Cafcass,⁴⁸⁰ judges are receiving minimum information about children's lives and circumstances. Munby P in his 15th View from the President's Chambers, points to a looming crisis in the public child law system.⁴⁸¹ As a consequence of the case of Peter Connelly,⁴⁸² the number of care cases coming before the court has increased significantly. Although to date the time taken to complete proceedings has not increased as a result, the President is less than optimistic for the future, given the ever increasing numbers of applications. He acknowledges that the professionals working within the system are at full stretch and that the system is facing a crisis without a clear strategy being in place to deal with the increase in workloads. He also acknowledges that no clear cause(s) emerge for such a significant and sustained increase. Munby P warns of the potential risk in relation to the principles of fairness and justice and therefore to Articles 6 (Fair Trial) and 8 (Family Life) ECHR. The President highlights the grave nature of public child law proceedings, stating: 'Care cases, with the potential for life-long separation between children and their parents, are of unique gravity and importance'.⁴⁸³

The above views serve to illustrate a real concern in public child law proceedings that judges have in relation to the values of justice and fairness, in ensuring that their decisions reflect these values, particularly in relation to the rights of children and parents including, adherence to the principle of paramountcy in achieving the best interests of children. This chapter now moves on to examine critically the interrelationships between judicial values and child-centred decision-making.

⁴⁸⁰ Capleman (n 205)

⁴⁸¹ J Munby, 15th View from the President's Chambers: Care Cases – The Looming Crisis (Ministry of Justice October 2017)

⁴⁸² Harringey Local Safeguarding Children Board, Serious Case Review: Child A (2008) (Department for Education 2010).

⁴⁸³ Munby (n 293) 4.

5.3 Judicial values and child-centred decision-making

Aoife Nolan points out, that while children have the right to be heard and their views given due consideration, their views are not determinative and very much take second place to that of the child's welfare and safety.⁴⁸⁴ Within court proceedings, their rights as opposed to their 'best interests' under s.1 Children Act 1989 are promoted far less.⁴⁸⁵ Such a position may seem very unfair to a child involved in proceedings. It is where the judicial value of fairness and the right of a child can be in conflict. This is an area on which two of the participating county court judges in this research addressed in their views on the challenges that judicial values can present, albeit from very different perspectives. In relation to balancing potential conflict between fairness and protecting the child one county court judge stated:

"I suppose there are times when there is in a court hearing some conflict between the desire for fairness and the desire to protect the child and you would lean in favour of protecting the child if it were an absolute conflict, but your professional role is to combine the two sufficiently that you achieve the outcome without compromising the fairness".

While another county court judge in his response appears to separate his judicial values and the making of a decision:

"Values in the sense of fairness, respect for the individual, respect for their integrity and their rights, these are all there, values that I run with, but I don't think that really informs the decision or makes the decision. The decision is made on the evidence and the arguments".

Tobin feels that, '... courts must inform the content of a right by reference to the experiences of children'.⁴⁸⁶ The realities of the application of judicial values alongside the rights of children seem to lay greater emphasis on the letter rather than the spirit of rights and legislation. Tobin sees such an approach as being dominated by a 'welfare model' of children's best interests

⁴⁸⁴ Nolan (n 333).

⁴⁸⁵ J Herring, *Family Law* 5th Edition (Pearson Education 2011).

⁴⁸⁶ J Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' (2012) 14 *Law and Childhood Studies: Current Legal Issues* 1, 9.

and rights,⁴⁸⁷ while Fortin maintains that a child's welfare should not be inconsistent with their rights.⁴⁸⁸ Furthermore, Bainham and Gilmore view welfare as being something that, '... can be too easily used to cover anything someone else thinks is good for you,⁴⁸⁹ which is why Eekelaar suggests that that the concept of children's well-being, which is a much more broader view of a child's life, replace the current welfare model.⁴⁹⁰

In their discussion around the conflation of children's welfare, paternalism and best interests, Stalford and Hollingsworth argue that the 'protective obligations' resulting from a highly paternalistic assessment of children's welfare and best interests, including protecting children from potential harm that may result from their involvement in court proceedings, is a real barrier to children exercising their rights in a manner of their choice.⁴⁹¹

Assessments of children's best interests for Stalford and Hollingsworth:

'...necessitates transparent, rigorous, systemic, even forensic, deliberations of the various factors that have comprised that assessment'.⁴⁹²

Judges in this research acknowledged such tensions in legislation, particularly in relation to balancing a principle like 'no delay' with the rights of parents and the best interests and welfare of children. The following lengthy quote from a county court judge, delivers a frank reflection on the application of legislation and serves to demonstrate some of the tensions and conflicts involved in balancing rights, values, principles and rules in practice:

"The professional value is to say, "Right, that is what the President of the Family Division wants us to do" and there is very good reason for that because so many cases have lasted much too long, but when you then start to relate that to a particular case, you can find that your personal view is, "Well actually, if I was just able to give this mother an extra three months, she probably could pull herself round and she probably could provide the evidence of adequate parenting, but that is going to take us well outside that 26 week limit that I am supposed to

⁴⁸⁷ Tobin (n 486) 16.

⁴⁸⁸ J Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 (3) *The Modern Law Review* 299.

⁴⁸⁹ A Bainham and S Gilmore, S. *Children: The Modern Law* (Jordan 2013) 63.

⁴⁹⁰ J Eekelaar, 'Beyond the Welfare Principle' (2002) 14 (3) *Child and Family Law Quarterly* 237.

⁴⁹¹ Stalford and Hollingsworth (n 427) 39.

⁴⁹² *ibid* 65.

be working to, so you do get a tension there. My view then has been that, going back to those statutory principles and rules, if you overriding desire is to meet the welfare of the child and also to reach a just decision, then you need to go beyond that 26 weeks. My guiding principle is that when you go home at night, are you satisfied that you were fair? I would rather be told that I was wrong by the Court of Appeal than to drive home thinking, I don't think that was really fair but at least it complied with the rules". (County Court Judge)

The issue of processes and procedures getting in the way of being child-centred was acknowledged by judges in this research.

" We get far too wrapped up in all our processes and procedures". (County Court Judge)

"The only thing that concerns me about it overall, it has become too legalistic in some ways. ... I wonder if we have actually made it much more legalistic than child-centred in that wide sense, that we now become very concerned with procedural rules and procedural steps and the child fades into the background. We do I think become so involved in the actual process itself that we can forget the child. We are all doing the best for the child, but the child must feel quite marginalised very often because they just are told what has happened". (County Court Judge)

Munro in her analysis of the child protection system makes the following observation:

*"It may seem self-evident that children and young people are the focus of child protection services but many of the criticisms of current practice suggest otherwise. In a system that has become over-bureaucratized and focused on meeting targets, which reduce the capacity of social workers to spend time with children and young people and develop meaningful relationship with them ... "*⁴⁹³

Munro's observation is very relevant to the current public law system, given the introduction of the Public Law Outline (PLO) with its 26-week limit on proceedings, which is an adult defined and adult led arbitrary target (see Chapter 4). It is also an observation that is reflected in the responses of

⁴⁹³ E Munro, (2010) *The Munro Review of Child Protection: Part 1: A Systems Analysis* (The Stationery Office 2010) 18.

judges. The following graphic quote is a relevant and insightful response of one county court judge, which encapsulates the reality of the current public law system:

“Our system is not remotely child-centred. It is not set up to be in any way at all, other than in the abstract conceptual idea. This touches on something that has been in my mind for years, although we talk about being child-centred, we spend all our time in Court dealing with the adults. Inevitably that does affect how you think because you tend to be more aware of what is in front of you than what is not in front of you. In a care case, we generally spend 95% of the time working out what is wrong with the current care givers, the parents, and that is partly because the nature of the contest in a court hearing tends to be about in care cases, removal, rather than anything else. The focus is on diagnosis of the problem or fault finding rather than on prescribing the cure because the cure is seen to be within very narrow confines, a matter of received wisdom. Our forensic focus is on, was it Mum or Dad who broke the child’s skull, was it uncle Peter who sexually abused the child?, is the standard of care given such that it amounts over time to emotional abuse and neglect?, if that is the dispute, then what you focus on are the parents. In public law proceedings we don’t focus on the child. We think we know what is right for the child so we focus on what is wrong with the adults. My perception of our professional thinking is that by and large we keep children as far away as possible, in their own interests, we think. The idea of inclusion of accountability, transparency, it is all mediated through the child’s Guardian in other indirect ways, it is not the Court’s structure itself”.
(County Court Judge)

The above response sees the concept of child-centredness as something remote from the court and is an area that lies within the domain of the children’s Guardian and Local Authority social worker rather than being an integral part of the legal process and system itself. Yet, for Stalford and Hollingsworth ensuring that the child’s voice is heard ‘...conveys to the child that her views are worth listening to, an aspect of the recognitional function of rights and reinforces the child’s dignity, autonomy and status as rights-holder...’⁴⁹⁴ while Willow⁴⁹⁵ feels the child’s voice should be at the heart of the system, as they are key sources of information in relation to their situation within their family and the impact it is having on their lives.

⁴⁹⁴ Stalford and Hollingsworth (n 427) 76.

⁴⁹⁵ C Willow, ‘Putting Children and Their Rights at the Heart of the Safeguarding Process’ in H Cleaver, P Cawson and S Gorin, *Safeguarding Children: A Shared Responsibility* (Wiley Blackwell Jones 2009).

Listening to children within the context of child-centred timeframes was very much seen by the participating judges as a core element of child-centredness:

“Time for a child is very different from time for an adult. ‘How many sleeps before I know where I am ‘gonna’ be’? I say to people in court, how would you like not to know where you are going to be next Christmas? What do you think it feels like not to know whether you are going to be friends with the girl who is sitting next to you? What school you are going to? Where are you going to live next year? Whether you should put pictures up on the wall because you don’t know whether you are going to stay. What’s the point of me investing anything in this house, these friends, these people? I say in court, wouldn’t it do your head in if you were living in that kind of limbo? that is the key word, limbo. How do you think that feels?” Children get lost in the decision, they get so desperately lost. (County Court Judge)

One County Court judge reflected on how historically timetables have been set:

“.... I think for far too long we have been timetabling care proceedings at the convenience of professionals. We have worked our timetables around how long does it take this expert to prepare his report? How long does the social worker want to be able to do that piece of work? When are counsel going to be available? What are the dates that most suit them? That is the way in which historically timetables have been set”. (County Court Judge)

Returning to the Munro review of the child protection system, as it is this system that feeds into the public child law process, and the issue of the system itself being given priority over the need for children to get to know significant professionals involved in their lives and for the professionals to get to know the children they are protecting and representing, Munro stated, ‘The ones who lose out most are the very children the system is intended to protect. The reforms have driven compliance with regulation and rules over time, with social workers increasingly operating within an over-standardised framework that makes it difficult for them to prioritise time with children, to get to know them, and understand their feelings, wishes, and worries’.⁴⁹⁶ She

⁴⁹⁶ Munro (n 293) 7.

found that children needed to develop an enduring relationship with their social worker, who would listen to them.

While making time to listen to children is very important, children also need to know what is going on in proceedings. They need to be kept up to date throughout the entire process; pre-court, during proceedings and post-court. Judges in this research viewed this as central in terms of being accountable to children and in terms of being transparent, helping children to have an age appropriate understanding of the system. One County Court judge felt that children were seen and treated as 'small adults' within the system;

“Children aren’t just small adults, they function in different ways and I think the system we currently have is certainly geared up for adults. I do not think it is anything children are well informed about. I do not think they understand it. They need to have some understanding in a way that they could comprehend. They would need to understand the limitations of the system. They would need to have information put to them in a child-friendly way and then have the opportunity to comment in a way whereby their own views could be properly recorded in a way that gave them confidence that it was their views, as long as they understood that nobody had the determining view, apart from the judge, assuming we are still in a court arena. I think that children need to understand what is happening and have it made relevant to them, so they can understand it properly”. (County Court Judge)

In her final report of her review, Munro states, ‘The centrality of forming relationships with children and families to understand and help them has become obscured’.⁴⁹⁷ The development of such relationships becomes much more difficult when the centrality of the relationship with the child is both diminished and diluted, as seen from the discussion of the evidence cited in Chapter 4.⁴⁹⁸ Brophy highlighted the need for transparency for children in a decision making process, where adults represent their wishes and feelings. Attention to the language used and the length of documents produced is also highlighted, as they often make both children and their parents feel less than equal partners in care proceedings.⁴⁹⁹ In their review

⁴⁹⁷ E Munro, *The Munro Review of Child Protection: Final Report – A Child-Centred System* (The Stationery Office 2011b) 8.

⁴⁹⁸ *ibid.*

⁴⁹⁹ J Brophy, *Research Review: Child Care Proceedings under the Children Act 1989* (Department of Constitutional Affairs 2006).

of the child care proceedings system, the Department for Education and Skills and the Department for Constitutional Affairs back in 2006 recommended the need for an informal approach by the Judiciary when talking with children and parents and the need for better, more detailed and clearer information about care proceedings and what to expect of the court.⁵⁰⁰

Making child-friendly, age-appropriate information available to children was considered by the judges in this research to be very much part of the court's child-centred approach, but such an approach in this area of the proceedings is not without its difficulties.

“For children who can be given information, and even very small children can be given information, they need to be given information in a form that they can absorb and that may be in different ways; that may be something in writing for children who can deal with that, then they should be given something in writing. Again, it needs to be child-friendly. There also needs to be materials for children who can't cope with things in writing, they may need the written material supplemented by other forms of information. I think we don't do that probably enough. That needs to be done at a very early stage it seems to me”. (District Judge)

“I am not sure that they are given the information early enough. How early do they need to be made aware if they are able to take it in, that they may not be going home? That is quite difficult. I think it is very important that they are given information about the process in a way that they can understand. I guess what is quite hard for them is to actually know who really is making the decisions along the way”. (District Judge)

In general however, judges felt that providing children with clear and accessible information throughout the course of their proceedings was an important element of transparency and accountability (see Chapter 4). For one District judge it was also important that children themselves felt confident about the system:

⁵⁰⁰ Department for Education and Skills and Department of Constitutional Affairs, *Review of the Child Care Proceedings System in England and Wales* (Welsh Assembly Government 2006).

“I think it is important by one means or another, preferably not directly, that children have confidence in the integrity and reliability of the system. That is really down to Guardians in particular; Guardian’s solicitor to an extent, to make sure that the child understands, within their ability to understand, what is going on and how he might be affected by the outcome”.

Given the lack of resources, particularly the time allocated to Guardians for each case, making the above aspiration a reality is a significant challenge for the present system, even though it was formally recommended over ten years ago.⁵⁰¹ Conflicts and barriers surrounding the whole area of accountability were also highlighted and acknowledged by judges. The following quote from this research summarises some of main issues in this area:

“There is a conflict and it is one which is uncomfortable. We have a rather paternalistic view that we know better, similarly to perhaps dealing with our own children, that terrible reply, “Why do I have to do it”? “Because I tell you to do it”, because we know best. There is a danger that the hard-wired nature of not seeing children, which has been so much part of the system for so long, stands in the way of the issue of our accountability to them. Accountability to children doesn’t necessarily mean that you go to the child and say, “This is why I did it and this is why I have decided it”. I think that there is a place for that accountability. Somebody should be identified to feedback to the child the decision that you have made and why you have made the decision and how it is going to be implemented. Accountability to children is more a broader ranging concept. This system is accountable to the child and ultimately it will only be judged by whether we deliver to children, individual children, what has been genuinely assessed as being in their best interests.

I fully accept that if, as I know is the case, there are a large number of children feeling that they are alienated from the system and ignored by it, although in the theoretical sense, the system may still be accountable to them in the sense that its success is measured by what we deliver for the child in the very tangible sense of the child saying, “What does it mean to be accountable to me, I wasn’t even listened to, I wasn’t told anything about what was going on and why the decision had been made”. Yes, there is a conflict there”. (District Judge)

⁵⁰¹ Department of Education and Skills (n 499).

Macdonald holds the view that the voice of the child should be given priority throughout the entire period of State intervention in their lives, but feels their voice is often ignored. He feels that through listening to the child's voice, this increases the accuracy of the assessment of the child's needs.⁵⁰²

Judges in this research identified the need for the legal system to be transparent for and accountable to children, but very much view this area as the domain of Guardian's and Local Authority Social Workers, yet they also acknowledge that neither children's Guardians or social workers have adequate time to fulfil their role adequately in relation to these areas. Paramountcy of the child's welfare and best interests were viewed by judges as the core principle underpinning the public child law system. However, they view their role in applying this principle in practice as one which is somewhat remote, relying on Guardians and social workers to keep children informed and up to date about their proceedings and to be the eyes and ears of both the child and the court, ensuring the court is aware of the child's wishes and feelings, albeit at a distance. It is acknowledged by the judges that the system itself, with its complex rules and procedures and adult-centred timetables, take priority over the reality of a child's situation and their need to feel part of a system that is making such important decisions about their lives.

⁵⁰² A Macdonald, 'The voice of the child: still a faint cry' (2008) July Family Law 648, 650.

The discussion in this section highlights a lack of progress regarding what constitutes a child-centred approach within the family justice system, even though over the past twenty years, much has been written by eminent academics and children's rights experts⁵⁰³ about the need and importance of hearing and listening to the voice of the child, particularly in those areas that affect significantly the nature and quality of their lives and the lives of their families. The child's voice is by common consent, the core of any work undertaken with children and needs to be embedded in any environment within which such work takes place. It is not possible to be child-centred in making decisions about children's lives without children's meaningful participation including, that of having direct input into in any forum, system or process, official or unofficial.

5.4 Listening Directly to Children: Judicial Perspectives

The responses from the judges in this study, when asked about their views on meeting children directly and on enabling children to participate directly in proceedings, reflect the restrictive nature of current formal guidance in this area (see Chapter 4 section 4.2) and of a legal system that is barely open to children's direct participation. Judges in this research made reference to the need for the court system to be more open and welcoming of children, but their views ranged from openness without restriction to those hinged on a variety of parameters, to questioning the usefulness and value of children's direct involvement in proceedings. One county court judge said:

"There shouldn't really be any barriers, there should be far more openness in my view toward seeing children and letting children feel they are being heard". (County Court Judge)

⁵⁰³ M Maclean, *Access to Justice in Family Matters in Post-War Britain* (Oxford University Press 2000); L Ackers and H Stalford, *A Community for Children?: Children, Citizenship and Internal Migration in the EU* (Ashgate 2004); J Fortin, 'Children's Rights: Are the courts now taking them more seriously?' (2004) 15(1) *King's College Law Journal* 253.; J Fortin, *Children's Rights and the Developing Law* 3rd Edition (Cambridge University Press 2009); M Freeman, *The Moral Status of Children* (Martinus Nijhoff 1997); M Freeman, 'Why it remains important to take children's rights seriously' in M Freeman, (ed) *Children's Rights: Progress and Perspectives* (Martinus Nijhoff 2011); M Freeman, 'The value and values of children's rights' in A Invernizzi and J Williams (eds) *The Human Rights of Children: From Visions to Implementation* Ashgate 2011a); Nolan (n 7); G Lansdown, (2010) 'The realisation of children's participation rights' in B Percy-Smith and N Thomas, (eds) *A Handbook of Children and Young People's Participation: Perspectives from Theory to Practice* (Routledge 2010); B Percy-Smith and N Thomas, 'Emerging themes and new directions' in B Percy-Smith and N Thomas (eds) *A Handbook of Children and Young People's Participation: Perspectives from Theory to Practice* (Routledge 2010); Munro (n 25); A Daly, S Ruxton and M Schuurman, *Challenges to Children's Rights Today: What do Children think?* (Council of Europe 2015); N Crichton, 'Listening to children' (2006) October *Family Law* 849.; B Hale, 'Can you hear me Your Honour?' (2012) January *Family Law*.

While another felt such openness should serve to facilitate and inform children about decisions made by the judge:

“I would never refuse a request by a child to come to court unless I was advised that there would be adverse consequences for the child in so doing”. I would be happy to explain why I can’t go along with their wishes to them so that they may find it easier to accept the decision of the court”. (County Court Judge)

The importance to children of hearing their views directly and of understanding the decision-making process was highlighted by the response from a County Court Judge:

“I think it is very important that the child has an opportunity to come and tell me in their own words what they want to say, more particularly if I am going to make a decision which is not necessarily on all fours with their wishes and feelings because otherwise there will be another candidate out there thinking, “well it is no good saying anything to the social worker, to a Judge, to a teacher, they never listen”. At least the child will know that I have heard what he or she has to say and I will have to think of some reasons that he or she can understand to make a decision which runs contrary to what they would like to happen. It is not just the child’s parents’ understanding, it is their understanding, which matters too”. (County Court Judge)

The following response from a county court judge gave an insight into how he keeps children at the centre of his decision-making:

“I very often say to parents, “What must it be like when we say, 6 weeks for this 3 months for that. You are a child; you have to go to sleep every night with all of this in your mind”. I think if they were more intimately involved with the process, assured by the process, it would be a healthier thing for them. From the point of view of their own welfare and their rights, I think they should be involved.

... when I am having to make a decision in what seems like a finely balanced case and you see the merits of both sides, how do I make a decision? I physically imagine, mentally imagine, that the children are here with me, and when I look to them, I think it focuses my mind and it makes the decision making easy, because whatever we say and however often we may say the children’s interests / welfare are the paramount consideration, it is easy for that to just become something that we trip off and lose sight of it in the adversarial nature of the proceedings”. (County Court Judge)

Judges acknowledged that meeting children requires much reflection, preparation and thought. The contrasting responses from two County Court judges reflect this approach:

“I think it would be quite a significant thing to do and I think it would need some careful thought, as to how you go about talking to a child directly in a case. I might have a child busy nodding their head but saying what they thought I wanted them to say or what they thought I wanted to hear. I think I would have to be quite careful that they were not just agreeing with me because I was the judge, and people tend to think that judges are people that have to be listened to. I would therefore be conscious to make sure I got the child’s views, because that presumably would be the purpose, not for me to tell them, but for them to tell me. I would approach any request to speak directly to a child with that very much to the forefront of my mind. I would have to ensure that I went about this in a way which left me feeling confident that the child had got their view across to me and not simply reiterated something that they thought I might want to hear”. (County Court Judge)

For another county court judge, reflecting on how effective and child-centred such a meeting is:

“I would have thought myself that a better, more thought out, more valuable presentation of views can be obtained in a more relaxed, over-time assessment by professionals, rather than just to sit down the child over a cup of orange juice or something, and a quarter of an hour later they are gone. It is a very fleeting kind of meeting. They are very anxious. The Judge is a bit anxious about it too and I am not sure that it is necessarily the best environment for something important like that”. (County Court Judge)

In the same vein a Magistrate from the family proceedings court commented:

“You get more from a child if you can talk to them quietly in a secure environment and that is what the CAFCASS Officers are expert at doing. I don’t think we would gain anything or get anything new by bringing children into court. It is not an appropriate forum for them anyway”. (Magistrate – Family Proceedings Court)

The above range of views; from being open to children’s direct involvement to questioning the usefulness and value of such involvement within the current public law system, reflects significant differences in judicial thinking on this issue. Although the responses reflect a range of views in this area, the level of judicial acceptance of direct participation of children in

proceedings among the participating judges in this study, range from being very cautious and restrictive to non-acceptance. It is restrictive on two levels. On one level child-centredness in relation to direct participation is very much seen as consisting of a one-off brief meeting with the judge, lasting on average no more than 15-20 minutes, while at another level the reality of the rarity of such direct meetings indicates that such occurrences are the exception rather than the norm. This reality fits very much what Tobin describes as the *incidental rights approach*, where the rights of children are very much on the periphery of the judicial process.⁵⁰⁴ The following responses highlight this reality. Meeting children directly is not promoted or encouraged by judges at the present time, a view that was shared by all of the participating judges and magistrates.

“I’m perfectly happy to do it, if it is asked of me, but it has been rarely asked. It is not something I would advertise either, perhaps I ought to, thinking about it. Perhaps I ought to say, well I am always willing to see children if somebody thinks it is a good idea and they want to”.
(District Judge)

“I did from time to time, not very often. The reason it wasn’t very often is because it wasn’t very often I was asked to”. (High Court Judge)

The following response from a County Court Judge is an example which indicates the rarity of children meeting judges in his court:

“Not very often at all. I have been a full-time Judge for seven and a half years and I have seen children I think on three occasions”.
(County Court Judge)

It is clear from this research that there is within the public child law system inherent barriers that block the development of a child’s own space and place in public child law proceedings. This space and place for the most part has been taken by the children’s Guardian and legal representative and the children’s Local Authority social worker and this according to Connolly and Morris can lead to risk aversion, ‘Risk aversion can push practitioners, and

⁵⁰⁴ J Tobin, ‘Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children?’ Legal Studies Research Paper No. 456 (2009) 33 (2) Melbourne University Law Review 579.

the agencies within which they work, toward more professionally-driven practices where the professional voice is dominant'.⁵⁰⁵

Concerns were expressed by participating judges in this study about the decreasing level of involvement of Guardians with children in terms of time spent getting to know the child. One district judge expressed concern regarding the impact and implications of the lack of time and resources available to Guardians on the child's level and quality of representation.

"If you speed on and do these things quicker, there is even less time for relationship building with the child and to involve the child. There ought to be a mandatory provision to say, how to involve the child is considered by the court at directions appointments and is part of the Public Law Outline. Guardians and solicitors have to consider it. It is in their guidance but it is not focused enough in court. It comes up more as a by-product if the child has been banging the drum rather than as a routine matter that should be considered". (District Judge)

Another county court judge has observed that,

In a time of limited resources, the exposure to their own Guardian and lawyer is going down, not up. The reports that we get from the Guardians now are the work of far fewer hours than once upon a time was the case. They are not seeing the children as much".

The above responses represent a wide range of judicial views on enabling child-centred participation, but the common thread is not one of meaningful direct participation. At best, it is a passive listening to children's views. The responses portray a judicial process that is wedded to judicial guidance, which only allows children to participate in the process if there is agreement from the adult parties involved.⁵⁰⁶

The above understandable and genuine concerns of judges encapsulate the real tension that exists between Article 12 (*children's right to express their views*) and Article 3 (children's best interests) of the UNCRC. However, the family court system as presently constituted, sees such tension being

⁵⁰⁵ M Connolly and J Masson, 'Private and public Voices: Does family group conferencing privilege the voice of children and families in child welfare?' (2014) 36 (4) *Journal of Social Welfare and Family Law* 403.

⁵⁰⁶ Family Justice Council, *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (2010) 1.

resolved in favour of the child's welfare and by the indirect participation of children in proceedings. The following contrasting judicial perspectives highlight a basis for such reluctance. A district judge highlighted the difficulties, both for the judge and the child in hearing children's views directly.

"With the Judge, the Judge has got great difficulty in discussing with a child what the case is, because you don't want to build up their expectations and give them false understandings of what the outcome might be. It also puts a huge responsibility on the child to be able to express themselves as to what they really want the court to know".
(District Court Judge)

Two county court judges expressed their unease in meeting children:

"One has to be careful because you must not send the message that he has in some way responsibility for the decision that you make and that is enormously difficult to do. You have to take away from them any assumption of responsibility for the outcome". (County Court Judge)

"I think the underlying reason is that we are very keen that children should not feel responsible for the outcome and as soon as you embark upon the discussion with a child of what their views are, there is the potential for the child to feel responsible for what happens ..."
(County Court Judge)

In contrast, an approach based on the reality of children's lives prior to and during proceedings, is taken by two other county court judges:

"I can't see how involving them in it and letting them see what is going on and letting them see Mum and Dad and letting them see the Judge, would do them much more harm than they have been caused already. It would do them a lot of good". (County Court Judge)

"The message taken on board by the child, who has probably been using childlike effective strategies for a long time anyway before it has got into the court arena, is that he or she has got to hold the fort, take on the responsibility for the decision making". (County Court Judge)

Judges also referred to the historical roots of proceedings including, their adult-centric nature and professional attitudes:

"The culture is deep seated in that you distance the children from the proceedings. The rules are quite labyrinthine about the involvement of

children within the proceedings, even where separately represented, whether they should attend the hearings and all the rest of it, raise all sorts of separate questions of their own. It is because of that historical, cultural thing, which has fed into a regime and rules which, it is not a presumption but it has stuck. Now when you look at the Family Justice Council's papers on it, all hedged around with a considerable degree of cautionary thinking". (County Court Judge)

"In terms of trying to involve them, I think the whole process is very adult-centric. The way professionals work, it is this old thing that Dame Butler-Sloss said about children, the object of concern rather than the subject of the proceedings and whereas if they really were the subject you would be saying "right how are we going to involve the child in this?" We don't, it is all very much adults in rooms talking and deciding about the child. There is this historical and perhaps natural tendency not to think about involving the children and just say this is going on for you, you don't need to come. It is a lazier way of working and it is adults just dealing with adults. Part of the structure is to intimidate people, isn't it? That is a natural barrier as well". (County Court Judge)

The public child law system is a system that quite rightly is protective in nature, but this can and does exclude children from the process. As one county court judge put it:

"I think the difficulty is; that as the process is intended to be largely protective, and one cannot expect the subject of the proceedings to understand the broad and detailed nature of the concerns about their parents and what implications those concerns may have for their well-being".

Another significant barrier, highlighted by judges, in obtaining a child's true view, is that of not being able to keep what the child says confidential. The response of one judge is a reasonable representation of the participants in relation to this issue.

"I think the biggest problem about it is the fact that what they say to the judge has to be revealed to the other parties and that I think is something, which perhaps is a difficult concept for them to understand. As we experience often with children, what they say to the parents is designed to find favour with the parents most of the time and that might not be the child's true view".

The area of confidentiality can present real problems for children in proceedings, for example, a child may not wish their parents to know of their true views and feelings about a certain situation, but is quite happy to express their views to the judge. This is an area where achieving a child-centred approach may conflict with Article 6 (Right to a fair trial) ECHR in respect of the other parties involved in the proceedings. Sensitive communication by the judge to the other parties is crucial in such situations (see discussion on Jackson J's judgments in Chapter 4).

There are significant barriers within the current public child law system preventing and disabling children from direct participation in their proceedings and therefore limiting the child-centred nature of such proceedings. Judicial perspectives and values, which in practice do not see children as people with the right to participate directly, except under certain criteria and guidelines, with age and capacity being used as justification for children not being able to speak with the Judge directly. In general, the barriers to enabling children to participate directly in proceedings did not sit uncomfortably with the participants involved in this research, including the belief that there are very limited benefits resulting from such a meeting: "One of the barriers at the moment is a general reluctance on the part of the judiciary to take on board the benefit of speaking with the child directly" (County Court Judge). Although there was a good level of awareness among the participating judges that other jurisdictions were much more open to hearing children directly, the influence of the practice of other jurisdictions seem to have had a very limited impact on established judicial practice:

"When you speak to Judges from different jurisdictions; in Germany it is a matter of course that they meet the children in each and every hearing. I am not, at the moment, in favour of that although views change, but I wouldn't want children to think that coming to court was routine, as if they were going to hospital. It is not somewhere that you necessarily want to take a child unless there is very good reason. Not many people have positive connotations when they think of courts. A child may well think, this is a dreadful place to come, why am I coming". (County Court Judge)

“Courts are not seen as places for children to come, they are seen as places from which to keep children because they are adult places of dispute”. (County Court Judge)

5.5 Conclusion

Both the child protection system and the public law system are systems that currently are driven by targets and efficiency in terms of tightly managed timescales and deadlines. Such timescales and deadlines are micro-managed on a daily basis. They are also systems bereft of adequate resources, to sustain a child-centred approach to both child protection and court proceedings. Such a reality is acknowledged readily by professionals within these systems including judges who find themselves working and making decisions with the weight of an historically long established and cautious legal system on their shoulders. The perspectives of the judiciary in relation to child-centredness is one of caution, which is informed by the sensitive and complex factors involved in balancing a child’s welfare and safety with their rights. In reality, neither system is willing or able to engage with children who are subject to proceedings, in a way that makes children feel confident and comfortable in using the available legal protections, processes and rights enshrined in legislation, to ensure their true voice is heard and understood, throughout the entire period of State intervention. Children remain the possession of a system that maintains a distance from the reality of their lives. Such a distance silences the feelings of children about the true realities of their abuse and neglect.

Chapter 6

Judicial Decision-making: Interpretation and Application

6.1 Introduction

Judges involved in public child law proceedings do not work in isolation. They are part of, yet separate and independent from, the child protection system, from which all cases originate. Judges also work within the prevailing political system of the day and abide by the letter and spirit of legislation, passed by a democratically elected Parliament.

Judicial principles and values have a significant influence on judicial thinking and decision-making. In the previous chapter, judges' perspectives of child-centredness were explored critically within the context of decision-making in public law proceedings. This chapter will focus on judicial priorities in care and adoption proceedings, drawing on the findings of this research and relevant case law, as well as those factors that influence judicial decision-making including, judicial values and the current Government's agenda on public child care, as well as the significant reductions in finance and resources, both in relation to the English legal system and the child protection system specifically. Using the example of the introduction of 26-week time limit on care proceedings,⁵⁰⁷ the chapter will explore the tensions judges experience in administering the system of child protection, and in placing the child at the centre of these proceedings.

The cases (*three care cases and one adoption case*) selected in section 6.4 of this chapter, give an insight into how judges apply and interpret both the letter and the spirit of current child care and adoption legislation. The selected adoption case provides a comparison between the priorities of the Appeal Court judge in this case in relation to a four-month-old child, and a children's rights approach to the case, as outlined in a re-write of this judgment.

⁵⁰⁷ Children and Families Act 2014 s.14(2)(ii) (*26-week rule*).

6.2 Values and Judicial Practice

Values are often implicit in a judge's decision, for example, returning a child to their birth family against the Local Authority's proposed care plan and recommendation of the children's Guardian,⁵⁰⁸ where the evidence before the court indicates that it is in the child's best interests to do so.⁵⁰⁹ This reflects the value of family life and accords with Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950 (ECHR), the right to respect for private and family life.⁵¹⁰ However, Article 8 is not an unlimited right. Intervention in the family to remove a child at risk is justified if it is in accordance with the law⁵¹¹ and is a proportionate response. However, according to Hedley, such decisions are complex, 'The essential judgment between a child remaining in the natural family or going to an adoptive family ... involves complex value judgments which, whilst they are presented as 'welfare' or 'best interests' evaluations, are in fact a nuanced, complex and profound distillation and balancing of values ...'.⁵¹²

Within the literature, judicial values are often listed as broad concepts and notions⁵¹³ and are very much seen as umbrella terms under which there exists a range of contextual and situational values.⁵¹⁴ In public child law proceedings, such values are often expressed in terms of what is in a child's best interests or the paramountcy of the child's welfare. Identifying and interpreting these values is challenging, as they are often a combination of professional and personal values.⁵¹⁵ However, it is acknowledged in literature⁵¹⁶ and in this research, that the judicial values of respect and fairness guide and inform a judge's decision.

⁵⁰⁸ North East Lincolnshire Council v G & L [2014] EWCC B77 (Fam).

⁵⁰⁹ Children Act 1989 s 1(3).

⁵¹⁰ Incorporated into English law by the Human Rights Act 1998.

⁵¹¹ Children Act 1989 s 31 (Threshold criteria for Significant Harm).

⁵¹² M Hedley, *The Modern Judge: Power, Responsibility and Society's Expectations* (LexisNexis 2016) 82.

⁵¹³ European Network of Councils for the Judiciary, *Judicial Ethics: Principles, Values and Qualities* Working Group Judicial Ethics 2009-2010 Retrieved on: 14th November 2014 www.encj.eu; R Singh, *Law as a System of Values* The Jan Grodecki lecture at the University of Leicester 24 October 2013; R J Cahill-O'Callaghan, 'The Influence Of Personal Values on Legal Judgments' (2013) *Journal of Law and Society* 40 (4) November 2013; Hedley (n 4) 50.

⁵¹⁴ Hedley (n 512).

⁵¹⁵ *ibid.*

⁵¹⁶ *ibid.*

Among those legal principles, which are enshrined in law, are ‘no delay’⁵¹⁷ and the ‘paramountcy’ of the child’s welfare.⁵¹⁸ Both of these principles govern and inform judicial practice in relation to judicial decision-making in determining the outcome of child protection proceedings, if the threshold criteria for significant harm are met under s 31(2), Children Act 1989. In addition to these specific principles in the context of child protection, Singh sees the law as a system of values that includes fairness, equality, democracy and the rule of law⁵¹⁹ (see Chapter 5).

In this research, judges were very much aware of and acknowledged their personal and professional values and the difficulties in distinguishing between the two. In this research, an example of a personal value would be compassion while a professional value would be respect. A County Court Judge felt her personal values was her ‘non-objective’ input into the case:

“Professional value; that would be the judge’s value, which is one of balance and fairness. Personal values; obviously, I cannot escape the fact that I have got personal values, they are my non-objective input into the case, what I know about families and how they operate from my experience of my own family ... “. (County Court Judge)

6.3 Accommodating the 26-week deadline and Judicial Values

Both personal and professional values are not without legitimate external and internal influences including, political influences. In her research, albeit relating to another jurisdiction (USA), Cahill-O’Callaghan highlights the significance of judges’ personal values and the implications for judicial decision-making. She found there was an interplay between personal values and the decision-making processes of Judges, ‘Personal values influence and are influenced by political ideology. Personal values are associated with attitudes, moral judgements, and activism, each of which have been implicated in judicial decision making’.⁵²⁰

⁵¹⁷ Children Act 1989 (n 3) s 1(5).

⁵¹⁸ Department of Health, *The Children Act 1989 - The Care of Children: Principles and Practice in Regulations and Guidance* (Her Majesty’s Stationery Office 1991) and s 1(1) Children Act 1989.

⁵¹⁹ Singh (n 450).

⁵²⁰ Cahill-O’Callaghan (n 449).

Within the public child law system today we continue to have political influences, one example being; that all care proceedings should be completed within 26 weeks.⁵²¹ Such influences are both legitimate and inevitable, as the public care system is the State intervening and acting to protect children at risk in the family and therefore there should be democratic oversight and management of how this system works or does not work.

Although judges have discretion to extend the 26-week deadline,⁵²² they may only do so in exceptional circumstances and for a limited period of eight weeks at a time, to resolve the proceedings justly.⁵²³ These restrictions raise serious questions around judicial independence and issues such as, access to justice and the quality of justice itself. For Masson, placing such restrictions on judges has the real potential of compromising their independence, a core judicial value. She feels that reform of the family justice system has impacted negatively on the quality of justice in terms of the advocacy available for parties, particularly the child's parents, due to a significant decrease in the number of experienced lawyers undertaking public law work, because of severe cuts to the legal aid budget.⁵²⁴

A study carried out by Masson et al was designed to find out how the changes introduced by the Children and Families Act 2014 and the Public Law Outline (PLO) 2014 have impacted on the decisions made in care proceedings and on children's subsequent care.⁵²⁵ The study comprised a random sample of care proceedings issued between July 2014 and the end of February 2015. These cases were compared with a sample of cases issued by the same local authorities in 2009-2010. The total sample included 373 care proceedings cases, involving 616 children. The interim report on this research provides the initial findings on court process and decision-

⁵²¹ Children and Family Act 2014, s 14(2)(ii), with amendment to Children Act 1989 under s.32(1)(a)(ii).

⁵²² *ibid* s 14(3)(8), with amendment to Children Act 1989 under s 32(8).

⁵²³ *ibid* s 14(5).

⁵²⁴ J Masson, 'Public child law: a service priority?' (2011) *Journal of Social Welfare & Family Law* 33 (4) 361.

⁵²⁵ J Masson, J Dickens, K Bader, L Garside and J Young, *How is the PLO working? What is its impact on court process and outcome? - The Outcomes of Care Proceedings for Children Before and After Care Proceedings Reform Study: Interim Report* (University of Bristol and the University of East Anglia 2017).

making. The second part of the study, is due to be completed in 2018 and will include the perspectives of the Local Authorities and the Judiciary.

The study found that the PLO reduced substantially the length of care proceedings, but not all cases were completed within 26 weeks. Nevertheless, 60% of cases were completed within this period.⁵²⁶

The introduction of the 26-week deadline has not escaped formal criticism. The All Party Parliamentary Group on Child Protection⁵²⁷ highlighted the arbitrary nature of this deadline. They were also of the view that this deadline had the potential to hinder the court in making decisions in the best interests of children. The Justice Committee of the House of Commons in the same year felt that this timescale could make it more difficult for members of the child's extended family to be assessed as potential carers.⁵²⁸

The tri-borough project was set up in London to test the viability of the 26-week deadline. It involved three Local Authorities, Cafcass and one court. The 26-week time limit was applied to all new applications between April 2012 and March 2013. Results from this project showed that proceedings were reduced substantially by adhering to an agreed timetable and a reduction in the use of experts. Completion of proceedings took on average 27 weeks. It was also found that there were no delays in making applications or in placing children following the application. However, an evaluation of this project found that the pace of work within this period was 'relentless', with concerns being expressed as to whether such a pace could be sustained in the future.⁵²⁹ One of the messages emerging from the evaluation was that the system needs to be well resourced and supported at all levels, both in the Local Authority and the Family Justice System, to

⁵²⁶ J Masson, J Dickens, K Bader, L Garside and J Young, 'Achieving positive change for children? Reducing the length of child protection proceedings: lessons from England and Wales' (2017) Adoption and Fostering forthcoming 2017.

⁵²⁷ All Parliamentary Group, *Making Care Proceedings better for Children: A Report by the All Party Parliamentary Group Child Protection* (NSPCC 2012).

⁵²⁸ Justice Committee, *Operation of the Family Courts*, 6th Report 2010-2012 H.C. para 518.

⁵²⁹ C Beckett, J Dickens and S Bailey *Concluding Care Proceedings within 26 Weeks: Report of the Evaluation of the Tri-Borough Care Proceedings Pilot* (Centre for Research on Children and Families, University of East Anglia 2013) 52.

achieve the 26-week deadline.⁵³⁰ This message was reinforced further in a follow-up study of the Tri-Borough Care Proceedings Project.⁵³¹

In 2009-2010 it took an average of seven weeks to appoint a Guardian. The expectation at that time for the appointment of Guardians was 48 hours. This delay was due to Guardians already having a full workload and therefore could not accept additional cases. To reduce this delay in the appointment of Guardians, Cafcass introduced a new way of working, which they called 'proportionate working'. This meant that Guardians were only required to do what Cafcass termed 'a safe minimum' of work on each case.⁵³² In effect, the Guardians' work was reduced to assessing the Local Authority's initial care plan and advising the court about the need for further expert evidence. For the final hearing, the Guardian was required to submit a written assessment of the Local Authority's care plan for the child. Masson makes an important observation in relation to Cafcass's new approach for Guardians representing children in proceedings, by pointing out that such an approach prioritises the avoidance of delay over time spent developing a relationship with the child. In this research judges also remarked on the decreasing amount of time Guardians spend in working with and getting to know the child they are representing. This change of approach was also criticised strongly by the Justice Committee of the House of Commons as not being 'child focused'.⁵³³ While the Family Justice Review Panel placed strong emphasis on the avoidance of delay in making decisions about children's lives,⁵³⁴ Masson et al asserts that it is of equal importance for the right decisions to be made in respect of children who are subject to court proceedings.⁵³⁵

⁵³⁰ C Beckett, J Dickens and S Bailey, *Concluding Care Proceedings within 26 Weeks: Messages from the Evaluation of the Tri-Borough Care Proceedings Pilot* (Centre for Research on Children and Families University of East Anglia 2014).

⁵³¹ C Beckett, J Dickens and S Bailey, *Outcomes for children of shorter court decision-making processes: A follow-up study of the Tri-Borough care proceedings pilot: Final Report* (Centre for Research on Children and Families University of East Anglia 2016) 38.

⁵³² Children and Family Court Advisory and Support Service (Cafcass) *Operating Framework* (Cafcass 2014).

⁵³³ Justice Committee (n 528) para 199.

⁵³⁴ Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice, Department for Education and the Welsh Government 2011) para 2.9.

⁵³⁵ Masson et al (n 525) 8.

The purpose of introducing the 26-week rule was to reduce delay, which is both credible and in the child's best interests, as cases were previously taking one to two years to complete.⁵³⁶ Masson and colleagues highlighted several areas contributing to this delay including, concerns around the level and nature of Guardians' workload,⁵³⁷ which limit the amount of time and direct work undertaken with children (see Chapter 2). However, the selected arbitrary period of 26 weeks has thrown up concerns and created in some cases, tensions for judges in their practice. It is an area that brings together the tensions and conflicts between political policies, legal principles and judicial values.

The previous coalition Government made it one of their priorities to increase significantly the number of children in the care system placed for adoption and to reduce the length of time it takes to assess and approve prospective adopters.⁵³⁸ Approved adopters are now able to search and inspect prescribed parts of the Government's central adoption register, '... for the purposes of assisting them to find a child for whom they would be appropriate adopters'.⁵³⁹ This political agenda is driven by the belief that local authorities are leaving children too long in neglectful and abusive families.⁵⁴⁰ The political drive to speed up the adoption process for children in the care system has created real tensions and conflicts within public child law proceedings, with judges having to re-state the value of family life, particularly in relation to the child's birth family and their extended birth family. Such conflicts and tensions also raise questions around the judicial values of fairness, respect and the ability to listen to parties. A number of judgments have brought these concerns to the fore. In the next section of this chapter a number of cases have been chosen to show how the values of fairness, respect and the ability to listen are interpreted by judges in practice, in relation to family life.

⁵³⁶ H Laming, *The Protection of Children in England: A Progress Report* (The Stationery Office 2009) 83.

⁵³⁷ J Masson, J Pearce and K Bader, *Care Profiling Study* (Ministry of Justice 2008).

⁵³⁸ M Narey, *The Narey Report: A Blueprint for the Nation's Lost Children* (Department for Education 2011).

⁵³⁹ s 7(4)(1), with addition of s 128a to the Adoption and Children Act 2002.

⁵⁴⁰ Narey (n 538).

6.4 Judicial Perspectives on Priorities for Children in Care and Adoption Proceedings

In *Re B-S* a mother was appealing against the refusal to grant her leave to oppose the adoption of two of her children.⁵⁴¹ Although the mother's appeal was dismissed, the judge, Sir James Munby, P, took the opportunity to restate that adoption should only be explored when all other realistic options including, placement with the child's birth family, have been considered properly and discounted as not being in a child's best interests. This reflected an earlier judgment involving similar issues, by Lord Neuberger in *Re B*.⁵⁴² In the case of *Re B* the appeal application by the child's parents centred on whether the threshold criteria for significant harm⁵⁴³ had been crossed and whether the response of the Local Authority was proportionate in applying for a Care Order, the plan being to place the child in an adoptive placement. In this case the threshold criteria related to likely future emotional harm to the child, due to her mother's somatisation and factitious illness disorders,⁵⁴⁴ which could have the potential to cause the child future physical harm through excessive and inappropriate medical treatment. This was a complex case, with the first instance hearing lasting 20 days. Part of the complexity of this case was the very strong and loving relationship, observed by professionals, between child and parents, who attended all their contact sessions since their daughter was placed in foster care. The strength and genuineness of this relationship was not in dispute. The appeal was dismissed by a 4:1 majority (Lady Hale dissenting). In this case the Supreme Court found the threshold criteria had been satisfied and that the Local Authority's response and care plan was proportionate. The court felt that the child's needs and best interests could not be adequately met without the support of the statutory services. However, they also were of the view that the provision of such support would be obstructed by the child's parents.

⁵⁴¹ *Re B-S (Children)* [2013] EWCA Civ 1146.

⁵⁴² *Re B (A Child)* [2013] UKSC 33.

⁵⁴³ Children Act 1989 (n 2) s31(2) Real or substantial risk of significant harm in the future. Threshold Criteria under s 31(2) states: (a) the child is suffering or is likely to suffer significant harm; and (b) the harm or likelihood of harm is attributable to the care likely to be given to the child if a care order is not made, not being what it would be reasonable to expect a parent to give to the child, or to the child's being beyond parental control

⁵⁴⁴ Somatisation and Factitious disorders is a category of psychiatric disorders under the International Code of Diseases ICD-10-CM Diagnosis Codes - Mental, Behavioral and Neurodevelopmental disorders 2017, published by the World Health Organisation (WHO). They are characterised by the presence of physical symptoms suggesting a medical condition but cannot be fully explained by known medical reasons.

Lady Hale in her dissent from the majority judgment was of the view that there was no risk that the parents would harm or neglect their daughter. She held that the evidence did not demonstrate that a Care Order was necessary to protect the child and that no other option for protection had been explored and therefore the Local Authority's response was not proportionate.⁵⁴⁵

In contrast, in relation to a Local Authority's approach, Munby P in his judgment in *Re B-S* was quite forthright in the language he used in relation to the option of adoption. He felt it was imperative that the, 'sloppy practice' of Local Authorities failing to adequately assess all realistic permanency options for the child identified by the Court of Appeal must stop. Munby P went on to state that, '... it is simply unacceptable in a forensic context, where the issues are so grave and the stakes, for both child and parent, so high'.⁵⁴⁶ This is a clear indication, albeit implicit, of the value of family life for children and of the judicial values of fairness and respect.

In the case of *Re MM*⁵⁴⁷ a seven-year old child, who at the time, was the subject of an interim Care Order and living in foster care, when a special guardianship report⁵⁴⁸ was requested by the court, which spoke positively of the child's great aunt and uncle who prior to the proceedings, the child had unsupervised staying contact and was observed to have responded well. However, the great aunt and uncle had not been encouraged by the Local Authority to participate fully in the proceedings. The child's Guardian and the Local Authority objected to the child moving from the foster placement. The issues here were whether a further assessment of the child's needs was necessary and whether the child could remain in long-term fostering. The judge in this case refused to permit further assessment of the child's needs and directed that the child should be moved to the care of the great aunt and uncle. This judgment is yet a further acknowledgement of the value of family attachments for children and of the judicial value of fairness, based on

⁵⁴⁵ *Re B* (n 542).

⁵⁴⁶ *ibid* para 40.

⁵⁴⁷ *MM* (long-term fostering: placement with family members: wishes and feelings) [2013] EWHC 2697 (Fam).

⁵⁴⁸ Special Guardianship Orders were introduced in the Adoption and Child Act 2002 with s 14A(6) inserted in the Children Act 1989. Courts can grant a Special Guardianship Order under s 14A (6), (9) Children Act 1989.

evidence before the court in relation to the child's relationship with their great aunt and uncle, observed by professionals during staying contact periods. The judicial value of respect for a child to be brought up within their natural extended family and of the child's right to identity is evident in this case. This value accords with the spirit of the Adoption and Children Act 2002,⁵⁴⁹ the relevant sections of which will be highlighted as part of the discussion in relation to *Re C*⁵⁵⁰ later in this section.

In a case brought by North East Lincolnshire Council⁵⁵¹ in respect of a child who was almost three years old at the time of the hearing, Black J was very critical of the Local Authority social workers involved in the case for not being balanced in relation to their assessment of the placement options for the child within the extended family, namely both sets of grandparents. This lack of balance led Black J to state that they were visibly biased in favour of the Local Authority's preferred option of adoption and ignoring the positive elements of the child being placed within their extended family. Black J decided to place the child with his grandparents making the point in her written judgment that the Local Authority seemed to be looking for an almost ideal family without any problems of their own, saying that the courts are not in the business of social engineering.

This section of the chapter will conclude with an adoption case, which has been re-written from a children's rights perspective and was part of a children's rights judgment project involving three university law schools in England; Liverpool, Newcastle and King's College London.⁵⁵² The project included 28 judgments covering seven domestic jurisdictions including, 14 from England and Wales.

The case concerned a 19-year old woman who gave birth to a child E following a one-night stand. She requested the Local Authority to place her

⁵⁴⁹ Adoption and Children Act 2002 s 4(c), (f).

⁵⁵⁰ *C v XYZ County Council* [2008] 1 FLR 1294 para 10.

⁵⁵¹ *North East Lincolnshire Council v G & L* [2014] EWHC 77 (Fam).

⁵⁵² C Fenton-Flynn re-written Judgement re *C v XYZ County Council* [2008] 1 FLR 1294 in H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments from Academic Vision to New Practice* (Hart 2017).

daughter for adoption. She did not wish for the father of her child to be informed of the birth of her daughter. In the first instance hearing, His Honour Judge Taylor decided that under the Adoption and Children Act 2002 the Local Authority had no choice but to carry out enquiries about the child's extended family.

He held:

'... that when children are adopted they come to a time in their lives when they do inquire about their parentage and it would be cruel in the extreme to prevent this child having as much knowledge as possible about her background in the event that she is adopted, even if that information comes without the consent of the mother but as a result of the authorities informing themselves of the relevant information'.

He gave the mother 21 days to consider her position and directed the Local Authority to disclose the identity of the child to the maternal extended family and to the putative father if located and identified.

The mother appealed. At the time of the hearing the child was four months old.

Arden LJ held that Judge Taylor has misdirected himself in relation to the obligation of the Local Authority to carry out enquiries in this case. In her leading judgment, she states:

*'The immediate question with which the guardian and local authority were concerned was who would look after the child on a long-term basis. The inquiries had to be focused on that result.'*⁵⁵³ (para 10)

However, Fenton-Glynn in her re-written judgment held, that the above question is too narrow in its formulation and as a consequence, Arden LJ's analysis of the issue is distorted. Fenton-Glynn points out that Arden LJ seems to elevate the principle of 'no delay' above all the other welfare considerations contained in the 'welfare checklist' under s1(3) of the Children Act 1989 and therefore '... fails to take into account the multifaceted nature of the child's interest'.⁵⁵⁴

⁵⁵³ Re C v XYZ County Council [2008] 1 FLR 1294 para 10.

⁵⁵⁴ Fenton-Flynn (n 552) para 12.

E was 4 months old at the time of the hearing. Her stability and security were considered by Arden to be very important factors, and indeed a priority in this case, given her very young age. However, Fenton-Glynn's view was that to focus only on these factors, albeit important ones at this very early stage of her life, amounted to quite a narrow and short-term view of E's welfare. She felt that identifying the father was important, way beyond the issue of long-term care, in terms of exploring options for the child's future permanent care within the paternal extended family. Fenton-Glynn accorded the child's right to identity as being of equal importance. Her approach in this case was very much informed by the spirit of the Adoption and Children Act 2002, which places a high value on the importance to children of life within their birth family. Such an approach is also in accordance with Article 8 ECHR.⁵⁵⁵

For Fenton-Glynn, *'The overarching question that must guide the judge, and the question of whether enquiries are warranted, is the paramount interests of the child. Nothing more, nothing less'*.⁵⁵⁶ In addition, *'The child's welfare must be interpreted in a much wider manner than a simple focus on long-term care, to include a more holistic understanding of her best interests'*.⁵⁵⁷

Fenton-Glynn relied on the following specific sections of the Adoption and Children Act 2002:

- (4) The court or adoption agency must have regard to the following matters (among others)
- (c) The likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
- (f) The relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including
- (ii) The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure

⁵⁵⁵ ECHR Article 8 Right to Family Life

⁵⁵⁶ Fenton-Glynn (n 552) para 11.

⁵⁵⁷ *ibid* para 9.

environment in which the child can develop, and otherwise to meet the child's needs

- (iii) The wishes and feelings of any of the child's relatives, or of any such person, regarding the child

Accordingly, Fenton-Glynn in her judgment directed the Local Authority:

- a) To take steps to identify E's father, if possible. While the mother should not be coerced, the importance of this for E's right to identity, and the possibility of a permanent placement with family, should be emphasised to her, and independent steps taken by the Local Authority where the father is identifiable;
- b) To assess the father (if identifiable) and the grandparents as potential carers for E, if they indicate that they would be willing to undertake this role.⁵⁵⁸

The above cases to varying degrees reflect the high value and respect judges place in their decisions on children remaining, if possible and appropriate, within their birth family including the wider birth family. They also reflect the values of fairness and justice in respect of children and parents, who often are faced with pressures from powerful professionals and agencies involved in court proceedings, who may have quite different agendas in relation to what they consider the best interests of the child. This is an area that concerns Eekelaar and Maclean:⁵⁵⁹

'There must also be concern that the values of the legal process, namely holding public authorities to account, showing respect for all individuals by treating them fairly and upholding the human rights primacy of seeking family reunification may be under threat'.

This threat is further exacerbated by the introduction of the 26-week limit on care proceedings,⁵⁶⁰ which can limit the amount of time available to the Local Authority to explore adequately other options for the child within their extended family network.

⁵⁵⁸ Fenton-Glynn (n 552) para 38.

⁵⁵⁹ J Eekelaar and M Maclean, *Family Justice: The Work of Family Judges in Uncertain Times* (Hart 2013) 154.

⁵⁶⁰ Children and Families Act 2014 s.14(2)(ii) (26-week rule).

Eekelaar and Maclean go on to say that there is a ‘... real concern that the ethos that respects these values of the legal process is seen as a source for criticism, and that solutions are seen almost entirely in terms of managerial efficiency’.⁵⁶¹ This view is evidenced clearly in the cases of *MM*⁵⁶² and *North East Lincolnshire Council*.⁵⁶³ The latter point made by Eekelaar and Maclean highlights the conflict that can arise between the values of ‘managerial efficiency’, for example, adoption being seen as a final and neat solution and one that is efficient financially, and achieving the best outcomes for children who are subject to care and adoption proceedings. In the research for this thesis, judges reflected on these issues and conflicts, particularly those tensions between adult-driven agendas and child-centred practice.

6.5 Putting Judicial Values into Practice: a question of resources

The introduction of the 26-week rule was an issue that emerged in this research, with one County Court Judge stating:

‘I will do my level best to achieve that 26-week timetable, particularly when it comes to the younger children, but there may well be times when that is not achievable. I have always worked on the personal basis, that if it takes me three days, three weeks, three months, to deliver a decision, which is in the interests of the child in accordance with my conscience, that is what will happen’. (County Court Judge)

This County Court Judge went on to highlight real issues about the lack of resources in children’s services, particularly in relation to the assessment of children’s needs for the court:

‘So much assessment seems to me to be resourced based and I worry about the emphasis, with Local Authorities in particular, going towards how much money have we got, therefore how much can we afford to spend, therefore how much input can we put into the area. There is an awful lot of resource input issues going on here.

They are under pressure of timescales. I am driven by time constraints; they are driven by time constraints. It almost seems as if it is some kind of a great race to the finish, but, at a higher level, this is

⁵⁶¹ Eekelaar and Maclean (n 559).

⁵⁶² *MM* (long-term fostering: placement with family members: wishes and feelings) [2013] EWHC 2697 (Fam).

⁵⁶³ *North East Lincolnshire Council v G & L* [2014] EWHC 77 (Fam).

all justified because the interests of children shouldn't be delayed. Are we going to run everybody ragged in the process? A quick decision is not necessarily a child focused or the best decision or the one to be relied upon. As long as the decision is delivered quickly that seems to be what will do and that worries me. I'm not advocating slow decisions. Children are not tins of peas coming off a production line. Every case, every child is unique'. (County Court Judge)

Another County Court Judge highlighted potential conflicts between the legal system, driven by managerial expediency and the principle of no delay and the child's best interests:

'I think the 'no delay' principle is very important for a child's best interests, because I think in the past, far too much emphasis was given to the case proceeding, either in the interests of the lawyers or in the interests of the parents, and not in the interests of the child. I think therefore that there has been a lack of rigour applied to the enforcement of the 'no delay' principle. I have seen examples in courts, where cases just proceed along at a snail's pace and nobody really gives any thought to whether or not that particular pace is the need of the child. Having said that, I can think of those cases, far fewer, whereby delay in fact is better for the child, because if a child, for example, has an obvious preference to live with a parent rather than being in foster care, then allowing more time for the parent to either achieve or sustain necessary changes, in order for that child to then return safely to live with that parent, is in fact the child's best interests, and occasionally the need to progress a case, particularly to progress a case in the light of a timetable, such as, for example, twenty six weeks, may well act in conflict with the child's interests, because again the imposition of an arbitrary timetable, cases should conclude within a specific period of time, may be wholly outside the interests of the child in that regard'. (County Court Judge)

For one District Judge, the Judicial Oath takes priority when it comes to making a decision about a child's life:

'The needs of the child must come first. I couldn't live with myself if I was to go home thinking, well, I couldn't get this case completed within 26 weeks because important evidence, which was probably going to have some really life changing impact on this child, is going to take longer, so therefore I would say, "No, we are not having it", I couldn't do that. To me, I would have difficulty I think in reconciling such an approach with my Judicial Oath'. (District Judge)

The above judicial views of the reality of their decision-making approach and practice, places the child firmly at the centre of proceedings, even if that means going against formal timescales and managerial efficiency. However, the real lack of adequate resources was identified by one of the participating County Court judges as a factor, which militates against justice for children and child-centred judicial decision-making:

'My own experience is that it would be achievable (26 weeks) if there were resources that were put into the system to allow the agencies to comply, but we are in a position where we are trying to do it without any additional resources. The Local Authority is telling us that they can't comply. We are making them comply but we are having shoddy assessments from them. The Official Solicitor, if he is required to come in, they are having delays there. Cafcass is struggling at times with meeting deadlines and the analysis that we are getting from Cafcass is often poor. We don't have any difficulty in terms of them been allocated but it is the quality of ability to analyse the issues in the case. There are two contributors to that: experience, we are getting younger Guardians who are not as experienced and we are getting Guardians who, on the face of it, have insufficient training in expectations in respect of court proceedings'. (County Court Judge)

It is a real challenge to disentangle and unpick judicial values amongst these tension and conflicts, given that such values are at times influenced and constrained by political ideologies and the realities of limited and reducing resources, within the family justice system.

6.6 Judicial Values in Practice: A collaborative endeavour

As stated at the beginning of this chapter, judges do not work in isolation. They work with and are dependent upon a wide range of professionals to inform their decision-making. The quality of their decisions depends on quality of evidence and information provided by these professionals and the parties involved in the case. For Hedley, an experienced retired High Court judge, the aim is to find out as much of the truth as possible in each case, based on consistent and accurate evidence and information. However, Hedley acknowledges that achieving this aim can be difficult in situations

which are highly charged emotionally⁵⁶⁴, none more so than in care proceedings, where the possibility of a child being removed permanently from their family.

Regarding the public child law system, Fortin describes a system that is adversarial in nature⁵⁶⁵, ‘Indeed when battle commences, the parents and their advisers, social workers and even the judiciary themselves, take up such formalised positions that the child at the centre is treated very much as a passive pawn’. This issue was also highlighted in the research for this thesis, with one County Court Judge stating:

“I think there is still, even today, a residual view still lingering in the system that goes back to the idea of children been seen and not heard. That decisions are made by people who understand these things and that other people know best. We have not really fully grasped the idea that children are individuals with rights, who should be allowed to participate in decision-making processes in a way, which is appropriate for their age. We tend to dismiss that and think well, they don’t know, they are only children”. (County Court Judge)

However, Fortin makes the point that, ‘Sadly, even when they are listened to, abused children may regret disclosing their abuse, feeling ignored and ‘walked over’ by those who try to protect them’.⁵⁶⁶ She attributes such an outcome to the, ‘speed with which decisions to intervene are sometimes taken in the early stages, leaving practitioners feeling that they have no time to provide the child with explanations’.⁵⁶⁷

All cases coming before the court originate in the child protection system. It is appropriate, therefore, to look at Munro’s view of the child protection system. Munro in part one of her review of the child protection, carried out an analysis of the system.⁵⁶⁸ She found that an increase over the years of bureaucratic rules and detailed procedures was taking from the time practitioners could spend with children and their families, while Willow found

⁵⁶⁴ Hedley (n 512) 21.

⁵⁶⁵ J Fortin, *Children’s Rights and the Developing Law* 3rd Edition (Cambridge University Press 2009) 578.

⁵⁶⁶ *ibid* 588.

⁵⁶⁷ *ibid*.

⁵⁶⁸ E Munro, *The Munro Review of Child Protection: Part 1: A Systems Analysis* (The Stationery Office 2010) 7.

the safeguarding system gave low priority to developing good quality relationships with children and was, ‘... frequently omitted’.⁵⁶⁹ Munro also found that there was much less attention being given to the skills practitioners needed to engage with children. This has led to social workers having a real difficulty in prioritising their time with children to understand and assess their circumstances. Munro feels that, ‘Building strong relationships with children and families with compassion is crucial to reducing maltreatment, but trust needs to be placed with care, and ‘respectful uncertainty’ towards families, and interest and curiosity in their narratives, needs to be part of the practice mindset’⁵⁷⁰ and Local Authority records, ‘... should provide an accurate reflection of the child’s experiences, history and observations’⁵⁷¹.

In the second part of her report Munro looked at the child’s journey through the child protection system⁵⁷² and found that agencies assumed a level of certainty in working together, which just did not exist in the field of child protection.

In her final report, which put forward a model for a child-centred system, Munro placed great emphasis on forming relationships with children and their families and felt that in the current system this important area had become ‘obscured’.⁵⁷³ She sees children as a, ‘... key source of information about their lives and the impact any problems are having on them in the specific culture and values of their family’⁵⁷⁴.

In this research one County Court Judge stated in relation to children being a key source of information about their lives:

“They are in one sense the prime witnesses, they are the ones who have known from day one what has gone on and they feel”.

⁵⁶⁹ C Willow, ‘Putting Children and Their Rights at the Heart of the Safeguarding Process’ in H Cleaver, P Cawson and S Gorin, *Safeguarding Children: A Shared Responsibility* (Wiley Blackwell Jones 2009) 112.

⁵⁷⁰ Munro (n 293) 18.

⁵⁷¹ *ibid* 58.

⁵⁷² E Munro, *The Munro Review of Child Protection: Interim Report: The Child’s Journey* (The Stationery Office 2011a) 90.

⁵⁷³ E Munro, (2011b) *The Munro Review of Child Protection: Final Report: A Child-Centred System* (The Stationery Office 2011b) 8.

⁵⁷⁴ *ibid* 25.

For another County Court Judge the principle of paramountcy and judicial accountability to children and their families are very much linked and requires that the relationship between the child and the system is given priority in the context of judicial practice.

“We are accountable to the families in these proceedings and if the child’s welfare is paramount then we are accountable to the child above all else”.

The above picture of the child protection system has serious implications for the public child law system and for the judges who work within it. The quality of services provided to children by the Local Authority inevitably impinge on the reality of judicial practice and on the quality of judicial decision-making. It was an issue that was highlighted in this research:

“I think it is inevitable however conscientious you are, that the busier you get after a certain point the quality of your decision-making declines because you do not have the time to take into account every feature. You do not have the capacity to investigate and the more pressurised the system becomes, after a point, the quality of the decision-making goes down. Our responsibility in any given case is to say, stop, this needs more time. Above the statistics or the Government guidelines, that it is our responsibility. Of course your willingness to do that, your ability to do that is constrained by the amount of pressure that there is around”.

It is clear that judges in this research are having at times to base their decisions on less than complete or inadequate information, often hurriedly collected and assessed, and the lack of available appropriate resources. This undermines the judicial values of fairness and justice. Stalford and Hollingsworth make a pertinent point in this regard: ‘The judge’s ability to hear and reflect in his or her judgment an individual’s experiences (including an individual child) is therefore constrained by the version of the facts and the evidence presented’.⁵⁷⁵ Judges in this research acknowledge a number of these factors. One County Court judge said:

⁵⁷⁵ H Stalford and K Hollingsworth, ‘Judging Children’s Rights: Tendencies, Tensions, Constraints and Opportunities’ in H Stalford, K Hollingsworth and S Gilmore (eds) *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice* (Hart forthcoming 2017) 37.

“We are doing our best, but it is far from straightforward simply because of lack of resources and by that I mean court time, I mean social work time, I mean Guardian time, I mean solicitor’s representing parents, many of whom, parents that is, are inadequate. Can they comply with all these timescales? so that ultimately you arrive at a fair child-centred decision. It is a real challenge. The conflict, if you like, are these excellent principles, excellent guidance, excellent working practices coming up against reducing resources. That is the principal conflict”.

Another County Court judge in relation to the child’s right to respect for their family life under Article 8 ECHR stated:

“You have parents who, given time beyond 26 weeks, could probably achieve enough parenting; assessments, all sorts of input from support services; psychological, social, family therapy and so on that could enable the child to return to the birth family, but not within the timescale for the child, which is the 26 weeks That is a tension straight away between the right of the child to be brought up within its birth family and yet the delay that might achieve that for the child, being such that the child can’t wait”.

For one County Court judge the lack of resources presents a real conflict for the application of the judicial value of fairness:

“The question of what support is offered to families by Local Authorities with resource issues is a real conflict because sometimes you think, “I could put this child back into, say with a family with a learning-disabled parent, but I know that the level of support the experts tell me they need will not be provided because there isn’t a resource for it. I think that is a practical issue. The idea of working in partnership with families requires some resource that isn’t always there”.

The uneasy relationship between resources and the threshold of significant harm for one County Court judge raised many challenging and searching issues for judicial decision-making:

“The case law on threshold criteria under Section 31 of the Act (Children Act 1989) before the State is justified on intervening, emphasise the broad range of eccentric parenting that should be seen as eccentric parenting rather than harmful. If you couple that with the extreme shortage of social child service resources, then that result is that there is not intervention in a vast range of families where there ought to be intervention and where intervention would improve the

outcomes for the children. We have struck a balance. On the one hand, it is an economic balance, we do not have the money to spend on it and on the other it is a principled balance. We have decided that parents can beat their children to a degree so long as they don't go too far that inhibits best outcomes for children, because otherwise you may have to take (20%) of children from their parents. You would also intervene a lot earlier than you do at the moment".

The picture emerging from this research is one of system-centred priorities, which are often determined by financial considerations including politically driven initiatives. This is an issue touched on by Stalford and Hollingsworth: 'Even when there is a willingness to allude explicitly to children's rights, it is often with a view to legitimising decisions that reinforce adults' or the State's interests rather than children's rights. Scratch beneath the surface and we often find that it impacts only superficially on the reasoning and outcome'.⁵⁷⁶ In the end, such priorities take over and the priority that should be given to the paramountcy of the child's welfare⁵⁷⁷ takes second place.

6.7 Conclusion

The material cited in this chapter and the findings of this research indicate a less than child-centred approach in relation to children's best interests and welfare. As discussed in chapter 2, the reality of Local Authorities having to cope with severe cuts to their budgets means that they do not have adequate resources to provide a service that is primarily focused on meeting children's needs. Children who are subject to proceedings are amongst the most vulnerable in our society, yet the systems that are meant to be protecting and safeguarding their interests find themselves lacking the resources to carry out their duties and responsibilities. Judicial decision-making is having to accommodate an ill resourced child protection system and is itself a system depleted of resources as a result of cutbacks in the legal aid budget. In such an environment, it is a real challenge at times for the judiciary to apply judicial values, such as fairness, justice and respect. In the research for this study, judges were very clear about their role in upholding these core values,

⁵⁷⁶ Stalford and Hollingsworth (n 575) 21.

⁵⁷⁷ s 1(1) The Children Act 1989.

despite the constraints imposed by statutory timescales and a lack of resources within the family justice system. However, they also acknowledged an unease in the reality of their judicial practice, at having to make decisions on children's best interests and welfare, where the number of available realistic options are reduced significantly, given the lack of resources. Such restrictions inevitably take from and dilute the application of the judicial values of fairness and justice in relation to children and their families including, the right to respect for family life under Article 8 of ECHR. This research has found that the experience of judges is, at times, one of tension between achieving their judicial obligations, their personal value system and the challenges that the child protection system may present in terms of process and resourcing of judicial decisions. Such tensions can contribute to less than child-centred outcomes.

Enabling children to feel more involved in proceedings and to be assured that the Judge is aware of their true wishes and feelings, is becoming more obscure given the current operating framework of Cafcass, limiting direct work with children to 'a safe minimum'.⁵⁷⁸ The child's Guardian is the ears and eyes of the court. Given the significant reduction in time spent in direct contact with children, there is a real danger of Guardians producing shallow rather than in-depth assessments of the children's circumstances and needs. Doing the 'safe minimum' does not facilitate forming a meaningful relationship with children, an essential requirement of a child-centred system highlighted by Munro in her review of the child protection system.⁵⁷⁹ This approach by Cafcass has also been criticised by both the All Party Parliamentary Committee on child protection⁵⁸⁰ and the Justice Committee of the House of Commons,⁵⁸¹ for not being child focused.

⁵⁷⁸ Cafcass (n 350).

⁵⁷⁹ Munro (n 293).

⁵⁸⁰ All Party Parliamentary Committee on Child Protection (n 527).

⁵⁸¹ Justice Committee of the House of Commons (n 528).

Chapter 7

Towards a Child-centred Public Child Law System

7.1 Introduction

This chapter considers how we move towards building a child-centred system that is rights-based and is inclusive of and transparent to children. A system that is centred on the child's needs, wishes and feelings, rather than on the needs and priorities of the system. Given the very real distance between the child and their proceedings, the voice of the child needs to be an integral, valued and respected part of the public child law system and of the paramountcy principle, which underpins this system. A child-centred system needs also to be a family-centred system, as the child's family is the centre of their world, albeit a neglectful and abusive world. Given the high level of vulnerability of a child who is subject to proceedings, the system needs to be a listening one, with the capacity and resources to reflect. Such reflection needs to pervade the entire process of pre-proceedings, the proceedings themselves and post-proceedings, guided and informed by research.

The focus of the chapter will be on moving from a system-centred system to a system where the child occupies actively a central position at all stages of their proceedings. The barriers and enablers to hearing and empowering children to participate directly in proceedings are explored and discussed, through the perspectives of judges in this research including their views on the training needs of professionals working in the system, with the aim of moving to a default position where the choice for children of direct participation (*expressing their views directly to the judge*) is a statutory requirement. The chapter then puts forward a model for child-centred decision-making followed by an example of a case revisited by the researcher and re-imagined through the lens of a children's rights perspective.

7.2 From system-centred to a child-centred system

A child's competence or more particularly, their perceived lack of competence from the perspectives of adults, is in evidence throughout the history of childhood.⁵⁸² Assessment of competence based on their age and level of understanding of their situation and circumstances, (see Chapters 2 and 4) has been and remains the yardstick by which we assess the level of importance given to children's views of their lived experience.

Although the above reality is a very real obstacle to moving to a child-centred system, judges in this research point to potentially productive ways forward. A county court judge put forward the idea of professionals involved in the system being informed regularly by children who have gone through the care system.

"I would start with much more involvement of children who have gone through the care system because they can inform everybody who is involved in the process about the pitfalls. I see a care plan, for example, and it all looks very good and I know that in six months' time the situation for that child may be completely different and you need more input from people who have gone through the system, who know what actually happens. What happens are the multiple changes of placement. The rate of adoption breakdown is very high but we are always told that there is a loving family out there for this child, despite his extreme difficulties and behaviour, it is all going to be a golden future and it isn't. I would involve children who now would be young adults who have gone through the care system and who have a different perspective on how good the outcome was for them. I would bring them in to help us to understand better what was likely to happen. You cannot bring people like that into individual cases but there could be a way, I can't think what it would be, of bringing into consideration what actually happens".

Another county court judge felt that the system needs to be more open and accessible to both children and parents:

"I would also like the system to engage more with young people We need to empower young people to report concerns without fear of

⁵⁸² H Cunningham, *Children and Childhood in Western Society since 1500* (Pearson 2005).

repercussions and, having reported it, it is essential that those concerns are dealt with properly". (County Court Judge)

This same judge felt the system also needs to become more inquisitorial rather than adversarial, which is very much in line with the spirit of the Children Act 1989,⁵⁸³ with the following caution:

"That is not to say that you would get rid of the parents' rights to representation. They raise things that you haven't thought of. It is wrong for any of us to think that we have all the answers. Counsel and solicitors, especially for the children, often raise things". (County Court Judge)

An important element of the child-centred model proposed later in this chapter will reflect the above elements put forward by judges. The model is about creating a system that is more inquisitorial and more inclusive in approach through empowering facilitating all parties to contribute to finding the best way forward in meeting the best interests of the child.

The reality is however, '... although, by statute, the welfare of the child is our paramount concern, the child is, by and large, completely invisible in court'.⁵⁸⁴ Sir James Munby, President of the Family Division of the High Court, has stated that regardless of the availability of the child's Guardian and the Local Authority social worker to communicate the child's views:

'... it is surely essential that, if the child wants to, the child should be able to communicate with the court independently, saying whatever the child wants to say and using whatever means the child is most comfortable with ... And this should surely extend to the child being able to see the judge face to face if that is what the child wants'.⁵⁸⁵

Touching on the factor of age in relation to children giving evidence, Munby P maintains that: 'The idea that family judges should be seeing or hearing evidence from children only if they are or will soon be teenagers has ceased

⁵⁸³ Department of Health (1991) *The Children Act 1989: The Care of Children – Principles and Practice in Regulations and Guidance* (Her Majesty's Stationery Office 1991).

⁵⁸⁴ J Munby, 'Unheard voices: the involvement of children and vulnerable people in the family justice system'. The annual lecture of The Wales Observatory on Human Rights of Children and Young People at the College of Law, Swansea University delivered on 25 June 2015.

⁵⁸⁵ *ibid.*

to be tenable, if it ever was'.⁵⁸⁶ Munby's perspective of a child's position in proceedings is one that potentially could facilitate our present public child law system becoming one that welcomes and values children's contribution to their proceedings and that their contribution is considered as an integral part of the decision-making process throughout, from investigations to court hearings.

In this research, judges felt that for an approach to be child-centred in nature, requires an attitude change. To embed such an approach in both judicial thinking and practice, a District Judge reflected:

"I do think that we all need to have some sort of humility about that and to be reminded of the fact that removal of a child into care is a very, very traumatic thing for the child. It is no guarantee that the child will thrive because the care system, whether it is a foster home, whether it is in an adoptive family, is fraught with its own difficulties".
(District Court Judge)

A starting point in creating a child-centred approach, for one High Court Judge, is to recognise the nature and reality of proceedings:

"I think I would start by recognition that child public law is necessarily a very bitter business, in the sense that what the State is doing in increasing numbers of cases is the permanent removal of children from families. It is very difficult when that is what is happening for it to be friendly and charming. It is a very bitter business. I think we need not to lose sight of that". (High Court Judge)

A county court judge summarised where the focus should be:

"The important thing first of all is to get it right. We are making huge decisions on behalf of our children and clearly it is very important that the child understands what is happening, why it is happening and has input into that". (County Court Judge)

In addition, for another county court judge, the quality of such decisions is an important factor:

⁵⁸⁶ Munby (n 583).

“I think it is inevitable however conscientious you are, that the busier you get after a certain point the quality of your decision-making declines because you do not have the time to take into account every feature. You do not have the capacity to investigate and the more pressurised the system becomes, after a point, the quality of the decision-making goes down. Our responsibility in any given case is to say, stop, this needs more time. Above the statistics or the Government guidelines, that it is our responsibility. Of course, your willingness to do that, your ability to do that is constrained by the amount of pressure that there is around”. (County Court Judge)

Munro also felt that there needs to be a clear focus on children’s best interests throughout a child’s journey through the system. She found in relation to social work assessments, ‘limited accounts of the child’s experience’ rather than an accurate and balanced story of the child’s life including, their experiences and history.⁵⁸⁷ As the starting point for proceedings, this aspect of the process should be focused on the child’s best interests.

Judges in this research felt that the public law process itself should be a listening, just and friendly one and one that is transparent and accountable to all parties including the child, with decisions being based on the child’s needs. Their priority in terms of being child-centred in their approach was to make the right and just decision in respect of the child, based on the child’s needs and welfare. However, Judges acknowledged that the court’s timetable, namely the 26-week time limit for proceedings⁵⁸⁸ has the potential to limit the child-centred nature of proceedings. Masson also acknowledged that limited resources combined with the pressure of completing cases within 26 weeks may make the task of delivering a humane system very difficult.⁵⁸⁹ This issue has been explored and discussed further in Chapter 4.

A county court judge acknowledged the need for judges to reflect on their practice and decision-making and suggested the following exercise:

⁵⁸⁷ E Munro, *Munro Review of Child Protection – Part 1: A Systems Analysis* (The Stationery Office 2010) 58.

⁵⁸⁸ Public Law Outline (n 368).

⁵⁸⁹ J Masson, ‘Third (or fourth) time lucky for care proceedings reform?’ (2015) 27 (1) *Child and Family Law Quarterly* 22.

“If one conducted a meditative exercise and sat a whole load of Judges down in a very quiet room on comfortable bean bags and said, right, shut your eyes. Think your way back to when you were 7 or 8 or 9 or 10 and bad things happen to you and all of a sudden you found yourself in foster care; strange home and environment. If someone did that with us and then got us to the bit about court proceedings, what we tell children at the moment, it might just get us thinking, why do we do it this way?”.

Guardians, who under legislation,⁵⁹⁰ are entrusted with the responsibility for representing the voice of the child in proceedings, need to develop a close and meaningful relationship with the child in order to provide the court with accurate and up-to-date analysis of the child’s circumstances and needs. However, the following interview extract outlines in some detail issues around the quality of such analysis:

“What you need to see from a Guardian in the initial analysis, what you need to see from the Local Authority in their initial evidence is, what is the prospect of change? In the 6-10 weeks that we have got, what are we looking for in terms of indicators that these parents may be on board with change? The vast majority of cases are neglect cases. In some instances, it is not like that. What we are getting is narrative. In the case of the Guardian’s analysis, sometimes it is just tick box and that is it. Whereas, 18 months ago I would be waiting to see what the Guardian’s analysis was because this would highlight issues for me from the perspective of the child. What needed to be done? Did the child need work? Should there be any additional support put in for the child? What does the child understand about the proceedings and about the process? I am not getting that now. Sometimes the last document I will read will be the Guardian’s analysis, because it is not going to tell me anything. (County Court Judge)

Reflecting on the reality of the relationship between the child and their Guardian and the impact of this relationship on the child’s participation, another county court judge stated, *“I would very strongly say that Guardians have lost the direct link to children. How can children feel part of it?”*

⁵⁹⁰ s 41 The Children Act 1989.

In relation to the realities of Local Authority practice, the following extract is the experience of one county court judge:

“I can get a case where you will have five, six, seven social workers in the life of a case, that is not child-centred. That is the opposite of child-centred. What will happen is, they will be with the children in need team, then on issue they will be with an allocation team and then on the making of the first ICO (Interim Care Order) they will go to the looked after team, then after the first LAC (Looked After Child) Review they will go to another team, then that social worker will be an agency social worker, we have a real problem with agency social workers; who are very transient. During that term you will probably find there can be 2 or 3 agency social workers who will go”.

“I have had in a space of 5 months, after a final Care Order had been made but had gone up to the Court of Appeal, I had 4 social workers, none of who had read the file, none of who had read my judgement, so they were making decisions in relation to this child without any proper understanding of the complex issues in the case. That is not unusual but there will be no consistency in terms of either the social worker or at times, the team manager. I think that undermines any child-centred way of working”. (County Court Judge)

Continuity of professionals in a child’s life, time spent with the child and close and meaningful relationships, are three elements considered essential by judges for a child-centred way of working with children. Research among children in the looked-after system which looked at the impact of a number of the above elements found they had a significant impact on the well-being of children.⁵⁹¹ 611 children and young people from the looked-after system took part in this research, covering six local authority areas in England. The majority (77%) of the children and young people were living in foster care with 16% in kinship care placements, 3% in residential care and 4% in a variety of other placements including, mother and baby homes, semi-independent living, hostel accommodation, or living with a parent.

⁵⁹¹ J Selwyn and L Briheim-Crookall, *Our lives Our Care: Looked after Children’s views on their well-being* (University of Bristol and Coram Voice 2017).

The purpose of this study was to obtain children's perspectives of their sense of personal well-being. The term well-being in this study means how children feel in terms of their happiness, life satisfaction, life having meaning.

Children were asked about the number of social workers they had in the previous 12 months. 69% of the young people had had more than one social worker during this period, which included 31% having had three or more social workers and 38% having two social workers in the previous year.⁵⁹² In response to the question about what would make their care better, a striking response from one young person who stated: 'By not having 14 social workers in three years'.⁵⁹³ The majority of children felt their care would be better if they could retain their social worker. Regarding their involvement in decision-making, children who did not feel involved in decisions made about their lives were, '...three times more likely to have low well-being in comparison with those who felt included most or some of the time.'⁵⁹⁴

Among the recommendations of the report, is the importance that needs to be attached to children having a constant trusted adult in their lives, particularly children in the look-after system, where they may have no contact with either parent or have a number of changes of social worker. Children in this study found they were unable to contact adults when they felt they needed help and support,⁵⁹⁵ which contribute to heightened levels of vulnerability and uncertainty about their future lives. The children who took part in this study felt that their social worker was an important person in their lives and where frequent changes of social worker occurred, this caused the children great upset. The report recommended that: 'Stability of social workers should be a national priority, as children in all local authorities reported frequent changes of workers'.⁵⁹⁶

⁵⁹² Selwyn and Briheim-Crookall (n 591)11.

⁵⁹³ *ibid.*

⁵⁹⁴ *ibid* 30.

⁵⁹⁵ *ibid* 33.

⁵⁹⁶ *ibid* 32.

These findings along with data from this research indicate that the importance and priority given to such elements are being affected adversely by a lack of professional time and resources available for children in the system and therefore their importance in relation to children's lives is not receiving adequate attention, resulting in a less than child-centred approach to working with children (see Chapter 4).

7.2.1 Judicial perspectives of what a child-centred system should look like

In this research, Judges were asked to outline their vision of a child-centred public child law system, notwithstanding the realities of significant budget cuts and the lack of resources. Giving children unique individual attention throughout the process was seen as an essential element of a well-resourced child-centred system:

“To direct assessments and to be able to expect that people only had to do what needed to be done at the time and didn't have to balance lots of other cases at the same time. Every individual case got the unique attention of everybody who was involved in it, where children, given their ability to participate, in terms of age, intellect and the rest, would participate”. (District Judge)

A county court judge reflected at length about a total mind shift required to create a child-centred system:

“I think in the first place we probably have a total mind shift and decide a child should be present at every hearing, unless there was a reason for them not to be. That may well be up to a certain age, that they are too young, much too boring for them or whatever. Rather than starting on the basis that it is pretty surprising to see the child there, maybe we should start the other way round and say, “Well, actually the case is all about this child, so the child should be there unless there is a reason for them not to be”. I can see in many cases there would be, there may be all sorts of sexual or personal details that are to be given. That would be perhaps a mind-set that which would cause us to look at things differently. We ought then to have a system that requires the Judge to create for any hearing that involves the child, something appropriate to the age of that child, to tell the child where the case has got to and why. It might even be appropriate to start before that and say that at the very point of social work involvement if the child is of any age of understanding, just as one would talk about

doing a life story book or something at the end of the case, at the start of the case may be the child needs to have a bit of information as to why they are not living with Mummy and Daddy and rather than that being something that the Guardian has always had to do and had to explain, maybe that should be the court's function as well to provide some sort of explanation of that. Perhaps if we had the money, what we would do is, we would always have the facility for the child at least to be on the video link. The child might want to be there. That also would cover some of the problems; perhaps of bits of evidence not being appropriate for the child to hear about what Mummy or Daddy are supposed to have said. The Judge would be saying, "Well, John, we are just going to have to turn off the television for a minute or two and that will give you a chance just to have a bit of a break because I need to discuss something with Mummy and Daddy's barrister before we carry on". That would be a relatively simple thing to do".

An experienced magistrate from the family proceedings court felt it was important in creating a child-centred system and maintaining the child-centred nature of the system, that feedback from the child following the completion of proceedings, is sought, valued, welcomed and acted on. This magistrate also focused on the need to keep in mind as part of this process, the child's emotional needs when they reach adulthood:

"That children were interviewed after the process, however they do it and however it should be done, and would feel that they have been involved, that they understood what was going on, whether they were informed orally or otherwise and they knew what was being done at that court hearing and they understood in terms of their life-story, why the decisions were made. For example, if I am involved, if we are writing reasons for a Care Order or a Placement Order, then you are bearing in mind that somebody at the age of 18 may want to read that and they want to know that their mother loved them and that their parents were involved but that these were the reasons for their decision at the time and that needs to be borne in mind, so that they can access them and help them have things understood". (Magistrate – Family Proceedings Court)

Improving the quality of the current system by giving judges more time on cases to enable them focus more on the child was crucial for one county court judge, as was continuity of judges in cases in relation to improving the child's experience of the process:

I would have more time to read the papers earlier on in the case, get to grips with the issues in more detail of pre-directions hearings. Start

taking well informed decisions without just simply rushing through a directions hearing. Instead of allowing two hours for a hearing, why don't we allow half a day so that we can spend more time on it. If we were improving the quality of the system, give more time to the Judges to work on the cases, that would obviously help, because we could focus more on the children, we could do more work in advance. Let us ditch half hour hearings. Let us make every half hour hearing two hours so that the Judge can really sit and read and think about it and do much more work and not just rely upon the barristers and the solicitors presenting the case for us. We have a lot of difficulties with getting the same Judge for the same case all the time because a lot of different Judges, lot of different cases and sometimes it is expedient for the cases to be heard by any Judge, just to get the case listed. Judicial continuity definitely improves the experience for all concerned and in particular the children". (County Court Judge)

Having a system that is less adversarial and more inclusive of children and their families was put forward by one judge as a way of achieving a more child-centred decision-making process:

"I would like to see the adversarial elements taken out of and segregated from the inquisitorial aspects of welfare. You have got to understand parents. Human beings being human beings and human nature is human nature, there needs to be a much less adversarial and much more inquisitorial process at the outset in the form of some sort of group conference. There needs to be a Judge involved, a pre-proceedings process, where everybody is able to sit round and work out what the main points are and the children participate and are represented". (County Court Judge)

In the same vein and recognising the need for proceedings to be fair for all parties involved, in accordance with Article 6 ECHR, while at the same time keeping the focus on the child's central position in proceedings, another county court judge proposed:

"A Judge led inquisitorial system rather than the adversarial system. The ability of parents to challenge a plan to make assessment demands before a decision is made, all of that is right and that is important. If it is going to be a child-centred system, then we have to put the child in the centre and that necessarily moves away from the adversarial system, where the parties are in control". (County Court Judge)

However, the above judge also acknowledged the resource implications for such a system:

“Personally, if you are going to do the Judge led inquisitorial system, then you need to be spending at least 80% of your time doing this sort of work because that is how you develop the evaluative skills, the knowledge, the ability to predict the evidence that you are likely to need, your confidence to challenge what you are presented with and your ability to drive the case. Sometimes there isn’t time to reflect”.

The following proposal by a district judge for more direct involvement of judges in cases to facilitate a more child-centred approach and process, is a radical departure from the present system and may not sit well with human rights legislation in relation to the rights of other parties:

“I think you probably take the court to the children. The court wouldn’t be a court room, like this, you would go down to the local primary school or youth community centre and hold the court somewhere like that. You would probably spend time with the child yourself as the Judge, getting to know the child a bit and talking to them. It would be much more inquisitorial. It would probably throw out many of the Human Rights, right to a fair trial aspects that we have got. If a child could design it, it would really be a radical change. You would make it more informal and more going to the child, where the child was, probably the Judge and let us say a Guardian to talk to the child together. It is more like the French system, more like the Scottish system, that is, more less human rights based. You would be taking people’s evidence, perhaps taking the parents’ evidence in court in a formal way but you would also add on a lot more child-centred work that happens. You might spend a day a week going to see children. That would be part of involving them and part of really child-centring it”. (District Court Judge)

A county court judge in their response outlined a number of quality issues in relation to practice within the system that prevents it from being child-focused:

“My own experience is that it would be achievable if there were resources that were put into the system to allow the agencies to comply, but we are in a position where we are trying to do it without any additional resources. The Local Authority is telling us that they can’t comply. We are making them comply but we are having shoddy assessments from them. The Official Solicitor, if he is required to come in, they are having delays there. CAFCASS is struggling at times with meeting deadlines and the analysis that we are getting from CAFCASS is often poor. We don’t have any difficulty in terms of them been allocated but it is the quality of ability to analyse the issues in the case. There are two contributors to that; experience, we are getting

younger Guardians who are not as experienced and we are getting Guardians who, on the face of it, have insufficient training in expectations in respect of court proceedings". (County Court Judge)

The need to work with the child's family and having a holistic approach in working with child was viewed by one judge as an essential component of child-centred working:

"You have got to treat a family. My system would be dealing with the ills of a family, that would be my core principle, within which the interests of the child were paramount, but you can't deal with the child without dealing with the family. That family is the flowerbed, that is where the child is, whether we like it or not, that is the bit of ground you have got. Holistically, you have to deal with all of that, you can't just say, oh dear me, you know this plant needs watering. Well of course the plant needs watering, but it is no good having a huge rose bush at the side of it that is stopping the light getting to it. You have to have a holistic approach. It is family law; it is law about dealing with the family". (County Court Judge)

The location and physical environment of the court was viewed by one county court judge as important in establishing and facilitating a child-centred approach to proceedings, reflecting the spirit of rule 8 of the Family Proceedings Rules.⁵⁹⁷

"The family court would be a completely different building away from other courts, designed in a completely different way. I would do away with the normal structures that one would expect in a court of a raised bench and platforms. I would have the child in a position of obvious superiority to everybody else, by putting them in an area where they could, at the very least be at the same level, on eye line level with, if not looking slightly down upon, the other people involved. I would have a system built around the particular needs of each child and trying to work out how a case could fit in with their life". (County Court Judge)

A lack of funding was a major issue for one county court judge including, the serious implications of this for making decisions about a child's life:

"Properly funded proceedings. The cut-backs in legal aid I think have caused some difficulties in terms of the provision of material for the court. For example, if you have got reports that are required you get

⁵⁹⁷ r 8 FPR 2010 r 12.14(3).

more often than not, the legal aid agency saying, "They won't pay or they won't make a contribution". At the moment the cost is disproportionately picked up by the Local Authority, so you have to have regard to resources and so forth. My view would be, you should have what you need. This decision that you are making for this child is life changing. You can't do it on the cheap you should have what you need. Presently, you don't have what you need". (County Court Judge).

Another county court judge highlighted the quality of professional practice as a real obstacle to creating a child-centred system:

"In my world of unlimited money, there would be time for social workers to do their jobs better; to be able to spend more time with children. I feel social workers and Guardians, if I hear the phrase "proportionate working" from one more Guardian which means I haven't met this child at all or I went out once at the beginning of the case but it is only a fairly small child, I have not bothered to go back. I haven't talked to the parents other than at court. I haven't gone out and visited them because they are using drugs, so what is the point'. (County Court Judge)

The dominance of children and parents' needs and the lack of adequate resources within the system to meet their needs emerge clearly from the data in this research. These themes and issues are reflected in judges' perspectives, not only on unmet needs but on the contributing factors that have real potential to detract from a child-centred approach being adopted by the system. While judges' focus and aim is to make decisions that are just, fair and right for the child, such decisions are sometimes based on less than adequate information and a lack of clear analysis of the evidence contained in such information about the child and their family. Judges felt they were making decisions at times about children's lives, where a limited amount of time and work with the child had taken place. Listening to children is essential if justice is to be achieved.⁵⁹⁸ Munro placed great emphasis on the need for professionals to make time to listen to children and reflect before and after they make decisions about children's lives, as she felt, 'The

⁵⁹⁸ K Kufeldt, 'Listening to children: an essential for justice' (1993) 1 The International Journal of Children's Rights 155.

centrality of forming relationships with children and families to understand and help them has become obscured".⁵⁹⁹

The expectation of both the child and their family is that the decision of the system will be just and right for the child, based on their needs, welfare and development. A picture emerges from the data of a system in which the judge is between the child and their family on one side and the child's Guardian and social worker on the other. The judge depends on the Guardian and the child's social worker for information and analysis of the evidence and yet has limited influence on these professionals and their respective systems, given the acknowledged lack of resources in both systems (see Chapter 6).

Judges in this research also identified training needs for professionals working in the system, with a view to facilitating a more child-centred approach to proceedings. Such needs have the potential to block the development of a more child-centred and child-involved decision-making process.

7.2.2 Training needs to improve professional practice

Unmet training needs can contribute adversely to child-centred judicial decision-making, thus impoverishing the nature and quality of outcomes for children. Training for professionals in this area is being addressed by the Council of Europe HELP programme, which is part of their family law and child-friendly justice initiative. The aim of this training is to enhance the capacity of judges, lawyers and prosecutors of all 47 States to apply the ECHR in their daily work.⁶⁰⁰

⁵⁹⁹ E Munro, *The Munro Review of Child Protection: Final Report – A Child-Centred System* (The Stationery Office 2011b) 8.

⁶⁰⁰ Council of Europe, HELP: European Programme for Human Rights Education for Legal Professionals (Council of Europe 2014).

A district court judge in this research felt that there was a need for the threshold of knowledge among all professionals working in the system needs to be higher, given the importance of their roles and tasks:

“For me personally, I would like to see the threshold of knowledge being higher, because we are dealing with such fundamental issues, of such fundamental importance, not just to the children, but to parents and indeed to wider society as well. I think the better informed the Judges are, frankly, the better the decision-making will be and probably the more effective they will be in getting through the work”.
(District Court Judge)

Two main areas where training was needed emerged from this research. Improvement of skills in collecting, marshalling, analysing and presenting evidence was identified by judges as a priority, particularly in relation to social workers and children’s Guardians. Judges in this research expressed concern about the quality and analysis of evidence presented to the court and felt that too much importance was being placed on just reciting facts and outlining the chronological history of the case. This they felt could impact adversely on the decision-making process, as clear options based on the analysis of information and evidence was not available to the judge, either in written statements and reports or in the oral evidence during the hearing. Recent judgments have highlighted this issue, with a particular focus on the lack of a balanced exploration and analysis of all reasonable options for the child’s future care⁶⁰¹ (see chapter 6). The second area to emerge from the data was the need for training all professionals including judges, in communication skills with children. This need includes training which focuses on the centrality of the child’s position and their needs within proceedings, particularly for Guardians, children’s lawyers and social workers, to enable the child to participate more fully in the decision-making process. The need for all professionals involved to improve their communication skills in talking and discussing with children their lived experience to ensure that such experience informs the evidence presented to the court.

⁶⁰¹ Re BS North East Lincolnshire Council v G & L [2014] EWCC B77 (Fam).

Inter-disciplinary training was seen by judges in this research, as a way of facilitating more effective working between professionals and their respective agencies. A high court judge felt strongly about the need for inter-disciplinary training, particularly in relation to children's lawyers:

“For Lawyers, my own view is that lawyers in family justice cannot be trained in isolation from the other professionals. If there ever was an inter-disciplinary argument for training, lawyers are at the heart of it. They need to train with social workers and discuss things with them. They need to train with the expert witnesses, medical or otherwise. They need to train, or be trained with the judges, not necessarily on the judge only training courses, but on courses that have the same content, with judges helping to train them”. (High Court Judge)

One district judge felt however, that priority needs to be given to meeting the training needs of professionals at the pre-court stage:

“There is a tremendous need to improve the working together and the training given to professionals at the coal face doing that kind of work. In a way, once it is within the court system, it is relatively protected and there are controls but pre-court I think that is the biggest weakness within the system and we put so much effort and time and money into getting the court side right. It is almost like the ‘Cinderella’ part of it is what happens on the ground when children turn up emaciated at school or injured in hospital and the signs are not seen. That pre-court stuff is the biggest vulnerability in the system to me. That is training for social workers, Police, health professionals, education and that is the biggest need”. (District Court Judge)

7.2.3 Developing communication skills for working with children

Skills in the area of communicating with children were highlighted by judges as important for all professionals involved in the system including judges. This area was seen by judges as very important in facilitating greater participation of children in their proceedings. Judges highlighted in particular the poor child interviewing skills of the Police at times, and felt that this was an area that needed to improve to a significant degree, particularly in relation to asking appropriate and non-leading questions.

A county court judge in relation judges training needs in this area, highlight a real fear among judges:

“I think for all Judges, if this was ever going to happen, how to speak to children, how to communicate with children, would be key. That I think is the fear of many, particularly the more traditional Judges who haven’t within their career ever had to talk to children. Even barristers will rarely have met a child. We train advocates in how to examine children in court”. “... for Judges meeting children, for children being part of the process, for them hearing about what you are going to be doing, for them to hear maybe your decision afterwards. I think all of those are things where we would need some training in how to communicate with children”. (County Court Judge)

Another county court judge in looking positively to judicial practice in the future said:

“I think children speaking to judges could properly become more common. It would be a beneficial idea and therefore I think judicial training would be important in that regard”. (County Court Judge)

A county court judge highlighted the need for training of lawyers in the sensitive questioning of children:

“I think therefore, training to how best to speak to a child in short sensitive ways, which are not leading a child, but aren’t also implanting an answer would be a useful way of dealing with matters as well”.

Although training in communication skills with children was considered by one district court judge to be desirable for judges, such training in itself would not make the system more child-centred:

“Trying to fine tune Judges to be able to talk to children, that is desirable but it is pretty late in the day. It is cream on the cake compared to trying to get the cake right, which is the harder and much more important job”. (District Court Judge)

In relation to communication skills in the context of Police interviewing children, the following experience of two county court judges was less than

positive and also less than child-centred. This is something that judges feel powerless in influencing or changing during the course of proceedings:

“I think that they may have, in the Police, lost prominence in training and I think in social work maybe we are so bound up now with single Family Court, revised PLO (Public Law Outline), that sometimes it just needs a reminder of some features like that (delay in interviewing the child, not keeping case notes of important meetings). You see that is children’s participation in court proceedings just as much as the child coming to court. If you are watching a video of a child and that video evidence is tainted by the fact the Police Officers concerned haven’t been trained enough to do a proper interview or the parents being accused of abuse, that their barrister can make a lot of meal out of the failures of the professionals involved, then that child is being failed and there is nothing you as the Judge can do about it. If it wasn’t done properly you can’t make it right. I am not saying that is typical and it happens all the time, but it shouldn’t actually happen at all”. (County Court Judge)

“I know that the Police have had a lot of training in how best to ask questions of children and I think the results are that more often than not, are still woeful. The child interviews I have seen have not been well conducted and I think that there needs to be a lot better education as to how to go about talking to a child in a way that will provide evidence or information, which can then can be relied upon in court, which hasn’t been led out of the child, and hasn’t confused the child. I have seen plenty of interviews where I failed to understand what the Police Officer was getting at, or I thought the child has got no chance. I think the general level of interview training or interviewing, is often quite poor in my experience”. (County Court Judge)

7.2.4 Analysis and presentation of evidence

This training needs area was viewed by Judges in this research as a priority, particularly in relation to social workers and children’s Guardians:

“If there is anything that I would ask of social workers and indeed from Guardians, is more analysis and less chronological recounting of events. That I am sure would apply to all my colleagues. We do not need the vast reports that we have had in the past, which deal with each and every incident in huge detail. There are certain significant incidents that may have to be explored in detail but by and large the remainder are not going to have any bearing on our decision at all, so why put them in front of us?” (District Court Judge)

“All of us have perhaps, particularly social workers, occasionally Guardians as well and Judges, need greater training in actually providing an analysis from facts rather than simply reciting the facts”. (County Court Judge)

One county court judge was quite clear about what was needed from social workers in terms of analysis:

“... what one can often get is a long chronology of all the problems that have been with this family, that forms the background, but what one wants now is the analysis of where you go with those problems. Do those problems mean that the parents can't be assisted to parent? or if they were given that support, could they parent?” (County Court Judge)

In relation to giving evidence in court, the following two extracts from two county court judges highlight a training need in this area:

“They (social workers) need to learn how to give evidence and how to marshal that evidence and how to put a succinct summary of that evidence before a judge”. (County Court Judge)

“They (social workers) need the practical experience and then from time to time when they do have to give evidence, that is an area of criticism, it is an area of attack and I sometimes feel that they could do with more sessions learning how to give evidence. Too often the young social worker is reluctant to make a concession”. (County Court Judge)

The next section of this chapter will look at ways to reduce the distance between the child and the system and particularly the distance between the child and the judge as the key decision-maker in determining the outcome of proceedings. Hearing children's views directly in proceedings and enabling children to become involved directly in their proceedings are the focus of the following section.

7.3 Children's choice of direct participation – being the norm rather than the exception

The first part of this section will look at the area of hearing children directly in proceeding. In this research, judges acknowledged that they rarely see

children during the course of proceedings. Howitt writing some 170 years earlier, expressed the following wish:

*“I have often wished that in books for children the writer would endeavour to enter more fully into the feelings and reasonings of the child; that he would look at things as it were from the child’s point of view rather than from his own”.*⁶⁰²

The above sentiments would not be out of place if uttered in relation to the current public child law system. A child’s attendance at court is at the discretion of the judge under current legislation.⁶⁰³ Such legislation could be said to be in conflict with Article 6 of the ECHR.⁶⁰⁴ The Council of Europe’s guide⁶⁰⁵ on the application of Article 6 makes clear that there can be no justification for a restrictive interpretation of this Article and that the requirement of fairness applies to proceedings in their entirety.⁶⁰⁶ A restrictive interpretation of Article 6 is not consistent with the spirit of the Article. The Council of Europe asserts that for a right to be effective a party needs to be able to present views that they regard as relevant to their case and have them duly considered by the trial court.⁶⁰⁷ The discretion given to judges under section 95 of the Children Act 1989 could be viewed as both restrictive and not proportionate in relation to the application of Article 6 ECHR, as the full rights of a party (the child) to the proceedings can be denied.

In this research, in relation to the direct participation of children in proceedings a county court judge felt there needs to be attitude change:

‘For direct participation, the primary thing that would have to shift would be attitude. We have to move, my perception is that lawyers and Judges would need to move away from; you have got to keep the kids as far away as possible, to; they ought actually to be involved

⁶⁰² M Howitt, *The Children’s Year* (Longman 1847) v.

⁶⁰³ s 95 The Children Act 1989.

⁶⁰⁴ Article 6 Right to a Fair Trial under the European Convention on Human Rights.

⁶⁰⁵ European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (Council of Europe 2013).

⁶⁰⁶ European Court on Human Rights (n 4)15; *Moreira de Azevedo v. Portugal* – In relation to article 6, the Court’s opinion in this case was that the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 para. 1 (art. 6-1) of the Convention restrictively para 66.

⁶⁰⁷ European Court of Human Rights (n 604) 16.

because these decisions are about them and are going to affect them for years to come'. (County Court Judge)

For another county court judge in relation to the involvement of children in their proceedings, the approach needs to be pro-active in nature:

"We shouldn't be waiting for children to say, they want to be involved, we should be asking them for reasons why they don't want to be involved". (County Court Judge)

The International Association of Youth and Family Judges and Magistrates (IAYFJM) in their guidelines on children in contact with the justice system places importance on context and professional attitudes therein, in which children exercise their right to participate in proceedings, and see these elements as facilitating children's participation in proceedings.⁶⁰⁸ The guidelines emphasises the need for the system to be enabling and encouraging, so that children are reassured that the responsible adults involved in proceedings are genuinely willing to listen and seriously consider their views. Reference is made within the guidance to paragraph 3 of General Comment 12 on Article 12 CRC, which views participation as a process of information sharing and dialogue between adults and children, '...based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'.⁶⁰⁹ The IAYFJM considers children's right to be heard as a component of the right to participate.⁶¹⁰ The guidelines state: 'Adults must convey the message to children that their contribution to the proceedings is welcome and taken seriously. They must be made to feel that they are in a safe environment, respectful of their person.'⁶¹¹ Such an approach very much accords with the model of child-centred decision-making proposed later in this chapter.

⁶⁰⁸ International Association of Youth and Family Judges and Magistrates (IAYFJM), Guidelines on children in contact with the justice system (IAYFJM 2017) 16.

⁶⁰⁹ General Comment 12 (n 323) para 3.

⁶¹⁰ IAYFJM (n 607) 17.

⁶¹¹ *ibid.*

In relation to children meeting judges, Hedley's view is that the purpose of such meetings needs to be clear; to give evidence, express a view or to meet the person who is making the decision about their life.⁶¹² He states that: 'No child can have a truly private conversation with the judge'⁶¹³ in the interests of fairness to other parties, particularly parents. Although he sees such meetings as somewhat of an artificial process, Hedley would favour such meetings, notwithstanding the required conditions of clear purpose and the judge being unable to promise confidentiality to the child, he makes a pertinent point in relation to the subject area of this research: 'What is essential is that every child should feel that they have had the opportunity they want to influence the outcome'⁶¹⁴ and goes on to make an important point in this regard: 'They cannot dictate the outcome, but they should certainly have an opportunity to influence it'.⁶¹⁵

In contrast, a review of 30 recent child abduction cases by Hollingsworth and Stalford,⁶¹⁶ found that the reliability of children's views and objections as communicated to judges by the Cafcass officer were open to question. Although in a different area of law, the principles in terms of a children's rights approach to cases has relevance in the context of this thesis. Among their findings they found very limited time being spent with children by the Cafcass officer; on average one hour or less, while in other cases the Cafcass officer did not have enough time to review the child's files. These findings are concerning, given that the report by the Cafcass officer was relied on heavily by the judge. Hollingsworth and Stalford concluded: 'Such evidence is tantamount to not hearing the child at all'.⁶¹⁷

The experience of the following two judges in relation to the direct participation of children reflect for them the reality of current professional practice among social workers and children's Guardians:

⁶¹² Hedley (n 512) 87.

⁶¹³ *ibid.*

⁶¹⁴ *ibid.*

⁶¹⁵ *ibid.*

⁶¹⁶ K Hollingsworth and H Stalford, Judging parental child abduction: What does it mean to adopt a children's rights-based approach? (Tribute Collection for Nigel Lowe, Forthcoming 2018).

⁶¹⁷ *ibid.*

“I am not sure that routinely the other professionals; the children’s lawyers, the Guardians, the social workers ask children, discuss with them whether they should have any direct participation. They set out in a sentence what the child wants in a care plan”. (District Judge)

‘It surprises me how rare it is for social workers and indeed Guardians, to pursue this point themselves in terms of direct participation’.
(County Court Judge)

In relation to judges’ views in this research about the factors that need to be taken into consideration when deciding about hearing a child directly during the course of proceedings, one of their main concerns was that it would place a burden on the child who may feel responsible for the court’s decision. The following extracts from three judges highlight their concerns in this area:

“First of all, because I think that even a child, let us assume a child of 14 who very much knows his or her mind, it is a huge burden and responsibility to place on a child, to give them the impression that they are having to take the decision”. There is an element of protecting the child of placing upon that child the burden of taking a decision or giving the child the impression that it is them who is taking the decision about their future”. (County Court Judge)

“I’m not adverse to it, but it does worry me that sometimes it could be misinterpreted by children as the responsibility for the decision being thrown back on them, when they express their views to the judge”.
(District Court Judge)

“I think the underlying reason is that we are very keen that children should not feel responsible for the outcome and as soon as you embark upon the discussion with a child of what their views are, there is the potential for the child to feel responsible for what happens”
(County Court Judge)

Judges also felt that the court process itself is very much an adult-centred culture that the child may find difficult to understand. One County Court judge stated:

“Courts are not seen as places for children to come, they are seen as places from which to keep children because they are adult places of dispute”.

One of the barriers judges identified in this area was around the issue of confidentiality in relation to what the child said to the judge. Such information would need to be shared with the other parties in the proceedings in the interests of fairness and justice and, therefore, may act as a deterrent to the child expressing their true wishes and feelings. The following extracts from two District Court judges reflect this barrier:

“I think the biggest problem about it is the fact that what they say to the judge has to be revealed to the other parties and that I think is something, which perhaps is a difficult concept for them to understand”. (District Court Judge)

“They can be seen but obviously not in any confidential sense. It has got to be shared and they have got to know that everything has got to be shared”. (District Court Judge)

For judges in this research, it was important that there was a clear purpose for hearing the child directly and that such a meeting between the child and judge was not used for the gathering of evidence.⁶¹⁸ The following extracts are from two High Court judges represent some of the challenges in this area:

“However, you talk with a child, you have got to be very clear with them why you are having this conversation. The child may want it, but still why are we, judge and child, having this conversation in whatever form”. (High Court Judge)

“The problem is seeing children when the pressure is still on. The real anxiety is being confident that the children know precisely why they are there. You cannot take evidence of fact informally from them. That would be a breach of all ideas of fair trials. You can of course take their wishes and feelings informally from them. It seems to me, the key thing in seeing the child is for you and the child to be absolutely clear why it is happening. The child doesn’t come thinking that they can tell you about what Daddy did to Mummy the night before last. That is not on the agenda”. (High Court Judge)

In hearing a child directly, judges felt that the welfare of the child needs to be taken into account in terms of the potential of the process itself creating anxiety for and further emotional harm to the child. However, if such a

⁶¹⁸ Guidelines on Judges meeting children (n 308).

meeting between the child and the judge was deemed appropriate, judges felt it was important for the child to be prepared properly. Judges saw this task as primarily the responsibility of the child's Guardian and legal representative, who needs to ensure, as far as possible, that no undue pressure is being put on the child to meet the judge and the decision to meet is very much that of the child.⁶¹⁹ For one High Court Judge: *"If it is to me, then we have to have appropriate ways of recording it and of having an appropriate escort with the person, who isn't going to influence the child's views"*.

Judges in this study said they were willing to see children, but only if asked, mainly by the child's Guardian and legal representative. However, they acknowledged that they did not promote such practice as the norm in public child law proceedings. The views of the following judges highlight a range of issues and barriers that have the potential, from the perspectives of judges in this research, to militate against hearing children directly in proceedings:

"I think the barriers are that one is not asked to do so and I think the reason for that is, most Guardians now will discuss this matter with children and for the most part, children do not want to be involved. Some do, but for the most part they don't, or they are not of an age to be able to be". (High Court Judge)

"The barriers are partly due to a general feeling I think that they are not properly engaged in decision-making at all. There is this tension between adults should decide this for you and consulting you, we don't want to involve you and put pressure on you ... There is a natural wish to protect the child from emotional upset. You can't have a child sitting through a court hearing where usually at least the mother or the father is giving evidence. You would not want to expose the child to that, it would be terribly distressing and pressured. That is a good reason not to expose them unnecessarily". (District Court Judge)

"I think the difficulty is that as the process is intended to be largely protective, and one cannot expect the subject of the proceedings to understand the broad and detailed nature of the concerns about their parents and what implications those concerns may have for their well-being. It would be wrong to leave them with the impression that whatever they have said had been determinative of the issue".
(County Court Judge)

⁶¹⁹ Council of Europe – Child-friendly Justice Guidelines.

The view of one county court judge reflects a position in relation to the child following the decision of the court, rather than the child having direct input to the decision. The judge has also a clear position on judges hearing children directly:

“What has tended to be the case is that I have agreed to see children in circumstances where I think it will help them come to terms with the decision, to have seen the Court and have met the Judge, but to hear the views of the child is not something which I would particularly encourage as a Judge. I believe that the best way of getting those views is by the careful basis of thought from the children’s Guardian in Public Law Proceedings. They are the professionals, they know how to speak to children”. (County Court Judge)

However, while acknowledging the issues emerging from this research in relation to the potential difficulties and barriers to hearing children directly in proceedings, the following perspectives of judges summarise these issues and barriers but move their thinking forward to a more child-involved system:

“A combination of these things I think; the culture, the rules, the practice directions, the materials that come out from the Family Justice Council about interviewing children and so on. Generally speaking, the thinking is, the mood behind all of that is that you don’t do it unless it is exceptional or different and there is a specific reason for doing it. The culture is deep seated in that you distance the children from the proceedings. The rules are quite labyrinthine about the involvement of children within the proceedings, even where separately represented, whether they should attend the hearings and all the rest of it, raise all sorts of separate questions of their own. It is because of that historical, cultural thing, which has fed into a regime and rules which, it is not a presumption but it has stuck. Now when you look at the Family Justice Council’s papers on it, all hedged around with a considerable degree of cautionary thinking. It is around wanting to protect children from the fall-out of the proceedings and crudely I think the thinking has been, the way of protecting them is to distance them from it. I think there is a cogent case for saying that children should be much more closely involved with the proceedings, for their own benefit”. (County Court Judge)

“There shouldn’t really be any barriers, there should be far more openness in my view toward seeing children and letting children feel they are being heard. I think the barriers are a fear of children becoming embroiled in a process that they don’t understand and which could actually cause them damage and of course no judge

wants to involve a child in the proceedings by letting them attend if that actually is going to cause them emotional harm. We as Judiciary have a fear of causing harm to children, from the best intentions and I have that fear as well. Sometimes it is a fear of what am I going to do, will I be able to communicate with the person. How will that young person feel? We are moving far more to putting the child a little bit more central". (County Court Judge)

"It is empowering for the child. It is a useful exercise for the Judge because no longer is this child or these children names on documents. You have got a picture of the child". (District Court Judge)

The above perspectives reflect a variance among the judges in this research, which includes a cautious and protective approach towards hearing children directly in contrast to an openness of moving forward to a more child-focused system, welcoming the direct involvement of children in their proceedings, as something that is empowering for the child and a recognition of their rights.⁶²⁰ This research has shown that hearing children directly in proceedings is the exception rather than the norm, despite formal judicial guidance in this area.⁶²¹ While judges are understandably cautious and protective of children involved in proceedings, such a cautious and protective approach has created a formidable array of issues and barriers that prevent the development of a system that really values the dignity of the person of the child. While the judge and the system surrounds the child throughout proceedings, the child's direct voice is absent and not considered a priority in the decision-making process. The status of the child's direct voice in proceedings has to give way to proxy representations by professionals, who are spending a very limited amount of time getting to know the child and their perspective of their lived experience. Current legislation supports such practice, with the child's wishes and feelings being only one factor in the welfare checklist⁶²² and proxy representation of their views also enshrined in legislation⁶²³ and in formal guidance issued to judges meeting children.⁶²⁴

⁶²⁰ Article 12 of UCRC Child's right to express their views and Article 6 ECHR Right to a Fair Trial

⁶²¹ Family Justice Council, *Guidelines for Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872.

⁶²² s 1(3) Children Act 1989.

⁶²³ s 41 Children Act 1989.

⁶²⁴ Family Justice Council, *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (Ministry of Justice 2010).

The potential weakness in this guidance from a children's rights perspective, is that the judge relies heavily on the advice of the children's Guardian and legal representative to enable him or her to make the decision as to whether it is in the best interests of the child that such a meeting take place,⁶²⁵ rather than the decision being based on the child's right to express a view. Such an approach could be viewed as inconsistent with the spirit of Article 12 UNCRC and with Article 6 ECHR.

7.4 Facilitating Children's Direct Participation

The second part of this section now moves on to look at ways of enabling children to participate directly in their proceedings. The Family Justice Review stated that it needed to provide, ... 'children, as well as adults, with an opportunity to have their voices heard in the decisions that will be made'.⁶²⁶ The Family Justice Review Panel were also of the view that children early on in proceedings should have opportunities to express their wishes and feelings and are enabled and supported to express them to the court,⁶²⁷ thereby including children from the outset of proceedings. Placing the interests of children at the centre of the Family Justice System was considered a priority by the review panel.⁶²⁸ The review panel also considered different ways of communication and the physical locations in which proceedings take place. They recommended that for routine hearings, greater use, where possible and appropriate, could be made of telephone and video technology and that the rooms where hearings are held need to be as 'family friendly' as possible.⁶²⁹ All of these measures go some way to creating a system that is more inclusive and empowering of children.

Direct participation of children in proceedings for one county court judge requires a shift in attitude towards children:

⁶²⁵ Family Justice Council (n 624) para 1(iii).

⁶²⁶ Family Justice Review Panel, *Family Justice Review: Final Report* (The Ministry of Justice, Department of Education and the Welsh Government 2011) 41.

⁶²⁷ *ibid* 6.

⁶²⁸ *ibid* 59.

⁶²⁹ *ibid* 77.

“For direct participation, the primary thing that would have to shift would be attitude. We have to move, my perception is that lawyers and Judges would need to move away from, you have got to keep the kids as far away as possible, to, they ought actually to be involved because these decisions are about them and are going to affect them for years to come. Attitude is a matter of education. There would need to be a process of enlightenment of persuading that there is something good in this process and of persuading that the investment is worth it in terms of outcome. In other words, would children who have been involved in the process have better outcomes than children who have been kept at arms-length as we tend to do at the moment? That is not material I imagine you can find directly because we are not in the habit of involving children”. (County Court Judge)

A district court judge questioned the level of commitment of social workers, Guardians and children’s lawyers, to encourage the direct participation of children:

“I think training if it is to do with children’s direct participation, social workers in their final care plans pay just almost lip service to what the children themselves are saying. You are lucky if you get a sentence in the final care plan about what the child actually wants. You get it in the statement but not in the final care plan. In my experience, the social worker’s final evidence doesn’t deal with the child’s direct participation in court proceedings. If there is to be more participation of children in the actual proceedings, then I do think it is a social work training issue. I am not sure that routinely the other professionals; the children’s lawyers, the Guardians ask children, discuss with them whether they should have any direct participation. They set out in a sentence what the child wants in a care plan. I would have thought if we were to look at how children are involved, there is a training need in terms of understanding why it might be good to involve children more directly and there is definitely a training need for lawyers. It is not part of the judicial role as most people would traditionally see it. If we were to branch out in seeing children I think people do need a lot of training. Getting the difference between asking a child what they want to happen and telling a child what is going on are very different things”. (County Court Judge)

While placing importance on the need for children to feel involved in their proceedings in a meaningful way (see Chapter 3 and section on Judicial Values and Child-centredness in Chapter 5), the following view of a county court judge highlights the potential of other factors that may get in the way of an inclusive approach:

“The things that you need to consider, putting aside your own preconceptions of what your kids and your friends’ kids are like and think about what it is like to be that child and the kind of fears and hopes and ambitions that that particular child may or may not be likely to have. How to make them feel listened to, even though at the same time you have got to make it clear to them that not everything they say can be kept secret from their parents and not everything they say is necessarily going to be what you would do. Nonetheless, making them feel that you listened. All of those things I think would be very a helpful addition to assist us with seeing children in a meaningful way”.
(County Court Judge)

Judges in this research felt that the court process can be quite intimidating and unfriendly for children, making it difficult for children to participate in proceedings and therefore does not facilitate seeing children in a meaningful way. They also felt that systemic issues, such the court’s formal physical environment, the culture of proceedings being more adversarial than inquisitorial and the court’s procedures and rules do not facilitate children’s direct involvement in proceedings. While the judicial value of justice must prevail in the system, the culture of proceedings historically has not considered the direct participation of children as a core element of justice. The 250 children who contributed to the Munro Review (see Chapter 4) did not feel they were at the centre of the child protection system and were clear about what they considered to be a child-centred approach that would meet their needs. The practice guidance contained in ‘Working Together to Safeguard Children’ included their views about what they considered to be a child-centred safeguarding system.⁶³⁰ The elements put forward by the children who participated in Munro’s review of the child protection system are consistent with the elements of a child-friendly system outlined by the UN

⁶³⁰ Working Together to Safeguard Children (n 6) 11. Vigilance: to have adults notice when things are troubling them; Understanding and action - to understand what is happening; to be heard and understood and to have that understanding acted upon; Stability - to be able to develop an on-going stable relationship of trust with those helping them; Respect: to be treated with the expectation that they are competent rather than not; Information and engagement - to be informed about and involved in procedures, decisions, concerns and plans; Explanation - to be informed of the outcome of assessments and decisions and reasons when their views have not met with a Positive response; Support - to be provided with support in their own right as well as a member of their family; Advocacy – to be provided with advocacy to assist them in putting forward their views.

Committee on the Rights of the Child⁶³¹ and the Council of Europe child-friendly justice guidelines.⁶³²

The UN Committee on the Rights of the Child asserts that, ‘The Convention requires that children, including the very youngest children, be respected as persons in their own right. Young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view’.⁶³³ However, a Council of Europe consultation with almost 4,000 children, which documented their views and experiences of justice systems, including the system in England and Wales, found that a fifth of the children who took part in this consultation would not tell those with responsibility for their safety and welfare if they were being neglected or abused, for fear of what might happen to their family. They said they would prefer to handle it on their own.⁶³⁴ It is as if children are aware of their powerlessness in relation to a system that makes them feel uneasy and fearful and therefore inaccessible to them.⁶³⁵

Regarding enabling children to become more involved in their proceedings, Judges felt that for this change of approach to take root, the child would need careful and proper preparation for direct involvement and that the necessary security precautions within the court environment are put in place throughout the proceedings, to enable the child feel free, safe and comfortable in contributing to the proceedings. For one District Court judge, this requires a balancing of factors:

“Cultural and social barriers, all of those do exist. They exist in dealings with everybody that comes to court. The only difference is, (a) it is a child and therefore more likely to be influenced by the situation that they are in and the unfamiliarity, particularly if they are from a different ethnic background, and (b) you are seeing the child at close quarters really even if you have got a children’s Guardian and

⁶³¹ Committee on the Rights of the Child, General Comment No.12, 2009 The Right of the Child to be Heard para 134 (a)(i) The Committee put forward a list of elements they considered to be child-centred; transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, safe and sensitive to risk and accountable.

⁶³² Council of Europe, 2010, ‘Elements of child-friendly justice’ – Transparent and Informative, Voluntary, Respectful, Relevant to the child, Child-friendly, Inclusive, Accountable, Safe and sensitive to risk.

⁶³³ UN Committee on the Rights of the Child, 2005, General Comment No 7: Implementing Child Rights in Early Childhood 3, para 5.

⁶³⁴ U Kilkelly, *Supporting Children’s Access to Justice* (European Union Agency for Fundamental Rights 2014) Retrieved on: 14th November 2014 www.fra.europa.eu

⁶³⁵ Daly et al (n 417).

perhaps a court officer taking notes there, it is a very intimate setting. That is the way which it is normally done in my experience. You don't want to bring the child into the big courtroom even if it is empty because it is intimidating, so you come into a relatively small room; you have a relatively tight knit group of people there, taking the note and verifying what is said. That can be quite difficult I think. There is a balance to strike there between making it intimate but not making it too intimate".

A County Court judge places much emphasis on the need to prepare carefully for such meetings:

"If you are going to talk to a child, it is not something you do by the seat of your pants, in a couple of spare minutes between two other things, it needs to be scheduled, you need to be prepared and you need to have the time to reflect on how you are going to talk to the child and time to spend with the child if the child raises issues with you that needs some of your time. We are under huge pressure of work to get things done. Providing that time, we have not made it a priority historically". (County Court Judge)

It is clear from the data in this research, in relation to enabling children to participate directly in their proceedings, that many issues and barriers remain within the current system that militate against children's direct participation. While judges in this research were open to such a change in practice, there was also a high level of reluctance among judges, given the systemic and cultural barriers that exist and which have been acknowledged by judges. A major shift in attitude is required by both judges and the system itself, to make the choice of children's direct participation in their proceedings the norm, rather than the exception, which currently is the established practice and for mainly older children i.e. teenagers. Munby P has stated that such practice and attitude needs to change, as it is no longer tenable.⁶³⁶

7.5 A Model for Child-centred Decision-making (see Figure 2)

Figure 2 is a diagrammatic representation of the core building blocks and elements needed to move to a more child-centred model for decision-making in public child law proceedings. At the centre of this model is the judge and

⁶³⁶ Munby (n 584).

child, with the judge listening and taking on board the child's perspective of their lived experience. This would be the starting point of all proceedings and accepted as the norm in relation to judicial practice in this area.

However, this approach would always be based on the child's agreement to meet with the judge, but such an approach would be an integral part of the public child law system from the outset. Currently, children who are subject to proceedings, rarely meet with the judge, with such meetings neither promoted or encouraged, due to respect for current professional practice boundaries and statutory roles, particularly in relation to children's Guardians.⁶³⁷ These issues have been highlighted by judges in this research.

7.5.1 Hearing children's views throughout proceedings

This model needs to be informed and guided by a number of factors (see Figure 2). Public child law proceedings need to start, continue and end with ongoing feedback from the child, even from very young children (*age 3 upwards*), who are more than able to express a view on their experience.⁶³⁸ The child's ongoing feedback needs to continually guide and inform the decision-making process and the decisions themselves, throughout the course of proceedings. Such an approach does not exist in the current system, which gives a minimum amount of time to hearing children's views⁶³⁹ and gaining an in-depth understanding of their situation and circumstances.⁶⁴⁰

⁶³⁷ s 41 The Children Act 1989.

⁶³⁸ Willow (n 568).

⁶³⁹ Cafcass (n 350).

⁶⁴⁰ Pemberton (n 202).



Figure 2: A model for Child-centred Decision-making

7.5.2 Children's vulnerability and rights

While children's vulnerability is a given reality in proceedings,⁶⁴¹ given that they will have suffered a significant level of abuse and neglect prior to proceedings being initiated, it is not a justification for suspension of their rights.⁶⁴² Children have full party status in proceedings⁶⁴³ and yet judges have the discretion under current legislation in relation to children being directly involved in their proceedings.⁶⁴⁴ This model proposes an amendment to s 95 of the Children Act 1989, which would limit such judicial discretion to those cases where there was clear evidence that such direct involvement of the child would cause them significant harm, otherwise, direct participation of children would be considered by judges to be the norm. The balancing of a child's vulnerability and their rights in law and international conventions, must not dilute the judicial values of equality, fairness, listening and justice.⁶⁴⁵

7.5.3 Equality of focus between protection and the child's dignity

Although the child in public law proceedings is a victim of a significant level of abuse and or neglect, such a status should not diminish the child's worth and dignity as a person.⁶⁴⁶ This child-centred model for decision-making places equal priority on the child's need for protection and on the child as a person, with the right to be respected as a human being, with their dignity being accorded equal respect with that of adults. The child's fears, anxieties, worries and just not knowing how and if their world will change, needs to be embraced and understood by the whole public child law system, which needs to acknowledge this turmoil of the child's inner world. This means in practice giving the child the time and space they need to express their true feelings and wishes including if the child wishes, directly to the judge.

⁶⁴¹ s 31 Threshold of significant harm The Children Act 1989.

⁶⁴² UNCRC Article 12 Right to express a view and Article 13 Right to receive information from a range of sources.

⁶⁴³ FPR 2010 r 12.14(3).

⁶⁴⁴ s 95 The Children Act 1989.

⁶⁴⁵ ECHR Article 6 Right to a Fair Trial.

⁶⁴⁶ Freeman (n 502).

7.5.4 Valuing children's understanding of their world

One of the major issues emerging from the judges' responses in this research, is the decreasing amount of time professionals are able to spend listening to the children they are representing in proceedings, particularly children's Guardians⁶⁴⁷ and Local Authority social workers.⁶⁴⁸ This issue is also highlighted in research.⁶⁴⁹ The lack of resources are often cited as the main contributory factor (see Chapters 4 and 6) as well as the tight timetable for the completion of proceedings.⁶⁵⁰ This proposed child-centred model places great value on the child's understanding of their world and introduces a statutory requirement to ensure the professionals involved in proceedings are informed and guided by this factor in relation to their professional practice, throughout the proceedings. Such a statutory requirement could be introduced as a separate section following s 1(3) Welfare Checklist in the Children Act 1989. Including the child's knowledge and understanding of their circumstances and lived experience, as a core element of decision making, would strengthen and enhance the much weaker factor of the child's wishes and feelings as contained in the welfare checklist,⁶⁵¹ which is viewed in practice as simply one factor to be considered and the importance given to this factor is often determined by the child's age and capacity⁶⁵² (see Chapter 6).

7.5.5 Valuing and respecting children's rights in practice

The model proposes that the public child law system and judicial decision-making adopt a children's rights approach⁶⁵³ in their work with children throughout proceedings. Such an approach would be an integral part of professionals' practice with children involved in proceedings and in judicial reasoning. Empowerment of children, particularly by children's Guardians and Local Authority social workers, would be seen as the norm from the

⁶⁴⁷ Cafcass Operating Framework (n 350).

⁶⁴⁸ Pemberton (n 202).

⁶⁴⁹ Masson (n 349).

⁶⁵⁰ Public Law Outline (PLO) 26-week rule Children and Families Act 2014.

⁶⁵¹ s 1(3) Welfare Checklist Children Act 1989.

⁶⁵² Stalford et al (n 428).

⁶⁵³ Tobin (n 436).

outset of proceedings. This would facilitate children gaining the knowledge and confidence to gain access to the system and use their right to be heard and have their views taken seriously.

7.5.6 Open and welcoming environment for children

The core building blocks and elements of the proposed model needs to be facilitated by an environment that is open and welcoming to children.⁶⁵⁴ An environment where the child is allowed to choose who accompanies them to court, in addition to their family, Guardian, social worker and lawyer. This could include people who the child feels are important in their life, particularly those who know what they have gone through and are going through in their lives. It is important for professionals to be reminded that the child is not defined by their proceedings and have a life outside of these proceedings, having friends and significant others in their life, who they turn to for support and understanding. Within this model, children need to feel part of the system that is making such significant decisions about their lives and those of their family. The system under this model is accountable to the child for the decision it makes about their care and life and therefore needs to be transparent so that the child always knows and understands what is going on in their proceedings. The issue of transparency has already been discussed earlier in this chapter.⁶⁵⁵

This model sees the need for continuity of professionals including judges, involved with the child throughout the proceedings, as an essential element of child-centred decision-making. The benefits of continuity have been highlighted by research.⁶⁵⁶ Children need to be able to form meaningful and trusting relationships with the professionals involved in their case. This research has highlighted the issue of high turnover of social workers in cases during proceedings. This will have the effect of disempowering and alienating the child and does not facilitate child-centred decision-making.

⁶⁵⁴ Family Justice Review Panel (n 369).

⁶⁵⁵ McFarlane (n 19).

⁶⁵⁶ Masson (n 349).

The final section of this chapter presents an example of a case revisited by the researcher and re-imagined through the lens of a children's rights perspective.

7.6 Re-visiting P-S (Children) (Care proceedings: Oral evidence of separately represented child) [2013] EWCA Civ 223, [2013] 1 WLR 3831

It is one thing to criticise the judiciary for failing to support a child-centred approach; it's another thing to demonstrate how it might actually be achieved in practice. The researcher tried to achieve this through participation in a two-year academic project aimed at re-imagining judgments involving children, from a range of different jurisdictions and legal contexts. The purpose of the project was to re-write these judgments adopting a children's rights perspective. The work of the project culminated in the publication of a book,⁶⁵⁷ bringing together the body of work on these wide-ranging re-written judgments, which were each accompanied and introduced by a commentary. The researcher co-worked with Jane Williams from the University of Swansea, who re-wrote the original judgment *Re P-S* (see copy of re-written judgement in Appendix 7) and contributed a commentary on Jane's re-written judgment to the edited edition.⁶⁵⁸ An adapted version of this commentary is presented here to illustrate how a child-centred perspective can be achieved in public child law cases.

7.6.1 Summary of the case background

The subject of the proceedings in *Re P-S*⁶⁵⁹ was a 15 year-old boy M, who did not wish to remain in foster care but to return to live with his mother. The local authority's view was that this would not be in M's best interests since his mother had previously attempted to leave the country without making adequate care

⁶⁵⁷ H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017).

⁶⁵⁸ D Lane, 'Commentary on P-S (Children) Care Proceedings: Right to give evidence' (2017) in H Stalford, K Hollingsworth and S Gilmore (eds), *Rewriting Children's Rights Judgments from Academic Vision to New Practice* (Hart 2017).

⁶⁵⁹ *Re P-S (Children) (Care Proceedings: Right to give evidence)* [2013] EWCA Civ 223 [2013] 1 WLR 3831.

arrangements for her children. An application for a Care Order was made under section 31 of the Children Act 1989.

M sought and was granted separate legal representation as he did not feel his guardian (whose role is to advise the court on a child's best interests) was representing satisfactorily his true wishes and feelings. Initially, M did not wish to attend the final hearing but did wish to meet the judge to express directly the strength of his feelings. M met with the trial judge in the presence of the guardian and his solicitor during the first part of the final hearing. However, the judge did not afford M an opportunity to express his wishes and feelings, and limited her communication with M to an explanation of the court process and task. During the second part of the final hearing M applied to give evidence via video link. His application was refused. The trial judge felt that the detriment to M, particularly in terms of him feeling responsible for the final decision of the Court, outweighed the benefit of his evidence to the Court. A Care Order was made in respect of M. The Court of Appeal unanimously upheld the trial judge's decisions both in respect of M's application to give evidence and in respect of the Care Order. In his judgment on the application to give evidence, Sir Alan Ward's reasoning encompassed a wide range of statutory and non-statutory provisions and relevant case law pertinent to the application including section 1(3) of the Children Act 1989,⁶⁶⁰ Article 6 of the European Convention on Human Rights, as scheduled to the Human Rights Act 1998⁶⁶¹ and Article 12 of the United Nations Convention on the Rights of the Child.⁶⁶² The main case law referred to was *re W (Children) (Abuse: Oral Evidence)*.⁶⁶³ Whilst the party status of the child⁶⁶⁴ was acknowledged in Ward J's judgment, it was held that the relevant provisions did not give M the right to express directly his views to the Court. M's very strong views were already known to the Court and acknowledged by the trial judge. The current model of children being represented by a guardian and a specialist solicitor was seen as meeting the requirements under Article 12 United Nations Convention on the Rights of the

⁶⁶⁰ The Children Act 1989, s 1(3) the welfare checklist, which includes the wishes and feelings of the child.

⁶⁶¹ European Convention on Human Rights, Article 6 right to a fair trial.

⁶⁶² UN Convention on the Rights of the Child 1989, Article 12 child's right to express a view.

⁶⁶³ *Re W (children) (abuse: oral evidence)* [2010] 1 FCR 615, [2010] 2 All ER 418.

⁶⁶⁴ The child is automatically a party to care proceedings under FRR 2010, r 12.3(1) of the Family Procedure Rules 2010, SI 2010/2955 (FPR 2010).

Child (UNCRC).⁶⁶⁵ Sir Alan Ward agreed with the trial judge that the harm to M of giving evidence far outweighed the benefit to the judge,⁶⁶⁶ as M would feel responsible for the final decision. In relation to the Care Order application, based on the known history of parenting, his lordship also agreed that there was no realistic prospect of either of M's parents having the capacity to meet his needs.

The original judgment highlights vividly the very real tensions that exist between the requirements of children's welfare as contained in the welfare checklist of the Children Act 1989 and a children's rights perspective. M's story in his own words was considered to be of less value to the Court than those recorded in formal submissions and reports. Baroness Hale, writing extra-judicially, observes that in her experience children frequently have important things to say and she maintains that, 'it is a big mistake to think that children's views can be effectively communicated through the adult parties to any dispute'.⁶⁶⁷ Among the advantages of judges seeing children, she includes the need to see children as real people and not to just view them merely as subjects of proceedings and to find out more about their wishes and feelings directly, rather than just relying on second or third hand information, which is the case currently in most public law cases.⁶⁶⁸ Raitt, in a research study with members of the Scottish judiciary, found it was possible for a judge to: 'simply encourage a child to talk about their wishes and feelings without rehearsing the options or presenting stark choices'.⁶⁶⁹ Of course the starting point for considering what might be achieved when children are the subject of legal proceedings is the legal framework within which the child's wishes and feelings are presented to the court, to which this commentary will now turn.

⁶⁶⁵ Re W (n 663) para 26.

⁶⁶⁶ *ibid* para 41.

⁶⁶⁷ B Hale, 'Can you Hear me Your Honour?' [2012] *Family Law* 31.

⁶⁶⁸ B Hale's address to the Association of Lawyers for Children 2015 - Are we nearly there yet?

⁶⁶⁹ FE Raitt, 'Hearing Children in Family Law Proceedings: Can Judges make a Difference?' (2007) 19 *Child and Family Law Quarterly* 214.

7.6.2 The party status of the child

In care proceedings, the child is automatically a party. The Children Act 1989 and the Family Proceedings Rules (FPR) provide how, in practice, effect is given to that party status, bearing in mind that a child may be a party from as early in life as the day of the child's birth. Section 41 of the Children Act 1989 requires the appointment of a Guardian, who in practice in England will be commissioned by the Children and Family Court Advisory and Support Service (CAFCASS) and in Wales, will be a Welsh family proceedings officer acting on behalf of the Welsh Ministers. The court may appoint a solicitor to represent the child. A child of sufficient maturity and understanding may instruct a solicitor independently. Since the Children Act 1989 became law in October 1991 there has existed a presumption that children and young people who are subject to care and adoption proceedings do not attend court.⁶⁷⁰ As a consequence of this presumption, children are not routinely asked about their views on participating directly in proceedings, including meeting with the judge, because the child's part in the proceedings for the most part is mediated through their guardian.

Under section 95 of the Children Act 1989 the court may order the child concerned to attend as prescribed by rules of court. FPR 12.14 provides that any party must attend the proceedings, but the proceedings or any part of them will take place in the absence of a child pursuant to FPR 12.14(3) if the court considers it in the interests of the child, having regard to the matters to be discussed or the evidence likely to be given, and the child is represented by a guardian or solicitor.

7.6.3 What P-S could have looked like if drafted from a children's rights perspective

The re-written judgment differs significantly from the original judgment. It gives greater relevance to, and places more weight on, the European Convention on Human Rights (ECHR) and UNCRC, leading to a more young person-centred outcome, with Williams J allowing the appeal in respect of M's application to give evidence and in respect of the care order application. The young person's voice

⁶⁷⁰ FPR 2010 r 12.14(3).

is placed at the centre of their proceedings. M is 15 years old and has been considered capable of independently instructing his own legal representative. The judgment quite rightly highlights the consequence were any other party to these proceedings to be prevented from being heard in person. As Lundy observes, 'it is difficult to imagine egregious breaches of children's rights in situations where they have been fully and effectively involved in determining the issues which affect them'⁶⁷¹ while Griffiths and Kandel make the point that, 'whether we recognise children's agency or not has a profound effect on the kinds of legal narratives we expect to emerge when the child's voice speaks directly or indirectly and is heard in a legal proceeding'.⁶⁷² While the trial judge in this case followed the 2011 guidance,⁶⁷³ weighing up the relevant evidence and welfare considerations in relation to M, the spirit of the principles of justice and fairness contained in Article 6 of the ECHR⁶⁷⁴ were very much diluted, particularly in relation to M's full party status. It seems that all parties, except the child, are given the opportunity to express a view about whether the child should meet the judge. Children meeting judges is almost wholly dependent on the judge receiving a request for such a meeting from the child's guardian or their solicitor or the child's Local Authority social worker. The 2011 guidance is firmly entrenched in the protective mode of the welfare paradigm, in which adults' views determine the best interests of children.⁶⁷⁵ It is a paradigm where the rights of children are relegated to a status that is inferior to adults' 'superior' knowledge and wisdom and are seen by the judicial system as being appropriately accommodated through proxy accounts. The re-written judgment states that the child is entitled to a 'fair and public hearing' (para 28) and points out that a hearing would not be fair if the child's case is not heard. The judgment reframes both the guidance on hearing children directly and the Court's thinking in this case by focusing on the potential harm that M might suffer should he be prevented from expressing his views directly. There may already be some

⁶⁷¹ L Lundy, 'Mainstreaming Children's Rights in, to and through Education in a Society Emerging from Conflict' in M Freeman (ed), *Children's Rights: Progress and Perspectives: Essays from the International Journal of Children's Rights* (Martinus Nijhoff 2011).

⁶⁷² A Griffiths and RF Kandel, 'Legislating for the Child's Voice: Perspectives from Comparative Ethnography of Proceedings Involving Children in M Maclean (ed), *Making Law for Families* (Hart Publishing 2000).

⁶⁷³ Family Justice Council, Guidelines in relation to children giving evidence in family proceedings (2011) 1.16

⁶⁷⁴ ECHR Article 6 right to a fair trial.

⁶⁷⁵ J Fortin, 'Children's Rights: Are the Courts Now Taking them More Seriously?' (2004) 15 *King's College Law Journal* 253,272.

indication of a similar judicial shift in thinking in a more recent case, *Re R*, in which Briggs LJ commented:

“The risk of harm which the process may cause to this bright and articulate fourteen year old does not seem to me to be more substantial than the risk of long-term harm at being denied the opportunity to have her evidence properly weighed in the determination by a court of matters of the utmost importance to her”.⁶⁷⁶

Re R was a case in which allegations of sexual abuse were made against the father of a 14 year-old girl, who wished to be heard directly in legal proceedings. She had not made any allegations against her father. The common element in *M*'s case and in *Re R* is the strength of feeling expressed in relation to the young people's need to express their views directly to the court, yet the outcomes were very different.

7.6.4 The voice and dignity of the child

The re-written judgment allows the appeal in respect of *M* giving oral evidence, giving real effect to Articles 3 (*best interests*) and 12 (*right to express a view*) of the UN Convention along with Article 6 of the ECHR (*right to a fair trial*) (para 31). This approach ameliorates the position, as identified by Michael Freeman, 'for too long [children] have been regarded as objects of concern (sometimes worse, as objects), rather than as persons, and even today they remain voiceless, even invisible, and it matters not that the dispute is about them'.⁶⁷⁷

Carole Smart makes the point that having a voice and an environment where that voice is heard is considered in developed societies as a basic human right.⁶⁷⁸ Courts are not particularly welcoming of children and therefore it is difficult to see a space within the current system where children can give expression to their true voice. This is particularly important when a child's views are at odds with their court appointed guardian. This space needs to be created within the legal process and the judicial system itself to enable children to speak

⁶⁷⁶ *Re R* [2015] EWCA Civ 167 para 36.

⁶⁷⁷ M Freeman, 'The Value and Values of Children's Rights' (2011) in A Invernizzi and J Williams (eds), *The Human Rights of Children—From Visions to Implementation* (Abingdon, Routledge, 2011).

⁶⁷⁸ C Smart, 'From Children's Shoes to Children's Voices' (2002) 40 *Family Court Review* 318.

if they wish, with confidence. Being excluded or prevented from expressing strongly held views can only undermine a child's dignity and confidence. Direct participation within the current system is often very much seen as consisting of a one-off brief meeting with the judge, lasting on average no more than 15 to 20 minutes, yet in practice even such meetings are rare. As Tobin has argued, this reflects an incidental rights approach, wherein children's rights are on the periphery of the judicial process.⁶⁷⁹ M's meeting with the trial judge did not enable him to express his strongly held views. This space is dominated by the children's Guardian and legal representative (Children Act 1989, section 41) and the child's Local Authority social worker. According to Connolly and Morris, this can lead to risk aversion, where professionally driven rather than child-centred practices take priority and professional voices prevail and dominate proceedings to the exclusion of the child.⁶⁸⁰

7.6.5 Formality, Rules and Procedures — are we forgetting the child as a person with rights?

The re-written judgment places much importance on the centrality of the young person's position in these proceedings and on the application of both the letter and spirit of Articles 3 and 12 of the UN Convention and Article 6 of the ECHR. It highlights the narrow legal interpretation of M's rights in the original trial and re-focuses on justice and fairness for M throughout, as a person with full party status. According to the European Network of Councils for the Judiciary, the ability to listen is considered one of the core judicial values.⁶⁸¹ In contrast, the 2010 Guidelines place emphasis on the judge having the opportunity to explain to the child what's going on in the process, not on the child having an opportunity to speak and the judge to listen.⁶⁸² In this case, the level of participation afforded to M is superficial at best. The re-written judgment asserts that the original trial placed insufficient value on M's dignity and integrity, in contrast to the UN Convention, particularly Articles 3 and 12, and Article 6 of ECHR. Fortin maintains that courts are not familiar with organising the evidence

⁶⁷⁹ J Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' (2012) 14 *Law and Childhood Studies: Current Legal Issues* 1 25.

⁶⁸⁰ M Connolly and K Morris, *Understanding Child and Family Welfare: Statutory Responses to Children at Risk* (Palgrave, 2012).

⁶⁸¹ European Network of Councils for the Judiciary, *Judicial Ethics—Principles, Values and Qualities* (Working Group Judicial Ethics 2009–2010), www.encj.eu.

⁶⁸² Family Justice Council *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (2010) 1.

within a rights based structure and states that, 'although complicated, the advantage of such a strategy is that it might produce a deeper analysis of the child's own position',⁶⁸³ making the proceedings much more young person-centred.

In respect of the Care Order, the re-written judgment quite rightly allows the appeal. It reflects the consistent approach adopted in this judgment in relation to M's right to express his views, having full party status within these proceedings. It is also consistent with the principles of fairness and justice, otherwise an assumption is being made that nothing M might say could change the decision. Such an assumption disrespects and pre-judges M's views regarding this application. For Smart, 'being able to hear what children have to say does change things. At the very least, we have to be able to stand in children's shoes if we are going to be able to hear their voices'.⁶⁸⁴ It seems reasonable to suggest that judges who have so much power over children's lives are very unlikely to be able to stand in their shoes without having had the opportunity of face-to-face meetings with the child.

7.7 Conclusion

To move to a more child-centred decision-making process in public child law proceedings, this research suggests a practice model that addresses a number of the inadequacies and gaps in the current system. It is a model that is based on the child being at the very centre of the system itself, rather than having the system and its requirements dictate and determine the priority it will give to the child's position and their perspectives of their lived experience, based on the notion of system efficiency.⁶⁸⁵

The proposed model includes ensuring that the child's voice including their direct voice, is an integral and ongoing feature of proceedings, ensuring that the child's perspectives of their world are given serious consideration

⁶⁸³ J Fortin, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *The Modern Law Review* 313.

⁶⁸⁴ Smart (n 328).

⁶⁸⁵ PLO 26-week rule (n 344).

throughout the course of the proceedings. It is a model that gives equal priority to both the protection of the child and the child's dignity as a person with rights, which need to be respected and valued. The elements of this model require an environment that is open and welcoming of children and their world. Transparency and accountability to children are essential elements of this model to ensure children are empowered to exercise their rights. To give this model a legislative basis, a number of amendments to current legislation are proposed to reinforce the child's voice in proceedings and to ensure a children's rights approach is adopted as part of a child-centred decision-making process.

The current system favours mediation of children's views through the Guardian and the child's Local Authority social worker. McFarlane LJ has observed that, 'The previous culture and practice of the family courts remains largely unchanged with the previous presumption against children giving evidence remaining intact'.⁶⁸⁶ However, the Family Justice Council has made it clear in their guidance on judges meeting children that the main purpose of such meetings is to 'enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings ...'.⁶⁸⁷ The proposed practice model and the re-imagined case presented in this chapter are examples of how a child-centred perspective can be achieved in public child law proceedings.

⁶⁸⁶ Re E [2016] EWCA Civ 473 paras 48,56, 28.

⁶⁸⁷ Family Justice Council (n 682).

Chapter 8

Conclusion

The core aim of this research was to gain insight into judicial thinking in relation to what constitutes the core elements of child-centred decision-making in the reality of public child law proceedings. Judges in this research identified a range of factors; human, legal, cultural, systemic and structural, that present barriers to a transparent, child-friendly, child-accessible public child law system. The research also explored with judges their views about the principles of public child law that may conflict or even collide with child-centred decision-making.

8.1 Expectations of the Public Child Law System

The Children Act 1989 marked a significant change, at least theoretically, in the public child law system in relation to children's position in the system and in relation to their representation in proceedings. The Act also aimed to be compliant with the requirements of the UNCRC, particularly Articles 12 (child's right to express a view) and Article 3 (child's best interests), although the UNCRC is still not part of domestic legislation. The central position occupied by the principle of paramountcy⁶⁸⁸ in current legislation and formal guidance⁶⁸⁹ accords priority to the child's welfare and best interests above all other matters in proceedings including the interests of adult parties. All children involved in proceedings have a Guardian appointed by the court to represent their wishes and feelings and to advise the court on their best interests.⁶⁹⁰ Each child has also a legal representative appointed to advocate on their behalf. The expectation from such developments in representation was to ensure the child's true voice was heard and listened to throughout their proceedings. The child was to be at the heart of the system.⁶⁹¹ There has been a succession of Acts since the Children Act 1989, each purporting a more child-centred approach (see Chapter 2).

⁶⁸⁸ s 1(1) Children Act 1989.

⁶⁸⁹ Working Together to Safeguard Children (n 344).

⁶⁹⁰ s 41 Children Act 1989.

⁶⁹¹ Family Justice Review (n 369).

Paramountcy was and continues to be seen as the essence of child-centredness including by the judges who participated in this research. In public child law, it is the overarching guiding principle that guides all deliberations and decisions about a child's welfare and development.

8.2 Current reality of proceedings

Proceedings are initiated to protect children from significant harm through abuse and neglect and therefore the court quite rightly sees this task within proceedings as a priority. The decision-making process within the current public child law system is one that has the best interests of the child in mind, but it is a process that virtually excludes the in-depth perspective of the child. The child's current position in proceedings is one where their voice gets fragmented and interrupted through proxy accounts, main through the child's Guardian and Local Authority social worker, based at times on a superficial knowledge and understanding of the child's situation and perspective.

From the evidence⁶⁹² available and from data in this research, representation of children's wishes and feelings are much diluted due to a lack of resources,⁶⁹³ legal requirements⁶⁹⁴ and professional working practices.⁶⁹⁵ Children find themselves on the periphery of a system that is driven by managerial efficiency (see Chapter 4). While the system and those who work within it including, judges, aspire in their respective roles to child-centred practice, as envisaged under current legislation⁶⁹⁶ and formal guidance,⁶⁹⁷ the system itself is driven by managerial efficiency⁶⁹⁸ masquerading under the principle of 'no delay' and the so called prudent spending of the public purse⁶⁹⁹ (see Chapter 4). It is acknowledged that undue delay is damaging for children's welfare and development.⁷⁰⁰ However, this important principle,

⁶⁹² Cafcass (n 350); Munro 2011b (n 293); Family Justice Review (n 369).

⁶⁹³ Fortin (n 322); Masson (n 349).

⁶⁹⁴ 26-week rule Children and Families Act 2014.

⁶⁹⁵ Pemberton (n 202); Cafcass Working Framework (n 350).

⁶⁹⁶ s 1(1) Paramountcy of the child's welfare and s 1(3) Welfare Checklist Children Act 1989; r 8 FPR Proceedings moving at the child's pace.

⁶⁹⁷ Department for Education, Working Together to Safeguard Children (n 344).

⁶⁹⁸ Masson (n 349).

⁶⁹⁹ Fortin (n 322).

⁷⁰⁰ Family Justice Review (n 369).

both in the letter and in the spirit of current legislation⁷⁰¹ and formal guidance⁷⁰², does and should not relegate the person of the child to that of a passive and for the most part inactive and invisible recipient⁷⁰³ of the outcome of decisions made in their name.

This research found a number of contradictions in the system in relation to the application of the paramountcy principle. While judges in this research were deeply committed to ensuring they made the right and just decision for a child, the lack of in-depth information in respect of the child and useful analysis of this information provided by both the child's Guardian and Local Authority social worker was highlighted as an issue. A number of judges felt that the child's Guardian did not spend enough time getting to know the child they were representing (see Chapters 6 and 7). The combination of 'proportionate working' by Guardians⁷⁰⁴ and the 26-week rule for the completion of proceedings⁷⁰⁵ does not facilitate the building of a trusting and meaningful relationship with a child and therefore makes it very difficult, if not impossible, to obtain the child's true perspective of their lived experience and circumstances. This reality leaves judges without an in-depth knowledge and understanding of the child's perspective of their situation and detracts significantly from child-centred decision-making. The present system colludes with this situation, the collusion seemingly justified by viewing the child's wishes and feelings as only one element of the welfare checklist,⁷⁰⁶ an element that in reality is given a low priority, both in practice and in current legislation.

8.3 What would a more child-centred approach achieve?

The Family Justice Review⁷⁰⁷ envisaged professionals, particularly children's Guardians, entering the child's world to gain an understanding of their perspectives on their lived experience and circumstances. There is nothing

⁷⁰¹ s 1(2) Children Act 1989, Presumption of delay can be rebutted if it is deemed to be constructive.

⁷⁰² Department for Education (n 26).

⁷⁰³ Freeman (n 437); Fortin (n 322); Munby (n 213).

⁷⁰⁴ Cafcass Working Framework (n 350).

⁷⁰⁵ 26-week rule Children and Families Act 2014.

⁷⁰⁶ s 1(3) Children Act 1989.

⁷⁰⁷ Family Justice Review Panel (n 369).

new about this approach, as it was and continues to be the spirit of s 41 of the Children Act 1989 in relation to the appointment of children's Guardians. However, this approach needs to also apply to judges. Currently, children remain the objects of a system⁷⁰⁸ rather than being seen as individuals with real rights and a first-hand knowledge of their history and circumstances. It should not be assumed that their perspectives of their situation are the same as the professionals that protect and represent them⁷⁰⁹ and therefore the child's ongoing feedback throughout proceedings to the Judge is necessary to guide and focus child-centred decisions. However, valuing and respecting a child's understanding their world and circumstances requires legislative support, given the lack of progress in this area. A separate section under s 1(3) would enhance and strengthen the much weaker element of the list, that of, the wishes and feelings of the child. Gilmore's⁷¹⁰ research has relevance in this regard. His research looked at 130 domestic family law cases in England and Wales reported in the Family Law Reports. He analysed the various ways in which the CRC had been used in case law and found that the most frequently cited Articles were 3 (child best interests) and 12 (child's right to express a view). Gilmore concludes however that the use of CRC has limitations as it is often only used to underline current domestic legislation provisions, indicating a lack legal status and power within the current public child law system.

A child's perspective of their lived experience is far more than just their wishes and feelings, which prevailing practice records in a few sentences within a witness statement or report. The child possesses valuable knowledge of and insight into their circumstances including, the abuse and neglect that they have suffered.⁷¹¹ They are in reality, experts on their experience and the impact such experience has had and is having on their lives. An adult version only of what is in a child's best interests in relation to their welfare and development, is an important and necessary requirement,

⁷⁰⁸ E Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987* (HMSO 1988)

⁷⁰⁹ Hale (n 440).

⁷¹⁰ S Gilmore, 'Use of the UNCRC in Family Law Cases in England and Wales' (2017) 25 *International Journal of Children's Rights* 504.

⁷¹¹ Ofsted (n 461); Brandon et al (n 209); Smart (n 328); Munro (n 293).

but the child's perspective of their well-being needs to be equally valued and respected by professionals. Adoption of a children's rights approach, not just a verbal recognition of rights, but real empowerment of children throughout their proceedings to exercise their rights. For this to happen the current public child law system needs to change to accommodate and facilitate meaningful participation in their proceedings and in the decision-making process including creating an open and welcoming court environment for children. Children need to have the freedom to choose the significant people in their lives to accompany them to court, if they wish to attend part or all of the proceedings.

The child's voice needs to become an active and integral part of the judicial values of fairness and justice. The requirements of current legislation and professional practice are weak in this area. The child's voice should be considered a core element of the principle of paramountcy in practice, supported and strengthened by legislation through amending s 95 of the Children Act 1989, limiting judicial discretion on hearing children directly, to those cases where there is clear evidence that the child will suffer significant harm by communicating their views directly to the judge (see model for child-centred decision-making in Chapter 7). Such an amendment will give a firm impetus for the child's perspective of their welfare and be equally valued alongside those held by professionals involved in their proceedings. There is a need for a radical move away from the current applied impersonal nature of paramountcy to a principle that really empowers the child to take their rightful and central position in proceedings, either indirectly and directly, determined by and in a manner of the child's choosing. The reframing and re-focusing of the principle of paramountcy would facilitate the child's place within the system becoming more visible in and impactful on their proceedings. Presently, the child is distant and invisible for most of their proceedings⁷¹² with their voice being seen as an 'add-on' rather than a core element of the process. The current public child law system is based on assumed respect and trust from children, who find themselves excluded from the heart of the

⁷¹² Munby (n 584).

decision-making process. Professionals need to earn the respect of the children they protect and represent and not assume it by virtue of their professional roles and status.

The combination of child and adult perspectives will enhance and make for more qualitative and holistic child-centred decisions in proceedings. The history of legislation (see Chapter 2) and the findings of serious case reviews⁷¹³ are testament to the need to maintain a consistent and clear focus on the child's experience and needs. This need is as relevant today, as it has always been. The current system and legislation needs to acknowledge and recognise this, both in legislation and professional practice.

8.4 Resources, time and investment in the system

The essence of the paramountcy principle⁷¹⁴ is compromised significantly in the interests of what is considered to be an effective system in terms of managing and completing cases within a 26-week period.⁷¹⁵ It is a system that is rapidly reaching its full capacity, if not beyond,⁷¹⁶ where Guardians are only able to do the 'safe minimum'⁷¹⁷ amount of work with the child they represent and social workers are reaching the point of exhaustion due to high caseloads and a lack of services to support children and their families.⁷¹⁸ Judges in this research highlight a number of issues that have resulted from such professional practice, namely, a lack of depth and balance in evidence and information presented to the court. They also commented on the need for training in this area (see Chapter 7). Judges felt that they themselves needed more training in communicating directly with children. Training needs in the area of working with children were identified in relation to the Police and lawyers. Judges in this research were acutely aware that professional practice has suffered adversely due to the lack of time and resources available to professionals in carrying out their statutory duties in respect of

⁷¹³ Brandon et al (n 209).

⁷¹⁴ s 1(1) Children Act 1989

⁷¹⁵ PLO (n 704).

⁷¹⁶ Munby (n 584).

⁷¹⁷ Cafcass Working Framework (n 350).

⁷¹⁸ Pemberton (n 202).

children. In reality, the system has become recursive in its approach to cases in that it is delimiting itself from the child's perspective of their world.⁷¹⁹ It has adapted to being satisfied with a limited knowledge of the child's perspective of their situation and circumstances.

The Tri-Borough Project in London is looked upon as an example of an effective way of working within the public child law system⁷²⁰ (see Chapter 4). However, even though this project had access to an exceptional level of resources compared to what is available nationally in England and Wales, in terms of services and personnel, the target of 26-weeks for the completion of proceedings was missed in some cases. The reality of the system today is one that is far removed from such levels of resources.

8.5 Judges adopting a more child-centred approach?

Judges work within a system that has become dominated by an arbitrary timescale⁷²¹ for the completion of proceedings. In this research, judges generally had ambivalent feelings about the direct participation of children in proceedings. In relation to the system becoming more child-centred, judges felt that such a development would necessitate a change of attitude among judges and professionals towards children having a more active and direct part in their proceedings, particularly the prevailing attitude that children need to be kept as far away as possible from courts. While judges in this research made reference to the need for the court system to be more open and welcoming of children, their views ranged from openness without restriction to those hinged on a variety of parameters, to questioning the usefulness and value of children's direct involvement in proceedings.

All of the judges in this research did not actively promote such involvement. Meeting with children was the exception rather than the norm. Their preference was to hear children's views through their Guardian. Their ambivalence in this area stemmed from their concern to avoid exposing

⁷¹⁹ Habermas (n 421).

⁷²⁰ Tri-Borough Project (n 528).

⁷²¹ 26-week rule (n 705).

children to further emotional abuse and stress and from their identified need for further training in the area of communicating with children. However, judges were very much committed to ensuring children receive high quality representation in proceedings, while at the same time acknowledging the limited time Guardians are able to spend getting to know the child they represent. Judges placed the child's welfare at the heart of their decision-making, but the direct voice of the child for the most part remains silent in the process. In this research, judges acknowledged that in some cases they did not receive adequate and useful information from professionals to enable them to make the best decision for the child. This reality represents a dysfunction between what judges see as important in terms of their judicial values of fairness and justice and the central position of the principle of paramountcy in proceedings and what they are resigned to accept in terms of professional practice standards. It also represents a system where procedural requirements⁷²² and timescales⁷²³ have become the driving force of proceedings and which maintain a system that remains opaque to children. The current system does not accept that accountability and transparency is an integral part of the protection of children.⁷²⁴

In their discussion on the importance of the judiciary advancing children's rights, particularly in highly charged sensitive and emotional situations, Stalford and Hollingsworth⁷²⁵ state: 'It is thus children's invisibility and vulnerability within the law and their lack of political voice that gives even greater legitimacy to the explicit judicial adoption of a children's rights perspective'. However, they also make a very relevant and cautious observation in relation to having an expectation that the law will achieve a child-centred perspective, by acknowledging that while it is essential to embed children's rights into the fabric of law and relevant policies, this of itself will not achieve a children's rights or a child-centred perspective in terms of the application of law and policy. The law, policies and procedures

⁷²² Guidelines on Judges Meeting Children (n 308).

⁷²³ PLO (n 705).

⁷²⁴ McFarlane (n 384).

⁷²⁵ H Stalford and K Hollingsworth, 'Judging Children's Rights: Tendencies, Tensions, Constraints and Opportunities' in H Stalford, K Hollingsworth and S Gilmore (eds) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart 2017) 22.

are what makes children invisible in the reality of proceedings.⁷²⁶ Children need to take centre stage in the process, rather than waiting in the wings of ongoing proceedings.

In her book Aoife Daly reframes the status of children where courts decide their best interests, arguing that the Convention on the Rights of the Child 'right to be heard' is insufficient, and that children's autonomy should instead be the focus. Daly puts forward a new right, that of autonomy, save in situations where a child would be at risk of suffering significant harm. In relation to hearing the voice of children in the current system she states: ' ... it is determined by the adults involved, and by whether the system has created means to hear children at all. This demonstrates that we require a change of focus from 'hearing' children to recognising them as equals who may sometimes need paternalism. Otherwise it is quite possible that children will either never be offered the opportunity to be heard, or offered a version which is not suited to their needs'.

8.6 Putting the child at the heart of the system

The model put forward in this research (see Chapter 7, Figure 2) encompasses a holistic approach to establishing firmly the child's place, presence, voice and rights within their proceedings, supported by necessary amendments and additions to current legislation. This research has shown that there is a need to move to a more child-centred approach to decision-making within the current public child law system. This requires a radical shift not only in attitudes towards children's active and direct participation in the process, but a re-positioning of children's status, welfare and needs within the system, through the re-assigning of the current narrow and limiting managerial approach to the appropriate role of supporting, facilitating and promoting the central position of children in proceedings, rather than occupying the dominant and determining position it currently occupies. Such a re-positioning of the current system is consistent with the spirit of the

⁷²⁶ Stalford and Hollingsworth (n 725).

Children Act 1989⁷²⁷ and accords with the principle of paramountcy⁷²⁸ and the spirit of rule 8 of the Family Proceedings Rules,⁷²⁹ which requires the system to move at the child's pace and to focus on what is important for the child including their perspectives of their lived experience.

The essential components of a child centred system must place the person of the child at the heart of the process. Children are subject to public child law proceedings because they have suffered significant harm often over a period of years. They come to the system for protection and for those with responsibility for their welfare and best interests to listen to their story. The response of the current system is to distance itself from the child, through only spending the minimum amount of time working with the child and then within a 26-week period reach a life changing decision on the child's life with less than adequate information on the child's life from the perspectives of the child. The child's story is not heard and the impact and scars of significant harm remain with the child. The expectation of the current system is for the child to tell their story of abuse and neglect to complete strangers in as short a time as possible to fit with a system that is driven and dominated by managerial efficiency masquerading under the principle of no delay.

The model put forward by this research is one that reaches out to children in an inclusive and welcoming manner. Children's participation including direct participation if the child wishes, is an essential component of child-centred decision-making as is genuine respect for children's rights under UNCRC, but of themselves, do not define a child-centred system. The system itself, with its processes, structures, values, principles and professional practice need to embrace and value the child's perspective of their situation. This perspective needs to be given priority and embedded in the very core of the current system, supported by the proposed additions to the current law. The child has a right to have their dignity respected and not trampled on by a system that views the child as an 'add-on' to the process. The current

⁷²⁷ Department of Health, *Introduction to the Children Act 1989* (HMSO 1991)

⁷²⁸ s1(1) Child Act 1989.

⁷²⁹ Family Proceedings Rules 2010 (n 669).

system has lost its way in both legislation and professional practice in relation to child-centred decision-making by relegating the person of the child to the status of a passive and distant object, while giving the system itself a pre-eminent status in proceedings. The proposed model for a more child-centred decision process, supported by additions to current legislation and changes in policy hopes to redress the balance, by having a system that is transparent, accessible and directly accountable to the child.

8.7 Areas for future research

This research study solely focused on judges' perspectives, as they are the decision makers and therefore hold a pivotal role in public child law proceedings. The scope of this research was limited to judicial perspectives in relation to child-centred decision-making. There is a need for a larger and broader study of judges' perspectives on public child law in the UK including judges from the Supreme Court. This would allow comparisons to be made, for example, between male and female judges' perspectives and between judges in other jurisdictions including Scotland and Northern Ireland.

The perspectives of children who are the subjects of these proceedings are equally important. An area for future research would be to explore with children their views on the impact of their experience of the current system had on their lives and the lives of their families and whether the decisions made in their case really took on board their perspectives of their lived experience and circumstances. Another area for future research with children who have gone or are going through the system is whether they felt they had a trusting and meaningful relationship with their Guardian and social worker and were given adequate time and attention to discuss and explore their true views about the abuse and neglect they had suffered.

The perspectives of children's families are important. Future research on their views of the proceedings and of the system overall would contribute valuable insights into how the process is being perceived and experienced by those whose lives are affected significantly by the decisions of the court.

There is also a need for research which explores the perspectives of the other professionals in relation to what they consider to be child-centred decision-making and in particular the perspectives of children's Guardians, Local Authority social workers and lawyers, with a particular focus on whether they felt supported and adequately resourced to carry out their professional tasks to a high standard, as envisaged by the spirit of legislation and formal guidance.

Given the significant role that information technology and social media play in children's lives, it would be useful to carry out research on the influence of these areas in relation to how children communicate in their everyday lives, with a particular focus on children going through and children who have gone through public child law proceedings. Such research could provide useful insights into children's perspectives on wider and more innovative ways of involving children in their proceedings. Research on these areas would increase our knowledge and understanding of the methods of communication, that children feel comfortable with and also feel empowered by, to take a much more active part in their proceedings. This increased knowledge and understanding has the real potential for providing both professionals and judges with more in-depth information about the child's world and circumstances, from the child's perspective.

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Appendices

- Appendix 1 Interview Guide / Focus Areas
- Appendix 2 Participant Information Sheet
- Appendix 3 Consent Form
- Appendix 4 Ethical Approval from the University of Liverpool
- Appendix 5 Approval from the President of the Family Division of the High Court
- Appendix 6 Tables showing number, level, gender and national location of Judges
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Appendix 1

Interview Guide / Focus Areas



Interview Guide – Focus Areas

(Interviews will be audio-recorded)

Title of Research:

Child-centredness in decision-making in Public Child Law Proceedings –
Perspectives of the Judiciary

Q.1 What values inform your judgements / decisions / directions?

- Personal values?
- Professional values?
- Conflict experienced between personal and professional values?
- In what ways do your personal and professional values influence and inform your directions / decisions / judgements?

Q.2 Do you hear the views of children involved in public child law proceedings directly on a regular basis?

- If no, what are the issues preventing this happening?
- Barriers to children's direct participation?
- Your professional / personal concerns?
- Interviewing children – worries / anxieties / fears?

Q.3 Enabling children participate directly in public child law proceedings, what would you see as the main factors / issues?

- Practical issues e.g. court environment?
- Procedural issues?
- Legal issues?
- Cultural barriers / issues?
- Social barriers / issues?
- Human issues / difficulties?
- Systemic barriers / issues?
- Training / preparation implications?

Q.4 What in your opinion characterises a child-centred public child law system?

- Transparency within the system – how?
- Accountable to children – how?
- Informative – measures that need to be taken?
- Respectful – examples of how this could be seen in action?
- Child-friendly – practice examples / attitudes / values?
- Made relevant to and for children – how?
- Being inclusive – examples in everyday practices of the court
- Training / skills issues?
- Safe and sensitive to risk – within the system, achieved through?

Q.5 Principles of public child law that may conflict / collide with child-centred decision-making?

- No delay principle – timescales relevant / appropriate to children?
- No order principle – strengths and weaknesses?
- Working in partnership with families – conflict of interests between children and adults?
- Paramountcy of child's best interests – is this achievable? – difficulties / barriers?

Q.6 Training needs in relation to children's direct participation in court proceedings?

- For Judges - Core elements / areas of training?
- For Lawyers? “
- For Social Workers? “
- For Children's Guardians? “
- For Police? “
- For Health Professionals? “
- For Education Professionals? “
- For Expert Witnesses? “

Q.7 In your view, what would it take to create and build a public child law system that children felt was theirs and one that they felt was welcoming and child-friendly and that they felt very comfortable and at ease in participating in?

- Your vision of such a system?
 - Core principles and values of such a system?
 - Change in values required?
 - Attitude change needed?
 - Obstacles in the way?
 - Training and development needs of professionals?
-

Appendix 2

Participant Information Sheet



Participant Information Sheet

Title of Study

Child-centredness in decision-making in Public Child Law Proceedings – Perspectives of the Judiciary

You are invited to take part in the above research study. Before you decide whether you wish to participate, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information and feel free to ask for further information or clarification on any aspect of the research. Contact details are included at the end of this information sheet.

Purpose of the study

The aim of the study is to identify from your perspective the core factors / elements of child-centredness in decisions made in public child law proceedings and to identify and explore with you any factors - human, legal, cultural, systemic and structural that present barriers to a transparent, child-friendly, child-accessible public child law system. This study forms part of the research for my PhD thesis, which I am completing in the School of Law and Social Justice in the University of Liverpool.

Judges' experience in and knowledge of the area of public child law proceedings are crucial to this research. Whilst there exists some research in other jurisdictions, notably, Raitt⁷³⁰ in a study among members of the Scottish Judiciary, in the area of private law and Birnbaum and Bala⁷³¹, where they compared the perspectives of American and Canadian Judges in relation to custody and access cases, there is a dearth of research on Public Child Law proceedings in England and Wales, with a specific focus on the child-centred nature of these proceedings from the perspectives of the judiciary. Although there have been notable contributions to the literature in respect of this area of law from experienced members of the Judiciary

⁷³⁰ Raitt, F. E., 'Hearing children in family law proceedings: can judges make a difference?' (2007) 19(2) *Child and Family Law Quarterly*.

⁷³¹ Birnbaum, R. and Bala, N., 'Judicial Interviews with Children in Custody and Access Cases: comparing experiences in Ontario and Ohio' (2010) 24(3) *International Journal of Law, Policy and the Family* 300.

(Baroness Hale of Richmond⁷³² and Crichton⁷³³), it remains an area where there exists a real gap in research. This study endeavours to reduce this gap.

Why have you been invited to take part in this research study?

You have been invited to take part in this study because of your knowledge, expertise and experience in public child law proceedings. In total, 20 judges from England and Wales (district, county and high court) will be taking part in this research.

Do I have to take part?

No. Participation is entirely voluntary and you are free to withdraw at anytime without explanation.

What is involved?

A one-to-one interview lasting approximately one hour. This will be audio-recorded to ensure your responses are recorded accurately for the purposes of subsequent analysis. A transcript of the interview will be forwarded to you for approval and for you to make any amendments / additions / deletions etc. The interview will take place on a date and at a time that is convenient for you, in a venue of your choice.

What if I am unhappy or if there is a problem?

If you are unhappy, or if a problem arises, please feel free to let either myself or my supervisor know and we will do our best to resolve the issue / concern. Our contact details are included at the end of this information sheet. If you remain unhappy or have a complaint which you feel you cannot come to us with, you can contact the Research Governance Officer on 0151 - 7948290 (ethics@liv.ac.uk). When contacting the Research Governance Officer, please provide details of the name or description of the study (so that it can be identified), the researcher involved, and the details of the complaint you wish to make.

Will my participation be kept confidential?

Yes. All data collected will be stored securely and password protected. Your responses will be anonymised and no identifying details will be disclosed. Access to the data collected will be restricted to myself and my supervisors. The data will be stored for one year following the completion of my PhD thesis.

What will happen to the results of the study?

⁷³² Hale, B., 'Can you hear me Your Honour?' (2012) January *Family Law*.

⁷³³ Crichton, N., 'Listening to children' (2006) October *Family Law* October 849.

The results of the study will form part of the completed PhD thesis, a copy of which will be stored in the University library. The results will also be used in future publications, but no identifying details will be disclosed. Your responses will be kept in a secure place for one year following the completion of the PhD thesis, before being destroyed.

What will happen if I want to stop taking part?

You can withdraw at anytime without explanation. Results up to the period of withdrawal may be used, if you are happy for this to be done, otherwise you may request that they are destroyed and no further use will be made of them.

If you have further questions or need clarification on any matter in relation to this research, please feel free to contact either myself or my supervisor.

Contact details

David Lane
PhD Research Student
School of Law and Social Justice
Rendall Building
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Tel. 07415 – 632093
Email: dlane.cobh67@gmail.com

Dr Helen Stalford
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Appendix 3

Consent Form



CONSENT FORM

Title of Research:

Child-centredness in decision-making in Public
Child Law Proceedings – Perspectives of the
Judiciary

**Please
tick**

Researcher: David Lane

1. I confirm that I have read and have understood the Participant Information Sheet dated, 1st August 2012 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.
2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, without my rights being affected.
3. I understand that, under the Data Protection Act 1998, I can at any time ask for access to the information I provide and I can also request the destruction of that information if I wish.
4. I understand that any personal information collected during the study will be anonymised and remain confidential.
5. I understand that the interview will be audio-recorded.
6. I understand that parts of the interview may be used verbatim in future publications or presentations, but that such quotes will be anonymised.

Participant	Date	Signature
Researcher	Date	Signature

The contact details of the Researcher are:

Address: The School of Law and Social Justice, Rendall Building
University of Liverpool
Liverpool L69 7WW

Telephone: 07415 – 632093

Email: dlane.cobh67@gmail.com

Appendix 4

Ethical Approval from the University of Liverpool



From: McManus, Linda
Sent: 21 May 2012 09:17
To: Stalford, Helen
Subject: FW: Ethics Application and Supporting Documents

Dear Helen

Can you please advise David that his ethics application has been approved, please see below email from Louise Hardwick.

Best wishes
Linda

From: Ackers, Louise
Sent: 14 May 2012 19:33
To: Drywood, Eleanor; Mair, Michael
Cc: McManus, Linda
Subject: RE: Ethics Application and Supporting Documents

Dear David,

The Committee are happy to approve your ethics request but can you please ensure that you review existing material before you embark on new empirical work

Louise

Professor Louise Ackers
Chair in European Socio-Legal Studies and Director
European Law and Policy Research Group
School of Law and Social Justice
Faculty of Humanities and Social Sciences
University of Liverpool
L69 7ZS
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Tel 0151 794 3679


Appendix 5

Approval from the President of the Family Division of the High Court

PRESIDENT
OF THE
FAMILY
DIVISION

SIR JAMES MUNBY
PRESIDENT OF THE FAMILY DIVISION AND HEAD OF FAMILY JUSTICE

Mr David Lane
University of Liverpool
School of Law
Rendall Building
Liverpool
L69 7WW




23rd July 2013

Thank you for the addendum to your application for judicial participation in your research project into Child-Centredness in Decision Making in Public Child Law Proceedings — Perspectives of the Judiciary, which you provided to this office on 25th June 2013.

I have reconsidered your application in the light of the addendum document within which you set out the differences between your proposed project and the recent project carried out by Dr Debbie Cooper. I am now content for you to approach judges for interview, subject to the conditions for approval as set out in the Judicial Participation in Research Projects — Guidance for Researchers; in particular

- Members of the judiciary will not be identified in any research reports; and
- The researcher undertakes to provide the President of the Family Division and the members of the judiciary involved in the research, with a final draft copy of any report in order to give them an opportunity to comment upon it before a report is published.

Please also note that the permission granted is also subject to the willingness of the judges to be interviewed, and there is no obligation on them to take part.

Holly Rodger


Royal Courts of Justice Strand London WC'2A 2LL
Telephone 020 7947 7054 Fax 020 7947 7274 Email Holly.Rodger@judiciary.gsi.gov.uk
Website www.judiciary.gov.uk

Appendix 6

Tables showing number, level, gender and national location of Judges

Research Statistics - England

Level of Court	Male	Female
High Court	2	0
County Court	5	8
District Court	4	2
Magistrates (FPC)	0	2
Total:	12	11
Total: 23		

Table 1

Research Statistics - Wales

Level of Court	Male	Female
County Court	2	3
District Court	2	0
Total:	4	3
Total: 7		

Table 2

Research Statistics - Summary

Number of High Court Judges	2
Number of County Court Judges	18
Number of District Judges	8
Magistrates (FPC)	2

Total Sample: 30

Table 3

Appendix 7

Copy of re-written judgment re P-S by Jane Williams

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SWANSEA CIVIL JUSTICE CENTRE
HER HONOUR JUDGE ISABEL PARRY
SA10C01648

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st March 2013

Before:

Jane Williams, with commentary by David Lane

And

Other Lords Justices

Between:

P-S (Children)

Mr David Blake (instructed by T. Lewellyn Jones) for the Appellant
Miss Ruth Henke QC and Miss Clare Williams (instructed by Carmarthenshire
 County Council) for the 1st Respondent
Mr Edmund Cofie (instructed by John Itsagwede & Co) for the 2nd Respondent
Mr Matthew Rees (instructed by Cameron Jones Hussell & Howe) for the 4th
 Respondent

Hearing date: 12th November 2012

Judgment

1. The appellant, M, was 15 years old when he applied through solicitors and counsel separately representing him for leave to attend court to give evidence in care proceedings to which he was a party. Other parties were the Local Authority, M's younger half-brother A and their Mother. The Local Authority sought care orders in respect of both boys. M wished to return to the care of his Mother and in his application stated that 'he does not feel that the strength of his feelings [are] being sufficiently understood and wishes an opportunity to attend before the learned judge to express himself in person in his own words so that his case is fully advanced.' On 21st November 2011 Her Honour Judge Parry sitting in the Swansea County Court

dismissed M's application. On 24th November 2011 she ordered that both boys be placed in care. With permission granted by Thorpe LJ, M appeals against both the dismissal of his application to give evidence in the case and against the care order.

2. Mr David Blake, M's counsel, submits that 'this case raises a novel point of principle as to whether a young person who has been afforded full independent party status should be heard orally as any other party would "fairly" expect to be and a general point of interest as to what is the right test for whether a child should be heard on questions of wishes, feelings and indeed future intentions when they are competent to express them.' He goes further and submits that 'M does have a "right" to give evidence or there is at least a presumption in favour.' In the appeal against the care order 'the general point ... is essentially should the elements of the welfare checklist be weighted with a rebuttable presumption in favour of wishes and feelings being complied with, where the young person is fast approaching majority?'

The background

3. M was born on [a date in] 1996 in Romania of Romanian parents. His Mother settled in the Republic of Ireland and was granted Irish citizenship. M's father played no part in the proceedings and there was no evidence about him. When in Eire Mother met Mr S, a Nigerian citizen. A was born of this relationship on [a date in] 2011.
4. The Mother, M and A came to Wales in September 2009, where they came to the attention of the Local Authority Social Services. On 28th May 2010, while the children were in school, the Mother attempted to leave Wales for Eire without having made proper arrangements for the care of the children. She was arrested and charged with neglect though eventually acquitted. The children were received into care and placed with foster parents. An application for a care order was issued on 24th June 2010 and a guardian duly appointed to both M and A. Contact ceased at the end of July 2010 because the Mother refused to agree to the Local Authority's requirement that she would not discuss the case with the children. M then tried twice to run away to re-join his Mother, on the second occasion being removed by the police after they forced entry in to the Mother's home. M's initial foster placement with A broke down but M is reported to have settled well with new foster parents.
5. In July 2011 M met his guardian and her solicitor and asked for separate representation. On 26th July 2011 the judge so ordered and appointed a solicitor to represent him. In a position statement settled by his solicitor, dated 31 July 2011, M said, 'I do not wish to remain where I am and I strongly desire to return home.' He said he wished to meet with the judge to convey to her how he felt. The Mother made an application for both M and A to give oral evidence. That application was dismissed.
6. The final hearing commenced on 1st August 2011. M was represented by counsel. At the end of the second day HHJ Parry saw M in her room in the presence of his solicitor and the guardian. In her judgment of 21st November 2011, the judge explained that she did not use the meeting as an opportunity to ascertain M's wishes and feelings, '

... because those wishes and feelings were already perfectly obvious from formal reports that the Court had received from the Guardian and the fact that he now wished to have separate representation ...’ Instead, she explained to M the task of the Court in trying to achieve a welfare outcome for children that reflects their wishes and feelings, and that the Court has to look at the whole picture, all the evidence that is available about the child and about the people who are looking after him and who want to look after him. She did not ‘discuss any issues evidentially with him, such as the reasons why he does not see his mother and the reasons why he apparently absconded to her care in early December 2010’. In taking this approach the judge applied the Guidelines issued by the Family Justice Council in 2010, which state that a meeting out of court between the judge and the child is not to be used for the gathering of evidence. However it is clear that the judge did, as a result of that meeting, form some impression of M, since she noted that M was reasonably subdued during the meeting, but became animated ‘when talking about matters that are far removed from the heavy emotional baggage which must constitute his day-to-day life and his feelings about his brother and mother’.

7. The next day the hearing was adjourned for some three weeks to 26th August to hear the guardian and for closing submissions to be made. On 26th August A’s father attended court and in view of his albeit belated interest the matter was further adjourned for a further three months, to 21st November 2011.
8. On 16th November 2011 M applied for permission to attend to give evidence by video link ‘so that the strength of my feelings can be made clear to everyone’. He explained that he would be ‘extremely distressed if told that I was to be forced to remain in foster care and I would struggle greatly to accept this outcome’. He also said that ‘I have had thoughts of running away as sometimes I have felt that people are not taking me seriously. These have occurred quite often, including quite recently, but in the last few weeks I have been a little more optimistic and hope that the court will grant my wishes. I would feel devastated if I were told I could not return.’ M’s application was heard on 21st November 2011. The Local Authority and guardian indicated that they did not wish to cross-examine M, and M’s Mother indicated that the only question she would be seeking to ask him through her counsel would be about the likelihood of him running away from his placement should a care order be made.
9. The judge dismissed the application and continued to hear the care proceedings, in which A’s father offered himself as a carer for the children either jointly with Mother or in the alternative by himself. The Mother seemed willing to care for the children jointly with A’s father but without any Local Authority intervention. The Local Authority was successful in its application.
The judgment on M’s giving evidence
10. The judge based her dismissal of M’s application to give evidence as follows. First, the Mother had always displayed her own emotions openly in court whether represented or not and there was a severe risk she would make an extreme emotional

outburst which it would be impossible to control. M would be ‘available to Mother’ in the court precincts, with ‘real potential detriment to M in terms of his coming to give evidence’. Secondly, M would want to do what he thought right by his Mother and would want to put right matters over which he had no control and for which he was not responsible. He would ‘assume a responsibility for the outcome of this case’ which would be enormously harmful to him. If he felt he had failed, there was a prospect that his relationship with his carers and Guardian would be damaged. Thirdly, she doubted whether M would communicate anything that would assist her in the determination of the relevant issues: she had already accepted that M would be bitterly disappointed if he could not return to his mother. She concluded that ‘the additional benefit to the determination of the relevant issues of M giving evidence is significantly outweighed by the very real potential detriment’. M should not ‘be placed in the invidious position of giving evidence when the giving of that evidence may make matters significantly harder for him should the case go against his express wishes’. Any ‘short-term emotional harm’ resulting from the rejection of the case put on his behalf, was a reflection of the reality that ‘there is rarely a perfect outcome to proceedings involving children’.

The judgment on the care application

11. The judge accepted the evidence relating to the Mother’s inadequate parenting and neglect. As to the welfare stage, the judge held there was ‘simply no material’ permitting a conclusion that the children could be safe in the care of their Mother or that a repetition of the past problems could be avoided. A’s father, M’s step-father, had no real understanding of the difficulties nor had he been prepared to gain insight during the short period that he had been involved in the proceedings. Neither the mother and father/step-father jointly, or either of them solely, could provide the parenting that both A and M needed.

12. Turning to M’s wishes and feelings, the judge accepted that ‘M has strong feelings’ and felt that the professionals misunderstood him and misinterpreted his apparent compliance with the arrangements made for his welfare. She accepted that M had thought of running away and that what he had written was what he wanted the court to hear of his wishes and feelings. However, she said that the court must ‘assess and interpret his wishes and feelings in the light of other welfare concerns’, specifically her conclusion about the capacity of the parents to meet ‘M’s global welfare needs’. She referred also to the evidence of a clinical and counselling psychologist which indicated that M’s anxiety about himself translated into anxiety about his Mother because of the role he had played in the family, that in the psychologist’s view, M would not run away and that in the current foster placements there was ‘a degree of containment and flexibility’ in which M would feel safe albeit remaining concerned about his Mother. The judge concluded that the expert evidence gave rise to a suggestion that M’s expressed wishes and feelings could not outweigh her clear conclusion on the danger to M’s welfare if he returned to his mother – so his evidence could not, in her view, affect the outcome.

13. After the judge had concluded her *ex tempore* judgment Mr Blake made further submissions and asked the judge to amplify her reasons for refusing to adopt M's wishes about his long term care. She acknowledged the need to balance the expressed wishes and feelings of the child against circumstances likely to prevail if the child's wishes are acted upon. There was no need to 'place any gloss on the s. 1(3) 'checklist''. In this case, she said, 'the risk of harm from Mother is overwhelming'.

Discussion on the issue of M giving evidence

14. In care proceedings, the child is automatically a party. The Children Act 1989 and the Family Proceedings Rules provide how, in practice, effect is given to that party status, bearing in mind a child may be a party from as early in life as the day of the child's birth. Section 41 of the Children Act requires the appointment of a Guardian - who in practice in England will be commissioned by CAFCASS and in Wales, will be a Welsh family proceedings officer acting on behalf of the Welsh Ministers. A guardian need not be appointed if the court is satisfied that it is not necessary to do so in order to safeguard the child's interest. The court may appoint a solicitor to represent the child. A child of sufficient maturity and understanding may instruct a solicitor independently.
15. As for attendance, under s. 95 of the Children Act the court may order the child concerned to attend as prescribed by rules of court. FPR 12.14 provides that any party must attend the proceedings, but the proceedings or any part of them will take place in the absence of a child pursuant to FPR 12.14(3) if the court considers it in the interests of the child having regard to the matters to be discussed or the evidence likely to be given and the child is represented by a guardian or solicitor. The rules thus reflect the norm in any legal proceedings that the parties will attend, but provide, where prescribed conditions apply and subject to procedural safeguards, for a child party not to attend.
16. Section 96 of the Children Act makes special provision about children's evidence. Subsection (1) has the effect that if a child understands the nature of the oath, the child can give evidence in the normal way. Subsection (2) provides that where the court is not satisfied that the child understands the nature of the oath, the child's evidence may be heard if the judge considers that the child understands the duty to speak the truth and has sufficient understanding. Section 96 also provides for the admissibility of hearsay evidence. FPR 22.1 gives the court power to control evidence by giving directions as to the issues on which it requires evidence, the nature of that evidence and the way in which the evidence is to be placed before the court. The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved at the final hearing by the oral evidence.
17. That is the legislative framework. As for its application, the leading authority is *ON v W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, in which a fourteen year old girl was being called to give evidence about alleged abuse relevant to the threshold stage. There are significant differences between that case and

M's, but the principles set out by Baroness Hale are still pertinent. She said that the object was to achieve a fair trial in the determination of the rights of all the people involved. When considering whether a child should be called to give evidence, the court had to weigh the advantages that will bring to the determination of the truth and the damage it may do to the welfare of that or any other child. The hearing, she said, cannot be fair to children unless their interests are given great weight. She set out various factors which the court would need to take into account when carrying out the balancing exercise. These included the child's own feelings about giving evidence, the age and maturity of the child and 'the general evidence of the harm which giving evidence may do to children, as well as any features which are particular to this child and this case'. (at para 26) The risk, and therefore the weight to be attached to the several factors, would vary from case to case. But she predicted that 'the consequence of the balancing exercise will usually be that the additional benefits to the court's task in calling the child do not outweigh the additional harm that it will do to the child.' (at para. 30)

18. The Court of Appeal in that case (hereafter, *Re: W*) [2010] EWCA Civ 57 had invited the President of the Family Division to consider the issue of children giving evidence in family proceedings. Lord Justice Thorpe's working party of the Family Justice Council did so, and produced Guidelines in December 2011. The resultant 2011 Guidelines drew heavily on the Supreme Court's decision in *Re: W*. The Guidelines state that there is no presumption or starting point against children giving evidence in family proceedings and that the court's 'principal objective' should be achieving a fair trial. The essential balancing exercise requires the court to weigh the possible advantages to the 'determination of the truth' against the possible damage to the child, having regard to a number of factors. Understandably, given the provenance of the Guidelines, the factors include many which have relevance only to the 'proof of abuse' cases. However some of the factors and the Guidance generally are helpful in dealing with the issue of whether the child should give evidence at the disposal stage when the question is what the welfare of the child demands.
19. Thorpe LJ remarked in *Re: H (Abuse: Oral Evidence)* [2011] EWCA Civ 741, [2012] 1 FLR 186 at [8], that Baroness Hale's guidance in *Re: W* essentially requires a measured balance between the demands of justice and the needs of child welfare. That reduction should I think be seen in the context of the 'proof of abuse' cases, of which *Re: H* was another example. In those cases, 'justice' is a shorthand for fairness to an alleged abuser, and 'child welfare' is a shorthand for the risk of the child being traumatised by having to give evidence and be cross-examined about the alleged abuse. I would not accept, as a general proposition, that justice and child welfare are opposing aims, and I am sure that is not what Thorpe LJ intended to be understood.
20. I turn now to the features which importantly distinguish M's case from cases like *Re: H* and *Re: W*, where the child would be a witness of facts as to alleged past abuse and would face cross-examination in court on difficult and painful

issues. M's evidence would be not about what had happened, but about what should happen. M, a child of relatively mature years, sought to address the court about his own welfare interest, on which he took a different view from the guardian and the Local Authority. Neither the Local Authority nor the guardian wished to challenge M's evidence and on behalf of the Mother it had been indicated that questioning would be limited to one issue only, which was whether he might run away again. It would be wrong to assume that the 'general evidence of harm' to children from giving evidence (para. 26 of Baroness Hale's judgment above) has the same purchase in M's situation. Furthermore, in M's case and others like it, the 'general evidence' about the impact of direct participation must nowadays, in my view, include evidence about ensuring respect for the rights of children in proceedings which affect them.

21. At about the time the Children Act 1989 was passed, the Convention on the Rights of the Child ('the Convention') was adopted by the United Nations General Assembly. The Convention was ratified by the United Kingdom in 1990 and is the most widely ratified human rights treaty ever. It contains some 42 substantive articles containing requirements for States Parties to recognise a wide range of rights and to take actions. The Convention has not been made a part of English law but is subject to the general rule that where more than one interpretation is possible, the interpretation chosen should be that which better complies with international obligations. (*Smith v Secretary of State for Work and Pensions and Another* [2006] UKHL 35 per Baroness Hale at para.78.)
22. This approach applies throughout England and Wales, but in Wales, where M's case was heard, there is an additional aspect which, whilst not in force at the time, will apply in family proceedings from 1 May 2014, when the Rights of Children and Young Persons Measure (Wales) 2011 came fully into force. Section 1 of the Measure requires the Welsh Ministers, 'when exercising any of their functions' to have due regard to the requirements of Part 1 of the Convention and specified articles of the Optional Protocols which have been ratified by the UK Government. Welsh Ministers, not the courts, are subject to this duty of due regard, but in Wales, it is the function of Welsh Ministers, exercised in practice by the Welsh family proceedings officers, to exercise the 'CAFCASS' functions in family proceedings. Accordingly this legal duty to have due regard to the Convention applies to the exercise of those functions in Wales. This will affect the court's approach to evidence; especially when considering any argument that due regard has not been given to the requirements of the Convention. Had the 2011 Measure been in force at the time of the hearing in M's case, this would have been an additional argument at his disposal, upon which the court would have had to adjudicate.

23. Even at the time of M's case, the Convention had already been recognised as having effects on the exercise of judicial discretion in family proceedings: see Thorpe LJ in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] Fam 366, at para. 32. Certain of the Convention's requirements have been identified by the UN Committee on the Rights of the Child ('the UN Committee') as being of particular and general importance. These include Article 3, para. 1 of which requires that in all actions concerning children undertaken by courts of law (and other institutions), 'the best interests of the child shall be a primary consideration', and Article 12, which requires States Parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. The UN Committee has made it clear that Articles 3 and 12 are interdependent. A best interests determination which fails to respect the child's Article 12 rights would be incompatible with the Convention, however well-intended and attentive to the child's other needs. Equally, a mechanism for 'hearing the child' which failed adequately to protect the child's best interests would be non-compliant.
24. Apart from these requirements of the Convention, there is the well-established right to a fair hearing guaranteed by Article 6 of the ECHR and enforceable under the Human Rights Act 1998. No person, however young, is excluded from its protection. Furthermore, as pointed out by Munby J. in *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam) at para. 158, the child, as well as the parent, has the right to respect for private and family life under Article 8 ECHR, including the procedural aspects recognised in *W v United Kingdom* (1987) 10 EHRR and *McMichael v United Kingdom* (1995) 20 EHRR 205. Section 3 of the HRA 1998 requires the court 'so far as possible' to interpret legislation compatibly with the ECHR Convention rights, and the common law requires that if more than one interpretation is possible, the more UN Convention-compliant interpretation should be preferred. This points inescapably to the conclusion that in proceedings which may result in interference with a child's private and family life, the child has the right to be heard, express views and have due weight attached to them in accordance with the child's age and understanding.
25. Still, this does not answer the question of *how* the child's views will be heard. Paragraph 2 of Article 12 contemplates that this may be 'either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law', so the representative participation supplied by the 'tandem' model appears on the face of it compatible with the Convention. This is the view taken by many commentators, for example Professor Jane Fortin, (*Children's Rights and the Developing Law*, Chapter 7). Plainly, however, this can only be the case *if* those exercising discretion –

judicially, professionally or administratively – act in a manner which is compatible with the holistic interpretation required by the Convention.

26. The General Comment on Article 12 at [43] prefers the child being heard under conditions of confidentiality, not in open court – a preference that would of course be satisfied by the closed character of care proceedings, from which the public are excluded. Further, it is clear that it may be enough that an intermediary hears the child's views and reports them the judge: it does not seem essential that the judge must hear directly from the child. But the question in this case is what approach must be taken by a court where the child party's views are at odds with those of the court-appointed intermediary and the child party, being of sufficient age and understanding to instruct a solicitor independently, wants to participate directly and give evidence in the case. Mr Blake argues that in this situation, the child has a right to give evidence. To this, the Local Authority replied that no-one has 'the right to give evidence' in family proceedings, the question of what evidence is required to determine the case being under the control and direction of the court. Quite so, but that is not the point: the point is how the court should exercise that power.
27. As in most cases involving the exercise of discretion, there is a balance to be struck between the benefits and the burdens. That is what the judge sought to do, but in my view she erred: as to the relevance of one factor, as to the weight to be attached to others, and in omitting relevant factors. Her view that M would not be able to convey anything she did not already know was not a relevant consideration. Whether or not, technically, anyone has a 'right to give evidence' in family proceedings, it is inconceivable that an adult party would be prevented from doing so simply because the court already knows the position that party wishes to convey. There is no justification for distinguishing between adult and child parties in this regard except by reference to the child's best interests. As to that, the judge erred when she preferred Dr Street's opinion and the 'general evidence' of harm to children from giving evidence to what M himself might tell her directly. She erred in finding that the impact on M of an outburst from his mother would be uncontrollable, since M had requested the use of a video link rather than being physically present in court. Crucially, she did not consider the potential harm to M from not being allowed to give his evidence. This was the final hearing which would determine whether he could, in the immediate future, live with this mother. He was 15, had been granted the facility of separate representation and had clear views which he wanted to convey directly, not through intermediaries. It seems to me curious that when we recognise that adult parties, excluded from a private meeting between the judge and child, may feel an injustice has been done to them, we should fail to recognise that children may also feel an injustice has been done to them if they are excluded from the process. I note that social research on this issue (for example, Masson and Winn-Oakley *Out of Hearing: Representing Children in*

Court) suggests that such feelings of injustice are in practice often experienced by children in family proceedings.

28. Accordingly, I would allow the appeal on this point. Where a party, of any age, to family proceedings is competent and wishes to give evidence, the effect of Articles 6 and 8 ECHR, and additionally in the case of a child, Articles 3 and 12 of the UNCRC, is that in practice they do enjoy that right. The judge must still control the proceedings, but judicial discretion must, as Thorpe LJ recognised in *Mabon v Mabon* quoted above, be exercised in such a way as to give effect to these fundamental human rights requirements.

Discussion of the issue of weight to be attached to the mature child's views

29. I have concluded that M had, effectively, the right to give evidence, and in light of that conclusion I cannot assume that his evidence would have made no difference to the court's decision on the welfare test. To do so would be to fall in to the same error as the trial judge. Accordingly, the appeal against the care order must also be allowed. In the event that the case comes again before the court of first instance, there is then the question of the weight to be attached to M's views. Mr Blake argues that there is a rebuttable presumption in favour of a mature child's preferred outcome at the welfare stage. There is merit in this argument, since, as with the question of direct participation in the proceedings, we have to recognise that the law is on the move in terms of recognition of the capacity and agency of the child. As I have already explained, this affects our interpretation of the rules and the exercise of discretion in family proceedings.
30. On balance, however, I decline to take that further step. The weight to be given to the wishes, feelings and views of the child will vary from case to case. It may be the determinative factor in a particular case but s. 1(3) Children Act 1989 cannot be construed so as to read into it a hierarchy of weight amongst the factors there listed. Each and all of the factors should also be interpreted in light of the fundamental human rights requirements to which I have referred. But as to the weight to be attached to them, each case is fact sensitive.

Other Lord Justices:

We agree.