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Reforming care proceedings in England and Wales: Speeding up Justice and welfare?

Judith Masson

Introduction

The drivers of change in the child protection system, identified in *Crosscurrents*: scandals and inquiries; ideology in terms of the approach to the relationship between the family and the state; and permanency in planning for children have continued to operate since 2000. However, austerity is now shaping both demands on, and capacity of children's services because of very large cuts in both welfare spending and local government funding. What funding remains for local authority children's services is largely spent on child protection, and looking after children removed for this reason.

This chapter examines care proceedings, the legal process to authorize compulsory, child protection, intervention. Following repeated failed attempts, care proceedings have been radically reformed in order to curtail the legal process, achieve timely decisions for children and cut costs. From the outside, little may appear to have changed: the process remains court-based, adversarial and with free legal representation for parents and children. However legislation, implemented following recommendations of the *Family Justice Review*¹, has required all the professionals involved to change their approach and this has been compounded by new case law and greater emphasis on publicising the work of the Family Court.

Context: Growth of care proceedings

Since 2000, the care population in England and Wales has increased, largely because children spend longer in the care system. More children have entered care through care proceedings, which result in longer stays in care,² and the Leaving Care Act 2000 has discouraged the premature exit of adolescents so that they can be more-prepared for adult life. Rates for the use of care proceedings, entry to care and the size of the care population vary enormously between local authorities, in part these relate to the local socio-economic conditions, with greater deprivation correlating with higher rates of entry but they also reflect current and past policies on the use of care.³ Over the same period, the number of care applications to the courts has almost doubled;⁴ in 2015, the Family Court received around 12,000 applications, relating to approximately 19,000 children or 12 per 10,000 children.⁵ Much but not all of this increase has been generated by changes in practice rather than law or policy. A review to consider the optimum size of the care population concluded that 'reducing the size of the care population would not be in the best interests of children' and resources should be directed at securing longer stays in care for those who could be helped most, and improving community services to support others with their families.⁶ However, it

¹ Family Justice Review, *Interim Report* (2011); *Final Report* (2011)

² John Rowlands and June Statham, 'Numbers of children looked after in England: a historical analysis' (2009) 14 *CFSW* 79; Department for Education, *Data Pack, Improving permanence for Looked after children* (2013)

³ Cafcass, *Three weeks in November... three years on ...*(2012) Appendix A; Martin Narey, *Beyond Care Matters: the future of the care population* (2007)

⁴ Judith Masson, 'Caring about care proceedings' (2010) *Radical Statistics* 1 and Cafcass, *Care Demand Statistics* <https://www.cafcass.gov.uk/news/2015/december/november-2015-care-demand-statistics.aspx> accessed 29 December 2015

⁵ *ibid*

⁶ Narey above, n.3, para 53

is widely accepted that the main factor in the increase in care proceedings after 2008 was the government and media response to the death of *Baby P*.⁷

Peter Connelly was killed by his mother's partner and the partner's brother through repeated physical abuse, despite being the subject of a child protection plan and regular social work visits. Although the social worker and manager were publicly blamed, there were failures in all the agencies involved; the police failed to investigate earlier injuries to Peter, and the local health clinic lacked both suitable staff and recording systems to follow up cases of possible non-accidental injury.⁸ Local authorities responded by reviewing cases and making more court applications. The threshold for proceedings was not apparently lowered, rather risks that had previously been seen as manageable without a court order are now considered too high, if not for the children and families, for social workers, managers and local authorities.⁹

In addition, greater recognition of the damaging impact of neglect on children's life chances encouraged earlier intervention, more authoritative work to improve children's care and use of court orders where this did not achieve lasting change. A substantial proportion of proceedings have been found to involve the same mothers, who become pregnant shortly after their baby's removal, and without resolving the problems which made them unable to parent.¹⁰ Demographic changes also appear to have added to the numbers of children needing protection: migration of young workers has increased the number of births, the use of care proceedings and the complexity of those proceedings, which now more frequently raise issues of jurisdiction and placement with kin overseas.¹¹

Changes to care proceedings

Even before the increase in numbers, the time taken to complete care cases and their cost to the tax payer was making a case for change. Whilst there was some agreement that applications should be better prepared and proceedings better managed by the court, there was a lack of collaboration and co-ordination between the government and the judiciary in the development of reforms and in their implementation.¹² The judiciary and the legal profession were both resistant to the idea that the time to decide cases could or should be limited, or to adopting practices which would help achieve this. The long duration of cases made the task of completing cases easier: a few parents were able to demonstrate that they had changed and could provide adequate care; others ceased to participate, either way some difficult decisions to commit children permanently to care were avoided. There was very substantial reliance on assessments of parents during proceedings, by expert witnesses, which made handling these cases easier for lawyers and judges: the time for assessment gave parents time to change; and the weight of evidence accumulated made some outcomes obvious. Consequently, neither a series of Protocols devised by the judiciary nor guidance for local authorities on case preparation had any impact on the use of experts or the duration of

⁷ The name used for Peter Connelly in the original media reports.

⁸ Ray Jones, *The story of Baby P* (Policy Press 2014)

⁹ Association of Directors of Children's Services (ADCS), *Safeguarding pressures phase 3* (2012) 8.1; Cafcass, above n. 3

¹⁰ Karen Broadhurst *et al.*, 'Connecting Events in Time to Identify a Hidden Population: Birth Mothers and Their Children in Recurrent Care Proceedings in England' (2015) *Br J Social Work* doi: 10.1093/bjsw/bcv130 (advance access)

¹¹ ADCS, *Safeguarding pressures phase 4* (2014) 85; *Re N* [2015] EWCA Civ 1112 and Council Regulation (EC) No 2201/2003

¹² Judith Masson, 'Reforming care proceedings – time for a review' (2007) 19 *CFLQ* 411 and 'Third (or fourth) time lucky for care proceedings reform?' (2015) 27 *CFLQ* 3

cases, with the *average* length rising to over 65 weeks by 2012, against a target of 40 weeks.¹³ This failure and the pressing need to save £2 billion from the justice budget were key factors in a new drive for change. This resulted in the setting up of the Family Justice Review in 2010. The recommendations of this Review, enacted in the Children and Families Act 2014 and implemented with a new court process, have made the most significant changes to care proceedings since 2000.

Pre-proceedings

A pre-proceedings process for care proceedings was introduced by Children Act 1989 Statutory Guidance¹⁴ as part of the Public Law Outline (PLO) reforms of care proceedings introduced in 2008. Its aims were to reduce the number of care proceedings by diverting cases from court and to ensure that the remaining applications were better prepared. The process was simple: where local authorities were considering care proceedings in non-urgent cases they were expected to send the parents a letter, advising them of their concerns and inviting them to a meeting to discuss these. The letter entitled parents to legal aid so that they could have a lawyer with them at this pre-proceedings meeting.¹⁵ Although this process was neither theoretically nor empirically grounded, it fitted with social work ideals of working in partnership and service-user empowerment. Having a lawyer could help the parents to recognise the seriousness of the local authorities' concerns; encourage them to engage with assessments and services to improve parenting; and enable local authorities to understand parents' capacities and whether court orders were needed. Use of this approach by local authorities varied but it did have some success in diverting cases. In around a quarter of cases care proceedings were avoided, either through sustained improvements in parental care or agreements for care by relatives or, occasionally, foster carers. Both social workers and lawyers regarded this aspect of the process positively. However, if local authorities took cases to court they found that pre-proceedings assessments were routinely ignored and new assessments commissioned by the court, usually from psychologists or independent social workers. For this reason, both costs and the time to achieve court orders were increased not reduced. It was clear that the judiciary had not engaged with this reform and continued to lack trust in the quality of local authority social work.¹⁶ Judges relied on experts they had appointed in the proceedings, and naturally lawyers acting for parents continued to seek expert appointments. Consequently, local authority use of the process declined.¹⁷

The pre-proceedings process diverted some cases from the courts but may also have contributed to the increase in proceedings and delays in decisions-making. A lower threshold may be accepted for this limited intervention but the close scrutiny that follows can elevate concerns that lead to a decision to apply to court.¹⁸ Alternatively, cases may drift in pre-proceedings because poor parenting neither justifies proceedings nor case closure. Nevertheless, the introduction of time-limited care proceedings has made the pre-proceedings process more important; the courts now

¹³ Family Justice Review, above n.1

¹⁴ Department of Children, Schools and Families, *The Children Act 1989 Guidance and Regulations, Vol. 1, Court Orders* (2008)

¹⁵ Above, n. 13, paras 3.23-3.33 and Annex 1

¹⁶ Judith Masson *et al.*, *Partnership by law?* School of Law, University of Bristol
<<http://www.bristol.ac.uk/law/people/judith-m-masson/pub/9073834>> 30 December 2015

¹⁷ Judith Masson and Jonathan Dickens, 'Care proceedings reform: The future of the pre-proceedings process' [2013] *Family Law* 1413

¹⁸ A net-widening response, see Masson *et al* above n. 16 at 183-4; ADCS, above n. 11 at 75

accept that most assessments are completed before the local authority applies to court, and are not repeated in proceedings.¹⁹ Use of the process has doubled.²⁰

The Children and Families Act 2014 and the PLO 2013 reforms to care proceedings

The statutory reforms to care proceedings went hand in hand with the setting up of the Family court of England and Wales²¹; a family justice modernisation programme which sought to secure judicial continuity in family proceedings²²; a new governance structure to improve co-ordination between agencies working in family justice, both nationally and locally²³; and a new Public Law Outline (PLO) setting out a revised court process for care proceedings.²⁴ Judges retained their independence but within each court area the Designated Family Judge was given greater responsibility for the management of family justice. Judicial practice, particularly timely decision-making and the use of adjournments was now subject to scrutiny. Although the new legislation only came into force in April 2014 the new PLO applying the 26 week timescale and the restriction of experts was introduced by temporary court rules in the summer of 2013 as 'a national pilot'.

The Children and Families Act 2014 set a 26 week limit for the duration of care proceedings, a period that was less than half the *average* length in 2012-13. Provision was made for extensions but only after considering the impact on the child's welfare, and where these were necessary to resolve the case justly.²⁵ There was considerable resistance and scepticism that cases could be completed so quickly²⁶ but the Sir James Munby, President of the Family Division gave his wholehearted support, speaking at training events for all family judges,²⁷ stating, 'This deadline can be met, it must be met, it will be met.'²⁸ Completion within 26 weeks was possible only by changing the process, requiring more preparation, severely restricting the appointment of experts, reducing the number of hearings and ending review and renewal of interim orders. Assessments must now be completed before the application; further assessments are limited to the children's guardian's analyses of the child's views and the local authority's social work case, and specific assessments determined by the judge as 'necessary to assist the court to resolve the proceedings justly.'²⁹ The judicial practice of ignoring assessments undertaken by the local authority, which had undermined the effectiveness of the pre-proceedings process, was effectively outlawed. Expert appointments were further constrained by rules that meant these applications involved substantial preparation, and by reductions in legal aid fees for experts, which discouraged some from doing this work.³⁰

¹⁹ Sir Nicholas Wall, speech to Resolution annual conference 23 March 2012

<<https://www.judiciary.gov.uk/announcement-type/sirnicolaswall/>> accessed 31 December 2015; Sir James Munby, 'View from the President's Chambers (2)' [2013] *Family Law* 680, 683

²⁰ Unpublished data provided by the Legal Aid Agency for 2014-15

²¹ Crime and Courts Act 2013, s. 17 and Sched. 10

²² Ryder J, *Judicial proposals for the modernisation of Family Justice* (2012) Judiciary of England and Wales

²³ See Family Justice Board, *Annual Report 2012-13* (2013) Ministry of Justice (MoJ)

²⁴ Family Procedure Rules 2010 (revised), Practice Direction 12A <

https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a> 31 December 2015

²⁵ S.14 (2),(3) adding Children Act 1989, s.32(2)(ii),(3),(5),(6), added by Children and Families Act 2014, s.14

²⁶ a) Justice Committee, *Operation of the Family Courts*, 6th Report 2010-12 H.C. 518, 10; b) *Pre-legislative scrutiny of the Children and Families Bill*, 4th Report of 2012-13 H.C. 739, 31-34

²⁷ All 600 judges who hear care cases attended a 2 day course on the PLO

²⁸ Sir James Munby, 'View from the President's Chambers: the Process of reform' [2013] *Family Law* 548, 549

²⁹ Children and Families Act 2014, s. 13(6).

³⁰ Family Procedure Rules 2010 (revised), Pt 25; Sarah J Brown *et al.*, *The use of Experts in family law* (2015) MoJ, 2

The general removal of experts has elevated the importance of social work expertise. This is supplied by children's guardians, employed by Cafcass, the court's social work service, and the local authority applicant. From the start of the new process, Cafcass introduced 'proportionate working' to ensure that guardian appointments could be made from the start of the case and all cases got appropriate attention.³¹ Guardians provide a brief initial analysis to identify for the court aspects of the local authority's case or child's welfare that required attention for the first hearing, and a final analysis, setting out the child's wishes and feelings, the guardian's assessment of the plans for the child's future and the orders required for the child's welfare, for the last hearing. This approach is both narrower than previously, with the guardian having only a 'watching brief' throughout the case, and more constrained, so that any need for further work must be discussed with a manager. This change was not universally welcomed: the Justice Committee was concerned that there was insufficient attention to the guardian's professional relationship with the child.³² However, this system has ensured that the courts routinely have access to guardian's assessments and that proceedings are not delayed by the unavailability of guardians as they had been previously.³³

The provision of good quality social work by local authorities has also been a major concern. Alongside the Family Justice Review the government appointed Professor Eileen Munro to report on child protection social work. Although there was some communication between the two reviews, the separation meant that insufficient attention was given in the former to the local authority context of care proceedings and the demands of the court in the latter. Amongst the issues raised in the Munro review was the excessive formalisation of authority social work - this focused social workers on *complying* with procedures rather than *thinking* about the impact of their work on children and families, and gave few opportunities to develop social work skills or learn from practice.³⁴ The Munro proposals sought to create a child-centred system, to refocus practice on social work and to raise professional standards by creating a 'principal social worker' post in each local authority, to retain experienced staff in front line or advisory work and encourage a learning culture.³⁵ Whilst the government accepted the majority of the Munro proposals and appointed a Chief Social worker, other aspects of the Munro reforms appear to have stalled with the severe cuts to local authority budgets, the failure of the new professional body, the College of Social Work³⁶, and new government priorities 'turning round troubled families'³⁷ rather than ensuring children at risk are helped.³⁸

Local authorities have also found it hard to recruit and retain social workers³⁹; care proceedings cases are allocated to newly qualified social workers with limited experience, not

³¹ Cafcass, *Operating framework* (2013) 9

³² Above n. 26 a, Chapter 6

³³ *ibid*

³⁴ The Munro review of child protection, *Part 1: Systems analysis* (2010); *Interim Report: The child's journey* (2011); *Final Report: A child-centred system* (2011)

³⁵ The Government accepted these proposals: *A child-centred system: the Government's response to the Munro review of child protection* (2011)

³⁶ The College of Social Work was established in 2012 but closed in 2015 because its income depended on having sufficient members.

³⁷ Department of Communities and Local Government, *Understanding Troubled Families* (2014) Stephen Crossley, *The Troubled Families Programme: The perfect social policy? Briefing Paper* (2015)

³⁸ June Thoburn, 'Troubled families', 'troublesome families' and the trouble with Payment by Results' (2013), *2 Families, Relationships and Societies*, 471

³⁹ Mary Baginsky, *Retaining experienced social workers in children's services: the challenge facing local authorities in England* (2013) < <https://www.kcl.ac.uk/sspp/policy-institute/scwru/pubs/2013/reports/baginsky13retaining.pdf> > 1st January 2016

people who can demonstrate expertise. Moreover, it was clear from early statements of the President of the Family Division that he had strong views about the content and length of documents for care proceedings, and expected social work accounts to be analytical not simply descriptive. In order to meet the challenges of producing applications and social work evidence which would satisfy the court, local authorities devised pro forma documents and trained staff. Many also appointed experienced staff as case managers to mentor social workers and assure the quality of applications.⁴⁰ The reforms to care proceedings placed very substantial demands on local authorities, in terms of social work and case preparation, having a clear idea about the plan for the child at the start, and working within tight timescales. For example, a decision to seek court approval for an adoption plan must be made by week 16 if a placement order⁴¹ is to be made at the final hearing in week 26. Where proceedings are started at birth, this allows for only 12-15 weeks to assess parenting, allowing no second chances for a mother who rejects or leaves a residential assessment.⁴² Despite a reduction in court fees,⁴³ the reforms increased local authorities' costs; they have to pay the whole cost of assessments before proceedings whereas previously they shared assessment costs with the other parties.⁴⁴ Costs have been shifted from the Legal Aid Agency to local authorities, from central to local government.

The length of care proceedings has been reduced: the average duration is now around 30 weeks; at least 55 per cent of cases are completed within 26 weeks but many court areas appear to be struggling to maintain this pace.⁴⁵ There are also some indications that judges are making different, 'lower tariff' orders, which fail to secure permanency for children. Justice in terms of sufficient scrutiny of applications and good decisions for children can sometimes be 'sacrificed on the altar of speed'.⁴⁶ Second applications may be a factor in the increase in cases.

These reforms have not merely changed the process, they have changed the role of the court and the nature of care proceedings. Rather than being an arena for problem-solving,⁴⁷ courts are now simply the place for determining factual disputes and making decisions. Judges are no longer referees with powers ensuring fair play amongst the lawyers who were searching for solutions, they are case managers and decision-makers operating within statutory rules. This challenges the way the courts and lawyers previously operated and imposes greater demands on judges. They now have responsibility for whole cases, not individual hearings, must make timely decisions rather than allow cases to edge towards resolution in a process over time⁴⁸ and hold the most extreme powers of any judge since the 'abandonment of the right to impose capital sentences.'⁴⁹

⁴⁰ This was the approach taken in the early pilot of the 26 week time limit: Chris Beckett *et al.*, *Concluding Care Proceedings within 26 Weeks: Messages from the Evaluation of the Tri-borough Care Proceedings Pilot* (2014) Centre for Research on Children & Families University of East Anglia

⁴¹ So that procedures within the local authority can be completed: Adoption Agencies Regulations 2005 SI 389 (as amended)

⁴² *Re S* [2014] EWCC B44

⁴³ The local authority must pay £2055 to bring care proceedings, a reduction from £4825, the fee introduced in 2008

⁴⁴ Masson above, n. 12 at 19

⁴⁵ Cafcass, *Care and supervision application duration by Designated Family Judge (DFJ) area* < <https://www.cafcass.gov.uk> > 1 January 2016

⁴⁶ *Re NL* [2014] EWHC 270 (Fam) per Pauffley J at 40

⁴⁷ Joan Hunt *et al.*, *The last resort* (1999) London, TSO

⁴⁸ Julia Pearce *et al.*, *Just following instructions?* (2011) chap 2 < <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/justfollowinginstructions.pdf> > 1 January 2016

⁴⁹ *Re L (Care Assessment: Fair Trial)* [2002] EWHC 1379 per Munby J at 150

Case law: the decisions in *Re B*⁵⁰ and *Re B-S*⁵¹

The decisions of the Supreme Court in *Re B* in June 2013 and the Court of Appeal in *Re B-S* in September 2013 were published early in the piloting of the PLO 2013. The timing was unfortunate because local authorities and Cafcass had already developed training, guidance and pro formas. Although, as will be made clear in the analysis below, these two cases made little or no change to the *law*, they had profound impact on the care proceedings system, by causing uncertainties about law, practice and process, and through encouraging many (ultimately futile) appeals. As a consequence, decision-making for some young children has been delayed, risking their prospects for a permanent placement, parents have had their hopes for re-unification prolonged unrealistically, and local authorities have faced costly and demanding legal challenges.⁵² Where challenges have occurred after children's placement for adoption, prospective adopters have been put under unbearable strain. Beyond individual cases, practice has changed; both local authorities and the courts are now making different decisions, with a consequence that fewer children will be adopted from care, contrary to their best interests and government policy.⁵³ Whereas it appeared that the PLO might enable local authorities to obtain their preferred order more easily so long as cases were well prepared, the case law has had the opposite effect. Case outcomes are harder to predict; the courts appear more focused on process and form and less willing to make care and placement orders. Whether this is a result of intended corrective action by senior judiciary or just another swing in the child protection pendulum is unclear.

In *Re B*, 'Amelia' became the subject of care proceedings on discharge from hospital at the age of one month. She was never in her parents' care but was found to be at risk of *future* harm because of her mother's 'significant disturbance of psychological functioning',⁵⁴ both parents' extremely troubled and criminal histories⁵⁵ and the apparent impossibility of their co-operating with professionals. A care order with a plan for adoption, made in the original proceedings, after long and complex proceedings, including a final hearing lasting four weeks, was upheld by the Court of Appeal: it was a proportionate response because there was no other way of protecting Amelia. However, the two non-family judges in the appeal court expressed concerns about excessive state intervention where the risks were only moral and emotional.⁵⁶ The parents' appeal was dismissed by the majority of the Supreme Court⁵⁷ despite their loving care for Amelia, throughout the three years of proceedings at supervised contact sessions.

The Supreme Court rehearsed the well-established case law that requires the local authority to prove its case, risk of harm to be based on proved facts⁵⁸ and any intervention to be proportionate, so as to comply with European Convention on Human Rights, Art. 8(2).⁵⁹ No further re-assessment of proportionality need be made by the appellate court, their role was simply one of review. The parents' characters and personalities determined how they would parent and so could

⁵⁰ [2013] UKSC 33 on appeal from [2012] EWCA Civ 1475

⁵¹ [2013] EWCA Civ 1146

⁵² Julie Doughty, 'Myths and misunderstandings in adoption law and policy' (2015) 27 *CFLQ* 331

⁵³ Department for Education, *Action Plan on Adoption* (2012); Placement orders have reduced by 45%, Adoption leadership Board, *Headline measures and Business Intelligence Q4 2014-15* (2015) Department for Education; courts are refusing placement orders more frequently: ADCS, above n. 11, 51

⁵⁴ *Re B* [2012] EWCA Civ 1475, para 12 taken from the Local authority's threshold statement

⁵⁵ *Re B* [2012] EWCA Civ 1475, para 322 taken from HHJ Cryan's judgment

⁵⁶ Lewison and Rix LJ; *per* Rix LJ at para 150

⁵⁷ Baroness Hale dissented

⁵⁸ *Re J* [2013] UKSC 9; *Re H and R (Sexual Abuse: Standard of Proof)* [1996] A.C. 563

⁵⁹ Lord Wilson at 32; Lord Neuberger at 75; Lord Kerr at 130; Lady Hale at 195

both contribute to a finding that the significant harm test was satisfied and determining what order was required in the child's welfare.⁶⁰ In this respect the case was unexceptional; the appellant parents' arguments were rejected and the exiting law restated. However, the language used by three of the judges, including by Baroness Hale who dissented, reverberated across the child care sector: adoption, or in this case, a care order with an adoption plan was only permissible, 'if nothing else will do.'⁶¹ This too was nothing new; proportionality had long been established as a test for orders in care proceedings.⁶² It is reflected in the Adoption and Children Act 2002, which allows a court to dispense with parental consent to adoption only if the child's welfare *requires*.⁶³ 'Nothing else will do' has become a slogan in challenges to local authority care plans. Since *Re B*, lawyers have argued, sometimes successfully, that there are alternatives which 'would do', including placement with family members unknown to the child,⁶⁴ even where they do not even share the child's language⁶⁵ and long-term foster care for a toddler.⁶⁶ Overall there has been a shift against valuing children's existing relationships with their state-chosen carers in favour of preserving blood relationships.

The Supreme Court also set a new standard for appeals in care proceedings. Decisions made about the threshold test and order were not exercises of discretion, challengeable only by showing the judge was 'plainly wrong', the approach which had applied for almost 30 years.⁶⁷ Rather they were 'evaluations', which could be overturned if it were shown simply that the judge was 'wrong'.⁶⁸ Overall, *Re B* upheld the well-established principles for decisions in care proceedings but made it easier to obtain leave to appeal and gave appellants a new slogan.

The application for leave to appeal in *Re B-S* was granted shortly after, and ostensibly because of, the decision in *Re B*, so that Court of Appeal could consider its impact on adoption cases.⁶⁹ The decision at first instance was upheld: Parker J had been right to refuse the applicant mother leave to oppose the adoption.⁷⁰ Nevertheless, Munby P, used his judgment as a vehicle for responding to concerns in other cases, telling social workers, children's guardians and judges what was expected of them. There must be 'proper evidence': the social worker and children's guardian must explain the benefits and detriments in terms of the child's welfare of all the available placement options.⁷¹ There must be an 'adequately reasoned' judgment including a 'global, holistic evaluation' of the options in comparison with each other.⁷²

This was all *obiter dicta*, unnecessary for the decision, but was delivered by the President of the Family Division in strident language and disseminated by the President's Office⁷³ with the consequence that it was viewed as law. Lawyers who acted for parents welcomed *Re B-S* for the

⁶⁰ Lady Hale alone rejected this.

⁶¹ *Per* Lord Neuberger at 76; Lord Kerr at 130 and Lady Hale at 145 and 198.

⁶² *Re O* [2001] EWCA Civ 16

⁶³ Adoption and Children Act 2002, s. 52(1)(b)

⁶⁴ Department for Education, *Special Guardianship Review: Report on Findings* (2015) 25

⁶⁵ *Re M'P-P (Children)* [2015] EWCA Civ 584

⁶⁶ *Re V (Children)* [2013] EWCA Civ 913

⁶⁷ *G v G* [1985] FLR 894 (HL); *Piglowska v Piglowski* [1999] 2 FLR 763 (HL)

⁶⁸ *Re B* [2013] UKSC 33 at 44, 61, 110, 139, 203

⁶⁹ [2013] EWCA Civ 813

⁷⁰ Adoption and Children Act 2002, s.47(5),(7); *Re B-S* [2013] EWCA Civ 1146 *per* Munby P, at 103

⁷¹ *Re B-S* [2013] EWCA Civ 1146 *per* Munby P, at paras 34-40

⁷² At 41-46; the President endorsed McFarlane LJ's judgment in *Re G* [2013] EWCA Civ 946 castigating 'linear' judgments, a label which became a ticket to appeal; see now *Re F* [2015] EWCA Civ 882 at 30-31

⁷³ This was unprecedented but has subsequently occurred with other judgments, including the corrective decision in *Re R* [2014] EWCA Civ 1625

opportunities it gave for challenge; the decision was widely disseminated on the websites of barristers and organisations that oppose adoption. Within days, it was being cited in court and used to justify the refusal of care orders, granting parents leave to oppose adoption and successful appeals against placement orders and against refusal of their revocation. In many of the cases the original decision had been made long before *Re B*, allowing the appeals therefore strengthened the impression that these two cases had imposed new legal standards.

Following the decision in *Re B-S*, the number of placement orders made almost halved⁷⁴ and appeals to the Court of Appeal in care and adoption cases increased by 30 per cent.⁷⁵ The Court of Appeal struggled to cope with its workload, leading to long delays to hear appeals and then to deliver judgment. The focus of the appeals was largely the structure and content of the judgment, not the merits of the decision. The majority of successful appeals resulted in cases being remitted for rehearing, adding to the delay in decisions for children, and undermining the aims of the PLO. It was fourteen months before Munby P made an opportunity in *Re R*⁷⁶ to correct the impression that *Re B-S* had changed the law. This case made clear that *Re B-S* was not intended to gloss the legislation but was primarily directed at practice.⁷⁷ By this time, the Adoption Leadership Board had published its own analysis reaching the same conclusion and re-iterating the importance of adoption.⁷⁸ Munby P responded by making it clear that he viewed this as guidance for social workers not judges, and that it was not 'endorsed by the judiciary.'⁷⁹ This was not co-operation across the family justice system, which the Family Justice Review had called for but an acerbic reminder of judicial independence.

Greater clarity in what was expected at the start of the PLO pilot, in training for judges and social work personnel could and should have prevented many of the *Re B-S* appeals. When he spoke to judges at their PLO training, Sir James Munby could have emphasised the continuing importance of detailed, reasoned judgments alongside completing cases in 26 weeks. That he did not suggests that he did not then think that judgments were inadequate. Similarly, when setting out his expectations for analytical social work evidence in articles on the PLO,⁸⁰ he should have detailed the approach he later took in *Re B-S*. The failure to do so combined with the uncertainty created by guidance delivered in the guise of a judgment put implementation of the PLO at risk. As it is, swifter conclusions may have been reached by making different decisions. The decline in placement orders has to some extent been offset by an increase in special guardianship orders, for children to live with kin. Although, family placement can have advantages, there are widely expressed concerns that some orders have been made without adequate assessment of the carers' ability to provide permanent care.⁸¹ Ultimately, a successful child protection system requires the courts working with children's services, setting standards and timescales which are realistic and achievable so that good decisions can be made. Large number of appeals and poor decisions should not be viewed as simply reflecting inadequate social work practice but a consequence of the poor quality of interactions

⁷⁴ Adoption Leadership Board, above, n. 53

⁷⁵ Calculated from decisions published on <http://www.bailii.org> ; Statistics for appeals to the Family Court are not published

⁷⁶ [2014] EWCA Civ 1625

⁷⁷ [2014] EWCA Civ 1625 at 55-56

⁷⁸ National Adoption Leadership Board, *Impact of Court Judgments on Adoption* (November 2014)

⁷⁹ *Re R* [2014] EWCA Civ 1625 at 70.

⁸⁰ Above, n 19

⁸¹ Department for Education, above, n. 64

within the family justice system, caused by lack of consistency and predictability in courts and local authorities.

Transparency

After the Children Act 1989, the majority of care proceedings (and other family proceedings) were conducted in private. Although journalists could attend the family proceedings court, they were not permitted to report in a way which identified the child or that they were involved in family proceedings,⁸² consequently they did not attend. Criticism of this position grew, particularly from fathers' rights groups, journalists, some judges, and Parliament. Confidence in the family justice system was linked to transparency of its processes and decisions. Rather than seen as respecting family privacy, family courts were portrayed as operating secretly, with the implication that their decisions could not withstand scrutiny. The Constitutional Affairs Committee recommended greater openness, including public access to the courts, limited press reporting and the publication of anonymised judgments.⁸³ The Labour Government followed with two public consultations, the first about greater access to courts and the second about improving the flow of information from them.⁸⁴ The response to the questions on media access revealed the gulf in views between respondents, with the press, the public and half of children's charities favouring this, whilst the majority of the judiciary, local authorities and lawyers opposed it.⁸⁵ The Government concluded that it was not in the interests of children for proceedings to be held in public but the volume of information flowing from the courts must increase. The rules on media access were amended and a pilot project was set up to publish anonymous judgments in care proceedings. This had little impact, without clarity about reporting, journalists could not afford to spend time at court. Reform of press reporting required legislation; the provisions to do this were highly contentious but passed after considerable amendment, shortly before the 2010 election. The Coalition Government never implemented these provisions, rightly regarding them as completely flawed. The legislation it was repealed in 2013.⁸⁶

Sir James Munby has repeatedly stressed the importance of greater transparency and the role of the court in holding local authorities to account, referring with the words of Brandeis J, to 'the disinfectant effects of forensic sunlight.'⁸⁷ He considered the failure to implement the 2010 Act a 'lost opportunity'.⁸⁸ As President of the Family Court, he has made clear his determination that 'the new Family Court should not be saddled...with the charge that we are a system of secret and unaccountable justice.'⁸⁹ He has issued guidance on the publication of judgments and a consultation

⁸² Children Act 1989, s. 97(2). It is also contempt of court to publish information about a child from proceedings heard in private, Administration of Justice Act 1960.

⁸³ *Family Justice: the operation of the family courts*, 2004–05 HC 116; *Family Justice: the operation of the family courts revisited*, 2005–2006, HC 1086

⁸⁴ Ministry of Justice, *Confidence and confidentiality: Improving transparency and privacy in family courts* (2006), and *Confidence & confidentiality: Openness in family courts – a new approach* (2007)

⁸⁵ Ministry of Justice, *Family Justice in View* (2008)

⁸⁶ Mark Hanna, 'Irreconcilable differences: The attempts to Increase Media Coverage of Family Courts in England and Wales' (2012) 4 *J. Media Law* 27

⁸⁷ *Whitney v California* 274 U.S. 357 (1927), see Munby P, 'Opening up the Family Courts', speech to the Annual Conference of the Society of Editors, 11th November 2013 <<https://www.judiciary.gov.uk>> 20 December 2015

⁸⁸ Munby, J., The Hershman-Levy Memorial Lecture For 2010: 'Lost Opportunities: Law reform and transparency In the Family Courts', 1 July 2010, <http://www.alc.org.uk/uploads/HERSHMAN_LEVY_MEMORIAL_LECTURE_2010.pdf> 20 December 2015

⁸⁹ Munby J, above, n. 28

paper on further reforms.⁹⁰ Specifically, he has introduced a presumption that written judgments should be published online, stating that ‘public authorities and expert witnesses should be named’ unless there are ‘compelling reasons’.⁹¹ More judgments are now published and social workers have been named, but some have been spared where managers are seen to be primarily at fault.⁹²

The effect on local authorities is chilling. It is already very difficult to recruit and retain good social workers, and this adds to the pressure. Being named and shamed does not stop with the law report but is carried on in social media, impacting on social workers’ families, their other clients and their work.⁹³ The most egregious example of this occurred following the death of Baby Peter.⁹⁴ The public’s view of social work is diminished, making those in need less likely to seek or accept social work support. Overall, this approach to transparency makes it more difficult to protect children.

Publishing more judgments does not improve knowledge or understanding of care proceedings or the family courts. For this much better data, on cases, court process in practice, decisions and costs are required. Publishing judgments simply provides more of the same, and adds to the workload of lawyers and judges. Judgments are written to satisfy the Court of Appeal, now more than ever, not to explain decisions to families or social work professionals. Published judgments do not reflect the generality of practice but its extremes, and so give a distorted impression. Much of the time spent on judgments would be better spent on systematic recording to provide data, analysing the operation of the system using these data and on explaining decisions to families.

Conclusion

The reforms to care proceedings have shown that they can be determined far more quickly but have also changed their nature. Judges have less power to shape or extend the process and have more responsibility for decisions, not only in relation to the orders but also how social work practice is seen. It appears speedier process has resulted in different decisions, an outcome which was neither expected, nor intended. It is too early to say whether the changes have been positive for children; earlier decisions should allow some children to secure a permanent home when they are younger and can benefit most but it seems that others will experience poor arrangements because of the emphasis on avoiding adoption and state care.

The lack of trust and co-operative working, which were seen by the Family Justice Review as the root of the dysfunction of the family justice system remain. Whilst there was considerable co-operation in introducing the PLO, the same cannot be said for the other developments, the shifts in case law and transparency.

⁹⁰ Practice Guidance: *Transparency in the Family Courts – Publication of Judgments*, 16 January 2014; Consultation Paper: *Transparency – Next Steps*, 15 August 2014

⁹¹ Guidance, above n. 89, para 20a

⁹² *Re A* [2015] EWFC 11

⁹³ See, for example, *In the matter of an application by Gloucestershire County Council for the committal to prison of Matthew John Newman* [2014] EWHC 3136

⁹⁴ Above, n. 8