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## Children's rights: Preventing the use of state care and preventing care proceedings

Judith Masson

### Abstract

Freeman was concerned about the large numbers of children in state care and proposed a right for children not to be care. This chapter examines the contemporary, legal and policy context for services to prevent the need for care and the operation of the 'pre-proceedings process' intended to divert families from care proceedings. Whilst there are provisions in the Children Act 1989 for family support, few people have rights to any services. The services available are severely limited and increasingly provided coercively. The state relies heavily on relative carers to keep children out of state care but supports very few to do so. As a consequence, children experience the negative consequences of poverty, and many would be far better supported in the care system. As a counter to Freeman, it argues that there should be more state support for alternative care and more (and longer) care for those without family and friends to care for them – a right to state care.

### Introduction

*The Rights and Wrongs of Children* (Freeman, 1983) captured the concerns about the role of state care in the early 1980s. Many of the worst defects of the public care system were swept away by the reforms of the Children Act 1989, the increased recognition of children as rights bearers and greater legal scrutiny of children's services departments. However, the fundamental issue of the proper role of the state in the care of children and young people remains, and with it questions about the rights of children and their parents, the obligations of the state and the processes to be used. Whilst at a theoretical level it might be possible to reach a settled agreement on these, changes in understanding of children's needs, developments in social work practice and shifts in the resources made available for children and families necessitate continual reassessment of how state care should be provided, used and arranged.

In his conclusion to chapter 5, *Children of the State*, Freeman wrote, '*Children should have the right not to be in care. Too many children are in care unnecessarily. Measures at state and local level could prevent children coming into care*' (Freeman, 1983: 181). Freeman's call to prevent entry to care was clearly not a matter of '*abandoning children to their rights*'. State care would continue to be necessary for some children, whose families were unable to provide an acceptable standard of care, but not *too many*. Preventing entry was not simply negative, imposing substantive or procedural barriers against state intervention. Rather, it required *measures*, positive action. Both central government and the local state needed to provide alternatives to care, which would enable children to remain with their families and receive good-enough care.

This chapter explores the policy and practice of prevention of state care in the Twenty-first century and the extent to which they support children's rights to care and not to be in state care unnecessarily. It uses the term 'care' in the broader sense, as Freeman did, of children being looked after by the state, rather than limited to those who are on care orders under the Children Act 1989. Specifically, it examines two positive approaches to prevention, the provision of family support and the use of a formalised pre-proceedings process to divert families from care proceedings. The section on the pre-proceedings process draws on an ESRC-funded study into its operation and

impact. The *Families on the Edge of Care Proceedings* study was conducted with Dr Jonathan Dickens from the Centre for Research on Children and Families, University of East Anglia, in six local authorities between 2010 and 2012 (Masson *et al.* 2013; Dickens *et al.* 2013). This chapter argues that securing some children's rights to care by their family requires both the availability of family support services and processes to assist some parents to make use of these. Also, that state care remains a positive option for some children in the care of relatives largely because of lack of financial and other support for such carers. Prevention of state care thus remains a contingent goal, which depends on the available alternatives for securing children's well-being. Finally, where the family cannot or will not provide good enough care there should be a right to state care which enables children and young people to achieve their potential.

### **Too many? The numbers of children in the care system**

Both the number and rate per 10,000 of children in public care declined from the early 1980s to the late 1990s (Rowlands and Statham, 2009). These reductions reflect changes in policy and practice, which have kept most young offenders out of the care system, raised the threshold for care proceedings, increasingly relied on the wider family to care for children who cannot remain at home and promoted adoption for young children in care. The high cost of care (Beecham and Sinclair, 2007), shortages of placements and the difficulties of rehabilitating children home (Bullock *et al.* 1993; Farmer, 2012)) have all encouraged local authorities to establish strong gate-keeping procedures to prevent entry to s.20 accommodation (Packman and Hall, 2008). The emphasis in decisions in the European Court of Human Rights on care as a temporary measure (*Johansen v Norway* (1996) 23 EHRR 33, para 78) has encouraged this trend, with the government (and local authorities) being required to explain why children cannot return to their family (*YL v UK* (2012) App No 4547/10 ECtHR).

Increases in the care population in the decade from 1999 largely reflected increases in the length of time children and young people remained in the care system (Rowlands and Statham, 2009). Two major factors have contributed to the increasing length of care careers. First, delaying young people's exit from the care system reversed a trend of abandoning young people to early independence by design (pushing children out of the care system) or by default (a lack of suitable placements for older, young people). The Children (Leaving Care) Act 2000 made local authorities, not the benefit system, responsible for supporting care leavers under the age of 18 years. In keeping with changes in wider society and recognition of the vulnerability of children who have been brought up in care (Stein, 2008), increased emphasis was put on caring for young people in state care. This has resulted in the development of better support for young people when they leave care, and rights for some young people to remain in care or to return if they leave before the age of 18 years (Munro *et al.* 2010a; b). Secondly, and less positively, the increasing number and length of care proceedings meant that children spent long periods in care before decisions for placement in the care of relatives or adoption (DCA and DfES, 2006; DfE, 2012).

The Green Paper: *Care Matters: Transforming the lives of Children and Young people* (DfES 2006) questioned whether more children should be supported in their families with a consequent reduction in the care population. The working group set up to examine this were concerned that lower numbers of care proceedings might mean that some local authorities were failing to make applications. However, they concluded that a numerical approach to determining the size of the care

population could be damaging to individual children, and that more should be done to support children aged 11-15 outside the care system because of the poor outcomes for those who enter at this time (Narey, 2007).

More recently, the death of 'Baby P' (Haringey LSCB, 2009) has resulted in a very substantial increase in care proceedings, and in the numbers of children in care (ADCS, 2010; 2012). In part, this increase is a result of the pressure social workers and local authorities experience in the face of a media storm following the highly publicised and hideous death of a child who had a child protection plan. It also reflects recognition of the inadequacy of family support, where professional capacity to engage families is limited, and parents are not committed to working with social workers to achieve change.

Not only has there been a change in the number of children looked after by the state, there have also been changes in the circumstances of children who are looked after, and the quality of the care provided. Over time, care has come to be used differently. In the Twenty-first century, children in care are far more likely to have been made the subject of a court order than in the 1980s, and to be in care because of abuse or neglect. Entry to the care system is often the culmination of a long process during which the local authority and the court have explored alternatives to making a care order (Masson et al 2008; 2013). Young children tend to leave care for relative placements or adoptive homes, whilst those who enter later, grow up in care (Sinclair *et al.* 2007). This underlines the role that state care has both as a place of last resort (Hunt *et al.* 1999) and a childhood home for children and young people who can neither return to their families nor be found an adoptive family.

As a result of concerns about the quality of care and the poor outcomes for looked after children (Select Committee on Health, 1997-8) considerable efforts (and resources) have been committed to improving and ensuring the quality of the care provided. Looked after children have additional rights to education and more attention is given to their experience of the care system through children's rights services and local care councils. Local authorities are 'corporate parents' and councillors are encouraged to consider '*If this was my child...*' (DfES and LGIU, 2003). Preventing entry to care can no longer be seen as a simple protective measure, which values children's families and saves children from poor quality substitute care. However, social engineering is never acceptable; an assessment that care might be better than home can never justify a decision to remove a child from their family (*Re SB (Children)* [2009] UKSC 17, Hale B at para 7). Also, entry to care creates as well as resolves problems; children are often relieved to be in care but they miss their families and worry about their future (Ofsted 2009; 2012).

In the absence of any alternative sources of support such as benefits for relative carers or supported housing for children whose parents cannot, or will not, provide for them, local authority care is an essential service. For those who are cared for by relatives, the benefits of being a 'looked-after child' - financial (and other) support before and after age 18 - place young people in a markedly better position (Selwyn *et al.*, 2013). This form of state care is not something to be prevented, although the need for such support to be under the umbrella of *care* can be questioned. A more equitable arrangement would link provision of resources to need rather than placement status (Hunt and Waterhouse, 2013). If this were done, the numbers of young people in public care could be reduced. Even greater advantages would be gained by children and young people living with relatives, whose lives and futures are severely constrained by poverty. However, it seems unlikely that central government would be willing to extend the benefits system in this way, or that local

authorities could extend the support provided for looked after children to the much larger number of children in the care of relatives outside the care system.

### **Prevention and the Children Act 1989**

The Children Act 1989 sought to move away from the narrow idea of prevention in child welfare to the broader notion of 'family support'. Rather than merely using services to prevent children's entry to care (Child Care Act 1980, s.1), local authorities were given a 'general duty' to safeguard and promote the welfare of 'children in need' and so far as this was consistent, to promote their upbringing by their families (Children Act 1989, s.17(1)). Statutory Guidance (DH, 1991) emphasised the wide discretion that local authorities had to provide family support, and the consequent need to establish priorities. The training materials developed for the implementation the Act noted that 'Part III comes before Part IV' that is, compulsory measures of care should only be used where family support services were inadequate to protect children (DH and FRG, 1991). Within this context, (voluntary) accommodation for a child (s.20) was seen as a service to the family at a time of acute family stress, not something that had to be prevented.

The new approach and wider powers did not come with additional resources (Masson, 1992). Rather than developing broad programmes to provide support for families, local authorities were constrained to focus their resources on the cases of greatest concern. Although they provided (or commissioned) some primary prevention services, resources were focused on secondary prevention: family support for children whose health or development were already impaired, particularly those at risk of neglect or abuse (Parton 1997), and tertiary prevention: services to repair harm to children, including to assist with rehabilitation or re-unification. The Act supported this approach through specific duties for prevention of neglect and abuse (Sched 2, para 4) and to investigate cases of actual or suspected significant harm (s.47). Local authorities retained powers to bring care proceedings; resources for preventive services were continually under pressure from the need to protect children.

In the 1990s, there was an attempt to refocus children's services away from a child protection orientation and towards provision of family services (DH, 1995; Gilbert *et al.* 2011) but this had only limited effect. The demands of the protection system, particularly the increasing complexity and cost of legal proceedings, and the ways local authority performance was monitored and funded made it difficult to redirect services.

Resource constraints resulted in local authorities refusing requests for services, even where families were clearly in need. Legal challenge to such decisions explored the nature of the 'general duty' and the extent of local authority children's services' responsibilities for homeless families or destitute young people, and thus rights to s.20 accommodation or other services. The wording of s.17 was construed as providing wide discretion to local authorities, allowing them to refuse services unless doing so breached the European Convention on Human Rights or was unreasonable (*R (ota G) v Barnet LBC* [2003] UKHL 57). Thus a challenge to a policy, which would separate homeless families through limiting support to care for the children in a foster home, rather than accommodation for the family together, was unsuccessful (*R (ota W) v Lambeth LBC* [2003] UKHL 57). The courts were more responsive when it came to the duty to accommodate young people estranged from their families, rejecting a number of approaches local authorities developed to limit their responsibilities. So, where housing was provided for young people without carers, they were held to be

'accommodated under s.20' and therefore owed 'leaving care' duties (*R. (ota Behre) v Hillingdon LBC* [2003] EWHC 2075). Similarly, local authorities were no longer able to avoid their responsibilities to homeless 16 and 17 year olds, by providing only assistance on the basis that they were resourceful enough to find their own accommodation (*R (ota G) v Southwark LBC* [2009] UKHL 26). Nor could social workers request relatives to care for a child who needed protection and then treat the arrangement as a private, family matter rather than the provision of s.20 accommodation through a family placement (*R (SA) v Kent CC* [2011] EWCA civ 1303). Effectively, the Children Act 1989 had created rights to care but left preventive services discretionary.

The Labour Government's focus on social exclusion gave a new impetus to family support and to primary prevention. New universal services were provided for pre-school children by *Sure Start*, in children's centres, initially in deprived areas. Early intervention services, provided largely on a voluntary basis, were developed as a way of preventing problems associated with poor parenting, which might lead to problems such as poor educational outcomes and unemployment, later. The *Every Child Matters* programme (H.M. Government, 2004) also sought to shift to prevention whilst strengthening protection, countering what might otherwise have been a greater emphasis on child protection investigation in the wake of the Victoria Climbié Inquiry (Laming, 2003). However, protection work again dominated local authority concerns following the media storm in the wake of the 'Baby P' case (Haringey, 2009).

The outlook for primary prevention appears much less positive under the Coalition government with cuts in services and reductions in the income of some of the poorest families. Although Eileen Munro's *Review of Child Protection*, set up by the Coalition (Munro, 2011) stressed the value of 'early help' and preventive rather than reactive services, there has been little progress in developing these. Changes to the welfare system, particularly the capping of benefits, are having the greatest impact on large families. *Sure Start* is being cut back to focus on the neediest families, and children centres closed; reduced budgets are resulting in major cuts to many other local authority services. Reduction of income and moving away from family and support networks as a result of the cap on housing benefit will leave some families struggling to cope. Preventive services have not completely disappeared but rarely provide the long term support some families need (Featherstone *et al* 2013).

Substantial budget cuts are also forcing local authorities to rethink the use of their most expensive service – care. The Early Intervention Foundation ([earlyinterventionfoundation.org.uk](http://earlyinterventionfoundation.org.uk)) is promoting alternatives, including to prevent family breakdown without the need to provide full-time care. The early intervention approach emphasises the intervening early, with young children and before problems become entrenched, the use of evidence based programmes and joint working across agencies. Where alternative services truly meet children's needs they are a welcome development, strengthening preventative work. However, there are risks that a lack of evidence results in negative assumptions of about services, thresholds are raised even higher, children are left without care and action is only taken where families are seen as a problem to others. There has long been recognition that there are very disadvantaged families, with multiple and complex problems who repeatedly interact with a range of public services in relation to physical and mental health, housing and benefits and their children's care and behaviour. Concerns about the costs of these families in current service provision, on local communities, and for children's futures as adults led to the development of new approaches. Family Intervention Projects provide intensive support, either in their own homes or in separate 'core units' to help families make changes, and have succeeded in

reducing some problem behaviours and improving family functioning (Action for Children, 2011). Focusing much of the rhetoric on the problems these families cause rather than those such as poverty, health and social exclusion that they experience (Levitas, 2012), the government has established the *Troubled Families Programme* (DCLG 2012) to target such families. Local authorities are required to operate the programme in their area. This is providing forms of family support, preventing family breakdown and admission to care but the language has shifted: this is family intervention by workers who have 'a persistent, assertive and challenging approach' (DCLG, 2012: 7).

Whilst family support under the Children Act 1989 was expected to be provided 'in partnership' with families so families agreed what services they used, the reality for families at the edge of care because of child protection concerns has always involved at least the possibility of coercion. A failure to accept or use services identifies parents as 'unco-operative' and raises levels of concern, making compulsory measures more likely (Platt, 2006). Conversely, where parents are willing to work with children's services, higher levels of risk can be managed (Platt and Turney, 2013). Emergency protection powers are used where families in extreme crisis refuse to agree to placement of their child in foster care or with relatives, and offers of s.20 accommodation sometimes make clear that they cannot really be refused (DH 2001; Masson 2005). Such practices highlight the problem of treating the provision of accommodation simply as a service, and family support as optional where children are in need of protection. They also raise questions about protecting rights where arrangements are not truly voluntary, and how this might be done.

### **Preventing care proceedings and the introduction of the pre-proceedings process**

The rationale for preventing care proceedings was more limited than for preventing entry to care. The concerns were not primarily with respecting children's right to life with their family or avoiding the damaging aspects of the care system. Rather, they were about reducing the burden that care proceedings placed on the courts, the time taken in proceedings and the cost to the legal aid system of those proceedings.

Concerns about the cost of the care proceedings system and the time taken by courts to make decisions about children led to the government establishing *the Child Care Proceedings System Review* in 2005 (DCA and DfES 2006). The Review forecast an increase in the number of proceedings and sought to reduce the pressure on courts in a number of ways. First, it sought to prevent the need for care proceedings by encouraging parents to address the local authority's concerns. Secondly, it wanted to ensure that local authorities prepared court applications more thoroughly. Thirdly, it recommended that parents had legal advice from a specialist solicitor before proceedings were issued so that they could be helped to understand the concerns, and engage with proceedings from the start. It brought these ideas together, suggesting an immediate pilot and evaluation of a scheme to establish: 'the impact of early advice on the parents' experience of and engagement with the system; the extent to which early advice can ensure that cases only reach ... proceedings when all safe and appropriate alternatives have been explored; and the impact of early advice on cases that go to court' (DCA and DfES, 2006: 5.11). The Review did not seek to explain why such a process might be effective but noted that most proceedings led to children's permanent removal from their parents, and most parents praised their solicitors.

Preventing care proceedings whilst securing children's rights to protection from significant harm depends on improvement in the way the parents care for their children or parental agreement for an

alternative care arrangement, either care by relatives or s.20 accommodation. That a relatively simple intervention might be able to achieve this appeared to suggest that local authorities brought proceedings too readily, a view that was not supported by research evidence of high thresholds and cases resulting in orders (Brophy, 2006; Masson *et al.* 2008). Where proceedings were not prevented, the intention was that the pre-proceedings process would enable proceedings to be completed more swiftly. The pre-proceedings period would provide time for the local authority to complete assessments, and so there would be less need to commission expert reports in proceedings and fewer late claims by relatives to look after a child. However, achieving speedier court decision-making also required changes in court practice. Rather than conducting their own assessments of the child's needs and the parents' capacity to care, using experts appointed at the request of the parents, courts would need to focus more narrowly on examining the key issues to be decided in the local authority's case. This would involve a change of culture and more robust case management so that proceedings could be completed in the timetable for the child (President of the Family Division, 2008).

The scheme was not piloted, nor was there any discussion of its theoretical or social work practice underpinnings. Rather, the idea was taken forward with the reforms to care proceedings in statutory guidance for local authorities (DCSF, 2008). This set out the formal pre-proceedings process to be followed before proceedings were issued, unless 'the scale, nature and urgency' of safeguarding concerns meant it could not be used (para 3.30).

### **What is the pre-proceedings process?**

The process appears very simple as set out in the *Children Act 1989, Guidance and Regulations, Volume 1* (DCSF, 2008). It is triggered by the local authority's decision, taken with legal advice, that the threshold for care proceedings is met. The social worker then sends the parents a 'letter before proceedings', listing concerns about the children's care and inviting them to a 'pre-proceedings meeting' to discuss these. Under a heading 'HOW TO AVOID GOING TO COURT' (DCSF 2008, 73), the letter warns parents of the possibility of proceedings and advises them to take the letter to a solicitor so that they can be accompanied at the meeting by a solicitor (or a paralegal). The letter before proceedings entitles the parents to free legal advice under legal aid, with solicitors paid a fixed fee (£365) for providing this service. The Guidance includes no further advice about the meeting, but states that its outcome should be explained to the parents orally and by letter. Nor does it make any links to other local authority processes such as child protection planning or looked after child (LAC) review. However, local authorities are required to file pre-proceedings documents with any subsequent applications for care proceedings (President of the Family Division, 2008). In this way, the court is made aware that the process has been used, and local authorities are made accountable if they fail to alert parents of serious concerns.

Although the guidance suggests a free-standing process and a single meeting, in practice it is part of a longer relationship between children's services and parents. In the Families on the Edge of Care Proceedings Study, over 80 per cent of the children whose care was considered under the pre-proceedings process were subject to child protection plans, and a quarter had been on plans for a year or more (Masson *et al.* 2013). The letter before proceedings marked a 'step up' in the local authority's action; a court order had not yet been obtained but parents in pre-proceedings were not



voluntary clients. Rather, their failure to make the changes set out in the child protection plan identified them as 'highly resistant' (Fauth *et al.* 2010).

### **Does the pre-proceedings process work?**

Although the Ministry of Justice commissioned an 'early evaluation' into the new court procedures for care proceedings (Jessiman *et al.* 2009), there were no plans for research on the pre-proceedings process. Indeed, the only data about use of the process was the number of bills solicitors submitted to the Legal Services Commission for doing this work. These showed that nationally, over 6200 parents obtained pre-proceedings legal advice in 2009-10, a wide variation in the numbers doing so in different local authorities and considerable change over time (Masson *et al.* 2013). However, it was not possible to determine from these figures the proportion of cases where the pre-proceedings process was used, or the effect the process had on them. This is what the *Families on the edge of care proceedings* study aimed to do. By examining the use of the process in 6 local authorities and comparing cases with and without pre-proceedings, it was possible to establish its effects. The quantitative study analysed local authority legal department records: 120 files where the process was used and 87 files where care proceedings were started without a pre-proceedings letter or meeting. A parallel qualitative study in the same authorities, included observations of 36 pre-proceedings meetings and interviews with those who participated in them: 24 parents, 35 lawyers (representing parents or the local authority) and 35 social workers or social work managers (Masson *et al.* 2013).

Care proceedings were avoided in a quarter of the file cases where the pre-proceedings process was used. This was not simply a short term effect; none of these cases had entered care proceedings within a year. A higher proportion of the observed cases had not resulted in proceedings by the end of the study but the follow up period was shorter. Out of 30 cases in the file sample where the local authority decided not to bring proceedings, parental care improved in 16 and in another 10, alternative care arrangements were made, 6 with relatives and 4 in s.20 foster care, including one with the child's grandmother. In 4 other cases, the file disclosed insufficient information to be clear why proceedings had not been brought. Improved care was not the only factor which kept cases out of care proceedings; difficulties in proving significant harm because of the passage of time or the nature of the evidence contributed to local authority reluctance to start proceedings in a few cases. For example, it would probably not have been possible to satisfy the significant harm test where a young child with multiple carers had sustained non-accidental injuries; the child now appeared safe living with his father away from the rest of the family and so proceedings were not needed.

Where the process did not succeed in diverting cases from proceedings (86 cases), it was also unsuccessful in shortening the duration of care proceedings and narrowing the issues in dispute. Cases where the pre-proceedings process had been used took almost the same time as those that went directly to court, approximately 51 weeks from application to final hearing. This occurred because courts treated cases where the pre-proceedings process had been used no differently from other care cases. Judges did not manage these proceedings more robustly but continued to approve parents' requests for further assessments. Indeed, judges, who participated in a focus group for the research, said they were unaware whether the local authority had used the pre-proceedings process and were reluctant to accept its assessments. As a consequence, local authorities became more reluctant to commission expert assessments during the pre-proceedings period. Only one of the six

authorities made frequent use of an external assessment service and had ceased doing so by the end of the study. The time spent in pre-proceedings meant that children waited longer for decisions where their case was not successfully diverted (Masson *et al.* 2013).

### **How does the pre-proceedings process work?**

The perspectives of the parents on the receiving end of the pre-proceedings process, their lawyers and the local authority professionals involved provide the basis for explaining how the pre-proceedings process prevented care proceedings, using social work theories of parental involvement, empowerment and engagement. There is no magic in the meeting, rather the process as a whole can provide the foundation for an effective partnership between the parents and the social worker (Dickens *et al.* 2013).

The letter gave a stark indication of seriousness of the local authority's concerns often referred to by parents and professionals alike as '*a wake up call*'. It was a clear demonstration of the social worker's power to take their concerns to the court. The mention of the need to take action to 'avoid going to court' and the importance of seeing a solicitor both reinforced this message. The letter invited the parents to a meeting, indicating that they could have some involvement in decisions. Importantly, it suggested their situation was not hopeless, they *could* avoid court. The literature on working with highly resistant families (Fauth *et al.* 2010) stresses the importance of involving families and dealing openly with the power dynamic between them and social workers. If parents are to try to make changes they need to feel that they can succeed; self-esteem, competence and hope have all been linked to parent engaging with social workers to resolve problems (Yatchmenoff, 2008).

Parents said they were 'shocked' by the letter; most responded by following the instruction to see a solicitor. Solicitors advised parents to co-operate with children's services on the basis that it would be harder for them to keep their children if proceedings were started:

*'This is the last chance saloon. You either row in now or you're going to end up in court, and trying to undo it is going to be a damn sight harder than it is to stick to the contract'*. (Parent's solicitor)

Such advice was not intended to produce mere compliance – lawyers told their clients that the local authority could not easily be diverted. Lawyers also provided a positive message '*you can beat them*', indicating that the solicitor had faith in the client, in their capacity to do what was necessary and the possibility of winning against children's services. This encouragement was not usually based on knowledge of the client or on an appraisal of the local authority's concerns; lawyers rarely knew enough about the circumstances to assess the strength of a case at the start of the process. Solicitors also tried to improve their client's position by making sure that clients understood what they were agreeing and social workers did not impose terms that parents could not keep, seeking adjustments in any that might be easily broken. For example, where a parent was required not to contact a specific person, usually an abusive partner or relative, lawyers raised the issue of unplanned meetings in the street, where a parent might feel obliged at least to be civil.

The solicitors' role is widely recognised as a partisan supporter (Davis, 1988). Even though most had only spoken to their lawyer once before the meeting, parents trusted that the lawyer would act in their interests:

*'You know that everyone in the room is against you ... and when you've got your solicitor with you, you know they're the only person who's 100% backing you up, so it helps you'* (Parent)

Support, including legal advocacy, is recognised as a means of encouraging parental participation in child protection (Darlington *et al.* 2011). This was its effect in many of the pre-proceedings meetings observed. It was notable that most parents' solicitors said relatively little in these meetings, leaving the talking to parents themselves. This allowed parents to show that they were willing to discuss the local authority's concerns. However, lawyers were clearly listening attentively and intervened occasionally to clarify points, or to take a parent out of the meeting before they got too angry or distressed.

Parents were more willing to accept their lawyer's advice than the same advice from the social worker, a point noted by many of the local authority staff interviewed:

*'Their solicitor would say to them clearly, "this is serious stuff" – so it's not just us as a department saying it – or nagging them to death, as they might well see it – there's somebody else outside the authority actually saying to them that this needs to change.'* (Team Manager)

This feeling that the lawyer was helpful to local authority encouraged social workers and their managers to be positive about the process and to use it to promote change. Effective engagement can only occur where social worker *and* client are willing to engage (Darlington *et al.* 2011). Some social worker managers used the meeting skilfully to harness the parents' assumed desire to do the best for their children, focusing on what the parents could do to achieve this:

*[I] try and focus on where we would like to go from here – trying to see if there are some positives, and try to hang on to those and try and move those forward.*

Having a solicitor at the meeting and legal advice made a substantial difference to parents. Not only did they feel encouraged and supported, some thought that social workers moderated their behaviour because of it. Parents felt less 'picked on', were more willing to accept the social worker's proposals, and were reassured by the prospect of the lawyer's assistance if the local authority did not keep to the agreement. Support and the feeling that the social worker was controlled empowered parents, redressing the power imbalance inherent in any child protection meeting. As a consequence, parents were more willing to engage with the local authority's plan for their child. Empowerment (Fauth *et al.* 2010), redressing power imbalances and using power with parents not over them (Dumbrill, 2006) are seen as crucial for successful social work intervention. They provide a foundation for parental engagement, a state where the parent does not merely comply with the terms of the agreement but 'buys in' to the idea that they will make changes in their parenting (Yatchmenoff, 2008) and is a 'key contributor' to effective helping (Munro, 2011: para 2.24).

Of course these positive effects were not present in all cases. Some meetings were quite negative; some were not well prepared, held in unsuitable rooms and poorly conducted, or with two parents who were not well supported or were in conflict with each other. There were also parents who were felt disempowered and did not engage, despite the presence of their lawyer. A substance misusing mother, who had already lost the care of her older children to her mother explained why she had agreed to her new baby also being placed there, despite having told her solicitor earlier that she was opposed to this:

*'... some things I don't agree with but I feel pushed to go along with it, because in the past I have sort of said I don't agree with something and then it has been, "Okay then, we will just go to court", so now I keep my mouth quiet about things I don't agree with ...'*

Overall, the pre-proceedings process has the potential to deliver key aspects of a successful intervention with highly resistant parents. It can empower parents; it limits the extent to which social workers can use power over them; and it allows parents some involvement. In this way it can provide a foundation for their engagement and an effective partnership with the social worker, sometimes a new social worker for the family. The partisan role of the lawyer is a catalyst whose presence makes the difference for the parent. This supports the provision of services for families at the edge of care proceedings; some parents engage with services they had rejected earlier. The process provides a 'last chance' for some parents to avoid care proceedings, either by improving their care or agreeing to change of the child's carer. This effect also depends on the capacity of the social work staff to use the process to establish a working partnership with the parents.

In a minority of cases, the process prevented both care proceedings and the child's entry to the care system. Where only proceedings were prevented, it helped ensure that kin care was considered before foster care, either by encouraging parents to suggest a suitable relative carer or by encouraging their agreement to a family group conference, where the family had an opportunity to make its own plan. Where the parents agreed alternative care, legal advice helped to ensure that they understood what was proposed, and their continued role. In some cases the process could be as effective as care proceedings in protecting the rights of parents.

### **Children's rights and the pre-proceedings process**

There is no special provision for children in the pre-proceedings process although in care proceedings they have representation by both a lawyer and children's guardian. The effect is to leave children's involvement in the shadows, and dependent on the beliefs, capacity and creativity of parents and social workers. Local authorities have a duty to ascertain the views of children they propose to look after (Children Act 1989, s.22(4) but must respect 'parental sensitivity' in the pre-proceedings process (DCSF, 2008: 3.28). Lawyers have criticised the lack of representation for children, suggesting that they had no voice in the process (MacDonald, 2008; Jessiman, 2009). In response, the 'best practice guide' advised always considering children's invitation to the meeting and how to include their views; if parents vetoed attendance, children should be told how to use the complaints process (MoJ and DCSF, 2009: 13). Additionally, Cafcass piloted a form of the process where a family court adviser attended the pre-proceedings meeting. Advisers provided 'essential oversight' of the child's best interests and advice on the social work plan, largely on the basis of their expertise rather than direct knowledge of the child (Broadhurst *et al.* 2011). Although this approach made claims to provide representation for children, or at least children's welfare, it appeared only to provide another professional view.

Being absent from the meeting or without external representation does not necessarily mean that children's views are excluded in decision making. There were examples of social workers working with children to establish their views before the meeting, and ensuring that decisions took full account of these. Skilled direct work enabled Belinda Charlery (a pseudonym), aged 13, to talk to her social worker about her exceptionally difficult relationship with her mother, who had learning

difficulties. At the pre-proceedings meeting, Ms Charlery accepted that she could not keep Belinda safe and agreed to her going into foster care (s.20), without being told just how unhappy Belinda was, living at home. This approach protected Belinda's rights and provided a better prospect for repairing relationships than more direct discussion which would have been hard to control had Belinda attended the meeting.

Many other children whose care was considered in the pre-proceedings process were babies, a third of cases included a child who had not yet been born. The focus in these meetings was the children's current and future well-being; social workers sought to maintain parents' attention on this rather than on talk about parents' rights or the local authority's powers. Some children were accorded the same rights as adults in the pre-proceedings process. Where children were also parents, they had the same representation as other parents, whose care was a cause of concern. For these very young parents, lawyers' previous experience representing children was particularly valuable in enabling them to establish rapport, take instructions and provide advice (Masson *et al.* 2013).

Not all children had their rights adequately protected in the pre-proceedings process. None entered care inappropriately but some waited too long for the local authority to react to their parents' failure to keep to the plan, and these delays were compounded by the length of care proceedings. That said, by giving the parents another chance to work with children's services and helping them to engage, the process helped some children remain with their parents or live with relatives, who would otherwise have entered care.

#### **A counter to Freeman – a right to state care**

Freeman argued for a right *not* to be in state care so that preventive services would be given a higher priority. This has been done to some extent. One consequence of prioritising prevention and family care is that state care has not been valued nor adequately supported. Use of state care meant failure (by the family and the worker), the quality of care was poor and care should be prevented, not improved. The consequences of the neglect of residential care homes and the young people placed within them were only two apparent in the Pindown and Leicestershire Inquiries (Levy and Kahan 1991; Kirkwood 1993) into abuse in care. They are also seen in foster care, where the development and support of carers has not kept pace with the increasing complexity of the children needing care, and carers are still seen primarily as volunteers who are reimbursed for their expense rather than as an integral part of the social care workforce.

Making a case for a right to be in care is not intended to place care above prevention, or to justify social engineering, but to stress that the state has obligations to care for those without adequate care elsewhere. This reflects the right to special protection and assistance in Art. 20 of the UNCRC. Viewing care as a residual service rather than a right, results in some children waiting too long for care, being returned to inadequate homes or being left without the care they need. Care is not an end in itself but must exist to enable children to reach their potential (ADCS 2013).

Delayed entry to care is a frequent concern of Cafcass guardians (Cafcass 2009 2012), occurring particularly where children are neglected. There were examples in the *Families on the Edge of Care Study* of cases drifting in pre-proceedings, with the local authority taking no action despite parental failure to comply with the written agreement; on average almost six months elapse between the legal planning meeting and the care application for cases subject to the pre-proceedings system

which were not diverted from proceedings. Long durations in pre-proceedings reflected indecisiveness by social workers, poor monitoring and a strong desire on the part of the local authority to avoid bringing proceedings. The majority of the children were living with the parents at home and continued to experience a lack of care until they were removed in the course of care proceedings (Masson et al 2013).

Despite recognition of the importance of continuity of care for children's development, repeated attempts are made to return children from care, which result in re-abuse. Reunification is attempted despite lack of change by parents or support, sometimes because suitable care is not available (Hunt and Macleod 1999, Farmer 2012). Decisions of the European Court of Human Rights that care should generally be seen as a temporary measure encourage this, valuing family reunification over continuity of care.

Poor outcomes have resulted in local authorities being reluctant to offer care for children aged 11-16 years rather than the development of more effective ways of providing care to them. This is now being challenged by the Association of Directors of Children's Services, which is arguing for the re-design of services across youth justice, health, education and children's social care to provide a continuum of support to meet the needs of troubled adolescents appropriately (ADCS 2013).

A right to care should also mean the continuation of care for young people beyond the age of 18 years, so that the care system recognises, as families do, that young adults continue to need support. The Government's *Care Leaver Strategy* (HM Government 2013) recognises the need support but sees its own role largely as a 'catalyst and advocate' rather than a provider, despite the fact that major changes to the welfare state in terms of benefits, education costs and employment opportunities are a direct result of central government policies. Leaving responsibility for provision largely to local government as in the case of relative care is inadequate and unfair.

A right to care is meaningless without sufficient resources. To achieve the best for children the right to care must be funded and exist alongside rights to other services so decisions are made on the basis of what is right for the child.

### **Conclusions: Problems and possibilities in preventing and providing state care**

The Children Act 1989 ideal of support provided in partnership with families was never realised because of a lack of resources. The aspirational statement of a general duty to promote welfare and support families is an unrealisable sham. Local authorities gained powers to help families but were constrained by limited resources to focus on those most in need. That situation still pertains. The courts have crystallised some duties which support homeless young people and a small, select group of relative carers. However, whilst resources remain inadequate, new duties serve to limit further the possibilities of support for those with needs but not enforceable rights. Attempts to redirect resources from child protection to family support have also failed; the pressure from the media, the public and central government to secure protection has increased bureaucracy and in doing so sucked in resources. Rather than allowing local authorities to decide whom they will help and how, they are now directed to deal with 'troubled families' in specific ways. In this shift, both local authority intervention and care are stigmatised further, making it harder to encourage families to accept help.

Preventing *unnecessary* entry to care is a policy that cannot be disputed. However, preventive action has to be resourced, and delivered in ways that enable children and their families to use it. As the local state retrenches, preventive work is also being curtailed, provided only for those at the very edge of care. Not only may this mean that opportunities are missed to provide more effective help earlier, there is also increased pressure to ensure that the available help is accepted. Rather than a service to families, preventive work becomes an extension of compulsory action, where refusal will inexorably lead to proceedings. This provides a very challenging context for working with families, who need to be empowered if they are to be engaged.

When Michael Freeman promoted the idea of a right not to be in care, he was concerned about the stigma of being in care, its poor quality, the narrow horizons the state had for the children in its care, and the lack of alternatives to care for parents in difficulty. Providing care was an easy option for the state but a poor one for children and families.

The right not to be in care looks rather different in the Twenty-first Century. Rights and resources for children in care have improved considerably the lives of those in care, and far more emphasis is placed on keeping children out of care and in their families through reliance on relatives. Whilst some family placements bring advantages, they often leave children poorly provided for. In assessing when entry to care is necessary, and when it should be prevented, the reality of children's lives must be considered: what care provides and what will be provided without it. The disparities in support available to children in these different care arrangements are very great, and continue as long as leaving care duties are owed, to the age of 25 years. There are children who would be better provided for if their relative carer was approved as a local authority foster carer. While none of those concerned - the child, the relative carer, the parents and the local authority - want this, such arrangements are easily prevented. Not only should relative carers be better supported but there should be rights to care for those whose relatives cannot care. A continuum of preventive and care services is required to enable all children to reach their potential.

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