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Editor's Message

This Autumn 2011 issue of the Journal has been delayed while we awaited, first, the Supreme Court's decision in the *Quila* case on the issue of the spouse visa age for immigration purposes and then for views on its impact, if any, on the incidence of forced marriages: and, secondly, for the government reaction to the decision which was apparent only on 28 November. Following these two updates, Colin Yeo has been able to complete the second part of his interesting article on this topic, although some questions remain which are addressed in Dr Lars Mosesson's note on the constitutional aspects. We suspect that this may still not be the end of the story.

This issue also opens up aspects of another topical debate, with Peter de Cruz's article on the continuing syndrome of apparently glaring but undiscovered abuse of children leading to shocking fatalities, a situation which it seems is still not being prevented by the current systems in place. Eleanor Howard takes this up with a suggestion about a comparative study with the American systems which could perhaps address the resource implications which it is suggested may be at the root of some failures to notice abuse in time to save repeated child deaths despite social services being aware of a problem family: in a following issue we will be building on the introductory Commentary on this theme in a more detailed study from a specialist practitioner perspective.

Relocation has also remained in the news in 2011 and Dr Wendy Schrama brings us the Netherlands' perspective following ongoing professional (including judicial) comment on the contemporary relevance of the existing authorities.

Our other continuing interest has been forced marriage which has not only been the subject of Marilyn's current research but also that of the second part of Colin Yeo's article on the Quila case in the Supreme Court, in relation to the government's raising of the spouse visa age for immigration purposes. This follows up Professor Marianne Hester's research which was featured in our 2010 conference.

This issue also announces the dates for our Second International Family Law and Practice Conference in July 2013, introducing a new theme of Parentage, Equality and Gender, topics which span both Child and Family Law, and we shall be foreshadowing some of the specialist sessions in the 2012 issues of the Journal.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

Hold the Date: Centre for Family Law and Practice International Conference 2013 Dates Announced!

The Centre for Family Law and Practice

CENTRE FOR FAMILY LAW AND PRACTICE

THE 2ND INTERNATIONAL FAMILY LAW AND PRACTICE CONFERENCE 2013

"PARENTAGE, EQUALITY AND GENDER"

3-5 JULY 2013

We are delighted to let you know about our next conference, being held in London on 3-5 July 2013.

We will be issuing a Call for Papers on our website (www.londonmet.ac.uk/flp) on 1st February 2012 with a closing date for submissions of 30th April 2012.

Acceptances will be notified by 28th May 2012. The conference themes are "Parentage, Equality and Gender", and we anticipate that the conference sessions will cover all aspects of these topics within both Child and Family Law, including the specialist areas of International Child Abduction, Relocation and Forced Marriage which formed the linked themes of our inaugural conference in 2010.

In addition, our 2013 conference will have a particular focus on the issues relating to both regular and alternative forms of parentage, as well as equality and gender in the wider areas of Child and Family Law which, of course, will include finance.

We will write again to remind you of the publication of the Call for Papers on our website. However, although we will email you whenever new information becomes available, please keep watching our website for information about the conference, and also do please make a note now of the conference dates in your diaries.

We are really looking forward to this opportunity of working with you all - to welcoming those of you who were not with us in 2010 to our Centre and to London, and to seeing once again our many old friends in the international Family Law community.

Claire Keefe, **Lucy Hall**, and the rest of the administrative team will be around, as before, to help with whatever you might need.

Do let them know if there is anything they can do to help you –

c.keefe@londonmet.ac.uk, l.hall@londonmet.ac.uk

In the meantime, very best wishes for the coming Festive Season from all of us at The Centre.

Marilyn Freeman and Frances Burton
Co-Directors
Centre for Family Law and Practice

The conundrum of Child Abuse investigation – will we ever get it right?

Professor Peter de Cruz*

I. Introduction

In 2009, media headlines were dominated by the case of Baby P, just as they were with the case of Victoria Climbie in 2001. Both these cases involved the systematic abuse of a child over a period of time, but whose plight was not detected by health care or child protection professionals, despite having seen these children on several occasions. At the other end of the spectrum, there has been the situation of families torn apart by false allegations. By early 2011, the publicity surrounding these sorts of tragedies had subsided but the conundrum which underlies child abuse detection for social workers and healthcare professional remains: To intervene or not to intervene? This Paper therefore proposes to look at the dilemma presented by suspected child abuse and considers possible ways to reform the system. What happens when social workers or healthcare professionals decide not to act on their suspicions which then prove to be well-founded, and what happens when they do act on their suspicions which subsequently prove to be totally unfounded and incorrect? The fundamental difficulty is: what should be done at the time when the decision is being taken, without the benefit of hindsight?

II. One end of the spectrum - Infamous Child Abuse tragedies – Victoria Climbie and Baby P

The Victoria Climbie Case –a failure of good practice

Victoria Climbie was an eight-year-old girl who died of malnutrition and hypothermia, who had 128 separate injuries found on her body, (many of them cigarette burns) which, it emerged, had been struck on a daily basis with a shoe, a coat hanger and a wooden cooking spoon. Her blood was found on a pair of football boots and on the bathroom walls. She had been forced to eat cold food, in the bath, served to her on a piece of plastic and was forced to sleep in a bin liner in the bath every night. Yet there were numerous occasions when her deplorable situation should have been discovered and where good professional practice may have enabled an intervention which might have saved her.

Lord Laming's Report highlights the fact that Victoria was not hidden away. She was known by five housing authorities, four social services departments, two child protection teams of the Metropolitan Police Service, a specialist centre managed by the NSPCC. She was also admitted to two different hospitals because of suspected deliberate harm. Unfortunately, these services knew little or nothing more about the child at the end of her life than when she was first referred to Ealing Social Services by the Homeless Persons' Unit in April 1999. Indeed, It was also apparent in the course of the Inquiry that 'as with many previous inquiries into child protection failures, it as clear that the quality of information exchange was often poor, systems were crude and information failed to be passed between hospitals in close proximity to each other.' (para. 40: Laming Report)

The Laming Inquiry into the Climbie case heard allegations of racism, incompetence and agencies neglecting their duty of care to Victoria. The inquiry also heard of 12 occasions when agencies could have intervened and might possibly have saved the girl's life. The Report makes clear that the lack of protection came not because no one was willing to refer her but because of mismanagement, unprofessional performance and the failure to put basic good practice into operation. As the Report stated 'The agencies with responsibility for Victoria gave a low priority to the task of protecting children. They were under-funded, inadequately staffed and poorly led. Even so, there was plenty of evidence to show that scarce resources were not being put to good use.

There were gross failures of system –for example, there

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were 12 missed opportunities to detect Victoria Climbie's plight and save her. There was a failure fully to implement the Children Act which Lord Laming believes is basically sound legislation. We shall say more about the legislation later.

What happened in Baby P's case?

Baby P died at the age of 17 months, after nine months of unimaginable cruelty.

The boy had been reduced to a nervous wreck, his hair shaved to the scalp, his body covered in bruises and scabs. Physical injuries included eight broken ribs, a broken back and the missing top of a finger. When his mother's second lover moved into her council flat in Haringey, his suffering increased dramatically with the man beating the boy and swinging him around by the neck or legs and punching him. A second man also subjected the boy to similar abuse. The child became a human punchbag.

The GP noticed marks on the boy but was told by the mother that the child bruised easily. Social services visited the child in the flat where they discovered that he lived with his grandmother and three dogs, and since the place was dirty, untidy and smelling of urine, allowed the child to stay with a family friend while police inquiries continued. But social services remained unaware that the flat also harboured a violent boyfriend. A month later, in January 2007, the child was allowed back home with no decision being made against either woman.

Social services tried to keep the family together, assuaged by the mother's excuses. There were Accident & Emergency attendances for black eyes, swellings and bruises. One episode even resulted in the mother's arrest. But she was released and nothing further was done to ensure the child would be protected in the foreseeable future.

48 hours before his death, the child was taken to St Ann's Hospital amid further concerns for his well-being. When examined by a consultant paediatrician, the consultant missed both the broken back and ribs. The mother was told by the police that she would not be prosecuted after consideration by the Crown Prosecution Service. On that same evening, Baby P received a fatal blow to his mouth, knocking a tooth out. He was found dead in his cot the next day.

Baby P had been known to and regularly visited by social services for many months. Over that time, debate focussed on whether the child was a suitable candidate for care proceedings or whether the family was entitled to a range of support services. Wilkinson points out that the issue of proceedings was proposed, only to be vetoed by the local authority's legal department, due to lack of evidence of significant harm. Wilkinson argues that 'a more comprehensive statutory definition of the concepts involved may have made a crucial difference.'[1]

Lord Nicholls commented in *Re H*[2] that in cases where the alleged maltreatment is itself not proved, the evidence might establish a combination of profoundly worrying features affecting the care of the child within the family. In such cases it would be open to a court in appropriate circumstances to find that, although not satisfied that the child is yet suffering significant harm, on the basis of such facts as are proved there is a likelihood that he will do so in the future.'

III. Child Abuse Inquiries – Problems, Policies and Politics

It will not have escaped your notice if you followed any of the governmental reaction to the child abuse scandals of the 1980s and 1990s that to hold an inquiry seemed to be the best way forward. This seemed to be the only course of action that the government of the day seemed to take. Have these inquiries really solved anything? Undoubtedly, they have led to greater awareness of the need to have greater interdisciplinary co-operation, but have failed to prevent or avoid human failings such as mismanagement and poor professional practice, with a lamentable failure of implementation. In the 1980s, an interdisciplinary policy was recommended, to include all professionals working in the child protection field- which would include not just the social workers but also healthcare professionals who were even issued their own separate Guidance, the police and separate guidance was also issued to teachers and any other professionals dealing with children and who might be in a position to detect child abuse.

IV. Working Together to Safeguard children: The Guidance

In 2006, another version of the governmental Guidance, *Working Together to Safeguard Children*, was issued, containing 256 pages. This is a guide to inter-agency working to safeguard and promote the welfare of children which is addressed to practitioners and front-line

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1 Wilkinson, B 'Child Protection: The Statutory Failure' [2009] Family Law 420

2 *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at pp.591-592

managers who have particular responsibilities for safeguarding and promoting the welfare of children, and to senior and operational managers. The 2006 version was revised to respond to changes made by the Children Act 2004. The three main changes are the creation of children's trusts under the duty to cooperate; the setting up of Local Safeguarding Children Boards (LSCBs) and the creation of a duty on all agencies to make arrangements to safeguard and promote the welfare of children. On the features emphasised is 'clear lines of accountability'. This Guidance was revised yet again in 2010, this time to incorporate 23 of the 58 recommendations made in the second Laming Report[3] which reviewed the state of child protection procedures in England and Wales and included a report on the Baby P case.

Have these Guidance documents been more effective than previous versions? From anecdotal evidence, there has been some progress but the biggest problem that appears to have inhibited effective inter-disciplinary child protection procedures since it was initiated has been the different perspectives and agendas within which the various professionals operate.[4] The social worker wants to continue to work with the family, and even if the removal of the child is recommended, hopes to reunite the child with the family at a later date, if at all possible. So detection is with a view to keeping the child within the family, as far as possible. The healthcare professional seeks to provide a medical solution to perceived child maltreatment; the police person is primarily seeking to obtain sufficient evidence to secure a successful prosecution.

Part of the rationale behind the Children Act has been the notion of partnership between social services and parents.

Whatever happened to the notion of partnership?

In 1987, a White Paper envisaged that wherever possible, 'Services to families in need of help should be arranged in partnership with parents.'[5] Yet the word 'partnership' does not appear in the Children Act and is nowhere defined, either there or in the Guidance and it may mean different things to different people. As Barton and Douglas put it in 1995: 'whatever the meaning, it breaks down because ultimately, despite the rhetoric, it will be for the professionals –social workers and courts –to determine at what point voluntary partnership will give way to coercive control.'[6]

So how does a professional dealing with suspected child abuse decide on whether to proceed with an order under the Children Act 1989, ie what is the basis on which such an order might be applied for? This brings us to the statutory threshold for intervention.

V. The Threshold Question: s.31(2) CA

The current threshold for intervention –where compulsory intervention can be sought, sometimes requires the sifting of complex sets of facts in order to present the case in such a way as to satisfy the threshold criteria under s.31 of the Children Act 1989 and to the requisite degree of proof. Mere hunches would not be enough at a preliminary stage of an investigation. As Lord Nicholls put it in Re H: 'unresolved judicial doubts and suspicions' cannot satisfy either the first or second threshold condition under s.31(2).[7]

The central issue remains one of maintaining a balance between protecting the family from unwarranted intrusion and the need to safeguard children.

If there is mere suspicion rather than clear-cut evidence, should it still be possible for the state to obtain a care order on the basis that the child is at risk of abuse? One might have thought that in these times of heightened public revulsion at child abuse in response to cases like Baby P, there might well be support for this.[8] But as far as current law is concerned, such a notion has been unanimously and unequivocally rejected by the House of Lords in the case of *Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141.

This followed the earlier decision of *Re H* [1996] AC 563, where the Law Lords had ruled that it was not open to a court to conclude that a child was at risk of suffering significant harm unless the allegations said to give rise to the risk were proved.

Baroness Hale clarified the rationale behind the intervention threshold when she stated in *Re B*:

'The threshold is there to protect both the

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3 Laming, H '*The Protection of Children in England: A progress Report*', 2009

4 see David, T (ed) *Protecting Children from Abuse: Multi-professionalism and the Children Act 1989*, 1994, Trentham; Williams, J 'Working Together II' (1992) *Jo. Child Law* 68; Lord Laming *The Victoria Climbie Inquiry*, 2003, para.1.13.

5 *The Law on Child Care and Family Services*, 1987, Cm62, Chapter 5, HMSO.

6 Barton and Douglas *Law and Parenthood* (1991), p.291,

7 See *In re H(Minors) (Sexual abuse: Standard of proof)* [1996] AC at p.589

8 Bainham, A 'Striking the balance in child protection' [2009] CLJ at p.43

> children and their parents from unjustifiable intervention in their lives. It would provide no protection at all if it could be established on the basis of unsubstantiated suspicion that there is no real possibility that abuse took place ie where a judge cannot say that there is no real possibility that abuse took place, so concludes that there is a real possibility that it did. In other words, the alleged perpetrator would have to prove that it did not.' [9]

Hence, since proof of abuse is required, the issue of the standard of proof then arises.

Standard of proof

In *Re H* [1996] AC 563, the balance of probabilities was stated to be the standard of proof required to activate care proceedings and all decisions made had to be based on facts rather than on suspicions.

But Lord Nicholls[10] also suggested that the more serious the allegation, the more cogent the evidence is required to establish it. This became known as the cogent evidence test. This test has stood for 12 years and applied by the courts throughout England and Wales without any legal challenge by way of appeal.

More than 12 years later, in 2008, the House of Lords confirmed in *Re B* [2008][11] that there is only one standard of proof in care proceedings and that is the civil standard of the balance of probabilities. They also reiterated that the possibility of the threshold criteria cannot be satisfied on anything less than proven facts. Some commentators believe that, inevitably this may well result in the law being unable to protect some children from possible but unproven harm.

Significantly, *Re B* appeared to consign to history this cogent evidence test and Baroness Hale said in that case that the standard of proof in finding the facts necessary to establish the threshold under s.31(2) or the welfare considerations in s.1 of the CA 1989 is 'the simple balance of probabilities, neither more nor less.'[12] She continued:

> Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.[13]

Hence, she said of the cogent evidence test that it is time 'to loosen its grip and hasten its quietus.' [14]

Various reasons can be advanced for the abolition of the cogent evidence rule: it had the potential to be misconstrued as setting a higher standard of proof and it did not strike the right balance between protecting the interests of the adults concerned and protecting the child.

Consequences of the abolition of the cogent evidence test:

Hayes[15] raises questions about the consequences of the abolition of the cogent evidence test: (i) If children were left unprotected because of the test, what can be done to protect such children now? (ii) If children were not left unprotected as a result of the test, then why change it? and (iii) would it mean that there is now a risk of parents and carers wrongly having adverse findings made against them in future cases? At the very least these questions suggest that more research needs to be carried out to discover how law and practice in this area has been affected by the ruling in *Re B*.

The threshold for interim care orders and the Baby P case

Interim care orders are not strictly related to the main thrust of this Article, which examines the dilemma of whether or not to intervene to protect a child suspected of being abused, whereas such orders relate to situations where a decision has *already* been made to apply for protective intervention. However, the threshold for making such orders can be pivotal if it presents an obstacle to much-needed protective intervention from child protection agencies to rescue a child who is being abused. Indeed, the threshold for an interim care order was arguably highly relevant in the Baby P case where the perception of a high legal threshold for intervention being required[16] might also have contributed to the incorrect

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9 *Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141 at 158

10 *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC at p.586

11 *Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141

12 see *Re B (care Proceedings: Standard of Proof)* [2008] 2 FLR at p.164

13 ibid.

14 *Re B* (above) at p.162

15 Hayes, J 'Farewell to the cogent evidence test: *Re B*' [2008] Fam Law 859 at 872

16 under either s.31(2) or s.38 of the Children Act 1989

legal advice given in that case.

Notably, a case-law development which occurred after Baby P's case appeared to make it more difficult for children to be removed from their parents. A month after Baby P died,[17] the threshold for interim intervention appeared to have been raised by Ryder, J in *Re L*,[18] suggesting a more rigorous test for removal of children at the interim stage of care proceedings than that actually enunciated under s.38 of the Children Act 1989.[19]

Re L (Care Proceedings: Removal of Child) [2008] 1 FLR 575

For two years and ten months, this High Court case was the standard authority cited by advocates for parents seeking to oppose an application for an interim care order. The test laid down by Ryder, J required the local authority to establish an 'imminent risk of really serious harm' before the court could be satisfied that it was justifiable to remove a child from the care of its parents prior to the final hearing.[20] This test provoked Darren Howe[21] to express concern that the threshold for interim intervention had now been set too high by Ryder, J. He also expressed the view that the threshold for removal of children from its parents under an interim care order may *already* have been set too high, particularly in the light of the Baby P case, which preceded *Re L*. He pointed out that a week before Baby P's death in August 2007, the local authority had received legal advice from its legal department that the threshold test for his removal from his parents had not been met.[22] This was clearly incorrect advice, and one can only speculate as to why it was given in those terms.

For instance, Gilliat has pointed out that the Haringey Local Safeguarding Board Serious Case Review (SCR) of Baby P's case also suggested that there was 'a lack of clarity about the justification for commencing proceedings, as well as a confusion between the likelihood of achieving a criminal conviction and the likelihood of achieving findings in care proceedings'[23] This poor understanding of the law relating to thresholds for intervention was compounded by the failure of inter-agency communication which might otherwise have revealed sufficient evidence on which to base at least an interim care order.

The *Re L* test was eventually clarified by the Court of Appeal in a judgment delivered in July 2009.

Re L-A (Children) (Care Proceedings: Interim Care Order) [2009] EWCA 822

In this case, Ryder, J's approach was overruled and disapproved of in the Court of Appeal by Thorpe, LJ who opined that the trial judge in *Re L-A* had been plainly wrong to think that 'the words of Ryder, J that there should be an imminent risk of really serious harm prevented him from doing what he instinctively felt the welfare of the child required.' Accordingly, Thorpe, LJ allowed the local authority's appeal against the refusal by the trial judge to make an interim care order removing children from their home on the grounds of their alleged chronic neglect.

The case also confirmed that the correct test for interim removal is: whether the child's safety demands immediate separation from the parents.[24] Thorpe, LJ was at pains to stress that contrary to what the trial judge in the case might have thought, the law had not been altered by Ryder, J's test and that any such judicial statement suggesting an alteration was a 'misdirection'.[25]

This analysis suggests that the ostensibly higher threshold set by Ryder, J in the first instance case of *Re L* has now been effectively overruled and lowered by the Court of Appeal in cases like *Re L-A*, which has removed the 'imminence' of the risk of serious harm as a prerequisite for interim intervention. The position now seems to be that so long as it can be shown that the child's safety is at risk, although not necessarily imminently, removal from its parents may be justified, at least as an interim measure. Whether the somewhat less stringent criteria set in *Re L-A* results in more children at risk being more easily protected by their removal from their parents, remains to be seen and is a subject for further research.[26]

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17 i.e. on 18 September 2007

18 *Re L (Care Proceedings: Removal of Child)* [2008] 1 FLR 575

19 ie that reasonable grounds exist for believing that the threshold criteria for making a care or supervision order are satisfied: s.38(2) Children Act 1989

20 *Re L (Care Proceedings: Removal of Child)* [2008] 1 FLR at p.577-578

21 Howe, D 'Removal of Children at Interim Hearings: Is the test now set too high?' [2009] Family Law 321

22 ibid

23 see Gilliat, J 'The Interim Removal of Children from their Parents Updated: Emergency Protection Orders, Interim Care Orders, *Re L* and the Baby P Effect' at www.familylawweek.co.uk/site.aspx?I=ed28647 (accessed 16/10/11)

24 per Thorpe, LJ in *Re L-A* [2009] EWCA at para [7], citing the law as previously established in *Re H (A Child) (Interim Care Order)* [2002] EWCA Civ 1932, para [39] and *Re K and H* [2006] EWCA Civ 1818 , para [16]; this has also affirmed by the Court of Appeal in *Re F (Children) (Care Proceedings: Interim Care Order)* [2010] 2 FLR 1455

25 see *Re L-A (Children) (Care Proceedings: Interim Care Order)* [2009] EWCA 822 at para [10].

26 For a view that the threshold is set too low for interim care orders, see Bainham, A 'Interim Care Orders: Is the Bar set too Low?' [2011] Family Law 374

Problems with the current statutory definition of 'significant harm'

Wilkinson[27] makes several criticisms of the existing definition of significant harm, and cites Hedley J's comment in *Re L* that it would be unwise to attempt an all-embracing definition of significant harm. 'It is fact specific and must retain the breadth of meaning that human fallibility may require of it. It must be something unusual; at least something more than commonplace human failure or inadequacy.'[28] Wilkinson argues that this test 'sets human fallibility against judicial discretion and believes the time has come to make an analysis of evidence which is fact specific amenable to objective scrutiny, by reference to a definition of the terms in play.'[29]

He continues that, unlike the statutes that previously dealt with child protection in England and Wales, the Children Act 1989 has effectively 'discontinued the requirement to demonstrate the presence of a particular protection issue, such as abandonment or a breach of the so-called 'offence condition' under the Children and Young Persons Act 1933 and 1969.'[30]

He contends that there is no meaningful legal definition to apply, at least in terms which would usefully assist a social work practitioner. In his view, there is a 'serious risk of too much effort being applied to interpretation'[31] as indeed Freeman has argued 'Each of the three elements (of the test at s.31) will require considerable judicial exegesis… Argument on the meaning of the language contained here is likely to rage for as long as this legislation remains in force.'[32]

Thus, the very danger highlighted in the earlier *Newham* case that the interpretation of the significant harm test should not become a legalistic exercise[33] has now materialised.

How 'significant' must the harm be?

Re MA (Care Threshold)

In 2010, the case of *Re MA (Care Threshold)*[34] was reported which appears to support the argument that the threshold for intervention under s.31(2) might indeed be too high and not easily satisfied in relation to certain situations where it might have reasonably been thought that the threshold criteria would have been easily fulfilled..

The background

The father and mother, who were cousins, were citizens of Pakistan and came to the UK in 2005. They had claimed asylum on the basis of their homosexuality, that they had married because of cultural expectations and that they faced prosecution if they were returned to Pakistan.. Their applications failed. They were therefore liable to be removed from the UK at any time. They had three children of their own and another girl, aged five, who was brought into the country and introduced into the family by the father although she was not the biological child of the parents but closely related to them. She was kept secretly by the family and she was subsequently removed into the care of the local authority. She subsequently alleged that she had been sexually and physically abused by the parents. There was no evidence to substantiate these allegations.

The issue

Whether the serious abuse of the girl could be the basis of a finding that the couple's own children would be likely to suffer significant harm.

The ruling

The Court of Appeal (by a majority) upheld the ruling of the trial judge that the threshold criteria were not satisfied and that to amount to significant harm, the harm had to be significant enough to justify the intervention of the state and justify an intervention in the family life of the parents, under article 8 of the European Convention on Human Rights. The trial judge's ruling could not be said to be plainly wrong. Wilson LJ strongly dissented and was unequivocal that he would have found the threshold established. He concluded that the conduct of the parents towards [the girl] had been so 'grossly abnormal as to show a capacity for cruelty towards children which, surely, gives rise to a real possibility that it would also be directed towards their own children…I am staggered that the judge refused to hold that the three children were likely to suffer significant harm.'[35]

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[27] See Wilkinson, B 'Child Protection: The Statutory Failure' [2009] Family Law 420

[28] Re L [2007] 1 FLR 2050

[29] Wilkinson, above at p.424

[30] Wilkinson, ibid, at p. 422

[31] Wilkinson, ibid, at p.423

[32] Freeman, MDA 'Care After 1991' in Freestone, D (ed) *Children and the Law*, 1990, Hull University Press, p.135.

[33] See the comments of Sir Stephen Brown, P in *Newham London BC v AG* [1993] 1 FLR 281 at p.289.

[34] *Re MA (Care Threshold)* [2010] 1 FLR 431

[35] see *Re MA* (above) at paras.[34] and [35].

The case certainly shows how difficult it can be for a court to determine whether the harm in question is sufficiently 'significant' so as to satisfy the intervention threshold. Keating[36] concedes that attempting to protect the autonomy of the family while also protecting children from harm is 'very far from easy' but voices several concerns about the ruling, including the Appeal Court paying too much deference to a judge held in high regard, the majority judgments being too parent-centred and not sufficiently focused on the interests of the children and is as staggered as Wilson LJ was, astounded 'that these children could be left so dangerously unprotected.' She asserts that cultural relativism has no place in child protection cases.[37]

Hayes *et al*[38] echo her concerns, are also highly critical of the decision and hope that the approach taken by the majority to young vulnerable children will not be repeated. The case is particularly open to criticism for the way in which the trial judge's ruling was endorsed by the majority judges and the way in which only *one* appellate judge (Wilson, LJ), the dissenting judge, mentioned the fact that the father kept a stick for the purpose of administering a beating to the child who was not biologically related, yet the trial judge had mentioned this stick. Wilson, LJ opined that the trial judge's finding was 'ambiguous' as to whether the stick was so used.[39] It was also rather alarming that the kicks and slaps which had been administered to that child might have been merely 'reasonable chastisement' and was not *necessarily* indicative of abuse.[40]

The fact that the parents did not provide an explanation for these slaps and kicks did not lead to an adverse inference as to their having committed abuse.

Do we need a threshold for intervention?

Cobley and Lowe[41] argue that there is no doubt that a threshold is needed, as it would not be human rights compliant to base intervention solely on the welfare principle. They submit that 'having a threshold stage followed by a welfare stage seems to balance the family's interests to be reasonably free from state interference and adequately to protect the child's welfare.'[42] However, they also believe that 'the inevitable price of having a threshold is that some children who might need it will not be protected'.[43]

The question is: is it a price worth paying? The present author submits that this is sometimes too high a price to be paid and that while it is impossible to prevent all child abuses that lead to tragic deaths of children, it has to be within the realms of human ingenuity to devise a system that can at least prevent tragedies such as Baby P and Victoria Climbie from recurring.

Cobley and Lowe concede that s.31(2) may not be the best way of expressing the threshold and perhaps s.31(2)(b) should simply refer to a lack of reasonable care.[44] Hence, if shared carers might be able to argue that they had taken all reasonable care, notwithstanding the harm to the child would call into question the *Lancashire* decision[45] which attributes blame to someone, in the light of the harm suffered by the child, which would justify the child's removal, despite the possible innocence of one of the carers. They conclude that on balance, s31(2) does strike the right balance as it stands.

Another way of ascertaining whether the threshold for intervention is too high or too low, is to examine empirical research findings on the operation of the child protection system and the extent to which emergency protection orders (EPOs) are used in practice. It is important at this juncture to note that despite the understandable focus on the judicial interpretation of the intervention threshold and its use by local authorities, the use of police protection under s.46 of the Children Act 1989 whereby the police have the power to remove or detail children for their protection is noteworthy. This is because it is used more frequently and in a wider range of circumstances than EPOs. Yet this is the only legal way in which a child can be compulsorily removed from the family without prior scrutiny and vetting of the situation by a court.

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36 Keating, H '*Re MA*: the significance of harm' (2011) 23 *CFLQ* 115 at 127

37 Keating, ibid, at p. 127

38 Hayes, Hayes & Williams "Shocking abuse followed by a 'staggering' ruling: *Re MA (Care Threshold*' [2010] Fam Law 167 at 180

39 *Re MA (Care Threshold)* (2009) EWCA Civ 853, para [20]

40 *Re MA (Care Threshold)* (2009) EWCA 853, para. [39]

41 Cobley, C and Lowe, N 'Interpreting the Threshold Criteria under section 31(2) of the Children Act 1989 –The House of Lords decision in Re B' (2009) 72 *Mod LR* 463

42 Cobley and Lowe, ibid, at p. 474-475

43 Cobley and Lowe, above at p.475

44 Cobley and Lowe, ibid

45 ie *Lancashire CC v B* [2002] 2 AC 147

VI. Research Findings

Judith Masson's empirical research on the use of emergency protection orders and police protection provides several insights into the operation of these orders in practice. Between 1998 and 2004, the NSPCC and Nuffield Foundation funded her research on emergency intervention (i.e. Emergency Protection Orders) in child protection.[46]

In a series of articles ranging from 2002 to 2010, Masson has disseminated the results of her empirical research in several journal articles.

Police protection is used as the first step in child protection proceedings

In an article published in 2005, Masson explores the factors that determine how local authorities respond to child protection crises, and her study of Emergency Protection Orders (EPOs) indicates that in 45% of cases where such applications had been made, the child had already been taken into police protection, at the request of the social worker.[47] This is because in situations where the child needed immediate protection, for instance where the parent was insisting the child leave the hospital immediately; or where the social worker was unsure as to whether there was sufficient evidence to persuade a court to grant an EPO; or the need to protect the child arose out of normal working hours, social workers usually contacted the police and requested that the child be taken into police protection. Indeed, Masson found that in 74% of these cases, the police action was taken at the request of social services.[48] Out of the 86 families that were surveyed, there were only ten cases where the police took police protection independently and the local authority then followed this with an EPO application. However, this latter practice only occurred in a minority of cases.[49]

Masson's research therefore suggests that the widespread use of police protection gives cause for concern, because, as she points out, unlike EPOs, police protection is a power and not a court order which means that the individual officer who exercises it takes responsibility for it, subject only to a review of its continuation by the designated officer. Police protection is also predominantly exercised by ordinary officers with very limited training and experience in child protection, not officers from specialist Family Protection Units.[50] This contrasts with EPOs which are sought by social workers from specialist child protection teams who generally work closely with specialist lawyers. The use of police protection avoids the system under the Children Act which seeks to make local authorities accountable for their actions[51] and denies the parents any opportunity to challenge the initial decision to remove or detain the child.[52] This could also be a breach of the rules of natural justice and Article 6 of the European Convention on Human Rights.

Masson's research has unearthed several other findings.

(i) Agreements between local authorities and parents not always freely negotiated

Instead of seeking an EPO, the local authority may make an agreement with the parents to identify and agree support for the families, but Masson's research suggests that agreements between parents and the local authority were not always freely negotiated but were 'conditions imposed on parent, which allowed the social services department to conclude that the issue of children's care could remain a matter determined by the department and need not be brought before a court.'[53] In addition, the failure to comply with an agreement was then sometimes construed as a reason and further ground for compulsory intervention.[54]

(ii) Variations in 'without notice' applications

In cases where 'without notice' applications have been made, so that the parents might not be present at the EPO hearing, for instance on the basis that to put the parents on notice of the application might place the child in greater danger, Masson's research found variations in practice within different areas. Some areas could obtain an EPO very quickly and others found it quicker to have the child taken into police protection.[55]

The national survey which Masson conducted also

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46 see Masson et al *Protecting Powers*, Wiley, 2007

47 see Masson, J 'Emergency intervention to protect children: using and avoiding legal controls' (2005) 17 CFLQ 75 at 75 at p.79

48 Masson, ibid.

49 see Masson, J 'Police protection –protecting whom?' [2002] JSWFL 157 at p.163 (25 EPO applications were made out of 108 cases)

50 Masson, fn 27, at p. 79

51 Masson, ibid at p.75

52 Masson, ibid at p.95

53 Masson, J 'Emergency intervention to protect children: using and avoiding legal controls' (2005) CFLQ 75 at p.82

54 Masson, J, above, at pp. 82-83

55 Masson, ibid, at p.89

revealed a wide diversity of approach in the courts' approach to without notice hearings; over a third of legal advisers said EPOs were rarely heard without notice in their courts, almost a third said EPOs were usually heard without notice, and another 12% that EPOs were never heard on notice.[56] Thus, in one area surveyed, over half (53%) of all EPO applications were heard after giving the full one day's notice to the parents, in another only 25% were on full notice and just under 50% without notice. In the third area, just over a quarter (26%) of cases proceeded without notice and just under 40% with notice.[57]

In a more recent article discussing her research findings into emergency protection, Masson found that there was considerably less recourse to police protection in areas where the courts were willing to hear EPO applications without notice.[58]

Despite her reservations about the widespread use of police protection as a preliminary step before obtaining an EPO, Masson's research also found that where police protection was followed by an EPO hearing on full notice, parents had more opportunity to obtain representation and give instructions. Hence, using police protection helped to 'make the proceedings [at the EPO hearing] fairer.'[59]

Further Statistics

Rise in numbers of children entering the care system

According to Department of Education data,[60] the number of children entering care through the use of emergency powers in the period between 1994 and 2009 has increased from 2,700 to3,700. In 2009, 81% entered through police protection compared with only 41% in 1994. In 1994, only 1,100 children entered care under police protection compared with 1,600 under an EPO. The period of 1994-2004 then saw a rise in the number of children entering care under police protection, increasing to 1,600 in 2001, followed by a sharp increase to 2,000 in 2003 and 3,000 in 2009. On the other hand, in the period between 1994 and 2004, the number of children entering under EPOs averaged just under 1,500 annually with a peak of 1,800 in 1999. From 2005, however, there has been a very noticeable decline and only 740 children entered care under these orders in 2009.[61]

(iii) PLO reduced the number of EPOs

The introduction of the Public Law Outline (PLO) in 2008[62] appears to have reduced the use of emergency powers as it did the use of care proceedings. In that year, 630 fewer children entered care under emergency powers than in the previous year.[63]

The ultimate conclusion that Masson draws from her research into the exercise of police powers in the context of emergency situations is that 'A shift in the balance between police protection and Emergency Protection Orders suggests that the balance and accountability system put in play by the Children Act 1989 has broken down.'[64]

NSPCC Research

A report was published by the NSPCC in September 2011 [65] intended to provide up to date information on the prevalence and impact of child maltreatment in the UK, as a follow up to their ground-breaking research by the NSPCC published in 2000. Among the key findings from the interviews conducted[66] in 2009 were:

- Severe child maltreatment was reported as an experience for a substantial minority of children and young people
- The rates of child maltreatment reported by young adults aged 18-24 were lower in 2009 than in 1998; 1 in 4 (25.3%) young adults

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56 Masson, ibid at p.93

57 Masson, ibid at p,94

58 Masson, J 'Emergency Protection: The impact of court control on safeguarding children.' [2010] Fam Law 1088

59 Masson, 'Fair trials in child protection' (2006) 28 JSWFL 15 at p.24.

60 cited and discussed *in extenso* by Judith Masson in 'Emergency Protection: The impact of court control on safeguarding children' [2010] Fam Law 1088

61 as pointed out by Masson, op cit above at p.1090-91

62 This is a system which introduced a more streamlined court process requiring only four key stages in public law proceedings rather than six. The PLO places greater emphasis on preparation before proceedings are issued, including completion of core assessments with the main objectives being to reduce the numbers of care cases in the courts by tackling the key problems of costs and delay in care proceedings. Local authorities are also required send the parents advance written warning of their concerns before proceedings and negotiate more fully with parents before going to court: see Masson, J 'Improving care proceedings: can the PLO resolve the problem of delay?' [2008] Fam Law 1019 and 1129.

63 See Masson, fn 56, at p.1091

64 Masson, fn 56 at p.1092

65 *see* Radford, L, Corral, S, Bradley, C, Fisher, H, Bassett, C Howat, N and Collishaw, S (2011) *Child abuse and neglect in the UK today*, London: NSPCC (The NSPCC Report, 2011)

66 Interviews were conducted with 2,160 parents or guardians of children and young people under 11 years of age; 2,275 young people aged between 11-17, with additional information provided by their parents or guardians; and 1,761 young adults between 18 and 24 (The NSPCC Report, 2011, p. 7).

aged 18-24 had experienced severe maltreatment[67] in childhood

- Five per cent of under 11s, 13.4 percent of 11-17s and 14.5 per cent of 18-24s had experienced severe maltreatment by a parent or guardian during their childhood
- 12 per cent of under 11s, 17.5 per cent of 11-17s and 23.7 per cent of 18-24s had been exposed to domestic violence between adults in their homes during childhood
- Adult males were the main perpetrators of domestic violence, accounting for 93.8 per cent of cases where one parent had beaten up the other.

One of the implications of the research findings is that any professional coming into contact with children must be alert to potential abuse and equipped to respond promptly; health, schools and early years' services could play a vital role.[68]

VII. The Other End Of The Spectrum

At the other end of the spectrum has been misdiagnosis by child protection professionals and children who were allegedly abused have been taken away from their families and placed in care and it has subsequently transpired that these children have not in fact been abused. This has led to several highly unsatisfactory cases, raising a host of thorny issues such as who should be held accountable for such misdiagnosis and the question of whether the local authority should incur vicarious liability. The other question has been whether the parents of such children have a right to sue the doctors or social workers who have made a misdiagnosis or acted negligently in child protection work. There is also the double trauma suffered by such children –being taken away and arguably suffering abuse by the very system designed to protect them.

(i) Local Authority Liability

In recent years, there have been several attempts by parents and children to sue local authorities for example, removing a child from her mother after an incorrect identification of an abuser as in *M v Newham* [1995] 2 AC 633; or failing to prevent abuse by a foster father after ineffective monitoring of the placement as in *H v Norfolk* [1997] 1 FLR 384.

These cases involve the issue of civil liability for negligent discharge of child protection functions, in particular whether a parent could sue for damages in respect of child protection intervention which turned out to be unfounded. As we have seen, the House of Lords tackled this particular point in 2005 in the *East Berkshire* case and returned to it in 2007 in the *Lawrence* case.

X (Minors) v Bedfordshire County Council [1995] 2 AC 633 [69]

This case involved conjoined appeals against local authorities in respect of their statutory powers in the field of child protection and education. The House of Lords had to consider whether a common law duty of care in negligence could be imposed on a local authority in respect of its statutory powers.

In the first appeal (the *Bedfordshire* case), a negligence claim was brought by five children who had suffered years of abuse and serious neglect because the local authority had failed to take steps to protect them, namely to remove them from their homes, even though it had been informed on several occasions that they had been suffering harm.

The House of Lords struck out their claim on policy grounds, holding that the defendant authority owed them no duty of care.

In the second appeal (the *Newham* case), the child had been taken into care after a child psychologist had wrongly identified the mother's cohabitant as having abused the child, when it was someone else who had abused the child. This led to the child being taken away from the mother and placed in foster care for nearly a year. The House of Lords held that the defendant local authority owed the mother and daughter no duty of care in negligence on policy grounds. The claim was therefore struck out.

Four of the children in the *Bedfordshire* case and the mother and daughter in the *Newham* case took their case to the European Court of Human Rights where they were successful and were awarded damages.[70]

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67 defined as severe including severe physical and emotional abuse by any adults, severe neglect by parents or guardians and contact sexual abuse by any adult or peer.(see The NSPCC Report, 2011, at p.7)

68 see The NSPCC Report, 2011, at p.14

69 see also [1995] 2 FLR 276

70 see *Z v UK* [2010] 2 FLR; and *TP and KM v UK* [2001] 2 FLR 545

(ii) Other cases

After these two ECHR cases,[71] the UK courts became more willing to allow cases in negligence to proceed to trial and for negligence claims to succeed, particularly where the claimants were children, or adults who had suffered when they were children.[72]

In *Barrett v Enfield London Borough Council* [2001] 2 AC 550, the claimant had been taken into care at 10 months of age, had numerous placements, five different social workers and remained in care until he was 18. He alleged that he suffered psychiatric harm which he alleged was due to the failure of the local authority to place him for adoption, locate suitable foster homes, and oversee his reintroduction to his birth mother. The House of Lords held that the defendant local authority owed a duty of care in negligence to the claimant, on the basis that it owed a duty of care to a child, to whom it was responsible. *X v Bedfordshire* was distinguished on the basis that care proceedings had been instigated and the complainant had already been in care. Although the decision to take a child into care was non-justiciable, the manner in which the local authority cared for that child subsequently could be subject to such a duty. He was therefore allowed to pursue his negligence claim.

In *W v Essex CC* [2000] 1 FLR 657, foster parents and their biological children brought a claim against the local authority for placing a 15-year-old boy who was a known sexual abuser within their family despite their express statement to the local authority that they were not prepared to foster children who were known/suspected of being sexual abusers and despite the fact that the local authority knew that the boy had assaulted his own sisters. The foster child subsequently abused all the children of the family. The social worker had assured the parents that the boy posed no risk. The parents brought a negligence claim against the local authority, alleging psychiatric injury.

The House of Lords held that a duty of care in negligence was owed by the defendant local authority to the parents. The case could therefore proceed to trial.

In *A v Essex CC* [2003] EWCA Civ 1848[73] a couple adopted a brother (aged 6) and a sister (aged 13). The prospective adopters had informed the adoption agency that they would consider a child with mild behavioural problems but not one needing special education outside mainstream school or with physical or psychiatric difficulties. The adoption agency possessed information about the boy's serious behavioural difficulties and his history of violent outbursts and destructive behaviour but the prospective adopters claimed the adoption agency did not disclose this information to them. In the course of the 14-month placement, the boy attacked both parents, demolished a greenhouse, attacked the mother whilst she was pregnant and threw an iron at the new baby. The boy was diagnosed with attention deficit hyperactive disorder and prescribed Ritalin. The parties nevertheless proceeded with the adoption although the boy was subsequently accommodated by the local authority. After this accommodation, he returned to live with the adoptive parents.

The parents claimed damages in respect of the agency's negligence in failing to provide them with 'all relevant information' about the two children they were preparing to adopt.

The High Court held that there had been a failure to disclose sufficient information, but that the adoption agency was only liable for injury, loss and damage sustained during the placement but not after the adoption orders were made as the parents proceeded with the adoption once they were aware of the boy's difficulties. On appeal, the Court of Appeal held that there was no duty of care owed by the local authority (in its capacity of adoption agency) in determining what information was to be given to prospective adopters, unless they took a decision that no other agency would reasonably take. The Court upheld the cut off date for damages as the date of adoption.

JD v East Berkshire (also known as *D v East Berkshire Community Health MHS Trust* [2005] 2 AC 373 is also illuminating. In each of the three appeals which were heard jointly in this case, the parents alleged that medical professionals had negligently misdiagnosed child abuse rather than the actual cause of the child's health problems, and that this had disrupted their family life and caused them psychiatric injury. The parents sought damages in negligence against the defendant NHS Trusts.

The House of Lords' decision

The House of Lords held (Lord Bingham dissenting) that :

(i)The defendant NHS trusts owed no duty of care in negligence to the parents because to impose such a duty would result in a conflict of interests.

(ii) Hence, the parents could not sue doctors or social workers who had acted negligently in child protection

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71 ie the cases mentioned in the preceding footnote

72 Standley, K *Family Law* (2010) p.420

73 also cited at [2004] 1 FLR 749

work but the children concerned would have a right of action. The first reason why parents were excluded from a right to sue was to enable investigators to act single-mindedly in the interests of the child, without concern that if the suspicions proved unfounded, she might be open to a claim from a distressed parent. Giving the reasons as to why parents have been denied such an action, Lord Nicholls (in the *East Berkshire* Case) stated (at para [85]):

> A doctor is obliged to act in the best interests of his patient. In these cases, the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand in hand. But when considering whether something does not feel 'quite right', a doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent.

(iii) The second reason was: the general approach of the law is to oppose granting remedies to third parties for the effects of injuries to others.

(iv) There were cogent reasons of public policy for holding that no duty of care was owed to the parents.

Parent owed no duty of care by social workers: The Lawrence Case

In *Lawrence v Pembrokeshire CC* (2007)[74] (the wooden spoon case) the Court of Appeal held that a parent is owed no duty of care by children's social workers.

Background to the case

This case involved the same sort of claim that had arisen in the *East Berkshire* case which had been decided by the House of Lords. However, it was heard by the Court of Appeal because the *East Berkshire* case concerned events that had occurred before the Human Rights Act 1988 came into force. Mrs Lawrence, the claimant in this case. Pointed out that under the HRA it is now possible for a parent to make a claim for damages where a child protection intervention amounts to an unjustified breach of the right to respect for private and family life contained in Art 8 of the European Convention on Human Rights.

Facts

Mrs Lawrence told social workers that occasionally she disciplined her four children by threatening them with a wooden spoon. Her partner subsequently told social workers that she had hit him with a wooden spoon, which was, in fact, a lie. The children were interviewed by police and in April 2002, a Child Protection Conference (CPC) was held. Mrs L was unhappy about the conduct of the CPC because she was not permitted to give her side of events. The CPC concluded that her children were at no risk of physical harm but that they should be entered on the Child Protection Register under the 'emotional harm' category. This was despite the fact that there seemed to be no evidence before the CPC which suggested that the children were at risk of emotional harm. The children's names remained on the register for 14 months.

A subsequent independent report concluded that 'the evidence did not justify placing the children's names on the register and social workers had misused the initial Child Protection Conference and misled the Chair'. In June 2003, soon after this Report, the children's names were removed from the register. Mrs Lawrence made a complaint to the Ombudsman who found there had been maladministration, issued a highly critical report and recommended £5,000 compensation. This sum was paid to her by the County Council, in recognition of the damage and distress to her reputation.

However, Mrs Lawrence brought a claim for damages in negligence. The High Court struck out her claim on the basis that a local authority cannot be sued by parents for negligent discharge of its child protection functions. Mrs L therefore appealed to the Court of Appeal.

The Court of Appeal

Issue: The Court of Appeal was asked to decide whether a local authority owes parents a common law duty of care to exercise reasonable care when carrying out child protection functions. Where such a duty exists, a well-intentioned but negligent mistake gives rise to potential legal liability.

In the *East Berkshire* case, the Law Lords decided that a common law duty of care should not be imposed for fear that this might make child protection professionals too cautious and prevent them from taking timely and robust action to protect children who could be at risk. The only difference between the *Lawrence* case and the *East Berkshire* case was that the facts in the *Lawrence* case

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[74] [2007] EWCA Civ 446

postdated the coming into force of the Human Rights Act 1998. It was argued that Art 8 gave a new right of action and there was a need for the common law to be harmonised with the human rights claim.

However, the Court of Appeal saw no good reason to depart from *East Berkshire* because whilst human rights legislation might now give a separate legal right to aggrieved parents, that did not justify exposing local authorities to negligence claims. Indeed, as the Court put it:

Art 8 is not concerned with the establishment of a duty of care, but of a threshold of interference by a public authority with family life. It is not based on a breach of a duty of care by a local authority, which, once surmounted, is for the authority to justify.

The whole point of the *East Berkshire* ruling was to forestall by robust and timely intervention, if at all possible, the possible harm when a local authority suspected parental abuse of children in the context of their family life.

The Court of Appeal rejected the subsidiary argument that the East Berkshire immunity was only ever intended to cover medical professionals and not to social workers.

The Court of Appeal therefore held that:

(i) Immunity from suit remains for the local authority as far as parents are concerned; and

(ii) The *East Berkshire* immunity was always intended to extend to social workers.

In the more recent case of *Merthyr Tydfil County BC v C* (2010)[75] the High Court held that a duty of care may be owed to parents in a situation where, if the parent is not the suspected abuser, there is no potential conflict of interest between parent and child.

VIII. Special Problems of detection with sexually abused children

There are additional difficulties with allegations of sexual abuse of children; the absence of physical signs does not necessarily mean abuse has not taken place and the presence of physical signs such as cuts and bruises near the genital area does not automatically or necessarily mean that sexual abuse of the child has taken place.

The discipline of fact finding is important as the following case illustrates:

IX. The Importance of fact-finding

D v B [2007] 1 FLR 1295

This case was presided over by Stephen Wildblood, QC, sitting as a deputy High Court judge, in Nov 2006. The mother alleged that her three-year-old son had been sexually abused by his father and paternal grandmother after the father's first unsupervised contact visit. The complaints were serious and involved penetration.

The abuse of the son was said to have taken place in a public place and involved using a knife. The allegations were florid and were dependent on what the children had said to their mother and later to the therapists to whom the mother referred them. There were two systems running in opposition to each other.

The very experienced judge who heard the allegations called them 'truly extraordinary'. These allegations were then abandoned by the mother at court and she then referred the children for counselling on the basis that they were true. A therapist and social worker believed the allegations. This went on for some years until the court was able to set up a fact-finding hearing. It was eventually found that there was not a scintilla of foundation to the allegations.

It was also said that the recordings of the therapy sessions had to be handled extremely carefully since they were never intended to bear any forensic function. There had been no attempt at open-ended questions to support and encourage the child; there had always an assumption that the allegations were true and had taken place. The trauma and emotional strain wrought on all the parties over many years is utterly lamentable and might have been avoided.

A common feature in all these cases is the failure of child protection professionals to make the correct diagnosis.

X. What is to be done about detecting child abuse?

What options are available to deal with the ongoing conundrum that bedevils child abuse detection? A wholesale overhaul of the system and the introduction of mandatory reporting[76] of any suspected abuse of children? Various possibilities may be suggested:

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[75] *Merthyr Tydfil County Borough Council v C* [2010] EWHC 62

[76] Introducing a reporting law was discussed by the Department of Health and Social Security in the *Review of Child Care Law* (DHSS, 1985) but the working party decided not to recommend such a proposal (at para.1.24)

- Revise the definition of significant harm[77]
- Have a central authority which can co-ordinate the implementation of the child protection service between agencies
- Train more social workers in recognising risk factors through more effective mentoring and supervision by middle managers and more experienced practitioners
- Allocate more money into specialist training and have dedicated legal advisory teams working closely with social services

At the end of the day, child protection professionals must somehow not allow themselves to retreat into the anonymity of collective responsibility but assume personal responsibility for their assessment of the needs of children and be more vigilant when faced with issues surrounding the detection and diagnosis of possible child abuse within the framework of existing law and practice.

Conclusions

Wilkinson argues that social work practitioners need an existing touchstone, against which to measure very difficult decisions and this, in his view, does not exist, and the continued absence of well-defined provision 'risks redundancy in provisions which otherwise furnish the basis of an effective scheme of child protection'.[78]

Jones[79] points out that 'although the pressures on professionals to intervene to protect children are immense, there are also dangers in acting precipitately or of approaching the issue of child protection with a blinkered mindset'. He refers to the Rochdale case where 20 children were taken away on the basis of alleged satanic abuse. It transpired the investigations were flawed and allegations unfounded. Some of the children have brought actions in respect of the psychological trauma they allege was caused by the investigation and separation from their families. No doubt the parents were also traumatised.[80] We can also recall the Orkney Islands affair[81] and note that that was another case of dawn raids and misconceived responses to unfounded allegations.

Mr Justice Hughes[82] has argued (writing extra-judicially) that the rigour of fact finding is extremely relevant to Children Act litigation as it is to any other. Hearsay is admissible but not compulsory and it is always preferable to get first-hand evidence where the evidence is disputed and critical. Deciding what evidence to act upon involves a balancing exercise which will depend on the circumstances of the case, so the decision may not be the same in all fields. The approach now is to try and get the alleged victim to give evidence, preferably via video link.

In 2009, a scathing critique of our existing system of child protection was delivered by the co-chair of the Association of Lawyers for Children, Piers Pressdee.[83] He highlighted a 'stretched, mismanaged and under-resourced system that failed Baby P' in stark contrast to governmental efficiency and speed in dealing with other crises such as foreign wars or the banking debacle. He submitted that the system of child welfare and child protection is 'filled with dedicated but increasingly disillusioned practitioners, expected to shoulder more burdens for the same or less pay, and drenched…by a torrent of templates, targets and tick-boxes, in which the child is as often lost as found'.[84]

He continued:

> If the life of baby P is to mean anything, then let it mark our collective rejection of our lowly place in the in the Government's pecking order; of policy drives that fail to recognise, encourage and harness the qualities of the practitioners on the front line…The truth is that there should be no bigger priority for the Government than the welfare, safety and protection of children. [85]

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77 The question would be whether to make it 'an absence of reasonable care' as some commentators such as Bainham have suggested. The issue of whether a higher or lower threshold best protects children remains..

78 Wilkinson, op cit at p.424

79 Jones, MA 'Child Abuse: when the Professionals get it wrong' (2006) Med LR 264 at 276

80 Jones, ibid at 276

81 see The Clyde Report : *Report of the Inquiry into the removal of children from Orkney in February 1991,* 1992, Edinburgh, HMSO; no findings of any sexual abuse of any of the nine children removed from South Ronaldsay by the police were made by the Inquiry or the Report.

82 Rt Hon Lord Justice Hughes 'The Children Act 1989: A Different Sort of Litigation?' [2008] Fam Law 1018 at 1015

83 See Pressdee, P 'All Right, Jack?' [2009] Family Law 3

84 ibid

85 ibid

The point being made throughout this Article is that at both ends of the Child Abuse detection spectrum, considerable difficulties and complexities present themselves. At one end, even if there are suspicions that child abuse may be taking place, a certain degree of credible evidence is required to satisfy the degree of proof that would trigger or activate the legal threshold of intervention. At the other end, if professionals do intervene but get it wrong with a misdiagnosis, at best compensation might be claimed, at worst, families will be torn apart and traumatised, and children and parents will suffer a different kind of abuse –abuse by the system which is meant to protect the best interests of children within the family. This paper has emphasised that professionals dealing with child protection and detection of child abuse face a constant delicate balancing of competing factors, knowing that a wrong decision can have very serious and even fatal consequences. Surely it is now an urgent duty of the government to monitor existing mechanisms and procedures more rigorously, introduce better supervision and training, and to strive to improve effective inter-agency and intra-professional communication between child protection agencies, particularly through the Children Act 2004, and to provide any necessary (and essential) funding to ensure that the abuse and death of children like Baby P and Victoria Climbie will still be regarded as tragic but isolated and rare occurrences. We cannot continue to keep failing the most vulnerable children in our society.

The Reign of *Payne*

Professor Marilyn Freeman* and Associate Professor Nicola Taylor**

INTRODUCTION

The Reign of *Payne*[1] stays mainly on the plane according to the Court of Appeal in *Re K (Children) (Removal from Jurisdiction)*.[2] How much impact this case and other recent judicial decisions, in particular *Re W (Relocation: Removal Outside Jurisdiction)*[3], will have on the family law tarmac is an issue that is attracting considerable academic and practitioner comment.[4] In this article, we focus particularly on the Court of Appeal's comment in *Re W* about the role of social science research evidence in relocation cases. Wall P cited an article by one of the present authors which had concluded that we do not currently know whether relocation is in children's best interests and agreed that there is much work to do in understanding the impact of relocation on a child and children's resiliency in these circumstances. His Lordship added:

> It further occurs to me that unless and until we have the research identified by Professor Freeman, and unless and until Parliament imposes a different test to that set out in section 1(1) of the Children Act 1989 (paramountcy of welfare), relocation cases will remain fact specific, the subject of discretionary decisions, and governed by *Payne v Payne*.[5]

In this article, we seek to show that while it is true there are many deficiencies in our knowledge of the impact of relocation on children, as indicated above, there are aspects of the existing research evidence that do provide some insights of particular relevance given the recent case law developments.

THE *PAYNE* LANDSCAPE

The judicial attempts to clarify the law in *K v K* and *Re W* have emerged, at least in part, in response to recent criticism of the approach in *Payne v Payne*. The facts of the renowned *Payne* decision, which reinforced what had been set out in a series of earlier cases including *Poel v Poel*,[6] will be familiar to most readers of this journal, so it will suffice to provide only the briefest of summaries. The case related to a four-year-old girl whose British father had been refused a residence order when the judge made an order allowing her mother to relocate from the United Kingdom to her homeland in New Zealand. The father appealed unsuccessfully against this order. The leading judgments of the Court of Appeal were provided by Lord Justice Thorpe and Dame Elizabeth Butler-Sloss P. Lord Justice Robert Walker agreed with both judgments. The frequently quoted sections of Lord Justice Thorpe's judgment are to be found in paragraphs 26, 40 and 41. They delineated what has become the longstanding landscape for relocation decision-making in the jurisdiction of England and Wales, and set the scene within which the recent decisions of *Re W* and *Re K* must be considered. Readers are, however, advised to remind themselves of the judgment of Dame Elizabeth Butler-Sloss[7] which has been referred to as "the best summary of the approach which judges are required to take to these difficult decisions."[8]

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[1] *Payne v Payne* [2001] EWCA Civ 166 [2001] 1 FLR 1052 (hereafter referred to as *Payne*).

[2] [2011] EWCA Civ 793 (hereafter referred to as *re K*).

[3] [2011] EWCA Civ 345, [2011] 2 FLR 409 (hereafter referred to as *re W*).

[4] See R George, 'Reviewing Relocation? *Re W (Children) (Relocation: Removal Outside Jurisdiction)* [2011] EWCA Civ 345 and *Re K (Children) (Removal from Jurisdiction)* [2011] EWCA Civ 793', FLQ [forthcoming] (hereafter referred to as *Reviewing Relocation*); S Gilmore, 'The *Payne* Saga: Precedent and Family Law Cases', September [2011] Fam Law, 970 (hereafter referred to as *Payne Saga*); T Scott QC, '*MK v CK*: The Retreat from *Payne*' http://documents.jdsupra.com/d1c62d88-413f-408f-872b-f67259b8a028.pdf, last visited 3rd October 2011.

[5] At para 129.

[6] [1970] 1 WLR 1469 (CA). See Rachel Taylor, 'Poels Apart: Fixed Principles and Shifting Values in Relocation Law', ch 6 in S. Gilmore, J. Herring and R. Probert (Eds) *Landmark Cases in Family Law* , Oxford, Hart, 2011.

[7] See *Payne*, paras 85-88.

[8] By Wall LJ in *Re D* [2010] EWCA Civ 50, at para 18.

Concerns have been expressed by fathers' groups,[9] academics, researchers, legal practitioners and members of the national and international judiciary about the guidance provided in *Payne*[10] and the apparent weighting given to what has become known as 'the distress argument' – where the primary carer mother's distress at not being permitted to relocate is considered to impact so negatively on her child(ren) that it is determinative of the issue and she will inevitably be granted permission to relocate.

Wilson LJ made an important observation in *Re H (Leave to Remove)*[11] when he stated that 'one must beware of endorsing a parody of the decision'[12] in *Payne* as both Thorpe LJ and Dame Elizabeth Butler Sloss emphasised the welfare of the child to be the paramount consideration in the determination of applications for permission to relocate. Nonetheless, Stephen Gilmore powerfully argues that Thorpe LJ has:

> … applied with great regularity his own discipline in hearing appeals, emphasising the welfare of the primary carer … so the parody is one that lives in practice, even though it may not represent the full picture as a matter of doctrine, and will continue in practice to dictate in its unbalanced way unless tackled.[13]

The Washington Declaration 2010

In March 2010 an International Judicial Conference on Cross-border Family Relocation was held in Washington D.C.[14] The resulting Washington Declaration on International Family Relocation[15] has been described by barrister Clare Renton as containing a set of 'agreed guidelines in respect of international family relocation including "factors relevant to decisions on international relocation."'[16] Clause 4 of the Declaration explains that the thirteen factors are for the purpose of promoting a more uniform approach to relocation internationally, and are intended to guide the exercise of judicial discretion in particular but not exclusively. Clause 2 states that the best interests of the child should be the paramount (primary) consideration in all applications concerning international relocation and that determinations should therefore be made 'without any presumptions for or against relocation.' The Declaration has received a mixed response.

In *Re H (Leave to Remove)*[17] Wilson LJ was generally positive about the Declaration and found it to be 'extremely interesting.' Subject to what he said below in paragraph 27, he stated that:

> … it may prove not only to be a valuable means of harmonising the approaches of different jurisdictions to the determination of applications for permission to relocate but ultimately also to become the foundation of some reform of our domestic law.[18]

Importantly, however, he also found that the Washington Declaration has no such effect at the moment.[19] This led his Lordship to state that the submission by Counsel that 'today we should replace the guidance given in *Payne* with that contained in [3] and [4] of the declaration, lacked elementary legal discipline.' [20] He continued that 'the document is indeed no more than a declaration, to which our jurisdiction, through Thorpe LJ, has subscribed.'[21] Taken together, these statements appear to indicate Wilson LJ's view that, although the Declaration is not currently enforceable, it might be ultimately used as a basis for making relocation decisions in this jurisdiction subject to the necessary issue of enforceability being addressed.

Lord Justice Wilson also made 'with some hesitation' what he termed 'an aside' in paragraph 27. He queried if the present law of England and Wales does indeed place excessive weight upon the effect on the child of the negative impact upon the applicant of refusal of the

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[9] See, for example, The Custody Minefield http://www.thecustodyminefield.com, and Relocation Campaign http://www.relocationcampaign.co.uk/index.html

[10] R George, Reviewing Relocation, fn 4 above, summarises the criticisms to which *Payne* has been subjected.

[11] [2010] EWCA Civ 915 [2010] 2 FLR 1875.

[12] At para 21.

[13] *Payne Saga*, fn 4 above, p 976.

[14] Organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children, with the support of the US Department of State.

[15] http://www.icmec.org/missingkids/servlet/NewsEventServlet?LanguageCountry=en_X1&PageId=4240 last visited 6th October 2011; http://www.hcch.net/upload/decl_washington2010e.pdf last visited 6th October 2011(hereafter referred to as the Declaration).

[16] http://www.familylawweek.co.uk/site.aspx?i=ed61748 last visited 6th October 2011.

[17] [2010] EWCA Civ 915 [2010] 2 FLR 1875.

[18] Ibid, at para 26.

[19] Ibid, at para 26.

[20] Ibid, at para 26.

[21] Ibid, at para 26.

application, whereas the Declaration 'as presently drawn by contrast places insufficient weight upon it.'

Mostyn J in *re AR (A Child: Relocation)* referred to Wilson LJ's comments expressed in re H about the possible insufficient weight placed upon the 'distress factor' in the Declaration:[22]

> I agree with this, up to a point. Certainly the factor of the impact on the thwarted primary carer deserves its own berth and as such deserves its due weight, no more, no less. The problem with the attribution of great weight to this particular factor is that, paradoxically, it appears to penalise selflessness and virtue, while rewarding selfishness and uncontrolled emotions. The core question of the putative relocator is always "how would you react if leave were refused?" The parent who stoically accepts that she would accept the decision, make the most of it, move on and work to promote contact with the other parent is far more likely to be refused leave than the parent who states that she will collapse emotionally and psychologically. This is the reverse of the Judgment of Solomon, where of course selflessness and sacrifice received their due reward.[23]

Mostyn J also provided his own view of the Washington Declaration:

> The Declaration supplies a more balanced and neutral approach to a relocation application, as is the norm in many other jurisdictions. It specifically ordains a non-presumptive approach. It requires the court in a real rather than synthetic way to take into account the impact on both the child and the left-behind parent of the disruption of the periodicity and quantum of the prevailing contact arrangement. The hitherto decisive factor for us – the psychological impact on the thwarted primary carer – is relegated to a seemingly minor position at the back end of para 4(viii).[24]

Courts in other jurisdictions have declined to follow *Payne* because of the emphasis placed on one, rather than all, the factors, creating a virtual presumption in favour of relocation.[25] However, some commentators have argued that imposing a 'discipline' is not necessarily detrimental in law, especially in the relocation field where greater certainty could lead to more consistent and predictable judicial decision-making. It would also signal, at an even earlier stage, how adult expectations about pursuing new cross-border relationships might come at the expense of their child(ren)'s stability and well-being and ultimately help separated parents to avoid expensive and lengthy litigation when making child care and mobility decisions. Professor Mark Henaghan emphasises that the value-driven reality of decision-making in relocation cases is:

> … not one of neutral fact finding. True neutrality will never reach a final result because all facts and principles would have to be treated equally. Decision-making requires prioritising, and giving more weight to some factors over others.[26]

He goes on to state his view that 'Thorpe LJ, in the England and Wales Court of Appeal case *Payne v Payne*, was right to impose a "discipline" in relocation decisions to reduce litigation and restore predictability.'[27]

With this background, we now turn to examine the recent case law.

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[22] [2010] EWHC 1346 (Fam), [2010] 2 FLR 1577 at para 12.

[23] Thorpe LJ describes the limitations of the committee drafting involved in the production of the Declaration at [2010] 1FLP(2) 8. In [2010] IFL 127, 'Washington Relocation Conference and *Poel v Poel*', he stated: 'Were England and Wales to subscribe to the text of the declaration, or anything in similar vein, it would represent a significant departure from the principles that our court has applied consistently since the decision in *Poel v Poel* [1970] 1 WLR 1469. The case for such a shift is not difficult to articulate. The principles stated in *Poel* were substantially founded on the concept of the custodial parent. Furthermore, there is an emerging body of significant research in various jurisdictions that must be brought into account.'

[24] At para 11.

[25] See, for example, *D v S* [2002] NZFLR 116 where the Court of Appeal (per Richardson P) stated at para 50: '*Payne v Payne* is not an appropriate model for New Zealand Courts. The guideline approach in *Payne v Payne*, with a clear emphasis on one only of the relevant factors to be weighed, is inconsistent with the approach required in New Zealand and not helpful as a reference point unless particular passages in the judgments are carefully identified and placed in a New Zealand context.'

[26] M Henaghan, 'Relocation Cases: The Rhetoric and the Reality of a Child's Best Interests: A View from the Bottom of the World' [2011] CFLQ 226-249 at p 227.

[27] Ibid, at p 228. See also Associate Professor Lisa Young, 'Resolving Relocation Disputes: The "Interventionist" Approach in Australia' [2011] CFLQ 203 where she cautions, at p 207, against a reversal of the Payne approach without consideration of what she terms 'the interventionist approach' in Australia and 'where this road might ultimately lead.'

RECENT CASELAW

The 2011 decisions of *Re W* and *Re K* represent what Stephen Gilmore has referred to as 'the Court of Appeal's latest forays into what might be termed the '*Payne saga*.'"[28] We briefly recount the facts of both of these recent cases:

Re W (Relocation: Removal Outside Jurisdiction)

Re W concerned unmarried parents who had not lived together as a couple, and where the father did not have parental responsibility for the two children of the relationship, a girl aged 12 and a boy aged 8.[29] The father had not had much contact with the children since 2009, and the mother believed that the children had suffered harm from being exposed to the father's alcoholism and possible recreational drug use, as well as his lifestyle. She alleged psychological and emotional abuse on a regular basis, witnessed by the children. The mother wanted to return home to Australia, where all her family lived, and the children were positive about the proposed move. She provided medical evidence attesting to her postnatal depression, although her primary motivation for seeking to relocate was the better life she thought she and the children would have in Perth. The Cafcass Officer filed three reports indicating that the mother should be given permission to relocate, but advocated a delay to allow the children to strengthen their relationship with their father. This was successfully achieved during the adjournment. At the final hearing the judge refused the mother's application because of his fears the children's embryonic relationship with their father would be adversely affected by the move. He accepted this would devastate the mother, but felt she 'needs to understand that the children's relationship with their father is very important.'[30]

The Court of Appeal later reversed this decision:

> [It] is my clear conclusion that this [sic] one of those rare cases in which the judge, in the exercise of his discretion, has plainly reached the wrong conclusion, and that it is not only open to this court to interfere, but that in the best interests of the children it has a duty to do so.[31] … When one is looking at the best interests of children, the best interests of their primary carer is a very important consideration and, I have to say, on the facts of this case, clearly outweighs the newly acquired relationship with the left behind parent.[32]

The Court took the opportunity, in light of the recent criticism of *Payne*, to clarify the status of *Payne*. Wall P dealt decisively in *Re W*[33] with the confusion created by his comments in the earlier case of *Re D (Leave to Remove: Appeal)* where he had stated:

> There has been considerable criticism of *Payne v Payne* in certain quarters, and there is a perfectly respectable argument for the proposition that it places too great an emphasis on the wishes and feelings of the relocating parent, and ignores or relegates the harm done of children by a permanent breach of the relationship which children have with the left behind parent.[34]

In *Re W*, Wall LJ stated that too much weight may have been given to some of his words in *Re D*[35] and he retracted his use of the word 'ignores'[36] which had been criticised by Wilson LJ in *Re H*.[37] Wall P sets out clearly in *Re W* that relocation cases are governed by Payne which he stated 'is, of course, not only the latest leading case on "relocation" in the English jurisprudence, but also a reserved decision of this court and binding on us.' [38]

Re K

In *Re K* the father was Polish, but had lived in Canada during his childhood before moving to England in 1993. He met the mother in her country of origin, Canada, and she had been in the UK since 2003. The couple married in 2004, but separated in 2010. The care of their two

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[28] *Payne Saga*, fn 4 above, p 970.
[29] The facts of the case are set out in the judgment of the President, Wall P. at para 24.
[30] Ibid, para 34.
[31] Ibid, para 95.
[32] Ibid, para 103.
[33] At para 129.
[34] [2010] EWCA Civ 50 [2010] 2 FLR 1065, at para 33.
[35] *Re W*, at para 128.
[36] Ibid, at para 129.
[37] *Re H*, at para 23.
[38] Re W, at para 13.

daughters, aged four years and 18 months, was shared by the parents under a shared residence order made in August 2010. The children spent five nights (six days) with their father and nine nights (eight days) with their mother in every 14-day period. Both parents worked part-time so they could raise their children. The father cared for the children alone; the mother was assisted by a nanny while she worked. The mother felt unhappy and isolated in London and applied for leave to remove the children to Canada so she could gain additional support from her parents. Cafcass recommended against allowing the relocation, despite acknowledging it was a fine and difficult balance. The judge at first instance allowed the mother's application. The father appealed on three grounds - that the judge (i) had rejected the recommendations of the Cafcass officer without proper analysis or explanation; (ii) had directed herself by reference to guidance for applications by primary carers rather than guidance in applications by a parent with a shared care arrangement; and (iii) had been one-sided in referring only to the mother's case and not adequately addressing the father's.

The Court of Appeal allowed the father's appeal, holding that the only principle to come from *Payne* is that the welfare of the child is paramount; the rest is guidance to be applied or distinguished depending on the circumstances. The judge should apply the statutory checklist in section 1(3) Children Act 1989 in order to exercise his discretion. Thorpe LJ confirmed the approach set out in *Re Y*[39] that the guidance in *Payne* is only applicable where the applicant is the primary carer. Where parents share the burden of caring for the children 'in more or less equal proportions' the approach in *Payne* at paragraph 40 should not be applied. The label 'shared residence' is not significant in itself. Black LJ reached the same conclusion as Thorpe LJ and Moore-Bick LJ, but via a different route. She said that *Re Y* is not a different line of authority from *Payne*, but 'a decision within the framework of which *Payne* is also part.'[40] She would not therefore 'put *Payne* so completely to one side.'[41]

Precedent

The issue of precedent, which is briefly addressed in *Re W*, and more substantially addressed in *Re K*, is comprehensively analysed by both Stephen Gilmore and Dr George in their respective articles. The point can be stated with unusual brevity. *Payne* remains good law and the expectation is that judges of the Court of Appeal and below must follow its guidance.[42]

The prevalence of shared care in modern post-separation parenting was raised in *Re K*, while the place of research in relocation dispute resolution was addressed in *Re W*. In what follows, we wish to argue that there are aspects of the research evidence on shared care arrangements that are relevant to relocation and have potential to affect the way *Payne* is applied in the future.

Shared Care

Several studies have included estimates of the incidence of shared residence arrangements in Australia (16%, 2009)[43], the UK (12%, 2009)[44], US (Wisconsin, 2% in 1981 to 32% in 2001)[45] and Norway (4% in 1996 to 10% in 2004)[46]. Shared care thus remains a minority post-separation care arrangement, but has increased in popularity over recent years.[47] Limitations pertaining to the research on shared care include the use of small samples, mutually agreed (rather than adjudicated) shared care arrangements, and variations in the definition of what constitutes shared care. For example, in the UK study with 559 parents (mentioned above), the children had to be spending the equivalent of at least three days and nights per week with each parent; whereas in the large-scale

[39] [2004] 2 FLR 330.

[40] See the helpful summary by Andrea Watts of 1 King's Bench Walk in *Family Law Week*, http://www.familylawweek.co.uk/site.aspx?i=ed84409 last visited 6th October 2011.

[41] *Re K*, para 96.

[42] Dr George (Reviewing Relocation, fn 4 above, in the section on Precedent, Principles and Guidance) explores at length the ratio decidendi of *Payne* and the implications of Black LJ's caution against overstating the effect of the *Payne* guidance and Moore-Bick LJ's caution against its unduly mechanistic application.

[43] R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the Family Law Evaluation Team, 'Evaluation of the 2006 Family Law Reforms', (2009) Melbourne: Institute of Family Studies.

[44] V Peacey and J Hunt, 'I'm Not Saying It Was Easy … Contact Problems in Separated Families' (2009) England: Ginger Bread and Nuffield Foundation.

[45] M Melli and R Brown, 'Exploring a New Family Form – The Shared Time Family' (2008) *International Journal of Law, Policy and the Family* 22, 231-269.

[46] K Sk rten and R Barlindhaug, 'The Involvement of Children in Decisions about Shared Residence' *International Journal of Law, Policy and the Family* 21, 373-385.

[47] S Gilmore, 'Shared Parenting: The Law and the Evidence (Part 2)' (2010) 20(1) Seen and Heard 21-35.

Australian study with 10,000 parents a wider margin of 35% to 65% of time with each parent was utilised.

Doubt has also been cast on the 'comfortable assumption' that 'shared care arrangements are only put into place when the parents are able to work harmoniously, or at least civilly, and are able to protect the children from exposure to hostility, sharp words, denigration, and the like.'[48] Reviews and critiques of the research findings have highlighted that while shared care can be beneficial for some children, others do not fare well in such an arrangement. Dr Judy Cashmore and Professor Patrick Parkinson note that:

> There is no support in the social science literature for parenting arrangements for children under four that involve alternative substantial blocks of time. The McIntosh et al findings indicate that 2-3 years old children with conflicted parents fare less well when each parent has the care of the child overnight for at least 5 nights per fortnight. While otherwise there is no direct evidence that alternating substantial blocks of time is harmful, the preponderance of expert opinion based upon what is known about young children's attachments and sense of time, is that primary residence with one parent, regular contact with the other parent, and limited periods of separation from both parents are best for young children, and especially those under 4.[49]

Caution is therefore urged when a decision to split the child's time approximately equally between parents disregards the child's developmental needs for secure attachments, creates psychological strain on the child, and best meets the parents' rights rather than those of their child. Shared care is likely to work best when the parents live near each other, respect their ex-partner's parenting competence, and have a flexible and child-focused parenting style.[50] Several recent reviews by Stephen Gilmore,[51] Liz Trinder[52] and Belinda Fehlberg, Bruce Smyth, Mavis Maclean and Ceridwen Roberts[53] comprehensively summarise the main international research findings on how shared care impacts on children's adjustment and well-being. These reviews include recent Australian studies that have also shed greater light on shared care as a skilful undertaking involving many practical and relationship challenges, particularly when the children are infants/pre-schoolers or inter-parental conflict is a feature of the child's landscape.[54] This evidence base provides important guidance to both separated parents and the courts on how to translate shared care into a developmentally supportive experience for the children concerned.

It is in *Re K* that the issues of shared care and relocation collide. Whether *Payne* is applicable to cases where the care of the child(ren) has been shared between both parents is substantively discussed in the case. However, Dr George makes the insightful observation that this matter was previously decided by the Court of Appeal in the unreported 1999 decision of *Re C and M (Children)*.[55]

The Role of Research Evidence

In an earlier article we reviewed the (mixed) findings from key studies pertaining to the impact of relocation in both intact and separated families.[56] It is clear that social science and socio-legal research has struggled with sampling and methodological issues in this field and with untangling the complexity of prior and current interacting factors influencing a child (and parent's) adjustment to a move, or to a proposed move being disallowed. While the

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[48] J McIntosh and R Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separations' (2008) *Australian Family Lawyer* 20(1) 1.

[49] J Cashmore and P Parkinson, 'Parenting Arrangements for Young Children: Messages from Research' (2011) 25 AJFL 1-22.

[50] J McIntosh, B Smyth, M Kelaher, Y Wells and C Long, 'Post-separation Parenting Arrangements: Studies of Two Risk Groups' *Family Matters* (2011) 86, 40-48.

[51] S Gilmore, fn 46 above. See also S Gilmore, 'Contact / Shared Residence and Child Well-being: Research Evidence and Its Implications for Legal Decision-Making' (2006) 20(3) International Journal of Law, Policy and the Family 344–365; S Gilmore, 'Shared Parenting: The Law and the Evidence (Part I)' (2009) 19(4) Seen and Heard 19-30 for an overview of the main principles that have emerged from English caselaw on shared residence orders.

[52] L Trinder, 'Shared Residence: A Review of Recent Research Evidence', *Child and Family Law Quarterly* (2010) 22(40, 475-498.

[53] B Fehlberg, B Smyth, M Maclean and C Roberts, 'Caring for children after parental separation: would legislation for shared parenting time help children?' (2011) Family Policy Briefing Paper No. 7, Department of Social Policy and Intervention, University of Oxford; B Fehlberg, B Smyth, M Maclean and C Roberts, 'Legislating for Shared Time Parenting After Separation: A Research Review' (2011) *International Journal of Law, Policy and the Family*, 25(3), 318-337.

[54] McIntosh et al., fn 49 above.

[55] Reviewing Relocation, fn 4 above, at fn 92 and accompanying text.

[56] N Taylor and M Freeman, "International Research Evidence on Relocation: Past, Present and Future", *Family Law Quarterly* (2010) 44(3), 317-339.

courts routinely canvass a range of factors, prescribed by statute or inferred from research and caselaw trends, uncertainty remains about which factor(s) have the greatest explanatory power in helping to resolve relocation disputes and advance the child's welfare and best interests.

> Social science can report the experiences of children and parents after separation, and measure how children cope. The difficulty lies in deciding which variables should be given weight in determining outcomes for each particular child. The variables range from the child's own particular internal resources, to the physical and economic surroundings they live in, through to their relationships with parents, peers and others in their life. Determining which one, or combination of these variables, leads to which outcomes is not a precise task. We simply cannot know how life would have been different if a child had, or had not, relocated with a parent.[57]

Research findings are unlikely ever to be definitive in this field, and therefore of assistance to the courts in quite the way some envisage. Methodological and ethical issues in recruiting (representative) litigating or litigated samples where relocation disputes feature, as well as the expense of tracking individuals over time, are significant hurdles in directly measuring the impact of family mobility on child (and parent) well-being – or the effect, when an application to relocate is disallowed, of having to continue living in a place where a parent, and possibly the child(ren), no longer wants to be.

However, in our view research can be both worthwhile and useful. Our own qualitative studies in England[58] and New Zealand[59] on family members' perspectives on relocation disputes, together with two similar Australian studies,[60] enabled the ascertainment of parents' (and some New Zealand children's) perceptions of the relocation issue, the dispute-resolution process, and its ongoing impact on their lives. This does have value in helping to shed light on the risk and protective factors that families, lawyers and the courts can take into account in future cases. Undoubtedly, more robust research is desperately needed but is unlikely to emerge very quickly given the impediments noted above. Meanwhile attention is turning to other avenues with the potential to provide more immediately useful guidance for parents, lawyers and the judiciary.

Existing Longitudinal Studies: Data collected within existing longitudinal studies can be used to investigate the impact of (changes in) family structure and childhood mobility on individual well-being over time.[61] While this avoids the problems and expense of recruiting new samples, since the data is already available, it does set relocation within the more general context of intact, separated and blended families rather than the court setting where the disputes we are primarily interested in are adjudicated. Nevertheless focusing on the significant difference between correlation versus causality in the existing research literature linking risk and resilience factors with relocation experiences is an important one. It may be possible to get closer to discerning the stand-out factors that courts can then more confidently apply in individual cases by examining impact and adjustment issues within an existing cohort sample where demographic, well-being and other psychological measures have been regularly administered with the same individuals (and their offspring) over several decades.

Finetuning Relocation Disciplines/Guidelines: Recently, legal scholars in New Zealand and Canada have suggested frameworks to guide decision-making in relocation cases before the courts. Professor Henaghan published his proposed discipline in his article in the *Child and Family Law Quarterly* in 2011.[62] It allocates the power between the parents in relation to their children on the basis of actual responsibility carried out for the child. Two pathways – 'primary caregiver' and 'shared care' lead on

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[57] M Henaghan, fn 25 above, at p 235.

[58] M Freeman, 'Relocation: The reunite Research. Research Report' (2009) London: Research Unit of the Reunite International Child Abduction Centre.

[59] N Taylor, M Gollop and M Henaghan, 'Relocation Following Parental Separation: The Welfare and Best Interests of Children – Research Report' (2010) Dunedin: University of Otago Centre for Research on Children and Families and Faculty of Law.

[60] J Behrens, B Smyth and R Kaspiew, 'Australian Family Law Court Decisions on Relocation: Dynamics in Parents' Relationships Across Time' AJFL (2009) 23(3), 222-246; P Parkinson, J Cashmore and J Single, 'The Need for Reality Testing in Relocation Cases' (2010) FLQ 44, 1.

[61] This approach is not entirely novel – see G Verropoulou, H Joshi and R Wiggins, 'Migration, Family Structure, and Children's Wellbeing: A Multilevel Analysis of the Second Generation of the 1958 Birth Cohort Study' (2002) *Children and Society*, 16, 219-231, where the researchers drew on a sample of 1,472 children whose mothers had been infants in the 1958 UK Cohort National Child Development Study. Relocation in response to family change, including parental separation and step-family formation, was not found to have a negative impact on children's wellbeing.

[62] See fn 25.

from the initial assessment of whether the parent who wishes to relocate is taking responsibility for the child's daily needs more than 50% of the time. Responses to key factors along each pathway determine whether the case exits at certain decision points as unlikely to succeed or flows through to a successful conclusion where weight should be given to the relocation application. Professor Henaghan concludes:

> Much of family law takes place in the shadow of the law. Putting the values up front via a visible framework, enables lawyers to advise their clients what is likely to happen, rather than guessing what will happen depending on who the judge is and how they may weigh the list of non-prioritised factors.[63]

Professor Nick Bala and Andrea Wheeler, in a forthcoming article planned for submission to the *Canadian Family Law Quarterly*, promote the adoption of Relocation Advisory Guidelines (RAGs). Using their analysis of over 700 Canadian relocation decisions from 2001-2011 they have identified rebuttable presumptions in favour of, and against, relocation. The benefit of this approach is that different presumptions or guidelines apply in different situations, rather than having a universal presumption apply to all relocation cases regardless of their individual nuances. Such presumptions would not be determinative, but rather offer guidance and greater certainty in the relocation field.

CONCLUSION

Shared care and relocation are two ends of a complex spectrum of children's post-separation living arrangements. It is through this lens that we draw together the judicial and research elements woven throughout this article. *Re K* has raised the issue of how shared care intersects with relocation and the validity of the *Payne* discipline in this context. It seems to us that the international legal community is searching for clearer ways to resolve relocation disputes in an era of both increasing mobility and more diverse (and perhaps more complex) post-separation parenting arrangements as both mothers and fathers are encouraged to co-parent across separate households. In New Zealand, for example, a non-prioritised and non-exhaustive list of factors is weighed and balanced by judges to determine whether or not a parent's application to relocate might be in the child's welfare and best interests. In England and Wales the more prescriptive approach of *Poel* and *Payne* has been applied for the past 40 years.[64] Jurisdictions are seemingly searching for sufficient guidance within their legal approach to provide some direction, but not so much that the ability to respond to the fact sensitivity of individual cases is compromised. *Re K* illustrates this very point in seeking to tackle relocation in the context of the trend towards shared care via a more nuanced application of, or departure from, precedent (depending on whether it is the judgment of Thorpe LJ or Black LJ to which one refers). Expense and delay emerged as serious concerns for the litigating parents interviewed in the four qualitative studies referred to earlier,[65] so it behooves the legal system to provide clear signals about how relocation disputes might be resolved in the hope that parents can make decisions in the shadow of the law and avoid litigation. Research has a significant place in assisting this process, but the complexity of post-separation family dynamics means that it is to more than one body of literature to which we must look. The research evidence on shared care is already clear that this should not necessarily become a trump card[66] when it comes to relocation. Moore-Bick LJ emphasised in *Re K* that:

> … the circumstances in which these difficult decisions have to be made vary infinitely and the judge in each case must be free to weigh up the individual factors and make whatever decision he or she considers to be in the best interests of the child.[67]

This illustrates how multiple strands of empirical research combine to provide such valuable insights for the family law tarmac.

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[63] Henaghan [2011], fn 25, at p 249.

[64] The differing ethos towards relocation in these two jurisdictions is nicely illustrated in the 44 participants' responses to the relocation case vignettes used by Dr R George in his doctoral research – see chapter 4 (Practitioners' applications of English and New Zealand relocation law to hypothetical cases) in R George, 'Reassessing Relocation: A Comparative Analysis of Legal Approaches to Disputes Over Family Migration After Parental Separation in England and New Zealand' (2010) DPhil Thesis, University of Oxford.

[65] See fns 58, 59 and 60.

[66] On this point see Black LJ in *Re K*, para 145, where she discusses a shared residence order in the armoury of a parent for deployment in the event of a relocation application.

[67] *Re K,* para 86.

Relocation after parental separation in the Netherlands

The duty 'to parent by doing' versus a parent's right to relocate

Wendy M. Schrama*

1. Introduction

In the Netherlands, relocation is an issue which has only quite recently received some attention,[1] whereas in other countries, mostly the common law jurisdictions,[2] it has been the subject of extensive and interesting research. It is difficult to determine why the Dutch civil law system and consequently the legal research field are lagging behind in this respect. Is it because relocation has only recently become a problem? In the case law an increasing number of relocation disputes are visible. Two socio-legal developments may play a role in relation to the recent increase in relocation disputes. On the one hand, the position of children in the law has changed over the last couple of decades in the national and international context. As a result, much more attention has recently been devoted in the Netherlands to the legal rights of children after their parents' relationship has broken down. The legislature promotes equal parenting after a relationship breakdown in the interest of children (see section 3 *infra*). On the other hand, the changing patterns of the division of financial and non-financial care between men and women and the respective legal and social positions of both parents in relation to the child will probably also have an impact in this respect. Fathers have, more than before, non-financial authority over their children, although women are still the primary carers in the overwhelming majority of cases.[3] Even though the respective roles of mothers and fathers are still quite dissimilar, the differences have become smaller. In addition, there are quite a number of active fathers' interests groups.[4] These developments might partly explain why relocation disputes arise more often than they used to do.

However, it is difficult to quantify the relocation issue in the Netherlands. No empirical research has been carried out, so it is impossible to find out what percentage of children are faced with relocation after a divorce. The yearly number of children involved in a relationship breakdown is estimated at 50,000 to 60,000. Empirical research is also lacking with respect to the effects of relocation and the experiences of children and parents, although this information is necessary in order to put relocation into perspective.

What is certain is that this subject is expected to become more important in the near future. This is due not only to a growing number of international marriages and other international relationships, but also to an increasing level of globalisation.[5] In this contribution, the Dutch

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[1] W. Schrama & M. Vonk, On the move: staat voortgezet gelijkwaardig ouderschap aan verhuizing in de weg? *Tijdschrift voor Familie- en Jeugdrecht* 2009, p. 223-228; E. van Blokland, Gebonden tegen wil en dank: Verhuismoeders en omgangsvaders, in: K. Boele-Woelki e.a., *Actuele ontwikkelingen in het familierecht,* Derde UCERF-bundel, Ars Aequi Libri 2009, p. 27-42; M. Groenleer, Handleiding bij verhuizing met kinderen na scheiding, EB 2008, p. 79-83. See also C. Jeppesen-De Boer, *Joint parental authority: A comparative legal study on the continuation of parental authority after divorce and the breakup of a relationship in Dutch and Danish law and the CEFL principles, Antwerp: Intersentia 2008* and *Parental Relocation*, in: K. Boele-Woelki, *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Leuven 2009, Intersentia EFL series no. 23, p. 107-120.

[2] See the other contributions to this special issue. See also T. Glennon, Divided Parents, Shared Children, in K. Boele-Woelki, *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Leuven 2009, Intersentia EFL reeks nr. 23, p. 83-106.

[3] See Sociaal en Cultureel Planbureau, *Emancipatiemonitor* 2008, p. 115 ff., http://www.scp.nl. See also: A.C. Liefbroer & P.A. Dykstra, *Levenslopen in veranderingen, Een studie naar ontwikkelingen in de levenslopen van Nederlanders geboren tussen 1900 en 1970,* Sdu Uitgevers, The Hague 2000, p. 154-162; C. Clement, C. van Egten & S. de Hoog, *Nieuwe gezinnen, Scheidingen en de vorming van stiefgezinnen*, E-quality Den Haag, 2008, p. 40; E. Spruijt, *Scheidingskinderen, Een overzicht van recent sociaal-wetenschappelijk onderzoek naar de gevolgen van ouderlijke scheiding voor kinderen en jongeren*, 2007 p. 17-18 Amsterdam SWP.

[4] Different father rights' groups are active, see the internet, for instance Vaderschap.org, Sos-papa; Fathers 4 justice, Dwaze vaders.

[5] Central Statistics Netherlands, http://www.cbs.nl/statline. For instance there are 1.1 million persons with a double nationality. See also the emigration and immigration data in the Statline database.

approach to relocation issues will be described and analysed, which will give rise to fundamental questions which are relevant to any legal system dealing with relocation after a relationship breakdown.

2. The legal framework

In order to understand the Dutch relocation approach, first some general legal remarks will be made. Relocation legally qualifies as a parental authority issue according to the Dutch Civil Code (hereafter DCC). Married parents share parental authority as a matter of law.[6] Parents in informal relationships will have to ensure that the father recognises the child, because otherwise he will not be a legal father. In principle only legal parents can acquire parental authority. Subsequently, the mother and the father may apply for shared parental authority,[7] which will be registered without a test. In all cases, whether parents are married or not, a relationship breakdown does not alter this situation; both parents will continue to share parental authority.[8] The main residence of the child has to be determined by the parents, and a contact agreement should be made in a parenting plan.[9]

Although it is possible to request sole authority, this will generally only be granted by the courts in exceptional cases when there is an extremely high level of conflict between the parents or if joint authority is clearly against the interests of the child, for instance in violence and abuse situations.[10] Ninety-three percent of divorced parents have joint parental authority.[11] The remaining 7 % in which only one parent exercises parental authority includes children with only one legal parent (where there is mostly no legal father).

A distinction has to be made between shared and sole authority in relation to the relocation issue. When parents jointly exercise parental authority, the resident parent has to obtain the consent of the non-resident parent for relocation, regardless of whether this is national or international. When the non-resident parent does not consent, the resident parent may ask the court for a replacing consent order. The legal provision in relation to this situation is the general dispute settlement provision in Art. 1:253a CC.[12]

When the relocating parent exercises sole parental authority, no consent from the non-resident parent is necessary. The Art. 1:253a CC-procedure is not applicable, since no replacing consent is necessary. Even though consent is not necessary according to the legal system, one may wonder whether this implies that the parent with sole authority has an absolute power to relocate without any limitations, even when this would virtually deny the child its right of contact with the other parent. This question has not yet been presented before the courts. The legal literature remains silent on this subject. This remaining part of this contribution will only deal with the situation of shared parental authority.

For those parents who share parental authority, two models are relevant: the consensus model, in which relocation is not perceived as a legal problem, even when access and the role of the other parent in the child's life are marginalised. The second one is the conflict model in which the legal system attributes both parents with a right to request the court to intervene and to decide on a certain conflict. The court will issue an order which it considers desirable in the best interests of the child.[13] The Civil Code does not give any guidelines as to any relevant factors other than the interest of the child. What is deemed to be in the interests of the child is also left to the courts.

3. The duty to parent by doing

Since 1 March 2009 new statutory legal norms are in force. The underlying notion of this reform is to promote the child's interest and the child's right to be cared for by both parents. The aim was to raise the level of involvement of the non-resident parent in the child's upbringing after a divorce and to reduce the level of conflict between parents.[14] Parents with parental authority are under a legal

[6] Art. 1:251 s. 1 DCC.

[7] Art. 1:252 s. 1 DCC.

[8] Art. 1:251 s. 2 DCC and Art. 1:253n DCC.

[9] Art. 815 Dutch Code of Civil Procedure.

[10] Art. 1:251a DCC.

[11] Central Statistics Netherlands, http://www.cbs.nl/statline.

[12] In fact two routes are possible, a parent can base a request on Art. 1:253a s. 1 DCC (conflicts between parents in general) and on section 2, which relates to conflicts concerning care and upbringing (s. 2 sub. a), the main residence of the child (section 2 sub. b) or information rights (section 2 sub. c). However, there is no substantial difference between the two sections. The courts will take a decision which they deem to be in the interest of the child. See also J.E. Doek, *Losbladige Kluwer Personen- en familierecht*, art. 1:253a BW, note 3, 2010.

[13] Art. 1:253a s. 1 DCC. See J.E. Doek, *Losbladige Kluwer Personen- en familierecht*, art. 1:253a BW, note 3, 2010.

[14] Wet van 27 November 2008, Stb. 2008, 500, tot wijziging van Boek 1 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap (Wet bevordering voortgezet ouderschap en zorgvuldige scheiding). See also Handelingen Eerste Kamer 18 November 2009, 8-388-423.

duty to submit a parenting plan with the petition for divorce concerning an agreement on the costs, the care and upbringing of the child and the information about the child.[15] Without such a plan, a divorce request will be delayed or will be declared inadmissible.[16] Secondly, Art. 1:247 s. 4 DCC contains a new norm on parentage: after a relationship breakdown the *child* retains the right to equal care and upbringing by both parents ('equal parenting'). The question arises of what impact these strict norms have in relation to relocation. If the norm 'equal parenting' means a factual 50-50 division of care, this would substantially affect the right to relocate.[17] Although there are indications in the Parliamentary History that the legislature did not intend the norm to imply an actual equal division,[18] it was not clear what it actually means. In section 6 infra two recent decisions by the Dutch Supreme Court will be considered, which have shed some light on this issue.

Thirdly, a new explicit duty for the resident parent has been introduced in Art. 1:247 s. 3 DCC to promote the relationship of the child with the non-resident parent. Finally, the non-resident parent without parental authority is under a legal duty to have access to the child (Art. 1:377a s. 1 DCC). The legislature clearly tries to keep both parents involved after a breakup of their relationship.

4. Case law: General Aspects

Before going into more detail, some general aspects of the recent case law are worth noting. For this research the Dutch case law from the period May 2009 – August 2010 has been analysed. Previous case law analyses have been carried out by Schrama & Vonk, Jeppesen De Boer, Van Blokland and Groenleer.[19]

From May 2009 to August 2010 twenty-seven cases have been published in the database of the Dutch judiciary (www.rechtspraak.nl). In the year before this less than 10 cases were reported in the database. This could partially have been caused by the fact that only a selection of cases is published in the database. More attention in the legal doctrine will probably influence the decision to publish a court case in the database. However, it is unlikely that this increase can only be explained by this effect; probably more parents go to court. In any case, since only a selection of cases is published, it is impossible to indicate the total number of cases brought before the courts each year.

Although it is of interest to have success rates relating to the replacing of consent orders, caution is required. Cases are different, not only as to their facts, but also in procedural respects, for instance who goes to court first and what is requested, as these are factors which may affect the outcome (see section 7.2 *infra*). In addition, the courts have a wide discretion to appreciate each case on its individual merits. In the period May 2009-August 2010 3 out of 10 national relocations were permitted by the courts. The permitted relocations concerned distances ranging from 5 to 150 kilometres. seven out of 15 international relocations were permitted by the courts, including relocation to Malaysia, Norway, Columbia, Germany and Belgium, but not to, for instance, Spain, Denmark, Singapore and the USA. On the basis of the case law analyses, in the next section the principles, interests and the factors which were deemed relevant by the courts will be dealt with.

5. The Court's Approach

5.1. The principles involved

Many legal principles are relevant in this area of the law. The courts do not reason based on these principles, they rather depart from the facts (a bottom-up approach). However, it is useful to take a top-down approach and to identify two principles which are specifically of interest to the relocation issue. In the first place, the principle of proportionality is relevant. Is the aim of the relocation in proportion to the negative influence of this relocation on the other interests? Secondly, the subsidiarity principle is relevant. This concerns whether there are other ways to do justice to the relocating parent's interest and the other interests involved. Are there alternatives which reduce the negative impact of relocation on the role and relationship with the other parent, for instance by means of a timely and sufficient preparation for the relocation? Even though

[15] Art. 815 Dutch Code of Civil Procedure and Art. 1:247a DCC.

[16] C.E. Ackermans-Wijn and G.W. Brands-Bottema, '*De invoering van het ouderschapsplan: goed bedoeld, maar slecht geregeld*', Trema 2009/2; B.E.S. Chin-A-Fat, Nieuw (echt)scheidingsrecht: de kloof tussen wet en praktijk, FJR 2009, 81; L.M. Coenraad, *Ouderschapsplan en ontvankelijkheid*, FJR 2010, p. 19; L.M. Coenraad & Antokolskaia, M.V. (Eds.) (2010). *Het nieuwe scheidingsrecht. Ouderschapsplan, positie van het kind, regierechter en collaborative divorce*. The Hague: Boom Juridische uitgevers; L.M. Coenraad, Ouderschapsplan en ontvankelijkheid, Een voorstel voor betere toegang tot en voortgang van de scheidingsprocedure, FJR, 2010, p. 41-46.

[17] W. Schrama & M. Vonk, On the move: staat voortgezet gelijkwaardig ouderschap aan verhuizing in de weg? *Tijdschrift voor Familie- en Jeugdrecht* 2009, p. 223-228.

[18] *Kamerstukken II* 2006/2007 30 145 nr. 26; *Handelingen II* 26 mei 2005, p. 5081; *Kamerstukken I* 30 145 C, p. 5. *Kamerstukken I* 2005-2006 30 145 C, p. 2; *Kamerstukken I*, 2005-2006, nr. E, p. 10; *Handelingen I,* 13 juni 2006, p. 31-1419; *Handelingen II* 26 mei 2005, p. 85-5080.

[19] See supra footnote 1.

the courts do not depart from these principles, what they in fact do in solving these disputes is to fit the facts to the interests and to weigh them. In doing so, one would expect that the courts' decisions will generally be in accordance with those two principles.

5.2. The interests recognized in the case law

Even though the courts have a large discretionary power to weigh the interests involved in relocation disputes, it is possible on the basis of the case law analysis to identify a number of interests of the child and the parents in these conflicts which are recognised by the courts. However, whether a court will or will not take into account a specific interest in an individual case is difficult to predict beforehand.

In relation to the position of the child, the following interests have been recognised by the courts:

- The interest in having a relationship with the other parent and to have sufficient contact;
- The interest in continuing to live in his/her familiar surroundings (stability) and the interest in not moving.
- The interest of a contact arrangement after relocation which does not pose too great a burden on the child in terms of travelling time and not being socially split up in two social environments. This can be the case, for instance, when there is a 'duty' to remain for the entire school holiday in the child's original place of residence.
- The interest in not having to suffer from ongoing conflicts and litigation between the parents.

The interests of the relocating parent are identified as follows:

- Starting a new life.
- Having a family life with a new partner and a new child.
- Having a new job and being financially independent.
- Being with one's (extended) family.
- Living in one's own home county/culture.

Finally, in relation to the non-resident parent with parental authority the courts take the following interests into account:

- Having frequent contact with the child and playing a role in the child's life.
- Being taken seriously in one's role as a parent.

A difficult question is how these interests have to be balanced against each other. Is the child's interest per se more important than the other interests? The statutory provision hardly provides any guidelines. In the case law no presumptions or classification system have been developed either. At most, the courts sometimes use a standardised formula in which they state that the resident parent has, in principle, a right to relocate, but that this may be different in the case of emigration, since this might have a serious impact on the child's right to contact.[20] However, whether the courts do or do not use this formula does not appear to make any difference as to the results. Therefore, the courts do not have clear guidelines on how to deal with the conflicting interests and no general points of departure have been formulated.

There is, however, one exception: a landmark decision by the Supreme Court[21] in which the court determined that the child's interests do not, as a matter of law, always prevail over or overrule the parents' interests. This decision dates from before the introduction of the new equal parenting norm, which means that this decision does not yet cover the new norm. Two children aged 8 and 11 years had an extensive contact arrangement with their father. The mother applied to the court for its consent for her and her children to relocate to Switzerland, thereby replacing the contact arrangement, since her new partner and their child (still to be born) lived there. The District Court and the Court of Appeal refused to issue a consent order. According to the courts the interest of the children prevailed. The fact that the mother wished to relocate in order to form a new family (husband, children and the child still to be born) was not explicitly given any weight. The Supreme Court ruled that even though the statutory provision of Art. 1:253a Civil Code determines that the interest of the child is a relevant criterion, this does not necessarily imply that it always prevails over other interests. All facts and circumstances of each case have to be taken into account, which may result in a decision in which other interests are dominant over the interest of the child. In the end, it was held that the mother should be granted the consent order. This decision provides at least some guidance to the courts in this respect.

5.3.The relevant factors

Which factors do the courts take into account in determining what is in the interests of the parties? There

[20] For instance, District Court of Almelo 26th May 2010, LJN BM5964.

[21] Supreme Court 25th April 2008, NJ 2008, 414.

is a large variety of relevant factors in the case law.[22] It is striking to see that factors which are deemed relevant in one case are not so in another. Therefore, it is difficult to predict the outcomes of this type of disputes. There is no generally accepted list of factors.

5.3.1. Child-related Factors

A number of factors in relation to children are mentioned in the case law. However, it is impossible to detect any clear rules as to the significance of any of these aspects, since these factors will be weighed in combination with all the other relevant facts. The age of the children is a relevant factor, but often there is no explicit reference thereto. Different cases show different aspects relating to the child's age. A greater age could be determined to favour relocation since the child may travel on his/her own by public transport. On the other hand, it has also been decided that given the young age of the child more weight should be given to continuing an existing care arrangement.[23] Therefore, there is no generally accepted notion concerning the significance of the age of the children.

Another aspect to which the courts refer in reaching their conclusion is whether the children are able to deal with a relocation. What that implies is not made explicit. In principle the Child Protection Board only gives advice on what it deems to be in the best interest of the child in relocation conflicts when the court asks the Board for advice. In a substantial number of the cases, the Child Protection Board does not present a report. In these cases the court cannot base its decision on an expert psychological opinion concerning what a certain child can cope with. It is the court's own perception of the child, whether that is based on reality (the judge or the Child Care Protection Board meets the child) or on the 'paper child' (the court bases its opinion on statements of the parents and in the documents), which is decisive. This is problematic, since judges are not experts in this area.

The courts sometimes refer to the special needs or abilities of a child, for instance serious psychological problems which influence the balancing of the interest in favour of not relocating.[24]

The Court of Appeal of Leeuwarden: *'Every movement has advantages and disadvantages for children. Whatever the court will decide and whether or not the children do or do not agree now, the court is convinced that they will find their way, considering their age and the impression the court has of them.* '

The District Court of Alkmaar: '*Moreover, relocation is not in the interest of the children in a socio-emotional and cognitive respect. Although the court thinks that it is not unlikely that emigration to the Czech Republic will positively stimulate the children's development, the court finds that the disadvantages outweigh the advantages.*'[25]

These quotes demonstrate that the balancing test is largely dependent on the basic view of a court as how to appreciate a relocation in itself.

Finally, the child's expressed opinion on relocation may have some effect, in combination with other factors. A child aged twelve or older will be heard by the court in accordance with the general provision of Art. 809 Code of Civil Procedure. However, this does not mean that the child actually appears before the court, since the child may also provide his/her view in writing. The older and more mature a child, the greater the possibility that the child's expressed opinion will be taken into account. However, sometimes a child's wish to relocate is not found to be relevant by the court, while in other cases the opposite is true, even in situations where the children involved are of the same age.[26]

5.3.2. Contact, Authority and Care during and after the relationship

An important aspect is the division of care and real (as opposed to legal) authority during the relationship. When the relocating parent had most of the responsibility and care, consent for relocation is sometimes more easily granted.[27] However, if that would be the prevailing norm

[22] Undoubtedly, many more factors are relevant for the courts in reaching their conclusion, but are not referred to, for example the judge's impression of both parents. These factors cannot be taken into account in this study, since this is a pure case law analysis.

[23] District Court of Utrecht, 20th May 2009, LJN: BI6800; District Court of Almelo 26th May 2010, LJN BM 5964.

[24] District Court of Alkmaar 6th May 2009, LJN BJ2417, the child had a fear of failure; District Court of Roermond 9th September 2009, LJN BJ8813 (autism), District Court of Maastricht 10th August 2009, LJN BJ5278 (an intelligent child would easily adapt to a new social environment).

[25] District Court Alkmaar 6th May 2009, LJN BJ2417.

[26] District Court Alkmaar 6th May 2009, LJN BJ2417: given the young age and the loyalty of the child to its parents, the court disregarded the expressed opinion of the child aged 12 years not to relocate: Court of Appeal of The Hague 5th August 2010, LJN BN3554 (the court took into account the opinion of the children that they wished to relocate and did not want to live with their father); Court of Appeal of Arnhem 22nd December 2009, LJN BK8015 (opinion of the children taken into account).

[27] Supreme Court 18th June 2010, NJ 2010, 35; District Court of Roermond 9th September 2009, LJN BJ8813.

a relocation order would be granted in most instances, since in 75 % of cases the mother is the primary carer of the children after a divorce.[28] So that is just one factor, the courts also deem the division of care and responsibilities after the breakup relevant.

When there is a shared residence arrangement (the child lives half the time with his/her mother, the other half with his/her father), this is a strong indication that a court will reject a request for relocation, even when the factual division of care does not correspond to the shared care arrangement.[29] In this situation the principle of proportionality results in the fact that the interests of the non-resident parent and the child weigh more heavily than the interest of the resident parent. More in general, there appears to be a link between the participation of the non-resident parent in the care and upbringing of the child and the possibility of obtaining a replaced consent. However, again there are exceptions.[30] When, after a relationship breakdown, there is a working contact arrangement, even though not at the level of shared care, the impact of relocation is more substantial for the child and the non-resident parent. When the non-resident parent has hardly been involved after a divorce, consent to relocation is more likely to be granted.[31]

It is also to be noted in this regard that when communication between the parents is problematic, consent is not easily granted, since there is a risk that the contact between the non-resident parent and the child will be virtually extinguished.[32]

On the other hand, when the relocating parent is aware of the relevance of contact and has an ability to cooperate in order to make a new contact arrangement work, this will generally work in favour of relocation. A concrete proposal for a new contact arrangement after relocation might have a positive influence. However, some courts do check the feasibility of the proposed arrangement in terms of the interest of the child, for instance when this involves a long travelling time, the child's social acclimatisation in his/her new environment, the financial capacity of the relocating parent to pay for extra costs in relation to the contact arrangement and the practical feasibility of the plan, for instance the non-resident parent should have sufficient time off from work.[33]

It is not clear what the effect of the geographical distance of the relocation may have. A long-distance relocation generally has a greater impact on the interests of the child and the non-resident parent. On the other hand, when the interests of the child and the non-resident parent are not negatively affected by a relocation, because of the close distance, the principle of proportionality requires that consent for relocation will in principle be granted.

5.3.3. Preparation for relocation

With an eye on the subsidiarity principle, the courts find the preparation for relocation to be important. At which stage is the preparation, is it a vague idea or is there an elaborate plan? The child has an interest in not having his/her life turned upside down by a vague plan which does not work in reality (although the courts do not put it in these terms). Has sufficient attention been given to the interests of children with regard to a timely preparation? Is there financial security after the relocation, does the resident partner already have a job in the new place of residence? Is there a new home which suits the family, has a new school been chosen? The less elaborate the plans are, the greater the possibility that the relocation request will be denied.[34]

There is, however, tension between the interests involved. On the one hand, a conscientious preparation is helpful in demonstrating that the resident parent takes the position of the child and the other parent seriously. The potential negative impact of a relocation on a child's life may be reduced when there is a feasible plan. On the other hand, the outcome of a relocation dispute also depends on which parent takes which steps at which stage. Imagine that the mother communicates her intention to move to the father, and he requests the court for a prohibition order when her preparation has only just started. She will not have a sufficient opportunity to demonstrate her plans.

[28] See supra footnote 3.

[29] Court of Appeal of The Hague 8th July 2009, LJN BJ3798; District Court of Haarlem, 16th July 2009, LJN BJ3312; District Court of The Hague 28th October 2009, LJN BK5352; District Court of The Hague 28th July 2010, LJN BN2833. See also C. Jeppesen De Boer, Parental Relocation, in: K. Boele-Woelki, Debates in Family Law around the Globe at the Dawn of the 21st Century, ULR Volume 4, Issue 2, June 2008, p. 77, http://www.utrechtlawreview.org.

[30] District Court of The Hague 5th August 2010, LJN NN3554.

[31] Court of Appeal of Leeuwarden 6th December 2009, LJN BK8321.

[32] District Court of Almelo 26th May 2010, LJN BM5964.

[33] Court of Appeal of Amsterdam 27th October 2009, LJN BK2820.

[34] Court of Appeal of Amsterdam 27th October 2009, LJN BK2820; Court of Appeal of Amsterdam 3rd November 2009, LJN BK7534.

But it is also risky not to inform and involve the father, since the court might think that this is making the father's parental authority illusory.[35] Sufficient preparation for the relocation increases the possibility that a relocation order will be granted. However, a long and detailed preparation at the same time might well affect the child's well-being, because for a longer period of time it will not be clear whether the family will move or not. This might increase the stress experienced by the child, the resident parent and the non-resident parent.

5.3.4. Parent-related factor

It is interesting to see that parent-related factors are only relevant with respect to the relocating parent, at least as far as the case law in this analysis is concerned. Perhaps this can be explained by the fact that the relocating parent generally has to prove his/her interest in moving. Relevant is whether the relocating parent originally came from the country to which he/she wishes to relocate. Only in some cases is there an explicit reference to the fact that relocation to the original home country is requested.[36] The next question relates to the parent's possibilities in building a life in the Netherlands (the subsidiarity principle). The court may take into account the possibility of mastering the Dutch language, Dutch educational qualifications, job opportunities in the Netherlands, etc. The case law demonstrates that successful integration by the mother reduces her chances of relocating. Those parents who try to be good parents by integrating into a foreign society in which the family lives will limit their personal freedom to return to their home countries after a divorce. Is that because good parents do not relocate? However, there are also exceptions in which the fact that the resident parent is unhappy and not very well integrated into Dutch society reinforces the resident parent's interest in relocating.[37] In more or less similar circumstances other courts could easily reach exactly the opposite conclusion.[38] The courts do not identify an interest of the child to be at home in two different cultures, countries and languages.

There appears to be little difference as to the reason why the parent wishes to relocate; whether this is a new job, the wish to care for the extended family, or to start a new life with a new partner.

5.4. The result

At first sight, it seems somewhat odd that a relocation to Singapore is permitted, but a relocation within 50 kilometres in the Netherlands is not. But is it really contradictory? One should keep in mind that all the relevant factors and the interests will be balanced by the judge and that the cases cover a wide range of factual situations. In addition, the parties themselves determine the relevant arguments in their dispute, while the judge has a rather passive role in this process. He has to assess the facts on the basis of the parties' input, and the court is not allowed to go outside the boundaries of the conflict which the parties have submitted to the court.

The general dispute settlement provision contained in Art.1:253a DCC leaves the court with a large discretionary power, since it only states that the court takes a decision which it considers to be in the best interests of the child. What is in the interest of the child is, however, completely blank. Is it in the interest of the child to stay with his/her primary carer, is it in the child's interest to have continuity and stability, is it an interest to be at home in different cultures or to develop adaptability skills? The Dutch legal system has no list of relevant factors or concrete interests which could be taken into account. It is striking to see that in the case law no system of presumptions in any direction (in favour or against relocation) has been developed. It is difficult to detect any guiding criteria as to what relevant factors will be identified in a particular case, how much weight they will be given, and what a court will decide at the end of the day. Remarkable is also that in a substantial number of cases, also in international relocations, no advice from a psychological expert or the Child Protection Board is present.[39] The pertinent point is that it is very

[35] District Court of Leeuwarden 28th August 2009, LJN BJ6339. See also: Court of Appeal of Arnhem 3rd November 2009, LJN BK7534.

[36] District Court Utrecht, 20th May 2009, LJN BI6800 where the fact that the mother originally came from Spain did not weigh heavily and where her interest was not even determined.

[37] Court of Appeal of Amsterdam 23rd February 2010, LJN BL9055, relocation to Colombia. The court seemed to allow the mother's interests and arguments to prevail over other interests like the father's right to contact. The case went to the Supreme Court 8 July 2011, LJN BQ7328; the complaints of the father are not even decided upon with respect to the content by the Supreme Court, which is possible in cases in which a complaint cannot result in cassation (Art. 81 Code on Judicial Organisation); the Court will only give a very short decision in which it states that it concerns a Art. 81 decision which cannot result in cassation.

[38] Court of Appeal of Amsterdam 6th April 2010, LJN BM2714, relocation to Finland.

[39] The Child Protection Board advised, for instance, Court of Appeal of Arnhem 22nd December 2009, LJN BK8015; Court of Appeal of Amsterdam 23rd February 2010, LJN BL9055; Court of Appeal of Amsterdam 6th April 2010, LJN BM2714, but not in Court of Appeal of Amsterdam 3rd November 2009, LJN BK2832; Court of Appeal of The Hague 23rd December 2009, LJN BK9864; Court of Appeal of Leeuwarden 27th April 2010, LJN BM3660.

difficult for a court to assess what is in a child's interest. There appears to be a fundamental difference in opinion between the courts about whether or not relocation should in principle be allowed and on how much weight should be attributed to the right of the resident parent to move.[40] When basic views and underlying ideas differ, the test which the courts apply is different. In some decisions, the fact that relocation might affect the contact arrangement and the stability of the child's life is already sufficient to even disregard the interest of the resident parent. In other decisions the point of departure is the right of the resident parent to relocate. This fundamentally different perspective determines the result. In conclusion, there is no generally accepted way of dealing with relocation cases, which results in a high level of legal unpredictability.

Furthermore, it is striking that the courts balance the interests in the situation in which relocation will take place compared with the situation in which the resident parent and the child will not move. This presupposes that the resident parent will not move without the child, because if that would be the case another comparison should be made. If the court would balance the child's interests in the situation that he/she will relocate with the resident parent and the situation that his/her residence will change to that of the non-residential parent, while the resident parent will move without the child, this would imply a completely different standard, in particular in those cases where the resident parent has been and still is the primary carer.

6. To parent by doing

Two important cases have recently been decided by the Dutch Supreme Court which are relevant for the interpretation of the new equal parenting norm (section 3 supra). It boils down to the question of what 'equal parenting' in Art. 1:247 s.4 DCC actually means, is it a 50-50 division of care? If that would be the case, relocation would be very much limited.

In a decision in May 2010 the Supreme Court was faced with a case in which the parties had been living in non-marital cohabitation for over 13 years.[41] Their son was born in 2004 and they shared joint parental authority over him. After the relationship had broken down, the mother moved to place X in the Netherlands. The mother then asked the court to determine the child's place of residence to be hers. The District Court and the Court of Appeal granted the order. The alleged fact that the mother had moved to place X without the father's consent, was, according to the Court of Appeal, even if it would be true, not sufficient to rule that the child's residence should be with his father. The father claimed that the right to equal parenting had been infringed by the mother. The Supreme Court ruled that the new norm of equality between both parents and the desirability of equal care and upbringing does not imply that when the parents do not agree, the court should not give more weight to the child's interest. The interest of the child prevails. The Supreme Court held that the Court of Appeal had not deemed one parent more or less equal than the other, but had balanced the interests of the father, the mother and the child and had held in favour of the child's interest. The child's interest includes the interest in stability, in particular since the boy was four years old and had been living for two years in his new place of residence, which was therefore now his social environment. So the norm does not mean a right for a parent to have an equal share in the care and upbringing of the child.

Remarkably, this case highlights the risk of the equal parenting norm, which is framed as a right of the child, being misused as a right of the parents. What happened here is that the father invoked the equality norm as if it were his right in order to improve his own position. This notion seems to have been adopted by the Supreme Court, since the decision explicitly refers to the equality of the parents, not perceived as a right or interest of the child, but of the parents.

A second Supreme Court case dates from 18th June 2010.[42] What is interesting here is that the father commenced the case before the mother had taken any steps to move. He requested the court to issue an order prohibiting the mother from moving further than ten kilometres from their current residence. The interest of the mother, who had been and still was the primary carer, was that she wished to live closer to her new partner. The District Court issued a prohibition order stating that any move had to be within 50 kilometres. A prohibition limited to ten kilometres was, according to the court, unnecessary for the welfare of the children, since the father and the children could still have contact. The interest of the

[40] Court of Appeal of The Hague 28th June 2010, LJN BN4038.
[41] Supreme Court 21st May 2010, NJ 2010, 398.
[42] Supreme Court 18th June 2010, NJ 2010, 353.

mother in making a start with her new family prevailed over the father's interest. The role of the father as a parent after the divorce would not be limited compared to the situation during their marriage. The father appealed to the Supreme Court with regard to the 50 km limitation instead of the 10 km as requested by him. The Supreme Court rejected the appeal in a very short decision of only five sentences. It was further decided by the Supreme Court that the Court of Appeal had taken into account all the relevant facts presented to the court by the parties and had based its conclusion on these facts. It had correctly applied the law and the equal parenting norm since all the relevant circumstances had been taken into account and it had come to its decision in the interest of the children.

Therefore, the conclusion is that the new legislation in this respect does not appear to affect relocation cases. However, a quick scan of the case-law in the period of August 2010-November 2011 shows that 28 decisions on relocation have been published in the Dutch case law database, of which only in seven cases permission for relocation has been granted, all cases before the Court of Appeal.[43] These results seem to leave less room for relocation than in the previous period, but as individual cases may vary to such a large extent, a detailed analysis should shed more light on these results.

7. Questions

7.1. The influence of procedural strategies on the outcomes

The first question hinges on what is the influence of procedural strategies on the results. Three different procedural strategies have to be discerned.

The first route, which appears to be the prevailing one, is that a resident parent, who is planning to relocate, asks the non-resident parent for consent. When this parent does not consent, the resident parent will request the court for an Art. 1:253a DCC consent order. The court has to consider what is in the best interests of the child and has to balance all the interests at stake. Beforehand it is often unclear what the court will rule.

The second situation occurs when the resident parent does not ask the other parent or the court for permission to relocate, but simply moves. When the non-resident parent does not take any steps, the legal system presumes, according to the consensus model, that the parents are in harmony as to what is in the best interests of the child. No further action is taken, even though relocation might be contrary to the child's interests. When the non-resident parent will take steps at a later stage, there is a substantial risk that the child's interest to stay where he/she is will prevail over the other interests. The age of the child is an important factor, as well as the period during which the child has been living at his/her new place of residence. Non-resident parents should take immediate action when the resident parent relocates without the required permission. On the other hand, it is a risky route for a resident parent to relocate without permission, depending on the actions of the non-resident parent, since the fact that this parent violates the law will not be in his/her favour. The court can ultimately assess the child's main residence with the other parent with only a contact arrangement for the relocating parent.[44]

The third way is that the non-resident parent is the one who starts the legal dispute when he/she is informed about the relocation plan. When a non-resident parent requests a prohibition order on relocating over a certain distance, this will be based on Art. 1:253a CC. The legal norm is exactly the same as when the resident parent requests the court to replace consent (see route 1 supra). The court has to weigh, taking the best interests of the child into consideration, the opposing interests. However, even though the same criteria apply, there might well be a difference as to the result, as some case law seems to indicate.[45] The parties themselves determine the boundaries of the conflict and it might well be advantageous to be the claimant and not the defendant. If that would be the case, this has implications for the strategy of each parent. A resident parent could then be very reluctant to communicate a wish to relocate to the non-resident parent. As long as the non-resident parent does not know about the desire to relocate, this parent cannot take any action. In the meantime, the resident parent may prepare for relocation. Any analysis of future case law should investigate this issue, because it would be

[43] Court of Appeal of Leeuwarden 12th October 2010, LJN BQ8535; Court of Appeal of Leeuwarden 30th November 2010, LJN BP0574; Court of Appeal of Leeuwarden, 1st March 2011, LJN BQ6064; Court of Appeal of The Hague 16th March 2011, LJN BP8947; Court of Appeal of the Hague 11th May 2011, LJN BR3529; Court of Appeal of Amsterdam 31st May 2011, LJN BR4850; Court of Appeal of Leeuwarden 27th October 2011, LJN BU3639.

[44] District Court of Leeuwarden 28th August 2009, LJN BJ6339; District Court of The Hague 18th November 2009, LJN BL0943.

[45] Supreme Court 18th June 2010, LJN BM5825 and Court of Appeal of The Hague 8th July 2009, LJN BJ5650 (father applied for a prohibition order) and Court of Appeal of the Hague 8th July 2009, LJN BJ3798 (father applied for a prohibition order).

detrimental to the interest of the child if parents would be obliged to act so strategically. Although there is always an element of strategy involved, it would be ironical when the outcomes of disputes would result in these kinds of undesirable side-effects.

7.2. A duty to contact for the non-resident parent?

According to the new Dutch statutory provisions the non-resident parent (also without parental authority) is under a more stringent and explicit duty to act as a parent than before. So what happens when a non-resident parent wants to move, which would negatively affect an existing and functioning contact arrangement? This is an intriguing question on which there is, as yet, no case law. Is there a parallel with the situation in which the resident parent wishes to relocate? Here the distinction between the consensus and the conflict model is relevant. As long as the resident parent who is not moving does not instigate legal action, the law is based on the presumption that this (both parents agree with a certain situation) is in the child's best interest. However, this makes the question of what the child's right to contact encompasses somewhat urgent when it only comes into play when the parents are in conflict with each other. It is only in the conflict model that one of the parents will go to the court and that is where the child's position is relevant. When the parents agree to have no or little contact, the State does not interfere. Independent representation and a right to start a legal procedure on behalf of the child could be a solution to this pitfall, but that is not a matter to decide here.

Assuming that the resident parent would go to court in order to enforce the non-resident parent's duty of contact (with or without parental authority), what would the court decide? It is not an easy conflict to resolve, since it is disputable whether it is in the child's best interest to have contact with a parent who has to be forced to do so. The actual enforcement might be problematic as well, although it will probably be possible to find a solution.

8. Conclusions

The analysis of the case law demonstrates a high level of legal unpredictability. This is problematic. Even though it is logical to take decisions on the basis of all the relevant facts, it is not at all clear how these facts will be balanced, and what will be seen as an interest which is recognised. There are no guiding criteria. This results in decisions in basically similar cases with completely opposite outcomes. In an age where relocation conflicts are on the increase, it is absolutely necessary to rethink the basic points of departure. Where do we start in balancing the competing interests? Is it the right to relocate, or the other interests against relocation? What is in the child's interest, to move or not to move? And to be without his/her primary carer or not? In this respect there is a clear need for empirical research in order to provide an input for an evidence-based approach. The courts will still need to continue to weigh the individual interests on a case-by-case basis, but perhaps a consensus will gradually emerge, once the basic points of departure have been defined on the basis of research. At the end of the day, there is a great deal which needs to be improved in the Netherlands. At the same time, there is no real reason for optimism, since complex human issues are difficult to resolve by means of the law.

Forced marriages and the spouse visa age: Part II

Colin Yeo*

In part one of this article the author examined the history of and reasons for the increase in the spouse visa age from 18 to 21 by the previous Government. The stated justification for this measure was that it would deter forced marriages. At the time of writing part one a test case challenge to the rule was still in progress. The application for judicial review had failed at first instance in the High Court, had been partially successful in the Court of Appeal and judgment was awaited from the Supreme Court. The new, incoming Government had defended the measure with the same vigor and stating the same reasons as the old, outgoing, Government.

The case in question was *R (Quila and Ors) v Secretary of State for the Home Department*. It was thought wise to refrain from finishing the article given that the outcome of the case was not yet known.

The judgment of the Supreme Court was handed down on 12 October 2011. The judgment represents an even more complete and unambiguous victory for the claimants than the earlier judgment of the Court of Appeal.

The thesis of the first part of this article was that the increase in the spouse visa age was never genuinely intended as a measure to prevent forced marriages, which is how it was justified politically on introduction and throughout the test case litigation. The author prayed in aid the Home Office's own unpublished research on the issue, the omission of any exception for proven genuine relationships, the inclusion of an exemption for spouses of the armed forces and the failure to enact any of the other promised measures intended to prevent forced marriages. The thesis clearly posed the question of what the real motivation was. It is, however, fruitless to speculate. Instead, it is perhaps more productive to examine the final judgment in *Quila* and consider its implications for future battles over the right to family life in the context of immigration control.

The judgment in *Quila*

The leading judgments are those of Lord Wilson of Culworth and Baroness Hale of Richmond, with whom Lords Phillips and Clarke agree. Lord Brown of Eaton-under-Heywood gave a dissenting judgment.

Lord Wilson observes at paragraph 32 that the impact on the two British claimants was severe in family life terms:

'These were two British citizens who had lived throughout their lives in the UK and who, aged 17 and 18 respectively, had just embarked upon a consensual marriage. The refusal to grant marriage visas either condemned both sets of spouses to live separately for approximately three years or condemned the British citizens in each case to suspend plans for their continued life, education and work in the UK and to live with their spouses for those years in Chile and Pakistan respectively. Unconstrained by authority, one could not describe the subjection of the two sets of spouses to that choice as being other than a colossal interference with the rights of the respondents to respect for their family life, however exiguous the latter might be.

Interestingly in the context of the current political and legal debate on how far the United Kingdom's judiciary should be influenced by European human rights laws, Lord Wilson goes on to reject the authority of what had been considered a highly influential early Strasbourg judgment on family life, that of *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. In that case the European Court of Human Rights held that there was no interference with Article 8 of the Convention in requiring the three claimant women to live abroad with their husbands, there being no 'general obligation on the part of a contracting state to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country'.

Lord Wilson takes account of the judgment, as required

• Barrister, Renaissance Chambers

by s.2 of the Human Rights Act, but declines to follow it on the basis that the different direction and emphasis of later Strasbourg jurisprudence means there is now no 'clear and consistent jurisprudence' to follow. Lady Hale considers the distinction in *Abdulaziz* between respect for and interference with rights to be a 'red herring'.

Taking a more liberal line than laid down in decisions of the Strasbourg court may not be what the present Government has in mind in urging the domestic courts to take a more independent line and make more use of the margin of appreciation and the principle of subsidiarity.[1]

Both Lord Wilson and Lady Hale were content to assume without comment that the increase in the spouse visa age was taken in accordance with the law and for a legitimate aim, considering that the real question was whether the measure was necessary in a democratic society. To this end, Lord Wilson applies his mind to the four questions on proportionality posed by Lord Bingham in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167:

a) is the legislative objective sufficiently important to justify limiting a fundamental right?
b) are the measures which have been designed to meet it rationally connected to it?
c) are they no more than are necessary to accomplish it?
d) do they strike a fair balance between the rights of the individual and the interests of the community?

It is universally accepted that forced marriage is a scourge that certainly justifies a public policy response and that question (a) must be answered in the affirmative. Question (b) is more contentious, as was suggested in part one of this article. To address the question, Lord Wilson goes on to consider the effect of the change in the immigration rules with an attention to detail, cause and effect and rationality that as far as is known was lacking from the Secretary of State's consideration. He poses ten questions on the potential link between forced marriage and immigration abuse:

a) Of the 13 motives for forcing a marriage suggested in para 36 of the guidance published by the Secretary of State in November 2008, set out in para 10 above, how prevalent in the genesis of forced marriages is that of "Assisting claims for UK residence and citizenship"?
b) From the fact that a forced marriage has precipitated an application for a marriage visa does it follow that the motive behind it was immediately to secure the visa and that, were it not immediately available, the marriage would not have occurred?
c) Even if by virtue of the amendment, the ages of the girl and/or of the man were such as to preclude the grant of a marriage visa for up to three years, might the parents nevertheless force the girl into the marriage in order, for example, to prevent her from entering into a consensual marriage which they regarded as unsuitable?
d) Even if the effect of the amendment were to preclude the immediate grant of a marriage visa, might the girl nevertheless be forced to marry the man abroad and thereupon be kept under control abroad until their ages were such as to enable her successfully to sponsor his application for a visa?
e) In the example at (d) might the girl kept under control abroad there have a lesser opportunity to escape from the forced marriage than if the rules had enabled her to set up home with the man in the UK immediately following the marriage?
f) Alternatively to the example at (d), might the girl be brought to the UK following the forced marriage and be kept under control in the UK until their respective ages were such as to enable her successfully to sponsor the man's application for a visa?
g) Even if the preclusion of the grant of a marriage visa for up to three years were to deter her parents from forcing the girl to marry at that stage, might the result be an increased intensity of control on their part over her for that period – whether by moving her abroad or by continuing to keep her in the UK – and, in either event, would her increasing maturity be likely to

[1] See, for example, speech by Dominic Grieve, Attorney General, 24 October 2011 at Lincoln's Inn, accessible via www.attorneygeneral.gov.uk

enable her to combat it?

h) How readily could one or more false certificates of birth be obtained which would deceive the immigration authorities into accepting that the girl and the man were both aged over 21?

i) Might the effect of the amendment be to precipitate a swift pregnancy in the girl, following the forced marriage and an act or acts of rape, such as might found an application for a discretionary grant of a marriage visa by reference to exceptional, compassionate circumstances?

j) Even if the effect of the amendment were to deter her parents from forcing the girl to marry a man resident abroad without a pre-existing right of abode in the UK, might they instead force her to marry a man with UK or EU citizenship or some other pre-existing right of abode in the UK?

The questions bear quotation as forced marriage, the means of deterring it and the potential link with immigration abuse remain serious public policy matters. The questions may be of assistance to policy makers if the Government returns to the issue of forced marriage and immigration control, although it is notable that in the Home Office consultation paper on forced marriage issued on 12 December 2011 there is no reference to prevention by means of immigration policy.[2]

The research paper on increasing the spouse visa age that was commissioned by the Home Office (referred to in part one of this article) is cited by both Lord Wilson and Lady Hale in their judgments.[3] Lord Wilson observes that Hester *et al* attempted to answer most of the ten questions he posed, but that the Secretary of State had declined to accept the report 'for reasons good or bad'. Nevertheless, he concludes that the amendment to the rules was rationally connected to the deterrence of forced marriages, in answer to Lord Bingham's question (b).

It is at questions (c) and (d) of *Huang* that the Secretary of State's case comes unstuck. Lord Wilson almost inevitably draws a parallel with the earlier House of Lords family life case of *R (Baiai) v Secretary of State for the Home Department* [2009] AC 287, concerning blanket, and therefore disproportionate, interference with the right to marry, owing to the Certificate of Approval scheme which required migrants to obtain prior Home Office approval to marry. He points out that the problem of forced marriage was unquantified, as was the impact of the change to the rules on that problem. He goes on:

> '[The Secretary of State] clearly fails to establish, in the words of question (c), that the amendment is no more than is necessary to accomplish her objective and, in the words of question (d), that it strikes a fair balance between the rights of the parties to unforced marriages and the interests of the community in preventing forced marriages. On any view it is a sledge-hammer but she has not attempted to identify the size of the nut.'

Lady Hale's judgment adds comments of her own. In agreeing that the measure was disproportionate she pointed to the unquantified nature of the problem and proposed solution, the divided opinion on the benefits of the measure, the fact that the measure might do more harm than good where a young woman was taken abroad to be married then kept there until over the age of 21 and the interference with the ECHR Article 12 right to marry as well as with the Article 8 right to a private and family life.

The majority go further than concluding merely that the Secretary of State had interfered disproportionately with the private and family life of the particular claimants. Effectively, the Immigration Rule which increased the spouse visa age is struck down.

Lord Brown's powerful dissenting judgment points to support for the rule change from the organisation Karma Nirvana and qualified support from the Crown Prosecution Service. He also observes that several signatory States to European Convention on Human Rights have imposed spouse visa ages of 21 or 24 partly for the avowed purpose of deterring forced marriage and that European Union Council Directive 2003/86/EC allows a maximum age of 21 for spouse sponsorship partly to prevent forced marriages. Lord Brown concludes that Lord Wilson's 'perfectly good' questions are largely unanswerable and therefore that a 'judgment call' is required and that '[u]nless demonstrably wrong, this judgment should be rather for government than for the courts.' He goes further: 'in this particular context the courts should to my mind accord government a very substantial area of discretionary judgment' because 'it is the Secretary of

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[2] Forced Marriage Consultation, Home Office, December 2011

[3] Hester, M, Khatidja Chantler & Gangoli, G. Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e, School for Policy Studies, University of Bristol, 2008.

State who has the responsibility for combating forced marriages in the context of immigration and who should be recognised as having access to special sources of knowledge and advice in that regard.'

The future of family life

Following the judgment in *Quila*, the Government changed the Immigration Rules on 28 November 2011 and restored the spouse visa age to 18. A programme to review cases that had been refused on age grounds alone was also instituted.[4]

During the course of the *Quila* litigation other proposals have been brought forward with the express intention of reducing immigration, a key plank of policy for the present Government. In the counts used by Government statisticians, family migration forms a relatively small element. Students and business immigration forming the bulk of the numbers. Nevertheless, in order to meet a policy aim of reducing net immigration to 'tens of thousands' from a figure of several hundred thousand, the Government is proposing to take measures that will reduce family immigration.[5]

Some of these measures will also interfere with family life and will mean that some couples will not be able to live together in the United Kingdom. What is the significance of *Quila* and the earlier *Baiai* case to these proposals?

Pre-entry English tests

One such measure has already been implemented: the imposition of pre-entry English tests for spouses from certain countries from 29 November 2010. Post-entry tests had already been introduced without legal challenge some time previously. Campaigners have argued that a pre-entry test is unreasonable. Learning English in a non-immersive environment is very difficult, particularly for the uneducated or illiterate, it is impractical to study English in remote villages in certain parts of the world and computer skills are required to sit the test in most countries. Unlike with the spouse visa age increase, however, certain exceptions were built into the scheme, namely for those aged 65 or over, for those with physical or mental impairments preventing them learning English and for those in 'exceptional compassionate circumstances'.

These arguments were canvassed in the case of *R (Chapti and Others) v Secretary of State for the Home Department* [2011] EWHC 3370 (Admin), handed down on 16 December 2011 and the subject of much media comment.

Notably different tactics were adopted by the legal teams in *Chapti* compared to *Quila*. Of the three claimants joined together for the purposes of creating a test case in *Chapti,* none had actually applied under the new immigration rules and therefore none had yet been refused entry to the United Kingdom. They argued that refusal was inevitable under the new rule and sought to challenge the rule itself rather than basing their challenge on their own individual circumstances. In *Quila*, the claimants argued that the rule was disproportionate on the (very strong) facts of their own cases and left the more general arguments to the intervenors.

In Chapti, Mr Justice Beatson rejected the claimants' arguments and rejected comparisons with the *Baiai* and *Quila* cases. A detailed analysis of the judgment is perhaps premature because an appeal is inevitable, but legal analysts may be surprised by some of the reasoning. The case was heard in July 2011 but judgment was delayed in order to await the outcome of *Quila*. The parties were invited to make further written submissions, but the judgment does not seem to reflect *Quila* in several respects. Beatson J holds that the rule did not interfere with the right to marry and places considerable reliance on *Abdulaziz*, for example. Ultimately he concluded that the new rule did interfere with Article 8 but that the claimants could not show that the rule itself, with its exceptions, was disproportionate.

Minimum income threshold

The other major planned restriction on family immigration is through a proposed steep increase in the minimum income threshold in spouse cases. At present a couple need only show that they would be 'adequately' maintained and accommodated in the UK. In *lieu* of more concrete guidance from the Home Office, the immigration tribunal years ago adopted a rule of thumb of a couple or family having at least the equivalent on income support and associated benefits on top of their accommodation costs.[6]

The Government's Migration Advisory Committee

[4] http://www.freemovement.org.uk/2011/11/07/spouse-visa-age-lowered/

[5] UK Border Agency, Family Migration: A Consultation, July 2011

[6] Uvovu (00/TH/01450) 15 June 2000; KA and others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065

recently proposed a new income threshold for sponsors of either £18,600 or £25,700 before tax.[7] The estimated mean and median income level for the United Kingdom is currently £26,000 before tax, so it can be seen that either threshold will prevent a very significant segment of the population from sponsoring a spouse to join them in the United Kingdom. The Government's Migration Advisory Committee estimates that the lower threshold would have rendered ineligible 45% of recent entrants under the current spouse rules and the higher threshold 65%.

On the face of it, a blanket prohibition on sponsorship with no inbuilt exception might well look likely to fall foul of *Baiai* and *Quila*. However, the research and reasoning that has gone into these proposals so far is considerably greater than into the Certificate of Approval or spouse visa age changes. There is clearly a public policy justification in ensuring that families have sufficient resources to support themselves, but the whole reason for the income support equivalence approach is that this has been deemed to be a minimum threshold by society and government. The imposition of further restrictions above and beyond this level for the express reason that it would reduce immigration involves a consideration of proportionality with which the courts have not yet had to grapple.

Conclusion

Immigration policy and the right to family life continue to be the most controversial battleground in human rights law. There is no sign of this changing in the coming months and years. So far legal challenges to very blunt public policy instruments have been successful. It may be that Government learns from *Baiai* and *Quila* and becomes more sophisticated in its approach to legislating around family life and immigration issues. Equally, it may by the case that the very introduction of such measures, although ultimately struck down by the courts, in fact achieves the primary objectives of Government in this sphere: intimating to the public a political will to address the perceived problems of immigration and abuse of human rights law. The ultimate legal efficacy of such efforts is perhaps less important.

Challenges through the courts to further immigration measures are inevitable. Along the way such challenges will lead judges into more overtly controversial political matters than ever before. It may be that the more deferential approach of Lord Brown in *Quila* will ultimately prevail.

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[7] Migration Advisory Committee, Review of the minimum Points Based System income requirement for sponsorship under the family migration route, November 2011

Additional Comment to the Article by Colin Yeo on Forced Marriages and the Spouse-Visa Age: Part II

Dr Lars Mosesson*

There are different ways of looking at this interesting case.[1] Colin Yeo has focussed on the substantive issues, and my comment is as an academic lawyer, on the wider Constitutional points raised by Lord Brown's dissenting judgment in the case.[2]

It was undisputed in this appeal that forced marriages are a serious problem, which needs to be addressed; that the evidence is, at best, ambiguous on whether raising the age of marriage where one party is outside the country would make a significant difference to the number of forced marriages; that many "unforced" marriages would be prevented or significantly delayed by the policy; and that the Secretary of State's decision was "in accordance with law".

However, there was deep disagreement on how the courts should approach the review of such a decision. In terms of Public Law, the central disagreement between Lord Brown and the majority is about "proportionality" and the size of the "margin of appreciation"[3] which judges should leave to democratically responsible decision-makers, where the evidence in support of the decision is unclear. It is an issue which the ECtHR[4] considers frequently, and it goes to the heart of the proper relationship between the judiciary and the politicians in decision-making. Lord Brown wanted "to afford to government a very substantial area of discretionary judgement"[5] in a case like this; but Lord Wilson and the majority were unconvinced that there was sufficient objective evidence to support the Secretary of State's decision or by the "democratic" basis for her decision-making.

Lord Wilson and the majority took a careful legalistic approach.[6] They focused on the English precedents and some decisions of the ECtHR, and, in the light of s.2 of the HRA,[7] took the latter "into account" and analysed and compared them credibly. They then focused on Lord Bingham's approach[8] to the test of "proportionality" and on the need for the government to justify its actions, which in this case involved interference with the rights in art 8. They took the view that the Secretary of State had not done and cannot do so, because of the ambivalent evidence and the number of "innocent" people whose rights would be interfered with by the new rule. Lord Wilson put it: "On any view it is a sledge-hammer, but she has not attempted to identify the size of the nut."[9] Lady Hale concluded: "It is difficult to see how she could avoid infringing article 8 whenever she applied the rule to an unforced marriage."[10]

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1 *R (Quila) v SSHD* [2011] UKSC 45

2 Ibid, starting at para 81.

3 Only Lord Brown used this term, at para 92, but it is the one used by the ECtHR.

4 The European Court of Human Rights

5 At para 91.

6 Lord Wilson gave the first judgment, Lady Hale gave a concurring judgment, and Lords Phillips and Clarke agreed with these judgments (para 98). Only Lord Brown dissented..

7 The Human Rights Act 1998.

8 In *Huang v SSHD* [2007] 2 AC 167, at para 19.

9 *Quila*, at para 59.

10 Ibid, para 80.

Lord Brown's approach was broader-brush. He started by asserting: "Forced marriages are an appalling evil."[11] He then looked at the decision of the Secretary of State in terms of what right the courts have to override her decision about how to reduce this evil. He denied he was, or should be, "deferring" to the Executive, as Lord Wilson had suggested[12]; but argued that Lord Bingham and the Court in Huang "expressly recognised the need to accord 'appropriate weight to the judgement of a person with responsibility for a given subject matter and access to special sources of knowledge and advice'."[13] Lord Brown asserts that this was such a case; and later he asserted: "In a sensitive context such as that of forced marriages it would seem to me not merely impermissible, but positively unwise, for the courts yet again to frustrate government policy except in the clearest of cases."[14]

The difference of opinion and approach in the case is not unusual under the ECHR and the HRA. There are many cases where the judges have refused to interfere in such types of case, both in the ECtHR and in English cases on judicial review. Like Colin Yeo, I suspect (and I confess I am reading between the lines) that, here, the majority felt that the real motives of the Secretary of State were not to deal with forced marriages, but, by disguised means, to restrict immigration for party-political reasons; and that this was another ill-conceived and ill-drafted piece of secondary legislation. In all, this case is a useful example for students of Public Law and Human Rights of the division of approaches that may be taken to the job of judicial review.

There is also an art-14[15] point touched on by Colin Yeo, which might be explored a bit further. He notes that the Migration Advisory Committee has proposed that new income-thresholds should be established for the sponsors in this country; and that these thresholds should be a little above or below the median income of people already in this country. Such a threshold would apparently prevent between 45% and 65% of current applicants from being eligible. The objection to this in terms of Convention rights turns on their poverty being a "status" within art 14, which may lead to some being arbitrarily denied their rights under the Convention, in this case under art 8. Again, it would be interesting to see how an English court would approach this argument. It is not clear that a financial test of this sort could be reconciled with the requirement of non-discrimination, in light of Lord Bingham's approach to proportionality in *Huang*[16] and of the decisions of the ECtHR in cases such as *Airey v Ireland*.[17]

Clearly, the government has a multiple challenge to overcome, if it is determined to try to restrict immigration by these means. This Public-law issue is connected with the discussion about whether the ECtHR is interfering too much in decisions taken by the elected governments; but it is also an issue of the proper role of the courts in this country. Lord Brown's approach may be seen as a failure in his judicial role of securing the Convention rights against bad decision-making by the Executive; or as properly respectful of the decision-making in a difficult area by the elective politicians; or as simply realistic about the ultimate power of the Executive. However we choose to see it, it is not unprecedented. As is so often the case, we must distinguish our views on the merits of the decision from an understanding of the proper roles of the different decision-makers - political and judicial - in a Liberal Democracy; and we must expect the judges to do the same.

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[11] Ibid, para 81.

[12] Ibid, para 91.

[13] Ibid, para 91.

[14] Ibid, para 97.

[15] Art 14 states: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... or other status."

[16] In *Huang v SSHD* [2007] 2 AC 167, at para 19.

[17] (1979) 2 EHRR 305.

Commentary: Guardian-ad-Litem: Social Worker or Community Volunteer?

Eleanor Howard*

Introduction:

The importance of independent representation of a child in family law proceedings has been established both in domestic law and more recently through the United Nations Convention on the Rights of the Child (UNCRC).[1] However, in the wake of the recent legal aid cuts growing concern has been levelled at the sustainability of an already over-burdened system. Strain on limited resources has resulted in persistent problems with delays and interagency mistrust, leaving the current system in a fractured state. These practical constraints are coupled with efforts to make the entire system more child-focused,[2] but it seems almost impossible to reconcile the current economic climate with improved public law services for children.

The guardian system in England and Wales uses trained social workers to assess the 'best interests'[3] of a child and relay recommendations to the court. However, financial constraints and negative perceptions surrounding social workers have served to undermine the current system. Efforts therefore need to be made to identify a workable alternative model which will continue to provide effective representation of a child's best interests while taking into account budgetary considerations. This article will explore the American guardian model which utilisises trained community volunteers known as Court Appointed Special Advocates (CASA) instead of social workers. It will examine the applicability of this model in the English context and identify the way in which a pilot scheme could be used to address some of the key problems currently facing the guardian system.

The article will first provide a background of the two systems, with a specific focus on how the model works in practice in North Carolina. The article will then compare the two models with an assessment of how the American system could be used to tackle some of the problems facing guardians in England and Wales. As guardians are principally appointed in public law cases this article will exclusively deal with the use of guardians in public law proceedings.

System in England and Wales:

The guardian system in England and Wales was established under the Children Act 1975 following inquiries carried out into cases of child abuse and neglect during the 1970s. The role of the guardian was to communicate the 'best interests' of a child to the court, distinct from the interests of either parent or the local authority. Individual representation of the child was also seen to be of key importance and therefore a tandem model was developed in which the guardian instructs a solicitor on the child's behalf. Under the Children Act 1989,[4] guardians were made mandatory in public law proceedings, unless it was deemed unnecessary by the court.

During the 1980s concern grew over the independence of a guardian both from their solicitor and the local authority. In 1984 this was addressed through the creation of panels of guardians which were used on a reciprocal basis between neighbouring local authorities. This was in large part to ensure that a guardian was not representing a child where their local authority (as an employer) was also a party.

In April 2001 these panels were then incorporated into Cafcass (Child and Family Court advisory and support

• BPTC Student

[1] Article 12

[2] Para 3.10 '*Family Justice Review* 2011'

[3] England - Children Act 1989 s.1(1). North Carolina appellate courts have referred to 'best interests' as the 'polar star' of the Juvenile code.

[4] Children Act 1989 Section 41(6)

service) as a non-departmental public body. Cafcass was set up under the Criminal Justice and Court Services Act. It encompasses what was previously known as the Family Court Welfare Service, the Guardian ad Litem Service and the Children's Division of the Official Solicitor's Office. It was hoped that a more streamlined structure would eliminate some of the bureaucratic difficulties of negotiating between different agencies.

Cafcass guardians are directly employed by Cafcass or contracted by them, removing the potential conflict of interest which existed under the earlier system. In public law cases involving the safeguarding of a child, the child is automatically made a party to proceedings. The tandem model continues to be adopted and as such a guardian is automatically appointed to represent the 'best interests' of the child and appoint a solicitor on the child's behalf.

This article focuses exclusively on the role of the guardian within public law proceedings. However, it is important to note that many of the same issues arise in both public and private proceedings. In much the same way as in public law proceedings, delay in the appointment of guardians is endemic to private law proceedings. In both sectors the impact of these delays is often most readily felt by the children whom the system is trying to protect.

Problems with the existing system:

Between 2009 and 2010 around £1.1 billion of public money was spent on public law cases.[5] Yet the system in place is still not adequately protecting vulnerable children. This article aims to examine the applicability of the American model of community volunteers, but in order to explore the effectiveness of a different model, it is first necessary to identify some of the key problems facing the existing guardian system. These can broadly fall into three categories; lack of resources, poor staff moral and interagency mistrust.

(i) Lack of resources:

In 2008 Cafcass came under fierce scrutiny following the tragic case of Baby Peter.[6] Cases were rightly treated with increased caution and there was a swift and sustained increase in demand for Cafcass services. In 2009 - 2010 the number of cases increased by 34 per cent from 2008.[7] Cafcass were unable to meet these demands and temporary measures were introduced to allow the prioritization of cases which required immediate attention. Interim Guidance was provided for the judiciary by the President of the Family Division in October 2009 to help ensure that resources were used most effectively through the allocation of care cases on a duty basis and a conscious reduction of the reports requested for private law cases. These measures provided a plaster over the wound but the organisation has still been considered 'not fit for purpose.'[8]

The increase in demand on Cafcass resources following Baby P has had a significant impact on case loads and continues to do so with applications in the last twelve months increasing by three per cent.[9] Whilst the Interim Guidance has been effective in addressing the sheer number of cases, criticism has been levelled at the impact of a more brief assessment on vulnerable children. Furthermore, this approach was introduced as a temporary measure pending the Family Justice Review and as such there are serious concerns over how Cafcass will be able to address the continually increasing number of cases in the long term.

Despite these efforts to deal with more cases more efficiently, the issue of extensive delays has recently been cited by the Family Justice Review as one of the most significant problems in public family law proceedings. The Review reported cases taking an average of 61 weeks in care centres and 48 weeks in the Family Proceedings Courts[10] These delays are costly but more importantly create greater instability for the child. Furthermore, the delay becomes further exacerbated at each stage in the proceedings.

In addition to the problems of increased demand and delays the resources available are also under greater pressure. This has resulted in fewer employees with higher case loads. This often exacerbates the delays and also allows the guardian less time to make assessments and interact with the child.

Practical efforts to circumvent this problem have been made by the judiciary through directions to instruct an independent social worker to undertake the role of the

[5] Para 3.2 *'Family Justice Review* 2011'

[6] Case of severe child abuse which resulted in the death of Peter Conelly in 2007. The death led to widespread criticism of Haringey social services and the publication of "*The Protection of Children in England: A Progress Report*" on 12 March 2009.

[7] Page 3 House of Commons Committee of Public Accounts '*Cafcass's response to increased demand for its services*' Sixth report of Session 2010 - 2011

[8] Ibid.

[9] Ministry of Justice (2011) *Court Statistic Quarterly April to June 2011: Ministry of Justice Statistics bulletin*.

[10] Para 3.2 *Family Justice Review*

guardian. However, with the current difficulties in allocating resources the Legal Services commission has stated that these directions do not fall under a "legitimate disbursement under a public funding certificate."[11] Whilst this decision is understandable when considering resources it does not address either the problem or the impact of these significant delays on the child.

There is little doubt that these delays are intensely problematic both to the child and the system but it is still important to ensure that the 'best interests' of the child are being effectively assessed and represented. In the 2010/2011 Annual Ofsted Report inspections were carried out on three Cafcass service areas. The inspections focused on time delays, safeguarding practice and performance management. However, the inspections did not include *"judgments on the quality of assessment, intervention and direct work with children, case planning and recording, or reporting and recommendations to the court"*[12] Whilst there are valid reasons why the inspections targeted specific concerns, it is essential to ensure that all of the functions of Cafcass are being adequately met rather than a fluctuation of focus and resources depending on what area has received most criticism.

It is a practical reality that in the current economic climate publically funded programmes are under significant financial pressure with too few resources and an ever-growing demand.

> *"We understand concerns about any reduction of guardian involvement. No public law case is unimportant. But the system has to be able to put resource where it is most needed. It cannot do everything so choices have to be made."* [13]

This statement aptly reflects the public law system as it is, in that priority has to given to some cases over and above others. However, it does not engage with problem and the possibility that an alternative model may be able to reduce the number of 'choices' that need to be made.

(ii) Poor staff morale:

The growing demand on CAFCASS resources and perpetual criticisms of its work has also led to significant problems with its own employees. Low morale, a high turnover of staff and strained resources has led to a frustrated and overburdened workforce. In turn, this has resulted in low levels of compliance with initiatives aimed to improve performance.

The disproportionate number of sick days taken by Cafcass employees highlights the current feelings of frustration and fatigue. In a report written by the House of Commons of Public Accounts it was stated that the average number of sick days taken by a Family Court Advisor in 2009 was 16.1 days per year.[14] Whilst the report records a reduction to 13 days per year following a pro rata assessment of the first five months of 2010 – 2011, the levels are still disproportionately higher than other public sector employees. Cafcass has predominantly attributed these high rates to the stressful nature of the work. However, efforts to tackle these levels have also been said to contribute to low morale. This is problematic in terms of limited resources and delay but also the quality of services provided for the children.

Working under such scrutiny and within such prescriptive time and financial constraints has also led to a high turnover of staff. Furthermore, Cafcass employees tend to be more established social workers and as such the average age is higher and has led to some problems in ensuring a comprehensive and consistent training of less experienced members of a team.

Despite the problems experienced by Cafcass it is important to note that "judges in the family court are satisfied with the quality of the advice and reports that Cafcass's family court advisers provide" however, the problem is that "Cafcass has failed to get to grips with fundamental weakenesses in its culture, management and performance."[15] Therefore, focus needs to be placed on the retaining the quality of reports for the court whilst working to improve the other elements of the guardian system.

(iii) Interagency mistrust:

In addition to difficulties in working within the confines of restricted resources and staff performance, there are also problems in what has been labelled by the Family Justice Review as 'interagency mistrust'. Tension between professional agencies has built due to heavy caseloads and budgeting concerns. In practice, this mistrust is often

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[11] Legal Sevices Commission '*Appointment of guardians in public law children cases*' (http://www.legalservices.gov.uk/civil/family/legal_guidance_updates.asp#appointment

[12] Page 151'*Ofsted Annual Report* 2010/2011'

[13] Para 3.164 '*Family Justice Review* 2011'

[14] Page 11 in House of Commons Committee of Public Accounts 'Cafcass's response to increased demand for its services' Sixth report of Session 2010 - 2011

[15] Page 3 in House of Commons Committee of Public Accounts '*Cafcass's response to increased demand for its services*' Sixth report of Session 2010 - 2011

fuelled by careless mistakes and an inability to implement recommendations due to lack of resources.

The Family Justice Review has highlighted an "*undercurrent of deep scepticism about the ability of local authorities to deliver adequate care for children*"[16] This mistrust has led to the placement of additional burdens on Cafcass to make further assessments if the work of the local authority social worker cannot be relied on. With problems of delay and limited resources in mind this additional workload has led to resentment between Cafcass and local authorities.

Along with mistrust between the professional agencies perhaps the most detrimental to the system is the negative perception of social workers often held by the family and the child. Despite a social work background, English guardians are independent of social services and are either directly employed by Cafcass or contracted by them. In practice, this distinction may be very difficult for a child (and often a family) to grasp, especially if the methods used to engage the child are similar due to equivalent training. This confusion from the perspective of the child can be seen in Professor Munro's report on the Child Protection System. Messages from children were submitted to the office of the Children's Commissioner in which they

> "*expressed how confusing they had found the process of being helped, which, in their eyes, was far from transparent. They made a plea for better information, honesty, and emotional support throughout the process*."[17]

By the time family proceedings are underway both the family and the child also often feel animosity towards social services for what they see as 'tearing their family apart' even if for the child's protection. This mistrust can substantially undermine a guardian's efforts to engage with the child and therefore adequately relay their best interests back to the court. The use of duty allocations may further exacerbate this problem through a lack of comprehensive attention and assessment. In practice, this may lead to confusing situations for a child whereby a placement is seen as inappropriate in the long term but acceptable until resources can allow for a more suitable placement to be found.

American/ North Carolina Model:

Prior to a comparison between the two models it is necessary to outline the context in which the American model has developed and the way in which it works in practice. For the purposes of this article the terms CASA and GAL (Guardian ad litem) will be treated as synonymous. Whilst the latter can be used in reference to the entire guardian system, in North Carolina GAL it is often used to refer to the community volunteer.

The role of the GAL in juvenile proceedings was established through the federal Child Abuse Prevention and Treatment Act 1974 (CAPTA), which requires states that receive federal funding to provide a GAL for each child involved in abuse and neglect proceedings.[18] Each state approaches this requirement differently as the federal act does not specifically define the role or responsibilities of a GAL. The structure of each programme therefore differs according to specific state legislation. Some states use attorneys while others use trained volunteers. The focus of the GAL may also differ from state to state with some programmes focusing on the best interests of the child whilst others emphasise the child's wishes.

Significant controversy has arisen in the United States regarding the interference of the State in bringing up a child. It is established law that a parent has the right to bring up a child as they wish[19] but parental rights are also seen to correlate with parental duties. In the North Carolina Supreme Court case of *Owenby v Young* [2003][20] it was stated that "*The Justification for the [parent's] paramount status is eviscerated when a parent's conduct is inconsistent with the presumption that a parent will act in the child's best interests*."

In 1977 the original volunteer guardian scheme was established in Seattle, Washington by Superior Court Judge David W. Soukup, following his frustration at the lack of background information on the children in public law cases. He implemented a pilot scheme which involved judicial appointment of "*carefully selected, well trained lay*

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[16] Para 3.21 '*Family Justice Review* 2011'

[17] Professor Munro, E. The Munro Report of Child Protection *'Final Report: A Child Centred System'* Para 2.9

[18] In most districts, Juvenile Court is divided into two settings;

(i) Delinquency and undisciplined proceedings

(ii) Abuse, neglect, dependency and termination of parental rights proceedings

The duty is mandatory for abuse and neglect cases and discretionary for dependency cases.

[19] This Liberty interest is rooted in the Due Process Clause of the 14th Amendment

[20] 150 N.C.App. 412

volunteers to represent the best interests of children in court. CASA (Court Appointed Special Advocates) volunteers typically handle just a few cases at a time so they can provide in-depth, first hand information to judges and referees to assist in sound decision making."[21] In the first year of the programme 110 lay volunteers were trained and served as a GAL for 498 children.[22]

In North Carolina the GAL programme uses a combination of attorneys and volunteers, both of which focus on the child's best wishes. The programme was introduced in 1983 in order to "*provide children with an independent voice and to advocate for abused and neglected children who are involved in court proceedings*"[23]. Each county has GAL offices (often in the court house) in which a small number of GAL supervisors are permanently employed in order to case manage and oversea the work of the volunteers. In addition, there is a GAL staff attorney who works alongside the GAL. Although the use of a guardian and attorney loosely correlates with the British tandem model it differs in that the GAL and attorney are jointly appointed by the court.

Whilst no specific education or employment background is required, each volunteer has to apply for the programme and is then interviewed by one of the GAL supervisors. There are certain exemptions for eligibility including those who have themselves been involved in an abuse and neglect case. Furthermore, the applicant has to be over 21 to participate in the programme. If the individual is then deemed suitable to volunteer they participate in 25 to 30 hours training.

Each volunteer is expected to spend approximately six to eight hours on a case per month, usually working on two cases at any given point. Many GALs are also in full time employment in some other form of work. The demographic of those involved is extremely varied and includes men and women, students and professionals and people from different racial and cultural backgrounds.

Comparison between the two models:

Alongside a general duty to represent the best interests of the child many aspects of the role played by the GAL (or CASA) are similar to that of a Cafcass guardian. Both interview the child and/or care giver and monitor the child's behavior for any changes or developments. Both attend court hearings to ensure that the child's wishes are heard and, if appropriate, facilitate a youth's participation in court proceedings. Both work on an independent basis to assess what would be best for the child distinct from the interests of other parties. With this in mind it is important to identify the practical distinctions between the two.

The most substantial difference between the two models and arguably the biggest criticism of the American model is the lack of formal expertise in a relevant field. Given the particularly sensitive nature of the subject matter and the vulnerability of the children involved this is a valid and persuasive argument. Similarly, the obligations on a volunteer are far less stringent than that of a professional and it could be seen to be inappropriate to take such a risk when a child's safety and wellbeing is at stake.

In 2004 a systematic review was carried out of 20 studies that assessed the impact of CASAs (or GALs) on the children, case outcomes and re-entry into foster care. The research consistently indicated the benefit of a CASA for the both the child and subsequently the system. It was found that children who were represented by a CASA advocate were more likely to receive access to practical services and tended to have slightly fewer placements.[24] Children were also more likely to be adopted[25] and 50 percent less likely to re-enter the "dependency system".[26] Furthermore, the research suggests that CASAs help to improve the self esteem of a child and help better equip them to control deviant behavior.[27]

Although these findings assert the practical benefits of the GAL model it is also important to point out that the studies are not directly applicable in an English context. The American guardian system initially involved legal representation for a child, the addition of a volunteer allowing further fact finding and support for the child. In contrast, the English model has always consisted of a social worker and as such the move towards adopting a

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[21] Page 110 in Youngclarke, D., Ramos, K. D., & Granger-Merkle, L. (2004). 'A systematic review of the impact of court appointed special advocates' *Journal for the Center of Families, Children & the Courts*

[22] Page 336 in Rebecca H.Heartz (1993) 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness' *Family Law Quarterly*, Volume 27, Number 3

[23] *'Be the voice of a child'* Guardian ad Litem; A Child's Advocate in Court (Pamphlet)

[24] Page 121 in Youngclarke, D., Ramos, K. D., & Granger-Merkle, L. (2004). 'A systematic review of the impact of court appointed special advocates' *Journal for the Center of Families, Children & the Courts*

[25] Ibid.

[26] Page 122 in ibid.

[27] Page 123 in Youngclarke, D., Ramos, K. D., & Granger-Merkle, L. (2004). 'A systematic review of the impact of court appointed special advocates' *Journal for the Center of Families, Children & the Courts*.

volunteer is largely to eliminate practical problems such as delay rather than broadening the scope of the guardian.

One of the most important points to consider is what role the guardian is intended to play. Is the role of the guardian as an expert? If so, it is essential for the guardian to be a trained social worker in order to relay an expert determination to the court. In contrast, if the guardian's role is more child centered and focused on providing support to the child along with reports to the court addressing their 'best interests', then expert status is not so inherently valuable. In practice, the two approaches are not so definitively polarised and the Cafcass guardian usually performs some of each role depending on the context. However, when assessing the structure of the system it is important to identify the practical value of each of these functions to both the child and to the court. In addition, from the perspective of the court, further research needs to be carried out in order to assess the qualitative differences of the respective reports.

Cross examination of guardians is also an essential element of the court process and concerns may be raised as to how effective this would be with community volunteers. This issue can be addressed in two ways, firstly through effective vetting of potential volunteers coupled with comprehensive training. Secondly, through the use of the GAL supervisor, who provides professional expertise and assistance to the GAL in formulating recommendations to the court. In the context of cross examination they would be able to ensure that the GAL is equipped with the necessary skills and knowledge. Furthermore, the increased time that a GAL would be able to spend with the child and on the case may increase their utility for the court in cross examination.

How the GAL model may address the existing problems:

(i) Lack of Resources

There are a number of potential strengths in adopting the GAL model. One of which may be tackling the problem of perpetual delays. Someone outside the system is less likely to be restricted by the pressure of significant caseloads.

> "*CASA volunteers are uniquely positioned to advocate for the best interests of children. They are typically assigned just a few cases and are involved for a case's duration. Social workers and attorneys may change, but the CASA volunteer provides support with continuity*."[28]

Furthermore, an individual used to a different working environment may be less familiar with the habitual delays and therefore more likely to challenge it.

> "*Too many of us have become inured, desensitized, to the nature and extent of delay within the system.*" [29]

The use of unpaid community volunteers would also reduce the financial resources needed to provide a comprehensive guardian system. In North Carolina, during 2010 – 2011 it was reported that 5,139 volunteers carried out 986,688 hours of service resulting in a saving of $21.1 million dollars.[30] However, it is important to note that initial costs would be necessary to establish an infrastructure to support the programme. Furthermore, the employment of permanent staff such as supervisors and a staff solicitor would have further financial implications. Whilst not necessarily reducing the required resources, the GAL model would allow the guardian system to work more effectively within existing financial constraints. This is particularly pertinent considering the growing number of public law cases.

(ii) Poor staff morale:

Following a volunteer structure would also effectively tackle some of the problems associated with staff performance. The volunteers under the American programmes consistently describe the experience as rewarding and fulfilling and as such low morale is not an issue. The small number of cases taken on by each volunteer also allows them to have "considerable time to devote to the fact finding and social-aspects of the case."[31] This attachment to individual cases and the luxury of fewer time constraints results in many volunteers staying with the child for the duration of the case.[32] This is beneficial to the child in terms of continuity and stability and from the court's perspective in providing a comprehensive outline of the child's best interests.

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[28] Page 110 in ibid.

[29] HHJ Newton, L. Reforming care proceedings – a judicial perspective '*The challenge of changing the approach of practitioners and the judiciary*' as cited in para 3.9 of Family Justice Review 2011

[30] North Carolina GAL fact sheet http://www.nccourts.org/Citizens/GAL/Documents/2010_AOC_GAL_fact_sheet.pdf

[31] Page 340 in Rebecca H.Heartz (1993) 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness' *Family Law Quarterly*, Volume 27, Number 3

[32] Ibid.

Whilst it is important to ensure that each volunteer shows the requisite commitment and professionalism for the role, any systemic problems could be effectively addressed through a comprehensive interviewing and training process. The problem of a high turnover of staff would also appear not to be in issue when following the CASA model. However, constant feedback from the employed supervisor would need to be carefully assessed during a pilot programme to engage with any potential problems.

(iii) Interagency mistrust:

In the context of professional interagency mistrust the impact of the community volunteer model is unclear. However, if the root of much of this mistrust in founded in practical concerns (such as delay) the alternative structure may go some way to addressing these issues. Use of a pilot study would give a further indication of how these problems could be tackled in practice.

The difficulty in establishing a meaningful difference in a local authority social worker and a guardian social worker can be effectively addressed by the GAL model. The use of a community volunteer would make it far easier to convey the unbiased and independent approach of a guardian to a child and their family. Furthermore as a volunteer position many GALs only have a couple of children that they work with and are therefore able provide more time for the child and develop a supportive relationship. This is essential for both the child and the court in the ongoing assessment of how the child is reacting in different placements.

> "*Perhaps owing to their small caseloads, CASA volunteers spend more time working on behalf of the children…The continuity of representation and documentation may be important when one considers the high turnover of county social workers and the rotation of private attorneys through the dependency court.*"[33]

However, there is also a significant risk in the GAL model that without professional training and through a small but intensive caseload there is some danger of a GAL becoming too involved and emotionally attached. This could result in an inability to adequately assess the child's best interests and make suitable recommendations to the court. This potential risk can be addressed through ongoing discussions with a GAL supervisor to ensure that a level of professional distance is maintained. The supervisor can also act as an overseer of the volunteer and child and therefore able to reassign the volunteer if the position is no longer appropriate or in the child's best interests.

The GAL may also face problems from older children who may feel that a stranger with little formal training has no right to interfere in their life offering what appear to be little more than opinions. This would be particularly potent should the GAL make a recommendation that does not correlate with the child's wishes. Training would be needed to equip the GAL with the skills to deal with issues such as this.

These criticisms are also likely to be raised by parents who may find it intrusive that a volunteer is interviewing them and their child as to whether they are an adequate parent. However, the Durham County GAL programme has asserted that in practice parents are often keen for the opportunity to have their say;

> "*It comes as a surprise to many people that the parents are usually more than glad to tell their version of the events that have caused this case to come before the court. As a GAL, you are just asking questions and listening at the outset, and most parents do not find this threatening*."[34]

This seems a surprising assertion but the very fact that the GAL is not a social worker may allow the parents to open up more and give greater insight into the child's environment.

Pilot Scheme:

Following this theoretical comparison it is necessary to assert a potential next step in practice. In light of the findings of the review and the potential benefits of adopting a GAL model, this article advocates the implementation of a pilot scheme with a similar structure to that founded by Judge Soukup in Seattle in 1977. The establishment of such a scheme would provide an effective method of assessing whether this model would be productive within the British context.

In line with both of the existing models, the GAL would be asked to make an assessment of the child's 'best interests' through interaction with the child, parents and any other relevant persons. The GAL would be carefully

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[33] Page 121 in Youngclarke, D., Ramos, K. D., & Granger-Merkle, L. (2004). 'A systematic review of the impact of court appointed special advocates' *Journal for the Center of Families, Children & the Courts*

[34] Durham County Guardian ad Litem Program www.nccourts.org/GAL

recruited and receive specific and detailed training. The initial role would be fact finding and enable the GAL to build up a relationship with the child and the family. Alongside this assessment the supervisor, as a trained social worker, would then embark on a number of discussions from which the GAL, with the assistance of the supervisor, would be able to formulate coherent recommendations for the court. At this point a staff solicitor would then be approached to address the legal elements of the case. If constructive, a conference between the GAL, supervisor and solicitor could be arranged at any stage in the investigation ensuring a comprehensive assessment of the 'best interest' of a child from three different perspectives.

Direct research into the cost of establishing the necessary infrastructure would need to be carried out. However, the use of volunteers to supplement the existing guardian system would make a significant practical step towards improving the current system. The GAL could be used to counter some of the practical problems such as delays, poor staff morale and interangecy mistrust along with providing increased support for the child at relatively little cost to the public purse.

Conclusion:

The guardian's role is essential to providing independent representation for children in England and Wales. It requires a delicate balance of an objective assessment for the benefit of the court along with emotional engagement with the child, yet with the problem of resources in play, too little time is spent on either.

Despite providing an innovative and cost effective structure the GAL model is not without problems. It may bear too much resemblance to David Cameron's 'Big Society' for some critics, others may feel ill at ease with volunteers working with such vulnerable children. However, greater emphasis needs to be placed on the impact of the existing structure on the child. Additionally the practical reality of dwindling resources and growing demand needs to be addressed. The GAL model engages with both of these issues and provides a realistic and practical alternative. Through the implementation of a pilot scheme the applicability and benefit of this model can be assessed in the English context. In directly tackling these practical problems it is hoped that the guardian system can more effectively carry out the intentions of the Family Justice Review in putting "the child's interests back into the heart of the process".[35]

> "*For too long, children who have been abused by their parents or caretakers, have also been abused by the system designed to protect them. Too often, they have become invisible to overburdened agencies and courts more concerned with processing and closing cases than with individual children. It is time to put aside debate, professional elitism and to take steps to ensure that every child has quality representation in the in the legal system*."[36]

This short introductory article will be followed up in the next issue by a more detailed piece by this author and a specialist practitioner, taking the opportunity to examine the potential relevance of the American approach to current practice in England and Wales. [Editor]

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[35] Para 3.10 '*Family Justice Review* 2011'

[36] Page 347 in Rebecca H.Heartz (1993) 'Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness' *Family Law Quarterly*, Volume 27, Number 3

Journal of the Centre for Family Law and Practice

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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