

The Family Courts of the Future

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Introduction

If justice is about redressing the wrongs perpetrated upon individuals and the community, then we must be seen to provide a mechanism for regulating the dysfunctional behaviour and broken relationships which are created or which exist, where appropriate, by punishment, compensatory relief, prescriptive order, or, as I will suggest today, by other more inclusive measures.

Where does any of this take us on an occasion that is rightly dedicated to the celebration of family justice and in particular the 25th anniversary of a great and hugely successful publishing endeavour, Butterworths Family Law Service?

Judicial independence

The judiciary, in common with the office of the police constable, are commended for their independence of mind but cautioned about the effect of corporate leadership or management upon them. An example of the latter is the flaw in striving to achieve a specified purpose so that it might be counted and audited as a measure of success, i.e. one can achieve a target but still fail to provide justice. Another example would be the division of the judiciary into the managed and the managers which, while not interfering with judicial independence in the individual case, can affect the whole

dynamic of the relationship of judges to each other and the public, i.e. the loss of the personal and professional imperative of responsibility, colloquially known as the professional ethic, debases the judicial function just as it debases the functions of any of the liberal professions by having the tendency to transfer responsibility and indeed accountability to the manager from the managed.

Consider the estrangement of the judicial function from the needs of the individual citizen and the society in which we live. The very independence that we have which has recently been restated and ring fenced in the Constitutional Reform Act 2003 and the Framework Partnership Agreement between the Lord Chancellor and the Lord Chief Justice, does not bring the judiciary any closer to the public even though it may give them enhanced protection from improper influence and more responsibility for the system itself, i.e. the delivery of justice.

We are at a crossroads in family justice. Over the last 25 years Parliament has provided far reaching statutory and procedural reform, the latter in partnership with the judiciary and the executive. I do not propose to try and improve on the authoritative works of Professors Bromley or Cretney: that would be impossible. Instead, I would like to highlight where we are and what we might do to provide for the defects previously identified.

The family courts

We are on the cusp of formally recognising the existence of a unified family court: a family courts network of the permanent judiciary in the county courts and the magistracy in the family proceedings courts jointly administered, deployed and listed

to achieve common ends. As a Division we also seek to preserve the status, some would say the constitutional importance, of the High Court with one of its responsibilities being the management of the family court while being independent of it. Despite this and the real achievements in statutory reform, rule making and the development of our common law over the last 25 years, there has rarely been more critical comment about the system itself. By way of example:

- The argument that secret justice is not justice at all. It is said to be partial and biased
- The lottery and expense of ancillary relief division
- Both the over zealous and the under resourced failures of child protection provisions and their and our obsession with snapshot justice
- The lack of voice for the child as a person in their own right
- The damage caused by adversarial dogfights between former partners in their residence and contact disputes concerning their children
- The lack of capacity in the courts to deal with an ever increasing volume of the most serious and complex cases in a timely fashion and as a consequence the downgrading of many legitimate medium risk and need cases as if we haven't got time for them.

In addition to this we have a hearings system for family proceedings which is underscored by case law which has a tendency to cause those cases in which a child needs the most protection to be the very cases where the proof of harm or establishment of risk is at its most difficult, thereby undermining the child protection imperative. In the annual lecture for the National Youth Advocacy Service delivered in November 2007 and reprinted in the January 2008 edition of Family Law I argued

that the House of Lords needed to consider whether *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 (otherwise known as *Re H and R*) was still fit for purpose. Our emphasis on fact finding is not apt to a risk assessment process adopted by all other professionals and necessary though it is to prevent miscarriages of justice and to securely underpin judicial inference with primary and secondary fact, it is also necessary for the courts to recognise the reliability of professional opinion which is not based upon facts ascertained to the civil standard of proof. A recent appeal to the Court of Appeal on that question is to come before their Lordship's House later this year. It has to be said, however, that however much a reconsideration of such issues of legal principle may assist in the outcome of the individual case it is unlikely as a process to improve the public's perception of the system, addressing as it does problems such as those that I have highlighted from the wrong end of the telescope.

Family justice policy

On Saturday 31st May 2008 there was an article on the front page of the Times which quoted Mr. Mark Rowley, the Acting Chief Constable of Surrey, as follows: "Quite simply, local peoples' safety, confidence in the Police and their satisfaction when they call us for help are more important than misleading targets". Very bravely, some might think, he and the Chief Constables of Staffordshire, Leicestershire and the West Midlands Police want to return to what used to be called community policing. They are concerned at the gap between the achievement of a target or being top of a performance league and the public's satisfaction in the process itself. That is a very good example of the problem I want to identify.

If the family courts, like the police, are to achieve renewed acceptance we need to have a family justice policy that is internally consistent and directed toward a consensus view of identified outcomes and we also need to have a method of delivery of justice that neither damages the outcome nor gets lost in the pursuit of abstract principles which are inappropriate to the key issue in the proceedings or pragmatic solutions which wrongly avoid fundamental principles in others.

Dealing first with family justice policy: to date we have not had any process which brings together let alone balances government and legal policy objectives and constraints. Government policy usually identifies with economic and cultural disadvantage, poverty, unemployment and so on. Legal policy objectives can be characterised by the sometimes overt but more usually unspoken policy assumptions that underpin decision making e.g. in the purposive construction of legislation, the subjective cultural and personal assumptions underlying welfare and need, and the degree of probability required to satisfy a court so that it might authorise its own intervention or that of another agency of the state into family life. The constraints which affect us are primarily resource driven but also include the limits of our enforcement and coercive powers and the involvement of citizens themselves in our processes be it through elected or voluntary organisations or generally in the community.

The executive in ministerial steering groups, the family judiciary in various policy fora sponsored by the President as Head of Family Justice and on an inter-disciplinary basis the Family Justice Council each in their own different way provide the platforms for policy discussion but they neither bring the constitutional arms of the State

together nor do they provide a coherent account of policy objectives. It may be that the new Access to Justice Group of the Ministry of Justice will be the basis for a new policy partnership. I hope so. I do not suggest we can or indeed should be constrained to agree with the Executive about policy and most certainly I do not think the judiciary should permit any interference in their decision making on that basis but I do suggest that there is an urgent need to discuss the many sticking points we have in an open and transparent environment. If family justice policy considerations can become more transparent and open to scrutiny then there will be a more informed basis for the poor quality of scrutiny presently undertaken of the family courts.

Whether or not the judiciary can be reassured that the process of scrutiny which is necessary to the public's reassurance and satisfaction in the justice system can be better informed, in my judgment the courts should carefully provide for that scrutiny. Our judgments should be given in public and anonymised where necessary. I have repeatedly urged that public law and international abduction judgments be given in public with automatic anonymity subject only to application to prevent or widen such publication and that private law and ancillary relief judgments be available in anonymised form on application.

The wider community

This, however, is but one aspect of re-addressing the relationship between the public and family justice. There are other and perhaps deeper questions which deserve discussion. Last month my colleague, Irwin J, one of the two Presiding Judges of this circuit, hosted a seminar in which I participated with representatives of directors of children's services, the probation service, the police, education and elected members

of all political persuasions together with the judiciary. Certain common themes emerged from our discussions and they were these: by and large, judicial involvement in the community is being marginalised to only the most complex cases: the crown court judiciary sees only trials leading to significant custodial sentences and the family judiciary in both the County Court and the High Court deal with an endless succession of cases involving serious non-accidental injury e.g. brain injury caused by shaking, multiple fractures, serious neglect, gross emotional damage, death and so on where once the facts are proved the removal of the child is almost inevitable. That picture is mirrored in the experience of other agencies. The Probation Service are overwhelmed by the need for their specialist skills to be made available to hard core high risk offenders: sexual predators, alcohol and drug induced serial assaulters and in particular those who are violent in the domestic context. Social Services and in particular children's services and education, like probation, have quite insufficient resources to tackle moderate risk and moderate need i.e. to take responsibility for vulnerable adults and children who are well known in the community but where a precipitating incident of high risk has not yet occurred. All of the participants argued for similar changes in attitude and practice:

- Create community involvement including by the courts
- Better risk evaluation
- Better targeting of specialist skills to high risk/high need people
- The recognition of the need to find alternative ways of dealing with the largest proportion of low to moderate risk and need, and
- The abandonment of targets for targets' sake but the acknowledgement of the need to obtain outcomes which satisfy the community - a real cry that politicians engage in the real world and in their communities.

For the family courts system to respond to all of that and to still be useful in the ordinary world of relationship breakdown is a challenge indeed.

The function of family justice

Every problem deserves a solution. I am going to suggest that family justice ought to provide two functions if it is going to continue to add value to society. Firstly, and at the most serious end of the spectrum, the family court must continue to be a forum

- a) to protect individual freedoms and rights
- b) to right wrongs perpetrated against the individual
- c) to protect the most vulnerable and
- d) in the final event to decide ultimate questions in family life, be it the status of a person, parentage, life or death by reference to the established or developing legal policy.

A second function which is just as important to the community is that we must provide a local resource where pragmatic resolution of disputes can occur between adults and between adults and children including those which involve the State but where the vulnerable person – child or adult is not at immediate risk of removal from the family home.

For all the impressive mediation services, in court conciliations, collaborative law and family group conference schemes which already exist there is no over-arching principle of the binding, out of court, family dispute resolution mechanism. I seek to suggest that whether it be statutory arbitration in ancillary relief as suggested by Lord Justice Thorpe in the January 2008 edition of Family Law, the conciliation of private

law family disputes in cases where the residence of the child or safety issues are not apparently at large or an earlier mechanism in child protection cases than the breakdown which causes a child to be removed: there ought to be a mechanism which can identify care measures to assist families in need. There are models for these concepts available to us from other jurisdictions. In many European jurisdictions the idea that a case needs to come before a court only at the point where the issue is likely to be the permanent removal of a child would be surprising indeed. The French family judge does not undertake a snap-shot view of the family, making findings and approving or determining the consequence, but rather he or she undertakes a longitudinal review of family circumstances and becomes involved in a process of approving or directing the care measures that need be taken to assist the family. These can even include the control of the families' budget so that underlying problems do not cause more detriment to the children than need be the case. Over the last six years in Guernsey a legislative review team with which I have been privileged to be associated has completely rewritten the children and youth justice law. Children under 12 have been de-criminalised save for the most serious offences and youth justice and family breakdown cases have been transferred in the first instance to a specialist panel or tribunal which seeks to identify solutions to problems on an inter-disciplinary basis so as to avoid the removal of a child from the family home. The tribunal has a statutory relationship with the court which remains involved for any fact finding process that may be necessary and as a reviewing and appellate authority, dealing also with the most serious cases where it has the combined powers of both.

I have to accept that the French culture is deeply ingrained and that Guernsey is a very small jurisdiction and also that their solutions may be resource intensive. But would

it not be possible to re-engage our magistracy and the highly qualified and experienced cadre of family lawyers that we already have so as to provide a form of gateway access to the court in all but the most urgent or complex proceedings. In order to use judicial resources to better effect we need a broader family justice system which, for the sake of convenience and the need for a sound bite, I will call a Family Court Diversion Scheme. Such a scheme I would suggest ought to encompass the use of volunteers, be community based i.e. be local and collaborative – problem solving without any possibility of an adversarial element, be inter-disciplinary, be advised and enforceable i.e. including a quasi-judicial input. It would have to provide for intervention in the home by professionals and volunteers alike under the supervision of a professional appointed by the panel. If the Legal Services Commission were to consider that funding in all non-removal cases including funding for ancillary relief should be dependent first upon a referral to an alternative dispute resolution panel staffed by lay members but with a legally qualified chair and that the determinations of such a panel would, subject to appeal, be binding, we could have for the first time in recent history the involvement of the community in family justice decision making and a system which is both informed and a more appropriate use of our scarce resources. It has to be accepted that the determinations of such a panel would be pragmatic but the court's position is then preserved for any issues of fact or principle which arise and all serious determinations which involve change of status. Furthermore, if the magistracy were to be involved as members of the panel and to become more representative of the community in their selection that in itself would help address the legal policy assumptions which often underpin our decisions and their acceptance by all involved.

A new family court

To return to my opening theme if the family courts system can be developed to be responsive to the needs of those involved in family breakdown and to be reflective of a consensus in family justice policy derived in a transparent manner then the last element of the jigsaw which is necessary to put that together is the management of the process. There is a responsibility in any system where decisions are devolved into an administrative justice forum to manage that forum by reference to clearly identifiable objectives i.e. policy. That requires careful management by the judiciary not the executive and as we have learnt in our tentative steps in the management of the Circuit and High Court judiciary that needs a model which inculcates responsibility and accountability but preserves independence.

We need a new family court if we are to survive the many pronged attacks on our existing system. The public deserves such a court and before we lose them to financial ruin or retirement now is the time to engage the professions to provide a model for the future. Our existing system of FPCs – constituted by the self selecting great and good and a professional judiciary is not in tune with the society we live in. We need to be brave enough to say so and say that family justice is more important than the structures we have inherited.