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Adversarial courts, therapeutic justice and protecting children in the family justice system*

Abstract

There are indications of a marked and growing move towards less adversarial approaches to justice for child protection cases in the English and Welsh family court. This article explores the advantages and some challenges of such a move, and some implications for the legal system and social work working as part of a wider system for protecting children from harm.

Keywords

Adversarial, inquisitorial, child protection, therapeutic justice, social work

(A) Introduction

The legal system of England and Wales is primarily adversarial¹. This includes family proceedings, and specifically public law (e.g. care) proceedings, the proceedings that are most associated with child protection social work. This paper explores some issues linked to the historic adversarial approach as the dominant paradigm in English and Welsh family court cases, and some developments that suggest that a less adversarial approach might have benefits for children, families, and the social work and legal system as these two professional organisations engage with each other in seeking to protect vulnerable children. In doing so, it looks at concerning indications that the social work element of the child protection system is becoming more adversarial in a lay sense – more oppositional – while the family courts are increasingly looking to less adversarial alternatives to help address both child and family welfare and resource issues within the justice sector.

According to the paradigm of the adversarial approach, courts approach establishing the truth and identifying the best outcome for the child by relying upon the parties' (parents', local authority children's services' and child's) discretion to choose what evidence they will put before the court. It is the parties, not the court, who decide what material to contribute to the process, limited only by a duty to tell the truth. In an apparent exception to this adversarial approach, public authorities, such as children's social work organisations, are under a duty to make honest disclosure of relevant facts known to them^{2 3}.

The task of the court is to use this material '...to do, and be seen to be doing, justice between the parties... There is no higher or additional duty to ascertain some independent

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¹ See for example comment made by Sir James Munby, P, concerning the form of adversarialism in the English and Welsh Family Justice System in J Munby, P, *21st Century Family Law: The Michael Farmer Memorial Lecture*, available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/munby-speech-bangor-10102014.pdf>

² *European Court of Human Rights Guide to Article 6 and Civil Proceedings* p.24 at para 219, available at http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf

³ *Cumbria County Council v M and Others* [2016] EWFC 27

truth.⁴ This is a very traditional English litigation approach. However, in areas where the public interest is involved or the protection of vulnerable parties is in play, the adversarial paradigm is not the only one involved. Family judges are concerned to act in the child's best interests. That may not involve reaching a conclusion or solution that any party has advocated. Even the task of "doing justice between the parties" may involve the court in complementing the researches of the parties with the tribunal's enquiries to test factual assertions and seeking to make up for the gap in the parties' resources. Additionally, the aim of discovering some definitive truth may not be possible given the complexity of children's lives, and scope for variation in interpretation of key concepts such as 'harm'.

Even in quite markedly inquisitorial systems, there has to be an element of adversarial "combat" in legal proceedings to ensure that the legal rights of the parties to question material that can be used against them are properly protected. In a sense, there is no such thing as a purely adversarial or inquisitorial legal system. The answer for any legal system, and even every individual judge, lies somewhere on a continuum between the two extremes.

Adversarial and inquisitorial approaches are not opposites, they are contrasting ways of conducting or approaching legal proceedings, and no legal system fits precisely into one category. Jurisdictions are on '...a continuum, a sliding scale upon which various legal processes sit, with most processes combining aspects of adversarial and non-adversarial practice to varying degrees'.⁵

The Family Justice System in England and Wales (FJS) is based on long tradition of adversarial trial, while it is said to also have inquisitorial features:

"Our system, and for good reason, is essentially adversarial, even in the Family Court. But it is a system very different from the adversarial system of yore. Modern case management imposes on the judge the responsibility of deciding what issues will be argued and what evidence will be permitted. The process before the judge may still be adversarial, but it is a dispute fought in accordance with an agenda set by the judge, not by the parties... The hearing is more likely to produce the right and just result if the judge adopts a more inquisitorial approach"⁶

However the basis of its approach until the present is 'essentially adversarial'. This is the environment for which social workers must prepare themselves when engaging in child protection work. It can be bruising for social workers, stressful for parents, and challenging for children who wish to be heard or participate, but it places a high value on protection of individual rights, with the safeguard of legal representation for parents and children and a guardian to represent their best interests of the child.

⁴ Wilberforce, LJ in *Air Canada and Other Appellants v Sc. Of State for Trade and Another* [1983] 2 AC 394 at para 338

⁵ M King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (Federation Press, 2nd edn, 2015) at p 29

⁶ Sir J Munby, P, *21st Century Family Law: The Michael Farmer Memorial Lecture*, available at <https://www.judiciary.gov.uk/wp-content/uploads/2014/10/munby-speech-bangor-10102014.pdf> at p 12

This is now beginning to change as less adversarial approaches are beginning to appear in the FJS. This article explores some of the underlying concepts and aspects of the relationship between social work and adversarial / less adversarial practice, including 'problem solving' approaches⁷ and therapeutic justice⁸. Therapeutic justice, '...focuses on the law's impact on emotional life and on psychological well-being... humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process.'

(A) More adversarial courts and child protection

More adversarial court systems traditionally emphasise protection of individual rights through formal processes and 'equality of arms'. Inquisitorial approaches, on the other hand, aim to give the judge a more flexible and proactive role in deciding what evidence is needed to decide the case. Evidence may be tested through direct questioning by the judge rather than through cross examination by advocates for the parties, who may not feel the need for representation, since being unrepresented does not bring the challenges that being a litigant in person in the FJS does. More adversarial systems are arguably more concerned with identifying winning arguments than seeking after truth, but in the case of the FJS, where usually the best interests of the child are paramount, finding the truth is an essential part of identifying the child's best interests. Legal representation is usual in classic adversarial systems, although in FJS private family law cases this is becoming less frequent, for financial reasons.^{9 10} In more inquisitorial jurisdictions, the judge is responsible for ensuring that the court considers all relevant information, so advocacy may be regarded as less crucial for fairness. Negative effects of adversarial processes include high levels of witness stress and conflict.¹¹

In a classic adversarial system, judges are not expected to find things out directly by, for example, questioning witnesses, although it is accepted that there may be exceptional cases in which this is appropriate¹². In the FJS, judges may speak to children who wish to meet them, as covered by Practice Direction 3AA of the Family Procedure Rules¹³, which states that children may speak with judges about their wishes and feelings, but although correct at the time of press, this area of flexibility in judges' direct communication with parties is under

⁷ Most legal activity may be seen as 'problem solving' in a general sense, but a problem solving approach in family justice would focus more on finding a solution to the family's problems than winning the case for the client. See for example J Nolan, *The International Problem-Solving Court Movement* (Princeton University Press, 2009) for further reading.

⁸ B Wexler (2001) *Therapeutic Jurisprudence: an overview* para 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=256658. For further reading see for example M King, A Freiberg, B Batagol and R Hyams, *Non-Adversarial Justice* (Federation Press, 2nd edn, 2015)

⁹ *Legal Aid, Sentencing and Punishment of Offenders Act 2012* available at <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>

¹⁰ *Civil Justice Council Report 2015* (2015) available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/11/cjc-ar-2014-15.pdf>

¹¹ K McGrath (2005) "Protecting Irish Children Better," *Judicial Studies Institute Journal* 5:1 pp 136 - 152

¹² See for example *Re K and H (Children)* [2015] EWCA Civ 543

¹³ Ministry of Justice (no date), *Family Procedure Rules* available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/raprnotes>

review¹⁴. Like all judges, though, they must be cautious about becoming partisan, or drawn into analysing a case to explore its merits and demerits.¹⁵ If a party's case is flawed or incomplete, it is not the role of the more adversarial judge to address this, although they may express decided views on inadequate evidence in family proceedings when local authorities fail to present arguments coherently or evidence to the expected standard. This arguably tends to focus attention on the conflict with the parents, in the child's best interests, rather than the child's best interests per se, during proceedings.

The concept of a fair trial under Article 6 of the European Convention on Human Rights (ECHR) includes the right to adversarial proceedings in both civil and criminal cases,¹⁶ which cannot be overridden by the desire to save time or expedite proceedings.¹⁷ The opportunity to challenge evidence and present an alternative interpretation of facts is a fundamental right. Parents must have the opportunity to challenge, and social workers must be prepared to defend, the narrative they have developed to explain the family situation and the intervention they think is in the best interests of the child. The effect of this is arguably to create a situation in which social workers are cast as being 'against' parents, although they will generally have been working to support the family staying together until shortly before proceedings commenced. The presence of the Children's Guardian, while an important safeguard for children and families, creates an additional aspect of proceedings with the potential to make social workers feel their position representing the best interests of the child somewhat devalued with parents and the court. Social workers have to establish the legitimacy of their claim that the parents have harmed or may harm their children, since the burden of proof rests with them as the party bringing the proceedings. They therefore have to establish that significant harm has occurred or is likely to happen if an order were not made, in accordance with the test set out in s31 of the Children Act 1989.¹⁸ The Guardian has the role of protecting and promoting the best interests of the child, as does the social worker. While the social work focus on the child's welfare remains constant when the local authority commences care proceedings, the fact the Children's Guardian is so called and is identified as the person representing the best interests of the child may suggest that the social work role is in some way less child focused, while social workers might point out that their role remains the promotion of the child's best interests throughout court process. The focus however appears to shift to evidence relating to parental inadequacies, as they seek to establish that the child has suffered significant harm.

If it is agreed by the parties that the threshold for making a care order has been met, or the court has reached the point of deciding an order may be made, its role moves to determining where the child should live and how they should be cared for. From this point, the rationale for adversarial practice to defend parents' and children's' rights from undue interference by the state becomes less clear.

¹⁴ New guidance covering judges speaking with children in care proceedings was being developed and in draft form but not yet released at the time of writing

¹⁵ *Re D (Children)* [2015] EWCA Civ 2105/409 para 36

¹⁶ *Werner v. Austria* European Court of Human Rights 24.11.1997 § 66 para 217

¹⁷ *Nideröst-Huber v. Switzerland* European Court of Human Rights 29.05.1997 § 30 para 218

¹⁸ *Children Act 1989* available at <http://www.legislation.gov.uk/ukpga/1989/41/contents>

The Family Drug and Alcohol Court (FDAC)¹⁹ is a recent successful experiment with a less adversarial approach that is being extended nationally. Its success includes a reduction in the cost to the public purse in supporting children and families seriously affected by substance misuse.²⁰ The FDAC picks up cases at the point at which it is apparent that parents' difficulties are caused or compounded by drug and/ or alcohol problems. Participation in FDAC as opposed to 'conventional' care proceedings is voluntary. Argument about whether or not threshold conditions for making an order have been met is replaced with questions about whether a further period of professional help might enable parents to parent their children effectively. The court manages therapy, monitors progress and uses its authority and resources to promote change rather than focusing on adversarial debate. However it is important in the interests of justice, as noted above, that parents do not concede the position of the local authority that they have harmed or are at risk of harming their children without having the opportunity to rebut those assertions.

The Overriding Objective, part of the Procedure Rules for civil cases in the English courts, requires courts to deal with cases justly and at proportionate cost and, so far as is practicable, to ensure parties are on an equal footing.²¹ 'Non means, non merit' - based legal aid to parents and children in care proceedings is essential in adversarial proceedings since without it neither most parents nor children would be able to challenge the local authority position, or indeed state their case clearly.²² The Public Sector Equality Duty introduced by the Equality Act 2010²³ protects vulnerable individuals against discrimination. When support is needed to enable a party to participate in the court process, it gives the right to such support as is needed for this aim.²⁴

Adversarial processes place responsibility for testing evidence with the parties. This may be a factor in creating a situation that is very stressful for parents in particular²⁵, but also more generally creates stress and tension. Witnesses must be available for cross-examination,²⁶ including children who give evidence and parents many of whom will be vulnerable

¹⁹ J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at

http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf

²⁰ N Reeder and S Whitehead *Better Courts: the financial impact of FDAC* (Centre for Justice Innovation, 2016) available at <http://www.justiceinnovation.org/better-courts/publications-and-toolkits/better-courts-financial-impact-london-fdac>

²¹ Ministry of Justice, *Part 1 - Overriding Objective* available at

<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01>

²² *Scope of Family Proceedings under LASPO*, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444189/scope-family-proceedings-laspo.pdf

²³ *Equality Act 2010*, available at <http://www.legislation.gov.uk/ukpga/2010/15/contents>

²⁴ *Equality Act 2010 Guidance*, available at <https://www.gov.uk/guidance/equality-act-2010-guidance>

²⁵ J Pearce and J Masson with K Bader, *Just Following Instructions? The Representation of Parents in Care Proceedings* (Ministry of Justice, 2011) available at <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/justfollowinginstructions.pdf>

²⁶ *Family Procedure Rules 2014: 'Power of the court to control evidence'* Part 22 (22.2.1) available at https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_22#IDAMGRKC

witnesses.²⁷ Although children rarely give evidence directly, it is an option and if children meeting judges were to become more constrained so that there were little scope for the child to talk about their wishes and feelings outside the court process, this would be the only way they could do so without going through another person. Giving evidence can add enormously to the level of stress caused by hearings.^{28 29 30} The appointment of a legal representative is necessary to achieve 'equality of arms' in the adversarial process since cross-examination is a skill few parents, and no children, would be expected to have. Legal representatives have an equally important role in less adversarial processes, but it is different by virtue of the fact that responsibility for ensuring all necessary investigations have taken place lies to a far greater extent with the court. Parties do not need a legally trained intermediary to communicate their views, wishes, etc. to the court to the same extent, although for some individual's advocacy and intermediaries will be a key element in enabling participation. Questions then arise as to how such vulnerability is to be defined and provided for in less adversarial proceedings.

In more adversarial courts, judges must be content with the witnesses called by the parties.³¹ In contrast, a more inquisitorial approach permits the judge to question anyone they think would assist them in making a decision about the child's best interests, and to request assessments and reports. Unrepresented parties in a more inquisitorial framework are not in the same position as a litigant in person in a more adversarial trial, since responsibility for finding the truth lies with the judge, not the parties. However, in either system, unrepresented parties lack an informed effective representative who can pick up on and challenge, for example, a partial evidence base, biased reporting of problems, or procedural issues such as unnecessary delay.

Adversarial courts can reduce the duration of conflict, for example, through expecting parties to identify matters on which they are agreed, narrowing issues for resolution by the court. Recent developments in practice in the courts and their mirroring in social work practice should be seen within the context of the reforms that started with the Family Justice Review of 2011 and its aftermath.³² This is a key thrust of the recent Public Law Outline³³, with its emphasis on active judicial case management, fewer expert reports and witnesses to be

²⁷ *Report of the Vulnerable Witnesses and Children Working Group February 2015* available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vvcwg-report-march-2015.pdf>

²⁸ *Safeguarding Survivor* website, available at: <http://survivingsafeguarding.co.uk/>

²⁹ P Freeman and J Hunt, *Parental Perspectives on Care Proceedings* (The Stationery Office, 1995)

³⁰ J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: a review of research* (Family Justice Council / Nuffield Foundation, 2010) available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Parental_Perspectives_final.pdf

³¹ Lord Denning, MR in *Jones v National Coal Board* [1957] 2 Q.B. 55 at para 63

³² Ministry of Justice, *Family Justice Review Final Report* (Ministry of Justice, 2011) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf

³³ For a summary of the PLO and links to relevant materials, see Mueller, M (2014) 'Public Law Outline and public law proceedings materials' *Child and Family Law Quarterly* 15 April 2014 available at http://www.familylaw.co.uk/news_and_comment/public-law-outline-and-public-law-proceedings-materials#.V5I35xw9Xo8

commissioned during the court process³⁴, and more 'front loading' through enhanced preparation of its case by the local authority^{35 36}. Many matters are in practice settled through informal negotiation between parties by advocates outside the courtroom. This expedites the court process, but means that much of what is settled in adversarial proceedings is agreed through a process of negotiation in discussion held in corridors and meeting rooms led by the advocates rather than in court. Little is known about this aspect of court functioning, particularly how the best interests and wishes and feelings of children or parents are taken account of in this process. A more inquisitorial process might expect judges to be involved in such discussions, which have significant implications for the parties, but this would increase judicial workload into a process which currently is an effective means of reducing it so the court can focus on key contested issues.

(A) Court practice and the wider system for protecting children

The approach used by the courts will affect other organisations with which it has regular interaction and is interdependent. Courts and child protection agencies form a larger system with a symbiotic relationship: neither can exist without the other. The public law functions of the FJS only operate effectively with appropriately constructed evidence from the child protection system, and child protection social work can only carry out its child protection function by engaging with the FJS. Social work practice appears to be increasingly adversarial, with an increasing focus on investigation of child abuse and removal of removing children through legal proceedings^{37 38}, and a move away from relationship-based social work towards practice that arguably leads to increasing fragmentation of families, rather than building relationships professional with them and strengthening the relationships within them.³⁹ At the same time, there are initiatives within the wider network of service provision that aim to reduce the need for statutory intervention through a more therapeutic approach to the prevention of the need for compulsory removal of children in the future, the 'Pause' project⁴⁰ being a notable example.

Despite such localised initiatives, and exhortation by Central Government to local authorities

³⁴ *Family Law Week* (Editorial) (2013) 'New Part 25 of FPR introduced to speed up family proceedings' available at <http://www.familylawweek.co.uk/site.aspx?i=ed111495>

³⁵ Research in Practice (2015) *Impact of the Family Justice Reforms on Front-line Practice Phase One: The Public Law Outline* London: Department for Education, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450254/RR478A_-_Family_justice_review_the_effect_on_local_authorities.pdf.pdf

³⁶ J Masson, J Dickens, K Bader and J Young, *The Pre-Proceedings Process for Children on the Edge of Care Proceedings* (Bristol University, 2014) available at: <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/summary.pdf>

³⁷ B Featherstone, K Morris and S White, S (2014) 'A Marriage Made in Hell: Early Intervention Meets Child Protection' *British Journal of Social Work* 44 (7) 1735 - 1749

³⁸ A Bilson and K Martin (2016) 'Referrals and Child Protection in England: One in Five Children Referred to Children's Services and One in Nineteen Investigated before the Age of Five,' *British Journal of Social Work* advance access at *British Journal of Social Work* doi: 10.1093/bjsw/bcw054

³⁹ B Featherstone, S White and K Morris, *Re-imagining Child Protection: Towards humane social work with families* (Policy Press, 2014)

⁴⁰ For further information about this initiative, see the Pause website at www.pause.org.uk

to provide more 'early help' services⁴¹, there is a concerning long term trend towards increasing levels of compulsory removal of children from families.⁴² This output of the English and Welsh social work / court system contrasts with the aims of a family services approach, focused on maintaining the family unit⁴³ although, as with the adversarial / inquisitorial distinction, there is a continuum rather than a divide between the two approaches. The family services approach is associated more strongly with an inquisitorial approach: judges working together with public services to help children through enabling improvement in parental capacity,⁴⁴ rather than monitoring and legitimising the threshold for removal. The 26-week limit to care proceedings⁴⁵ makes it harder for courts to offer parents the chance to change once they enter care proceedings, making the quality of local authority evidence at the outset of proceedings critical⁴⁶. This in turn requires social workers to start collecting evidence of failure early in their contacts with families where court proceedings are possible. There is renewed emphasis by the courts on evidential requirements and thresholds for adoption, Special Guardianship Orders, and use of s20 accommodation.⁴⁷

Concerns have been expressed within the social work profession over its increasingly authoritarian approach to families and the impact this is having on the profession and its values⁴⁸ while it intervenes too often, sometimes too readily.⁴⁹ Conventional adversarial proceedings most often lead to children leaving the care of their parents under some form of order, but not necessarily the order applied for at the outset of proceedings⁵⁰. This may be

⁴¹ Ofsted, *Early Help: Whose Responsibility?* (Ofsted, 2015);

⁴² *Family Court Statics Quarterly October to December 2015*, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518297/family-court-statistics-quarterly-q4-2015.pdf

⁴³ C Waldegrave (2006) 'Contrasting national jurisdictional and welfare responses to violence to children' *Social Policy Journal of New Zealand* 2006 27 pp 57-76

⁴⁴ C Waldegrave (2006) 'Contrasting national jurisdictional and welfare responses to violence to children' *Social Policy Journal of New Zealand* 2006 27 pp 57-76 at p 58

⁴⁵ S14 *Children and Families Act 2014* places a statutory limit of 26 weeks on the duration of care and supervision order proceedings.

⁴⁶ See for example *Re A (A Child)* [2015] EWFC 11

⁴⁷ See for example, *Re B-S (Children)* [2013] EWCA Civ 1146 on the threshold for making a placement order; *Kent County Council v M and K (section 20: declaration and damages)* [2016] EWFC 28, on the use of s20 Children Act 1989, and UK Government Special Guardianship Guidance: *Statutory guidance for local authorities on the Special Guardianship Regulations 2005 (as amended by the Special Guardianship (Amendment) Regulations 2016)* available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503547/special_guardianship_guidance.pdf

⁴⁸ M Mellon (2016) 'Have parents become the enemy in social work?' *Community Care* February 19, 2016, available at <http://www.communitycare.co.uk/2016/02/19/parents-become-enemy-social-work/>

⁴⁹ T Donovan (2016) quoting David Hill, ADCS President, 'ADCS president aims to improve public image of care and end 'formulaic' social work' *Community Care online* 22.04.2016 available at <http://www.communitycare.co.uk/2016/04/22/adcs-president-aims-fix-public-image-care-end-formulaic-social-work/>

⁵⁰ J Harwin, B Alrough, M Ryan and J Tunnard *Changing Lifestyles, Keeping Children Safe: An evaluation of the first family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University,

seen in a positive light: few cases come to court that are not subsequently judged to merit some form of statutory intervention, and a care plan that does not involve the child returning to parental care in the immediate future. On the other hand, the higher rate of family preservation in the Family Drug and Alcohol Courts (FDAC), using a less adversarial approach, suggests some part of the reason for this may lie in the way adversarial courts work.⁵¹ This variation in outcome by route through the legal system is concerning on one level, suggesting as it does that some aspect of adversarial proceedings, as opposed to parental capacity to parent, is inimical to parents' chances of retaining care of their children, or keeping them in the family network. This question about inequity in the wider child protection / FJS system by route is mirrored in concerns over equity by region, with wide variation by geographical area in the number of care proceedings per child population.⁵² Less adversarial approaches may help with this inequity if they can safely reduce rates of compulsory removal through discussion and agreement.

Once the decision is taken by local authority social workers to go to court, social workers and families become engaged in a highly formalised and structured process designed to provide legal safeguards as well as expediting proceedings as far as is consistent with justice. The pre-proceedings stage (sometimes referred to colloquially by social workers as 'the PLO [Public Law Outline] process', reflecting the expectation that this stage will usually lead to court proceedings being issued) starts the process in non-emergency cases. Approximately 75% of all cases entering this stage continue into care proceedings.⁵³

An adversarial system can support children and young people to be heard directly by the court, but it presents barriers that are sometimes insurmountable, especially for young children. Care-experienced young people have expressed dissatisfaction with a system that supports them in meeting the judge hearing their case, but not direct participation: 'To hear a child must mean to hear her or his evidence and if the child/young person is not going to give oral evidence there must be provision for their evidence to be heard as directly as possible without interpretation by the court appointed officers or others'.⁵⁴

2014) available at

http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf

⁵¹ By the end of proceedings, 40% of FDAC mothers were no longer misusing substances, compared to 25% of comparison mothers, and 25% of FDAC fathers were no longer misusing substances, compared to 5% of the comparison fathers, see J Harwin, B Alrough, M Ryan, M and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at

http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf

⁵² Cafcass, *National picture of care applications in England for 2013-14*, available at <https://www.cafcass.gov.uk/news/2014/may/national-picture-of-care-applications-in-england-for-2013-14.aspx>

⁵³ J Masson, J Dickens, K Bader and J Young, *The Pre-Proceedings Process for Children on the Edge of Care Proceedings* (Bristol University, 2014) available at <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/summary.pdf>

⁵⁴ Judiciary of England and Wales *Report of the Vulnerable Witnesses & Children Working Group February 2015*, available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/03/vwcwg-report-march-2015.pdf>

Testimony in court by parents can make all the difference to the outcome of a case as it sometimes ‘...illuminate the underlying realities’⁵⁵ of families’ lives. However adversarial processes purposefully make courts a harsh environment for witnesses: being cross-examined is not an easy experience, however much the lawyers involved would wish to hold back from asking difficult questions. The challenge is enabling child and vulnerable adult parent participation to happen in an adversarial court process, or indeed any process that protects their rights, without being ‘anti-therapeutic’. The situation should improve when draft Practice Directions addressing vulnerable witness testimony are implemented.⁵⁶ The draft guidance covers all children, as well as adults with a learning disability, mental health problems or undergoing medical treatment. If the last category includes those undergoing treatment for substance dependency, the number of witnesses deemed vulnerable could be very large, maybe most of the parents as well as all the children involved in care proceedings.⁵⁷ This raises a question as to whether a system that probably requires special measures to enable most of those affected by its decisions to participate in it is suitable for the task, and if it is not, the question that follows from this is, is there any other approach to judging that might provide similarly robust decisions, while improving accessibility for the participants?

(A) Therapeutic justice and problem solving by the courts: an alternative approach

More adversarial court practice is primarily concerned with due process as fairness, but therapeutic justice (TJ) may be used as a ‘lens’ for looking at the impact of the rules, procedures and roles of lawyers and other players in the legal process and their therapeutic or anti-therapeutic consequences for participants, suggesting other ways of evaluating court proceedings. TJ began in the USA in the 1980s.⁵⁸ It is ‘...a perspective that regards the law ...as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law’s role as a potential therapeutic agent should be recognized and systematically studied’⁵⁹ and ‘...the processes of, and outcomes from, the law are considered in terms of how they impact on the whole person’.⁶⁰ TJ started being

⁵⁵ *A, B, C and F (Children)* [2015] EWHC 3663 (Fam)

⁵⁶ Ministry of Justice, *Draft Amendments to Family Procedure Rules 2016* available at: https://consult.justice.gov.uk/digital-communications/draft-amendments-to-family-procedure-rules/supporting_documents/annexachildrenvulnerablewitnessesfprcdraftrule.pdf

⁵⁷ J Masson, J Pearce and K Bader, *Care Profiling Study* Ministry of Justice Research Series 4/08 (University of Bristol, 2008) available at <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/care-profiling-study-report.pdf>

⁵⁸ D Wexler and B Winick, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press 2000); D Wexler *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Carolina Academic Press, 2008)

⁵⁹ *International Network on Therapeutic Jurisprudence*, available at: <http://www.law.arizona.edu/depts/upr-intj/>

⁶⁰ V Topp *Specialist Courts – The impact upon the individual*, LIV Conference 2002, available at: http://www.communitylaw.org.au/clc_mentalhealth/cb_pages/images/Therapeutic_Jurisprudence.pdf

applied to mental health related legal processes.⁶¹ Since 1989 it has been used in criminal drug and alcohol courts in the USA.⁶² In criminal cases, it is associated with 'problem solving' the causes and consequences of crime, aiming to make justice 'restorative' rather than retributive.

For therapeutic or problem-solving approaches to achieve a positive result, the problem behaviour must firstly be within the control of the relevant person or potentially so. It should be modifiable through some process over which the court can exercise some influence, which involves the court interacting with a wider multi-disciplinary network. Courts taking a problem solving approach '...have an obvious, perhaps superficial, appeal in that they allow decision makers to deal with personal issues through an intersection with service frameworks outside the justice system to develop solutions'.⁶³ The joint court / social work system referred to above is expanded to include therapeutic services such as drug and alcohol services, counselling, mental health services, etc. The potential for justice to be 'therapeutic' is therefore limited by availability of therapeutic services and their capacity to co-operate with the court, which could be a problem in a time of public service retrenchment.

Problem solving courts can '...serve as laboratories for therapeutic jurisprudence, insofar as therapeutic jurisprudence is especially interested in which legal arrangements lead to successful therapeutic outcomes and why'.⁶⁴ TJ is also concerned with personal accountability: holding the individuals to account at the same time as offering support to change.⁶⁵ The person concerned has to agree to work with the court as well, so it is not suitable for everyone. A further caveat is that the potential for a court to have a therapeutic effect is limited if the person at whom its efforts are directed is subject to the control of someone else, who may have an interest in preventing change. Coercive control of one parent by another person is frequently seen in families with child protection problems⁶⁶, and this it is argued should be seen as a serious challenge for courts seeking to use a more therapeutic approach in child protection cases. While it may not make TJ impossible, without sensitivity to the impact of coercive control, it could undermine efforts to work in a more problem-solving way with parents.

⁶¹ B Winick and D Wexler (2003) *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003)

⁶² Hora, P, Schma, W and Rosenthal, J (1999) 'Therapeutic jurisprudence and the drug treatment court movement: revolutionizing the criminal justice system's response to drug abuse and crime in America' *Notre Dame Law Review* Vol 74 Issue 2 pp 439 - 537

⁶³ V Topp, *Specialist Courts – The impact upon the individual* (LIV Conference 2002) available at http://www.communitylaw.org.au/clc_mentalhealth/cb_pages/images/Therapeutic_Jurisprudence.pdf p 1

⁶⁴ B Winick and D Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) at pp 105 - 106

⁶⁵ P Bowen and S Whitehead, *Better Courts: Cutting Crime through Court Innovation* (Centre for Justice Innovation, 2013) available at <http://www.justiceinnovation.org/node/76/>

⁶⁶ NSPCC Information Service, *Learning From Serious Case Reviews* (NSPCC, 2013) available at: <http://www.familylawweek.co.uk/site.aspx?i=ed111495>

FDAC was piloted in England from 2008⁶⁷ and is currently being extended to a number of sites across the FJS. Judicial continuity, fortnightly communication between the judge, the child's social workers and the family, and close co-operation between the court and therapeutic agencies are highlighted as key aspects of the FDAC approach.⁶⁸ FDAC judges 'motivated parents to change their lifestyle and make good use of services on offer, whilst keeping the case on track and being clear with parents about the court's power to remove children from their care'.⁶⁹ No explicit concession is required by the parent that threshold for making a care order is met, but parents have to acknowledge their substance dependency and its impact on their parenting. The court is therefore selective about those it engages with, but parents are selected for problems that are more rather than less severe⁷⁰. Harwin et al. (2014) suggest adversarial care proceedings can fail to motivate parents to change, or get agencies working together. Relationships between parents and social workers are dominated by a process that pits them against each other, which is likely to be more difficult with every re-exposure when there are repeat care proceedings. There were higher rates of family reintegration and lower rates of re-abuse of children who returned to parents' care after FDAC compared with conventional care proceedings, despite the FDAC parents having multiple entrenched difficulties.⁷¹ It is worth noting that FDAC started before the current 26 week limit on care proceedings became mandatory: it will be interesting to see if reducing the time frame affects outcomes.

Feeling that the process of the court was fair may be as or more important to parties than winning or losing. Being heard, being treated with dignity and respect, and perceiving those in authority as trustworthy are associated with satisfaction with the legal process (Daicoff, 2013).⁷² A fair hearing may be delivered within an adversarial system or an inquisitorial one, or be lacking in either, so simply changing to a less adversarial approach does not, by itself,

⁶⁷ J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf at p 3

⁶⁸ N Crichton, K Kershaw, M Shaw and K Daniels (2015) 'FDAC – the facts' *Family Law* July 2015 pp 786- 791

⁶⁹ J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf at p 14

⁷⁰ There were fewer contested hearings in FDAC cases compared with control cases: J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at: http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf

⁷¹ J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014)available at http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf at p 6

⁷² S Daicoff (2013) 'Apology, Forgiveness, Reconciliation and Therapeutic Justice' *Pepperdine Dispute Resolution Journal* Vol. 13 Issue 3 pp 131 – 180 at p 157

guarantee an improvement in perceived fairness of the process, but more adversarial approaches may make it harder to deliver it. Legal representatives are a barrier to direct communication between parties and the judge, which may impede courts' ability to demonstrate respectful attention and concern for parties, even while it underpins the protection of their individual rights. The formality of the adversarial process may reflect the seriousness with which their rights being regarded, but for many parents this is not their perception.⁷³

Daicoff (2005) suggests adversarial law is psychologically unrewarding for professionals, and may lead to 'burnout': she argues for making law a 'healing profession'.⁷⁴ Legal disputes are often fundamentally concerned with interpersonal failures, resolution of which is not assisted by adversarial practice. Further, there is not one 'truth' in many disputes,⁷⁵ and each participant in child protection cases has their own perspective on what constitutes the truth. In adversarial proceedings, the integrity of process and procedural fairness are benchmarks of success, but judgment in TJ is more iterative, the judge drawing on direct communication with other actors and knowledge about the external world (social science knowledge) as well as legal argument and fact.⁷⁶ Social workers preparing for a less adversarial process may have the opportunity to consider the different perspectives and value them, rather than being tied into a position that necessitates undermining the arguments of any that oppose the outcome they seek. It might offset some of the anti-therapeutic impact the adversarial system has on many social workers who engage with it, who have to endure hostile cross-examination and scrutiny of their practice. Exposure of poor practice is important, but the means for doing this might be less devastating for those who are charged with defending the local authority case in court.⁷⁷ Courts perform a vital role in identifying poor practice, but social workers too often '...have been exposed to clever young barristers taking easy points off [them], trying to throw [them] off balance, trying to make [them] feel uncomfortable in court.'⁷⁸ The competitive nature of proceedings plays into aggressive cross-examination by barristers rather than keeping a focus on what is best for the child.

If more adversarial courts rely on parties' self-interest to place all relevant material before the court, they may not be as effective at discovering the truth as is claimed: '...there is an

⁷³ P Freeman and J Hunt, *Parental Perspectives on Care Proceedings* (The Stationery Office, 1995); J Hunt, *Parental Perspectives on the Family Justice System in England and Wales: a review of research* (Family Justice Council, 2010) available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Parental_Perspectives_final.pdf

⁷⁴ S Daicoff (2005) 'Law as a Healing Profession: The "Comprehensive Law Movement"' *Pepperdine Dispute Resolution Journal* 12-01-2005 Vol 6 Issue 1 pp 15 - 63

⁷⁵ S Daicoff (2013) 'Apology, Forgiveness, Reconciliation and Therapeutic Justice,' *Pepperdine Dispute Resolution Journal* Vol. 13 Issue 3 pp 131 – 180

⁷⁶ N Stobbs, *Mainstreaming Therapeutic Jurisprudence and the Adversarial Paradigm — Incommensurability and the Possibility of a Shared Disciplinary Matrix*, PhD thesis 2013, available via SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347810 at p 33

⁷⁷ S Daicoff (2005) 'Law as a Healing Profession: The "Comprehensive Law Movement"' *Pepperdine Dispute Resolution Journal* 12.01.2005 Vol 6 Issue 1 at 51

⁷⁸ J Munby, P (2014) *Show Social Workers the Respect they Deserve*, BASW, available at <https://www.basw.co.uk/news/article/?id=767>

inherent contradiction between the stated aim of truth-seeking on the one hand and the passivity of the judge's role on the other... [It is] commonly accepted by lawyers that the adversarial model is primarily designed to resolve disputes, rather than discover truth.'⁷⁹ Parties and their lawyers engage in moulding 'raw facts' into narratives that can withstand the legal process when tested in court, to win the case for their client, rather than to find the truth.⁸⁰ An inquisitorial approach requires a different approach to the rules of evidence that may permit courts to be more amenable to hearing from vulnerable witnesses directly⁸¹. McGrath (2005) argues attempting to determine of the child's welfare needs through adversarial conflict rather than through the discourse of child welfare decreases the focus on the needs of the child⁸². The focus is on accentuated conflict between the parties, and the role of 'best interests' reasoning is diminished in the effort to ascertain some definitive truth (McGrath, 2005:150).⁸³ Herring (2005) suggests that it is impossible for a court to really work out what is in the best interests of a child anyway,⁸⁴ although this is what the court must attempt.

Some primarily adversarial jurisdictions have been trying less adversarial alternatives for child care hearings for over many years,⁸⁵ including the USA, Canada, New Zealand and Australia. Less adversarial courts typically exist within the wider adversarial court system to address specific issues, such as drug and alcohol related crime, child protection or crime involving people with mental health problems.⁸⁶ Less adversarial approaches aim to provide more therapeutic or less damaging experience of the justice system: the judge does not just hear evidence, but uses the court process as an opportunity to work towards an outcome that serves the interests of the individual, e.g. the child and family, and of society. FDAC marked a new venture in the introduction of a more therapeutic approach in child care cases in England.⁸⁷ The success of this appears to herald further more therapeutic approaches to

⁷⁹ R Finkelstein (2011) 'The Adversarial System and the Search for Truth' *Monash University Law Review* 8 37(1) 135 – 158 at p.136

⁸⁰ R Finkelstein (2011) 'The Adversarial System and the Search for Truth' [2011] *Monash University Law Review* 8 37(1) pp 135 – 158

⁸¹ V Topp, *Specialist Courts – The impact upon the individual* (LIV Conference, 2002) available at http://www.communitylaw.org.au/clc_mentalhealth/cb_pages/images/Therapeutic_Jurisprudence.pdf at p 5

⁸² K McGrath (2005) 'Protecting Irish Children Better' *Judicial Studies Institute Journal* 5:1 pp 136 - 152

⁸³ K McGrath (2005) 'Protecting Irish Children Better' *Judicial Studies Institute Journal* 5:1 pp 136 - 152

⁸⁴ J Herring (2005) 'Farewell Welfare?' *Journal of Social Welfare and Family Law* 27: 2 pp 159 – 171

⁸⁵ L Edwards and S Baron (1995) "Alternatives to Contested Litigation in Child Abuse and Neglect Cases," *Family and Conciliation Courts Review* 33(3) 275 - 285

⁸⁶ M King, A Freiberg, B Batagol and R Hyams, *Non-adversarial Justice* (The Federation Press, Annandale, NSW, 2014); The Law and Justice Foundation (Australia), *On the edge of justice: the legal needs of people with a mental illness*, available at: <http://www.lawfoundation.net.au/ljf/app/084A39B598CAE7E8CA25718E000AB0D5.html>.

⁸⁷ J Harwin, B Alrough, M Ryan and J Tunnard, *Changing Lifestyles, Keeping Children Safe: An evaluation of the first Family Drug and Alcohol Court (FDAC) in care proceedings* (Brunel University, 2014) available at http://www.nuffieldfoundation.org/sites/default/files/files/FDAC_May2014_FinalReport_V2.pdf

justice being introduced to the FJS.⁸⁸

FDAC is available to a minority of parents in care proceedings who meet its criteria: parents with addiction problems where it appears likely that a care order could be made and where parents agree to taking part in the FDAC process instead of conventional court proceedings. This reflects a comment by Stobbs (2013): ‘...a judge who sets out to exercise a significant therapeutic function is likely to be doing so in a specialist court or jurisdiction, outside the mainstream court system, and arguably, outside the adversarial paradigm itself. To some extent, this work is tolerated but marginalised’.⁸⁹ What we appear to be seeing at present is a slow but noticeable mainstreaming of more therapeutic / less adversarial approaches to justice in the FJS, as FDAC is rolled out to more geographical areas,⁹⁰ and a ‘settlement conference’ model, described below, is being tried in two English Family Justice Board areas⁹¹, in an approach similar to a Canadian model, discussed below.

Procedural rights are not central and privileged in problem solving approaches in the same way they are in an adversarial system. TJ is premised on the belief that people are more likely to feel better at the end of a less conflict-based process but, as noted, there is no guarantee that parents would find a more inquisitorial approach any fairer than an adversarial one. Nolan⁹² points out that approaches that work in one culture do not always transplant readily: the cultural roots of law are very different in different places. What seems fair in France or Denmark may not seem so in a society with a long history of adversarial practice since judicial procedures reflect society’s ‘fundamental values and sensitivities’.⁹³

(A) Settlement conferences: an alternative approach in child protection cases

Settlement conferences (SCs) are in use in Canada in public law / child protection cases,⁹⁴ and are currently being tried out in England. There are pilot projects running in Plymouth and

⁸⁸ Sir J. Munby, P, *The President’s address to the Family Law Bar Association, 26th February 2016*, available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/pfd-speech-family-law-bar-assoc-2016.pdf>

⁸⁹ N Stobbs, *Mainstreaming Therapeutic Jurisprudence and the Adversarial Paradigm – Incommensurability and the Possibility of a Shared Disciplinary Matrix* (PhD thesis, 2013) p1, available via SSRN website: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2347810

⁹⁰ N Crichton, K Kershaw, M Shaw and K Daniels (2015) ‘FDAC – the facts’, *Family Law* July 2015 pp 786- 791

⁹¹ C Goodman, *Moving Forward in Family Justice* (Cafcass, 2016) available at: http://adcs.org.uk/assets/documentation/Cafcass_moving_forward_in_family_justice_Apr_2016.pdf

⁹² J Nolan, *Legal Accents, Legal Borrowing: The International Problem- Solving Movement* (Princeton Press, 2016)

⁹³ W Kiddane (2012) ‘The Inquisitorial Advantage in Removal Proceedings’ *Akron Law Review* 45 pp 647- 718

⁹⁴ *Guidelines for the Holding of Settlement Conferences in Family Law Proceedings* (Family Law Rules) (April 2014) (Canada) available at: http://www.court.nl.ca/supreme/family/guidelines_for_holding_settlement_conferences.pdf para 1

Liverpool, and if they are successful, they may be rolled out much more widely⁹⁵. The aim of Canadian settlement conferences is to allow parties to meet before a judge, in private, to try to reach agreement and to ‘...promote harmonious relationships among the individuals involved, in the best interests of the child and the child’s rights’.⁹⁶ SCs are voluntary and can only take place if all parties agree. Ideally they happen early in the legal process, but can be made at any time.⁹⁷ The process is conducted relatively informally. Reports are required, but only a short synopsis, with summaries of expert reports. The SC judge acts as a mediator as opposed to an adjudicator. Parties are expected to be present: if children are not present, their representatives will be. Lawyers for all parties will usually also be present. Proceedings are confidential and will not be shared with the court, if the case should need to return to court: ‘...(s)tatements made by counsel or the parties are confidential and without prejudice and cannot be used for any purpose other than to facilitate a settlement and they cannot be referred to at trial, if a trial should take place, except where permitted by law.’⁹⁸ All briefs and submissions are returned to the parties and any notes or recordings destroyed when the process concludes. The judge presiding over the SC is a non-compellable witness after the conference is concluded. Parties should feel able to speak freely, knowing that this will not affect evidence put before the court should the SC fail and the case return to the ‘ordinary’ court process. The informality of the process helps to reduce obstacles to child participation. Any agreement must be in keeping with the child’s interests and principles of child care law, and any agreement confirmed by the judge is legally enforceable. Failing an agreement, the conference ends and the (contested) case returns to court before a different judge.

Adversarial evidential processes (such as cross-examination) are not required in SCs, so parents and children have more opportunity for less stressful direct participation. Vulnerable child witnesses have a right under Article 12 of the United Nations Convention on the Rights of the Child⁹⁹ to have their support needs assessed so they can participate if they wish to do so, if the process is to be fair, especially since SCs can lead to enforceable agreements. Monitoring compliance with agreements after the SC process ends is a matter of some concern. Children subject of any agreements endorsed by a court will have experienced, or been at risk of experiencing, significant harm so robustness of monitoring after the SC process is essential. To be effective, arguably parents would have to give agreement that agencies may share information about them as well as about the child. One might consider

⁹⁵ C Goodman, *Moving Forward in Family Justice* (Cafcass, 2016) available at: http://adcs.org.uk/assets/documentation/Cafcass_moving_forward_in_family_justice_Apr_2016.pdf

⁹⁶ Court of Quebec (no date) *Settlement Conference in Youth Protection Cases* available at: http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_CRAjeunesseAnglaisFonct.html

⁹⁷ Court of Quebec (no date) *Settlement Conference in Youth Protection Cases* available at: http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_CRAjeunesseAnglaisFonct.html

⁹⁸ Court of Quebec (no date) *Settlement Conference in Youth Protection Cases* available at: http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_CRAjeunesseAnglaisFonct.html at para 15

⁹⁹ *United Nations Convention on the Rights of the Child*, available at: http://www.unicef.org/crc/files/Rights_overview.pdf

the role of Independent Reviewing Officers (IROs)¹⁰⁰ in reviewing care plans: they have the power to seek independent legal advice if they have concerns about implementation of care plans, and may consider taking back to court any case in which the local authority has failed to respect the child's rights, for example their right to family life, but anecdotally these powers appear to be used very infrequently. Systems for monitoring compliance and supporting continued progress would need to be robust and closely monitored for effectiveness.

(A) Time for change in the family court

The desirability of change in the FJS has been discussed over a number of years. In 2011, Sir Nicolas Wall P stated: 'There are times when the adversarial system is inevitable. For example, if you have to have a finding of facts, then you have to have the two cases put before you and decide between them... We have long recognized that in many family law disputes, particularly relating to children, the adversarial system is unhelpful'.¹⁰¹ His observation at the time was that judges in the FJS were moving away from inquisitorial practice: 'Judges as case managers in public law cases are taking a much more adversarial role... the difficulty is, what is the alternative? Is the judge to become a French inquisitorial judge, who gets off the bench, goes round and opens the fridge and has a drink with the child in the home?'¹⁰²

The possibility of making fundamental changes to such a long-entrenched adversarial approach to the legal system appeared slim just a few years ago, but things have changed even since 2011. Financial retrenchment has led to questioning the value of all public bodies: what they provide, what they cost, and what more they might offer, especially if it saves money. An approach to justice that enables more children to remain within their families at lower cost in terms of both court time and the cost of caring for them is therefore attractive. In any case, it is argued that the court's objective of identifying and achieving an outcome that represents the best interests of the child, and the Local Authority's duty to act in the child's best interests even when notionally opposed to the parents, has always slightly compromised the adversarial approach in family proceedings.

Hoyano (2014) suggests the idea of a fair trial in European jurisprudence is restrictive, focusing on procedure rather than achieving a just result;¹⁰³ both, though, are clearly essential. The same is true for child protection social work, too: following procedures is not enough, there has to be a commitment to achieving a therapeutic outcome for children and families, and a system that promotes pursuing therapeutic work and improvement in family

¹⁰⁰ J Dickens, G Schofield, C Beckett, G Philip, and J Young, *Care Planning and the Role of the Independent Reviewing Officer* (University of East Anglia Centre for Research on Children and Families, 2014) available at <http://www.familylawweek.co.uk/site.aspx?i=ed111495>

¹⁰¹ *House of Commons Justice Committee: Government's proposed reform of legal aid* Third report of session 2010 – 11, 7 Feb 2011 Vol. II London TSO 2011 Question 148

¹⁰² *House of Commons Justice Committee – Government's proposed reform of legal aid* Third report of session 2010 – 11, 7 Feb 2011 Vol. II London TSO 2011 Question 151

¹⁰³ L Hoyano (2014) 'What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' *Criminal Law Review* January 3, 2014 pp 4-29 Oxford Legal Studies Research Paper No. 01/2014

systems that put children at risk of harm. The wider courts-plus-child protection social work system needs to be considered as a whole system with two interdependent components, not two independent systems that collide when parental care fails. Changes being signalled in the family justice system of England and Wales will impact on social work, since the way social workers prepare for engagement with the legal system is determined in large part by the characteristics and modus operandi of the courts. If the courts begin to work in a less adversarial, more therapeutic way, social work will have the opportunity to re-think practices developed over decades of engagement with the more adversarial process.

There might be grounds for a note of caution when considering the very high rates of success claimed for less adversarial approaches, for example, up to 95% success rate for SCs in British Columbia¹⁰⁴. It might be questioned how feasible it is to safely divert large numbers of children who might have been removed from their families under traditional adversarial proceedings to remain with their families. A robust mechanism will still be needed under any less adversarial approach to identify families whose children cannot safely live with them under any arrangement that can be arrived at by consensus. Additionally, if 'success' is defined as the family leaving the court / formal decision making process without the necessity of making a court order, this is procedurally highly successful, but the true test is whether the process has achieved a lasting improvement in the life of the children concerned, and this is much harder to ascertain than figures relating to the outcome of the court / hearing process itself. Recent concern over the durability and suitability of some Special Guardianship Orders provides a good illustration of this point¹⁰⁵. While a decrease in the number of children removed from their families in favour of other safe arrangements would be welcome, a landslide reduction in court orders would give cause for concern, given what we know about these families.¹⁰⁶ This is especially so if there is any chinks in the arrangements for support and monitoring after the court-led problem solving process ends, especially if families are discharged from support and monitoring within a short period of time, as seems likely in the current environment of public service retrenchment.

It seems highly unlikely that the adversarial process will disappear altogether, since whatever new developments there may be in the future, there will still be families and situations of high conflict where the protection of individual rights under an adversarial system offers safeguards against abuse of power by local authorities and refusal to engage on the part of parents. When compulsory removal of a child without parental consent is being considered, the rights-based procedural safeguards of adversarial practice may be always be seen as necessary, especially when parents are unable to accept grounds for

¹⁰⁴ C Goodman, *Moving Forward in Family Justice* (Cafcass, 2016) available at http://adcs.org.uk/assets/documentation/Cafcass_moving_forward_in_family_justice_Apr_2016.pdf

¹⁰⁵ Department for Education, *Special Guardianship review: report on findings* (Department for Education, 2015) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487243/SGR_Final_Combined_Report.pdf

¹⁰⁶ J Masson, J Pearce, K Bader with O Joyner, *Care Profiling Study, Ministry of Justice Research Summary* (Bristol University, 2008) available at <http://www.bristol.ac.uk/media-library/sites/law/migrated/documents/care-profiling-summary.pdf>

concern, or unable to engage freely in a process of planning for change. The expectation that cases are concluded in 26 weeks presents a challenge for a therapeutically-oriented approach, too as noted in relation to FDAC: change after a long period of difficulty is not quick, and personal change takes time to become securely embedded. There is a risk that such short intervention, relatively speaking, will leave parents without the spur that made them engage in the process of change too early: some level of relapse is inevitable.

(A) Conclusion

Sir James Munby, P, recently stated, 'The family court must become, in much of what it does, a problem-solving court.'¹⁰⁷ It was noted at the start that some believe that social work has been pushed or has fallen into increasingly adversarial practice with families, reflected in increasing numbers of children being involved in care proceedings.¹⁰⁸ Whether this is because of increased anxiety about public and political responses to cases of children harmed by their carers, or because austerity measures are making it more difficult to do preventative 'family service' social work with families, or because the family court is expecting certain kinds of evidence or a mixture, practice appears to have shifted towards more compulsory interventions with families. It is impossible to say how far this is the effect of an overburdened court system reflecting pressure back at local authority social work, requiring that evidence 'against' parents be prepared ever more comprehensively at the outset of proceedings, or due to economic pressures on society and resource limitations, or due to some other reason. However, the legal and social work aspects of protecting children are elements in a larger interdependent system in which both influence the other, and stress in either system is likely to have negative consequences for the functioning of the other. The family court has adapted to rising numbers of applications by reducing the amount of time cases take in court, and raising expectations concerning 'timeliness' of assessments. This prevents the anti-therapeutic effect of children waiting a long time for the outcome of the case, but reduces scope for the court to use the proceedings for exploration of the complex social problems in which families are often embedded, or as a last opportunity for parental change.

In less adversarial proceedings, judges can talk directly with children, parents, social workers, Children's Guardians and other experts. The truth, or truths, of the situation can be seen through a variety of 'lenses': that of the court, seeking to balance evidence to support a fair disposal, but this is achieved through discussion rather than the exigencies of witness testimony. This process of 'illuminating the underlying realities' of family life through focused discussion means that judges become an active player in the process of 'creating the narrative' that describes the child, the family, their views and professional perspectives in a way that is not possible when they are relatively passive adjudicators in adversarial courts. This is arguably a new (to England) and different kind of responsibility from the responsibility

¹⁰⁷ Sir J Munby, P, *The President's Speech at the Annual Dinner of the Family Law Bar Association*, 26 February 2016, available at http://www.jordanpublishing.co.uk/practice-areas/family/news_and_comment/the-president-s-address-at-the-annual-dinner-of-the-family-law-bar-association-26-february-2016#.VzYPwRw9W-g

¹⁰⁸ Cafcass, *Care Applications in 2016*, available at <https://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/care-demand-statistics.aspx>

that traditionally accompanies reaching judgment in more adversarial proceedings. It places new demands on judges, who have to engage with families in previously impossible ways, from which they have traditionally been both barred and shielded.

A wider change in family court practice has the potential to stimulate a rethinking of child protection practice by local authority social workers as well as by lawyers and the court. As introducing Family Group Conferences¹⁰⁹, increasingly widely used since the introduction of the PLO¹¹⁰, has encouraged social workers to rethink what wider families might offer vulnerable children, so changing the way the courts respond to parents and children could encourage a different way of thinking about removing children from parents. However, increased interest in engaging extended families in caring for vulnerable children has in the recent past led to concern about the robustness of arrangements for assessment and monitoring of arrangements made for some children¹¹¹, and it is important to avoid a repeat of this process of engagement and concern, then possible retrenchment. It is also important to be concerned about the possibility of under-investment in the substantial support services that will be needed for more very vulnerable children remain safely with their parents, or within the extended family.

Now is an opportune time to think again about the therapeutic and anti-therapeutic impact of what courts and social workers do in the child protection system: to children, parents, and other professionals as well. We are taking increasing numbers of families to court to seek removal of their children: a more court-based problem solving approach may offer opportunities to have more therapeutic, less conflict-ridden, more inclusive discussions about alternatives to removal. At the same time, if more less adversarial / more therapeutic approaches are to be introduced more widely in the expectation that this will lead to faster court processes, higher parent and child satisfaction, or fewer non-consensual child removals, or all of these, then good continuing support services for families and robust monitoring must be key to child safety and longer term success. This article has focused on two approaches to less adversarial proceedings in child care cases: FDAC and SCs, but they do not represent the totality of less adversarial approaches, and there may be other approaches that could be explored for their potential transferability to the FJS / UK social work context and their potential value. The FDAC experiment with less adversarial justice in the FJS showed very positive results: it is to be hoped that similar success will be seen in any other 'therapeutic justice' initiatives.

Legal systems are never entirely adversarial or inquisitorial. A combination of economic necessity and pressure on the courts together with recognition of the disastrous effect on children of waiting for many months or even years for a solution to legal disputes about their best interests have driven changes that have led to judges playing a far more energetic role in managing the court process. This more active role is associated with introduction of a

¹⁰⁹ Family Rights Group, *Family Group Conferences* (Family Rights Group, 2016) available at <http://www.frg.org.uk/involving-families/family-group-conferences>

¹¹⁰ Family Rights Group, *Report on the Impact of the Public Law Outline on Family Group Conference Services in England and Wales* (Family Rights Group, 2009) available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Report_on_the_impact_of_the_PLO.pdf

¹¹¹ Department of Education, *Special guardianship review: report on findings; Government consultation response* (The Stationery Office, 2015)

more inquisitorial approach, and giving the courts an impetus towards an arguably more therapeutically oriented approach to the process of resolving children's care cases.

A major challenge is that this change is being introduced at a time of austerity in public services. Parents and children need high levels of support to participate in the process, and support for parents and children alike involves expenditure, whether on lawyers or other professionals with specialist skills. Parents subject to domestic violence and other forms of coercive control need particular care and attention paid to their needs, as do parents with learning disabilities, mental health issues or other factors that could impact on their ability to participate. Another challenge is making sure that, whatever the outcome of the legal process, there are sufficient safeguards in place to ensure that plans made are monitored and children remain safe. While a more inquisitorial approach has arguably been needed in child care cases for many years, it is vital that we monitor carefully the effects of these changes to the courts' approach, especially when budgetary concerns are part of the driving force behind the introduction of innovations - even if they are primarily motivated by a wish to reduce conflict, make justice more 'therapeutic', and identify more humane ways of solving the problems faced by some of the most vulnerable children.