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LIFE AFTER NORGROVE

Sir Nicholas Wall

A Paper by the President of the Family Division for the Plymouth Law Society 25 November 2011

1. I would like to make some preliminary observations. The first is that I am very honoured to be asked to give this lecture. I am very conscious of the distinction of my predecessors, and particularly of the fact that the first lecture was given by that polymath Lord Bingham of Cornhill.

2. My second and third observations are by way of apology. As President of the Family Division, I am currently absorbed by the Family Justice Review. I fully appreciate that this may not be the area of your expertise, your study, or even your interest. Its importance to the family lawyer, however, is very great, and the timing of the lecture falls between its delivery and receipt of the government's response. I fear, therefore, that it is inevitable for this lecture to address it.

3. Thirdly, I have struggled to find any connection between the theme of my lecture and the Pilgrim Fathers. For this I can only apologise.

4. We meet at a time of considerable change and some uncertainty. As I have already indicated, we now have the final report of the Family Justice Review, although we do not have the government's response. What we do know is that the government proposes to remove legal aid and advice from scope in most areas of private law family work, and to rely on ADR (Alternative Dispute Resolution) in general, and mediation in particular, to resolve most private family law disputes.

5. Quite how this will work out, I cannot foresee. I have grave anxieties for the future of the legal profession so far as family work is concerned. Parties at the point of relationship breakdown need sound advice: they will, of course, get it from mediators, but what proportion will get it, or be in a position to carry mediation through?

6. I fear, therefore, a substantial migration from the profession. I worry about young people coming in to the profession to undertake family law.

On the subject of private law family work I remain deeply sceptical that the government's decision to remove legal aid and advice from nearly all private law family work will do anything to improve the situation. I am troubled, for example, by the fact that we had the Bill well in advance of the Review.

7. We are undoubtedly going to have more litigants in person. Whatever else they do, they slow the system down. There is, it seems to me, an irony in the fact that the Private Law Programme – by means of which people are required to engage with the court system – has been very effective, or so it would appear, in steering parents away from litigation. You go to a FHDRA (a First Hearing Dispute Resolution Appointment): from that you are sent to a Parent Information Programme or mediation or some other form of ADR is suggested. If you cannot reach agreement, then you litigate.

8. All this means, as the FJR recognises, that the Family Justice System – in terms of cases that have to be litigated - gets the intractable disputes. And these are the cases which we are going to have to deal with without the help of lawyers. The inevitable result, in my view, assuming the system copes, is that cases will take longer both to try and to get on. The system will simply be unlikely to be able to deliver difficult decisions within an acceptable time-frame.

9. I have been copied into a dispiriting Email correspondence between DFJs about litigants in person. The demise of public funding will lead not only to an increase in LIPs – it will also in practice, I think, mean the end of the hair strand test and the DNA sample. Experts may be unwilling to write reports at the rates prescribed. We are going to be left to decide difficult cases without the help on which we currently rely.

10. I am also worried that the absence of lawyers in sensitive cases involving sexual abuse may lead to the alleged “victim” being cross-examined by the alleged “perpetrator”. Such a situation is forbidden by statute in criminal law. There is no such protection for the victim of sexual abuse in the family justice system.

11. I am in favour of mediation and ADR. I have long been of the view that adversarial litigation is not the best method of resolving family disputes. Frequently, parents who litigate over their children take the opportunity to revisit the battles of the relationship, using the children as the battlefield and the ammunition. So please do not think that I am opposed to ADR or Mediation.

12. My understanding of mediation is that mediators do not give advice: they rely on lawyers for that. My fear is that even with a modicum of legal advice being available as part of the publicly funded mediation process, the numbers seeking to avail themselves of mediation – or who are suitable for it – will be small, and that the FJS will end up with a wealth of cases, all difficult, most involving litigants in person and a system which is less satisfactory and slower.

13. However, I recognise that there is no money, and we will have to do our best. If the system comes to a halt, we will have to say why. We shall see.

The Family Justice Review

14. We now have the FJR's recommendation, although we do not as yet know which recommendations the government will accept or reject. There were, I am told some 675 responses to the consultation on the Interim Report. Two members of the panel came to the Family Justice Council's Annual Conference at Dartington at the end of September and a number of resolutions from the conference were forwarded to the panel.

15. I propose to address a number of issues in this paper. I also wish to make it very clear where I stand, and the changes which I see as required.

16. First, I remain of the view that the FJR is to be welcomed. As I said in my Press Release when the Interim Report was published I particularly welcomed the report's recognition that family justice has hitherto not been given the prominence it deserves. I also welcome the Report's recognition of the important status of family justice and that the issues faced by the family justice system are "hugely difficult, emotional and important" I agree that tribute should be paid to the dedication of all who work in the system.

17. In both the public and the private law spheres, I welcome the Report's emphases on proactive case management by judges and on judicial continuity. These echo guidance which I have recently given. I remain of the view, however, that if the judiciary is to implement the Report's recommendations, it will need to be given the administrative freedom and support from the Ministry of Justice and HMCTS in particular to do so. In other words, judges must take ownership of the cases assigned to them, and must be a position to list such cases swiftly when they are ready for hearing.

18. I remain of the view that the Report offers the judiciary (including the magistracy) the opportunity to play its full and critical role as a part of the inter-disciplinary process which is family justice. That opportunity is to be welcomed.

19. Inevitably, I am speaking from a judicial standpoint but I hope I am acutely conscious that family law is multi-disciplinary, and that without cohesion between the disciplines, the system will fall apart. I chair the national committee of the Family Justice Council, and was previously a member of the President's inter-disciplinary committee. I was also the only judge on the Lord Chancellor's Advisory Board on Family Law and chaired its Children Act Sub-Committee.

20. Much of what follows reflects what I said to the National Committee at Dartington last weekend. I make no apology for that.

21. I believe that the FJR offers both us and the government an opportunity to reform the Family Justice System which is unlikely to be repeated – certainly in my professional life-time and, I anticipate, in the profession life times of many of us. It is, accordingly, an opportunity to be seized. Reform and change are necessary. The cultural change necessary for the judiciary is immense, and not to be under-estimated.

22. At the same time, the role of the judiciary is critical to the success of the FJS. For example, my view remains that for as long as the State empowers the removal of children from their birth families into care and adoption, the decision to effect that removal has to be taken - on all the available evidence - by a third party who has no personal engagement in the process save that of ensuring that it is fairly and efficiently

carried out. Such decisions, which depend upon an objective evaluation of all the evidence in each case, cannot be taken by anyone with an interest in the result – for example, by local authorities. These decisions have to be taken by judges and magistrates.

23. The Judges of the Division made a number of other points to the Panel, all of which I endorse. Thus, we emphasised the role of the guardian, the tandem model, the preservation of which we regarded as extremely important. The guardian is the child's best protection against inadequate or inappropriate social work. This is a point the FJR has endorsed. If CAFCASS is to be reformed, it is for government to do so. The FJS plainly needs a welfare service, and cannot function without one. CAFCASS or its replacement must provide a service which truly represents children and safeguards and promotes their welfare needs. Although centrally funded, and carrying out nationally agreed measures any welfare service needs, in my view, to be essentially a local service, albeit with national standards, meeting local needs. Hence my strong encouragement of local agreements and local discussions between the local branch of CAFCASS and the local judiciary.

24. I greatly welcome the FJR's conclusion that the Children Act 1989 (the Act) is not in need of substantive reform and should remain in being. However, if the process for making care orders remains a legal one, it is essential that parents and children retain the right to good quality legal representation.

25. There is an important place for the legal profession in family justice. Family lawyers, in my experience, do not prolong cases or cause undue expense.

26. There needs to be flexibility in the system which enables each case to be heard at an appropriate level. Hitherto, all care cases have had to enter via the Family Proceedings Court (the FPC). I am pleased that the FJR sees a single point of entry as important. The local district judge in the county court – if need be assisted by the FPR legal advisor - is a more effective gatekeeper, and is in a better position to allocate (up or down). The anxiety that the FPC will be starved of work is not, in my judgment, made

out and can in any event be catered for – as I have said - by the legal adviser being involved in the allocation process.

27. It needs to be recognised that some cases can be dealt with speedily and some simply cannot. Family law is multi-disciplinary. There are some cases which are highly complex and in which a multiplicity of disciplines is involved. If cases are to be made subject to time limit – and 26 weeks is suggested - there is a strong case for an explanation to be made - in public – when a case takes more than a given time.

28. If the process generally is to be accelerated, the whole system (judges and magistrates included) must be more accountable. This can be achieved in a number of ways, for example the imaginative use of local performance groups, who can be given clear and objective methods of measuring each stage of the care process. LPIGs, as they are known, are already in being. I am encouraging judges to sit on them, or even to chair them. If the process of care proceedings is to be improved, it is essential that judges – and other disciplines - know what they are doing wrong.

29. On any view, proper statistics must be collected and made public by HMCTS or some other public body. There must be a proper IT system. One of Norgrove's constant refrains is that there are no "numbers". One DFJ complains to me that he lacks the basic information to know how he and his fellow judges are coping with their difficult workload.

30. If the Public Law Outline – the judges' way of handling care cases - is demonstrated not to be working in any particular respect, it can and should be changed. Competent social work (and the long term oversight of children in care) is critical to the success of the care system. Anything that the government can do to raise the standing of the social work profession would be welcomed by the judiciary. The recommendations of the Munroe reports are to be welcomed. It is, however, essential that the local authority goes into proceedings having conducted all necessary enquiries and able to prepare a care plan as directed by the court. (section 31A(1) of the Act).

31. So far as private law proceedings are concerned, the Revised Private Law Programme with its effective First Appointment Dispute Resolution Appointment (FHDRA) should be retained. encouraged and carefully monitored.

32. Parents should be encouraged to resolve their disputes by agreement, conciliation or mediation as appropriate. The Pre-action Protocol on mediation should be monitored carefully by HMCS.

33. Judges should make every effort to ensure judicial continuity in those cases which continue to come before the court. Full use should be made of parenting education programmes and the panoply of remedies provided by contact activity directions under section 11A to P of the Act.

34. These were the major considerations which the Family Division judges urged on the Review Term. Most of them are reflected in the final report. Let us now turn to look at some of the recommendations in greater detail.

A Unified Family Court as Proposed by the FJR

35. Three immediate points should be made. Firstly, the Family Procedure Rules (the FPR) have been deliberately written so that each court exercising jurisdiction over children is subject to the same set of rules. We thus have the mechanics of a unified system.

36. Secondly, co-location with the FPC should be achieved wherever possible. The benefits of co-location are numerous. Apart from ease of administration, justices have the opportunity to see professional judges in action, therefore greatly enhancing their court room skills. In Manchester, for example, all the outlying FPCs now sit in the Family Justice Centre in the centre of Manchester. I have sat as a JP in Manchester and experienced the improvement. This means, amongst other things, that cases can be transferred swiftly up and down, and the legal advisers in Manchester can concentrate on family work. Some do nothing else. All this makes for greater efficiency.

37. Thirdly, however, it is crucial that judges remain judges and do not become administrators. One of the overriding fears about a unified family court is the effective disappearance of the High Court Bench. I am pleased to see that the Final Report of the FJR goes out of its way to recommend the continued existence of the High Court Family Division. When the Interim Review's proposal was put to the Judicial Executive Board (comprising the Lord Chief Justice, the Heads of Division, the Senior Presiding Judge and others) this was one of the principal anxieties.

38. I was clear that this was not the Review's intention, as has now been proved to be the case. I fear, however, that at a time of financial astringency, the government may be reluctant to create a new structure for Family Law which may well lead to copycat applications from other jurisdictions. It needs to be remembered that there simply is no money.

39. It also needs to be remembered that family justice is as much part of the administration of justice as civil and criminal justice. The ultimate decisions in respect of children, as I have already made clear, are, and constitutionally have to be, made by judges. Only a judge can decide whether a child should be placed into care or with which parent a child should live. No outside service can take such decisions.

40. The final report of the FJR has adhered to its proposition that a Family Justice Service should be created. As I say, we await the government's response. But even with the adherence to its recommendation of a new Family Justice Service I suspect that the government, keen above all not to spend money, may not implement the recommendation – at least in any way other than the purely interim. It is partly at least for this reason that I prefer the proposal approved by the Judicial Executive Board and favoured, inter alios, by Ryder J (whom I have appointed the Judge in Charge of Judicial Modernisation) namely the creation of a *Family Business Authority* (FBA). What follows is an outline.

41. The background, as well as where we are, both need to be taken into account. Since 1 April 2011, when HMCS and the Tribunal Service were merged, the courts have been administered by HMCTS. Whilst an agency of the Minister of Justice (MoJ), HMCTS is a partnership between the Lord Chancellor, the Lord Chief Justice and

the Senior President of Tribunals. It has an independent Board whose objectives are to deliver the aims of the Lord Chancellor and the Lord Chief Justice. The relationship between the Lord Chancellor and the Lord Chief Justice is set out in a Framework Agreement which seeks carefully to balance the independence of the judiciary with appropriate control by the executive of resources and accountability to Parliament for the use of those resources.

42. I acknowledge that judicial independence is something of a war horse which is often wheeled out inappropriately. But here it is a matter of very significant constitutional importance as one example of the embodiment of judicial independence, the listing of cases has always been a judicial function. On a day to day basis it is carried out by HMCTS on behalf of the judge. No outside service can decide when cases should be listed. I shall come back to this point later in this paper.

43. I am persuaded that setting up what would amount to a new independent bureaucracy outside HMCTS, whether to bring coherence to the family justice system or negotiate funding with HMCTS, would not be cost-effective nor would it benefit family justice (or the administration of justice in general) in the long term. Whilst I accept that there should be significant structural improvement, I take the view that the fundamental problems are cultural, and that they will only be solved by cultural change. This, again, is a point to which I shall return.

44. In my view, the important changes rightly identified by the Interim Review can take place sooner and with less cost within the newly created HMCTS. This would – in due course and after, no doubt, appropriate consultation and necessary statutory change - involve CAFCASS as the provider of advice and services to the court moving from the Department for Education (the DfE) to HMCTS (not to MoJ as the Review suggests).

45. The proposal which we have put to Norgrove – and which he has acknowledged as one of the possible models - is that a *Family Business Authority (FBA)* be set up, which would be the counterpart of the Civil Business Authority - which already exists within HMCTS). The *FBA* would likewise operate within HMCTS and the existing Framework Agreement between the Lord Chancellor and the Lord Chief Justice.

It would, among other things oversee the operational functions listed in the Interim report and take as its broad strategic objective the policy aims therein set out.

46. The FBA could be chaired by the most senior HMCTS director with responsibility for family justice (who is a member of the HMCTS Board), with members from the judiciary and HMCTS: it would have in place the mechanisms to deliver the changes sought and would help me lead a cultural change by judges regarding case management; it would play a full role within HMCTS in deciding the family budget as well as commissioning support services for the family courts. Equally, it might over time be possible to bring mediation services, expert advice services and the representation for children within the enhanced HMCTS.

47. In addition, it would co-ordinate interdisciplinary induction training and consideration of reviewing processes across agencies and plan and oversee implementation of major changes and initiatives.

48. My view, accordingly, is that such a model would be consistent with the leadership, management and coordination of civil justice and, to the extent that they are assisted by their Magistrates' Business Authority, the business of the magistrates. It would ensure that the family jurisdiction continues to be considered within the wider judicial context and that the use of resources is maximised. The responsibilities of the Senior Presiding Judge would not be compromised, as they are by his suggestion that Family Division Liaison Judges (High Court judges who oversee the work of family work on different circuits). The *FBA* could be – and indeed is being - set up almost immediately and at virtually no cost. It could begin immediately to introduce some of the changes envisaged by the Review.

49. In short, I believe this approach builds upon what is presently happening within HMCTS and amounts to a more realistic and cheaper means of achieving the objectives set by the Review. I suspect that David Norgrove and his terms have not fully appreciated the re-organisation there has been within HMCTS and it remains my view that it is not currently practical to create a fresh organisation outside.

A Specialist Judiciary

50. I am in no doubt that hearing family cases and cases involving children requires a special skill, and that this skill is at its most effective when regularly used. I am very clear that the days of the judge who only dabbles in the work are over. Judicial continuity and proper case management are simply impossible for the circuit judge who, for example, only sits to hear family case for a few weeks a year.

51. Like the FJR, I am therefore clear that we need a judiciary which spends a great deal of its time hearing family cases. I am, however, opposed to any judge having an unvarying diet of family work unless that is the judge's personal choice. I personally spent eleven years as a judge of the Family Division, during nine of which I heard almost nothing but difficult care cases. I recall feeling distinctly jaded as a result. At least the judge of the Division has some variety - there is the Administrative Court. There is the variety of work within the Family Justice System, there is the court of Appeal and there is circuit – for me there was also the Employment Appeal Tribunal.

52. There are those who thrive on an undiluted diet of child care cases, and for them I am duly grateful. My personal view, however, is that for the circuit bench in particular, a mixed diet of crime, family and civil is the best way of keeping sane, particularly with the enormous pressure of work under which the Circuit Bench has to operate.

53. The corollary to all this is that the circuit and district bench – if they are to hear contented care applications - must exercise a greater degree of control over listing. Six months in crime will not work if it means that urgent child cases have to be adjourned for that period or go to another judge.

54. Equally, as it seems to me, the same principles of judicial continuity and flexibility of listing must apply in the FPC. I acknowledge the difficulties here. Justices are volunteers. It is also difficult for any justice who is in paid employment to take a substantial amount of consecutive days off in order to hear a contested care case which may last two or three days.

55. There are several points here. The first is the flexible use of DJ (MC) s to hear care cases. The current Chief Magistrate, Howard Riddle, is keen on DJ (MC) s having family tickets. I agree that this is a valuable resource. We do, however, need in addition Legal Advisers who are able to specialise in care proceedings, and who can stay with a case from beginning to end.

56. In my trips around the country I detect no lack of enthusiasm on the part of justices. There is a strong pragmatic argument for them to do the work, since there is in any event too much of it for the county court alone. The flexibility of being able to use FPCs is enormously valuable.

57. Listing, in my view, is not only a judicial function: it must be more flexible. My experience from visiting county courts up and down the country is positive in this respect. Listing Officers welcome judicial involvement and are prepared to be flexible if the judge is. There needs to be a co-operative pattern of negotiation.

58. Magistrates will also need to negotiate an increase in their family sitting days, as the FJR suggests. Once again, my experience is that family justices do the work because they enjoy it and find it fulfilling. Judicial continuity and the continuity of the case manager creates its own problems for the FJC, as I have already stated, but the more experienced the bench, and the more it has sat, the better.

59. It is also my view that a different set of skills is required to hear family cases. A “winger” hearing a criminal case is trained to be silent and only to ask questions through the chair. As we all know, family law requires a more interventionist approach. I see no reason, therefore, why justices should serve an apprenticeship in crime before they sit on family cases. On this I do part company with the Chief Magistrate. Once again, co-location shows its benefits. A day or even a half day sitting with a professional judge teaches a lay justice a great deal more court craft than a week sitting in on crime

60. In summary, therefore, like the FJR. I favour a more specialist bench (both professional and lay) because such a bench is, on the whole, more efficient and generates greater confidence in the professions and in litigants. The judges of the Division need to maintain their level of expertise. The circuit judges need, in my view, to

spend at least half of their time in family work and need to have the flexibility to list to meet the needs of the case. The lay justices need to do as much sitting as they can.

Allocation

61. In my judgment, this is key. Like the FJR, I am in favour of allocation being done in the county court either by the district judge or a mixture of DJs, legal advisers and, if he or she wishes, the DFJ. My reasoning is, I hope, reasonably simple.

62. Family cases are, by their nature, “dynamic”. One of the principal sources of delay in my experience, is the case that has to be transferred up from the FPC after some weeks because it has become a county court case. So there is the delay point.

63. In addition, it seems to me that allocation by the county court is likely to be more efficient. The presence of the legal adviser, if required, should ensure a proper allocation to the FPC, and cases which are not suitable for the FPC will start where they will remain and where they belong – in the county court.

64. I have not detected any potential tension between the district bench and the legal advisor over allocation: allocation seems to me very much a matter of local judgment. It is, I think, noticeable that in private law cases lawyers tend to issue in the county court even though there is a choice of jurisdictions.

Case management and Judicial continuity

65. Case management and judicial continuity are the key issues for the judiciary. The problem of judicial continuity is easy to identify, but not so easy to tackle. It is a huge waste of resources, as well as unsatisfactory from every point of view, for a number of judges, or different benches of magistrates, to read the same set of papers in what are sometimes only slightly different circumstances and reach often varying conclusions on them. How is the point to be addressed?

66. A judge simply has to take control (ownership) of a case -whether public or private. In Leeds, for example, the civil judges and DJs in particular have developed a “docketing” system. The case is allocated to an identified DJ and he or she stays with the case throughout.

67. It seems to me that in each and every case the practice needs to be developed whereby at the first appointment the court asks itself a very simple question: what is this case about? The court, with the assistance of the parties, can then decide how the identified issues are to be addressed.

68. It will, in my view, be good practice to write the name of the allocated judge on every file, so that when the case comes back, it comes back to that judge. Hand in hand with this, however, must go the power to list. The judge who hears the case which has to come back must fix it for a date on which he or she can hear it.

69. However, once again, power goes with permanence. The judge who is in the same location can deal with the case when it comes back. This has simply got to happen. If it can be done in location A, it should be possible in location B.

70. I acknowledge that this is a substantial cultural change. It may not happen quickly. Traditionally the English judge is an arbitrator, not a manager or an investigator. The case is brought to the judge to try: it is prepared by the lawyers and the litigants: the judge tries it and goes away.

71. All that has changed. We are now all case managers. We must be involved. We tell the parties what evidence they need to call. And with case management goes judicial continuity. The two are inseparable. This is what the FJR says – in effect – and I agree.

72. In my view, as I have said already, active case management and judicial continuity are the two principal contributions which the judiciary can make to the problem of delay. The PLO may be detailed, but its structure is simple. There are four essential stages: the first appointment, the Case Management Conference, the Issues Resolutions Hearing and final hearing. In practice, the CMC is often adjourned, and there are several CMCs. Professor Judith Masson, in her research, attributes this not to judicial incompetence, but to lack of time and training. In her view, many care cases are advocate led because the judge simply does not have the time to go through the papers. With too many cases in his / her list, any agreement brokered by the advocates

is “rubber stamped” by the judge, who is only too glad to have an agreement which absolves him / her from reading the papers.

73. This, of course, is not how it should be. From the first appointment onwards the judge (1) should take sole control of the case and (2) should be proactive, identifying issues and ensuring that the evidence in the case is being collected swiftly and in a way which will most help the judge.

74. As important, of course, is the power to list. The judge who is managing the case must have it back both to ensure that it is on track and also to ensure that what he / she says is to be done has been done. This means, in my view, that judges are going to have to negotiate with listing officers. Everybody pays lip service to the notion that listing is a judicial function: in public law family cases it must be just that. This in turn means a greater flexibility of sitting patterns and itineraries.

75. All this can only be done (1) if there is a willingness on the part of the bench to case manage; (2) a determination on the part of the judges to insist that their cases are heard promptly; and (3) an insistence on the part of judges that cases can and must be listed when the judge wants them to be listed. Care cases cannot wait for the judge to become available.

76. I appreciate that none of this addresses a number of the other facts which add to delay and drift. The delay in appointing guardians – the need to instruct “experts” to re-do work which has not been done by others. All this is highlighted in the FJR. Some cases will never be finished in a target of 26 weeks. But I began the paper by making it clear that I was looking at the FJR from essentially a judicial perspective: and I remain of the view that proactive case management and judicial continuity are the two principal benefits which the judges can deliver.

77. As I said at the beginning, I am very conscious that this paper may be many miles from your area of practice or your area of study. You must forgive my preoccupation with the FJR. Life after Norgrove is going to be very difficult for both the profession and the judiciary alike. I hope we are both of us up to the challenge.