



PRESIDENT OF THE  
FAMILY DIVISION

**WHAT IS FAMILY LAW? - SECURING SOCIAL JUSTICE FOR CHILDREN  
AND YOUNG PEOPLE**

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Eleanor Rathbone (1872-1946), the formidable President of the National Union of Societies for Equal Citizenship, was, from 1929 until her death, the Independent Member of Parliament for Combined English Universities. She holds an honoured place amongst the family law reformers of the middle 20<sup>th</sup> century. She played a pivotal role in the campaign for the equal treatment of men and women, fathers and mothers, which led to the enactment of the Guardianship of Infants Act 1925. She criticised the failure of the Money Payments (Justices Procedure) Act 1935 to implement an important recommendation of the Fischer Williams *Departmental Committee on Imprisonment by Courts of Summary Jurisdiction in Default of Payment of Fines and other Sums of Money* (Cmd 4649), an omission remedied by the Justices of the Peace Act 1949 and the Married Women (Maintenance) Act 1949. She was instrumental in the long campaign which led eventually to the Inheritance (Provision for Family and Dependants) Act 1938. Her last great campaign, again successful, was for the payment of family allowances to the mother rather than the father. All this is described in attentive detail by Stephen Cretney in *Family Law in the Twentieth Century*, 2003, an account enlivened by vignettes of the opposition mounted to what we would now think of as very sensible reforms by such eminent figures as (the first) Lord Hailsham LC, the judges of the Chancery Division and the officials of the Ministry of National Insurance. She was, in Cretney's judgement, perhaps the leading Parliamentary proponent of women's interests. On all these matters she was on the right side of history, though, as I have remarked elsewhere,<sup>1</sup> "So much of this is so distressingly recent."

Pondering the eclectic range of Eleanor Rathbone's reforming interests, prompts the question: What is family law? After all, the law of inheritance is usually thought of as a branch of property law and thus a matter for the Chancery rather than the Family Division. And family

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<sup>1</sup> *Changing families: family law yesterday, today and tomorrow – a view from south of the Border* [2018] Fam Law 538, 542-3.

judges have never been particularly concerned with family allowances or, as they now are, child benefit.

However, before turning to consider this question I ought first to address the logically prior question: What is the family? Time was when most people probably thought the answer was not merely clear but obvious. Today it is more complex.

In contemporary Britain the family takes an almost infinite variety of forms. Many marry according to the rites of non-Christian faiths. People live together as couples, married or not, and with partners who may not always be of the other sex. Children live in households where their parents may be married or unmarried. They may be brought up by a single parent, by two parents or even by three parents. Their parents may or may not be their natural parents. They may be children of parents with very different religious, ethnic or national backgrounds. They may be the children of polygamous marriages. Their siblings may be only half-siblings or step-siblings. Some children are brought up by two parents of the same sex. Some children are conceived by artificial donor insemination. Some are the result of surrogacy arrangements. The fact is that many adults and children, whether through choice or circumstance, live in families more or less removed from what, until comparatively recently, would have been recognised as the typical nuclear family. This, I stress, is not merely the reality; it is, I believe, a reality which we should welcome and applaud.

What has brought about these enormous and very profound changes in family life in recent decades?

They have, I suggest, been driven by five major developments. First, there have been enormous changes in the social and religious life of our country. We live in a secular and pluralistic society. But we also live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which is at one and the same time becoming both increasingly secular but also increasingly diverse in religious affiliation. Secondly, there has been an enormous increase in the number of trans-national families. When travel was limited by the speed of a horse, most people hardly moved from the locality of their birth. The railways and the steamship broadened people's horizons enormously. But it was only the introduction of the Boeing 747 and its successors, and the enormous reduction in the price of air travel in recent decades, that has made it possible for ordinary people to travel back and forth across the world so easily and so frequently and thus to find partners abroad. Thirdly, there has been an increasing lack of interest in – in some instances a conscious rejection of – marriage as an institution. The figures demonstrate a decline in marriage. Fourthly, there has been a sea-change in society's attitudes towards same sex unions. Within my lifetime we have moved from treating such relationships as perversions to be stamped out by the more or less enthusiastic enforcement of a repressive criminal law to a ready acknowledgment that they are entitled not merely to equal protection under the law but also to acceptance and respect. Finally, there have been enormous advances in medical, and in particular reproductive, science. Reproduction is no longer confined to 'natural' methods – modern forms of medical technology mean that sexual intercourse is no longer a necessary pre-requisite to conception. Many children today are born as a result of 'high-tech' IVF methods almost inconceivable even a few years ago.

All of this poses enormous challenges for the law, as indeed for society at large. The law – family law – must adapt itself to these realities. It has, and it does, though the pace of the necessary change has, for much of the time, been maddeningly slow.

Let us take, for example, the position in law of the married woman.

The classic statement of the nature of marriage was that of my predecessor, Sir James Hannen P in 1885: “protection on the part of the man, and submission on the part of the woman:” *Durham v Durham* (1885) 10 PD 80. “Protection” and “submission” reflect a characteristically Victorian view of the man as prepotent and the woman as essentially frail and weak. These views were an unconscionable time a dying. As late as 1954 the Court of Appeal, although wondering whether submission on the part of the woman was still an essential part of the marriage contract, was unwilling to state unambiguously that it was not: *In The Estate of Park Decd; Park v Park* [1954] P 89. It took another 50 years until the doctrine received its final quietus in 2004: *Sheffield City Council v E* [2004] EWHC 2808 (Fam), [2005] Fam 326.

The Guardianship of Infants Act 1925, for which Eleanor Rathbone had fought so long and so hard, established the principle that mothers and fathers, wives and husbands, have equal rights with respect to their children. But not until 2000 was equality identified as the core principle of ancillary relief: *White v White* [2001] 1 AC 596.

In parallel with this change in the nature of the modern family is the development of the concept of the “family life” protected by, and demanding of “respect” in accordance with, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. For an early attempt at a synthesis see *Pawandeep Singh v Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2005] QB 608, drawing attention (para 59) to the fact that:

“... “family life” is not confined to relationships based on marriage or blood, nor indeed is family life confined to formal relationships recognised in law ... A de facto relationship outside marriage can give rise to family life.”

A striking example of the width of the concept is to be found in the decision of the Strasbourg court in *Kroon v The Netherlands* (1994) 19 EHRR 263, where the court held that the relationship between a man and a woman amounted to family life, even though they chose neither to marry nor to live together, because they had a stable relationship which had produced four children. This has been profoundly important for the development of family law. Thus, it has informed the question of whether the child’s home is “with the applicants”, an essential prerequisite under section 54(4)(a) of the Human Fertilisation and Embryology Act 2008 if a parental order following a surrogacy arrangement is to be made: see *Re X (A Child: Foreign Surrogacy)* [2018] EWFC 15, where the authorities are collected.

So what is family law? The question may be thought surprising. It is the law that applies to families; and surely we know what that is. For the law student it is surely what is to be found discussed in the standard text books on family law. For the practitioner and judge it is surely to do with what goes on in family courts, the Family Division of the High Court and, since 2014, the newly created Family Court. If I was to press one of them, the testy answer would probably be: ‘Look in the Red Book [the annual Family Court Practice].’ But the question, I suggest, is nonetheless worth pursuing.

In the first place, family law, as traditionally understood, is concerned with status:

- (1) So, family law defines the criteria by reference to which, and the circumstances in which, a particular status – being married for example – is treated for the purposes of our secular law as having been acquired or (as in the case of a foreign marriage) is treated as one recognised by our law. Similarly, family law determines the status of a child. Sometimes, as in the case of a marriage performed in this country, the status is acquired without any judicial act. Sometimes, as in the case of a child’s parental responsibility, the matter arises by simple operation of law. Sometimes, in contrast, as

when a family court makes an adoption order or, in the case of surrogacy, a parental order, a particular status is acquired by reason of a judicial act.

- (2) Family law defines the legal attributes of the status, for example, the mutual rights and obligations of the married couple, and provides remedies for regulating the relationship of the parties. Similarly, family law defines who are the holders of, and delineates the ambit of, “parental responsibility,” and provides mechanisms for regulating the exercise of parental responsibility, in particular, following rupture in the relationship between the child’s parents.
- (3) Family law provides a mechanism for terminating the status, in the case of marriage, for instance, by proceedings for divorce, in the case of a child by making an adoption or parental order.

It is important to note that family law is concerned primarily with status as it applies in relation to partners, parents and children. Family law does not normally regulate status in relation to citizenship, immigration and asylum; by way of exception, in certain circumstances the making of an adoption order automatically confers citizenship on the adopted child.

Secondly, family law is concerned with the consequences of the fracturing of the family, either because of the breakdown of relationships within the family or because of the intervention, in accordance with Part IV of the Children Act 1989, of the State in the form of the local authority. Following relationship breakdown, the family courts have available, for example, the various powers conferred by Part II of the Children Act 1989 and Part IV of the Family Law Act 1996.

Thirdly, family law is concerned with the regulation of the family finances, typically following the termination of relationships whether in life or on death. Here the law is determined by the parties’ status. If the parties were married, or in a civil partnership, the court can exercise its powers under section 17 of the Married Women’s Property Act 1882 and Part II of the Matrimonial Causes Act 1973 or the corresponding provisions of the Civil Partnership Act 2004 and the Marriage (Same Sex Couples) Act 2013. If the parties were not married or in a civil partnership, then, except to the limited extent to which Part IV of the Family Law Act 1996 provides remedies, family law has nothing to say about their financial claims inter se. The claimant is left to such remedies as he or she (usually she) may have under the Trusts of Land and Appointment of Trustees Act 1996 – something in relation to which the Family Court in fact has no jurisdiction, although the Family Division does. So far as concerns their children, the matter is regulated and remedies provided by Schedule 1 of the Children Act 1989. If the relationship is terminated by death, the parties and their children’s financial claims, as defined by the deceased’s Will or, absent a Will, by the law of intestacy, can be adjusted by the court – again the Family Court does not have jurisdiction – in accordance with the Inheritance (Provision for Family and Dependents) Act 1975, the successor of the 1938 Act for which Eleanor Rathbone fought so hard.

You will note the statutory and procedural complexities of all this.

Do the family courts as presently constituted provide an adequate legal and procedural framework for the resolution of family disputes and do they – can they – secure social justice for children, for their parents and for their families? The complacent may answer with a reassuring ‘Yes’. I am far from being so sanguine.

There are, as it seems to me, four problems with the family courts as they are currently structured. Two of these problems are internal to the family court system; two are external. I start with those that are internal.

First, there is the problem that the complex procedures (both statutory and as set out in the Family Procedure Rules 2010) for addressing the three central concerns of family law – status,

relationship breakdown and the family's finances – prevent the family court ever addressing the family's problems holistically and in a simple 'one-stop' process. This fragmentation of the family court's processes can lead only to delay, added cost and, worst of all, additional stress for all concerned. It is, perhaps, all too reminiscent of those medieval causes of action of whose clanking chains Lord Atkin spoke so many years ago. Surely we can do better.

Secondly, there is the problem that family courts ought to be, but for the most part are not, 'problem-solving' courts. Let me explain what I mean.

Unlike the civil courts, which essentially look only to the past, the family court (like the criminal court) looks both to the past and to the future: to the past to help determine what should happen in the future. That is all to the good, but, too much of the time, the exercise is still limited to determining what is the appropriate disposal for the case: what, for example, is to happen to the child in future. In the family court, where the welfare of the child is, by statute, the court's paramount concern, it is all too easy to focus on the child's future, without paying adequate attention to what it is that has brought about the court's involvement in the first place. And, especially with younger children, that has to do almost exclusively with the parent, or the family as a whole, and not the child. Very often, as we all know, the families and children who find themselves before the courts are the victims of multiple difficulties and deprivations: economic, social, educational, employment, housing and health (sometimes both physical and mental). These are families desperately seeking social justice. We should be treating such families holistically, but, too often, far too little time is spent identifying the underlying problem or, more typically, problems and then setting out to find a solution for the problem(s). In a sentence: family courts ought to be but usually are not problem-solving courts.

That much can be achieved (and, I might add, largely without the initiative or intervention of Whitehall) is demonstrated, I think, by the great success of FDAC, the Family Drug and Alcohol Courts, the first, and triumphantly successful, example, and judicially driven, of problem-solving in the family court. Fundamentally, the approach adopted in FDAC is a combination of judicial monitoring and a multi-disciplinary therapeutic intervention tailored to meet the needs and problems of the parents in care cases where the underlying issue is parental substance abuse. Very careful independent academic research has proved that FDAC works and that FDAC saves money. More children are reunified with parents if the case has gone through FDAC than through the normal family court, and there is significantly less subsequent breakdown. FDAC increases the sum of human happiness and decreases the sum of human misery. And it saves the local authorities who participate significant sums of money: £2.30 for every £1 spent.

Another, more recent, project which is already proving a great success is PAUSE, where the objective is to break the pattern we see so frequently in the family courts of mothers who find themselves the subject of repeated applications for the permanent removal of each of their successive children. (The dismal record is believed to be held by a woman who has lost nineteen children to the care system.) Again, as with FDAC, the approach is founded on identifying and then tackling the, often numerous and varied, underlying problems and difficulties which have confronted the woman – in short, helping her to 'turn her life around'. There are other projects adopting similar approaches.

I believe that this points the way forward to what in my view is so urgently required: a fundamental re-balancing of the family court towards what ought to be its true role as a problem-solving court, engaging the therapeutic and other support systems that so many families, children and parents need if they are to achieve justice – both justice from the court and social justice.

This is particularly important in cases where the court, whether the family court or a criminal court, is struggling to deal with a disturbed teenager. In these uniquely complex cases, the children have themselves become part of the problem, so a problem-solving court must grapple with the underlying problems and difficulties not just of the parent but also of the child, in short, with the underlying problems and difficulties of the whole family. So what we need is a problem-solving court for the whole family – in short, a re-vamped family court with an enhanced jurisdiction.

What of the problems which are, as I have put it, external to the family justice system?

One – the third of the problems I identify – is that cases involving families, parents and children are spread across the jurisdictions, so that families from time to time find themselves enmeshed in the various justice systems in England and Wales. These systems – and I use the plural deliberately – are, I have to suggest, far too complex, far too little co-ordinated, and serving far too many different and often conflicting objectives, to be effective in furthering the welfare of children and their families. Thus, cases where a child is to be put into the care of a local authority and disputes in relation to what until recently were called residence and contact are heard in the Family Court or the Family Division of the High Court. Criminal cases where a child is being prosecuted are heard in the Youth Court or the Crown Court. Where a child or parent is seeking asylum, or is subject to immigration control, the case is heard in the First-tier and Upper Tribunals of the Immigration and Asylum Chamber. Where a child or parent is subject to the provisions of the Mental Health Act 1983, the relevant tribunal is the Health, Education and Social Care Chamber.

Although there are some mechanisms in place for the sharing of information between some of these jurisdictions, these mechanisms, even when they work, are largely confined to the sharing of information; there are no effective mechanisms to facilitate collaborative, joint or even joined-up decision-making. Moreover, because of the way in which the professions are organised and the judiciary deployed, there is too little understanding across the jurisdictions of how the others operate.

Let me give an example: although the jurisprudence analysing the tensions between, and explaining the differing functions of, the family and the asylum/immigration jurisdictions is, it might be thought, not merely long established but clear enough, misunderstandings on even the most basic points are still rife.<sup>2</sup>

Or take the interactions between the family courts and the criminal courts. On occasions, the perception of a family court is that the sentencing decision of the criminal court is not helpful in furthering the family court's planning for a disturbed teenager. On occasions one finds that the two jurisdictions simply do not 'marry-up' sensibly. I remember a case some years ago where both the family court and the Youth Court had made orders providing for the involvement of the relevant local authority in the child's life. The child lived in London; the family legislation decreed that the relevant authority was the London Borough of A, the criminal legislation that the relevant authority was the London Borough of B. Did the child benefit from having the services of two local authorities? The answer, as you may have guessed, was No. The involvement of two authorities was simply a recipe for confusion leading to inertia.

In an ideal world we would be giving very serious consideration to sweeping jurisdictional changes, bringing order to disorder by incorporating many if not all of these jurisdictions within the expanded jurisdiction of a re-vamped family court. As I have said, the families and

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<sup>2</sup> See *Nimako-Boateng (residence orders - Anton considered) Ghana* [2012] UKUT 216 (IAC) and *The Secretary of State for the Home Department v GD (Ghana)* [2017] EWCA Civ 1126, paras 44-51.

children who find themselves before the courts are the victims of multiple difficulties and deprivations: economic, social, educational, employment, housing and health. Ideally, we should be treating such families and their social and legal problems holistically, but too often this is made more difficult, or even impossible, because responsibility is spread across too many courts and other agencies.

We cannot, of course, wait as the decades pass while the argument gains traction. But could not more be done in the interim by the judges? For example:

- Improving understanding across the jurisdictions of how the others work.
- Introducing mechanisms to facilitate collaborative, joined-up or even joint decision-making.
- In particular, ensuring by appropriate judicial ‘ticketing’ and ‘cross-deployment’ that judges with expertise and experience in the family court can also sit in the Youth Court, the Immigration and Asylum Chamber and the Health, Education and Social Care Chamber.
- In cases where there are parallel proceedings in different courts involving the same child or family, listing the cases simultaneously before suitably ‘cross-ticketed’ judges. There is nothing particularly novel or difficult in this: I have myself on a number of occasions sat simultaneously in the Family Division and the Administrative Court to hear a pair of cases relating to the same family.

However, a court which is to be an effective problem-solving court has to have available to it the necessary tools, including, critically, access to the therapeutic and other support systems for the families involved. In the case of FDAC those tools are, generally speaking, to hand, because each FDAC reflects a local alliance between each of the relevant agencies, who have voluntarily come together to share their resources in what they recognise has to be a common endeavour. But what is feasible in the context of FDAC may be impossible to achieve in other contexts.

This brings me to the final and most pressing problem of all, which derives from the fundamental constitutional principle explained by Lord Scarman in *A v Liverpool City Council*,<sup>3</sup> that:

“The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority.”

For present purposes, this has a number of important consequences. One is that, absent statutory provision to the contrary, the ambit of judicial decision-making is constrained by the extent of the resources made available by other public bodies. So, the family court cannot *direct* that resources be made available or that services be provided; it can merely seek to *persuade*. Another consequence is that if, for example, a child or a parent is detained under a criminal sentence or in accordance with the Mental Health Act 1983, the decision as to the child’s or parent’s release lies not with the family court but with the Secretary of State in the one case or the treating clinicians or the Health, Education and Social Care Chamber in the other. The family court can make a care order in relation to the child, but the court’s functions

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<sup>3</sup> [1982] AC 363. This principle has been followed and applied in other cases at the highest level: see *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791, *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413, *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591, and *N v A Clinical Commissioning Group and others* [2017] UKSC 22, [2017] AC 549.

in relation to her placement and welfare inevitably remain largely in suspense pending her release.

The same principle applies, of course, as between the family court and the local authority. When a care order is made, it is for the local authority to formulate its care plan and for the judge to approve it. What if there is disagreement? The answer, it has been said, is this:<sup>4</sup>

“It is the duty of any court hearing an application for a care order carefully to scrutinise the local authority’s care plan and to satisfy itself that the care plan is in the child’s interests. If the court is not satisfied that the care plan is in the best interests of the child, it may refuse to make a care order ... It is important, however, to appreciate the limit of the court’s powers: the only power of the court is either to approve or refuse to approve the care plan put forward by the local authority. The court cannot dictate to the local authority what the care plan is to say ... Thus the court, if it seeks to alter the local authority’s care plan, must achieve its objective by persuasion rather than by compulsion.

That said, the court is not obliged to retreat at the first rebuff. It can invite the local authority to reconsider its care plan and, if need be, more than once ... How far the court can properly go down this road is a matter of some delicacy and difficulty. There are no fixed and immutable rules. It is impossible to define in the abstract or even to identify with any precision in the particular case the point to which the court can properly press matters but beyond which it cannot properly go. The issue is always one for fine judgment, reflecting sensitivity, realism and an appropriate degree of judicial understanding of what can and cannot sensibly be expected of the local authority.”

The principle is impeccable, but all too often the consequences are unsatisfactory: a court changed with the duty of furthering the child’s welfare is denied the necessary tools to do so.

These difficulties are exacerbated and made more complex by two further problems. One is the way in which our public finances are organised. A salutary and long-established principle is that public money is to be spent by a public body only for the proper purposes of that body and in accordance with what has been decreed by Parliament. Again, the principle is impeccable but sometimes the consequences are unfortunate. To repeat, because the point is so important, typically, the families and children who find themselves before the courts are the victims of multiple difficulties and deprivations: economic, social, educational, employment, housing and health. Ideally, we should be treating such families holistically, but too often this is made more difficult, or even impossible, because responsibility is spread across too many agencies and too many budgets. And there is too often the tension between attempting to solve today’s problem – the responsibility, let us say, of a local authority – and the longer-term benefits which will flow to other agencies – for example, those involved with criminal justice and health – if the problem is solved.

Even within the ambit of local authority responsibility, there are difficulties created by the ways in which local authorities organise their services and budgets. A unitary authority may have responsibility for children’s services, adult services, education and housing. But if the focus of the proceedings in court is on the child, as where the local authority has embarked upon care proceedings, it can often prove frustratingly difficult to engage and motivate the

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<sup>4</sup> *In re N (An Adult) (Court of Protection: Jurisdiction)* [2015] EWCA Civ 411, [2016] Fam 87, paras 34-35.



other services, even where, for example, the child's parents are themselves, because of their own difficulties, entitled to the support of the local authority's adult services.<sup>5</sup>

These difficulties are, of course, further exacerbated by the all too frequent lack of sufficient resources. This problem pre-dates, though it has been made much more acute by, the current age of public sector austerity. The family court is, still, sadly lacking in the resources – for example, adequate and effective special measures, the provision of intermediaries<sup>6</sup> – which are essential if the vulnerable, whether children or adults, are to be enabled to participate properly in the process. These are not merely things mandated, it might be thought, by Articles 6 and 8 of the European Convention. Even more important, are they not mandated by any acceptable concept of what justice and fairness demands? Recent changes to the family court's rules go some, but, many might think, inadequate, way to addressing these deficiencies.

But there are, of course, many other instances where the lack of resources is seriously hampering the work of the family courts (and, for that matter, the criminal courts). Let me give two very different examples which illustrate the present difficulties.

The first is *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413. The facts were very simple, even banal. A judge in the family court made a shared residence order, but the father's accommodation was too small to have the children staying with him. He sought appropriate accommodation from the local authority. The local authority rejected his application. The Court of Appeal thought that he had a remedy within the family proceedings. Moses LJ said ([2007] EWCA Civ 970, [2008] 1 WLR 1289, para 48):

“where a shared residence order is opposed, the court is bound, by virtue of section 1(3)(f) of the 1989 Act, to have regard to the capability of the parents to accommodate the child. The local housing authority ought, therefore, in that circumstance, to be given the opportunity to comment upon local conditions and the effect of a shared residence order on others in priority need and on its own allocation scheme. Accordingly, where those matters have been taken into account, as they ought to have been, it is difficult to see that there is any room for a local housing authority to do other than follow the decision of the family court on a contested hearing. After all, in that contested hearing, the court will have been bound to consider not only the capability of the parents to accommodate the children but also the needs of the children. The family court will have been in a far better position to assess such needs. I conclude, therefore, that in contested hearings there will be no room for a fresh assessment by the local housing authority of the reasonableness of the expectation, unless, by the time of its consideration, circumstances have changed.”

In the House of Lords, Lord Hoffmann was having none of this. He said (para 17):

“In my opinion the Court of Appeal was wrong to suggest that a housing authority should intervene in family proceedings to argue against the court making a shared residence order. It will obviously be helpful to a court, in dealing with the question of where the children should reside, to know what accommodation, if any, the housing authority is likely to provide. It should not make a shared residence order unless it appears reasonably likely that both parties will have accommodation in which the children can reside. But the provision of such accommodation is outside the control of

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<sup>5</sup> For an illuminating and saddening example see *Re D (A Child) (No 3)* [2016] EWFC 1, [2017] 4 WLR 55, paras 104, 129.

<sup>6</sup> Again, for an illuminating and saddening example see *Re D (A Child) (No 2)* [2015] EWFC 2, [2015] 1 FLR 1247, paras 15-19, and (the same case) *Re D (A Child) (No 3)* [2016] EWFC 1, [2017] 4 WLR 55, paras 19-20.

the court. It has no power to decide whether the reasons why the housing authority declines to provide such accommodation are good or bad. That is a matter for the housing authority and, if necessary, the county court on appeal. Likewise, it is relevant for the housing authority to know that the court considers that the children should reside with both parents. But the housing authority is not concerned to argue that the court should not make an order to this effect. The order, if made, will only be part of the material which the housing authority takes into account in coming to its decision. The two procedures for deciding different questions must not be allowed to become entangled with each other.”

In saying this, Lord Hoffman was, in substance, adopting exactly the same approach as the one he had explained in the Court of Appeal in *R v Secretary of State for Home Department, Ex p T* [1995] 1 FLR 293, a case involving the interface between family and immigration proceedings.

Probably the most egregious of these difficulties, because they so directly impact on the ability of the courts to further the child’s welfare, are the serious shortages, regularly all too apparent to too many family judges, of the secure accommodation and the mental health services (whether residential or in the community) needed by ever-increasing numbers of disturbed, sometimes very disturbed, adolescents.

These difficulties are exemplified,<sup>7</sup> if in extreme circumstances, by a case I referred to as X, where I was recently concerned (in every sense of the word) with a suicidal teenager.<sup>8</sup> I do not propose to discuss the case in great detail: it would not be appropriate to do so. I refer to it only because it might be thought to exemplify some of the systemic difficulties we face and because it illustrates some of the problems I wish to address today. For present purposes, all I need to say about X is that she was a gravely disturbed teenager who came from a troubled home and whose mother (her father was dead) had her own difficulties. X was taken into care in accordance with the Children Act 1989 but the various plans approved by the family court did not work. The time came when she needed, for her own safety, to be placed in secure accommodation; no suitable accommodation was available in England, so the placement was in Scotland. Returned to a placement in England, X’s behaviour led to her being sentenced by the Youth Court to a Detention and Training Order and placed in another institution where the intensity and frequency of her self-harming and suicidal actions increased. Eventually, a place was found for her in a suitable clinical setting to which she was transferred by the Secretary of State in accordance with the Mental Health Act 1983.

The crisis had come to a head on 3 August 2017. X was due to be released into the community from the Detention and Training Order in 11 days’ time. The expert opinion was stark (*Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam), [2018] 1 FLR 1054, para 6):

“The care plan to send her back to any community setting ... “is a suicide mission to a catastrophic level”. Staff do not think it will take more than 24 to 48 hours before they receive a phone call stating that X has made a successful attempt on her life.”

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<sup>7</sup> *Re X* is, unhappily, only one of too many similar, if, happily, usually less extreme cases. For subsequent cases see, for example, *Re F (A Minor: Secure Accommodation Resources)* [2017] EWHC 2189 (Fam), *Re M (Lack of Secure Accommodation)* [2017] EWFC B61 and *Re A Child (No Approved Secure Accommodation Available; Deprivation of Liberty)* [2017] EWHC 2458 (Fam).

<sup>8</sup> The curious can trace X’s story through the six judgments I have given: In *re X (A Child) (Jurisdiction: Secure Accommodation)*, *In re Y (A Child) (Jurisdiction: Secure Accommodation)* [2016] EWHC 2271 (Fam), [2017] Fam 80; *Re X (A Child) (No 2)* [2017] EWHC 1585 (Fam), [2018] 1 FLR 1041; *Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam), [2018] 1 FLR 1054; *Re X (A Child) (No 4)* [2017] EWHC 2084 (Fam), [2018] 1 FLR 1072; *Re X (A Child) (No 5)* [2017] EWHC 2141 (Fam); and, for the outcome, *Re X (A Child) (No 6)* [2018] EWHC 1005 (Fam).

It was clear that X's need for a place in a suitable, secure clinical/hospital setting was now overwhelming, yet there was, it seemed, no such place available anywhere in the country.

I did not mince my words (para 37):

“What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms.”

I went on (para 39):

“If, when in 11 days' time she is released ..., we, the system, society, the State, are unable to provide X with the supportive and safe placement she so desperately needs, and if, in consequence, she is enabled to make another attempt on her life, then I can only say, with bleak emphasis: we will have blood on our hands.”

These designedly strong, even strident, words, and the accompanying media interest, seem to have had some effect: by the end of the following day, a suitable bed for X had been found: *Re X (A Child) (No 4)* [2017] EWHC 2084 (Fam), [2018] 1 FLR 1072. I commented (para 18):

“Conscious of the dangers of falling into the fallacious trap of *post hoc ergo propter hoc*, I cannot escape the powerful feeling that, but for my judgment, the steps subsequently taken would have been neither as effective nor as speedily effective as appears to have been the case. This, however, is not a matter for congratulation; on the contrary, it is, of itself, yet further cause for concern. The provision of the care that someone like X needs should not be dependent upon judicial involvement, nor should someone like X be privileged just because her case comes before a very senior judge. I emphasise this because a mass of informed, if anecdotal, opinion indicates that X's is not an isolated case and that there are far too many young women in similar predicaments. How are they to be protected?”

I was subsequently criticised. I am afraid I remain unrepentant. As I observed in the judgment I gave on 3 August 2017 (*Re X (A Child) (No 3)* [2017] EWHC 2036 (Fam), [2018] 1 FLR 1054, para 40), there are occasions, and this, in my judgment, was one, where a judge's sworn duty to do “right” includes speaking truth to power.

If one thinks about cases like this – and there are far too many of them, even if not all so extreme – it might be thought obvious that we face serious problems to which, at present, we have no effective solutions. What are the problems? And what can we do about them? The first question, I am the first to admit, is much easier to answer than the second.

We need to find ways of working round the problems caused by the rule in *A v Liverpool City Council*. This will probably require primary legislation and will certainly require ingenuity, but it ought not to be impossible; for there are already statutory provisions which, for example, empower a family court to direct what services a local authority is to provide. Thus, section 38(6) of the Children Act 1989 enables the court to direct an assessment at the expense of the local authority of a child who is subject to care proceedings. Although this particular power is narrow in scope – in substance it applies only to an *assessment* and not to *therapy*, and only

to the *child* and not to the *parent* – it shows that there can, if Parliament chooses, be exceptions to the *Liverpool* principle. The need for the practical implications of the *Liverpool* principle to be revisited as a matter of appropriate urgency is surely obvious if cases such as X are to become things of the past and if the courts are to be properly equipped for their vital problem-solving role. More effective tools are required than the present blunted weapons of persuasion and shaming.

Standing back at the end of all this, what is the objective to which this part of family justice reform ought to be aiming? My thesis is simple, though the road to achieving it will, I fear, be long and hard.

We have somehow to create a one-stop shop in an enhanced re-vamped family court capable of dealing holistically, because it has been given the necessary tools, with *all* a family's problems, whatever they may be. More narrowly, dealing holistically with the family court's traditional concerns with status, relationship breakdown and family finances; more widely, and ultimately more importantly, dealing holistically with all the multiple difficulties and deprivations – economic, social, educational, employment, housing and health (whether physical or mental) – to which so many children and their families are victim. Family justice is surely about something much wider than mere lawyers' law. As Eleanor Rathbone recognised, it must surely also be about securing social justice for children and their families.

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