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MR JUSTICE COLERIDGE

"LETS HEAR IT FOR THE CHILD; RESTORING THE AUTHORITY OF THE FAMILY COURT, BLUE SKIES AND SACRED COWS"

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Introduction

I am flattered and honoured to be asked to speak to this most prestigious organisation on the occasion of its 21st birthday. One whose reputation has gone from strength to strength during its relatively short life. At 21 it is now truly one of the grown–ups. And may be this is an appropriate and opportune moment to reappraise some of its functions and approach. I say "its" function. I mean, of course, "our" function for we are all in the same boat albeit with our separate and distinct functions.

The short title is taken from the main conference title. I had no say in that. But coincidentally my own thoughts, the subtitle if you like, which I have been mulling over for some time now, precisely amplify and illustrate the plea of the main theme.

This mulling process is driven by an increasing awareness and, to an extent, concern, that we all in this business are prone to being swept along by the latest fashion or fad in child protection, research or practise and we can end up forgetting where we started from and where are we are heading. In short we end up abandoning sound personal and professional experience and common sense and, dare I say, our innate sense of right and wrong. As a result we may nominally continue **to hear** children but are we *really* **listening** to what they are *really* saying?

My experience and background

Let me say a little more about my background so at least you know where I am coming from professionally speaking.

I have been at the coal face of family law for now a total of almost exactly 40 years. I also have experience of family justice at every level of the system. I may properly have been described as a fat cat in the last few years of practise at the Bar in London (or at least well rounded) but over the years there is no type of family court which I have not addressed and on many occasions. And, as with many family lawyers, clients have been drawn, over the years, from across the entire social spectrum.

I have been a High Court Judge for ten years, since 2000, doing all the kinds of work which make up our traditional diet from the worst types of abused and injured children cases at one end of the spectrum to sorting out the financial affairs of the super rich celeb at the other end.

On the administrative side, for the last eight and a half I have looked after the family courts on the Western Circuit (or the south west region as it is now rather boringly described in official language), as Family Division Liaison Judge. That area covers, since we unified the administration for all courts and magistrates courts in 2003, all family courts from Hampshire to Cornwall, from Portsmouth to Truro. And at all levels, from the Family Proceedings Court, presided over by lay and stipendiary magistrates, upwards through the Care Centres to the High Court.

So I think I know the scene from all perspectives. But of course, I am not alone in this, many of my fellow judges could describe a similar length and depth of experience. And I am sure that there are many in this room who have just as much knowledge and experience as myself. And I am conscious that my boss is here today! I doubt there is anyone here with greater or more in depth experience than him.

The Macro problem -
This morning, under the umbrella of the titles I have referred to earlier, I want to discuss **the macro problems** which face us all and their effects especially on children.

And having considered the scale of the problem I want to suggest one or to solutions.

The question in summary is this. How can the family justice system cope with ever increasing volumes of work at a time of unprecedented squeeze, indeed cut backs, on public resources ? And how can we better protect children from the effects.

A 23 % cut in the Ministry of Justice Budget has now been announced though the detail remains largely hidden. Two weeks ago it was suggested that the axing of almost all public funding for private law disputes would be part of that cut. The implications of that (which cannot possibly yet have been properly considered) are at this stage impossible to predict. The law of unintended consequences make it quite impossible to do so. It may not all be bad. Less money to fight your ex partner may lead to less dispute and so ease the burden on us all. Overall will children suffer more or less? Frankly who knows? Some certainly will. And there can be no doubt that these changes will produce a greatly increased demand for your services. Whether that demand will be satisfied however is much more problematic.

We are of course assured, and have over the years always been assured, that there will be no cut to front line services. Even if that was true, which it never has been and isn't in reality, merely standing still would create huge extra pressure by dint of the steady increase in the volumes and the increased complexity of the work.

Of course, the major cause for the increase in the work is the huge increase in the scale of family breakdown within both married and unmarried communities from all sections of society and all ethnic groups with the concomitant children related issues. But I am not going to discuss family breakdown this morning. I have done that on numerous occasions in the past few years, both in Britain and abroad. It has provoked strong and mixed reactions although broadly and mostly favourable. But everyone is fiercely defensive of his or her own chosen mode of life. Objective evaluation is, at best, at a premium in these debates. Family breakdown is a vastly complex problem which confronts all of the western world and it has to be addressed by both individuals, private funded or charitable organisations and to an extent governments. That is for another time. But the fact is; primarily the family courts have to pick up the pieces of these fractured societies and the damaged children which they spawn and the question is how do we manage the ever increasing flood?

To say that the situation in the Family Courts in Britain is at breaking point, or on the point of collapse, is graphic and eye catching but, as we speak, largely inaccurate and certainly

unhelpful. However what is true is that the delays within all parts of the system are completely unacceptable and set to get longer and, especially where children are involved, whether directly or indirectly, these delays are very damaging to their development and welfare. Where we will be in five years I decline to speculate.

As a response to the emerging crisis we, and by that I mean the judges and the lawyers, have designed and redesigned a series of protocols for the more efficient management of the cases and so, hopefully, the speedier dispatch of the work. Without drastically truncating the process and so cheapening the product unacceptably, I do believe we can do no more. These protocols have helped, to some extent, to focus the mind of the legal profession and indeed all those involved in the family justice system (lawyers, social workers, experts, court guardians) on the essentials. But if I am honest, and I have had a major part in the design of some of the systems, both covering children and money cases, the difference has been limited, especially in those child cases which are the most time consuming. In other words the routine, less complex cases, do now move through the system with greater fluency and take up less court time. But there has been almost no improvement in the dispatch of the complex and time consuming cases, either private or public.

So we have the twin problem of more work and less money and both the causes and the solutions are multi-factoral and complex. One thing is certain; there will be no more and, most probably, less money.

However, I am going to suggest that a **major contributing factor t**o the problem is **the reduction in the perceived authority of the family court** and the family judge.

And the cause is at least in part, if not in large part of our own making. In short the population do not generally take our decisions seriously enough and do not obey the orders promptly and fully. And it is **this attitude** which leads to **ever more hearings and ever more interventions** by guardians, social workers, CAFCASS officers and child experts of all descriptions. And this is extremely expensive of time (both in and out of court) and so money and both are, as I say in ever scarcer supply. We simply can no longer afford it.

In short we are demonstrating insufficient authority in our handling of cases and our orders are regarded as helpful advice rather than binding edicts to be obeyed. This attitude, which has grown insidiously over the last two decades or so and which mirrors a general reduction in society's attitude to authority in general, I suggest markedly exacerbates the problem and adds yet further strain.

Some preliminary points

Before expanding on this in more detail let me set the scene a little more by making three preliminary points:

1. **My views only**

   A health warning! These are my views only not necessarily the collegiate views of the Family Division of the High Court or the wider Family judiciary in Britain. However, many I would count as my friends I know share my views although they tend to be rather more reticent about expressing them in public. In that respect I now no longer share their traditional restraint. Times demand more open discussion and debate.

   [Traditionally **Judges have kept their mouths shut** and not entered the arena of the administration of justice or policy matters. That was for two reasons; firstly, things on the whole were tolerably well managed, resources were adequate and the work load was manageable. Secondly, judges did not really involve themselves nor

were they required to involve themselves much in the administration of the system. But that has all changed beyond recognition in the UK in the last ten years.

Thus, it follows, it seems to me, that in these new circumstances, we are not only entitled to have a view, gained from direct daily experience, but a duty to speak out and express it publicly and, if necessary forcefully, when circumstances demand it. And **in my judgement the circumstances do now demand it**. Indeed we could be criticised for remaining silent or being mealy mouthed, for far too long. For there is a depth of frustration and despondency amongst all those involved in the family justice system at all levels, and in the family judiciary in particular which is, in my experience, unprecedented and palpable].

In this respect and with great respect I wholly endorse the remarks of our new President, Sir Nicholas Wall, who took over at Easter this year. A family judge of almost unprecedented experience, in his speech last year to this organisation said this:

> *"Neither I nor any of my colleagues has any wish to engage in politics. But I do think-certainly in the field of family justice- the time has come when the historical and indeed instinctive judicial reluctance to go public over matters properly within our sphere of activity must come to an end. In common parlance, we must come off the bench. We must say what we think and if we feel the exercise of our proper functions is being impeded by anyone or anything we should say so, loud and clear and in plain language"*

It was, dare I say it, a brave and hard hitting speech which did nothing to endear him to the government in the run up to the election.

2. Beware the stereotype judge.

As I have said, I am going to talk about **authority or the lack of it**. It is very difficult, especially as a judge, to discuss the question of the loss of authority and in particular judicial authority without sounding like someone from the dark ages. The elderly, stereotypical judge bemoaning the loss of a bygone age. The tired judge on a bad Friday afternoon. But that is a superficial response, though an attractive one to our detractors. Authority is a devalued, almost dirty, word. But the fact is institutions and figures of authority in society are, and always have been, part of its essential strength and framework. To diminish or allow to diminish their authority, thoughtlessly and on the grounds of fashion or political whim or correctness, is a step fraught with risk.

3. Some statistics

Let me give you some very recent and simple UK statistics

In **public law cases** there has been a 31% increase in the number of new applications in past two years. Just over 20,000 has increased to 26,000. That upsurge has to some extent been provoked by the reaction of local authorities to the Baby P case but that factor is not simply going to evaporate. As we all here know only too well, Baby P cases will to continue to emerge regularly despite the media and politicians cry "we must learn lessons so that this will never happen again"!

In **private law cases**, there has been a 35% increase on the figure of five years ago and last year the figure increased by 19% from 113,600 cases to 135,000 cases.

So the total number of NEW cases last year both public and private was 161,000. If we guess that there are, on average, at least two children involved in every case, that

is over 320,00 children each year NEWLY caught up in the system. Is it alarmist to suggest that one could multiply that figure by, say, 10 to encompass all the children affected by the family justice system at any one time bearing in mind that when they reach the age of 17 they fall out of the other end of the system? That is over 3 million children. And that is only the children caught up and so recorded by the system and the statistics. How many thousands or even millions more are there who go unrecorded?

So the problem is both chronic and ever more acute. I have in the past referred to this state of affairs as an epidemic. Am I exaggerating?

An illustration of the problem

So with those preliminary thoughts in mind let me illustrate the problem of the diminishing of court/judicial authority by reference to that most sensitive and demanding of cases; the intractable contact dispute.

In the UK and certainly in mainland Europe and in the US, we have been wrestling with this problem and solutions to it for a very long time and with very mixed success. I have just been in Australia speaking at their excellent back to back conference of family judiciary and family lawyers. Their problems are identical to ours. Unsurprisingly they have some interesting thoughts, ideas and solutions.

There are great many of these cases going through the system at any one time. In fact my impression is that they are on the increase. Especially as the category of case where the parents hardly know each other prior to conception is also on the increase (eg parents who have met via the internet and conceived within days or weeks of meeting or via IVF or surrogacy arrangements) . These cases absorb huge amounts of resources, both of court time and money; the lawyers fees and experts fees often running into tens of thousands of pounds (or even hundreds on occasions). The outcomes are frequently unsatisfactory especially in terms of a significant or even measurable improvement in the relationship and contact between the estranged parent and child.

Hundreds of paragraphs of judgment from both the High Court and Court of Appeal have been devoted to this topic over the past decade. A number from the President himself.

Let me quote from one in 2004 from the pen of Mr Justice Munby, as he then was. As of last year he is now Lord Justice Munby, the current chairman of the Law Commission. [He has a brain the size of the O2 centre, an encyclopaedic knowledge of the English Law and his judgments are of the highest quality (if perhaps and on occasions a little on the lengthy side !)]. In other words in all respects he is identical to me except for the size of the brain, the knowledge of the law and the length of the judgments. (I am chairman of the campaign for shorter judgments (or CASHJUDG for short).]

The case, you may well remember. It is called Re **D (intractable Contact Dispute) 2004 1FLR 1226.**

I quote short sections from a 30 page judgment

1. *On 11 November 2003 a wholly deserving father left my court in tears having been driven to abandon his battle for contact with his seven year old daughter D. ……. That battle had lasted for precisely five years. It was on 11 November 1998, a matter of days after the parties separated ……. that mother petitioned for divorce and on the very next day that she began proceedings for a residence order. From almost the moment when the parties separated there were problems about contact. As matters stand today, direct contact has ceased – it has not taken place and father has not*

even seen his daughter [for over two years] …. Such indirect contact as is taking place is far from satisfactory.

2. *From father's perspective the last two years of the litigation have been an exercise in absolute futility.……*

15. *This is a father who was described by a Consultant Clinical Psychologist ….., in words with which I also agree, as follows:*

"Psychologically, [father] presented as a balanced, fairly well-integrated man who could acknowledge both his own deficits as well as reflect on his past behaviour and consider errors, misjudgements and misdemeanours. His view of others was equally balanced; he had no difficulty in adopting another's perspective and could easily acknowledge alternative viewpoints and alternative hypotheses ……In general, he presented as an emotionally warm and caring man. …

21. *……. What does the history of this litigation show? There are various features which, if perhaps present here in more than usually concentrated form, characterise far too many such cases. Let me identify some of the most significant:*

i) First, there is the sheer length of the proceedings: five years.

ii) Secondly, there is the large number of hearings and the astonishing number of different judges who have been involved. There were 43 hearings conducted by 16 different judges: . ……

iii) Thirdly there is the vast bulk of the evidence filed down the years. The parents' evidence (including exhibits)…… ran to some 165 pages; since then there has been more than 400 further pages. The expert evidence runs to 388 pages. A total of more than 950 pages! ……

22. *Seen from a father's perspective, a case such as this exhibits three particularly concerning features:*

i) the appalling delays of the court system, ……

ii) the court's failure to get to grips with the mother's (groundless) allegations; and

iii) the court's failure to get to grips with the mother's defiance of its orders, the court's failure to enforce its own orders.……

54. *…….*

The court should grasp the nettle*…. allegations should be speedily investigated and resolved, not left to fester unresolved and become a continuing source of friction and dispute. ……* ***Judges must resist the temptation to delay the evil day in the hope that perhaps the problem will go away. ……***

56. ***…… Other things being equal, swift, efficient, enforcement of existing court orders is surely called for at the first sign of trouble. A flabby judicial response sends a very damaging message to the***

defaulting parent, who is encouraged to believe that court orders can be ignored with impunity, and potentially also to the child.
……. There is no reason why in a case of serious recalcitrance or defiance where it is possible to establish a breach of the order the court should not, then and there, make an immediate suspended committal order, so that the mother can be told in very plain terms that if she again prevents contact taking place the following Saturday she is likely to find herself in prison the following week.

57. *It may be that committal is the remedy of last resort but, ……. the strategy for a case may properly involve the use of imprisonment. ……. A willingness to impose very short sentences – one, two or three days – may suffice to achieve the necessary deterrent or coercive effect without significantly impairing a mother's ability to look after her children.*

58. *I emphasise that these are only ideas, and that they are far from being comprehensive. There are no simple solutions. And it is idle to imagine that even the best system can overcome all problems*

That was 2004. It is a paradigm case and one with which you can all identify. It contained all the usual features including a parent against whom nothing substantial could be said, a child who refused to go on contact but who enjoyed contact when it occurred and a mother who simply ignored the court orders over and over again.

You may think that nothing much has changed in the intervening six years except there has been an improvement in judicial continuity. I think you would be right. There have been a number of other cases on the same subject which have gone to the Court of Appeal and it is possible, I think, to detect a slightly tougher attitude to the flagrantly miscreant parent. You may also be interested in the very recent case handed down on 4 November this year where Munby LJ surveys the whole scene surrounding enforcement of contact orders by the use of enforcement orders, committal and suspended residence orders. It is called **CPL and CH-W and AL-W. But the question remains……. how have we reached the situation where these cases are the scourge of the courts both in terms of their quantity and the time they occupy ; what is the real underlying cause of the problem ?**

The answer is, I suggest, in large part, a lack of clear and sufficient judicial authority exercised swiftly.

A symptom of a greater problem
And I suggest this itself is part and parcel of greater malaise with its roots, at least partly, in the current attitude to children, their views and their upbringing. In other words the lack of respect for court orders mirrors a lack of parental authority in particular (i.e. the authority exercised by parents towards their children) and other forms of authority in general.

I recently spoke at the annual conference given by a respected organisation called the *Family Education Trust*. It does excellent work supporting many aspects of families and family life. There are many similar organisations in Britain. One of the speakers was **Dr Aric Sigman,** an American doctor, fellow of the Royal Society of Medicine and of the British Psychological Society. He calls himself amongst other things, a street anthropologist and he has made a study of the way children are reared nowadays both in the UK (including his own four children) but as importantly all over the world and in particular the Far East (places like North Korea, Borneo, Laos, Cambodia and Sumatra amongst many others). He has written a fascinating book comparing child rearing in these places with western countries. It is called "*The Spoilt generation*" and I cannot recommend it too highly.

His conclusions both in the book, and in the lecture I attended, are clear, unhesitating and I would say obvious and, more importantly, obviously right. His thesis is simple. Parents nowadays are far too inclined to abandon an authoritative style of parenting in favour of one where the child's own views and wishes uncritically rule the day. He maintains that parenting is now done by reference to experts and not by reference to the individual's experience.

Let me quote a little from his book to give you a flavour of his message:

Under the heading "death of the inner parent" he says this
"Even as we chant "put children first" ever louder, we have actually retreated from parenting. We used to parent far more. But in the space of a few decades, the way we parent has changed dramatically. Something we once did unknowingly and intuitively has been elevated to a fine science and become the subject of political fashion, the province of gurus, experts and TV nannies.

As parents we are older and more time poor than ever before and we have the highest proportion of single parent households in history. ……..So we have to start asking direct questions : why has compulsion been replaced by the politically correct alternatives of persuasion and negotiation as the "right" approach to shaping our children's behaviour ? Is parental guilt behind the trend of parents saying "no"but with a sense of apology in their voice ?

Spoilt behaviour is making a growing impression in every area of society, from the classroom and workplace to the streets, criminal courts and rehab clinics"

And I would add "in the family courts" as well.

Let me quote a little more

"Authority has been horribly misconstrued when it comes to dealing with our children. Sixty years after [the end of the last war] many of us who should be figures of authority – parents teachers, policemen, doctors (and perhaps Judges ???*) have gone to great lengths to obscure obvious signs of hierarchy and control. …… And many parents,……now casually refer to their children as their best friends. This loosening up of overt hierarchy in power relations may seem cosy and kind but it has helped to undermine our authority. Through a failure to distinguish between authoritarian and authoritative, best friend and superior, our parental roles have become less defined. We've done ourselves out of a job. There is a growing recognition that the tail is now wagging the dog and this is not good for either."……..*

" ……. Young people crave and need figures of authority, if only as a frame of reference to rebel against. This is a necessary part of their development……..in a world that changes more quickly in every other respect, older people serve as a form of continuity and quiet assurance. Given the detrimental effects of high rates of divorce and our increasingly mobile society this is particularly so for children. To deprive the young of these things is selfish and short sighted……"

"Every time I hear yet another ingratiating politician or radio or television interviewer gushing the stock phrase "children today don't have a voice I want ot schedule a hearing test for them. …..slogans such as "we need to listen to young people" are ….often taken as "we should do what young people want". But this is a far cry from being aware of children and young people's needs and acting as responsible figures of authority is deciding what is legitimate and in their best interests as their arbitrator and ultimately their superior. ……Like adults children don't actually know or cannot articulate what they want

or mean; in fact, what a child says can literally obfuscate what may really be on their mind. Ignoring what someone says in favour of listening with our third ear – our intuition – and using our considered judgment and experience often enables us to hear more clearly"…….

There is a growing list of compelling reasons to unashamedly reinstate adult authority and hierarchy as an absolute necessity in relating to our children. ……Erosion of authority is cascading across our society . You could call it institutionalised disrespect……..

Pulling Rank
By shying away from being in control and maintaining a clear position of authority we have engaged in a type of parental and societal self harm. Children today urgently need the most secure support network possible, in the form of boundaries discipline and order to keep them from crumbling. Yet instead the adult world at every turn – from parents to teachers, to social workers, police, the courts and politicians- has retreated from authority and in so doing has robbed children of their basic support structures. In a misguided attempt to appear more sensitive to children's needs, our institutions have shed much of their authority in favour of being accessible and less intimidating.
Children need teachers, school heads and other authority figures to provide order in their world.
……
Parents who do not discipline their children should be considered shoddier parents who are failing their children and society."

Apart from this abnegation of parental authority, Dr Sigman identifies other areas where we have gone terribly wrong in our modern methods of child rearing; excessive exposure to TV and the internet and the forming of cyber relationships in place of real relationships through social networking sites. And of course he emphases the terrible effects of family breakdown and the lack of full time joint parental input, more often of course, a lack of a father.

But it is, he maintains, the almost cowardly failure to assert parental authority which is the umbrella under which these problems are collected. And he extrapolates from this, the lack of respect shown to parents, to others in authority especially teachers, the police and the courts of all kinds.

Interesting stuff, you say, but I do not want to hear a talk on child rearing, how is this relevant to our topic this morning?

The answer is because, I would suggest, it is similarly this attitude which has been absorbed by the family courts and infected the way the family courts have being dealing with the views of children especially young children and by the same token with their parents. We have allowed slippage to occur and so for our roles and especially the judicial function and role to become blurred and diluted.

Let me give you a recent example, entirely against myself, to illustrate that I am as guilty as the next judge or even worse.

I recently handled what I think was, if not the most difficult, then one of the most difficult intractable contact cases I have ever encountered. I had the assistance of the legendary **Dr Hamish Cameron** surely one of the best and most experienced child psychiatrists in the business with a long track record of regular success in the field. He has handled hundreds of such cases some of which I have been involved in either as advocate or judge.

In this case he asked that I see the children, aged 7 and 9, and of course I agreed . If asked I invariably do. Frequently I suggest it; I almost always find it helpful for both sides, the children and me . He suggested it should be in my room at the court and arrangements were duly made for their attendance at court. It being a hot day (unusually for the west country in winter) I had taken off my jacket and even my tie and had arranged the chairs in my room in a friendly and informal way. I intended that it should be as informal an event as possible to put the children at their ease and to enable them to see that the judge who was making decisions about their future, was not a bogey man but a nice, jolly chap who was thoroughly approachable and wanted to help them. To quote again from Dr Sigman. "*In a misguided attempt to be more sensitive to the children's needs*".

Dr Cameron came to see me before the event as he was to be present throughout. He took one look at my casual attire and was immediately critical. "What are you dressed like that for" he said." You are the judge not the CAFCASS officer or the children's guardian. You are the authority figure. Please put your jacket and tie on and I would prefer if you sat behind your desk". Thoroughly, admonished I naturally I did as I was told. The meeting went ahead as planned and was I think useful and successful for the children. But it caused me to think hard about my role and what we are all there to do.

Is this not a classic illustration of Dr Sigman's concern?

And by the same thinking, are we in danger of going too far when listening to the expressed views especially of young children?

A Too sacred Cow?

No one would question the need to involve children in an age appropriate way in the decision making process which so obviously affects their daily lives. **But the ever increasing emphasis on the sacred cow of listening uncritically to the unfiltered views and wishes of children, including young children, is in serious danger, I think, of undermining the family court's authority and proper function which is to arrive at a decision which is overall, best for the child.** Have we allowed this sacred cow to become too sacred and in so doing passed the buck to the child?

Dr Kirk Weir, also one of the most respected child psychiatrists in forensic child work in Britain, has recently been lecturing on the dangers of slavishly following children's expressed preferences especially in high conflict contact cases. He has carried out a detailed study of his own cases over the past ten years. I have heard his lecture twice now, delivered once to family lawyers and once to senior family judges. It is interesting even disturbing stuff. It should cause us to pause long and hard before placing too much reliance upon or taking undue notice of children expressed views in these cases.

I quote from his recent lecture

"***It is important for assessors to understand that children's responses when caught in a conflict of loyalty can be quite misleading….children may state one set of wishes and feelings when influenced by one party and an entirely opposite set of wishes and feelings when influenced by the other ; the author has seen this occur (accompanied by serious allegations against each parent) within a two hour period***. *Some children express open anxiety that their parents should not be aware of anything they have said, this does not make it more likely that the expressed view can be relied on.*

This is a situation in which an assessment of the child's "wishes and feelings" may be unhelpful or misleading, ***and places the child in the invidious position of choosing***

between their parents. *Such questioning if carried out at all, should be planned with great care and the stated wishes and feelings treated with circumspection. These difficulties, a source of potential harm to the child, are not referred to in the UK Government's Guidance to practitioners*".

And another example, closer to home for some of you. Recently I was confronted in a tricky contact dispute by a report from the court appointed guardian of a three year old child, in which he suggested that seeking to persuade a child (of 3) to alter her views about her father might constitute a breach of the regulations of his registering authority and possibly the child's human rights. This was in a case where the child was having successful supervised contact with the father who she hardly knew and it was being suggested by the expert (but not the guardian) that this should continue and develop. The guardian concluded his report by saying and I quote " *bearing these things in mind I suggest that the wider community should also take the view that this course of action* (viz. seeking to persuade the three year old child to change her mind*) should not be followed*". He is an experienced and respected child guardian but was he failing to act authoritatively as opposed to merely parroting the unrefined wishes of a three year old?

How often did we **used** to read in reports that children didn't want to choose between their parents? We largely ignore that now, I suggest, in favour of forcing children in every case and at every turn to express "*their wishes and feelings*". Is this a good and child centred development or an uncritical following of fashion and fad, driven more by the ideas of the chattering classes than sound research and, dare I say it, common sense and the real experience of specialists?

Is this is another symptom of the family court retreating from acting with proper authority? As a matter of both fact and law, children lack capacity to make important decisions. That is why they are treated as "being under a disability" legally speaking.

If we forget this and too readily impose the decision on the child, surely we, all of us, are shirking our responsibility to a degree which is bordering on the abusive. In just the same way as the weak and indecisive parent allows the children to call the shots we are abnegating our function to a degree which is nothing short of cowardly and unfair.

Children expect and are entitled to expect us to make these important decisions without overly and unnecessarily involving them in the process

So where should we go from here?

I think the conclusions we can and should draw from this evidence and these examples are simple and clear. So far as judicial authority is concerned, it should not be compromised in favour of being user friendly. When the court is approached, it is as the authority figure in the drama. Accordingly, I suggest we need **to reaffirm, redefine and re-establish the proper function and role of the family court and family judge**. It is to act as the proper and appointed authority figure both towards the parents and the children. Not another expert or welfare officer.

Similarly, this reaffirmation should include those appointed to advise the court or represent children. They too are there, in loco parentis, to act with authority and not simply to listen to young children and parrot their views. However unpopular it makes them. And as an aspect of that we should be very slow to allow court appointed guardians to be replaced on the ground that they are no longer representing the views of the child

As a vital corollary of all this, when we have made decisions and orders it is essential we enforce them rigorously and swiftly. The flabby judicial response, to quote Lord Justice Munby, is another symptom of the larger problem and a significant contributor to it.

Is this not so obvious it does not need stating ?.

I can hear some of you say that surely I did not come here to hear the bleeding obvious. But, if we are all brutally honest with ourselves, are we not all, from time to time, guilty of sloppy decision making and endlessly putting off the evil day? Is this not something we are all capable of being guilty of, especially in the course of a very busy court list or with a heavy workload . Grasping the nettle firmly and hanging on can be personally stressful and very demanding. Making oneself very unpopular with one, other or both parties or their lawyers is not something one readily invites. The easy way out is often beguilingly attractive.

So my principle point this morning is that we should all, all of us involved in the system, be alive to the unintended slippage in the authority of the family court which has been creeping in and gathering momentum over the last decades and which we can no longer afford to ignore. Expression and projection of proper authority is of vital importance to parents, the courts and society. The rot must not be allowed to go further. In every way we simply cannot afford it.

Some glimmers of blue sky?

As part of that restoring process let me suggest a few other areas which perhaps merit consideration, a little blue sky thinking perhaps;

1. **Different/diverse Training**

In these days of financial constraint do we as judges require different, better and more in depth training so we can make decisions about children without endless recourse to expensive experts? Most of us have huge practical experience of the business and have engaged frequently with the regular experts in the field both at the Bar and on the Bench. How many hundreds of reports have we read about the psychological impact on children of e.g. their warring dysfunctional parents or of uprooting children from their settled home? Very many cases exhibit very similar features. Do we need to hear it fresh every time? With perhaps a little extra training in child development would we not be able to act more quickly and **with greater authority** at an earlier stage without waiting for a yet another simple but expensive report?

2. S**imple/swift Enforcement**.

As if they were disobedient children, parents need to be given the clearest understanding of the consequences of their flouting court orders especially in the field of contact. A clear process or system of enforcement, generally appreciated and understood by all parties, is essential for the reaffirmation of the court's authority, the efficient disposal of cases and the saving of huge amounts of public time and money.

If I were to call it "three strikes and you are out" it sounds antediluvian and insensitive but something like it, perhaps should be the norm in the interests of clarity for **all** separated parents. In other words if an order is disobeyed, say, three times the residence of the child should normally be transferred to the other parent.

The three breaches might take the following route e.g.

1. **A simple contact order** followed, if that was breached, by
2. **A detailed and closely defined contact order with a very clear warning** (possibly in writing and signed by the judge) followed if that was further breached by
3. **A suspended residence order with conditions of contact attached** which if breached again would lead to immediate change of residence with almost no further recourse to the court. In other words three broken orders.

You may not yet have come across "the suspended residence order". it was invented by me last year to deal with the case I was mentioning earlier. The Court of Appeal has now given this new tool its blessing on two occasions and it is now reported as **Re A (suspended residence order) 2010 1 FLR 1679**. It works in the same way as a suspended committal order but without the irritating technicalities attached to enforcement by committal. The court attaches clear conditions which if breached lead to immediate removal of the children to the other parent. The advantage of this order, in these intractable cases, is that the outcome lies entirely in the hands of the defaulting parent (which, of course, is made clear to him or her at the time of the making of the order).

In the "A" case the suspension had to be lifted and the police finally moved the children earlier this year to their long suffering grandparents. It was all pretty grim but they are now having full and unsupervised contact to the father they had not seen for properly for four years.

There are three conditions I would attach to this suspended residence order approach. Firstly, and obviously, the judge must be satisfied, **at the time the suspended order is made**, that the alternative home is good enough. Secondly, it must be made abundantly clear to the parent concerned that you really mean what you say, and finally there must be judicial continuity throughout. The authority must come from the judge not the process.

I do not, as a rule, favour imprisonment for parents who breach these orders because of the risk of making them martyrs and because it does not actually deal with the problem practically. You are often no further forward after the parent has left prison. But it is sometimes the answer as Munby LJ has reemphasised in the case I mentioned earlier

A clearly understood process of enforcement, employed quickly and efficiently might, very occasionally, work against the interests of a particular child but the benefits to the general population of children caught up in these cases would be incalculable. In other words the underlying policy considerations should rule the day just as they do in eg. the Child Abduction process underwritten by international convention. Sometimes in those cases, as we all know, the decisions seem harsh in a particular case but the benefit to abducted children in general is obvious. This approach, guided by macro policy considerations, works overall for the greater benefit of all children worldwide. In contact disputes we should not be afraid to replicate that approach. If it was generally understood that breach of contact orders led to swift and rigorous enforcement, I have no doubt that the situation would drastically and rapidly improve. Children learn quickly enough when their parents really mean business. Similarly their parents need to learn from the courts as well.

In Australia, they have resumed wearing robes in family cases to reinforce the authority of the court. "*We have taken out the carpets and the indoor plants*" as one judge recently put it to me. "*It sends a clearer message to the participants that this is serious stuff*". An idea worthy of serious consideration here, perhaps?

[As a postscript, it goes without saying that it is essential to the success of this approach that the appellate courts support the judges at first instance unless it is unavoidable].

2. And other areas....

This clear, authoritative approach must surely also be affirmed in other fields of forensic activity too. Especially I suggest in relation to Case Management. Far too often Court directions are regarded as useful advice and guidance but not essential orders to be obeyed. It is hard to be tough on over pressed, poorly paid, publicly funded lawyers but in

the interests of litigants generally and the children, the public purse and the restoration of the authority of the process it is necessary. I know the President is very concerned about this as is evidenced by the fact that he is personally involving himself in the case management of many of the cases in London at the RCJ.

Some concluding thoughts

Let me then try to draw together the some of the underlying threads within my suggestions:

1. Family justice is the area of justice most likely to be encountered by the average citizen nowadays (with possible exception of the driving offence). It is an integral part of the working of a modern society just like the family doctor. The family court is, in every sense, **the front line service** for the family at the time of breakdown.

2. Nowadays it is part of **the proper function of the family judge to express himself /herself publicly** on matters about which we know more than anyone else. If this is unpopular that is unfortunate but it necessary and unavoidable.

3. The circumstances in which family courts now find themselves call for a reappraisal of our approach to our function. There are simply **too many cases and too few resources**. The situation will only get worse and, quite simply, we cannot afford to go on as we have been. **The luxury of endless hearings and endless employment of lawyers and experts is not going to be funded by central government and so has to be very substantially restrained.** We cannot go as we are, however retrograde and even painful that may seem to us. We will have to learn to manage in other ways.

4. **Children's views and wishes should be given their proper but not undue weight** in reaching the correct overall outcome in any given case. We should not only hear what children say but listen to what they are really saying.

5. Once a decision and order is made the consequences of breach must be spelt out with perlucid clarity and then, where breach, occurs **the order must be swiftly and rigorously enforced**. A clear and simple system of enforcement, well understood by all the population would, like the Child Abduction procedures work for the benefit of all parents (especially estranged parents) and children.

6. We are not social workers or child psychiatrists and never should be but **better training,** not in the child law, but in child psychiatry /paediatrics and child development would give us greater authority and reduce the need for employment of experts in the more routine problem cases. This might cost a little money initially but would save its cost many times over in the saving of expert and other public funded fees and also of court time.

In the interests of doing our best for children, the overarching and vital need is for the re-emphasising of the authority of the family court as the authority figure/institution in the process. It is vital to the process and to the healthy and efficient functioning of the whole system. Just as parents need to be the authority figures for their children and not cowtow to ill considered and apparently fashionable views about their role in their children's lives, so too the court needs to act with authority by imposing clear boundaries on the behaviour of litigants. This does not mean we become grumpy old, hang'em and flog 'em judges or that we do not employ our skills as mediators to achieve good solutions and outcomes but, by whatever means we employ, we need to make clear and firm decisions as quickly as practical. We must grasp the nettle of the difficult case and avoid the

temptation to put off the evil day. At all costs the flabby judicial response is to be outlawed. The reintroduction of robes especially in serious, intractable cases deserves consideration.

If nothing else this morning I hope I have given you pause for thought.

We need to ask ourselves the question; have we not allowed this uncritical attitude, which I have tried to identify, to creep in under the guise of a modern approach. If not, all well and good, but be on your guard. If what I have said strikes any chords with any of you; I invite you to subject yourself to rigorous re appraisal.

Thank you for inviting me. I am looking forward to meeting many of you and to you coming up and telling me you disagree with every word and I should be pensioned off as soon as possible.

At all events let us avoid slavish adherence to fashion and fad and really bring all our skills to bear so that we can truly, genuinely and selflessly **hear it for the child**.....

Paul Coleridge

26 November 2010
