PRESIDENT OF THE
FAMILY DIVISION

THE NICHOLAS WALL MEMORIAL LECTURE 2019

"THE CHILDREN ACT 1989: 30 YEARS ON"

Sir Andrew McFarlane: President of the Family Division

9th May 2019

I first met Nicholas Wall at some time after he had taken silk in 1988. During the period of 5 years prior to his appointment to the Family Division in 1993, Nicholas was my first choice as a leader on the few occasions when I, as a young Birmingham hack, had a case requiring the 'weapons grade' advocacy skills of a QC. I now recall these encounters, which are themselves some 30 years or so ago, as being a mixture of hard work, interest, admiration, relief and fun in roughly equal measure. Nicholas had a prodigious capacity for work which was driven by an apparently insatiable interest in the law and in the human beings at the centre of each case. I certainly found that to have his striking intellect, great knowledge and towering physical presence in court on "our" side, was a wholly reassuring experience on each occasion that I was fortunate enough to work with him.

Any substantial piece of new legislation requires wise and careful judicial development as the central concepts and internal architecture of the new law is applied, case-by-case, within the courts. This was true of the Children Act in spades, where much of the content was either wholly new to English law or was a substantial reformulation of that which had gone before. There was much for the Family judiciary to do in terms of unpacking and developing the new law and, in Nicholas Wall, Family Law had the benefit of a judge who approached this all-important task with focus and energy. This was a busy time and the law

reports are full of important decisions by Mr. Justice Wall in which the law, and just as importantly, the practice, was developed for the greater good. A story from the time, which I suspect is true, has a young barrister referring Mr. Justice Douglas Brown to "an *unreported* decision of Mr. Justice Wall" only to receive this response from the Bench: "*are* there any?".

Although the title of this talk: "The Children Act 1989: 30 years on", would be an apt title for any general Family Law lecture given this year, it is, in my view, particularly apt that the modest overview that I offer this evening is particularly linked to the memory of a man who did so much, in so many ways, to bring this most valuable piece of legislation to life during 20 years of unstinting judicial service.

At the risk of being overtly tribal, it is also fitting that this lecture is arranged by Grays Inn and is taking place in that Inn's ancient Hall. Although, of course, these things are by no means competitive, it is the case that Grays Inn and its members have undertaken at least their fair share of the heavy lifting over the years with respect to the development of the Children Act. Starting, of course with Baroness Hale who was the principal architect of the legislation and who has been a judge almost the entirety of the period since its implementation, Grays can count Nicholas Wall and two of the other six Presidents of the Family Division during the past 30 years, as well as Sir Alan Ward, the late David Hershman QC and others amongst its members. This is not to forget the prominent role played by Grays Inn and its fictional member Mrs. Justice Fiona May, played immaculately by Dame Emma Thompson, in the recent film of "The Children Act"!

Much was written at the time, and has been written since, about the origins of the Children Act, its philosophy and its aims. I have recently re-read, and will quote from, two lectures given at the time of the Act's birth.

It was almost exactly 30 years ago, on the 12 April 1989, that the then Lord Chancellor, Lord Mackay, gave the inaugural Joseph Jackson Memorial Lecture, marking the death of an earlier towering presence in the development of Family Law, who practiced, like Nicholas Wall, from 1 Mitre Court chambers. Lord Mackay's title was 'Perceptions of the Children Bill and Beyond'.

The second is an address entitled "The Children Bill: The Aim" given to a conference in Bath in March 1989 by Professor Brenda Hoggett QC, as Baroness Hale then was. That address opened with these words[1]:

> "The Children Bill has two main aims. The first is to gather together in one place, and (it is hoped) one coherent whole, all the law relating to the care and upbringing of children and the provision of social services for them. The second is to provide a consistent set of legal remedies which will all be available in all courts and in all proceedings. Such simple aims should not be as revolutionary as, in fact, they are. Child Law, perhaps more than other aspects of Family Law, has developed piecemeal to provide particular remedies or services for particular needs."

As is well known, much of the content and structure of the Children Act was drawn from two comprehensive reviews undertaken prior to 1989 by the Law Commission. At the core of both the private and public law provisions is the concept of "parental responsibility".

When introducing the Bill to Parliament Lord MacKay, the Lord Chancellor, described it as "the most comprehensive and far-reaching reform of Child Law which has come before Parliament in living memory'[2].

In the introduction to their excellent textbook by White, Carr and Lowe: "The Children Act in Practice", the authors state[3]:

> "The Children Act 1989 brought about the most fundamental change in our Child Law… The Act has been widely regarded as a structural masterpiece providing an admirable framework for the promotion of the interests of children and families within a system of support services and court intervention where appropriate."

The Act was supported by important changes in procedure and evidence which, for the first time, established common principles of practice across all courts

[1] [1989] Fam Law 217
[2] 502 HL Official Report (5th Series) col 488.
[3] 4th Ed, page 1.

and paved the way, in due course, for the establishment of the single Family Court.

The Children Act 1989, which came into force in October 1991, has more than stood the test of time. This lecture marks the passage of some 30 years during which the essential elements of the legislation have been soundly proved under fire. The drafting of the original provisions within the Act was superb. Where subsequent changes have been made they are seen to be embellishments or extensions to the established structure, rather than any radical reform. Further, the ethos and approach of the Children Act was, in 2002, extended to encompass the one area of child law not included within the 1989 Act, namely adoption so that, upon the implementation of the Adoption and Children Act 2002, the entirety of the law relating to children from birth to adoption and beyond is encapsulated within these two complementary statutes which, together, form one jurisprudential whole in terms of philosophy, principles and practice.

In Wales, where the social service function is a devolved matter, the Welsh Assembly has moved away from the CA 1989 and developed the law relating to local authority responsibilities very significantly under the Social Services and Well-being (Wales) Act 2014 and other measures. This important legislation is of interest and should be more widely known by those who only practice in England; there is a good deal that we may learn from within it.

Much that is positive can be said about the Children Act 1989; indeed, there is little that can be said to the contrary. It would be hard to envisage a lecture entitled "The Children Act 1989: how did we get it so wrong?". If such a lecture were offered, attendance would be low but, devoid of proper content, the text would, at least, be mercifully short!

I am not, however, going to take more time this evening in singing the praises of this inspirational and extremely important piece of legislation, which has shaped the lives of countless children and families over the past 30 years and has become part of the DNA of every Family Law professional and judge. I would like instead, if I may, to point up three or four areas within the 1989 Act's

provisions which justify comment or consideration as we mark its 30th anniversary.

"Making Contact Work"

As many of you will know, 'Making Contact Work' was the title given to the 2002 report of the Children Act Sub Committee of the Advisory Board on Family Law led by Mr Justice Nicholas Wall. This substantial piece of work, which involved extensive consultation, was, I recall, [and I should now sound a 'trivia alert' claxon] the subject of a sell-out conference in the QE Conference Centre on what turned out to be the day of the massive march against the war in Iraq, in February 2003.

'Making Contact Work', identified the need to enhance the court's powers but, just as importantly, public understanding of the issues that arise when parents separate.

Re-reading the 30 or so recommendations of the Sub-Committee today, one is entitled to ask, at least in relation to some of them, what has happened in the past 16 years. The recommendations put forward advising of the need to provide sound information to separating parents remain on the 'to do' list and will feature in the soon to be published report of the Private Law Working Group under Mr Justice Stephen Cobb. That this is so, despite the same recommendation being made not only by the major review of Family Law under Sir David Norgrove in 2011 but also by the Child Arrangements Programme, again led by Cobb J, which rolled out a revised regime designed to support the amendments made to the CA 1989 as a result of the Norgrove Review, is nothing if not dispiriting.

The Wall sub-committee recommendations on this aspect were in favour of:

- The preparation or commissioning of a leaflet for parents on post separation contact;
- The organisation of a co-ordinated approach to the preparation and distribution of information to parents;

- The organisation and provision of age-appropriate information for children on the effects of parental separation and contact.

The sub-committee report also stressed the need for judicial continuity, a goal which is still not achieved in some court centres. A number of its recommendations stressed the need for central funding to provide contact centres and to support alternative dispute resolution via conciliation or mediation.

The sub-committee's recommendations that were aimed at enhancing the range of powers available to a court to require parents to undertake particular activities or to impose fines or other punishment where orders are not obeyed, were taken up and, in due time, were enacted in the Children and Adoption Act 2006, which introduced 'contact activity directions and conditions', enhanced provision for enforcement (including the imposition of a community service order) and jurisdiction to fine a parent in certain circumstances.

Building on 'Making Contact Work', the Family Justice Review, which made a substantial number of recommendations in relation to Private Law, attempted to move the focus away from 'contact' towards an approach that became known during the subsequent training as 'Making Parental Responsibility Work'. A central plank in the Review's recommended strategy was to change the labels of 'residence' and 'contact', which had, in its view, by 2010, become tainted with the same unhelpful concept of there being a First and a Second class of parent, in the same manner as had been the case with respect to 'custody' and 'access' under the pre 1989 Act law. The review therefore recommended that s 8 orders should have a more neutral title, namely that of 'child arrangements order', which might be seen as simply doing what it says on the tin and fixing the practical child care arrangements, without enhancing or diminishing the parental responsibility, or the status, as between each other, of the child's parents.

In due course, many of the Family Justice Review's Private Law recommendations were taken up and enacted in the Children and Families Act 2014, with the result that 'residence' and 'contact' orders have now become 'child arrangement orders', under which a court may order 'with whom a child

is to live, spend time or otherwise have contact'[4]. However, because of the need to continue to afford some measure of freedom where one of the parents is the de facto primary parent (for example to go abroad for up to 28 days) the reformed provisions still afford some priority where one parent has a 'live with', and the other only a 'spend time with', child arrangements order.

Have these and other changes to the original provisions of the 1989 Act made a positive difference? This is, of course, a complex question to which there will be no definitive answer, but, in terms of the numbers of separated parents who still turn to a magistrate or judge to sort out the arrangements for their children after parental separation, the answer, depressingly, would seem to be 'no'.

That this is so, I would venture to suggest, is not the fault of the Children Act or the law that has developed under it. The law is plain that each parent has full and equal parental responsibility and all that the court is doing when determining an application is fixing the practical arrangements for a child's care. I spoke on this theme only recently at the Resolution Annual Conference[5] and I will not repeat what I said then here. The courts have been plain that it is the responsibility of parents, and not judges, to determine issues that may arise between them and that this 'responsibility', difficult and burdensome though it may well be, is just as much part of their responsibility to do what is best for their child as some of the happier parental tasks may be.

In looking back at the words in the addresses given by Lord Mackay and Baroness Hale in 1989, I am struck by the clarity of their message on this point. Lord Mackay described the concept of parental responsibility as running through the Bill 'like a golden thread.' He stressed that under the new law families would be 'left to sort matters out for themselves unless it can be shown that without a court order the child's welfare would suffer.' He drew attention to the Law Commission's intention to lower the stakes by the introduction of 'residence' and 'contact' as opposed to 'custody' and 'access' orders and he stressed that 'it is important, therefore, for the professions and the courts to seize the opportunity, from the outset of a dispute, to bring home to parents the

[4] CA 1989, s 8

[5] https://www.judiciary.uk/announcements/speech-by-president-of-the-family-division-to-the-resolution-conference-2019/

basic fact that these orders do not affect their status as parents, and that it is vital to preserve the bond between parent and child'.[6]

In her 1989 Bath Address, Baroness Hale stressed that the assumption in the Act is "that bringing up children is the responsibility of their parents and that the State's principal role is to help rather than to interfere. To emphasise the practical reality that bringing up children is a serious responsibility, rather than a matter of legal rights, the conceptual building block used throughout the Bill is 'parental responsibility.'... It... represents the fundamental status of parents."

In holding, as this lecture does, that the Children Act is essentially sound and effective legislation, I am in no way closing my eyes to the manner in which the delivery of dispute resolution following parental separation often falls short, or, worse, compounds the potential for harm. That this is so is, in my view, demonstration of the fact that the law can only go so far in resolving what are essentially relationship difficulties within families.

Building on positive statements by those in Government, for example in the DWP's "Reducing Parental Conflict Programme" and the MOJ's consultation "Reducing Family Conflict", the current Private Law Working Group, whose interim report will be published later this month, is likely to recommend significantly enhanced out-of-court family dispute resolution services. Such services, coupled with a sustained public education campaign, would aim to support and guide separating parents towards resolving their dispute before they ever contemplate issuing a court application.

Child Protection

The concept of 'significant harm' and the need for the State to establish an objective baseline of detriment to a child's wellbeing sufficient to justify intervention in family life must be high on any list of innovations brought to pass under the Children Act 1989.

The 1989 Act replaced the previous parallel routes for placing a child in care, either via magistrates sitting in the Juvenile Court under section 1 of the

[6] (1989) Family Law 213.

Children and Young Persons Act 1969, or via a High Court judge in wardship proceedings under the inherent jurisdiction, with one new route provided that the statutory threshold criteria in CA 1989, s 31 based on 'significant harm' are satisfied. Wardship and the inherent jurisdiction were maintained for deployment, but only with the court's leave and only where the result that is sought can not be achieved under the new statutory scheme.

This is not the place to give a detailed exposition of s 31 or the meaning of 'significant harm'. But it is right to ask the question, at this 30-year anniversary, whether this pivotal reform has proved fit for purpose.

The answer to that question is, in my view, an almost unqualified 'yes'. Indeed, the flexibility both of the concept of significant harm and the continued availability of the inherent jurisdiction have met the needs of children in circumstances which are likely to have been well beyond the contemplation of many when the new provisions came in.

When considering the flexibility of the concept of "significant harm" it is necessary to think back to the level of understanding in relation to child abuse that existed in the latter part of the 1980s. The Cleveland Child Sexual Abuse Inquiry, conducted by Lady Justice Butler-Sloss (as she then was) had taken place in 1988. The inquiry, which was itself the primary political catalyst which spurred the government and Parliament on to enact the 1989 legislation, arose from difficulties encountered as professionals began to develop ways of understanding and analysing evidence of potential child sexual abuse. As is well known, the development of a society's understanding and acceptance of different categories of child abuse takes time and moves from stage to stage. It was only in the 1960s, with the work of Kempe and Kempe[7], that the concept of "battered babies", namely that parents might physically harm their children, became accepted. Acceptance of the existence of sexual abuse followed on. Thereafter, and at a time since the 1989 Act has come into force, the understanding of professionals has developed yet further so that, for example, it became accepted that some parents might deliberately harm their children in order to gain attention from medical professionals (so-called "factitious

[7] Described in "Child Abuse" (Ruth Kempe and Henry Kempe) Fontana Press 1978

illness"); other examples could readily be given. Alongside the extension, from time to time, of the specific categories of child abuse has run a continuing development in the understanding of the importance of emotional harm to a child's health, well-being and development.

Decades ago, I recall, the focus of a court in cases of domestic violence was upon the particular physical act or acts complained of. Often the violence was between the adult parents and, where the child was not in the room, courts were encouraged to the view that the impact upon the child was therefore not great. In the intervening 30 years our understanding has undergone a sea-change, following the acknowledgment in *Re L* [2000] 2 FLR 334 that there is always an emotional impact on children in circumstances of domestic violence irrespective of whether they are, themselves, injured or even present when any particular assault takes place. That understanding has, rightly, progressed so that the potential for emotional harm is recognised in the wider circumstances now encapsulated by the term "domestic abuse", irrespective of whether there has been any actual violence at all; the harm to the child comes from the dysfunctional manipulative relationships between the adults as much as from any particular physical flareup. The concept of "harm" within the Children Act has been sufficiently flexible to take in this wider understanding as to emotional harm as it has developed over the years and, although many Family lawyers might argue that this did no more than confirm the case law post-*Re L*, the definition of 'harm' in the 1989 Act was enlarged in 2002 to include harm from seeing or hearing the ill-treatment of another person.

A measure of the importance of this facet of potential harm to children is that 'domestic abuse' now features in some 62% of all applications for private law orders that come to the Family Court[8].

In passing, but importantly this evening, it is right to record that the author of the advisory committee report on which the Court of Appeal based its ground-breaking judgment in *Re L* was, naturally, Mr Justice Nicholas Wall.

A more modern example of the flexibility of the s 31 threshold criteria is to be found in the ability of the Family Court to make orders for the protection of

[8] Women's Aid and CAFCASS Report 'Allegations of Domestic Abuse in Child Contact Cases' (2017)

young people who are involved in gang culture generally, or running "county lines" in particular. In the past some such young people may have found themselves before a criminal court. Now, not infrequently, young teenagers in such circumstances, who are seen as victims and in need of protection, are brought, by local authority social services, before the Family Court where an application is made for a care order on the grounds that the child is "beyond parental control" and as a result is suffering or is likely to suffer significant harm. Care judges in the larger courts in urban centres now see a regular flow of cases involving young people on the edge of the gang culture. Whilst these are not the most straightforward of cases, it is right that the Family Court is able to take steps to try to protect these young people, where protection is needed, and it is, again, a sign of the flexibility of the Children Act that its provisions apply readily to these modern problems. At a time when, rightly, there is extreme public concern over the impact on young people of the gang culture, it is, I believe, important to trumpet this initiative by local authorities and the Family Court by taking action under the Children Act 1989 to try to protect some of these vulnerable young people.

Having mentioned gang culture, it is right to report, in passing, one of the regular challenges now presented to the staff and security teams at city centre Family Courts from some of those attending carrying knives on arrival at the court building. During the first four months of this year at the Central Family Court in Holborn, London, not 500 yards from where I stand this evening, no fewer than 473 knives with blades over 3 inches long were confiscated from individuals during security checks at the court entrance. An additional 230 knives were found deposited in the precincts immediately outside the court entrance. We do not believe that most, indeed any, of these knives were necessarily being brought in for use in the court building. It simply seems to be a facet of everyday life in 2019 for some members of the population to carry a weapon with them at all times.

The third and final example to demonstrate the flexibility of the child protection jurisdiction established by the Children Act 1989 is in respect of young people who are proved to be at risk of "radicalisation". Unfortunately, there is time only to flag this up by mentioning it. In short, since 2015 the Family Division of the

High Court has exercised the wardship jurisdiction, in appropriate cases, to prevent, or secure the return of, a child being taken out of England and Wales to join a radical religious group[9]. This development of the jurisdiction in modern times demonstrates the wisdom of the architects of the 1989 Act in limiting, but nevertheless maintaining, the ability of the court to make orders under the inherent jurisdiction where such orders could not be made under the statutory scheme.

Secure accommodation

It is, unfortunately, necessary to change from a positive tone to a less positive one when considering the ability of the 1989 legislation to encompass the needs of young people who may require to be accommodated in circumstances where their liberty is restricted.

Part 3 of the Children Act 1989, which deals more generally with local authority support for children and young people, includes provision in s 25 by which a court may make a "secure accommodation order". That jurisdiction is facilitated by a statutory scheme for secure accommodation enshrined in the Children (Secure Accommodation) Regulations 1991. For the children who fit the criteria, the provision made by s 25 is entirely appropriate and not in need of reform. The number of young people who need this form of accommodation, however, far exceeds the number of approved places available. I understand that at any one time each secure bed that comes free will have between 15 and 20 potential occupiers chasing it.

I wish, in the few words that I now say on this topic, to identify three separate groups of young people who require some form of restriction on their liberty and who are brought before the Family Court. The first group are those who would otherwise go to an approved secure accommodation facility but, due to a lack of beds, no such place can be found for them.

The second group are those whose circumstances do not strictly come within the statutory scheme for secure accommodation, but whose mental health and well-being requires some form of restriction. Those suffering from eating

[9] *President's Guidance: Radicalisation Cases in the Family Courts* (8 October 2015).

disorders, or who have been groomed for sexual abuse, or who may self-harm, might be examples of this second group.

The third group is one that I have already mentioned, namely young people who need to be moved out of their home area and placed in accommodation to prevent them from being found and drawn back into the gang culture.

Each of these three groups represents some difficulty for the Family Court. In essence the difficulty is that, normally, and almost inevitably, the bespoke accommodation identified by social services will not be in an approved children's home, let alone approved secure accommodation. Often the placement will be a significant distance away from the local authority area and outside the local knowledge of the court. Often it will be provided by a private company. Often the accommodation will be very expensive. Very frequently the need for the court to approve any particular placement will arise as a matter of urgency, with the court being told that no other placement is currently available. Typically, the application comes before a judge on short, or no, notice. Young people in the groups that I have described are vulnerable and very needy. It is difficult for the court not to approve such a placement – at least on a temporary basis.

The Children Act 1989 does not make provision for the court to authorise placements on the basis that I have described. Young people under the age of 16 years do not fall within the jurisdiction of the Court of Protection[10] where there is a statutory scheme for the authorisation of deprivation of liberty. The Family Court engages with these cases either by approving the local authority care plan, which will specify the particular placement provision that is to be made, or more commonly, by deploying the High Court's inherent jurisdiction.

Whilst there seems to be no legal basis to question the Family Court's jurisdiction to approve ad hoc placements that restrict a young person's liberty as I have described, I do have a profound unease over the court frequently being asked to approve the accommodation of children when it, the court, has no means of checking or auditing the suitability of the facility that is to be used.

[10] Mental Capacity Act 2005, s 2(5).

The circumstances in which the Family Court is asked to approve placements of this nature have developed exponentially in recent years. It is now a regular feature of the life of the Family Court, whereas this was rarely so even 10 years ago. Whether or not the court's jurisdiction to deal with these cases requires to be brought within the statutory scheme is, of course, a matter for Parliament, and, in raising it this evening, I am doing no more, nor no less, than inviting those who were charged with these matters to consider the question.

In any event, there is a need, where a judge is forced by circumstances and the lack of any other option to authorise placement in facilities which have not been approved as a children's home under the statutory scheme, for the court to ensure that steps are taken immediately by those operating the facility to apply to the regulatory authority (OFSTED) for statutory registration. I intend to issue Practice Guidance to the courts before the end of July on this topic so that we can do what we can to bring more of these placements within the statutory regulatory scheme.

Children Act 1989: Conclusion

This 40-minute lecture is not intended to be the definitive word on the Children Act 1989, 30 years on. If I had thought that you had all paid good money for a 4-hour symposium on the topic, I might feel a tad guilty, but as the tickets are free I am sure you will not feel short changed if, subject to one further topic to which I wish to turn, I conclude my consideration of the 1989 Act at this point.

On any view, and in the view I am sure of every Family lawyer, the Children Act 1989 was ground breaking to a very high level on the seismic scale. It changed the world of children's law and it has more than stood the test of time. Such amendments that there have been, and there have been many, have built upon, rather than removed the core structure of the Act. There is no clamour, yea not even a whisper, that the basic concepts of child law now need further reform. The architects of the legislation, and its draftsmen, simply got it right. That that is so has been, and continues to be, to the great benefit of the children and young people whose needs it was aimed to meet.

Adoption

I would like, however, to conclude this short review of the Children Act 30 years on by, somewhat oddly, referring to its offspring the Adoption and Children Act 2002. Whether one thinks in terms of "imitation being the sincerest form of flattery" or, in parental terms, having offspring of whom one is entitled to be proud, a major sign of the success of the Children Act is the manner in which its approach and principles have been adapted and deployed in the field of adoption. The law relating to children is now one seamless whole, governed by general principles which are applicable across the board, notwithstanding bespoke procedures and orders being available at different stages of a child's journey through the system.

The Adoption and Children Act 2002, which came into force in 2005, has, in my view been a great success. Significantly, the 2002 Act abolished the old "freeing for adoption" orders and brought in the concept of placement for adoption, thereby bringing forward the all-important "adoption decision" for each child to a stage prior to placement. It was often the case under the old law that parents and, for that matter, the court, faced a fait accompli with a child who had been living with the adopters for 18 months or more and where, no matter what the merits of the parents' case might be, it was unconscionable for the court to consider moving her back to their care at that stage.

Those who drafted the Adoption and Children Act, and of course the Parliamentarians who enacted it, are to be congratulated for establishing a scheme which, whilst mirroring the principles and approach of the Children Act, developed the key concepts to reflect the lifelong quality of adoption over other potentially less permanent forms of intervention.

This is not a lecture on adoption law; but it *is* the Nicholas Wall Memorial Lecture and, although he made very many contributions to the development of Family Law more generally throughout his career, I consider that Nicholas' finest achievement was the manner in which, from his pivotal seat in the Court of Appeal, he teased out and gave wings to key concepts in the 2002 Act.

To demonstrate what I mean, and to give you an indication of the high quality of Nicholas' work, I will leave you with one example by reading the key passage

from his judgment in the case of *P (A Child)* [2008] EWCA Civ 535; [2008] 2 FLR 625.

To set the scene, it is not legally possible, as is well known, for a child to be adopted unless either each parent with parental responsibility consents or a court dispenses with their consent. Prior to the 2002 Act, the test generally applied for dispensing with consent was to determine whether the parent was acting "unreasonably" in withholding their agreement. The law did not require the welfare of the child to be the paramount consideration in making that determination. The new law made two significant changes. Firstly, the test for dispensing with consent is simply expressed in s 52(1) as follows:

> 'The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or the making of an adoption order in respect of the child unless the court is satisfied that-
>
> a) the parent or guardian cannot be found or is incapable of giving consent, or
> b) the welfare of the child **requires** the consent to be dispensed with.'

Secondly, the Act is explicit in requiring the court to determine the dispensation of consent issue by making the child's welfare throughout her life the paramount consideration.

The question for Family lawyers, which eventually became the question for the Court of Appeal, was what the word "requires" required! In particular, did it indicate a higher test than simply the ordinary one of deciding, on balance, what is "best" for the child? In other words, was 'required' in some way an imperative, with the court having power only when the child's welfare "required" that this be so. The whole provision had, also, to be interpreted in a manner that was compatible with the jurisprudence of the European Court of Human Rights in Strasbourg.

It is within this context that the passage from Nicholas's judgment, that I am about to read is set. It is, as this build-up may indicate, in my view, an absolutely splendid distillation of the law. Easily understood and readily applied in practice. Here are the words of Lord Justice Wall, having first described the context:

'This is the context in which the critical word "requires" is used in section 52(1)(b). It is a word which was plainly chosen as best conveying, as in our judgment it does, the essence of the Strasbourg jurisprudence. And viewed from that perspective "requires" does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.

'What is also important to appreciate is the statutory context in which the word "requires" is here being used, for, like all words, it will take its colour from the particular context. Section 52(1) is concerned with adoption – the making of either a placement order or an adoption order – and what therefore has to be shown is that the child's welfare "requires" adoption as opposed to something short of adoption. A child's circumstances may "require" statutory intervention, perhaps may even "require" the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily "require" that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is "required" is adoption.

'In our judgment, however, this does not mean that there is some enhanced welfare test to be applied in cases of adoption, in contrast to what [counsel] called a simple welfare test. The difference, and it is an important, indeed vital, difference, is simply that between section 1 of the 1989 Act and section 1 of the 2002 Act.

'In the first place, section 1(2) of the 2002 Act, in contrast to section 1(1) of the 1989 Act, requires a judge considering dispensing with parental consent in accordance with section 52(1)(b) to focus on the child's welfare "throughout his life". This emphasises that adoption, unlike other forms of order made under the 1989 Act, is something with lifelong implications. In other words, a judge exercising his powers under section 52(1)(b) has to be satisfied that the child's welfare now, throughout the rest of his childhood, into adulthood and indeed throughout his life, requires that he or she be adopted. Secondly, and reinforcing this point, it is important to bear in mind the more extensive "welfare checklist" to be found in section 1(4) of the 2002 Act as compared with the "welfare checklist"' in section 1(3) of the 1989 Act; in particular, the provisions of section 1(4)(c) – which specifically directs attention to the consequences for the child "throughout his life" – and section 1(4)(f). This all feeds into the ultimate question under section 52(1)(b): does the child's welfare throughout his life require adoption as opposed to something short of adoption?'

Perfect! A perfect judgment from a superb judge, whose presence amongst us we still keenly miss for his wisdom, for his skill and experience as a Family lawyer, and for his companionship and encouragement, which was always so welcome and so very freely given.

Sir Andrew McFarlane

President of the Family Division

9th May 2019