ROUND AND ROUND THE MULBERRY BUSH

or, The rationale for, and the practicalities of, the new public law outlines and children order advisory committee guidelines relating to case management in family proceedings in Northern Ireland

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INTRODUCTION

Many of us here today, if not all, are married. Most of us have children. Those of us who do, I can say without a shred of doubt, love our children dearly and would do nothing which might have any adverse consequences for them. In short, we want the best for "our kids".

So, it is alleged, does the law and so, apparently, do our politicians. The Minister for Children in Westminster not so very long ago was heard to aver that for the British Government our children are our most important priority. No doubt similar utterances can be traced back to Dáil Eireann. My unhesitating response to this is negative. I have yet to hear of a government minister – certainly in Northern Ireland – and I include indeed all our M.L.A.s at Stormont from all parties in this – prioritising our children's welfare in terms of direct legislation which materially affects the basic welfare of children in our jurisdiction over other matters of what they would think of as "of more pressing need". In Northern Ireland we have had the Bamford Report which stressed the urgency of funding a facility in Northern Ireland which is designed specifically for the mental health care of our children, especially those in severely disadvantaged areas, who have suffered trauma as a direct result of our euphemistically titled "Troubles" over the past 40 years or more. You may very well ask: "Who is Bamford?" and "What has become of his report?", which, be it said, is still talked of in Stormont occasionally as something which the Government of the day is

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"about to bring into operation". Ladies and Gentlemen, Professor Bamford died some years ago now, and his report has never been acted on in terms of bringing his recommendations into effect.

Long ago, when I was a mere twinkle in the eye of my late father, back, that is, in 1948, the Declaration of Geneva expounded upon the "rights of the child". These were in fact first drafted in 1923 by Eglantyne Jebb, the founder of the Save the Children Fund. They read as follows:

> 1. The Child must be protected beyond and above all considerations of race, nationality or creed.
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> 2. The Child must be cared for with due respect for the family as an entity.
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> 3. The Child must be given the means requisite for its normal development, materially, morally and spiritually.
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> 4. The Child that is hungry must be fed, the Child that is sick must be nursed, the Child that is physically or mentally handicapped must be helped, the maladjusted Child must be re-educated, the orphan and the waif must be sheltered and succoured.
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> 5. The Child must be the first to receive relief in times of distress.
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> 6. The Child must enjoy the full benefits provided by social welfare and social security systems, must receive a training which will enable it, at the right time, to earn a livelihood and must be protected against every form of exploitation.
>
> 7. The Child must be brought up in the consciousness that its talents must be devoted to the service of its fellow man.

Making due allowance for the use of the neuter-gender pronoun applied to "the child", which we would nowadays consider unacceptable, to me these principles have a resonance of applicability in today's world, nearly 90 years on. Why I mention this is to demonstrate that the problems relating to our recognition of the needs and rights of the child are not new phenomena. But it also highlights the minimal degree to which our legislators have in fact addressed these problems in the intervening period. Nor have they taken all the relevant points on board, even yet.

We are so tied up in the "rights culture" that we have paid little or no attention, it seems to me, to point seven of the Declaration. We do not need rights for children purely to empower them to take decisions about themselves, but to help them to recognise and assist the rights of *others*. It is not a selfish programme, but one which enables them to apply the principles for the good of others. These principles are positives in their own right and not merely, as is too often portrayed as the case – even in a lecture I attended which was given by a very distinguished Commonwealth judge – to be seen as mere restrictions on, or derogations from, the rights of others. In short, it inculcates not only the principle of rights, but also of the *responsible* use of these rights.

Nor can we rely on the press who shout of inequities in society from the rooftops. They love celebrities – especially politicians or those who are merely "famous for being famous" – and will write up those stories with alacrity. But apart from jaundiced reporting of high profile cases in which apparent unfairness exists – and that of course presumes that the full story is in fact being told – I have not seen any reports of what happens day-by-day in our Family Proceedings Courts to try to help children gain a better life. Such stories are just not newsworthy, it seems. Let us be perfectly clear on this. In Northern Ireland, over 90% of all family proceedings cases are heard at our level. The press have access to these courts, unlike in those at a higher level, and yet I have never ever heard of one single case being reported ... Oh yes, there *was* in fact one. That was when I myself had a trusted clerk in my court contact a responsible radio journalist to come to my court to report on me "giving forth" about the lack of mental health facilities for children here. (And, I must say, a very good job he made of it.) The response from politicians and other members of the third estate was, and continues to be, a simply deafening silence.

I have, I must admit, no idea as to what the position is in the Republic of Ireland, but the impression I get from my daily perusals of the *Irish Times* leads me to conclude, with respect, that in many aspects of children and family law, you are not a great deal more advanced. Forgive me if I am mistaken.

So, we, as simple district judges in Ireland, North and South, are often left to "carry the can" for the shortcomings of

others in this sphere. It is an area of the law in which much of the terminology and language used by us and other so-called "experts" is utterly obscure for the ordinary citizen, let alone, child, the more so for one from a disadvantaged background.

The Republic of Ireland has its written Constitution which, my study of constitutional law at Trinity College many years ago taught me, recognises the rights of the "family", but it so far has not brought in any changes which specifically recognise the rights of "children". I understand that this is likely to change in, hopefully, the near future.

Governments in Ireland, North and South, are currently presiding over severe family breakdown and they do not seem either to realise this or, at times, even to care greatly about how to tackle the problems to which this state of affairs inevitably gives rise. There are many parents in both jurisdictions, it seems to me, who themselves have never experienced an ethical upbringing with two parents as role models for their upbringing. How on earth do we expect such unfortunates themselves to "set a good example" for their own children? As one of my lay magistrates, Mr Robert Campton, put it the other day, "nowadays the nuclear family is often an aspiration rather than a reality". Families are fractured and fragmented, and the parents often have insoluble problems of their own, and merely pass their own fractured experiences on to their children. As a result of all of this, it is more and more left to the social services and, ultimately, to the judiciary, to do something about this sad state of affairs.

Nor, recent highlighted cases have shown, is there any guarantee that social services will always get it right. Lessons which were meant to have been learnt, from such cases as that of the unfortunate Victoria Climbié concerning the sharing of information between government agencies, have been shown in the Baby Peter case not in fact to have been properly acted upon.

Why do I preface the main meat of my talk with all of this? It is because I am attempting thereby to show that legislation and intentions of politicians alone, and the tender care of parents, does not and cannot of themselves suffice to fulfil the needs of children. Yet these principles, and those set out in the United Nations Declaration of the Rights of the Child, I believe, *must* help judges inform their interpretation of statute. It seems to me

that in the absence of real political will, judges and social workers, virtually alone, can impact positively on the welfare and lives of some severely disadvantaged children.

But to do this, judges need to take the lead in cases brought before them. They must be pro-active, not merely re-active. Our children are far too important to be dependent on the vagaries of Parliament, or social services alone. It is we who must drive cases forward. We simply cannot rely on others doing it for us. We have to do this in conjunction with a host of others, including social services, lawyers, parents and experts. It must be taken seriously, and delivered to the best of our ability and skill as speedily as possible. To that end, it is only right that case management in family law cases becomes our responsibility, and is not merely left to the tender mercies of the Court Service or lawyers alone. No-one must be allowed to impede the progress of us doing what we feel to be in the best interests of the child or children in the cases before us. We must always act in those best interests and, in Northern Ireland, apply the welfare principles set out in Article 3 of the 1995 Order. These are well known to those of us who practise in the North. We must also listen to the children on whose behalf we are effectively acting. Gone are the days of paternalistic welfare, when adults assumed that they alone should determine what was best for a child, without the necessity of listening to the child him-or-herself.

That is why there is such a need for a public law outline (where the government bodies – trusts, as we call them in Northern Ireland – are involved in seeking public law orders, that is, care orders, supervision orders or secure accommodation orders), and for the Children Order Advisory Committee Guidelines, which are just about to undergo a real transformation in the form of a second edition. These are designed to help judges to manage individual cases before them, so as, as quickly as they can, to achieve the best possible outcome for the children to whom these cases relate. In other words, how do we get to a position, as soon as possible, where we have all the relevant information before us to reach a truly informed decision in each case?

This is the true purpose of case management in family proceedings, it seems to me, and here, now, is how we, in Northern Ireland, seek to address these problems practically.

I. GUIDE TO CASE MANAGEMENT IN PUBLIC LAW PROCEEDINGS

Much of this part of my talk is unashamedly plagiarised from an excellent talk given last September by one of Northern Ireland's foremost experts on the subject, Mr Michael Long, Q.C. I shall seek to summarise what he told us, in so far as it represents what we are now trying to do to ensure that cases are not delayed unduly. I shall stick to the points which in my opinion are most relevant to our job as district judges, since we are usually dealing with rather less complex cases than those in the higher echelons. Our cases are nearly always heard within a single day, which is necessary because, among other considerations, they involve, at our level, two lay magistrates as well as a district judge. As lay people, lay magistrates have other full-time jobs and commitments of their own, and are not able to simply drop everything and turn up for a further hearing every day as suits the court.

The guidelines arise from the injunction in article 3(2) of the Children (Northern Ireland) Order, 1995, which provides:

> In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

Courts have often taken lower-level judiciary, lawyers and parties to task on this subject, although they have also often excused delay where it is found to be "planned and purposeful". It is, opines Mr Long, a common perception, which may have some truth behind it, that "bad" delay had become endemic. Hence the introduction of the *Case Management Guide*. It applies to all proceedings under Part V of the Children Order issued on or after the 1st October, 2009 (generally known as public law proceedings).

There were some "key elements" introduced, many of which in fact a number of us were already conscious of and applied in our case management.

1. One "key element" is that a case should be actively managed by the judge who is going to hear it. It follows that each case should be allocated to the appropriate level of judicial responsibility – that is, Family Proceedings Court, Family Care Centre (the County Court) or High Court – as early as possible. That is not to prevent subsequent re-allocation where appropriate, for example where a non-accidental injury scenario emerges at a later stage from new medical evidence, which would result in the transfer of a case from Family Proceedings to the Family Care Centre.

2. Absolute transparency and procedural fairness is to be expected from trusts.

3. Active case management should be aimed at the identification, reduction and resolution, not the proliferation, of issues at a much earlier stage than hitherto (*i.e.* not at the door of the court on the morning of the full hearing). This has to be tempered by recognition of rights to a fair trial, and care must be taken not to let the timetable prevent appropriate investigations.

4. We must take care to find out, as early as possible, not just what the trusts are urging upon us, but also the response of the guardian ad litem (who represents the child's interests), and of the parents in the case. Various stages of proceedings are therefore envisaged.

A. Stage 1 – Pre-proceedings

At the earliest stages of the case, it is important to identify, and make available to all relevant interested parties, the core information relating to the case to be made by the applicant trust, who should send a letter before action to the parents outlining the trust's concerns and proposed solutions. You should be aware that the trust will certainly have been talking to the parents for some time before action is actually taken, but in my experience, a lot of parents only really start to remove their heads from the sand when proceedings are actually instituted and the matter comes before a court. Even then, the language which we and trusts use is often utterly obscure to them, and some of them

still do not really grasp the full significance of the situation. This letter, in plain English, should be sent to all "prospective parties", and the recipients of the letter should be invited to attend the pre-proceedings meeting. (The *Case Management Guide* provides for information to be withheld where that is in the best interests of the child and, of course, Article 6 rights may be engaged even at a pre-proceedings stage.)

Core documents are to be disclosed in advance of proceedings. These are documents which ought to be readily disclosable in most proceedings without any necessity for argument, and they should suffice to let any prospective party or solicitor retained by such a party know in sufficient detail what the case is about, to enable a pre-proceedings meeting to be held. The object of pre-proceedings meetings is the resolution of issues without the bringing of proceedings, so that no parent can claim not to have known what it was alleged that he or she was doing wrong, and/or having no insight into what has gone wrong, and/or having no opportunity to demonstrate capacity for change before the issue of proceedings. It is up to the several legal representatives to agree the basis of any pre-proceedings meeting, that is, whether all or some matters are "on the record" or without prejudice. In any event, if agreements are reached then they should be reduced to writing there and then. Whatever the situation, there ought to be a means of accurately recording whatever transpires which the parties, collectively, want to be open to subsequent inspection by a court or anybody else.

B. Stage 2 – Issue of proceedings

It is important that the court knows sufficient about the case to be able to give meaningful administrative directions resulting in the first directions hearing. It should be informed in a summary and readily accessible way of what the applicant says the case is about, and what the applicant proposes as the immediate way forward for the child. The form C1 therefore requires information on six specific areas –

1. A concise and relevant chronology of events;

2. An initial summary of threshold facts, being the grounds for bringing the application and for seeking a public law disposal;

3. Details of the event or events which precipitated the trust's application;

4. The terms of any immediate order sought;

5. Initial placement options and proposals for the child; and

6. Proposals for allocation, and why (that is, at what level should the case be heard).

The timetable should have particular regard to –

1. Dates of all L.A.C. ("Looked After Child") reviews;

2. Any anticipated change in placement;

3. Any move to a new school;

4. Review of any statement of special educational needs;

5. Assessment of the child by a paediatrician or other specialist; and

6. Significant steps properly to be taken to implement an (interim) care plan.

At this point, the court will be expected to issue standard directions, such as appointing a guardian ad litem, directing representation of any person under a disability, transfer of level (if appropriate), and fixing the date of the first directions hearing.

C. Stage 3 – The first directions hearing

This is designed to ensure that the court puts in place all the necessary directions to enable the case management hearing to deal with all case management issues, preferably in one hearing, but at least in as few hearings as possible.

Certain specific directions are likely to be required in most cases. These include the following:

1. Filing of responses from the parents to the allegations made in the application form;

2. Filing of other evidence;

3. Any outstanding disclosure issues;

4. Filing of any case summary for the case management hearing;

5. Fixing a date for receipt of the guardian's initial analysis;

6. The holding of an initial joint consultation;

7. Identification of any need for assessment or retention of expert witnesses;

8. Filing of proposed directions for the case management hearing;

9. Filing of case summaries for the eventual trial; and

10. Fixing a date for the first case management hearing.

The idea here is to get the parents' response to the trust's case at a relatively early stage of proceedings, and it lets the court know what the parents are really saying about it as quickly as practicable.

The guardian's initial analysis should permit that party to set out in summary form the issues which he or she should be considering and allows the guardian to influence the conduct of the case in a powerful way. This is in keeping with the guardian's role as an advisor to the court. It also encourages the guardian to be pro-active rather than reactive. Again, the new form of analysis directed reports ought to make for shorter reports which are more focussed on the live issues at each stage.

D. Stage 4 – Case management hearing(s)

This is the core stage at which the court actively manages the case to get it ready for trial. The target is that all outstanding case management issues should be dealt with at the one hearing, although it is recognised that this may not always be possible, and that more than one hearing may be required. Applications for leave to have the child assessed or for the release of documents to expert witnesses should be before the court, if not already dealt with administratively. There should, by this point, have been a joint consultation, and the court should have read the guardian's initial analysis and the applicant should have filed draft directions. In fact, at our level, most of these will probably be done at or during this hearing if my experience is any guide.

E. Stage 5 – Final review hearing

This is really the last chance before the full hearing for the court and the parties to ensure that the case is ready for hearing, and that the hearing will be time-efficient and focussed towards the resolution of all relevant outstanding issues. It may be that there may have to be another joint consultation held or further directions given. To this end, a final care plan should be available, or at least a summary of one.

At this hearing, the court will:

1. Revisit the issue of the resolution of outstanding key issues;

2. Scrutinise compliance with the directions already given and give any further directions;

3. Consider the proposed final care plan;

4. Consider threshold and whether any concessions or agreement ought to be accepted by the court;

5. Consider the witness template and receipt of evidence by video-link (though I would surmise that this is unlikely to be much used at our level); and

6. Confirm the date of the full hearing.

F. Stage 6 – Full hearing

This is simply for the resolution of all outstanding issues. It must be stressed that, for the system to work, it is necessary that each case should be actively managed by the judge who is likely to try it. It is therefore important that the case should reach that judge as early as possible, and that it should, so far as possible, stay with him. Given that there is to be judicial continuity, it would be seen as important that there should likewise be continuity of representation wherever possible.

There is a perceived risk that since the emphasis is on active judicial case management, that this will make the lawyers more lazy and diminish their roles. For myself, I constantly demand their input, with a view to using their expertise to help everyone to work together in the process. Quite simply, the system will only work with the goodwill and input of all concerned acting collectively. We are fortunate that we have been permitted by our political masters to devise our own methods, rather than having a more prescriptive one imposed on us. In due course, we shall ourselves, of course, review its workings once it has bedded in.

And that brings me quite neatly on to the final part of my paper, regarding the redrafting of our very own *Children's Order Advisory Committee Guidelines* (or, more accurately, "Best Practice Guide"), of which the second edition is due to be officially unveiled on the 22nd April next.

We have already the first edition of this document, which appeared back in July 2003. Its purpose was to provide, in the words of the then Chairman, Gillen J., "a living instrument and therefore subject to periodical review and amendment in order to keep pace with changing times and new developments in practice and procedure". Clearly, with the arrival of the public law outline, there had to be amendments made, and this is about to take place. Much of the work behind this new edition has been carried out by Master Hilary Wells of the High Court and by Rosy Ryan of Counsel, under the watchful eye of our current High Court family judge, Weir J.

The guidelines addressed all aspects of family law, not just the public law sector. The new edition has been a vast undertaking, covering every conceivable aspect of family law. It is not prescriptive and it does not have the force of law, recognising that there is such a thing as judicial discretion and that judges, who are seised of a case, have much more intimate knowledge as to what is required from time to time. It is, as it states, merely a guide.

It is, of course, not directed solely at the judiciary, but at everyone who comes into contact with family law proceedings, whether they be social worker, guardian ad litem, solicitor, barrister or court official, as well as to judges. It recognises the basic premise, to which all family proceedings are subject, that delay is often (or even usually) not in the best interests of the child who is the subject of the instant proceedings. It therefore is a useful tool for judges who wish to ensure that everyone involved in a case keep this principle to the forefront of their thinking.

The new document is a much more comprehensive document than its predecessor. It covers all of the topics contained in the first edition, beginning with "Adjournments" and "Appeals" all the way through to topics with which we in the Family Proceedings Courts are not concerned, such as "The Official Solicitor" and "Hague Convention and Child Abduction", which, of course, are handled at higher levels. There are numerous appendices, which set out the manner in which applications and reports are to be worded. There are also sections which deal with matters which are extremely important

at our level, such as the use of the court children officers and social service reports.

It is not, however, a wholly complete document; nor can it ever be, by its very nature as a "living" process. Various aspects of everyday case management are often in a state of flux and are still developing, even as I speak. For example, in Belfast, there is an ongoing tension between the court teams and the "field" teams in the preparation of social services' reports. What is happening is that if a child is known to social services, or if there is perceived to be a risk of significant harm to a child, then the request for a report goes to the "field" team dealing with the matter. If, on the other hand, no such risks are perceived, then it will be the court team who will handle it. So far, so good. However, if "to gain the upper hand", as it were, one of the parents decides to make more and more serious allegations against the other, there is a risk that the situation may be greatly exaggerated and there may, in fact, be no real risk (certainly not a "significant" one) to the child from either parent. Unfortunately, we, who do not know the parents, have at that point no way of knowing who is telling the truth and who is not.

Reports from "field" teams are taking eight weeks to be compiled (interestingly enough, as against six weeks for reports requested by the Family Care Centre and four weeks for the High Court) and reports from the court team take five weeks. The problem then is that the "field" team may look into the case, decide that there is no real risk and that they should not have been involved in the first instance. What is happening is that I am getting letters back from "field" teams at the end of eight weeks baldly stating that there is no risk of significant harm and that the matter should have been referred to the court team in the first place. I then have to re-direct the report towards the court team, thereby wasting another five weeks. The reverse can also be the case, where parents have talked down the risk to the child. That makes a total of 13 weeks, a considerable time out of a child's life whilst living in a stressful situation. The unspoken reason why the teams are waiting until the end of their allotted period before replying is clearly because they are short-staffed, and have too much already on their respective plates.

What is patently needed is a link-up between the court team and the "field" teams, so that once a determination is made that the report should really be the responsibility of the other, they should at once and without delay transfer the case between themselves. No such arrangement currently exists. So there is in this, as only one example, a lot still to achieve in streamlining the system so as to make it user-friendly for courts and children. The idea of the guidelines is to consult with the various bodies involved as part of the groups involved in drafting a particular part of the guidelines, so as to let everyone engaged in the process arrive at a conclusion into which they will have had an input and which they will, in consequence, be expected to honour. It may even be, with some luck, that a child somewhere may benefit from it – and that, at the end of the day is what the whole process ought to be about.

CONCLUSION

By way of conclusion, there is, I am well aware, a risk that in some way this process, which seeks to rationalise and to standardise the procedures, can appear to seek to dictate to judges what they may and may not do in their own courts and in their own cases. In short, it may be felt to be a threat to judicial independence. This is not the objective of either document.

In the first place, if we as judges do not take our own affairs in hand collectively in terms of managing our own cases, then we can be quite sure that the Executive – that is, the politicians and civil servants – will do it for us. We do not exist in a vacuum. There are always financial restraints, whether we like it or not and, like every organ in a democracy, we have to be answerable for our actions. If anyone doubts the ability or will of the Executive to interfere in what we, quite rightly, see as judicial matters, let him or her look at other countries in Europe or the Commonwealth – including other well-established democracies – and you will see what I mean. If we do it ourselves, we thereby obviate the reasons or the need for others to take these matters into their own hands and out of ours.

Neither of these documents seeks to prescribe to any judge what he or she may validly do in a particular case. The final

decision has to be his or hers. What they *are* doing is to help judges by giving them a framework within which to operate, and the prescriptive element is directed at other non-judicial bodies in an attempt to assist judges in their case management. (The example I gave of what one might *seek* to achieve, though not yet in place, as between the Court Children Service and the "field" teams, springs to mind.) We all act within certain parameters in all walks of life. These guidelines are asking no more and no less.

Finally, to bring the wheel back full circle, all the way round the Mulberry Bush, we must always be mindful that it is very largely up to the judiciary to deliver for children who are disadvantaged in whatever way. Anything which assists this process, which can be used as a tool by us, and which need not interfere with our independence, is surely to be welcomed.