

Just following instructions?

**The representation of parents
in care proceedings**

**Report of a Research Study
funded by the ESRC**

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by

Julia Pearce and Judith Masson

with Kay Bader

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Julia Pearce, Judith Masson and Kay Bader

Authors:

Julia Pearce LLM, was Research Fellow in the School of Law at the University of Bristol. Following several years as a solicitor in private practice in family law, Julia worked for 12 years in empirical socio-legal research, mainly in the field of family law including studies in public and private child law, family mediation, domestic violence and cohabitation disputes. She retired at the end of this study.

Judith Masson MA PhD is Professor of Socio-legal Studies at the School of Law University of Bristol, specialising in Child Law. She has conducted a series of empirical studies into local authority, court and professionals' practice in the operation of child law. Judith has been a member of the Judicial Studies Board and the Family Justice Council.

Kay Bader BA, BSc is an experienced fieldwork researcher who has worked with various research teams over a number of years in the field of family law, in particular on divorce, mediation, adoption and care proceedings - most recently, with Judith Masson and Julia Pearce on the *Care Profiling Study* (2008).

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LIST OF ACRONYMS

ALC	Association of Lawyers for Children
B	Barrister
CAFCASS	Children and Family Court Advisory and Support Service
CC	County Court
CMC	Case Management Conference
DCSF	Department for Children, Schools and Families
EPO	Emergency Protection Order
FG	Focus Group
FLBA	Family Law Bar Association
FPC	Family proceedings Court
ICO	Interim Care Order
IRH	Issues Resolution Hearing
J	Judge
LA	Local Authority
LAD	(Magistrates') Legal Advisor
LSC	Legal Services Commission
NAI	Non-accidental Injury
OS	Official Solicitor
PLO	Public Law Outline
S	Solicitor
SGO	Special Guardianship Order

Chapter 1: Introduction

1.1 The aims of the study

The objective of this study was to examine the task of legal representation and client management, in the context of the experience of lawyers representing parents of children subject to care proceedings. While previous research had focused on the work of legal representatives in other areas of family law, and also on the work of other parties in child protection litigation there was no research on the work of the legal representatives of the parents of children in these cases. Recent developments in procedures emphasised the importance of good legal representation for parents not simply for their own benefit, but also for the smooth operation of the system. It therefore appeared particularly relevant now to provide clear understandings of how the legal representatives of parents conceive and operate their role.

Care proceedings have in recent years been subject to extensive review and changes in procedure, as has the public funding regime under which legal representatives operate. This research sought to explore the experience and difficulties faced now and also under new procedures and a more constrained funding regime. The research was prompted also by an earlier study commissioned by the DCA and DfES profiling care proceedings (Masson et al 2008), based on an examination of court files, which raised questions about the way parents were represented, and the role of parental representation in affecting the process and outcome in these proceedings. Underlying the issues for legal representation of parents are issues of access to justice for one of the most vulnerable and needy groups in our society.

This research aimed both to contribute to the literature on professional roles within the family justice system, and also to provide a proper understanding of the nature and quality of parental legal representation which is essential for the development of policy and practice in the area of child protection. Specifically, we sought to answer the following questions:

1. What roles do lawyers representing parents seek to play in care proceedings and to what extent does this conflict with client expectations?
2. What strategies do lawyers deploy in managing non-submissive or otherwise problematic clients?
3. How do solicitors formulate a concept of 'reasonableness' by which to judge their clients' cases?
4. How do solicitors acting for parents perceive and perform their duties to parties and bodies other than their client - the children, the court, the LSC?
5. How do the views and approaches of specialist and non-specialist Solicitors differ?
6. What are the expectations and views of the legal representatives of the other parties and the court?

7. How do solicitors view changes in the public funding regime and the potential impact on the specialist panels?

This research has proved very timely. The Family Justice Review, the Justice Select Committee Inquiry into the operation of the family courts and the Ministry of Justice Proposals for Reform of Legal Aid will each have access to research evidence which would not have been available had the ESRC not funded this study.

This report is divided into six chapters. This chapter provides background for the report, describing the process of care proceedings and the context in which the study was conducted, a brief review of the literature, and an account of the method. The second chapter explores the nature of the legal processes through which care cases are currently determined. Chapter 3 focuses on the place of parents in care proceedings as the parties whose representation is the subject of the research, individuals whose parenting is being questioned and the only non professionals involved. Chapter 4 describes the lawyers, both barristers and solicitors, who represent the parents and other parties, and considers the business of representing parents under the legal aid scheme operating at the time. Chapter 5 describes and analyses the various elements which form the task of representing parents in care proceedings from the first meeting with the client through to the final hearing, which in most cases will take place about a year later. In Chapter 6 we reflect on the study and pose questions for policy makers concerned with the future operation of care proceedings, and finally we summarise key findings in a series of bullet points.

Pen pictures of the 16 case studies, followed for the project and a chart illustrating their passage through the legal process are included as Appendices.

1.2 Care Proceedings

Local authorities bring care proceedings when the Children's Social Care Department considers that it needs a court order to protect a child. This form of intervention is only used where the local authority is seriously concerned about a child's well-being and considers that it cannot safeguard the child by making an agreement with the child's parents. Thus care proceedings are commonly regarded as 'a last resort' (Hunt, Macleod and Thomas 1999), to be brought only if alternatives have been rejected as inadequate. Local authorities must bring care proceedings whenever they want a care or supervision order. The court also has wide powers to determine a child's care; it can approve a plan for adoption and make a placement order, or make residence, special guardianship and contact orders (see Appendix 3 for details of these orders).

A local authority bringing care proceedings must prove to the court that intervention is required. It does this by providing evidence to show that the child 'is suffering or likely to suffer significant harm... attributable to the care provided by the parents, or likely to be provided if no order is made, not being

what it would be reasonable to expect a parent to provide.’ (Children Act 1989, s.31(2)) This is referred to as the ‘threshold test’ for a care or supervision order. The local authority must also provide a care plan which satisfies the court that its proposed arrangements are in the child’s best interests and court order is required.

Although care proceedings are brought where a child suffers serious non-accidental injuries (NAI) or sexual abuse, more commonly care proceedings concern children who are neglected, some of whom are also injured. The context for child neglect is frequently parental drug or alcohol misuse, domestic violence and/or parental mental health or learning difficulties.

Bringing care proceedings is a costly and time consuming business for local authorities. It has been estimated that each care case takes up 20 per cent of a full-time social worker’s working hours for a year (Plowden 2009). In addition, the local authority will have to contribute towards independent assessments ordered by the court and may need to instruct barristers (counsel) to represent it at court. In order to ensure that proceedings are used only where the local authority can prove its case and court orders are required, as well as to control expenditure, local authorities have established internal procedures for approving court applications. Legal advice and senior management approval are generally required even where an application is made for an order to remove or detain a child in an emergency (Masson et al 2007; DCSF 2008, para 3.3).

A local authority applying for care proceedings must complete the application form, detailing (amongst other things) the order it wants, the reasons for bringing proceedings and the preliminary plan for the child. Once issued by the court, copies are served on the other parties, usually the parents and the children. Children are represented by a children’s guardian, a social worker from Cafcass or, in Wales, Cafcass Cymru, and a solicitor who is a member of the Law Society’s specialist Children Panel - the ‘tandem’ model of representation. The court notifies Cafcass/Cafcass Cymru and formally appoints the allocated guardian; the guardian then appoints the child’s solicitor. Delays by Cafcass in allocating guardians have led to courts appointing solicitors so that children are represented from the start of proceedings.

The children’s guardian is an independent professional, responsible to the court for their recommendations. Their role is to investigate the child’s circumstances, usually to instruct the child’s solicitor, to represent the child’s best interests, and to advise the court about the child’s welfare and specific matters such as making other people parties to the proceedings. The children’s guardian provides an analysis of the child’s circumstances at various points in the case in order to assist the court to decide what expert assessments are required and whether the proposals of the parties match the child’s welfare needs. A children’s guardian can influence the ways both local authorities and parents view the child’s care, and consequently help them to agree arrangements. They are regarded as highly influential in care proceedings (Masson and Winn Oakley 1999; Hunt 2009).

Mothers and fathers with parental responsibility are automatically parties to care proceedings with the right to free legal representation under the legal aid scheme. Under the current legal aid arrangements parents can choose any solicitor with a contract to for 'public family legal aid' who is willing to represent them. Legal aid will cover not only legal costs but any assessments that are 'within scope'. Similar legal aid arrangements apply to the child's legal representation.

Care proceedings are not simple disputes between the parents and the local authority over the care of children, rather they are a court-supervised, multi-party enquiry into the child's current circumstances and future care needs. Ultimately, the court's role is to make decisions whether the threshold test is met and what orders should be made in the best interest of the child. In reaching these decisions the court makes very substantial use of expert witnesses.

The court rules require most care proceedings to be started in the family proceedings court, where decisions may be made by either a bench of 2 or 3 magistrates or a district judge. More complex cases can be transferred to the county court or (exceptionally) to the High Court initially or later in the proceedings. Approximately a third of cases remain in the family proceedings court but there are wide variations between areas in the use of the higher court, reflecting local customs and, particularly, the confidence that practitioners have in the magistrates (Masson et al 2008).

Care proceedings are a process not an event (Hunt 1998). The separate stages of the process are described and their main functions explained in Chapter 2. On average proceedings last about a year during which time the child may be subject to interim orders, and may remain at home, live with relatives or be placed in foster care, either by agreement or under a court order.

1.3 Context: Child protection, care proceedings and the family courts 2007-2010

Introduction

Two key concerns have dominated thinking about care proceedings in the last few years – reducing delay and cutting costs. Care Proceedings were seen as taking too long for children who consequently experienced long periods of uncertainty before plans for their future care were finalised (Ward et al 2006). Legal aid costs for care proceedings had risen substantially, and lengthy proceedings were placing excessive demands on the courts leading to delayed decisions. Longer cases not only took up more court resources, they involved higher costs for the legal aid system (Masson 2008). Despite the inter-relationship between delay and costs two separate reviews of the operation of the care proceedings system were established by the President of the Family Division (Judicial Review Team 2005) and the government (Department for Education and Schools and Department for Constitutional

Affairs 2006), and there was a third review of legal aid provision (Department for Constitutional Affairs and Legal Services Commission, 2006).

The recommendation of the reviews of care proceedings were taken forward in new procedures for care proceedings – the Public Law Outline (PLO) (Judiciary 2008) and new guidance for local authorities on preparing to bring proceedings (DCSF 2008). To control its costs, from October 2007 the Legal Services Commission introduced fixed fees for solicitors in care proceedings (LSC 2007). There appeared to be some conflict between the objectives and the reforms; the new approach to proceedings required experienced lawyers for parents and children but the changes to fees ran the risk that experienced lawyers would be unwilling to continue with this work (Masson 2007).

This was a period of change and uncertainty with the most substantial ‘shake-up’ in care proceedings since the introduction of the Children Act 1989 (Arnold 2008). Since autumn 2007 there have been reforms to the care proceedings system through the introduction of the Public Law Outline (PLO); changes to legal aid with the introduction of fixed fees for solicitors and reductions in barristers’ fees (LSC 2007, 2009a); new requirements on local authorities in terms of case preparation (DCSF 2008); substantially higher court fees; new forms and procedures for legal practitioners; and increased expectations on courts in terms of case management (Judiciary 2008). Cafcass introduced a new practice model and report templates to fit with this (Cafcass 2008, 7). It was an anxious time for solicitors not only because of uncertainty over the impact of legal aid changes on firms’ viability but also because of a large fluctuation in the number of cases. An initial decline in cases prompted worries about income but the subsequent increase left them struggling to complete all that was required, and with the stresses of excessive work (ALC 2009). Trust between the Legal Services Commission and the legal profession broke down as the LSC sought to control costs and reduce fees, without sufficient appreciation of the work lawyers did and the reasons costs had risen, using data which appeared unreliable (Justice Committee 2009). Nationally, morale amongst child care lawyers was low; they felt that their work in avoiding conflict in proceedings was not recognised and valued, and that they were being blamed or punished (with lower fees) for problems elsewhere in the system (Potter, 2009; Little 2009).

Local authorities were under very substantial pressure. The government had adopted many of the proposals made by Lord Laming whose Report into the death of Victoria Climbié had identified numerous failings (Laming 2003). Children’s social care services were combined with education to form children’s services departments, most of which were headed by Directors with no experience of social care. Local authorities were required to introduce the *Integrated Children’s System* (ICS), a computerised system for recording casework and decision-making for children known to children’s social care. In most authorities using ICS was time consuming and frustrating, leaving social workers with less time to see families and without a holistic picture of the families they worked with (Broadhurst et al 2010). Local authorities experienced continuous difficulties in recruiting social workers; many relied on short term agency staff and had high vacancy rates making it impossible to meet deadlines. In recognition of these difficulties the government established

the Social Work Task Force in 2008 to review the profession and subsequently accepted its proposals for substantial changes to recruitment, training and support for social workers (Social Work Task Force 2009).

Public confidence in child protection and in the family justice system was low following wide publicity for unfounded claims that local authorities removed children inappropriately (Hemming 2008), alleged miscarriages of justice, failures to protect children from abuse (Haringey 2008; Doncaster 2009) and media accusations that the family courts operated 'secret justice' (Cavendish, 2008). In an attempt to strengthen public confidence in the family courts, the government decided to allow reporters to attend family proceedings from April 2009. No changes were made in rights of access to documents or reporting restrictions. Reporters could not read the documentary evidence, essential for understanding the case, nor could they report details that might identify the children. Consequently, journalists scarcely attended and continued to criticise lack of openness in the system. Further reforms were legislated at the beginning of 2010 which, if implemented, will permit reporting of care proceedings but not the identification of the children or families concerned. These latest reforms are very controversial; both expert witnesses who carry out assessments of children for proceedings (Glaser 2009) and children themselves (Brophy 2010) have indicated that they will be reluctant to give the court information if the press could have access to it.

Legal aid

Until October 2007 solicitors were paid for their work in care proceedings by line and time, that is, they got a fee for each specific task and for the time they spent on preparation. Members of the Law Society Children Panel were paid enhanced rates, at least 15% higher in recognition of this qualification. Following a series of proposals (Masson 2008) which were criticised for threatening the supply of legal services (Constitutional Affairs Committee 2007), this system was replaced by fixed fees for case preparation, dependent on the area of the country where the solicitor practised, the party they represented, and the court hearing the case. Increases for Children Panel members were abolished. The fees for representing one parent in the county court ranged from £2621 in the North to £3589 in the South, with fees paid at hourly rates if the work done reached an 'escape' level of twice this amount (LSC 2007). On top of this, solicitors could earn fees for the time they spent on advocacy at court. The introduction of fixed fees transferred the risk of work above the notional amount (under-remuneration) onto solicitors. In return solicitors gained the chance of over-remuneration where less work was needed. The LSC referred to this as the '*swings and roundabouts*' principle. The LSC continued its reform programme proposing fixed fees for other family work and a new contract for legal aid suppliers. There were delays in progressing reforms, partly as a result of disputes between the LSC and the profession. However, in the spring of 2010, firms were required to tender for new contracts to provide family legal aid from October 2010.

Barristers in independent practice are paid for legal aid work under the Family Graduated Fees Scheme, which provides higher rates for advocacy by a barrister than is paid to solicitors. The scheme, introduced in 2001, sets fees

for hearings according to the type of work, the type of hearing and its length. Uplifts are paid according to the size of the court bundle, the amount of time spent on preparation and to take account of the complexity of the case. Special Issue Payments (SIPs) result in increases to hearing fees if there are more than two parties, if the barrister is acting for parents who have had allegations made against them, etc. The scheme was amended to take account of changes to care proceedings; Advocates' Meetings, introduced by the PLO, are paid as interim hearings. In June 2008, the LSC issued a consultation on reform to the Family Graduated Fees Scheme which proposed reductions in payments (LSC 2008). This was followed with a consultation on a new Family Advocacy Fee Scheme applying to solicitors and barristers (LSC 2008a). This revised scheme proposed 'dramatic reductions' in fees for barristers with 'perverse incentives' through high payments for short hearings and low ones for some longer ones (FLBA 2009a) but increased fees for solicitors. It prompted a media campaign by the Bar, stressing their limited remuneration (Price and Laybourne 2009) and the importance of their work for family justice (FLBA and Bar Council 2009). There was also criticism from the judiciary (Potter 2009) and from the Justice Committee (Justice Committee 2009).

There is considerable uncertainty about the impact of new fees on the solicitors bidding for legal aid contracts and on barristers' willingness to act in care proceedings. A report for the LSC, based on assumptions about the way barristers worked, suggested that there might be an over supply of family barristers so that withdrawal of some might have little impact, but was uncertain (Ernst and Young 2009). Whatever their future impact on provision of services, the legal aid reforms have had a major impact on relations between the Legal Services Commission and the legal profession. The profession has expended substantial resources in understanding, responding to and fighting these changes. The Justice Committee concluded that evidence showed that the Commission was proceeding 'at speed with inconsistent data, a weak evidence-base and a poor understanding of key issues' (Justice Committee 2009, para 67). In March 2010, the government announced that the Legal Services Commission is to be abolished with responsibility for its work being taken by an Executive Agency of the Ministry of Justice.

There were other changes to legal aid affecting care proceedings, particularly the decision to end funding for all residential assessments from October 2007 (LSC 2007a). The courts could continue to order such assessments in care proceedings (Children Act 1989, s.38(6)) but it was open to the local authority to argue that it had insufficient resources, a position which was more likely without the possibility of sharing costs with the Legal Services Commission. The change of funding regime made courts less willing to order these assessments where the local authority opposed this. Some residential assessment centres closed whilst others focused on providing community-based assessments.

Since the completion of the research there have been two further developments in family legal aid which impact on the futures of many of the law firms providing representation for parents. First, in July 2010 the results of

the Legal Services Commission's family law contracting process were announced with a very substantial and unexpected decline in the number of firms being awarded contracts. A successful challenge by the Law Society and others (*Law Society v Legal Services Commission* (2010)) resulted in the contracting process being overturned and the Legal Services Commission deciding to continue with existing contracts until December 2011. Secondly, a further consultation on legal aid changes in November 2010 (MoJ 2010) will have a major impact on firms providing advice and representation in family law. Although the proposals leave public funding for care proceedings as it is, except for a 10% cut in fees, there is to be a virtual end of legal aid for private family proceedings. Firms that handle both public and private family work will lose part of their legal aid income; some will cease to be viable and will close. Lawyers doing public family law work will necessarily become increasingly specialist without access to legally aided private law work, and this work will attract only those prepared to do this work exclusively.

Introduction of the PLO

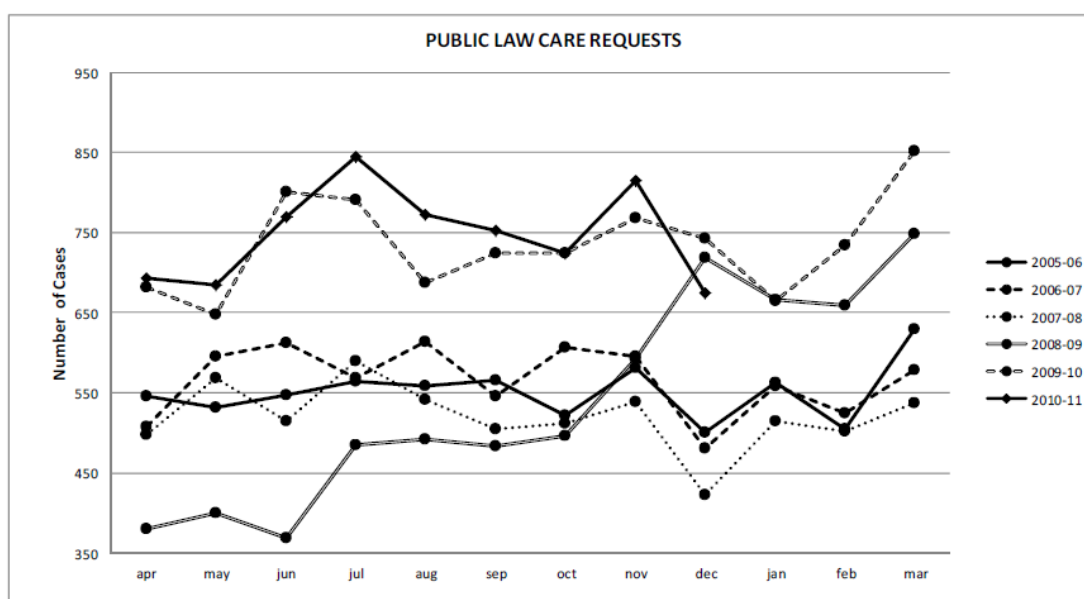
The new system for care proceedings was announced in June 2007 and piloted quickly in 10 'initiative' areas with implementation throughout England and Wales from April 2008 (Jessiman et al 2009) without any evaluation. Training in the new system was provided free, across the country, for local authorities, Cafcass officers and the courts. Lawyers in private practice could attend for a fee; relatively few did so but the early evaluation noted that practitioners identified the need for more notice and training prior to implementation (Jessiman et al 2009).

The reforms to care proceedings 'front loaded' proceedings, making additional demands on local authorities in two respects. First, the process of deciding to bring care proceedings was formalised. Except in cases requiring emergency or immediate action, local authorities were required to write formally to parents about their plan to bring proceedings and invite them to a meeting at which both parents and local authority could be legally represented (DCSF 2008; MoJ and DCSF 2009). These meetings were additional to other meetings such as reviews and case conferences to which most parents involved in care proceedings must be invited (Masson 2010a). Secondly, local authorities were required to complete assessments before making an application to court and to provide additional documents for the court (Judiciary 2008). These changes were intended to ensure that care proceedings were only used where there was no alternative, applications were better prepared and parents were engaged in the process from the start. Lawyers were critical of the new system. There was concern that children were not represented in the pre-proceedings process (MacDonald 2008; Jessiman et al 2009) and that local authority arrangements for assessments prior to proceedings would not allow for parents to influence the selection of experts or focus of their crucial work.

It was unclear from the early evaluation, commissioned by the Ministry of Justice (Jessiman et al 2009) whether the PLO had ensured that cases were better prepared or enabled the courts to reach decisions more quickly. Application of the PLO in the initiative areas was variable, most cases required more than the four hearings set out in the Practice Direction and

those interviewed did not think that cases had been concluded more quickly (Jessiman et al 2009). As might have been expected, the introduction of the PLO led to an initial sharp decline in the number of care applications made while local authorities became familiar with the new documentation and completed the work required before proceedings could be started. The decline in applications started from autumn 2007 with low numbers of applications in the ‘initiative’ areas and continued until November 2008 in much of the rest of England (Masson 2010b), see Figure 1.

Figure 1: Numbers of requests for a children’s guardian in care proceedings 2005-2010



Note Guardian appointments approximate to the number of care cases. (Cafcass 2009 and 2010)

Fees for Care Proceedings

In December 2007, the Ministry of Justice announced its intention to increase the court fees paid by local authorities for bringing care proceedings from £150 (plus additional payments for renewal of interim orders and additional hearings) to almost £5000. This new fee was intended to reflect the cost of proceedings to the court service, to implement policy on charges and to promote the efficient use of the courts (MoJ and HMCS 2007). Some compensation was given to local authorities via the Revenue Support Grant but this was not made clear before many authorities had set their budgets (Plowden 2009). Consultation was limited to the way fees should be structured. Responses from local authorities, the judiciary and practitioners were almost all negative; concerns were expressed that this change was wrong in principle, would discourage local authorities from bringing proceedings to the detriment of children and that their introduction at the same time as the introduction of the PLO would make it impossible to assess the impact of each change (MoJ and HMCS 2008). Nevertheless, higher fees

were introduced in May 2008 and an attempt by a group of local authorities and the NSPCC to reverse this decision through Judicial Review was unsuccessful (*R. (Hillingdon et al) v Lord Chancellor and the Secretary of State for Communities and Local Government* [2009] 1 FLR 39). Fees were linked to stages in the PLO and substantial savings could be made by not having a final hearing. An independent review of these fees, commissioned following criticism by Lord Laming (Laming 2009), concluded that the introduction of the PLO had a greater influence on the reduction of applications than the fees, that court costs were generally not a consideration when making care applications but that 'at the margin' both fees and the PLO deterred care proceedings (Plowden 2009). Subsequently the Labour government announced the withdrawal of court fees for care proceedings from April 2011 but this decision was reversed by the coalition government in October 2010.

The death of Baby Peter

In August 2007, Peter Connelly, aged 17 months was found dead at his home with horrific injuries. Peter, who was the subject of a child protection plan had been the victim of repeated physical abuse. A week before Peter's death, a decision was taken at a legal planning meeting that his case did not meet the threshold for care proceedings although a previous meeting which had not resulted in proceedings had decided that it had done so (Haringey 2009). In autumn 2008, Peter's mother, step-father and their lodger were convicted of causing or allowing the death of a child. Their trial and the subsequent dismissal of the Director of Children's Services in Haringey received huge publicity, re-igniting public views about the ineffectiveness of child protection services, particularly local authority social work. Although many factors contributed to this tragedy including obvious failures in the health service, the legal advice served to raise professional concerns about the use of care proceedings. In addition to appointing Lord Laming to report on progress on safeguarding children, the Minister asked all local authorities to review their safeguarding arrangements (Balls 2008).

From October 2008, there was a substantial rise in the number of applications made for care proceedings. Although this has been labelled 'the Baby P effect' (Douglas 2008) with the suggestion that the threshold for bringing proceedings has been lowered, it is far from clear that this is the case. A survey of Cafcass officers in November 2008 confirmed that cases were not being brought unnecessarily, with only 2% suggesting otherwise and over 40% indicating that cases allocated to them should have been brought earlier (Hall and Guy 2009). Overall, the number of care proceedings in England in 2007-8 was only four per cent higher than the previous year, and was lower than the number in 2005-6, see figure 1. The significant increase from November 2008 is likely to be a result of the delay of applications occasioned by the introduction of the PLO with its substantial pre-application requirements. The continued increase may reflect a change in the operational threshold but the greater scrutiny which is now required before applications are made means that the local authority will have been advised that the threshold is met, and social work managers will have taken the view that proceedings are required.

The impact on Cafcass and Cafcass Cymru

The increase in cases from October 2008 created immediate problems for Cafcass which was unable to meet the demand for children's guardians. There were increasing delays in these appointments with substantial numbers of unallocated cases in some areas, including the 3 study areas served by Cafcass. Ofsted noted that, in August 2009, there were over 400 care cases awaiting appointment of a guardian in London (Ofsted 2010). Delays in allocation meant that courts had to reach early decisions without the guardian's early analysis of the case. Courts took over the appointment of solicitors for children, which is usually a matter for the children's guardian. However, without instructions, children's legal representatives could only play a more limited role in the proceedings, testing the evidence rather than advocating specific points for the child. Some children did not have a Cafcass guardian until after the CMC when key decisions about assessment should have been made. This had the potential to delay decision-making if the guardian subsequently advised that further assessments should be obtained. The increase in cases also put individual guardians under pressure, both to take on more cases and to limit the time they spent on them (NAGALRO 2010).

In July 2009, the President of the Family Division issued emergency, short-term guidance to address the backlog in allocation of Cafcass officers and avoid delays in the future. Each area was encouraged to make arrangements to agree priorities and ensure that the court was advised when a children's guardian would be available for any case (President of the Family Division 2009). Cafcass announced that it would only be able to operate 'a safe minimum service' (Cafcass 2009a). In some areas it adopted a duty system whereby advice was provided for initial hearings but a guardian was only appointed at a later stage. Courts were encouraged to save guardian time by excusing their attendance at proceedings. Guardians were encouraged to seek advice from the court about the focus of their work (President of the Family Division 2009) and advised that there was no expectation that they should read local authority files (Cafcass 2009a). These temporary arrangements and additional resources from central government helped to reduce delays in guardian appointments but did not resolve the problem of unlimited demand and finite resources. In the autumn of 2009, Cafcass and the DCSF proposed an amendment to the Children Act 1989 to end the personal appointment of guardians so that any Cafcass officer could work on a case. It was suggested that this would avoid delays although it appeared more likely to increase work than to reduce it. Following criticism from the judiciary, lawyers and the Family Justice Council, the proposal was dropped (Hunt 2009). However, continuing backlogs led the President to extend the emergency arrangements first for another six months and later, in September 2010, for a further year.

Although Cafcass backlogs were far lower at the end of the research period, concern continued to be expressed about delayed appointments, Cafcass officers with quite limited experience in child protection and the Cafcass officers' lack of time due to their increased caseloads. In October 2010, the House of Commons Public Affairs Committee issued a damning report on Cafcass' handling of the increase in demand for its services and expressing

concern that the number of unallocated cases would again increase (Public Affairs Committee 2010).

Cafcass Cymru did not resort to duty schemes and managed to ensure timely guardian appointments in almost all cases despite an increase in cases (Cafcass Cymru 2009). However concern has also been expressed about its management and work (CSSIW 2010).

Developments in Case law

The appellate courts have two distinct roles in care proceedings. They clarify the meaning of the legislation and supervise the exercise of discretion by the lower courts, including whether the judge has ensured a fair trial and the decision is based on the evidence. Relatively few appeals in care proceedings turn on the judge's interpretation of the law; most relate to the exercise of discretion in case management or the orders made. Whilst in civil proceedings the Court of Appeal has given clear guidance that it will not normally interfere with procedural judges' decisions (Peysner and Seneviratne 2005), it has taken a much more interventionist approach with the case management of care proceedings.

Discretionary decisions of the lower courts, for example a decision whether a care plan is in the best interests of a child or whether to order an assessment, can only be overturned in accordance with the test set down by the House of Lords in the case of *G v G (Minors)(Custody: Appeal)* (1985) 1 W.L.R. 647. Under this ruling, a discretionary decision must be 'plainly wrong', a decision 'no reasonable judge could make', involve considering matters which should not have been considered, or ignoring relevant information, if it is to be overturned. Although this appears to set a high bar on appeals, practice between courts and between judges is somewhat variable. For example, in *Re MA (Care: Threshold)* [2009] EWCA Civ 853, Wilson LJ held that the judge's interpretation of the threshold test in care proceedings was plainly wrong whilst the other two judges disagreed and upheld the original decision. Occasionally, it may be clear that the reasoning is not sustained by evidence, as in *Re W-P* [2009] EWCA 216. There the judge accepted that the father caused bruising accidentally whilst changing the child's nappy despite evidence that the father had not changed the nappy.

The focus of appeals on discretionary matters is clearly on the case at issue but decisions may indicate to the lower courts how discretion should be exercised. For example, a series of decisions between 2007 and 2009 overturned the refusal of the lower court to allow an assessment (*Re K. (Care Order)* [2007] EWCA Civ 697; *Re B. (Care Proceedings: Expert witness)* [2007] EWCA Civ 556; *M (A Child)* [2009] EWCA Civ 315; *L (A Child)* [2009] EWCA Civ 1008). In these cases it appeared that the lower courts were seeking to control the cost and length of cases as the PLO required. However, the Court of Appeal clearly considered that the way they were exercising their powers of case management was plainly wrong.

During the period of the study there were two notable developments relating to the Children Act 1989 which impacted on the way care cases were

handled, including cases in the study. First, in *Re L* [2007] EWHC 3404, Ryder J held that a child could only be removed from the parents under an interim care order if there was 'imminent risk of really serious harm.' This case was widely publicised (Gilliat 2007, 2008) and caused concern to local authorities and lawyers in the Department of Children, Schools and Families. Local authorities found that courts were willing to grant interim care orders but were not satisfied that a case was made out for *removing* the child, particularly where the case was based on chronic neglect rather than non accidental injuries. However, local authorities are reluctant to have the responsibility for the child without control over their care, unless they have the clear co-operation of the carers. This decision was subsequently re-interpreted by the Court of Appeal which held that Ryder J had not intended to change the law and raise the standard for removal set in earlier cases (*Re LA* [2009] EWCA Civ 822). In the two years between these two cases it is likely that more parents contested removal of children under interim care orders. The use of interim care orders and the standard to be applied was an issue in the cases of Carole, Colleen and Lauren in the study.

In *Re B* [2008] UKHL 35 the House of Lords considered the standard of proof in care proceedings based on 'likely significant harm' and held that the risk of likely harm must be based on proven facts. Evidence showed that either something had happened or it had not, and courts could only make findings of risk of harm where relevant facts were proved. Also, that the standard of proof was the ordinary civil standard, not a higher standard which had sometimes been suggested. In reaching this decision the House of Lords was clarifying, not departing from, its earlier decision in *Re H and R* [1996] A.C. 563. For this reason, the case is likely to have reduced, not increased, the number of disputes.

Further reform to the court process and child protection social work

In November 2009, the Labour Government announced the Family Justice Review. Its terms of reference focused on changes to the family justice system, particularly the potential to shift from an adversarial approach; the potential for inquisitorial proceedings; the greater use of mediation; and improved collaboration between different elements in the system across the whole range of family proceedings, including public law children. The Coalition Government confirmed the continuation of the Review with a slight change in its terms of reference (Family Justice Review 2010). Evidence was collected over the summer with a view to publishing draft proposals in April 2011 and a final report in November 2011. The Ministry of Justice's departmental plan indicated that there would be legislation in the second session of Parliament (MoJ 2010a).

Another review was commissioned in June 2010 into frontline child protection social work, led by Professor Eileen Munro. Announcing the Review, the minister stated that he wanted 'to strengthen the profession so that social workers are in a better position to make sound judgments, based on first hand evidence, in the best interests of children, free from unnecessary bureaucracy and regulation' (Loughton 2010). At least some of the bureaucracy in social work is related to care proceedings. Social workers' professional judgments

are scrutinized by the courts with the assistance of the professional view of the children's guardian and often further experts commissioned by the parties. Care planning for children subject to proceedings not only involves court scrutiny, there are also internal local authority processes intended to secure control of resources as well as quality and accountability mechanisms such as adoption panels required by legislation.

These two Reviews are working together in relation to changes relating to care proceedings (Munro 2011). This holds the possibility of reform which does not merely attempt to streamline care proceedings along the lines of the Civil Procedure Rules as the Protocol and PLO did but to change more fundamentally the way local authority applications to protect children are prepared and considered. The future role of parents' representatives may be different but parents are unlikely to be able to navigate the emotionally difficult and legally complex processes through which their children may be removed or kept in state care without the support of a representative whose advice and guidance they can trust.

1.4 Literature review

Previous research

The Children Act 1989 provided a new comprehensive and unified scheme for public child care and protection. Empirical research following implementation of the Act commenced in 1991 and included a number of studies discussed in *Children Act Now* (DH 2001). Several studies are of particular relevance to this study, including a report by Freeman and Hunt (1998) recording the experiences specifically of parents and other family members and a study by Lindley (1994) investigating the impact of the changes introduced on families' general experience of the court process. These culminate in the seminal research by Hunt et al (1999), which made a comparative analysis of child protection cases handled before and after the Act.

Since these earlier studies, there have been substantial changes to the process and in the circumstances where care proceedings are brought. Child care proceedings involve essentially a trio of parties: the Local Authority applicant, the children – represented by their children's guardian, and the parents, and research has focussed on the experience of most of these players. The experience of the children and their representation was explored by Masson (1999), looking at the tripartite relationship between the children themselves and their 'social work' guardian and their solicitors.

More recently, Dickens (2005 and 2006) has focussed on the relationship and representation of Local Authority social workers and their solicitors, exploring the tensions involved between the two 'discourses' when working together. Dickens notes in particular the challenges for lawyers involved in fighting hard, whilst complying with the non-adversarial philosophy of care proceedings. He discusses the concept of 'reasonableness' in balancing the competing obligations faced by lawyers acting for Social Service Departments.

Research on the views of parents themselves has proved problematic (Brophy 2006), with questions over the validity of parents' views and also of representativeness. Difficulties arise where parents deny the nature of Local Authority concerns. Hunt et al. (1999) and Brophy et al. (2005) however both used multilevel control data in exploring parents' views and experiences of the court process and also those of their legal representatives.

Lindley, Richards and Freeman (2001) conducted research focussed on the innovative provision of advice and advocacy for parents, mainly at the stage of administrative decision making by the Local Authority. This culminated in the production of a protocol (2002) for the provision of such services. However, while this research included a small number of solicitors acting as advocates for parents, there has been, so far as we are aware, no previous research focussing exclusively on the legal representation of parents involved in child care proceedings.

Studies of care planning and placement outcomes for children have also explored the effectiveness of the court process in making plans for children's future care and involving parents in the planning process. Although the majority of plans were implemented, those for children's reunification were least likely to be so (Hunt and Macleod 1999). Where children had been neglected a very high proportion such arrangements broke down (Farmer and Lutman 2010), which the researchers attributed to over-optimism by expert assessors and children's guardians. Most parents in Harwin and colleagues' study of care planning could identify a professional who had listened to them in the course of proceedings; parents' views of children's guardians were largely positive but those of their solicitors were more variable (Harwin et al 2003).

Theoretical perspectives

Theoretical perspectives relevant to this study occur in the area of private children and divorce law and in criminal law practice. An essential issue in the examination of the relationship between lawyer and client is the extent to which lawyers direct and control their clients: how they 'translate' their disputes, and particularly how they 'educate' clients into an acceptance of compromise and negotiated settlements. This has been the subject of much study in family law, for example by Sarat and Felstiner (1986), Cunningham (1989), and in the UK by Ingleby (1992), Davis et al (1994 and 1998). More recently, Eekelaar and colleagues examined how solicitors manage this work within the financial constraints of running a business (Eekelaar et al 2000). Another concept key to this project is that of 'collegial control' in shaping lawyers' practice, as described by Mather, McEwen and Maiman (1995 and 2001), in their examination of the impact on the lawyer of common understandings of their work, peer pressure, formal norms and collective organisation.

Research in the criminal justice sphere (Blumberg 1967; McConville et al, 1994) has further emphasised the extent to which clients are dependent on, and managed by, their lawyers, whose role has become one of conveying systemic imperatives (most notably, that clients should plead guilty) rather

than 'acting fearlessly in the best interests of the client'. Research has also examined how lawyers justify to themselves their departures from standard adversarial theory in the context of criminal proceedings (Mulcahy 1994), not least by the routine denigration of clients who are assumed to be substantively guilty and unworthy of full-blooded representation. Whether such rationalisations are evident in care proceedings is currently a matter for conjecture, however.

In civil justice generally there are issues about the place and function of adjudication (Roberts 2000) and the control that courts can assert now that legal practice is increasingly dominated by negotiation (MacFarlane 2008). A long trend away from adjudication has been noted (Kritzer 2004) in both civil and criminal law, and negotiated settlement in the shadow of the law is a dominant form in much of family law (Mnookin and Kornauer 1979; Eekelaar et al 2000; Maclean and Eekelaar 2009). Court practices have both promoted settlement (Galanter and Cahill 1994) and put adjudication out of reach. Reforms of civil justice have sought to encourage settlement whilst securing greater control over process so that adjudication remains accessible (Woolf 1996; Zuckerman 2003; Turner 2009). The extent to which these conflicting aims can be realised is unclear, especially where there large imbalances of power, so too is the capacity of informal settlement systems to achieve just resolution and protect rights, particularly in the area of child protection (Sinden 1999).

1.5 Method

Qualitative methods were chosen as best suited to achieve the in-depth exploration envisaged in this study, where the aim was to describe, clarify and explain, rather than to provide statistical data. Our earlier investigation of the care proceedings system (*The Care Profiling Study*) provided us with a wealth of quantitative data which not only formed a backdrop to this study, but also informed purposive selections of samples to ensure that the study included a representative range of cases. A combination of observation and interview methods was used, allowing for triangulation to achieve a multi-dimensional perspective.

Our method comprised 3 limbs:

1. Observations of court hearings at all stages of the proceedings,
2. A set of 16 case studies in which we tracked current cases as they proceeded through the court system,
3. Interviews with solicitors and barristers representing parties, including those who act for parents, and other legal personnel involved in care proceedings.

The main fieldwork was carried out between September 2008 and the end of 2009, in four locations in England and Wales, chosen to capture diversity in terms of practice and procedures. The project was based around a County Court and Family Proceedings Court (two in one area) in two major metropolitan conurbations and two smaller city locations with surrounding rural areas. These areas included two where the PLO had been piloted for 6-

9 months before national roll-out in April 2008. To secure anonymity and to protect the confidentiality of those who took part in the research, we have not identified these areas specifically. It was not possible, from published data to make comparisons between the areas and courts in terms of volume of care proceedings work or the resources available at each court for handling these cases, either in terms of judicial time or of courtrooms, since reports on the family courts are no longer published on the court service web site.

Court Observations

We observed hearings at each of the stages of the court process as provided for in the PLO. The majority of these were directions appointments but also included a number of contested and final hearings (see Table 1). The fieldwork commenced with a number of observations in all four areas at both County Court and Family Proceedings Court level, first to obtain an initial perspective of the court process in practice, and then to focus on early stage hearings in order to start recruiting the sample of case studies.

We had anticipated that courts would hold regular sessions of case management hearings which we could attend to identify potential cases for observation. In the event this proved impracticable in those courts which held such sessions, and in other courts public law hearings were not confined to dedicated sessions. We therefore agreed a procedure for checking forthcoming public law hearings with court listing staff. This enabled us to identify the basic case types and stages of proceedings needed to ensure full coverage. Having selected relevant hearings, we contacted solicitors acting for the parents who then, at their discretion, approached their clients on our behalf to request consent to our presence at the hearing. Solicitors in each area had been informed of the research in advance and so were aware of its purpose. We encountered very few refusals either from solicitors or from parents. Refusals were usually on the grounds of a client's extreme distress or volatility.

Observations took the form of the researcher 'shadowing' the parent's legal representative (either solicitor or barrister) in court. Having personally confirmed consent with parents and other parties, we would then accompany the parent's legal representative as they moved back and forth between their clients and the other parties in pre-hearing discussions and negotiations, finally accompanying cases into the courtroom for the hearing itself. Each observation was carried out by a single researcher, taking full notes to include a record of all parties and legal representatives present, a chronological log, the subject matter of discussions, ideas and impressions. These notes were typed up by the researcher as soon as possible after the observation. References to specific observations in the text appear as AO1, BO1, etc.

We observed a total of 109 hearings, the majority of which (81) were from the 16 cases we were tracking as case studies. In addition to the case study observations, we observed a further 28 one-off hearings from other cases, some during the initial stages of the project while recruiting the case study sample and the remainder chosen to ensure a sufficient sample for each hearing stage. Of these, 12 were spent not with the parent's legal representative, but with a judge, a legal adviser and a Local Authority legal

representative from each area, in order to obtain other perspectives of these hearings. In all we ‘shadowed’ solicitors at 59 hearings, barristers at 26, and 11 hearings involving both the parent’s solicitor and a barrister – a total of 23 individual solicitors and 18 individual barristers. We also observed 4 hearings at which the parent was unrepresented.

Table 1: Observations of court hearings by type, court and area
(Excludes the 8 observations with Judges and Legal Advisors)

In practice it proved difficult to categorise hearings into specific stages. Table 1 shows hearing stages as *listed*. However, it was frequently the case that hearings listed as a CMC or IRH, actually took the form of directions or reviews. Occasionally hearings listed as Final Hearings also took the form of reviews/directions.

Area	A		B		C		D		Total
	CC	FPC	CC	FPC	CC	FPC	CC	FPC	
First appointment	-	5	-	-	-	2	-	-	7
CMC	4	4	1	4	3	1	6	2	25
IRH	1	8	2	7	2	-	6	-	26
Reviews and Directions	1	4	1	2	3	2	2	1	16
Hearings listed for contest	3	2	1	3	2	1	-	-	12
Final Hearing	2	2	1	1	2	1	5	1	15
Total	11	25	6	17	12	7	19	4	101

We also observed a total of seven Advocates’ Meetings and three solicitor/client appointments at solicitors’ offices. We had intended to observe more of both types of event. From the Advocates’ Meetings observed, it appeared that discussions, while perhaps more structured, were very similar in nature to pre-hearing discussions. Since we were observing large numbers of pre-hearing discussions, and that these were more comprehensive than we had anticipated, our resources did not extend to travelling to observe these separate meetings which often lasted less than two hours. With regard to solicitor/client appointments, again we found that we were observing longer and more intense solicitor/client discussions during the court observations than we had anticipated. Solicitors told us that client appointments are often arranged at short notice and that clients often fail to turn up. For some solicitors, meetings in court were their main or only contact with client (see 5.3). On these grounds, we did not pursue our original plan which did not seem practicable or cost effective.

Case Studies

The 16 case studies, involving both observations and interviews, formed the heart of the research, providing the most detailed and richest data. As described in the previous section, cases were recruited from among hearings observed in the early stages of the project. The cases for this element were purposively selected to provide examples of the categories identified from our earlier quantitative study, the *Care Profiling Study* (Masson et al 2008). Specifically we sought to include examples of these 'Case Types'.

Table 2: Case Types

Care Profiling Study (CPS) Casetype¹	CPS %	Study sample No.
1. Application at birth	22	3
2. Crisis intervention	42	8
3. At home with services	12	3
4. Services for parent and child in supervised setting	4	-
5. Separation	15	1
6. Services and Accommodation	2	1
7. Continuous legal involvement	3	-
Total		16

¹ See Masson et al (2008) Appendix 1 for a detailed description of each case type

These included cases involving the most commonly occurring parental issues of concern to Local Authorities: substance abuse, learning difficulties, domestic violence, mental illness, chaotic lifestyle. Problems relating to the children included neglect, inconsistent parenting, physical/emotional abuse and poor school attendance.

We aimed also as far as possible to select cases being handled by a variety of practitioners in terms of experience and expertise. We sought representatives of both mothers and fathers, and of parents who were the main focus of LA concern but also of some more peripherally involved in the case, in order to ensure that the sample reflected the full diversity of a solicitor's caseload. What we could not predict was the course that these cases would take or how complex they would become. Given that all proceedings commence in the FPC, most of these cases were picked up there since we wished to recruit them at as early a stage as possible. While some of these cases were subsequently transferred up to the County Court, our sample may include a higher proportion of FPC cases (44%) than might be expected nationally,

although there are no statistics available for this - and there are known to be considerable variations between court areas (Masson et al 2008).

Of the 16 cases, five were picked up at their first hearing in the FPC, five at the second hearing of the case and six at their third hearing – none later than at CMC stage. The project was designed to allow a maximum of 15 months (65 weeks) for cases to progress from start to conclusion – given the 40 week target for completion. In practice only two cases were concluded within 40 weeks, one of which was abandoned at an early stage by the party whose representative we were shadowing. Six were completed within 55 weeks, another four by week 64 and two by week 78. Two cases were still ongoing beyond the end of the fieldwork. We had anticipated observing 4-5 hearings on each case study, given the PLO aspiration to reduce the numbers of hearings. However, although in the event we did observe an average of five hearings in each case - ranging between 1 and 10, the average number of hearings per completed case (including, as far as we could estimate, the numbers of hearings before we encountered the case) was 7.25. Appendix 2 shows the timelines for these cases. This is discussed further in Chapter 2.2.

Researchers kept in touch with the parents' solicitors throughout the duration of these cases, obtaining updates on progress. While the majority of hearings were observed, occasionally emergency hearings took place to handle intervening events which it was not possible to observe. In all but one case the parent's solicitor was interviewed at the end of the case, or as near the end as possible. In some cases, barristers involved in these cases were also interviewed. The format of these interviews is described in the next section.

Table 3 gives details for each case study. A narrative report of each of these cases is included as Pen Pictures in Appendix 1. We have used pseudonyms and excluded uniquely identifying data from these cases on which the report will draw for illustrative examples. In the judgment of the solicitors handling these cases, none were considered to be outside the typical range of cases they handled in terms of complexity.

Interviews

This third element of the research was designed to add breadth to the data obtained from the cases studies. Interviewees were selected to represent legal representatives from a full range of specialisation, experience and expertise (see Table 4). The majority of interviewees were solicitors a majority of whom were members of the Children Panel – reflecting findings from the *Care Profiling Study*. In addition to those included by virtue of being involved in one of the case studies, others were identified from the Law Society website listed as handling children cases, and selected to ensure full representation in terms of Children Panel membership, position in firm, years of qualification and size of firm.

Table 3: Case Studies in outline (for further details see Appendix 1)

Name	Court	Parent	Solicitor	Issues of concern	Ages and placement of children at time of application	Hearings Total / Observed	Duration of case in weeks
Barbara	FPC	Mother	Not on Panel	Neglect Non-cooperation	9, 12 yrs At home	6 / 5	64
Bernie	FPC	Mother	Panel	Alcohol abuse Neglect	3 yrs Foster care	13 / 10	78
Carly	CC	Mother	Panel	Neglect Learning difficulties	10 months At home	8 / 7	50
Carole	FPC	Mother	Panel	Alcohol abuse Neglect	10 yrs At home	7 / 5	73
Clare	CC	Mother	Not on Panel	Father's violence Learning difficulties	14, 10, 8, 6, 5 Foster care	5 / 3	37
Colleen	CC	Mother	Not on Panel	Alcohol abuse Domestic violence	9, 7, 5, 2 yrs Foster care	8 / 7	59
Dawn	CC	Mother	Panel	Drug abuse Non-cooperation	10 yrs Foster care	11 / 6	106
Evie	CC	Mother	Panel	Non-accidental injury Mental health	2,4 yrs With Maternal Grandmother	6 / 2	25 Parent abandoned
Hayley	CC	Mother	Panel	Drug + alcohol abuse Domestic violence	14 months Foster care	4 / 3	43
Jeff	FPC	Father	Not on Panel	Domestic violence Neglect	6, newborn At home	9 / 6	47
Josie	CC	Mother	Panel	Neglect Learning difficulties – both parents	Newborn In hospital	6 / 5	47
Kevin	FPC	Father	Not on Panel	Drug abuse. Poor school attendance	9, 5, 3, 2 yrs With Maternal Grandmother	8	54
Lauren	FPC	Mother	Panel	Inability to cope with child Poor school attendance	9 yrs With Mother at MGM home	10 / 6	81
Robert	FPC	Father	Not on Panel	Mother's substance abuse 3 children already removed from her care	Newborn In hospital	1	53
Sean	CC	Father	Not on Panel	Substance abuse Mental health	15 months, newborn With PU&A, in hospital	7 / 5	43
Trevor	CC	Father	Panel	Drug + alcohol abuse Mother's mental health	8 yrs With Paternal Aunt	5 / 2	61

Table 4: Practitioner Interviews

Area	A	B	C	D	Total
Solicitors on Children Panel	3 (P) 3 (A)	7 (P) 2 (A)	6 (P)	4 (P) 1 (A)	26
Solicitors on Adult Panel	1 (P)	-	-	-	1
Solicitors not on Panel	4 (A)	2 (A)	1 (A)	1 (A)	8
Solicitors qualified 5 years or less	1 (A)	1 (A)	1 (P) 2 (A)	1 (A)	6
Total solicitors	12	12	10	7	41
Barristers	2	2	2	2	8
Local Authority Solicitors/Barristers	1	1	1	1	4
Judges/District Judges	1	1	1	1	4
Legal Advisors – Focus Group					4
Total no. of Practitioners	16	16	14	11	61

(P): Partner or Sole Practitioner, (A): Assistant or Associate Solicitor

The full sample of solicitors (40 solicitors, one legal executive) included 26 on the Children Panel, one on the Adult Panel and 13 who were not on the Panel. Their years of qualification ranged from 41 years to 3 years. Twenty three were partners in their firms, 16 were assistant or associate solicitors. We also interviewed 8 barristers, 2 from each area. Again, the selection was made to represent a range of experience. Barristers were identified from among those encountered during observations; four of these had been involved in the case studies. The profile of these practitioners is discussed in Chapter 4.

Interviews were case and topic based, using a semi-structured schedule to ensure that the key research questions were addressed, while leaving scope for unforeseen themes and issues to emerge. The purpose of these interviews was twofold. Interviews with practitioners involved in the case studies included a full discussion of that case – providing the opportunity for any necessary clarification and to explore the practitioner’s views and strategies. The other practitioners were asked to have available their most recently completed case for discussion, on an anonymous basis. The second part of the interview was topic based focussing on other practitioner issues concerning child care work more generally and their responses to current

issues, including the recent introduction of the PLO and changes and further proposals for changes to Legal Aid remuneration.

Not wishing to rely solely on the self reporting of their role by parents' lawyers, a further set of interviews was conducted with other key players in these proceedings: in-house local authority solicitors, and judges in each area. A focus group of family proceedings court legal advisors was held towards the end of the project. This complemented three earlier focus groups conducted as part of the *Care Profiling Study* with barristers, solicitors and judges, transcripts of which informed this analysis. These were intended to broaden our overall understandings of the field and to explore the expectations of other parties and of the court of parental representation.

Interviews were recorded and transcribed verbatim for subsequent NVivo analysis. The interview transcripts and observation records (fully anonymised) have been deposited in the ESRC Qualidata Archive (RES-062-23-1163).

Limitations

Our methods involved some minor limitations. To the extent that only willing participants were involved in the research, this resulted in self-selected samples of observations and cases. We suspect that our sample may have under-represented those solicitors who rarely handle care proceedings, although we understood that these were a rarity, since any firm which acts in care cases must have a public law contract with the Legal Services Commission. There were a very few refusals to observations where we felt that perhaps solicitors themselves had not wished to be observed. However, all those approached for interview agreed to participate.

The timing of our fieldwork was unfortunate at two stages. The start of the project, when we wished to observe early stage hearings, coincided with a period when very few new applications were being made, which made finding such hearings more difficult. The phase for recruiting the case studies had to be extended for this reason. Conversely, the point at which we were seeking interviews with solicitors coincided with a particularly busy time for solicitors following the case of Baby P (Haringey 2009), which made it difficult for them to find time for the research.

By virtue of ensuring diversity in a variety of factors, our case study sample included a disproportionately high number of children in the older age ranges (as compared with the *Care Profiling Study*). Of the 26 children involved, five (19%) were under a year old (as compared to 29% in the CPS) and nine (35%) between the ages of five and nine years (compared with 24% in the CPS). (The comparison here is to all the children in that study, not just the index child).

A further dimension to this study would have been a full exploration of the views of the parents involved. However, we decided against this for a number of reasons. Our method, designed to explore the work of the parents' legal representatives, involved contemporaneous observations. For legal reasons

it would not have been possible, while proceedings were still ongoing, to discuss the handling of their cases with parents, even if this had seemed appropriate at such a stressful time. Our sample would in any case have been very small indeed. We had decided that if parents expressed a wish to speak to us later, we would agree to this, but no parents did. Questions as to the validity and robustness of research on parents' perspectives are discussed in Brophy (2006). However most parents did chat to us from time to time during the course of the time spent with them over many observations of their cases and their views are included in Chapter 3 of this report.

Access

The court observations element of the research required the approval of the President of the Family Division and of the Courts Service. Having obtained these consents, we were then able to obtain a general approval to our presence at hearings from the relevant Social Services Legal Departments and from CAFCASS – subject, naturally, to the consent of the parents. We obtained permission in principle, from the Official Solicitor' (OS) office, to observe cases in which the OS was involved – subject to the parent's wishes and feelings. In the event, consent was given for us to follow both of the two cases in which the OS was involved.

Ethical considerations

Before the fieldwork began we sought and obtained ethical clearance from the School of Law Research Ethics Committee and we conducted the research in accordance with the SLSA ethical guidelines.

While the focus of this research was on the legal representatives of parents in care proceedings, our method, which included court observations and tracking current cases as they progressed through the courts, required the consent and willingness of the parents involved. Care proceedings are by their nature among the most distressing and difficult experiences possible for a parent. The issue of how to approach parents in this situation was a delicate one. On the one hand, it was important that they should understand our purpose in order to give their informed consent - and not to feel under any pressure in doing so. On the other hand, we were very mindful of the fact that our approach was to be made at an extraordinarily difficult time for these parents, and we did not wish our requests to intrude into the real purpose of their court attendance or to distract in any way from their full concentration on the case.

We decided that the initial approach should be made through the parent's solicitor. While this risked the possibility of a pressure on the parent to agree, it meant the issue could be handled in advance of the court hearing itself, and allowed the solicitor to judge the timing of our request. On balance, we felt this was preferable to a personal request from ourselves, coming out of the blue, either in court or in writing, and likely in the general stress of the situation, not to be properly understood. We documented and discussed our thinking in detail with the School of Law Research Ethics Committee and, following careful reflection, they gave their written approval to our proposed

approach. We continued to check consent personally at each hearing. The majority of parents agreed to be involved in the research – for which we cannot overstate our gratitude. Invariably any concerns they expressed were over confidentiality. There were few questions and in fact, as we had hoped, both parents and their legal representatives generally appeared oblivious to our presence while in discussion together. However many parents spoke to us during periods of waiting around in court and several told us, at the end of their cases, that they had found the presence of the researcher positively supportive.

Researchers were aware of the potential risk of becoming inappropriately involved in the cases followed as case studies. Many of these entailed observing hearings on half a dozen or more occasions, which meant that parents and legal representatives became familiar with our presence and regarded us almost as part of their ‘team’. The effect of this generally was to make parents more relaxed about our presence and, as mentioned, to chat to us occasionally. However, there were a very few occasions when legal representatives effectively used the researcher as an ‘assistant’, for example suggesting the researcher remain with a mother rather than leaving her on her own in a bleak interview room at a difficult moment, while going off to speak to the other legal representatives. On another occasion the researcher was asked to sit beside a parent in court, in order to ‘shield’ her from the other parent. These requests were made on the spur of the moment, in the presence of the parent and were therefore difficult to refuse without causing further anxiety or upset.

There were four occasions on which we observed hearings in the absence of the parent. This was justified on the basis that consent would be discussed retrospectively and the data used only if that consent was forthcoming, and if not, would be destroyed. In the event, consent was given for each of these occasions.

The identities of all participants, professional and private, remained confidential to each individual researcher and were anonymised on all records. Interview transcripts and reports made of observations were coded immediately, with no personally identifying information held on computer. Direct quotes have not been attributed to any identified individual. Pseudonyms are used for the case studies in which uniquely identifying details have been changed.

Chapter 2: The Process of Care Proceedings

2.1 Introduction

This section explores the purpose and function of the care proceedings process and how it operates in practice. It will look first at the structure provided for the handling of these cases in the PLO, and the extent to which that structure is adhered to and seen as appropriate by those using it. It will then consider the court's approach to case management, and finally explore how the relationships developed between legal practitioners, and their common assumptions and beliefs, underpin the way in which these cases are handled in practice.

Care proceedings are initiated by local authorities with serious concerns over the safety and welfare of children under section 31 of the Children Act 1989. Although this could entail a traditional adversarial process of trial and adjudication between parent and local authority, since the child is also a party to the proceedings the court's role is not limited to an investigation of the local authority's allegations, but also involves an inquiry into future plans for the child. Proceedings are typically shaped by a lengthy process of investigations and assessments of parenting capacity and children's needs. Cases typically take many months to complete and are properly seen as a process rather than an event.

Looking both at the past and to the future, care proceedings involve a hybrid adversarial/inquisitorial process, supervised by the court. First the local authority must prove the facts it alleges so that the court can decide whether intervention is justified under the terms of the legislation – whether the 'threshold' has been met. The parents have the opportunity to respond to the local authority's 'accusations', in traditional adversarial mode, in accordance with their right to a fair hearing involving the full legal protections. The local authority, the parents and the children's guardian may seek the court's permission for further specialist assessments and evidence to counter the local authority view, proceedings take on an inquisitorial mode.

The proceedings also take the form of a court led inquiry into the children's future care needs, involving not only examination of the local authority's plans for the child's future, but going beyond to consider options arising from the input of the children's guardian, the representative of the child party to the case. This may include the potential for the child's care by members of the wider family, who may at the court's discretion be made parties to the proceedings so that they can advocate their proposals.

Finally, the court is empowered to make orders granting legal rights and responsibilities for the child, both during the proceedings and subsequently, to those whom it decides will be caring for the child in the future.

There are a number of features peculiar to care proceedings distinguishing them further from the traditional adversarial stereotype of legal proceedings:

1. Their tripartite nature:

The 'adversaries' in these cases are not the only parties. In accordance with all Children Act proceedings, the focus is on the child – whose care is not only the subject matter of the dispute but who is given voice as a party through the children's guardian. It can be argued that one effect of this is the creation of a more collaborative and problem-solving approach than would be likely in a two-party polarised adversarial process.

2. Their publicly funded nature:

Most litigation is conducted at the expense of the parties involved, which is likely to shape the extent and manner in which it is pursued. Sanctions in the form of orders for costs are a routine tool of the court for the management of cases in civil litigation generally, but this is not generally regarded as feasible in care proceedings where the whole of the costs are borne by the public purse. Care proceedings come at enormous financial cost. There are three main elements, all of which come from public funds: the cost to local authorities which are responsible for their own costs; legal aid, for parents, children and other relatives including their share of assessment/experts' costs; and the provision of children's guardians from Cafcass. Local authority legal costs including full cost court fees of approximately £5000 per case were calculated at between £10,000 and £30,000 in three case studies completed in 2009 (Plowden 2009). Legal aid bills in the *Care Profiling Study* sample ranged from £5,000 to £210,000 (Masson 2008); the total cost of legal aid in care proceedings was £180 million for 2004-5 (DCA and DfES 2006, 10). Since then the cost of experts has risen by 50% (LSC 2008) and fees to barristers have similarly increased (MoJ 2008d). Cafcass cost £141 million in 2009-10 but that includes its work in private law cases (Cafcass 2010).

3. Their dynamic nature:

Case scenarios do not remain static during the proceedings. It is axiomatic that family life continues during proceedings – further children are born, new partners may come on the scene, incidents may occur which change the nature of the case. Investigations ordered in the course of the proceedings have the capacity to cause a change in the facts. Parental attitudes may change - while a parent's refusal to co-operate may have triggered the application, for some this is a wake-up call whereby, typically through the advice of their solicitor, a parent may finally decide to cooperate – thus presenting a different situation to that on which the application was based. Finally, the local authority itself rarely comes to court with a fully-fledged case; indeed it might be considered to have prejudged issues if it did so. Consequently, the case evolves in response to developments in the course of the proceedings.

In her seminal research in the 1990s, Hunt conceived care proceedings as providing “a *legally protected framework for welfare investigation, assessment, and the promotion and management of change. The enterprise on which family justice practitioners are engaged, it was concluded, is essentially one of problem resolution.*” (Hunt 1998)

2.2 The structure on paper

The Public Law Outline

The structure for the management of care proceedings in court is set out in the Public Law Outline – a Practice Direction issued in April 2008 by the President of the Family Division in parallel to new statutory guidance to the Children Act 1989 for Local Authorities, issued separately by the Secretary of State for Children Schools and Families (DCSF 2008) and the Welsh Assembly Government (WAG 2008). The PLO is itself a refinement and simplification of the Protocol for Judicial Case Management of Public Law Children Act cases (President and Lord Chancellor 2003), introduced in 2003.

The PLO format assumes a lengthy and investigative process through four clear stages, each with a target timescale, aimed at streamlining the process and reducing delay – see Figure 2. All applications are made to the Family Proceedings Court (other than in exceptional cases, for example public proceedings arising out of private law proceedings in the county court – as in Trevor’s case, or where there are already ongoing care proceedings in that court – as in the cases of Dawn and Sean). On issue, the court allocates the case to the appropriate court – either retaining it or transferring more complex cases to the County Court (Allocation and Transfer of Proceedings Order (2008 SI 2836)). The PLO now requires (except in urgent cases) Local Authorities to have carried out specific tasks before taking cases to court – this ‘front-loading’ being designed to streamline the process once cases reach court. The Local Authority’s application to the court is to be accompanied by extensive documentation, including all assessments – core assessments, any other in-house or specialist assessments, records of contacts with the family and the social work chronology. In addition, documentation required specifically for the proceedings includes the application form, initial social work statement, Care Plan, Case Summary, Allocation Record and Timetable for the Child. These requirements have subsequently been modified – see below. The original version of the PLO as described here was in force during the whole of this research period.

Through a streamlined court process, the PLO aimed to reduce delay by placing emphasis on timescales, case management and the duties of the parties.

Timescale

Cases are to be completed “*in accordance with the Timetable for the Child*”. However, while the PLO does not explicitly retain the 40 week goal for completion laid down in the earlier Protocol, this target continued as a Ministry of Justice key performance indicator within its Public Service Agreement target. Set initially at 70% of cases to be heard within 40 weeks, this target was revised down, so that by 2009/10 the proportion completed within 40 weeks should be 48% in the county court and 57% in the magistrates’ courts. (DCA 2004; DCA 2007).

The Timetable for the Child appears as the first of the case management tools described in the PLO: “*The court will set an appropriate Timetable for the*

Child who is the subject of the proceedings.” (3.2). This is an individualised timescale designed to meet the specific needs of each child. It is to be “*set by the court to take account of all key events in the child’s life likely to take place during the proceedings.*” These would include social, care, health and educational steps. (3.3). This timetable appeared on form PLO4 – the Allocation Record and Timetable for the Child(ren), to be completed and updated by the Local Authority through the case and is now found on the application form, C110 (p.11).

Case Management

The drive from party controlled litigation to the concept of judicial case management spread across the Civil Justice System during the late 1990s. Case management was a major tool in reforms to the civil justice process aimed largely at reducing the cost and length of civil litigation (Woolf 1996). Recognition of the need for judicial case management in care proceedings, specifically aimed at avoiding delay, has evolved since the Children Act 1989 (see Masson 2007), culminating in the Protocol (President and Lord Chancellor 2003), which adopted the approach taken in civil justice.

The Protocol, closely mirroring concepts from the Civil Procedure Rules (Rules 1.1-1.4), imposed on the court the duty to further the ‘overriding objective’ (2.1) (i.e. ‘*to deal with cases justly, having regard to the welfare issues involved*’) by actively managing cases, and on the parties a duty to help the court in doing this. However, further reviews of the care proceedings system (Judicial Review Team 2005; DCA and DfES 2006) found the Protocol not to have achieved its objectives and that delay was an ever increasing problem. The promotion of court case management had not been successful, as identified in the Foreword to the PLO Practice Direction (Judiciary 2008) “*a lack of robust judicial case management has led to widespread failure to identify early, and concentrate upon resolving, the determinative issues in the case.*”

The main principles of court case management, as set out in the PLO (para 3.1) are:

- Judicial continuity: no more than 2 case management judges should be involved in any one case – court managers in Magistrates’ courts.
- Use of the PLO case management tools: the Timetable for the Child (3.2), the PLO documentation (3.5 and 3.7) and the four main hearing stages of the PLO structure (3.9 – 3.13).
- Active case management: “*The court must further the overriding objective by actively managing cases.*” (Para 3.14). This includes identifying the Timetable for the Child, identifying the appropriate court for the proceedings, identifying all facts and matters in issue at the earliest possible stage, deciding which issues need investigation and which do not, controlling the use and cost of experts and the progress of the case, helping the parties to reach agreement in relation to the whole or part of the case and giving directions to ensure that the case proceeds quickly and efficiently. The expectation is that cases should be determined within the target times set out in the PLO.

- Consistency: cases to be managed consistently and in accordance with the PLO standard steps.

Figure 2: The Public Law Outline

Stage 1	
Issue: Court to ensure compliance with pre-proceedings checklist, Allocate proceedings, Appointment of Guardian and Solicitor for the child, Give initial case management directions.	Days 1-3
First Appointment: Confirm allocation, Confirm Timetable for the child, Identify cases suitable for early Final Hearing, Scrutinise Care Plan, Give initial directions.	By Day 6
Stage 2	
Advocates' Meeting & Case Management Conference: Check compliance with directions, Identify issues, Identify any expert evidence required, Scrutinise Care Plan, Review and confirm Timetable for the Child, Issue Case Management Order	By Day 45
Stage 3	
Advocates' Meeting & Issues Resolution Hearing: Consider the position of each party, Resolve and narrow issues, Identify remaining issues, Scrutinise Care Plan, Review and update Timetable for the Child, Make final orders if agreed at this point, Give directions for Final Hearing	Between 16 – 25 weeks
Stage 4	
Final Hearing: To determine the remaining issues, and make final orders	In accordance with Timetable for the Child

Encouragement to settle

The culture of settlement has been an entrenched aspect of family law practice since at least the 1970s. Encouragement to settle is also a repeated feature of civil litigation encapsulated within the Civil Procedure Rules. The pre-proceedings element of the care proceedings process, outlined in the revised Children Act 1989 Guidance (DCSF 2008) seeks to promote agreement between the parents and the local authority with a view to avoiding the need for proceedings (Masson 2010). The PLO continues this approach throughout. For example, the section on active case management states that this includes '*helping the parties to reach agreement in relation to the whole or part of the case.*'(3.15 (15)). Further, Rule 18 promotes the consideration and use of Alternative Dispute Resolution.

The parties' responsibilities

Case law and guidance call for care proceedings to be conducted in a constructive and non-adversarial manner, in conformity with the ethos of partnership promoted by the Children Act 1989. Law Society guidance for solicitors acting in public law Children Act cases (Law Society 2004) clarifies what is meant by the 'non-adversarial' approach in practice: "... *solicitors should not behave in an unduly adversarial, aggressive or confrontational manner. All child care cases should be approached in a spirit of professional co-operation.*" (1.2.1) Solicitors are expected to "*avoid delay and contribute to co-operative, timely and organised case management.*" (1.5.2).

Guidance on the responsibilities of all parties in care proceedings throughout the PLO scheme emphasises collective participation, co-operation and collaboration: "*The parties are required to help the court further the overriding objective.*"(2.3). The court's active case management is to include "*encouraging the parties to co-operate with each other in the conduct of the proceedings*" (3.15 (3)). In addition to the co-operation, with the court and each other, expected in terms of use of documentation, the fixing and adhering to timetables, etc. (5.4, 19.1, 20), the parties are required to monitor compliance with the court's directions and to inform the court of failures to comply (5.5). Most importantly, the parties are expected to work together collaboratively in the preparation of draft Case Management Orders (5.7-5.9). In addition, Stages 2 and 3 of the PLO structure – the Case Management Conference and the Issues Resolution Hearing - are to be preceded by Advocates' Meetings.

Advocates' Meetings between the group of advocates are given formal status and may be ordered by the court to take place prior to the two main case management stages of the PLO process (CMC and IRH). The legal representatives are to consider each of their client's respective current positions and to draft the Case Management Order (13.1). Guidance as to how these meetings are to be organised is quite prescriptive. They should be no more than 7 and no less than 2 days before the relevant court hearing. Their purpose is specifically to avoid "*the need for discussions outside the 'court room door' of matters which could have been discussed at an earlier time...*" (13.3). The aim of these meetings is to "*facilitate agreement and to*

narrow the issues for the court to consider.” (3.11) Specific provision is made for advocates’ meetings in the legal aid fee structure. Advocates can claim payment at advocacy rates for participating in up to two such meetings. Participation can be in person or by video or telephone conference. From 2009 the full fee can only be claimed in cases of personal attendance.

Ministry of Justice FAQs for the PLO implementation (MoJ 2007) and the *Best Practice Guidance* on the PLO issued in 2009 (MoJ 2009) make clear that meetings are to be attended only by legal representatives. *‘Professionals have been excluded from attending advocates’ meetings before the CMC and IRH because it may be seen as unfair to parents if they are the only people excluded (unless they are a litigant in person) or intimidating if they were there with the professionals’.*

Social workers and guardians *‘should be notified of the time and date of the meeting and contactable throughout so that counsel may take instruction as necessary’.* The guidance strongly reminds advocates that the advocate who will be representing the client at the final hearing should personally attend Advocates’ Meetings.

The importance of this collaboration between the advocates was emphasised by the President of the Family Division/Sir Mark Potter:

“The courts will be heavily reliant on the work done by advocates at this stage. The lawyers will be required to thrash out the issues, to explore the question of settlement and produce agreed documentation as a basis for the court to make directions at the CMC and IRH.” (at a Meeting of Stakeholders, Church House Westminster, 11 July 2007).

Subsequent revisions to the PLO

Feedback from a review of the operation of the PLO in the areas where it was first implemented in 2008, involving the judiciary and practitioners, and an early evaluation commissioned by the Ministry of Justice (Jessiman et al 2009) identified a number of problems in the operation of the PLO:

- The bulk of pre-proceedings LA documentation to be filed/served with the application, were seen as overly burdensome.
- Difficulties with PLO forms, which were seen as confusing and unhelpful.
- The Timetable for the child was largely ignored.
- There was continued heavy use of experts during proceedings.

All of which problems were echoed by respondents in this study. Revisions described as ‘fine tuning’ were introduced from April 2010, aimed at addressing the first three of these issues. The key changes aim at reducing the burden of documentary evidence at issue, introduce a new form (C110) to replace not only the original application forms (C1 and C13) but also all the PLO forms PLO1-6 which become obsolete, and to clarify and emphasise the principle of the Timetable for the Child, creating a court rule making express reference to it.

At the same time the Ministry of Justice launched a system-wide target for reducing unnecessary delay in care and supervision proceedings (MoJ 2010b), following Lord Laming's recommendations after the case of Baby Peter (Laming 2009). The series of targets include focus on Core Assessments, appointment of guardians and target timescales for reaching outcomes in care proceedings cases. These categorise cases into three levels of complexity:

- 'cases suitable for early resolution' 26% 30 weeks
- 'the vast majority of cases' 66% 50 weeks
- 'those that genuinely need a longer period' 92% 80 weeks

These revisions were introduced well outside the fieldwork phase of this study.

2.3 The structure in practice

While the PLO envisages four neat court stages, two preceded by meetings of the legal representatives, the reality in practice is very different. Appendix 2 shows timelines for the 16 case studies, set against PLO target timescales (and also revised timescales introduced in April 2010 – see above). It can be seen that the numbers of hearings significantly exceeded the four main stages in the majority of the cases, and in particular, that they include numerous examples of multiple attempts at the key stage hearings. Most took substantially longer than the default 40 week target for completion.

Looking at the case study sample, one case was abandoned by (the only) parent party (Evie) in its early stages, and two very long cases were not completed within the timescale of this study. Robert's case could not be followed once his paternity was ruled out. The average number of hearings in the 12 cases which were observed to completion was 7.25, ranging between 4 and 13 hearings. Only one case (Hayley) was completed within the four hearing structure, with even the apparently least complex of cases spilling out into additional hearings. The average duration of the 14 concluded cases was 57 weeks. In comparison, in the *Care Profiling Study* (Masson et al 2008) the average number of hearings was 8.4 and the average length of cases 47.8 weeks. In the *Early Evaluation of the PLO* (Jessiman et al 2009) the average number of hearings was 7.7 and 70% of cases finished within 40 weeks – but the study design only allowed for the inclusion of shorter cases.

This is clearly a far looser structure than that envisaged by the PLO. While the major case management hearings were respected as stages to be achieved, it appeared rarely possible to get to those stages without a number of additional directions or review hearings in court. While the PLO makes provision for the court to give directions without a hearing (17.2), this appeared rarely to be used. This was also true of the sample in the early evaluation (Jessiman et al 2009).

The First Appointment appeared unsuccessful in getting cases off to the purposeful start envisaged by the PLO. Legal representatives might arrive with very little knowledge of their respective client's cases. The client may not even be present. Unless the pre-proceedings process has been used parents' representatives may have met their clients for the first time only the day before the hearing, or even in court immediately beforehand. Advocates were still exploring and clarifying their clients' positions. In Kevin's case neither parent was present at the first hearing, nor were they represented. In Bernie's case there was no guardian for the first two or three hearings. A parent's case is likely to be either that the local authority is wrong in their assessment, or that the application has induced a change of heart in a parent's attitude, with the parent now prepared to engage and co-operate with the local authority. Their representatives are therefore likely to be seeking immediate assessments of their clients, possibly on the basis that a pre-proceedings assessment carried out by the local authority had been inappropriate in some way – as in Clare's case, or that it pointed positively to a further assessment – as in Bernie's case. The potential need for the Official Solicitor might be an issue. Josie's case was held up briefly and Clare's for some three months before the OS formally accepted their cases. In the early stages of a case, it was likely that the issues were increasing rather than narrowing.

Where children were still at home or accommodated voluntarily, the local authority might want an ICO, which might not be agreed by the parents. First appointments listed for contested ICOs did not always proceed as such, sometimes due to failures in provision of court time, and had to be relisted. This situation could result in protracted negotiations in court between the parties to reach some form of holding agreement – as in Barbara's and Carly's cases. These were followed by review hearings, also listed for contest, which might then not be required when parents were now co-operating. Carole suffered the trauma of 2 court hearings listed for contested ICO which failed to materialise – the first through lack of court time and the second because the local authority was unable to make provision for the care of the child, before her son was finally removed at a third attempt.

There were clear differences in court practice between areas A, B and C and area D. In areas A, B and C the majority of cases required further time between their First Appointment and an effective CMC, with an average of 2.8 additional hearings before a CMC took place at which the issues could be clearly identified. These additional hearings were often planned and listed in advance as 'directions' or 'reviews'. In other cases, hearings listed as CMCs in accordance with PLO procedures could not take effect as such, because key elements required for the clarification of the issues were missing. These might include assessments not yet completed, reports filed late, incomplete information regarding proposed assessments. Bernie's case, for example, required three CMCs before proceeding because of protracted discussions over the form of assessment which might be required, before it finally became clear that Bernie was not yet ready to undergo an assessment. Trevor's case required two CMCs because at the first statements and drug test results from the parents were still awaited. In some cases CMCs were adjourned a

number of times. Nine of the 19 CMCs we observed were adjourned to a further CMC and of 7 observed adjourned CMCs, 4 were again adjourned to a third attempt.

The number and nomenclature of hearings were frequently the cause of consternation, with parties and courts endeavouring on the one hand to stick to the PLO terminology whilst, on the other, evading its structure. We observed numerous convoluted discussions, sometimes between the group of legal representatives and sometimes in the courtroom involving also the judge or legal adviser, focusing on the issue of how the next hearing should be designated. The first CMC in Trevor's case involved a lengthy discussion between the advocates and judge as to whether the next hearing could or should be designated a CMC or an IRH, revealing a degree of confusion and uncertainty typical of many other such discussions. The next hearing was finally designated as a 'hybrid CMC'. The PLO in fact provides for the possibility of repeats of particular hearings (17.3). However, underlying these discussions were financial ramifications which depended on the precise designation of hearings. Advocates can be paid for only one CMC and only two Advocates' Meetings per case. The local authority on the other hand had the issue of court fees to consider because the fee scheme operation from May 2008 required the local authority to pay further fees for an IRH and a final hearing.

The timelines show slippage occurring in the timing of an effective CMC, supposed to take place by the ninth week. Of the case studies in areas A, B and C, six CMCs took place 5-11 weeks after First Appointment, three between 13-18 weeks, and three between 25-31 weeks.

Between CMC and IRH there is typically a lengthy period when, as many solicitors reported, '*nothing much happens*' – at least from their point of view, while parents undergo assessments of various kinds. Again, during this period, some cases had further hearings before an effective IRH could take place. Slippage in the overall timescale increased. While the gap between CMC and IRH should be between 7 and 17 weeks, the case studies showed an average of 28 weeks. Reasons for this included late service of expert reports, late formulation of local authority plans – and caused a knock on effect on statements from guardians and parents. Also, despite the notion of nothing happening, this was a period when events outside the proceedings could throw it off course. For example in Jeff's case, his assault on his partner's daughter, or in Carly's case a domestic violence incident between herself and her mother – both of which threw each case off its previous track.

The same problem of repeat hearings arose for the IRH stage. These hearings are designed to narrow the issues and, where possible, to make final orders. However, of 22 IRHs observed, nine resulted in listing for a further IRH or a review. This was also a pattern observed in early evaluation (Jessiman et al 2009). Around 9 per cent of the cases in the *Care Profiling Study* concluded on the date set for the Pre Hearing Review (Masson et al 2008, p.53). At IRH issues may well be narrowed. However the expectation that cases might be concluded then, where parties agreed, did not appear to

materialise in our sample (or in that of Jessiman et al 2009) to any great extent. Bernie's case ended at a 'Repeat IRH', a Final Hearing in all but name – designated as such specifically so that the LA could avoid paying the fee for a Final Hearing. Kevin's case was also concluded at the IRH; by the time the hearing took place, it had already been agreed to seek final orders. Clare's was the only case, where a parent had participated fully, in which final orders could be made at the IRH, subject to settlement of a minor dispute over the extent of contact. More often, even where there was basic agreement, usually issues such as placement, contact and the form of final orders remained to be dealt with at a final hearing. Seven cases were agreed earlier but still required a final hearing. It was also not unusual for documentation which might have made completion possible not to have been available until the hearing itself.

The issue of listing final hearings had caused much dissatisfaction before the PLO; it was common practice to list final hearing dates at the start of the case in order to secure a date many months hence. The PLO attempted to address this problem by insisting that final hearing dates could not be set until the IRH when the issues (and the required length of hearing) were known. However, this attempt did not appear to have had the hoped for effect of unblocking listing, partly because of the variable application of the provision. In some courts it was relatively easy to obtain a final hearing date before the IRH through special pleading.

Overall five out of the 15 completed cases were still contested at the final hearing.

Area D

In this area the picture appeared rather different on the basis of our observations. Interviews with professionals confirmed that the observed practice was not unusual in that court, but recognised as different by those who also practised in courts elsewhere. The structure of cases appeared to conform to a greater degree than elsewhere to the PLO – both in terms of numbers of hearings and the duration of cases.

Court Case Management

The aims of judicial case management have not been clearly specified. Moreover, the term has no precise definition, as pointed out by the Lord Chancellor's Department's *Scoping Study on Delay* (2002). Interviewees in that study expressed different views as to the principles of case management; some expressed unease as to what is expected of the court, *"There did not appear to be a shared or consistent picture with regard to the principles underpinning case management which may partially explain the very different statistics on the time taken to deal with a case."*

Neither the Protocol nor PLO make clear exactly how 'active case management' is to be achieved, other than as a list of the tasks to be included (PLO 3.14 and 3.15). Guidance for Legal Advisors: *Dealing with the Public Law Outline in Family Proceedings Courts* (Justices' Clerks' Society 2009)

similarly sets out the tasks to be completed at each stage from a purely procedural perspective.

The *Care Profiling Study* found little evidence of court control or management of the proceedings, with courts generally accepting draft directions presented by the parties and agreeing requests for further assessments or for contested hearings. Some judges acknowledged a reluctance to manage assertively, feeling unable to impose their view when they had not had sufficient time to read and prepare for the case. This study closely reflected those findings.

The task of case management by the court might be broken down into three main functions:

- Oversight
- Adjudication on procedural issues
- Authority / control

Court case management was approached in a broadly similar manner in areas A, B and C, but was markedly different in area D. We start by considering the first three areas, looking first at the county courts in areas A, B and C.

Oversight

The task of oversight can take two forms: having a grasp of the substantive issues in the case, and checking on procedural compliance. In order for the court to exert any form of strategic control over a case, it needs to have a clear understanding of the substantive issues. However, this appeared problematic in these areas for two potentially inter-related reasons: lack of judicial time to read and assimilate the voluminous documentation flowing into the court for each case, and the dynamic nature of cases.

As described above, cases in these areas typically required significantly more than the two main PLO case management hearings, facing the courts with streams of directions appointments. Judges in these areas readily acknowledged difficulties in devoting sufficient time for reading and preparing for hearings. When faced with a session of miscellaneous intermediate directions hearings with papers being filed on the day, it is not surprising that judges felt unable to keep abreast of each case. As one judge acknowledged during a “*rather frantic*” but “*not exceptional*” morning session of half a dozen hearings “*we’ll be flying by the seat of our pants today*” (Judge 5)

Judicial continuity is one of the PLO case management tools. The areas researched in this study did not include county courts with very large numbers of judges and generally speaking, local lawyers were satisfied at the level of continuity in their court. However, this is not easy to achieve and may involve choices between continuity and delay:

Once we get a case, as you know, we’re supposed to do our best to hang onto it right to the end, but that does cause considerable issues with listing. Obviously, if one’s done a Fact Finding, you are required under Re B and Baroness Hale to..... she told us all it was part heard and we should carry on

doing it. So that apart, if there's choice about doing it or not doing it, we quite often say 'before X or Y if possible', assuming it's not going to cause delay. That's the worst thing that can happen is that you say, we must have Judge X or Judge Y, we can't have him for 4 months, therefore we won't have that earlier slot for another judge in 6 weeks. That would possibly be doing a grave disservice to the children if the case can be handed on. (Judge 2)

Practitioners expressed a preference, in the FPC, for cases to be heard by professional District Judges:

We might have transferred it but he kept it all the time and all the hearings before him, which was very good – that's not to say a Bench couldn't deal with it but it's the fact that with a Bench you can't guarantee the same people all the time. And it does make a difference having continuity – definitely. (LA Solicitor 2)

It did appear that when a case reached a key case management stage, judges had read and prepared for the hearing and formulated questions and points for the advocates – which they would put gently or assertively depending on their personal style. However, their ability to take a strategic view was typically thwarted on these occasions – as for all hearings – by the late filing of documents – often on the morning of the hearing, and reports of last minute developments which might significantly change the direction of the case. One judge expressed his frustration at this:

I've said it before and I'm going to say it again, that if the parties expect the court to cooperate with them, then they should cooperate with the court. I received the Case Summary and Position Statements at 10.10 this morning. The last Case Summary was [5 months ago] and there has been no update since then. I was in the dark, only enlightened by my own research, when suddenly a tsunami of documents appears. It starts the day on the wrong footing and then I'm trying to dig out all the information. It leaves me with a feeling of depression, irritation and unpleasantness. It is inappropriate for a judge to remind other professionals of their discourtesy and inattention to their cases. (Judge 3)

However late filing of documents and last minute information was generally accepted by judges as an inevitable consequence of the dynamic nature of these cases:

Yes there is the drive to stick to it [the PLO], but you can't cater for a father who couldn't be found at the beginning all of a sudden is found. Grandma and Grandad now want to be considered – they hadn't really thought about it, so half way through it they offer to put themselves forward. Aunt and uncle come out of the woodwork – 'we'll do it'. You've got a mother, for example, doesn't get on at one assessment centre and kicks off, then perhaps you get someone who goes into foster care and then absconds. You know all that sort of mix and you can't cater for it. You've just got to say 'Well – I know this is another CMC, but we've got to have one.' (Judge 4)

Many of the decisions which had to be made to progress the case were agreed in prehearing discussions between the legal representatives. It was rare for the court to challenge these decisions or to suggest additional points which they had not considered. In terms of checking procedural compliance, some judges in these areas openly expressed scepticism and impatience as to the utility of the PLO structure. While during the earlier stages of the project, under the newly introduced PLO, they would become involved in convoluted attempts to fit cases within the structure, latterly they were more than receptive to proposals irrespective of whether these fitted the PLO, on the basis of a generally held belief that cases needed an individualised, tailor-made structure.

Even judges who were more favourably disposed to the PLO nevertheless perceived practical difficulties in their ability to perform the role – given time constraints:

But if the case management judge has got to be the enforcer for every aspect of the PLO, we're scarcely going to be able to hear any contested cases. So there has to be an awful lot that proceeds on trust, I think. I don't have the time to read every piece of paper on my desk every morning. It's just not possible. (Judge 3)

This judge also expressed frustration at his inability to control all aspects in a case:

You are at the mercy of all the other agents involved in the process - not only the current concerns we've all got about CAF/CASS; you've got the problems of Local Authorities who are also heavily over-stretched; you've got the problems of shortage of experts in some areas and long waiting times before they start work and produce a report in some specialties. So from the judicial perspective, you've got a whole range of problems that you can't completely control. And that's a problem.

Inadequate court time was also a problem stressed in all three of these areas, with courts frequently unable to provide hearing dates to fit within PLO guidelines.

Where cases are dealt with by magistrates, case management functions are the responsibility of legal advisors. Magistrates only managed the process during substantive hearings. Time for case management in the magistrates' court varied between courts. Some legal advisors could expect to devote half a day in preparation per full day of hearings. In other courts this was purely aspirational. It was evident in some courts that legal advisors had spent time ahead of hearings and may have been in contact with the parties. This appeared to have been only within the week preceding the hearing. Continuity of Legal Advisor was rare and indeed, hardly even attempted. Procedural compliance was the major focus in magistrates' courts, with legal advisors determined to fit hearings into the PLO timetable. Resources did not allow for ongoing monitoring of cases between hearings:

The missing link for us is - we've got a case progression officer but with the best will in the world, there's no administrative management, there's not much chasing of directions except the most important ones that the LA thinks they've got to take a lead on. (Legal advisors' Focus Group)

In terms of actual case management, the critical factor is you can't chase up directions and compliance. You're very much reliant on particularly the child's solicitor notifying you when things go wrong. (Legal advisors' Focus Group)

It is difficult to see how legal advisors can function effectively as case managers. The lack of continuity and the constraints on their time limited their capacity to manage, even on a procedural level. Case management cannot be divorced from the facts but it did not appear that legal advisors saw a function for themselves in terms of considering the substantive issues. However, one legal advisor described advice given by the judge pointing to a more strategic view:

We had a case where something similar happened where the local authority was missing directions. Every time the local authority came along we had extremely reasonable justifiable grounds out of every file and at each hearing everybody thought, that's fine, we'll give them a bit more time, but we got to a stage where we did try to spur it eventually because things were getting so out of control and the judge, had a discussion with me about it, and what had happened was that people had lost sight of the big picture because you're looking at every hearing. And that seems to be very critical – it's losing sight of the fact that you've always got to look at the whole length of the case and where you are, not just the individual problems a party may be having. (Legal advisors' Focus Group)

Adjudication on procedural issues

A second function of court case management involves adjudication when the advocates cannot agree over procedural issues, including the need for assessments and who should pay for them. As described, the PLO encourages the parties to agree directions (20.1) and in the majority of hearings observed, this was successfully achieved. While both FPCs and county courts in areas A, B and C appeared unwilling or felt unable to challenge decisions made by the group of legal representatives as presented in draft directions, it appeared perfectly willing, at both magistrates and county court level, to make decisions on the occasions where the legal representatives could not agree. For example, frequently the question of payment for assessments was in dispute. Courts would invariably deal with this during the hearing in which it arose. The issue of whether or not an assessment should take place at all – nearly always agreed between the legal representatives – might also be dealt with within the hearing. In Bernie's case however a hearing was listed specifically for that issue.

The tension judges feel between the robust style of case management they are encouraged to take by the PLO, and the approach of the Court of Appeal was expressed by one judge:

If from the judicial perspective, you are really robust and say, no, we're not going to have this, this and the other expert in this case, I think some of us feel that we are not at all confident that we would be supported by the Court of Appeal if those kind of decisions were taken upstairs. So the move to cut down on experts, I think, has to come from the top down. I think until the Court of Appeal start giving the message loud and clear that judges are going to be supported if they take robust decisions about experts, the likelihood is that judges are going to allow too many experts in. (Judge 3)

The President of the Family Division has recently responded to similar comments by issuing guidance to judges on making case management decisions (Wall 2010).

Authority/control

The third function of court case management involves the use of the court's authority to exert control over the parties, in particular to deal with non-compliance. However, in neither the magistrates' nor the county courts in areas A, B and C did this appear to happen. Compliance with directions concerning the filing of documents was routinely poor. This was particularly so with regard to local authority evidence, and frequently also the filing of expert evidence, both of which had knock-on effects for the other parties, left with no time to consider or present their response. However, courts appeared to feel generally helpless in these circumstances. Stern words might be expressed, particularly by legal advisors, but no action would be taken. Frustration with routine day-of-the-hearing filing of documents by local authorities was typically overcome by a sympathetic appreciation of local authority difficulties and lack of resources in the face of which courts appeared to feel powerless. The failure of the local authority to produce a care plan in one hearing caused only mild comment from the judge who added:

I know the service manager is overworked and under-paid and doing everything he can. I respect him and see no point in labouring the issue. (Judge 4)

Frustration with repeated failings on the part of the local authority boiled over in Bernie's case, resulting in the making of an order for the Director of Children's Services to attend the court to explain. However, this appeared not to happen and no further action was taken. In the same case Bernie's solicitor at one point threatened to withhold consent to the renewal of the ICO, but compromised by consenting to renewal for a shorter period – until the following hearing. However, this had no effect on the performance of the local authority for the remainder of the case.

In other areas of civil litigation, and to some extent in private family law, the court is able to exert some control by means of costs sanctions. However this is not generally seen as feasible in these proceedings which are publicly

funded. It appeared simply to be recognised that ‘everyone was doing their best...’

As described, PLO procedures conceive case management to a large extent to be the joint responsibility both of the court and of the parties in a form of partnership. The group of advocates spend considerable time in consideration of management of the case, culminating in the drafting of case management orders, in accordance with the responsibilities set out in the PLO. In terms of its intimate knowledge of the case, the time spent in considering it and the realities of what can be achieved, the advocate group is clearly the stronger party. When the group has spent 2-3 hours in discussion, with the most up-to-date information on the position of all the parties and been successful in agreeing directions – as encouraged in the PLO (20.1), it is not obvious on what basis a court, openly acknowledging a lack of time for preparation, could be expected to challenge or second guess the details of such agreements.

Some judges found the input of the advocates a relief:

If I agree with what the advocates put before me, it's because I haven't got time to read the papers as well as I would like to.”

Half the time you've thought, well, I might make that direction and then they have half a dozen more that you haven't thought of. They come in to tell me what they've agreed basically, what people need, and I draft the order. (Judges' Focus Group)

This was universally coupled with an immense respect expressed by judges for their regular groups of advocates:

And I think we could not conduct the throughput of work we do without sensible solicitors and counsel in many, many cases assisting us to get to the obvious and right answer. (Judge 2)

The interesting point from all of those comments that you've made is that, by and large, our view of the advocates who come in front of us is 'first rate'. We're all very well served by our advocates. (Judges' Focus Group)

There were other views. One judge expressed disappointment at the time constraints which he felt made it impossible for him to engage fully in case management in the way he would have liked:

I'm fed up with the parties huddling together outside court and coming into court with a raft of agreed directions for the court just to add its rubber stamp to, included in which are directions for experts' reports, and I've said to the Local Authorities 'Why don't you just stand up to the other parties sometimes, say we don't need an expert, come into court, have the argument.' It's very difficult to have an argument about whether there should be an expert in the case when you're faced with a piece of paper that everybody agrees to. So I have encouraged them to come into court and have the argument but ...

That would be the ideal but the amount of work that there is to do, the pressure on court time, the need to get through the contested hearings, means that good intentions frequently fall by the wayside. (Judge 3)

There was general satisfaction in these areas with the level of judicial input:

We've had three IRHs on that – but that doesn't mean necessarily that you aren't resolving certain issues as you go along. For me that's up to the judge. Judge [X] at B is very very good. Every time he'll say 'What can we actually agree today? What can we put in writing today, so that I know that that isn't an issue that we have to deal with at a later stage?' I think that's very good. (Solicitor 22)

Some legal representatives however would have welcomed more from the court:

There are many times when I'm in court and you sit there praying for the judge to actually get a grip and take a position and manage what's going on – but a lot of them aren't very good at that. The PLO was obviously making it clear to them – 'This is what we – the higher judiciary - expect you to be doing.' But it hasn't made much difference in terms of speed of cases on the ground, or any of those issues. (Solicitor 3)

Area D

The approach to court case management was significantly different in Area D, particularly in the county court, where the difference in the structure of cases in practice has already been described. In this court, the judge took an extremely proactive role in case management. This court appeared to hold significantly fewer additional directions hearings, conforming closely to the PLO structure. Advocates' meetings were held before the two key case management hearings, but other than that, the legal representatives did not collect together for lengthy discussion immediately before hearings.

The judge, who invariably appeared entirely *au fait* with the details of the case, adopted a strongly inquisitorial mode, questioning the advocates on the steps they had taken and seeking further information, with a view to firming up his view of how the case should progress - which view did not necessarily correspond to any plan already agreed by the group of representatives at advocates' meetings. While this area suffered the same problems of late filing of documents, the judge would always read these before the hearing so that they could be factored into the discussion. Hearings would then take the form of lengthy discussions of the type which elsewhere took place outside the courtroom which, it could be argued, effectively rendered the collaborative efforts of the legal representatives redundant.

You have the judge sitting there and instead of just saying 'yes thank you' he'll sit there and toss ideas around and you get an almost round table – it's a round table with a point at the end! A round table with a chairman. There's a

lot of contribution from the judge – a steer he calls it – more than a contribution. It's not an iron fist – a steer... (Solicitor 18)

The judge himself commented on his approach:

Sometimes I feel that the advocates come along with a checklist which is: we want this, this, this and this, when in fact it's not actually going to help. If, for example the core assessment – when it's been filed – shows that there's a big gap in it that the local authority haven't considered and there is, if you like a genuine level of apprehension in the parents that because the local authority haven't covered that, they won't cover it fairly, then that will be a good argument for saying 'right we need an independent assessor to come in to have a look at it' but I do try and limit the number of experts that we have for a number of reasons: 1.it limits the length of the final hearing, 2. it limits how much it costs – which is a not inconsiderable question, and 3. for some parents, how many assessments do they have to actually go through because, although it may look from a professional's perspective that we're accumulating evidence, it means that parents are almost being assessed to the point of exhaustion when, for some parents that's extremely difficult to keep going back to the same things, to keep being asked the same questions, and it may not add anything to the great scheme of knowledge about the case at all.

In this court, while periods of pre-hearing discussion were minimal, the hearings themselves took considerably longer than those elsewhere – typically between one and two hours, in comparison with under half an hour elsewhere. However, there were fewer hearings overall in the cases in the sample.

Another feature of this court's approach to case management was an extremely rigorous approach to compliance issues. Legal representatives were expected to monitor the compliance of their colleagues informing the court of their colleagues' failures to comply with directions. We were told of a case in which costs sanctions were threatened where documents required for a particular hearing had not been filed making the hearing ineffective. Some representatives admitted that they found appearing in this court particularly stressful. Nevertheless, the record of compliance of the local authorities appearing in this court appeared no better than elsewhere, and although extreme frustration and displeasure was expressed, it seemed to be of little effect.

One effect of this model of case management is that the extent of agreement between the parties becomes less relevant. Adjudication was not an issue in this court, since the judge's decisions were based ultimately on discussion in the courtroom, rather than on anything previously considered, agreed or disputed by the legal representatives. The nature of this qualitative study does not make it possible to say whether the approach in Area D was more successful than those elsewhere in terms of narrowing the issues, reducing the use of assessments, the shortening of the length of cases or reducing costs.

Overview on the structure of the PLO

This study suggests that the structure for handling care proceedings provided by the PLO has not reduced their length or the numbers of hearings, or changed the way in which cases have always been handled since before the Judicial Protocol. There was a general consensus that the principles of the PLO, a more focused approach, emphasis on the avoidance of delay, etc., are positive, but many saw it merely as institutionalising existing good practice, and something that experienced lawyers did anyway:

Yeah. I think what it [PLO] does do is – for those who are less ... If you've got a case where you've got a set of experienced lawyers, I'm not sure it achieves over much. But I do think it helps when you've got less experienced people in cases because they have a clear framework within which they work. So it helps in that respect. I suppose it does focus everyone's minds in the sense that they know that by a certain hearing certain things have to be done. But I think largely they would have been done before. (Solicitor 9)

The prevailing view, held both by practitioners and the judiciary (as the two following quotes demonstrate) was that the architects of the PLO simply did not appreciate the realities of these cases, where the scenario may continue to unfold and expand throughout the case in an unmanageable way.

Well – it's classic - all it's done is to replace the old structure and try to simplify it, but hasn't succeeded in doing that. The reality is that you're dealing with people's lives and you can't fit people's lives – usually – into a fixed system – it just doesn't work. I think your average judge will agree as well that it doesn't work. (Solicitor 22)

You start off PLO compliant obviously and have your initial steps and then it just goes completely pear shaped after that. So you get to case management conference and then – especially in a bigger case – there will always be some expert you haven't got their availability – or somebody makes an issue about a different expert, or you then get another report in where you need to consider – in a case like that, the issues were growing rather than narrowing – so then you're back before the court for further directions. There were several hearings where there were issues about contact. Obviously the placement with grandparents as well, so that led to lots of additional hearings. So the PLO fell apart and it reverted to what it would always have done. (Solicitor 3)

The general view that the PLO structure is fine for 'simple' cases, but cannot be expected to work for 'complex' ones may well reflect what its architects had in mind. However, there appears to be a complete mismatch between what the architects on the one hand, and the practitioners on the other, would consider constitutes a 'complex' case. Those 'at the coal face' consider a large proportion of their cases to come into the complex category and therefore incapable of being forced to fit the PLO structure. Another major problem was the lack of judicial time to undertake effective case management. The fact that there has been no radical change in the culture of

handling of these cases perhaps reflects the rather contradictory aspiration expressed on the introduction of the Protocol:

This protocol has been prepared on the basis that a change in the whole approach to case management and a clarification of focus, among all those involved in care cases, is the best way forward. This protocol is not a fresh start – it is a collation and distillation of best practice... (Foreword to the Protocol)

We now turn to look at what *does* underpin the handling of these cases.

2.4 The Culture of Care proceedings

Party control and shared assumptions

The Legal Community

The duties and responsibilities of the legal representatives for all the parties in their handling of these cases, is set out in the PLO and in professional guidance as already described. In practice the tone of hearings is positive and constructive. Confrontational adversarialism is rare, with legal representatives generally taking a collaborative, problem solving approach.

This collaborative approach may well be easier to achieve given the multi-party nature of these cases. There are always at least three parties involved – the local authority applicant, the parent respondent and the child through the guardian. Sometimes there are two or more parents – almost invariably separately represented – and, as the case progresses, other parties (usually potential family carers) may be joined. The atmosphere is therefore not one of naked polarisation between two opposing parties, but rather that of a committee with the members putting forward their different perspectives. The fact that all involved, except for the parents, are professional, ‘repeat players’ may also contribute to this collaborative atmosphere (Galanter 1974). While the parents are of course directly involved at the deepest level, the professional parties are not personally involved and are not likely to be irrational or vindictive, as is often the case in private law litigation about children between two warring parents. Indeed the prevailing atmosphere usually includes a significant element of sympathy for a distressed parent.

We found in each area a nucleus of lawyers who, between them, are involved in the majority of care cases. These lawyers, and those working for local authorities, meet each other in court on a regular basis, often spending many hours working closely together, and so coming to know each other very well. A deep mutual respect among these groups of legal representatives was observed in each area:

...I think [area B] as an area is remarkably well served by some very, very high quality practitioners and I feel very fortunate, in terms of my own career, to have worked around these people for all these years.....I think when you're rubbing shoulders with people like that, then you inevitably have to raise your

game and it's been an enormous privilege and experience for me to work alongside people like that, and that's how to get to the point where you feel you're holding your own with these people. So there is this inner circle – I suppose you get these sort of cliquy groups in all fields. (Solicitor 35)

An important feature of these relationships is the generation of reputation (Mather et al 2001). Practitioners come to know and trust each other to act in ways which they consider reasonable. They prefer to negotiate with colleagues who they feel know the system. The maintenance of reputation with their peers is understood and appreciated.

I suppose what I would say is that there are a number of people in [C] who appear regularly in care proceedings and if you think, 'oh, so-and-so's on the case', then you think, 'well at least I'm going to have somebody sensible who's going to be proactive, knows what they're doing'. (Solicitor 15)

I think because there are so few of us doing it, it's inevitable that we all know each other very well, and I think on the whole that that's a good thing. We all respect each other and we know we'll be on a different side next week and we've got an investment in having good relationships. (Solicitor 35)

Local authority solicitors expressed the same degree of trust that the solicitors in the 'elite' group would operate appropriately:

We find that all those firms are in just about all our cases, so it's quite a close-knit community and, I think we have a really good working relationship with those lawyers. It's taken a long time to build that up but they are all on the Children Panel and they're experienced lawyers in my view.....So yes, we do have those contests and certainly in my experience the solicitors – certainly in [B] – give excellent representation and fight where they should fight and advise where not to fight where appropriate. (LA Solicitor 1)

I think here we are quite lucky generally because we tend to have quite a good relationship with private solicitors – don't get me wrong, they do damn good jobs for their clients, but at the same time, they don't do it aggressively to cause problems – we do it on a professional level rather than a personal level. (LA Solicitor 2)

The majority of solicitors considered that the fact of knowing each other so well was a positive thing:

But we do (discuss things at court) and that makes the job slightly easier in that the solicitors who do this work are very, very friendly – we all get on very well, we all trust each other, we've never tried to put a fast one on anybody and that makes life a lot easier. (Solicitor 16)

A small minority however felt uncomfortable with this 'cosy' world:

It's a bit too cosy I think. I like going out to other areas. I work in other towns and I much prefer it sometimes – it keeps you on your toes. (Barrister 4)

It's a very cosy world really, has been for many years. That's been one of the criticisms of the whole system for a long time, and people who are coming into it new and fresh can't get into it because of this clique, and it exists, I see it all the time. (Solicitor 23)

We wondered whether advocates might find it difficult to argue their cases forcefully in negotiation in this 'cosy' atmosphere, but all claimed this was not a problem for them:

On a personal level people are quite friendly and tensions and disagreements do occur about the case but they don't go down to the personal level, so it doesn't really ... you can argue about something with the other side and be quite short, I suppose, but then it's dropped because if there's going to be an issue, then the judge is going to decide it and there's no point in pursuing it and it certainly doesn't go down to a personal level. The next minute you can be matey again. It's necessary to take the tension away, I think, to get on quite well with everybody. I've never felt that it went any deeper than the case, you know what I mean. (Solicitor 19)

Those solicitors who were on the Children Panel (68% of solicitors interviewed for this study, 74% in the Care Profiling Study) frequently represented different parties in the process and so met in other roles. Carole's solicitor responded, when queried about her friendly relationship with the guardian, who did not support Carole, "Of course we keep friends – she's often my client."

Generally the group of lawyers taking care cases was seen to be closed with very few taking up this work. Outsiders coming into a case were perceived as potentially likely to cause difficulties in negotiations because of their lack of understanding of how the group operates:

It does happen – a number of issues. It doesn't happen often – it usually happens where parents are involved in the criminal justice system and so they use their criminal solicitors. Just in general terms what I notice about that is (1) it's a totally different start in the way solicitors talk to you – it's acrimonious from the word go – probably because we don't know each other. I think that's the thing about [location X] because the solicitors know each other and they respect each other. You can have a discussion. (LA Solicitor 1)

On occasion this occurred where a barrister whose practice focused on private family law was briefed to appear, usually at the last minute.

The picture was the same in all four areas, of a group with a very conscious sense of belonging to a 'community of practice' - as described by Mather et al (2001): "*networks of interdependent layers establish shared expectations for conduct through repeated interaction in common activity.*" Mather et al describe how such groups of practitioners interacting and comparing themselves come to exert 'collegial control' over each other, whereby common assumptions at the foundation of their practice are taken for granted

in a shared language and understanding of the rules and roles. They suggest that formal guidance and rules may be interpreted or modified by such shared understandings.

Shared ethos

There exist a number of shared perceptions and understandings among those operating in this field, which appear more important in shaping the handling of care proceedings than the imposition of a formal structure. This underlying ethos informs the way cases are handled and appears to outweigh any perceived requirement to adhere to what may seem to be arbitrary timetables.

First, a key belief is the perception of care proceedings as being of an extreme and extraordinarily serious nature. The word 'draconian' occurs frequently in the judgements of reported cases – for example:

Care orders are Draconian orders to which resort is only made when no alternative family arrangements for a child can properly be put in place. (Re G (A Minor) (Care Proceedings) – [1994] 2 FLR 69, Wall J)

The sentiment was expressed time and time again by respondents in this study, by representatives of all the parties, including local authority lawyers and magistrates' legal advisors and the judiciary:

It's a very serious and important area of law which I think has been misunderstood to date – just what we do. I mean there is nothing more draconian than the loss of a child from a family for life. It's as serious as it gets. (Barrister 5)

We're talking about the most draconian decision that a court can now make, once they got rid of the death penalty, of removing a child from a family. It's not an area – no area of law is for messing around in – but it is the most draconian. It's easy to sentence someone to life if the jury's found them guilty of something that enables you to do that. In some ways that decision is not difficult - it's prescribed by the law. (Solicitor 22)

From my point of view – acting for the LA – I find it extremely uncomfortable to be – when there isn't a proper fight. It's a draconian step to take away someone's child – I want to be challenged. I want everything we do to be challenged and for us to have to justify absolutely everything and only then if it still stands up in the eyes of an intelligent judge who's really taken the trouble to read it and think about it that they then make that decision. (LA Solicitor 3)

Secondly, the corollary of this is the absolute right of parents to contest their case in a fair trial. This is of course enshrined in law and as a human right (ECHR Art. 6). There is an almost deferential attitude to this right expressed to explain support and respect for even the most hopeless of cases. Kevin's case was held up for months because of his offer to care for his child – even though this was, objectively, completely unrealistic. Fairness to Kevin was, of

course, at the expense of his daughter whose permanent placement was delayed until the final hearing, which he did not attend.

Without sounding too holier than thou, it's really important that people get a fair crack of the whip and even if it's a complete no-hope they have the right to understand the process and put their views across because the sanctions are obviously as harsh as it gets. (Solicitor 12)

There's no worse thing you can do, as one Court of Appeal judge said, to a parent than take their child away from them forever. They're very, very grave and important decisions and if people want to contest them, then that is their absolute right. They have non merits, non means tested legal aid, as they should do in my view. (Judge 2)

This tenet was frequently linked to the perception of the therapeutic value of fighting a case – that parents might be helped by the feeling that they had been heard, and also for children to know later on in their lives that their parents had fought for them:

I always feel better if the parents come to court and fight it no matter what. Because I feel then the child can be told 'your parents came to court and they did their best – but at the time the judge decided that all the things weren't in place' – as opposed to – I can't imagine what it would be like and you thought your mother or father just didn't bother to turn up. (Solicitor 39)

Well – should they stop them? I don't think they should. Because, you know, they're going to feel better about it aren't they – that it wasn't them abandoning them. Especially if the child is going for adoption, there is a pay-off for them, in being able to say 'I didn't give you away – I fought for you – I went all the way', and all the rest of it. (Solicitor 40)

This contrasted with a more positive view of parents' potential contribution. Where they were unable to care for their child themselves, some lawyers hoped that they would be able to encourage their parent clients to play a role in supporting a placement, for example by meeting prospective adopters.

Thirdly, the view that it is best for children to be brought up by their own parents was wholeheartedly endorsed among practitioners generally, and particularly by guardians. One guardian considered of a case which had taken nearly 3 years that it was worth the delay “*for the prize of the child returning to Mum*” on which basis she supported a further postponement of a final hearing. Another guardian observed that she didn't feel that 40 weeks, or even up to a year was too long “*to give a child the chance to live with their parents.*”

The argument in support of parents' rights to keep their children could readily be turned into support for children's rights:

If you were being totally focused on the needs of the child, you would try and get cases dealt with, almost universally, well within the 40 weeks in order that

children can be moved on and start the next phase of their lives. But that's not fair to the parents. And if the parents are capable of turning their lives round and having their kids back, then arguably it's not fair to the kids either because the kids should ideally be with their birth parents and not with substitute parents. Removing a child from her birth parents doesn't inevitably mean that that child's future is going to be better than her past. (Judge 3)

There was general scepticism regarding the quality of a life in care. However, views that more neglected children could return to, or remain at, home seem optimistic in the light of recent research evidence (Farmer and Lutman, 2010) which found that 60% of care plans involving a return to parents with a supervision order and 87% with a care order broke down in cases where care proceedings had been brought because of concerns about neglect. The researchers expressed great concern about the willingness of courts, guardians and social workers to accept the potential for successful return in the face of long histories of neglect. Similarly, Ward et al (2006) have highlighted the impact that delayed decision-making has in terms of instability for children through preventing placements when children are most able to benefit from them, or at all.

Finally, the value of kinship placements is wholeheartedly embraced by all involved in care proceedings. Professionals share a common belief, founded on research evidence and concern for human rights, that it is in the best interests of children who cannot remain with their families to be placed with a member of their extended family. Several parents' solicitors described placement of the child with family members as a successful outcome – for example:

I think it was the right outcome – my client couldn't manage the care of the child – she loves him dearly – there is no question about that – but she doesn't have the capacity to meet his day to day needs In terms of the outcome – in the circumstances it was the best outcome because the child remained within the family and the hope was that relationships with the paternal family would get back to where it was at commencement of the proceedings, which was really good and extremely supportive, to allow Mum to be able to go and visit whenever she wanted. (Solicitor 13)

The strength of this belief was graphically demonstrated at the conclusion of Sean's case, where the majority of practitioners involved were so clearly dismayed by the parents' wish for their older son to be removed from a kinship placement to stranger adoption.

The belief in the superiority of kinship placements challenges earlier views that the roots of poor parenting go deep into families, and assumptions that relatives would not provide good enough care. Research evidence indicates that kin placements compare with other foster placements in terms of providing stability and meeting children's needs. Kin placements are more likely to last as long as they are required and with grandparent placements having lower levels of breakdown (Hunt et al 2007; Farmer and Moyers 2008). However, enduring kin care is not always positive; some children remained

longer in poor quality placement with relatives. Also, relationships between relative carers and parents were more likely to be problematic than those with unrelated foster carers. Negative outcomes relate to lack of support for relative carers and the more limited commitment of some relatives who feel obligated to offer care for children (Hunt et al 2007; Farmer and Moyers 2008).

The right to respect for private and family life (ECHR art 8) can be interpreted as imposing a duty to place children with their wider family where a family member is able and willing to provide care. This is now reflected in the Children and Young Persons Act 2008 which (when implemented) will amend the Children Act 1989, s. 22C(7)(a), to require local authorities to give preference to placing children with relatives or friends who are also local authority foster carers, over other unrelated carers.

This view of course fits with policy and practice developments in response to the difficulties in finding enough foster placements, particularly since the increase in proceedings since the end of 2008 (ADCS 2010). Parents' lawyers saw placement within the family as advantageous, especially where children were young and might otherwise be adopted because their client would be more likely to be able to maintain a relationship through contact. The emergence of a relative, even at a late stage of the proceedings could be seen as a lifeboat. This study demonstrated the willingness of the courts to support kinship placements which, on the face of it, appeared potentially problematic. While in Trevor's case, his daughter had been living with his sister for 18 months by the end of the case when an order was made for her to remain there, in Josie's case, placement with her brother, who had no children of his own and had hardly met baby Danielle, seemed far less secure.

The result of these deeply ingrained tenets is an ethos which values getting cases *right* above getting them *quick*. The prospect of removing children from their parents' care is something which naturally weighs extremely heavily on all involved in these cases. The focus on the parents and their potential to change, which is commonly accepted as the appropriate way to proceed, is based on a *rule of optimism* (Dingwall et al 1986) and the place of state intervention in a liberal democracy. This is an approach requiring substantial expert evidence (Phillimore 2010). The approach is taken even where there may be little objective likelihood of success and these principle based mantras may appear to override the facts presented in individual cases. Moreover, this approach is in sharp contrast to research pointing to the negative impact on the child of the uncertainty of delaying the decision. (Ward et al 2006; Farmer and Lutman 2010).

In court negotiation

Meetings between the legal representatives of all parties are the dominant feature of care proceedings. The process of care proceedings can be described as one of 'litigotiation' (Galanter 1984). The PLO requires the parties and their representatives to co-operate 'whenever reasonably

practicable' with the aim of 'securing the welfare of the child as the paramount consideration' (para 19.1). The court is expected to ask the parties at each hearing what steps they have taken to achieve co-operation and how far they have succeeded (para 19.2(1)). Hearings listed as CMCs or IRHs frequently fail to take place as such, instead taking the form of review or directions hearings. Rather than adjourning the substantive hearing administratively, legal representatives almost invariably use the opportunity presented for negotiation with all representatives and parties present in court. These pre-hearing negotiations tend to take on similar form whatever the designation of the hearing itself, and whether or not an advocates meeting has taken place.

The modus operandi immediately prior to court hearings – whether at the key PLO stages or at interim reviews – was very similar across areas A, B and C, which we consider below; area D was considered in the previous section, 2.3. Typically, in the first three areas these hearings were preceded by a flurry of activity outside the courtroom while the legal representatives digested and took instructions from their respective clients on documents crucial to the case, frequently just handed in and not previously seen, and exchanged information on their respective clients' current positions. The group then settled down to negotiate procedural and substantive issues.

The courts in areas A, B and C operate different policies as to how individual hearings are timed to go into court – either on an individual or sessional basis. Either way, it was rare for a case to go into the courtroom at the time listed. Either the legal representatives were not ready, or the court was occupied on another case. Time spent in pre-hearing negotiations averaged about 2 ½ hours – significantly longer than the length of the hearings themselves – which averaged less than half an hour. Not surprisingly, the perspectives of the legal representatives on the one hand, and judges/legal advisors on the other, were in sharp contrast. Although negotiations aimed at resolving or avoiding disputes saved the court time, they could also disrupt the court schedule. Magistrates' legal advisors expressed frustration about the length of time they and magistrates were kept waiting by lawyers negotiating '*in court time*', particularly if agreement was not reached and a hearing was required as in Carole's case:

They've got no time management themselves on the other side of the door. So, if you allow them to have a discussion, you really have to limit that because you know that they just won't achieve what they want to achieve – it will just be wasted time. But that only comes with experience and if you're a lawyer that's moving about a number of courts, you very soon pick up who these people are and your colleagues tell you, but it's not always easy to manage that sort of a person in the court proceedings. (Legal Advisors' Focus Group)

The perspective of the legal representatives was rather different. At an earlier occasion in the same case, the court had entirely failed to provide adequate time or magistrates for a contested ICO, requiring the whole case to reconvene ten days later.

Legal representatives were frequently kept waiting for a courtroom to be ready for their hearing – in the case of Bernie’s contested hearing, the case was kept waiting for 5 hours. A substantial number of hearings were observed where the pre-hearing wait was for more than 3 hours. Delays of this length and more appeared invariably due to the unavailability of the court, rather than because the parties were not yet ready.

The views of Judges have already been discussed in the section on case management above.

Despite the fact that these lengthy pre-hearing discussions almost invariably took place, there was generally very little physical provision for them on court premises. Typically the first arrival in court would commandeer a consulting room for themselves and their client(s). Sometimes this would become a ‘base camp’ for the group as a whole while in negotiation, depending on the extent to which the legal representatives required privacy to consult with the client(s). However, there was frequently no private space available, leaving the group of legal representatives to conduct their discussions standing together in a huddle while being jostled in a crowded waiting area, stairwell or court café, potentially within earshot of people involved in other cases.

These occasions followed no set pattern and the extent to which the group remained together or separate depended on the need for consultation with clients during negotiations. The discussion group usually, but not invariably, included the guardian and social worker (together with Team Manager). Parents were virtually never included in the group; parents’ lawyers discussed issues with them separately, moving between meetings with their client and with the rest of the case. One solicitor explained why negotiation with the other parties was easier in the absence of the parent client who might undermine the position which was being proposed for them:

I’m also aware that if I’ve got my difficult client in the room, I’m a lot more on edge until I’ve trained them that they’re not going to say something that I’m going to have to make a recovery for them. I’d rather they were out of the way. I think on the whole I do a better job for them that way. (Solicitor 27)

(For further discussion on parents’ perspective, see Chapter 3).

Where all the lawyers were together with the social work team and the children’s guardian, several discussions might take place simultaneously with those not concerned about a particular issue talking amongst themselves, preparing to progress other aspects of the case, or even other cases. Negotiations continued in the absence of lawyers or guardians who were in discussion with their respective clients or engaged in other hearings and it generally appeared to be accepted that everyone would have the opportunity to give their view, even if it meant reconsidering something which had been agreed earlier. This reflected the generally high levels of trust and co-operation amongst the lawyers doing this work. There were also separate discussions between the social work professionals; with guardians and social workers talking about the services children, parents or carers required.

Problems could arise where lawyers representing parents or the local authority were barristers or solicitors standing in for someone else and not fully *au fait* with the case. Legal representatives new to the case might not have information others saw as essential for an agreement and also sometimes left instructing solicitors unclear about what had been agreed or why. Local authority solicitors expressed annoyance at agreements made by their counsel regarding the dates for filing care plans or evidence, which had not been discussed with them or social work managers. One solicitor described the problems arising from such lack of continuity:

It highlights in a way the difference between a solicitor and a barrister because they don't have the flavour of the case. They often come up with some new idea how to resolve the case or some new demand – we discussed this at the last hearing and the hearing before. Unfortunately those sorts of discussions are never recorded and couldn't be because you'd spend all your life recording them but that lack of continuity makes for a very serious problem. Very recently I had a case where the fact that barristers were involved has just created a terrible problem in the case. One aspect is that everybody agreed a particular expert which had been suggested by a solicitor and everybody else – there were 2 solicitors and 3 barristers in the case – the 3 barristers – 2 of them agreed to this expert and then a week later reneged on this. By then the expert had been instructed but they wouldn't agree to the letter of instructions because they had thought up a different expert. And then we had two more court hearings as a result of this. (Solicitor 2)

Negotiation was usually led by the local authority advocate (in accordance with PLO 5.9), although this role was sometimes taken by the solicitor for the child. Generally a constructive and collaborative spirit prevailed, with discussions taking a brainstorming, problem solving form. As described, these discussions were usually between people who know each other well – and of course even if they had not known each other at the start of the case, they would do so after half a dozen such meetings. In this very fluid scenario discussions tended not to be very focused, but there was a clear sense of a shared understanding as to the general direction of the case.

Many hearings were characterised by the input of new information – in the form of late served documentation or concerning events extraneous to the court proceedings. This dynamic nature made it difficult or impossible for the legal representatives to arrive in court with fully fledged positions. Discussions therefore tended to take the form of genuine debate rather than as prepared set piece arguments. The preliminary stage of these occasions involved legal representatives reading documents just presented to them, going through them with their clients and taking instructions, before convening as a group to negotiate. Discussions concerning the situation of the children and/or parents did not involve only social workers and guardians, but revealed the way in which legal practitioners who have worked in this field for a long time acquire 'welfare knowledge' and are involved or actually initiate discussion on this level. For example, Bernie's solicitor made suggestions about making contact for Ben '*child friendly*', which could as easily have been made by a social worker or children's guardian.

There was little explicit talk of law between lawyers in these meetings but this was clearly 'bargaining in the shadow of the law' (Mnookin and Kornhauser, 1979). Any issue not agreed or abandoned would need to be decided by the court. Lawyers were fully aware that lack of court time meant that a dispute which required a substantive hearing with oral evidence meant a further hearing and thus delay unless the court could find time immediately. Some matters could be determined on submissions but there might be insufficient time even for these. In the family proceedings court, where directions appointments were routinely handled by legal advisors, there might not be magistrates available to hear the case. Lack of court time after protracted negotiations resulted in disputes about ICOs in Carole's and Colleen's cases being adjourned with further discussions and another hearing a week or so later. Carole's solicitor was not satisfied that the local authority would be able to convince the court that the test for an ICO was met. The allegations about Carole's care of Ben related to neglect and truancy, which Carole disputed. The High Court had recently appeared to increase the bar for removing children under ICOs (*Re L*, 2007). In Colleen's case, the local authority claimed that the law precluded them agreeing to place the eldest child with his grandmother although his foster placement was clearly failing and they could identify no other carer. A senior manager vetoed a placement with grandmother under an ICO, asserting that this would breach the regulations, which required even relative carers to be assessed except for emergency placements; the children's guardian insisted an ICO was required and would not agree the local authority's suggestion of an interim residence order. An ICO was made by agreement at the next hearing; Colleen's son was placed with his grandmother who also accepted terms set out in a local authority written agreement.

Although there were occasional technical discussions about the law much negotiation focused on the search for common ground and a solution which all the parties could accept (Fisher and Ury 1981).

And I think when you're talking emotional and emotive stuff like this, I think it's right and proper that there is rather less law and rather more – it's negotiation, it's how to get to yes, how to get to the best result, and that isn't always by looking at the law books and looking up what you can do. (Solicitor 34)

For parents' lawyers this meant finding something which took account of the local authority's concerns and that they could persuade their client to accept:

The thing about care work is that it is quite important to be conciliatory, and to meet the LA half way. It's no good going out with guns blazing because they wouldn't have brought the proceedings unless there was something the matter. (Barrister 4)

For the local authority lawyer it meant finding something within existing instructions or accepted practice, which involved only resources already agreed. The child's solicitor might facilitate agreement either by proposing a

compromise or encouraging the children's guardian to focus the discussion around the children's needs:

I think it's my job to look at everybody's point of view because I think you have to see what the Local Authority's position is and you have to look at the parents, and I see myself most of the time as trying to broker some kind of deal (as the child's solicitor). I think the times I've had the Local Authority in one ear and the parents' solicitor in one ear and you have to say to the guardian, 'How can we make this better for the children?' (Solicitor 15)

The absence of a children's guardian at the start of the case, which was a major problem during the fieldwork period, limited the scope for negotiation at the start of the case. Whilst children's solicitors were able to take a view on legal and procedural issues they could not claim expertise in child welfare, nor did they have instructions about assessments or the arrangements for interim care and so were constrained from contributing.

All sides expected some flexibility from the others; fixed positions from the social work team were resented and occasionally openly criticized by the other lawyers or the children's guardian. Legal advisors believed that it was '*rare to have a situation where there is no room for compromise*' (FG LAD). Experienced counsel were aware of a '*raft of suggestions ...to move a case forward*'. (B2) Panel members with experience in acting both for children and parents who '*saw both sides*' and '*were prepared to start negotiations about middle ground*' (FG LAD) could help to resolve conflicts between the local authority, children's guardian and the parents.

There appeared to be few issues in a case which could not be resolved between the lawyers by negotiation in Areas A, B and C. Three issues commonly negotiated related to expert assessments, contact and the threshold statement. The need for expert reports, the names of experts to be appointed and the division of costs of assessments between the parties and the local authority were discussed not only before the CMC but later if further questions arose where expertise might assist. Contact negotiations occurred repeatedly relating to arrangements during the proceedings and in the final care plan. Although the threshold might be discussed at any stage in the proceedings, the most focussed discussions generally came towards the end of the proceedings, by which time it was likely to be clear what the final order would be. The exact wording of the threshold statement was negotiated with the aim of reaching a complete agreement, obviating the need for any oral evidence on past events at the final hearing. In Area D, there was very little negotiation between lawyers before hearings, (see section 2.3, above).

The way parents lawyers handled these issues through negotiation is discussed later (Chapter 5.4).

Advocates' Meetings

As described earlier the practice of pre-hearing discussions between legal representatives was formalised by the Protocol (President and Lord

Chancellor 2003) and modified (to require a longer gap between meetings and hearings) by the PLO, with a view to avoiding the need for the typical last minute flurry of activity just described. However, while Advocates' Meetings took place before CMCs and IRHs, these appeared to make little difference to the need for discussion immediately before hearings. They appeared rather to result in the identification of further enquiries to be made by the legal representatives to ensure all documentation would be available on the day. The results of these enquiries then formed part of the pre-hearing negotiations.

A majority of practitioners found advocates' meetings useful, some suggesting that this is what they used to do anyway.

We always used to have them so I don't see that that's any different. If there was an alteration in the circumstances and we needed to meet, we'd meet. I think now you feel obliged to make sure you get paid for it, you ask the court to order it – whether that's appropriate or not, I don't know, but I think that's happening a bit more. (Solicitor 36)

A majority found these meetings useful in principle but felt that they would be more useful if the professional clients could also attend. One area routinely included social workers and the guardian. While the problem of including professional clients but not the parents was understood as a matter of fairness, it was not thought generally that parents were disadvantaged in practice:

I just think it's invaluable to have the guardian here to hear what they say and quite often the social worker - at the Advocates' Meeting is where you're being updated about what has been happening on the ground with the children and the families, whereas otherwise what you're getting is you're getting the lawyer coming along and saying, well, the social worker's told me this has happened, and you're saying, well, what about this? And they're having to say, I don't really know, I'll have to check with the social worker, I'll have to come back to you on that. (Solicitor 6)

So I don't like meetings where the clients aren't there. I don't approve of them. I think they should be there. And I think that's why – even though it's crowded and all the rest of it – it's better in court because then at least you can nip out every 5 minutes and say, do you agree with this? Or, what shall we do? Or, let's go through ... I also think it sort of makes their representatives focus a bit better on their own clients' needs rather than on their own thoughts because it's a grounding each time, they have to make sure the client agrees with that. (Solicitor 2)

Many respondents would have preferred to have advocates' meetings immediately before the hearing – rather than the stipulated 2 days before:

I wouldn't have an objection to a standard Direction to say the advocates should assemble at 9 o'clock and shall do what they can to agree or whatever – that seems to me very sensible. I think we spend far too much time drifting

in at 10 to 10 and then the court may or may not be ready at 10 o'clock, and then we go in. I think all that can be done much better. But I personally don't see any value at all in the Advocates' Meeting 2 or 3 days before the hearing without their clients. (Solicitor 33)

2.5 Conclusions on the nature of this process

In terms of how the process operates, neither the Judicial Protocol nor the PLO appear to have made any significant impact on the underlying culture of care proceedings. Little has changed since Hunt's vivid descriptions of the process in *A Moving Target* (1998), which could all too easily be describing the current position. Indeed, cases are now taking even longer, despite the incorporation of a number of Hunt's recommendations. As cases have expanded – more experts, more assessments – perceptions as to how 'big' cases should be have increased. Legal representatives on all sides feel that more and more is required for the job to be done properly. Furthermore, attempts to control cases in accordance with the PLO have been overturned by the Court of Appeal in a number of cases, for example: *Re M* [2009] EWCA Civ 315; *Re L (A Child)* [2009] EWCA Civ 1008 *Re F (A Child)* [2010] EWCA Civ 375.

Court case management, supposedly a joint enterprise between the parties and the court, has effectively been devolved to the group of legal representatives. It is simply too difficult for court to keep grip of such unwieldy cases. Judicial case loads and work patterns mean that judges lack the time to manage cases, and the route to judicial office does not automatically equip judges with the administrative and managerial skills which would be required. Nor are courts staffed with administrators who can keep cases under review and ensure that the judge keeps the case on track and the parties comply. The process whereby all involved work together to decide what needs to be done is effectively project management by committee and largely by consensus. However, without the court as manager, while certainly principled and not overly partisan, 'case management' by the respective legal representatives is actually about each advancing their respective clients' cases and respecting each other's rights and duties to do the same. Their directions are likely to give scope for parties to have whatever they want – within reason. Since judges share the same ethic, the representatives are largely knocking at an open door. The result is that there is little independent overview of the way cases are being handled and where they are going (except in area D). It could be said that the progress of cases and often their outcome are effectively decided by the legal representatives rather than the court.

There is increasingly heavy emphasis on experts' views in terms of parenting capacity and children's needs. These views have replaced both social work and legal judgments on welfare issues. Lawyers rely on experts for the content and direction of their advice, and therefore seek assessments to provide them with a foundation for their representation. Where experts' opinions are adverse to the parent, representation can involve strong

encouragement to settle. Judges rely on expert evidence in coming to their decisions. In this way judges share the burden of these difficult decisions with knowledgeable, independent professionals. Cases come to decide themselves through the accumulation of expert evidence.

The settlement of cases by agreement is promoted throughout the PLO. As we have described (and discuss in more detail in Chapter 5), legal representatives negotiate with each other, and with their clients, throughout the process. There are undoubted pressures to settle, referred to by most lawyers, for example:

In the end the judge can decide it if there's not going to be any agreement, but there is a lot of pressure, I suppose, from the system to try to resolve the issues. There tends to be a lot of pressure at the ICO stage to agree to an ICO for example and that the parents fully take on board what that means sometimes – there is pressure to do that, there's pressure to agree that the threshold criteria are met at least to that standard. (Solicitor 19)

Another form of pressure is the desire to spare parents who have no chance of success the traumatic experience of a contested court hearing. Carly's case was contested right up until immediately before the case went into court for the Final Hearing. Her barrister, convinced that she had no chance of success and felt that, with her learning difficulties, she should not be exposed to the trauma of giving evidence and very carefully put the position to Carly in such a way that she accepted the inevitable, on the basis of 'not agreeing but not opposing'.

However, the settlement culture is tempered with the ethos that parents must be allowed the 'right to fight' because of the seriousness of the issues at stake. Unlike the approach in private law proceedings – over children or money – where District Judges will routinely refuse to adjudicate, demanding that the parties come to an agreement (Davis and Pearce, 1999), in care proceedings the court appears always willing to adjudicate, if that is what the parents wish. Negotiations in Carole's case failed both at an early stage, where she was *advised* to contest, and at its conclusion where despite strong advice that she was unlikely to succeed, she *chose* to contest. On neither occasion was there any pressure from the court to avoid a contested hearing. In such cases this demonstrates to the parents that the judge has considered the evidence in a way that providing a bundle of witness statements never can, and allows witnesses' accounts to be challenged. In the majority of cases where conflict is about parenting capacity or the care plan, the adversarial process does not ensure that the decision-maker gets a clear picture which allows him or her to give appropriate weight to the various competing elements in the child's welfare. Moreover, where the issues in dispute are not the form of placement (adoption or foster care) or the legal arrangement for relative carers (special guardianship, residence or care order) but contact arrangements, the notion that these can be fixed at the final hearing conflicts with the need to adjust arrangements as children's circumstances change and the obligation of local authorities to keep matters under review.

It was not the purpose of this study to critique the process of care proceedings per se. However, this understanding of what the care proceedings process is and how it operates derived from this research differs from what was expected or intended by those who designed it. A disjunction between the form and intention of the PLO and actual practice is clearly apparent. The philosophy of case management and court control of the size and duration of cases appears not only difficult or impossible to achieve in practical terms, given the pressure on judge time, but also clashes with the deeply imbued culture and ethos, currently supported by the approach of the Court of Appeal, as to how care proceedings should be handled.

Chapter 3: The Parents' Place in the Legal Process

Profile of the parents

The profile of parents with children in care proceedings is well established (for example see Cleaver et al., 1999; Harwin et al 2003; Brophy, 2006; Masson et al, 2008). Parents experienced multiple difficulties, including mental illness, substance abuse (drugs and alcohol), learning difficulties, domestic violence and chaotic lifestyles. Lack of co-operation with agencies features in a significant proportion of cases – 72% in the *Care Profiling Study*, and is a major additional reason for local authorities to resort to care proceedings. However, despite lack of co-operation at that level, parents appear overwhelmingly to engage in the legal process (see Brophy 2006,58; Masson et al 2008). Parents (with parental responsibility) whose children are subject to care proceedings are automatically parties, qualify automatically for legal aid for legal representation and are almost always represented. The *Care Profiling Study* found 94.5% of all mothers and 89.4% of fathers who were parties were represented at some point in the proceedings.

Data from the *Care Profiling Study* shows that in the majority of cases (81%) children had been in the care of their mothers (either alone or together with the father or a partner) before the proceedings. Mothers therefore took a more prominent role in the proceedings, which usually focused on their capacity to care for the children. Fathers tended to play a more supportive or peripheral role. While 62% of mothers were represented from the first hearing, only 36% of fathers were represented at that stage, with another 48% joining the proceedings later. This was reflected in the case studies in this project. The initial position of 14 of the 16 mothers was to keep or regain care of their children. Of the 14 cases in which fathers were parties (albeit for brief periods in 3 cases) 6 were seeking to care for their children (4 of these together with the mother with whom they were in a stable relationship). The main focus for 6 fathers was contact.

Despite the views of professionals on parents' general reliability in keeping appointments, the parents in this study overwhelmingly attended court hearings. In nine of the case studies, parents attended every hearing and in two more, parents missed only one hearing. Three of the parents missed several hearings, indicative of a state of semi-detachment from the proceedings. Only one parent, Evie, disengaged from the proceedings altogether. A DNA test excluded Robert who was found not to be the father of his partner's baby.

The position of parents in care proceedings is both peripheral and central. While the focus of the case can be seen as an inquiry into the child's future care needs, the proceedings can appear, from the parents' point of view, to be closer to a trial of their parenting practice. On the one hand, the proceedings take the form of a series of meetings between professional practitioners (lawyers, social workers and the children's guardian) from which the parents are excluded, on the other hand the parents are usually the only direct

participants in the case with a personal stake in the outcome. While parents may feel sidelined in this process, their performance (outside court) is likely to be the determinative factor in the case.

As explained earlier, this study of legal representation did not set out to explore the perspective of parents as they progressed through the proceedings. A review of the research relating to parents' perspectives on the family justice system was undertaken by Joan Hunt for the Family Justice Council (Hunt 2010). This section is informed by parents' input to discussions with their legal representatives and from brief informal conversations they initiated with researchers from time to time. Whilst we shared the experience more of the legal representatives than of the parents during the pre-hearing discussions, when it came to the courtroom, we felt our experience was more akin to that of the parents as noted in Hunt's review.

Directions hearings

These hearings are essentially concerned with legal technicalities involving the progress of the case. The setting up of assessments, the appointment of experts, disclosure of documents, etc., as well as the setting up of the next hearing, are all matters technically requiring court orders. During the hearings themselves, there may be very little discussion of the substance of the case. While all this might well appear abstruse to any parent, it is a requirement that they attend court for these hearings (Rule 4.16(1) of the Family Proceedings Rules 1991) unless the court directs otherwise and, in general, parents did attend. There are however a number of other reasons why they should attend.

Transparency and parents' rights clearly demand that parents should attend all hearings. However esoteric the courtroom discussion might be, this should not take place behind parents' backs. Secondly, parents' attendance in court is seen as a way of their demonstrating commitment to the case and to their children, not least to the other parties. On the few occasions when parents failed to attend, social workers and guardians appeared to view this adversely as a demonstration of their fecklessness, and scepticism of the parent's case was more overt. There was certainly an expectation on the part of the court that parents attend. While invariably willing to accede to requests made by their legal representatives that a parent's attendance be excused, for specific declared reasons, the court frowned heavily on parents who didn't turn up, or who left early without permission. For example, Dawn did herself no favours by her non-attendance on several occasions. On one occasion, exasperated by the legal technicalities, she stalked out of the courtroom in the middle of a hearing. At a later hearing when her solicitor asked the judge to excuse her presence, the judge responded that Dawn *"has burned her bridges concerning her credibility regarding court attendance it makes no difference if she attends or not. If she's not here she's not here."* As one solicitor explained:

They need to be engaged to at least have a voice that's trying to make sure there's a proper process going on in terms of what's the right decision for the

child, but also there are the issues of ongoing contact – which would be in the best interests of the child. But if they become disengaged from the court process, that doesn't mean that they've become disengaged in terms of wanting to play a role in their child's life – but that is how it will be perceived by the local authority and that's how the court will see it – 'well they're not interested in the process therefore – you know ...' So you've got to try to keep them engaged in the process (Solicitor 22)

However, the major practical reason for parents to attend court for directions hearings was not for the hearings themselves, but for the lengthy pre-hearing discussion period. In some cases, court appointments were used as the main opportunity for solicitors to meet their parent clients (discussed further in Chapter 5). It was in any case essential for parents to be present to read and respond to documents which were invariably filed on the morning of the hearing, and generally to be available to give instructions during these often extensive pre-hearing discussions. However, parents themselves did not always perceive this as productive time, but would express mild exasperation at the length of time spent waiting outside the courtroom for what might turn out to be a 10 minute hearing, much as they might complain about a long wait in a doctor's surgery for their appointment.

We did not have the opportunity to explore parents' understandings of these occasions systematically. Previous research suggests little understanding of the process generally (Brophy 2006, 55). Directions hearings might seem confusing or irrelevant to any lay person, but the capacity of many parents in this situation to understand is often compromised by mental illness, learning difficulties, etc. and by anxiety about their role as a parent. The question of how detailed explanations to parents should be is a difficult judgment for their legal representatives. Directions appointments involve many matters that may appear incomprehensible to parents, and which are objectively unimportant for them to know about. Not only are abbreviations and jargon used (IRH, Advocates' Meeting, LAC review, fact finding hearings, 'go short', etc.), but discussions between legal practitioners naturally assume knowledge and experience of the process which could not possibly be shared by a parent. All the professionals instantly understand the various implications of any proposal without spelling them out. When parents' representatives explain hearings such as this, it appears hard for them to avoid this assumption of knowledge, especially as they would neither want to patronise their clients, nor to waste time explaining matters that are not *objectively* important or relevant for parents to understand. However, for parents unable to distinguish what is and what is not important or relevant for them to know, these occasions must seem clouded in confusion and anxiety.

Waiting for the hearing

The demeanour of parents waiting in court – often for considerable periods of time – ranged from calm resignation to uncontrolled outbursts of anger. Whilst it cannot be imagined that any parent could take these occasions in their stride however many times they have been in court for previous hearings, many appeared surprisingly accepting and compliant. However,

others more obviously found the situation difficult to cope with. Dawn's solicitor told us of an occasion when, having waited around on the court premises for about 4 hours during which time the guardian actually went to visit the child for the first time, her patience snapped and she left court before the hearing – reinforcing the judge's already unfortunately negative impression of her commitment. Barbara, a volatile and loud-spoken character at the best of times, found a similarly long wait for a courtroom to become available unbearably stressful and paced around the waiting area declaiming her frustration loudly to all present.

As noted in the previous section, parents might find themselves, during the typical 2-3 hours before going into court, either in the court waiting area, or in a small consulting room. Neither situation was very satisfactory. If parents were left waiting in a room on their own, although they had privacy, they could feel cut off from the 'action'. Frequently in this situation they would 'escape' and return to the waiting area where they had a better view of what was going on and could not be forgotten while their legal representatives were in discussion with the rest of the case. However, waiting areas were typically noisy and distracting places. When legal representatives came to talk with them there, parents could feel that their case was being aired almost in public, as they had to receive information and advice and give responses often within earshot of strangers.

Parents in the waiting area would also have an awareness of the fact that everyone else involved in their case – not only the legal representatives but often social workers and the guardian too – were closeted together and that they alone were excluded from discussion. Bernie mentioned that she always felt very nervy on these occasions, with butterflies in her stomach and that she wondered what people were saying about her in these discussions. Most parents appeared to accept the situation. Only Lauren was seen to challenge this, angrily questioning her exclusion from a meeting at court before the CMC. Her solicitor's response made it clear that there was no question of her attendance at pre-hearing discussions:

Mother: *'Why can't we all talk in the same room? Why do you have to be in a separate room with the others? Why can't we be included?'*

Mother's solicitor: *'You don't have lay people and professionals at the same time in the same room.'*

Lauren, together with family members also present, was keen to express a number of dissatisfactions with the local authority, which while vital to them, would have been irrelevant and time consuming to deal with had the family been included in the practitioner discussions. In another hearing, a mother who had been left on her own on a landing – the only place her solicitor had found to speak privately to her – re-appeared and joined the group discussing her case. This clearly caused some discomfort among the practitioners, some of whom extricated themselves from the discussion so that it could re-form elsewhere without the mother.

Many legal representatives were aware of parents' perceptions in this situation, and of the potential for the appearance of a 'clubby' atmosphere when groups of legal representatives who know each other well and meet together on a regular basis, are ensconced in a room:

I am always aware that these meetings are going on without your clients present and they're sitting out there and they're hearing a lot of laughter going on, and if I'm for a parent in those cases, I will be in and out of the room quite regularly to make sure they are feeling engaged and I am reporting back to them about what's going on. I think the others do that as well. So I am always aware of that. (Solicitor 27)

There is a mutual obligation on all of us who do this work, to be a bit careful about boundaries really. It's a way of keeping our sanity - to tell outrageous jokes about each other's clients. It does go on. Of course, it goes on but we need to keep it within bounds. Because if you hear the laughter outside the room, what must that be like? What must that be like when you're losing your child that day? (Solicitor 33)

An issue which concerned several lawyers, at least theoretically, was that of trying to avoid any appearance of being too friendly to 'opposing' parties. As one solicitor explained:

Yes, there's a bit of a care clique, I accept that. In terms of professionalism I don't think it causes any problems whatsoever but where I do think that we all need to be careful is that we use it as an opportunity standing outside the courtroom door to catch up on other cases, to deal with this, to deal with that, that might need chatting through, and I think you've got to be really careful when you're acting for parents in terms of perception because if they see you talking, particularly to the local authority solicitor, even if it's on something completely different, then they can have concern as to your neutrality. And I think that's something that we all have to keep our eye on, that we can sometimes perhaps appear a bit too matey, a bit too friendly, and you've got to keep that professionalism up when you're in the eye certainly of the client who – it doesn't matter how professional everybody is about things and, of course, we're all experienced to do that but it's really important that clients maintain a confidence in you. (Solicitor 31)

Parents attending court on their own appeared isolated and forlorn. However, many parents attended court accompanied by someone they knew. Couples attended together, though usually separately represented, and so were able to share the experience of the court. Many others came to court accompanied by family members, partners or friends. Family members were typically their own parents, but occasionally their older children. They would invariably wish that person to be present and actively to participate in consultations with their legal representatives. The presence of a trusted supporter was sometimes used for support or for clarification by legal representatives and was generally regarded as a positive feature. Presumably to some extent it absolved the legal representative from sole responsibility for emotional support. However, it could have its pitfalls, as described by one solicitor:

I felt she wanted to give in, and I was talking to her about 'well, if you choose not to fight it, then I think what we should do is, we should put together a statement, and I will draft it for you, in which we tell the court just how much you love your child and just how much you want the best for him' and all of this she was saying 'yes'. And the friend was saying 'I think she should fight it'. And it's really difficult because you could see that this woman would have to go through 3 days of contested evidence, it would destroy her. She wanted me to give her a way out. I was trying to give her a way out. (Solicitor 31)

Parents with learning difficulties were sometimes accompanied to court by lay advocates. Clare's advocate attended on every occasion and was perceived as being extremely helpful. Josie's advocate attended on some but not all occasions and was very keen to explore, on Josie's behalf, a number of points arising from an agreement she had signed.

Sometimes parents were in the position of sharing the waiting area with people they were at odds with – for example former partners or family members offering care. It was obvious that parents were uneasy in this situation, and it could occasionally create tense and volatile situations. Jeff's partner had children by 3 different fathers, all with histories of violence and antagonism to each other. Long periods of waiting in the same space caused tension to mount. On several occasions Jeff was loudly abusive to his partner's former partner, and also to his own solicitor.

The courtroom

There were two contrasting models in the physical layout of courts. All the county courts were in traditional formal style – reinforcing the stereotype of the criminal trial – with the judge seated on high, facing rows of benches. Advocates would take the first row, leaving the rows behind them for instructing solicitors or clerks and clients. District Judge's rooms were on the same basic model, but on a smaller, less intimidating scale. The position of parents in this type of court appeared to be fairly random and rarely considered or discussed. Sometimes parents might find themselves sitting next to their social worker, or a relative – possibly someone they felt at odds with. More often than not, parents would seat themselves in the furthest back benches behind everyone else, meekly assuming a peripheral presence. In the smaller rooms, parents would sometimes have to find a space at the side of the court, as if not really part of the action. The dialogue between the advocates and judge, often of a technical legal nature, was frequently conducted in quiet tones, almost conversationally. Since we as observers sometimes found it difficult or impossible to hear what was being said, it is highly likely that parents had the same trouble. The situation seemed almost designed to give the parent the feeling of being an observer rather than participant in their own case.

The court layout in family proceedings courts was generally far more user-friendly from a parent's perspective. Most (though not all) of these courts were set out as a square of tables, with Magistrates and Legal Advisor on one flank and advocates and parties on the other three, with all present facing in

towards each other. In this layout, clients would sit next to their legal representatives, with whom they would typically have frequent whispered communication. This inclusive style puts parents on a par with everyone else, clearly giving a full sense of participation. The fact that parents would communicate so often with their legal representative when in this court layout, must suggest that those who did not have this opportunity in the other form of court, would have liked to be able to do this.

Some parents sat in the courtroom together as a couple and others were accompanied into the courtroom by friends or family who had come with them. The exercise of discretion to allow such people to come into the courtroom varied. Generally if the parent asked, the other parties would have no objection, on which basis the court would agree. However, sometimes parents did not ask, perhaps assuming that this would not be allowed. Carole asked, but her legal representative did not consider it appropriate for her (nearly adult) daughter to come into the court room with her and so did not consult the other parties. Where parents were accompanied they would invariably whisper to each other from time to time, unnoticed by all concerned.

Court etiquette with regard to the active participation of lay parties varied in formality. Generally parents were dissuaded by their legal representatives from speaking in court – perhaps not simply because of the formalities, but for fear of what they might say! However, we were told by some Legal Advisors of the importance of parents feeling part of the process:

Engaging with the parents is hugely important because otherwise they come into the court and they just feel as though everything is going on around them. People are just talking to the advocates or social worker or whoever and they're not part of the process and it's really important that they are and they feel as though they are and they're clear as to what's happening and what the expectations are. (Legal Advisors' Focus Group)

In practice though, parents seemed more often to be ignored. The etiquette that communication should be only through legal representatives was sometimes very strictly applied. We observed one hearing where the Legal Advisor pointedly ignored a local authority social worker who was giving an explanation directly to the court, and addressed himself only to the legal representative for the local authority. Whether or not the parents were addressed directly appeared to be a matter of the style and approach of the individual judge or magistrate. Some made no acknowledgment of parents whatsoever, others appeared welcoming and sympathetic. Some judges and magistrates were punctiliously polite to parents, starting by acknowledging their presence and asking after the child. On one occasion we observed a magistrate check a prospective court date with the mother. Remarks from the bench to parents were usually of an encouraging or congratulatory nature, or perhaps advice pointing to the best interests of children, rather than engagement on a personal or substantive level.

Speaking to parents could occasionally backfire. At an early stage of Barbara's case, a district judge made a point of addressing the parents,

encouraging them to stick to the agreement which had been hammered out with some difficulty before the hearing. Barbara, who was in an agitated state, took this as a cue to bring up her concerns as to what might happen if her husband broke the agreement. The district judge, having no specific answer to this, could only respond generally that it was for the good of the children. Barbara angrily told him she knew *that*, but that she could not be liable for her husband – and angrily stalked out of the courtroom. On another occasion we observed a judge respond kindly to an agitated parent only to find himself drawn into an argument where he could not compete in rudeness.

More typical is the practice of speaking *about* parents rather than *to* them. Many judges and magistrates used this approach, sometimes to give quite detailed advice or encouragement to parents by speaking of them in the third person.

Substantive hearings

These may be contested final hearings or contests earlier in the proceedings – for example, ICOs to remove children and fact finding hearings. These hearings are, by their nature, very different from directions appointments. Here the focus is on the parent and on the substance of the case. The procedure is more as parents might expect of a court, with the traditional examination of witnesses in the witness box. On these occasions, parents appeared to take centre stage also during any pre-hearing discussions, with their legal representatives taking final instructions on points raised by the other parties, and giving final advice concerning the hearing itself. (For full discussion of legal representative/client interaction on these occasions see Chapter 5)

Agreed Final Hearings

In contrast to the above, where agreement had been reached prior to the hearing, these occasions were in many ways very similar to directions hearings. Pre-hearing deliberations between the legal representatives were similar in nature and length as legal technicalities which might seem esoteric to parents were confirmed and tied up, with the parent often taking only a rather peripheral role, uninvolved sometimes for considerable periods of time.

The hearings themselves were very brief – often a very anti-climactic 5-10 minutes. Of course, in these cases, the hearings were merely the rubber stamping of climactic decisions already made by parents at an earlier stage. The hearings observed were of a surprisingly impersonal nature – one District Judge even opened a final hearing by saying they should “*just deal with this as swiftly as we can.*” However, from observation, even where parents had already accepted a conclusion to the case, they still considered the final court hearing highly significant.

Court communication with parents at final hearings

It was not typical for judges or magistrates to address parents directly, confining themselves to impersonal commendations that the best decisions

had been made for the child. Courts were frequently more effusive in their thanks for the efforts of the legal representatives than in any words to the parents. In only five of the nine cases where parents were present at the last hearing were any positive remarks made about or to them by the judge or magistrates. Where this occurred the parent's advocate had usually included such remarks in a submission. For example, Colleen's solicitor informed the court of her '*tremendous efforts*' and the judge commended her in a brief judgment making the supervision orders; Carly's barrister's submission that said her client had '*bravely decided*' to agree to adoption was echoed by the judge who acknowledged Carly's love and commitment for Abi. In two other cases the magistrates spoke directly and positively to the parties, unprompted. Barbara and her partner were sent away with good wishes and in Kevin's case the Chairman of the bench said how pleased he was that the maternal grandmother had taken on the care of the children. Barbara took full advantage of her unusual opportunity, as a litigant-in-person, to address the court, which she did graciously but to the obvious slight consternation of the magistrates.

Bernie, Clare, Hayley and Sean left the court room without positive words from either their representative or the judge. The focus on technical issues in drawing up the order, apparent in Bernie's case, and the pressure of other cases in Clare's may partly account for this. There are other issues such as the limited relationship barristers have with clients whom they represent only at single hearings, the need to avoid mixed messages and the desire of judges and others to distance themselves from the personal in deciding care proceedings which mean that little attention is given to the meaning of the decision for the parents involved.

As groups of practitioners left the courtroom at the conclusion of a case, there would usually be some acknowledgment that the end had been reached, which often included the parents. There might be brief hugs for them – often from guardians or even social workers. We witnessed once an invitation from the mother's barrister for coffee for all at a nearby café, giving the opportunity for winding down. However, on other occasions parents simply left quietly and the legal representatives were seen immediately moving on to other matters.

Chapter 4: The Lawyers

4.1 Introduction

There is in each area a nucleus of private practice solicitors working in the field of care proceedings who, together with the barristers they routinely brief and local authority lawyers, regularly find themselves in court together. This 'community' of lawyers has been described and discussed in Chapter 2.3. Many solicitors represent children as well as parents, and barristers also represent children and local authorities. Although roles may change, the faces in the core group remain the same.

This section investigates the members of this group of lawyers, looking first at their profile – solicitors in private practice, barristers and local authority lawyers. It then explores their motivations and perceptions of the skills needed for this work. Next it looks at the workload and the increasing pressures during the timescale of this study on solicitors and barristers at an individual level, before finally considering how firms of solicitors manage the financial business of providing representation for parents in care proceedings.

4.2 Profile of participating lawyers

Solicitors

In the course of this study researchers met and spent time with a total of 46 solicitors, shadowing them at court hearings and/or at interview. Solicitors for interview were selected purposively, as described in Chapter 1.5 to ensure full representation, in broad terms, of years of qualification, type of firm, position in firm and Children Panel membership – see Table 4 in chapter 1.5. This selection of 40 solicitors and one legal executive produced a sample with varying characteristics in terms of experience, degree of specialisation, gender, full and part-time working, types of firm, position in their firm, and Children Panel membership, on a random basis.

Years of experience

One factor in the selection of the interview sample was the degree of experience – as far as could be ascertained from the Law Society website (year admitted/areas of law handled). However, while we identified large numbers of solicitors with 10 or more years' experience, it was far more difficult in all four areas to find more newly qualified solicitors handling care work. Of those qualified for 10 or more years, 60% had more than 20 years professional experience. See Table 5.

Table 5: No. of years qualified

No. of years	No. of solicitors
5 years or less	4
6 – 10 years	3
11 – 20 years	13
21 – 30 years	13
More than 30 years	7
Total	41

The fact that the population of solicitors handling care work appears to be an aging one was readily acknowledged by many of them, with some concern:

I'm 40 and I'm young - I see myself as being a young practitioner, because most of the people that do this work are late 50s, 60s It's top heavy, it's very top heavy, so I'm young and to find someone in their 30s is rare, to find someone in their 20s is impossible. (Solicitor 23)

I think the more concern is that you haven't got younger solicitors coming through so there are not many solicitors in their 20s doing the work. There's the crowd – we've grown up together really over the last 10-15 years. There are two at one firm but the other big firms haven't really got anybody. There's nobody to follow us so I don't know what will happen then. (Solicitor 24)

The absence of new members of the Law Society specialist panel has also been noted by the Association of Lawyers for Children, and by the Law Society (LSC 2006, p.37).

Degree of specialisation

There was a high level of specialisation in terms of the proportion of solicitors' workload taken up in public law. Around a third of our lawyers focused on care cases almost full time (90% +), with a further third devoting 70% or more of their time to this area. Only 5 (12%) spent 10% or less of their time doing this work. These figures were estimates by these solicitors, many of whom added that care cases took up a disproportionate amount of their time compared with private family law work. The other area of law most commonly handled by solicitors was private family law – usually focusing on children disputes.

Gender

The predominance of female lawyers in this field was very marked, from our observations. This was reflected in our interview sample (selected without reference to gender), two thirds of whom were women. This did not appear to

be problematic generally, but was the subject of comment by one or two of the male solicitors:

I think one of the problems of this work is that there is a massive gender imbalance. You've got a little bit already – that's apparent in dads and mums, but in lawyer terms – you go to court on these cases – virtually all the advocates are women, all the social workers – virtually all of them are women, and virtually all the guardians are women. I often go to cases where I'm the only man.....Massive gender imbalance , it's a huge thing and it's a big problem.....They talk to each other, like each other, go out for lunch and all that sort of stuff. I'm not interested to be honest – it just doesn't lend itself to my personality. (Solicitor 23)

The majority of parent clients overall are of course mothers, so the male solicitors did not report a preponderance of father clients. However, one or two felt that some fathers might prefer to consult a male solicitor:

At that time there was probably only one other firm in [this area] that had male Children Act practitioners on the Panel – and just sometimes fathers find it easier to talk to another bloke about these things. Nine out of ten cases, I can be the only bloke in it. (Solicitor 21)

I'm also the only man in this city on the Panel. Most of them are women so if somebody wants a man then they look down the list and probably see my name. There might be one other now. (Solicitor 25)

Of the 11 male solicitors in the sample, all but two were partners in their firms (plus one sole practitioner) – as compared to slightly less than half the female solicitors who were partners. All but two of the men were members of the Children Panel, one of whom was relatively newly qualified and actively working towards Panel membership.

Full/part-time work

The majority of solicitors interviewed worked full time, with only five (12%), all women, working part-time, in the range approximately two-thirds of full time hours. In most cases these were mothers of young children whose care made it difficult for them to change their days of work. It was therefore difficult for these solicitors always to do their own advocacy – as was the case for Carly's first solicitor. Another experienced the same difficulty:

I'd like to be able to act for guardians – I find it slightly daunting because it means – you're meant to do all your advocacy and I would find that quite a struggle because I work part time. That would be difficult for me, but I would like to have that opportunity. (Solicitor 38)

Type of firm and position

Most (83%) of the solicitors in the sample came from generalist high street firms with family law departments. This meant having colleagues with whom to discuss issues and, in some cases, to share the court work. Very few of the sample were the only public family lawyer in their firm. Ten solicitors worked

in firms specialising in family law – mainly small, single branch, 2-3 partner firms. The two sole practitioners were both highly experienced solicitors of long standing – 28 and 33 years post qualification. Both worked mainly representing the child. The importance of being able to talk through problems with colleagues was very evident, for example:

It's also nice to bounce off. When I was the only person doing care work here a long time ago, I felt very lonely and I used to ring [consultant in the firm] – she had a practice over the road then, and I'd ring and say 'What do you think about this? What would you do with this situation?' And I've had other 'lonely' practitioners ring me and asked what I think of something. I say 'ring me any time.' We do a lot of that, though I don't think there are any firms now who have people on their own. (Solicitor 18)

Table 6: Position in firm

Position in firm	No. of solicitors
Partners/Sole practitioners	23
Assistant/Associate solicitors	16
Paralegal	1
Independent locum solicitor	1
Total	41

The fact that well over half the sample were partners in their firm might reflect the perceived seriousness of this area of work – it was not work which solicitors necessarily 'grow out of' or leave to more junior colleagues as they become more senior. Some 'senior' solicitors reported that these days they tended to handle mainly the more complex cases and some tended to work more with guardians. Partnership might also be a consequence of the 'aging' of the population of solicitors handling care work, as described earlier. It should also be noted that many assistant or associate solicitors had been qualified for many years – albeit that they had not chosen to seek the responsibilities of partnership. Seven assistant or associate solicitors had over 20 years post qualification experience and another two over 10 years. Public law clearly had a high profile position within many firms.

Children Panel

The *Care profiling Study* indicated that the majority (74%) of parents are represented by members of the Children Panel. 68% of this study's interview sample were members of the Panel – all as children's representatives except for one adult representative.

The Law Society Children Panel was initiated in 1984. To be eligible for membership, a solicitor must have been in practice for a minimum of 3 years and be able to demonstrate their public law experience by submitting details of five cases they have handled involving a contest or significant issue requiring a substantive hearing. The application process involves giving in depth responses to a number of scenarios and a case study, and attendance on a three day course at a cost of up to £1000. In addition, the application for membership costs over £500 and lasts five years, after which solicitors must apply for re-accreditation, costing nearly £300 and again requiring the demonstration of regular handling of child care cases, including the advocacy. Members of the Panel give an undertaking to handle children's cases personally and not to delegate their preparation, conduct or presentation without good reason.

Membership of the Panel used to involve an uplift in fees of at least 15%. However, the uplift was abandoned for fixed fees, although where hourly rates are paid an uplift may be claimed by Panel members. There appeared to be some confusion about this (as there was about the latest position on fees):

.... try to get on the Panel for a variety of reasons – one is obviously the enhancement mark up that you get – a minimum of 15% mark up that you get by being on the Panel. That will continue – I'll have to double check that actually – if – I'll have to double check if that is factored into fixed fees.
(Solicitor 1)

Many solicitors expressed anger at changes which appeared to devalue or downgrade membership of the Panel:

I don't know what the Law Society is doing about the Panel. There is huge uncertainty about the continuation of the Panel and the Law Society are in a spat with the government about Panels, because of course you don't get the enhancements now for being a Panel member. So if you're in a hard pressed publicly funded practice, why are you going to spend a load of money getting Panel membership? You don't get any extra money for it, so why bother?
(Solicitor 40)

The most significant advantage to solicitors of being on the Panel is the right to be instructed by guardians, which gave access to a wider range of work. Local authorities also provided lists of Panel solicitors to parents when care proceedings were likely to be brought. The merits of Panel membership are discussed below.

As might be expected, Panel solicitors were almost universally convinced of the merits of membership in terms of quality of work and having an all round understanding of the issues:

I suppose I think it would be good if everybody who does this kind of work is on the Panel for representing children, because I think the focusing of making you, as part of your training, really think about what that means, is crucial for

them representing parents. And I know that there are people who I've felt uneasy about representing parents and they're not on the Panel and they're taking a very litigious, aggressive stance which just doesn't feel like the stance that we try to promote. (Solicitor 2)

This solicitor was far from alone in their perception that non-Panel solicitors, particularly 'crappy criminal lawyers' were likely to take an aggressive and acrimonious approach inappropriate to family proceedings:

Yeah. And it can be frustrating all round, it can be frustrating when you're representing the child if you've got a parent's solicitor who's a little bit inexperienced, who isn't on the Panel, or very experienced but has the wrong approach. I think you'll find generally that the Children Panel solicitors have quite a conciliatory approach to sorting these things out and to come in and want to heavy-litigate isn't always the best way forward. You've got to make sure then that the child doesn't get lost in the system if (Solicitor 31)

Many, including judges, commented that having non-specialist lawyers involved in a case could lead to delay because they lacked the knowledge of practice which Panel members had 'absorbed' and the skills they had developed:

If people aren't experienced in this work, it comes out in negotiations, it comes out in the way the client's case is being put. I think it's unearthed quite quickly because it causes real problems, it really does – this is a specialist area of work. Particularly in terms of how the case is put, how clients are spoken to and what they're advised – that's the issue. If the solicitor's starting point is just polarise and fight, rather than negotiate – our work is very much about negotiating, being aware of – judging the issue. If you're offering an agreement you can really get a lot more – being conscious of that, and that is what skilled solicitors will be doing. Deciding how long down the line to compromise and work that out. Yes it really does cause issues where solicitors aren't – not just on the Panel – but experienced. And usually the firms that we encounter are all on the Panel. It's very noticeable when they're not. (LA Solicitor 1)

Some saw lack of Panel training and experience as likely to cause disservice to clients:

I do think it's important, because I've come across too many cases where I think the parents have been sold short by having lawyers that don't really know what they're doing. Obviously you can't tar everyone with the same brush – I was acting for parents before I was on the panel because you've got to do that to get experience, but I do think the Children Panel is a quality control mechanism in terms of knowledge of the law, in terms of at least having been on the 3 day course to get the rudimentaries and the foundations of how to approach these cases properly. (Solicitor 22)

For many solicitors membership of the Panel was also about recognition for their experience and expertise:

Well I think from our point of view it's important because it is specialist and it reflects our skills really and experience of many years, so I think from my point of view there's a bit of kudos attached to it and I like being part of that kudos, I think it's important. From a client's point of view I think it's critical that they should have a solicitor on the Panel, I think it's vital. I can say quite categorically that in the cases I deal with, parents who have a solicitor representing them who is on the Panel get a far better deal than non panel lawyers, far better, the gulf is vast, it's absolutely vast. (Solicitor 23)

However, there were Panel solicitors who felt that attitudes, experience and taking this work 'regularly' were more important than actual Panel membership:

I think it depends entirely on the lawyer because there's people on the Panel that I don't particularly rate and there's people that aren't on the Panel who I do rate. I think it's whether you care or not is the criteria. Yeah, if you don't care about the people you're acting for, then it doesn't matter what Panel you're on really.... I think the more you do of a particular type of work, the more au fait you are with it and the easier it is to spot the pitfalls.... Particularly the type of people that you deal with in care cases, I don't know whether you could be trained to deal with them actually, because I just think it comes with experience, that's all. (Solicitor 16)

We were particularly interested in the perspective of solicitors who were not members of the Children Panel, speculating that they might exemplify the 'rogue' solicitors mentioned by a minority of solicitors as appearing in proceedings without much idea of what they are doing (though it should be said that this was not something observed in practice during this research). In fact, of the 13 solicitors not on the Panel, six had been qualified for 5 years or less and therefore had not yet built up the requisite experience. Despite pessimism as to the worth and future of the Panel, all but one of these solicitors expressed the definite intention of applying – one or two had already started the process. However, such inexperienced solicitors were uncommon.

Not being on the Panel did not necessarily indicate lack of experience in care work. Three of the longer qualified non-Panel solicitors were in fact very experienced child care solicitors with various reasons for not applying. One, with a 60% public law caseload for the past 8 years or so, had worked in private family law for over 20 years previously and now considered herself too close to retirement to undertake the rigorous application process. Another very experienced solicitor whose workload was entirely made up of care cases had spent several years out of the profession while her children were young. Her Panel membership had lapsed and she was now required to go through the whole application process again – which she planned to do. Content herself just to represent parents, her firm saw an advantage in her being able to take on work for guardians. There were only three longer qualified solicitors who handled very little care work (under 10% of their workload) and expressed no intention of joining the Panel. The researchers'

observations matched the rather critical observations of experienced representatives about such solicitors.

Barristers

Researchers spent time with a total of 19 barristers either in interview or shadowing (sometimes on several occasions) at court during the course of this study. Barristers were shadowed at 26 court hearings handled on their own and 11 where they were accompanied by solicitors or clerks. Eight barristers chosen to represent a range of experience were interviewed. Seven of these barristers had also been shadowed at court on at least one occasion and several had been involved to greater and lesser degrees in the case study cases, involving many meetings with the researchers. The sample of interviewees included five barristers qualified for 12 years or more (one for 38 years), with experience of working in public law ranging from 7 to 18 years. Three others were considerably more junior having been qualified from between 4-7 years with five or fewer years experience in care work. All the interviewees were female. Again, this was not by design, but reflected the overall preponderance of women in this area of work.

While none worked exclusively in public law, six barristers devoted 70% or more of their time to it and the other two, 50%. They all also handled some private family law work – both children and money – and one also handled other civil litigation. Two barristers were members of specialist family law chambers.

The impression formed, from observations, was that most of care proceedings work handled by barristers is done by those of ‘medium range’ experience. Conversations with higher ranking barristers at observations suggested that they did not typically handle ‘run of the mill’ care proceedings such as those we were focusing on. They indicated that they had ‘moved on’ – usually to more lucrative areas of privately paid family law, or to handling unusual and more complex care cases. Such barristers tended to make one-off appearances in the cases we observed, typically filling in for a colleague at the last minute because they happened to have a gap in their diaries. On occasion these barristers appeared to provide a more limited and detached service to parent clients. It may be that representing parents in routine care cases is typically something of a career stage for barristers from which they will progress, in contrast to the norm for solicitors in this area.

On the other hand, it was made clear by the three most junior barristers that care proceedings were not seen as suitable for the most newly qualified barristers. One, describing herself as ‘*really junior*’ commented:

You’re not allowed to touch public when you first start off – effectively you’re told ‘the implications are too big’. The clerks are very careful who they chose. The stakes are too high and solicitors are quite fussy about who they have – especially junior people doing public law – they don’t like it. (Barrister 6)

Local Authority Lawyers

Local authority legal teams typically comprise a mix of solicitors, barristers and legal executives. Their particular training and qualifications appeared to make no difference to the work they handled. Indeed, legal executives working for local authorities have the same rights of audience as solicitors.

The four interviewees, three of whom occupied senior positions in their teams, were two barristers, one solicitor and one legal executive. All were experienced, having between 9 and 20 years experience of care work. We were told that local authority legal teams are typically made up of large numbers of part-timers, with the perception that part time work is easier to obtain and manage when working for a local authority than in private practice.

The caseloads held by team members varied with the flow of cases, increasing substantially at times but dropping back to an average of 14 to 15, with part-timers averaging 11 cases. Typically once a lawyer had picked up a case, they were likely to maintain responsibility for it to the end, unless they became overburdened with work. Within teams, lawyers discussed their cases with colleagues so that there was continuity of knowledge; cases could be covered by a colleague during absence. One lawyer described their team as:-

a close-knit, hard-working team – yes, a good team. We discuss things between ourselves – we work in an open-plan office – we just bounce things off each other all the time – that’s very much how it works. (LA Solicitor 1)

All considered that continuity of representation important:

Continuity of representation is a major priority. All the solicitors try as much as they can to do – certainly all of their advocacy in the Family Proceedings Court and as much as we can in the County Court. (LA Solicitor 1)

Local authority lawyers in all four areas sought to do their own advocacy as far as possible. However, all had to acknowledge that the most likely casualty of this ideal were contested hearings, particularly in the county court. For these they tended to instruct barristers, either from local chambers or further afield.

Yes, we use barristers ...at one time we were very, very stretched, we were very thin on the ground and we had agency staff, and we were using barristers more than we do normally, and that was to free us up really, rather than spending a lot of time in court which, as you know, it’s not the fact that you’re in for 10 minutes but it’s the whole morning or the whole afternoon that you’re there. But generally as a rule of thumb, if you have a contested hearing, that’s going to be more than one day, then we’re advised to use barristers because it’s more cost effective than us being out of the office doing that. (LA Solicitor 2)

Some local authorities were so overloaded with work that they would hive off whole cases to barristers – which is what had happened in Carole’s case. Others appeared to plan for each hearing individually so that, when over-

stretched, a case might be handled by a large number of different outside barristers – as happened in Bernie’s case. In two of the areas, the local authority had specific arrangements with particular chambers and therefore regularly used the same few counsel.

Although using barristers eased workload pressures and could reduce costs because the local authority could employ fewer lawyers, it could mean losing control temporarily over a case. Particularly actions or timescales might be agreed which the local authority did not accept or could not comply with:

Because it’s the LA, you’re very much leading the whole operation – everybody else knows that if you’re not there, things might get agreed at court which then – for the LA to do – which then won’t be done because it’s not quite the same if the person who’s got to do them is there. (LA Solicitor 3)

All the local authority lawyers felt that their job had become increasingly difficult in terms of workload and responsibility with the introduction of the PLO. Both the work that had to be carried out before proceedings were issued and the increased paperwork required in proceedings had added to the demands on local authorities. When asked if the workload was manageable, one local authority lawyer commented:

It peaks and troughs – at the moment we’re all feeling – to be honest – quite overwhelmed. (LA Solicitor 1)

Another reflected how the team she worked in coped with heavy caseloads:

[We have] an exceptionally good manager – she’s created an atmosphere where people volunteer really and there’s an extraordinary sense of mutual responsibility – so I think it’s a very unusual working situation really. People, if they feel their colleagues are a bit busier than them, they will volunteer for things. It’s very good like that. (LA Solicitor 3)

4.3 Motivation and view of the work

Motivation

It’s the best job in the world. (Solicitor 14)

Lawyers – both solicitors and barristers - working in care proceedings expressed an exceptionally high level of motivation, although a few were beginning to feel, towards the end of the study period, jaded and exhausted by the overwhelming workload pressures at that time (see later this section). Their motivation came from a combination of the intrinsic challenges and interest of the work itself, together with a sense of public service and social justice. This came out not only in discussion of motivation, but often also when solicitors considered alternative careers in the light of increasingly disadvantageous fee regimes, for example:

When this thing came up where I thought I might lose my job, I realised how passionately I love doing it. I've been having to think over the last 6 months about what else I might do instead and really not coming up with any clear ideas about ... could I retrain? But I don't know what I'd want to do.... So I suppose for me I just couldn't bear it and I suppose I've just seen my income reduce all the time and I live with that. (Solicitor 2)

The majority of lawyers interviewed talked of the constant variety and interest of this '*enormously, endlessly, daily rewarding*' (S33) work:

I enjoy the work. It's interesting, and actually I'm really quite interested - the fact that you instruct experts like psychologists, psychiatrists, I find that very fascinating to read their reports - I always enjoy that, and they're interesting cases – the stories behind them. (Barrister 1)

Many were stimulated by the intellectual challenges of these cases:

And I think as a lawyer it's one of the most challenging areas you could work in – might be terribly paid, but in terms of challenge you're getting things that you wouldn't get anywhere else, because your knowledge base has to be so huge. ... There's nothing routine about care work at all. I never know what I'm doing from one day to the next. (Solicitor 3)

While some lawyers felt that these cases did not involve very much law, many found considerable legal interest and challenge, including opportunities for 'legal argument', continual change and many appeals so '*everyone re-thinks*' (S3) as well as '*human rights issues, judicial review and all kinds of exciting points*' (S32) :

From a lawyer's perspective it is the most interesting aspect in family litigation – complex legal issues often arise – even where the outcome of a case is known – you can still have all sorts of complicated arguments. If you look at the cases which are dealt with on appeal in family work, you never get appeals, or rarely on residence orders, divorce cases – whereas lots of these care cases do end up on appeal. So I think from a personal point of view it is intellectually challenging and interesting. (Solicitor 8)

Many public lawyers see themselves as a '*different breed*' (S2) from others in their firm. This is partly to do with the seriousness of these cases – solicitors feel they are doing significant and important work which was often contrasted with the relative triviality of private family law disputes:

It's more challenging and intellectually engaging than perhaps a private law case where you've got two parents quite often who should know much better acting like children themselves and arguing about whether they pick up little Johnnie from outside Asda or pick him up outside Sainsbury's. This is something where there's more on the line and quite often parents at their most vulnerable, or vulnerable adults anyway who stand to lose their children and need somebody to fight their corner for them because nobody else will. (Solicitor 6)

Some lawyers, particularly the barristers expressed their motivation in terms of a sense of social justice and a strong belief in the rights of parents and their need for strong representation because of 'an imbalance of power' (S30):

I think ultimately it is about justice – it's about better outcomes and best outcomes for families. I think I've always been motivated by social injustice – and I think fighting for parents, fighting for their rights and a child's right - against sometimes very jaundiced, cynical, overly protective approaches of say the court, the guardians and the children – the guardian and the local authority. (Barrister 5)

For others the concern was more about ensuring justice and the best outcomes for children (for full discussion on solicitors' aims in representing parents see Chapter 5.1).

Because fundamentally you need the best outcome for children and if there is any way that brings about the best outcome – either being with their parents or placed in their family rather than in care, or retaining a contact relationship, that matters hugely. It probably sounds terribly twee, but it is about ... that's why the judges do it, that's why solicitors do it, that's why social workers do it – they don't do it because they want to take children off their parents, they do it because they want the children to be safe. (Barrister 8)

However, in contrast to the almost universal job satisfaction, a small number of solicitors were willing to admit that the work had taken its toll – particularly where they had been in handling this area of law for many years. This solicitor had 25 years' experience:

At the moment because I am so distressed about not being able to do that properly, I would give it up tomorrow. The reason I do it is to earn a salary. I've done it for 25 years – I've been proud of what I've done, proud of what I've achieved, but you reach burn-out factor. (Solicitor 5)

Preference for representing parents – or children

Of those solicitors on the Children Panel as children representatives, two thirds said that they were equally happy to work for parents or for children, although all considered representing parents to be the more difficult task. The majority of these expressed the strong view that they could do a better job representing either party by having regular experience of both, in order to appreciate the different perspectives:

I like to do both – I actually think that it's not good to do all of one thing. As a lawyer you ought to be able to look at it from all angles, and to me as a lawyer, the important thing is to get whoever you're acting for to see the other person's point of view, and therefore I think it's very important that you act on all sides. (Solicitor 30)

About one third of Panel solicitors expressed a definite preference for representing children and some made a point of *only* representing children, through choice. For others, representing a higher proportion of children was a consequence of their being on the Panel while other, non-Panel solicitors in their firm would take on the bulk of parent work. Some solicitors admitted that their preference was based on the fact that representing the children through their professional guardian is easier:

I think the children work is probably easier I guess in some ways, because your client is a guardian - not that you get a guardian these days - so clients should be a guardian (laughs) - and therefore fairly civilised and able to deal with stuff on the ground. Parents are more demanding and challenging definitely, you're much more involved for a parent than for a child. I think for a child your role is - your guardian does all the stuff on the ground, occasionally you get emails saying, could you do a position statement for court? Or write these letters, or whatever, but with parents you're in at the coalface. (Solicitor 23)

Some preferred the slightly detached 'analytical rather than confrontational' (S1) role of representing the child:

I prefer acting for the children. I feel it suits my skills better, I think, to be sometimes the neutral person, sometimes to mediate between Local Authority and parents. I quite like being very business-like and proactive in care cases and I find sometimes that I'm the one driving it if there's not a very experienced Local Authority lawyer or they have different representatives hearing after hearing and they haven't quite got the continuity of it. (Solicitor 27)

Some enjoyed working with a professional client:

I like representing the children, particularly if it's with a guardian that I know well and I've worked with for years. I enjoy that sort of camaraderie and that intellectual relationship. I suppose because I've been doing it now for 20 years, I do find the sort of drugs and alcohol cases a little bit tedious... (Solicitor 35)

A small number of solicitors expressed their preference for representing children in terms of having 'more of an effect on a case – you are listened to more' (S21) on the basis that the joint input of solicitor and children's guardian could determine the outcome of the case. This contrasted with the view of lawyers for parents who saw (and told parents that) the changes the parents made in their lives were the key determinant of outcome. One solicitor simply expressed her preference for acting for children thus:

I like acting for the children. You're on the side of the angels really, if you're acting for the children. (Solicitor 16)

In practice it is not possible to represent a children's guardian without being on the Panel, so non-Panel solicitors can only represent parents. While some

non-Panel solicitors in the sample were planning to apply expressly with the intention of being able to represent guardians – either personally or because their firm wanted this, many non Panel solicitors preferred working only for parents.

I actually think that the parents are the ones who most need me. I think they are the least protected and often – I wouldn't say that they were more vulnerable than the children – but they need people with good communication skills and an ability to get on with them because otherwise I think they can be very lonely in the proceedings and I think they can go through the entire set of proceedings and not really understand what's going on unless they have some sympathetic legal advice really. (Solicitor 34)

One or two were seen by their colleagues as having a particular knack – or perhaps simply the patience – to represent parents:

I got this label that 'you're really good with teenagers, you're really good with people with mental health and learning difficulties – which are normally the parents!..... The others can't handle them, so they're mine..... I sort of got a niche in the firm. (Solicitor 28)

The 'cab rank rule' theoretically gives barristers less choice in the clients they represent; they must accept any client who they are able to represent. However after the introduction of the Family Graduated Fee Scheme, the Family Law Bar Association and the Bar Council abolished this rule for legally aided work because of the level of fees. In the sample of barristers most acted for all the various different parties in care proceedings but two never took guardian work one almost always acted for the local authority and another for children. When responding to a question about their preferred clients in these cases 5 viewed local authorities as their least favourite client whilst acknowledging that they were happy to take their cases because '*you get paid more doing work for the local authority generally*' or '*obviously with the local authority you tend to have the easier case, but... you have a lot more work to do generally.*' (Barrister 1)

Skills and qualities/attributes considered necessary for this work

In discussing what skills and attributes the work of representing parents required, solicitors talked both of personal qualities and of technical skills. Although many had come into care work from other areas of law, about a sixth of those interviewed had come to law as a second career. However, most of the solicitors had little experience of other areas of work on which to draw for handling the "*highly sensitive and very difficult work*" (S34) of representing parents. Notable exceptions were three who had come from nursing, social work and youth work. Of the barristers interviewed, two had briefly tried other, unrelated careers. However, several of the lawyers felt that their own experience of life helped them in this work, particularly in enabling them to relate to people.

It's just from life's experiences. I come from an ordinary working class background. I suppose I've been exposed to ordinary members of the public throughout my life – with that comes an understanding of how people function. Common sense – it's a great attribute. I haven't got an ivory tower background – some people have – and I think they'd be the wrong people to do this sort of work. (Solicitor 8)

Some felt they were able to empathise with parent clients because of their specific experience. Several mentioned that the fact of their being parents themselves made it easier for them to empathise, and that parent clients gave their advice greater weight:

It helps being a parent yourself. That really helps. Often you say to your clients 'I am a parent myself and I know what you must be going through. I feel it. I'm a mother myself and wondered what I would have done if this had happened to me and I've often gone through that with them. I think they appreciate it more when you are a parent, I think they realise that you are a mother and that you know the feeling and pain they must be going through. I think that has helped me to link. It means a lot to them to have someone who has had a child, I think it's really important. They suddenly listen to you – you're not just talking, you're actually talking as a parent. I find that helps me to deal with a very emotional client. (Solicitor 29)

This perception was reflected back by parents – for example Barbara and Carole were both scathing of social workers without children of their own. Barbara struck up a surprisingly good relationship with a male barrister she had never met before when he talked about his own children. Lawyers from minority ethnic backgrounds suggested that this fact helped in their relationships with minority ethnic clients:

I think it's my own social background – I'm from an immigrant, black, working class background. I think I've had experience of racism and society that might be comparable to his. I have worked with people who are disadvantaged. I've worked in charities and voluntary sector agencies meeting people like this, so I have an understanding – I think – of what motivates him, what his concerns and fears may be. You know – understand his ability to communicate and where the difficulties might be. So I would ask questions and approach the case in a way that perhaps another barrister wouldn't. (Barrister 5)

Most interviewees rated 'people skills' as the most important attribute for representing parents. This included patience, 'being a good listener' (S6) and the ability to communicate effectively with their clients.

I think you need to be non-judgemental and quite patient with people. And to have good listening skills. You need to be able to hear what people are saying. And that's very difficult in the sort of worlds that we operate in, because we're always so busy, it's very difficult to – I think you have to have a good memory, you have to remember – because it matters so much to people that you remember things that they tell you about their children. (Solicitor 38)

A couple of interviewees said that they had been chosen within their firm to work with 'difficult' parent clients because of their exceptional patience. Barbara's solicitor told us that she was often allocated the 'nutty' clients and acknowledged having more patience than a couple of younger colleagues. The ability to communicate effectively with these particular clients is seen as a crucial attribute.

I think communication, communication, communication. I think the ability to gauge one's client's ability to understand and to pitch advice and attitude to that. (Solicitor 34)

Following on from this, the same solicitor, together with a number of others, identified 'authority' as a crucial quality – the ability to be 'very direct' (S21), to 'challenge' (S8) parent's views and instructions and to give robust advice which parents will be prepared to follow:

'I think sometimes my clients do what I tell them because I tell them to do it and because I tell them in a certain way..... I think being able to manipulate people is useful, if I'm being honest, because you can manipulate them into doing what you want them to do, which optimises the result of the case. (Solicitor 34)

This ability and confidence to 'deal firmly' with parents came with experience and 'a certain maturity'.

In terms of technical expertise, advocacy and analysis were both skills mentioned by interviewees as being necessary in care proceedings work. Many solicitors enjoyed the advocacy aspect of the work and felt they did a 'reasonable job'. Children Panel solicitors were expected to do their own advocacy and did not feel daunted by this, handing it over to colleagues or barristers only for workload reasons.

Analytical skills, particularly pertinent given the mass of documentation, were seen as crucial by a number of interviewees:

The first role is to make sure that the – that you have properly analysed what the problems of your clients are. Because it's not about accepting their view of the world because that's not what the court will be looking at. And you've got to sit down and think. One of the problems is that this work is so badly paid now and so Cinderella service – perception of it – people are drowning in cases, just drowning in information. You've got to just give yourself a bit of time out to think – you know. All right – you've got 6 lever arch files over there that have just been delivered. Where do you start? Where do you start – you've got to analyse. I wonder whether we teach to youngsters now enough about how to précis – I don't think they do that now. Précis that and analyse it – what are the issues here? So you've got to understand that because then you need to be advising your clients how to address those issues from day one. (Solicitor 40)

Not surprisingly this form of expertise was referred to particularly by barristers who saw themselves as having superior analytical skills and a greater degree of objectivity and detachment than solicitors:

I think you've got to be able to grasp all the minutiae and all the detail of all the contact notes and when the social worker visits happened and in what order and what the philosophy behind the whole thing – as well as see the big picture – because if you lose sight of the big picture you can't be objective. You've got to be objective when you're acting for a parent – I believe. (Barrister 4)

4.4 Work / time management

Solicitors

Numbers of current cases

Most solicitors were unable to give a precise estimate of the number of cases they were currently handling and reported a wide range of figures. Of those working on care proceedings virtually full time (90%+), the average number of cases currently being handled averaged 25, which ranged between 12 and 33 cases. One solicitor reported a current caseload of 50 cases, but explained that prior to the recent influx of cases, she would normally have been handling 20-25 at any one time. For those solicitors working on public law less than full time but at least 25% of their time, the average number of cases equated to 27 for a full time equivalent. There appeared to be no significant difference between the four areas.

I don't know exactly how many cases – I don't keep a count quite deliberately (laughing). I feel pushed in terms of numbers of cases, but also in terms of the complexity. It's about the amount of time cases draw from you – not really about the numbers. (Solicitor 40)

As described above, many solicitors carry a public law caseload split between representing parents and representing children. Typically solicitors reported that acting for parents in care cases was more demanding and time-consuming than either acting for children, or representing parents in private law cases.

Working week

The typical working week for public law solicitors contains a large degree of variety – which is one of the reasons so many enjoyed this work. Their time is divided between attendance at court and working in the office. The proportion of court to office work appeared to average in the region of 2:3, although this varied enormously, obviously depending on the number of court hearings in the diary. Many solicitors reported on periods of time when they had almost wall to wall hearings, keeping them out of the office for up to a couple of weeks. Part time solicitors appeared to spend a higher proportion of their time in the office simply because hearings might take place on days they were

not working (when they would have to instruct colleagues or barristers). Solicitors seemed always to prioritise court hearings (other than lengthy contested hearings), and would not delegate these simply on the basis of pressure of work at the office. They were frequently in the position of having to handle hearings unexpectedly:

Take last Monday for example – a week last Monday I said to (secretary) ‘I’ve got nothing in court this Monday’, so in the space of an hour, (partner) asked me to do a Directions Hearing, the LA asked if I’d do a new care case, Judge listed one of mine for an Emergency Directions at 10 o’clock, and then also last week, a case was transferred up from the Magistrates to the County and that was the only day they could fit it in. I did the first hearing in the FPC because there was no children’s guardian and it wouldn’t be right in a children’s case for me to give that to someone else, so I did that. I got (independent solicitor) to deal with the case the judge had put in because I knew she could do it, (colleague) did (partner)’s directions and (another colleague) did my case that had been transferred up from the FPC. So you see, I had nothing in on that Monday and then within the space of an hour, I ended up with 4 hearings. (Solicitor 24)

Time spent in the office was divided between a range of tasks: seeing and communicating with clients, arranging assessments and tests, reading documentation and preparing for hearings. The first two of these were often far from straightforward given a clientele notable for their chaotic lifestyle. Attempts to see clients in the office could result in the client not turning up at all – which might mean a stream of phone calls to check their whereabouts – alternatively, very lengthy sessions, obtaining initial instructions or going through long documents with clients whose ability to read and/or to comprehend was often quite limited, and who might also be in an extremely emotional state. One solicitor described the difficulties typical of such clients:

I’d know that if she was coming to see me, clear my diary for the rest of the day because it’s going to take a long time. Going through documents takes a long time and listening to what she has to tell me and her getting upset, calming down and getting upset, calming down, ‘Can I have a drink?’ ‘Yes you can.’ ‘Can I have another drink?’ ‘Yes you can.’ – So – just patience. (Solicitor 13)

Another described the difficulties of written communication:

I’ve got clients who are functionally illiterate. They can’t read or write barely, so I have to write – “we were at court last week” paragraph, new line. “We saw the judge.” You send them letters like that and it goes on to a second page – well clients like that can’t read a second page! So you have to put everything in bold, and go out to them a lot and talk to them. Then you phone them the next day and they can’t remember what you said. It’s so hard. (Solicitor 14)

Similarly, apparently straightforward tasks such as arranging assessments and tests could be made far more laborious because of the clients' failings in prioritising such matters.

She needed a hair strand test – it took me ages to get the hair strand test. And that's the other thing – the court think 'you haven't got the hair strand test' but they don't understand that I asked for the hair strand test ages ago, but actually trying to get my client to go – and it doesn't actually mean that they are refusing to have the hair strand test, it's because – well that's why they're in that situation – because they can't organise themselves. So that took me ages. (Solicitor 10)

Almost without exception, solicitors complained at the excessive amount of documentation created by these cases, typically measured in numbers of lever arch files, which all have to be read. Much of this documentation came, in accordance with the PLO, from local authorities up-front at the start of the case. By the time of the final hearing the documentation could amount to anything from 5 to 15 lever arch files.

But there is a lot going on. There's paperwork coming in all of the time. This Magistrates' Court case which finishes tomorrow – 14 lever arch files! In the Magistrates' Court where the outcome is clear – it's crazy. So we're being inundated with paperwork. (Solicitor 8)

The tasks of reading the paperwork, and also of preparation of hearings appeared frequently to be something solicitors could best focus on out of office hours. Most reported long working hours. Some made a practice of starting work early in order to prepare for hearings. Many worked late at the office or took work home and worked during the evening. Working at weekends was not exceptional – again, especially when preparing for hearings.

Solicitors typically described how the intensity of work in care cases varies from an initial hectically active stage to a much calmer phase, in terms of solicitor activity, while assessments were being undertaken, before building up again to the final stages of the case.

Generally it's frontloaded, isn't it? There's a lot of work at the beginning and then it kind of peters out a little and then you'll get a bit of a flurry if there's problems with contact or something in the middle, and then more work at the end towards the final evidence. If you take a new one on, you know that's a lot of work initially and then they go on a kind of rota, don't they almost, because you know when the activity will arise usually, unless there's a bit of an emergency in the middle. (Solicitor 36)

In the earlier stages of this study, despite their long hours of working, love of the work meant that very few solicitors seriously contemplated doing anything different, despite the introduction of the fixed fee system which they suspected would result in a reduction in income.

It's pretty bad. We do legally aided work. The pay compared to what I can get for a private divorce, for example – it's pretty terrible. Especially with this fixed fee. I do work weekends, evenings and it's very hard, particularly as I've got a young son now. It is hard but I keep doing it, I'm still not sure why, but there we go. (Solicitor 32)

However, there was certainly a great deal of concern being expressed about the way things were going, not least by the judiciary:

They work incredibly hard and, as I say, we really couldn't function without them. Counsel also. We just expect them to work weekends, and all weekends, and most of them do. Why should they? I think there is a real danger here, overall, of a dispirited profession just saying, well, I've had enough, I can't carry on, it's stressful enough doing these cases, I'm not being paid sufficiently well, why should I, I'll take early retirement – and that's why I'm afraid in the end the LSC will have brought about a grave disservice to parents and then of course they'll take the whole thing out of the court and they'll do it all by tribunals and the local authorities will make decisions about Care Orders without any overview by the courts at all, and the government will have felt it's done a jolly good job. (Judge 2)

Increasing pressure

In the autumn of 2008, (see 1.3), a few months into the fieldwork of this study solicitors universally reported a massive increase in their workload. This was equally true in all four areas with individual solicitors experiencing a 'massive influx' of new cases, far in excess of their usual number.

This, coupled with the fixed fee system, tipped a few solicitors into a state of frustration and demoralisation, well described by a solicitor of over 20 years' experience:

We have been completely overwhelmed recently. Basically, you get phoned up by the court – the other day, one of my old cases blew up the last week - week before. I couldn't go because I was at the ALC conference. So for about 2 days I'm bombarded with papers from the LA by email – I identify the counsel, forward it all on to him. In the evening did a brief, from my knowledge of the case before – but I hadn't even read it when I sent it to counsel. I mean, I've read enough to know what it was about – but I haven't read the details. But because I had knowledge from having acted in the case last year, I knew how he needed to approach it. But it doesn't make you feel very satisfied about the way you're doing your work. You're just sort of bouncing off ...

Another case – the one I took on last week – has come in, my secretary has done it – she's done all the work – sent it to counsel – and I still haven't read it – and it was dealt with last Friday and I actually haven't the faintest idea what it's about. It's like that at the moment – and I don't think I'm the only solicitor who is saying that. It's not really very satisfactory. I had a case in November – acting for a parent – very complicated sex abuse case which was really quite – very difficult, and counsel needed to have me there quite a lot of the

time. I was going to [town 40 miles away] every day then coming home in the evening and spending 3 hours on the computer – just dealing with the email. So that's how it is. That's just dealing with the email – but then I didn't come into the office, so as I say, at some point I've got to spend some time... My secretary manages what she can, but I share a secretary with another busy fee earner so – it's balancing it.

You just end up having to compromise – one of the things that makes me upset is that I'm not doing the job the way I want to do it. I don't like to take on a case when actually I don't know anything about it – and I haven't got time to read about it. Or you're preparing cases and something comes in and you just bounce it off to counsel, and only get round to reading it later. It makes you really frustrated and unfulfilled. So that's what happens. (Solicitor 5)

Although email had made communication between lawyers and professionals easier, facilitating co-operation over, letters of instruction for example, it had also added to the pressure. Emails appeared to require an immediate response, and *round robin* emails went to everyone involved in a case even though they might not need to respond. Lawyers arrived at court having been to the office early to 'do emails', and returned to find a '*massive list*' (S18) of further emails about their other cases.

We remained in contact with a number of solicitors well into 2010. Several of these reported that their workload had reduced considerably in comparison with the peaks reached in 2009.

Adapting the work

In general, solicitors felt unable to control the work they did on their cases; the work required was determined by the demands of their client, the other parties and the court.

I think the cases drive how you manage them. I don't think you can properly do these cases and say, right, the amount you're going to pay me equates to 20 hours, so I'm only going to spend 20 hours on this case. I just don't think ... the case drives it and with the best will in the world I don't think you can do that. I think the PLO helps to a certain extent, in the sense that it says, by this time you have to do this work and by that time you have to do the next stage. It doesn't actually cut down on the amount of work you do, it just puts a framework on it. (Solicitor 9)

For most solicitors, the idea of reducing the amount of work undertaken on cases was quite unrealistic – they did not feel they were doing anything superfluous which could be cut out. They had no time to make the work more lucrative by artificially increasing the work they did. They felt that there was little they could do to reduce the hours they spent on cases to ensure that they made a profit under the fixed fee. The idea of ensuring that a case 'escaped' was unrealistic, as described by Carole's solicitor:

I could have [escaped] if she'd come to see me! The fixed fee would be £3,589 – so to escape I've got to do £7,178 – and I've done £5,205, so I'm not going to escape.

These lawyers did not expect to reduce substantially the work done on individual cases but to cope by putting in extra hours. Indeed, it was the volume of work, not the rate of pay which exercised assistant solicitors. Solicitors in all areas complained about pressure of work. By the end of the study solicitors were talking about turning cases away – something they had never previously contemplated. There was also a growing recognition that taking on too many cases could be inefficient.

[I]f you're the solicitor and you go along [to court] and you do it, you're actually keeping a much tighter ship on everything, because it's just the one person, and you could record it and you know what's happening and you can pass it on, and the whole thing works much more smoothly. But again if we've got too few people doing too much work then there's going to be inefficiencies that way because you just can't get it all done. (Solicitor 30)

Barristers

Called upon by solicitors for specific and discrete tasks, the work of barristers is by its nature more focussed and less wide-ranging than that of solicitors. Their workload is comprised mainly of advocacy in court, with the remainder of their time spent on preparation for court, conferences with clients and responding to requests for advice.

Being self-employed, barristers rely on getting and maintaining a reputation, both with solicitors who would instruct them regularly and with their chambers' clerks (powerful figures who offer incoming work to barristers where no individual is specified). This was particularly true of barristers at the level of those typically handling routine care proceedings. Thus barristers appeared typically very loath to turn away any opportunity for appearing in court – even at short notice. They appeared willing to take on any late booked hearings even though this meant giving up their evenings and weekends to prepare other long standing hearings. This was, of course, also a way of maximising their income. Very junior barristers are naturally keen not to turn away work:

You scream and then you just get to grip with the papers. It's difficult, but a lot of my care stuff, I am now started to get from the beginning – I'm building up my practice. But it's inevitable at my level of call – you're always going to get cover work and last minute stuff – that happens. (Barrister 6)

A more senior barrister explained that if one hearing collapsed early, there would usually be others to take its place:

I'm in a chambers that is very busy, so I would almost always be able to have other work if.... I had a case this week that was listed for 5 days – looked like it was going to run, very fraught, collapsed at the end of Tuesday. I had Wednesday off because I needed to prepare for a 10 day case I'm starting on

Monday, but I did a case on Thursday and Friday. The thing is sometimes, I'm double and treble booked. So if things collapse, I'm going to already have something waiting. My clerks frequently ring me to ask 'Is this going to go short – what do you think is going to happen? We're anxious about this case on Thursday – do you think you'll be able to cover it?' I am pretty busy, pretty fully booked yes. (Barrister 5)

Preparation for advocacy in court obviously requires complete documentation. As described above (Chapter 2) it was typically the case that documentation – parties' statements, assessment reports, etc. - would only be filed at the latest possible stage. In these cases there was also a high likelihood of significant changes in the client's circumstances. It was therefore impracticable to prepare very far in advance of the hearing.

For these reasons, and also in order to have the case fresh in mind, preparation for hearings appeared almost invariably to be done as late as possible – usually after court from around 4pm and into the evening. This work could take many hours - barristers reported preparation times of 6-8 hours for hearings expected to last 2-3 days. It appeared to be the norm for barristers to accept the need to work for a considerable proportion of their weekends.

Sometimes the clerks try to put five day hearings in on a Friday evening for the Monday, and if you've got plans – but that's the way it goes. Basically the thought is – you've got a weekend – you've got no excuse, so you do the work – that's it. But you can turn it down – you always can. But then you think, why would I want to turn down a five day brief which is well paid? (Barrister 1)

This intensity of work is coupled with the intrinsic stresses of court advocacy. The key was in the preparation, but more than one of the younger barristers found this almost too much to cope with, finding it necessary to return briefs occasionally or refusing late instructions. Another reflected:

I've gone home and physically thrown up, I've gone home and screamed in the shower – I've just made myself ill – because I've been so stressed in certain cases because they need so much to make sure that it's done properly. (Barrister 6)

This workstyle was not without its cost. More experienced barristers appeared to be more oblivious to pressures and become used to it.

I think I've just got used to it now, I think I've just got used to it. Just get on with it yes, that's just the nature of the job. I don't think it gets any easier actually, as you become more qualified. (Barrister 3)

But the same barrister described the impact that working for these hours and at such pressure had on her life:

Well it does – I haven't had kids because of my job. Yes, that's the reason, because my job has taken over my life. I was never going to be very maternal

anyway, but I do see some of the women here who have got kids being put under a huge amount of pressure because they've got families. (Barrister 3)

One young barrister seriously questioned whether she could or would want to sustain this pressure of work indefinitely:

At the moment I do wonder if I'll continue at the bar – because I just wonder if you can sustain this forever. There's no social life – I'm 30, I don't have children – I'm not saying I want children now, but it does – I'm from a big family – I sometimes think is that why – because the job is so demanding I know I couldn't have children. I've just split up from my partner – again you think, is it because of the job? And there are so many examples – sometimes I think I'll just leave the bar and do something more creative and more 'me' really – it's a difficult one. (Barrister 6)

4.5 Care proceedings as a business

Law firms are businesses; the commitment of individual solicitors, whether partners, associates or assistant solicitors, cannot transcend the economic realities of paying rent, wages and utility bills. Although departments might cross-subsidise each other from time to time, clients referred for one matter might later bring work to another department and the legal aid franchise generally depends on offering a range of services, firms cannot afford indefinitely to carry work at a loss. Public child law is no exception, but the fact that there are almost no privately paying clients means that the level of fees set by the Legal Services Commission is crucial for firms.

As the Head of Department, I'm forever having to defend: 'Why are you still doing it? If you look at the figures, you're not profitable.' The only way you do it is by putting the hours in and we do double the hours that all the private client solicitors do. So, yeah, it wears you down a bit after a few years of doing it. (Solicitor 27)

Solicitors' responses to changes in legal aid fees

Before the introduction of fixed fees, care work was more profitable than many other areas of legal aid. Although there was no doubt that the changes to the fees had led many firms to review whether to continue with legal aid, the general impression was that the partners in the study wanted to continue this strand of their practice, and were strongly supported by their salaried colleagues. For some firms the volume of care work undertaken or the proportion of turnover it represented made continuing it very important to the firm's viability. Despite a few negative comments about legal aid rates - the firm's '*bit of pro bono work*', the partners in the firms which continued to do this work clearly thought that it was possible to achieve a reasonable return doing this work but some of their colleagues had needed convincing. The generally poor economic climate which had hit other areas of practice made legally aided work appear more attractive:

[I] would have been [tempted to give up] a few months ago – but with the credit crunch, views have changed. The LSC do pay and [I have] a regular income. While other solicitors are being laid off in other areas of law – “at least I’ve got a job” – regular work and am paid for it. (Solicitor 10)

There were accounts of firms giving up care work or legal aid more generally in Area B but in Area C none of those interviewed were aware of this happening although one firm had confined its legal aid work to just one of its branches. The increase in care cases meant that there was plenty of work available for those who could do it.

Firms doing this work did not expect to make large profits:

Well, I’m in business. I admit I choose to do Legal Aid work, but if you choose to do Legal Aid work, you have to do a lot more hours than you do if you’re just doing private law work. My private charge out rate is £180 an hour plus VAT. The most I’m going to get paid by the Legal Aid Board, I don’t know, is £75 an hour if I’m on my feet in court. When you do sums like that, you realise that you have to work twice if not 3 times harder for Legal Aid money than you do for private law. And I think the tendency for that, particularly with fixed fees – if I can get political, is that you will take on more than you really should, or I will take on more than I actually should because I’m conscious that I need to meet my own targets, I need to bring in the money and I need to make sure that I do all of it and to that end I need to take on as much business as I can. (Solicitor 34)

The change to fixed fees created an additional pressure on firms because it meant that they took the risk that a case might require more work than the fee set by the Legal Services Commission. Although firms could make a profit if a case involved less work than the standard fee (between £2600 and £3600 for acting for a parent), they also stood to lose up to this amount if more work was required but not so much as to reach the ‘escape’ level (double the standard fee), after which fees were paid on the previous hourly-rate basis. Solicitors were sceptical about the possibility of making a profit on simple cases.

So when the LSC talk about swings and roundabouts, there wasn’t really any up side. It’s the ones that fall just over the fixed fee level that aren’t exceptional. The only ones coming under the fixed fee are the ones where clients cease to instruct – that’s literally it. If it’s a case that runs to the end I don’t see how you could do any less than the fixed fee amount. (Solicitor 3)

Some partners compared the situation in criminal law, noting that the concept of ‘swings and roundabouts’ evening out large and small cases was not really applicable in public law given the much smaller volume of cases typically handled by public law solicitors:

I think you’re probably looking at a balance of somewhere between 15 and 20 – and even then that’s pushing it a bit really. So consequently, when the LSC go on and on about this ‘swings and roundabouts’ effect – I think it’s actually

very difficult to achieve with this low volume number of files. I'll give you an example – in our criminal department, where we've also got standard fee schemes and have had to live with that for a number of years, in the Magistrates Court, because we're a very big criminal firm, we've probably got something like between 15 to 20 hearings every day in the local Magistrates Court. Now in that volume, obviously you can get swings and roundabouts because the volume does make it work. But I don't think you can do that necessarily with family work, or care work in particular. (Solicitor 35)

Partners and solicitors sought to encourage efficient ways of working. 'Maximising the value of each case' 'prioritising advocacy' and 'thinking about billing' were all mentioned as ways of ensuring that care work was cost-effective for the firm. However, by far the most common response to the new fee regime, which was reflected in replies from partners and assistant solicitors in all 4 areas, was to take on more cases. The substantial increase in the number of care applications from the beginning of 2009 (Cafcass 2010) made it not only possible but essential for them to do this.

In almost all firms, individual solicitors acted independently of each other, handling all aspects of the work themselves (although billing might be carried out by ancillary staff). An exception to this was the practice of one solicitor reported to us with some admiration:

She's organised her small office so that there are piecemeal workers. They work on particular tasks and so she just does plain honest legal work per file. I quite like that – that she picks up a file and she'll just do the work that needs to be done on the law... (Solicitor 11)

However, towards the end of the study when the financial changes and increased numbers of cases were being felt more seriously, there were signs that other firms were starting to organise their office systems to handle care cases on more of a production line basis, making use of paralegals more systematically, not just to check the availability of potential expert witnesses and prepare bundles for hearings but also to interview clients and read reports. Obviously though, this was something that only firms with considerable volumes of work and competent para-legals could do.

We're quite well set up here, primarily because we have one very experienced clerk, one who is very good but who doesn't have much experience, we have some other clerks who handle the routine stuff that we don't need to touch. So in that sense we're set up to be out of the office for a week. Technology has made it very much easier as well because I can leave court at 5, put the children to bed, and then at half 8 start dealing with my emails and my correspondence, so that assists a great deal as well. (Solicitor 9)

However, there could be pitfalls in this, as observed by Carole's solicitor:

You get a paralegal and they do the work and – one of my colleagues works with that sort of structure in her firm – who then spends ages having to overview what they've done. You can't – they're not a lawyeryou've got to

have enough experience to judge whether the evidence meets the law – you can't expect someone without legal qualifications to do that.

Another, more common response to the change to fixed fees was consideration of the handling of advocacy in economic terms. One efficiency saving was to ensure that a single solicitor from the firm conducted advocacy on all the cases the firm had in a court on a particular morning. Inevitably, this meant that the service provided for parents by solicitors became less personal.

You become more efficient but you put more hours in. People end up doing two things in court instead of one...It's quite do-able, there's no reason you shouldn't do that. It's one thing that people could do. It's not an issue if properly managed. We've got 6 practitioners – chances are in 3 local courts ...there's somebody there so if you can double up it makes things that bit more efficient. (Solicitor 37)

Efficiency alone could not ensure that work was profitable. Solicitors had sometimes exhausted the fixed fee before the final hearing. Although their preparation for the hearing would effectively be unpaid, some solicitors made a point of doing their own advocacy, which attracted its own separate fee, adding to the total earned for that case:

The fixed fee situation is making that harder and harder – I've had a couple of cases where all my preparation for the final hearing – I'm not going to get paid for because I've just about got to the fixed fee or just over, but there's no way I was going to double the fixed fee.... So I'll get paid for doing the hearing because advocacy is paid separately, but a 5 day hearing will take a day to prepare – possibly 8 hours – that's about £600-£700. I'm not going to get paid. (Solicitor 22)

Before the introduction of fixed fees, the different legal aid regime applying in the magistrates' and county court was a factor for solicitors considering instructing counsel. Solicitors could not claim fees for attending with counsel in magistrates' courts. This rule still applied but was irrelevant where the case came within the fixed fee because additional payments could only be claimed in the county court for cases that 'escaped' and were therefore paid at hourly rates. Nevertheless, fees issues were still considered when solicitors thought about using counsel.

The other consideration (in using a barrister) which can't be forgotten is that cases in the FPC you can't instruct barristers and get paid for the work because of the LSC ruling on that, whereas in the County Court you do get paid for barristers and therefore I'm more open to instructing barristers. (Solicitor 34)

It could be 'uneconomic' for a solicitor to instruct counsel even for a contested final hearing in the family proceedings court. If they decided to use counsel, they invariably left counsel to manage the client alone.

The original proposals for the Family Advocacy Scheme (LSC 2008), which were published in December 2008 were considered to be particularly disadvantageous to solicitors because they replaced hourly rate advocacy payments with fixed fees but made no additional provision for preparation. There was considerable negative response, not least from interviewees:

Looking at the proposed level of that, it's not what we're getting at the moment, it's a significant reduction, and it's one that simply wouldn't make any business sense. Advocacy is a large part of my income – it's one of the reasons I do advocacy at the moment – because at the moment it will pay. I also enjoy it – that's another reason - but looking at the proposals, it just wouldn't be economic. (Solicitor 8)

There was considerable relief when the revised scheme was published with improved remuneration for solicitor advocates.

Barristers

The bar had not been exposed to a major change in their legal aid fees since the introduction of the Family Graduated Fee Scheme in 2001 although there were alterations to the scheme in 2003 and 2005 (LSC 2008a). The Legal Services Commission became increasingly concerned about the increase in the cost of counsel in family work; the new Family Advocacy Scheme proposed substantial reductions in fees to barristers which the profession suggested could be up to 50% (Bar Council and 2009). These were a concern for most of the barristers we spoke to during the research, all of whom were still engaged in care work. Some were clear that they would give up family legal aid; others seemed to expect that it would still be possible to 'earn a decent living' even though care work was 'not the gravy train that it used to be.' (B 3) There was also a suggestion by a barrister during an observation that care work would be done by less-experienced barristers because those who could, would take better paid work, 'talented people would be driven out' and that the commitment which care specialists showed would be sapped by lower fees. (AO9)

[I]t's not a lucrative area of law and it has attracted people who are committed and do more than they are actually remunerated for. And it's made it worthwhile on balance – but the balance is going to shift. (Barrister 5)

Barristers doing care work were also concerned about the way the fees regime influenced solicitors' decisions to instruct counsel, and thus the type of work they got. They believed that late instruction and instruction for single hearings rather than the whole case were increasing, and related this to the introduction of fixed fees. They assumed solicitors were trying to maximize income for their firms by avoiding using specialist advocates and keeping advocacy in-house.

An overriding impression of the discussions about fees with barristers was how they had accommodated their ideas about the work done for a case to the payment scale under the Family Graduated Fee Scheme. Work which was not rewarded by a Special Issue Payment (SIP) was considered to be done

without payment, rather than just part of the professional responsibility of accepting a brief. Drafting skeleton arguments and position statements, sorting poorly ordered documents, seeing clients away from court and providing an attendance note after a hearing were all identified as work barristers did without pay. SIPs could make care work 'a lot more lucrative' but were only available for cases in the family proceedings court if the required form had been filed. The rules about claims could mean that complex cases were not well rewarded because they did not have features which allowed key boxes to be ticked, or the fees for conferences had already been claimed by other barristers. Although barristers accepted the 'swings and roundabouts' of the fee system they also felt some unfairness in a system where payments did not reflect time and effort. There was some variation between courts in the extent to which SIPs could be claimed.

It's difficult to say an average because we have a standard structure for our fees but there's what we call swings and roundabouts in that, just because of the way the fee structure is. Sometimes you will not come out of a case very well and you won't earn very much at all considering the effort that you've put in. And other times you will earn what looks like objectively quite a good amount. And they do balance each other up a little bit. Take an example: we can be paid for the conference before we go into court separately from the hearing but we can only be paid twice for that, so if you collect a case where two barristers have previously billed for conferences at court, then you can't claim the conference fee. Say, the papers are voluminous but the case doesn't have certain features about it, then you won't be able to tick certain boxes such as 'more than one expert'. (Barrister 2)

4.6 Conclusion

Whilst there were differences between the four areas, the fundamental issues – the nature of parent clients; the variety and stimulating nature of the work; the demands and challenges of acting for parents in care proceedings; and the pressures imposed by the legal aid regime, particularly the change and uncertainty in this payment structure - were the same across the board. Almost all the solicitors encountered in the study were passionate about this work and committed to doing it to the best of their ability. It appeared that in each area there was a culture of working together to progress cases through the system ensuring that cases (and clients) got a proper hearing.

However, it was clear that the field of care proceedings is under tremendous pressure with the continual changes and uncertainties in the legal aid regime (see Chapter 1.3). Firms and individual solicitors are adapting their practice, but workload pressures and financial constraints were placing them at breaking point. Practices adopted when this work was better remunerated were not sustainable with substantially lower fees. The failure of the PLO to deliver substantially shorter proceedings with fewer hearings left lawyers doing the same or more work on individual cases and taking more cases so that public law work remained financially viable for their firms.

Chapter 5: The Task of Representation

This section describes and analyses the various aspects of representing parents in care proceedings, from being appointed and the first meeting with the client to the end of the case, which can be expected to be a year later. Care proceedings may be considered as a journey (Hunt and Macleod 1999) with the case gradually moving towards the final hearing, and carrying the parties along. Many of the tasks of representation - advising the client, taking their instructions, negotiation, advocacy in court and providing support - have to be carried out repeatedly and concurrently as the journey proceeds. The nature of the case, the demands and needs of the client and the requirements of the court inevitably mean that the different aspects of representation are required to different degrees in each case. The starting point for this analysis is a discussion of what the lawyers said they aimed to do and achieve in representing parents.

5.1 The Aims of Representation

Representation of parents in care proceedings was seen by experienced care lawyers as different from both civil and criminal representation because, ultimately, it sought to impact on the parents themselves, not just on their case. The lawyer's approach could '*make the difference between a parent engaging and turning their life around*' or not. However parents' lawyers were sanguine about what was likely to be achieved, and recognised that it was the client's actions not the lawyer's skills which determined outcome:

You don't ... in this line of work, you don't get too many successes if you gauge success by having the children returned – there aren't too many of those because the local authority within which I work routinely don't take proceedings unless they've got a good chance of getting a Care Order at the end of the day, and that's right and proper. Why issue proceedings if you're not going to get the order you want? So it really is down, from my point of view, to the parents putting their best efforts into changing from what Social Services have found to be not good enough parenting to good enough parenting within the period of the care proceedings. (Solicitor 34, also Solicitor 6)

Solicitors identified three aspects of their representation: helping the parents to understand the process and what they needed to do; *making* the process work in their client's interests; and securing the best outcome for them. These were reflected in the way they carried out the tasks of representation through giving advice, taking instructions, negotiating, advocacy and supporting clients. The parent's solicitor was a guide who could '*help them see a pathway through what's going on to understand the proceedings*' (S 12). Increasing awareness and understanding was the key to enabling clients to make decisions and the basis for making the necessary changes in their lives. Understanding what was happening and having a representative, a guide and supporter, was seen by lawyers as making the parent '*comfortable*' in court, the whole experience '*a bit easier*' and '*empowering*' them. It meant being on their side. It also meant '*managing the client's expectations*' so that they

realized what they were facing if they did not engage. Carly's solicitor told her client, *'My job is to get as much for you as I can.'* Achieving the best for the client in the proceedings was frequently focused on the assessments. A further assessment could mean a more positive view and provide the basis for challenging the local authority's view. The views of a local authority solicitor echoed those of many parent's solicitors:

They're doing the best for the client – that's a bit of a glib comment but they're trying to get the best assessments for their clients, or perhaps even though the local authority have assessed, challenging those assessments, making sure that the assessments have been done on a sound factual basis. If perhaps there have been injuries to the child, making sure that there are second opinions, so they're not taking things at face value really. And that's what you'd expect from a good solicitor. (LA Solicitor 4)

Getting additional assessments was about fairness for the parents, and about parents believing that they had been treated fairly:

[Giving parents] the chance to say that they had a fair trial, fair hearing, and were assessed properly, and the Judge made a decision on the basis of whatever evidence he had or she had. You just give them a fair crack at the whip really. (Solicitor 23)

It could also involve making sure that they had time to show that they were making changes. Bernie's solicitor commented about the delays occasioned by planning an assessment of Bernie's brother: *'I couldn't argue against it because the longer she had the better really.'* Making the process work for the parents could mean fighting the case but a few solicitors recognized that some parents *'wanted a get out card'* (S 15) that is, the opportunity to give up without a fight. Whatever stance the parent took, lawyers aimed to *'preserve some dignity'* (FGB; S 15) for them in the process, and seemed to be supported in this by the other representatives (S 5; S 9 and AO9).

Lawyers talked about getting *'the best outcome'* for their client both in general and specific terms. Some qualified this – the outcome had to be *'possible'* or *'realistic'*, another indicated that it should be *'the least possible intervention'*. Parents' lawyers identified the outcomes which they (and their clients) viewed as generally more desirable:

What I would aim to do is to – has got to be to keep the kids with the parents – just try and keep the families together, because no matter what – there are very few parents who don't cry themselves to sleep – with fear or with worry. And it must just almost put you in a sort of frozen limbo. I can't begin to imagine how appalling it must be. (Solicitor 14)

There was a common hierarchy of outcomes from return of the child (best) to placement with strangers for adoption without contact (worst) (S 20; S 32; S 37; S 17). Lawyers also reflected that outcomes which clients were able to accept were better than those imposed following a contested hearing, particularly where this had been a very bruising experience for the client. This

might involve getting the client to accept the likely outcome, even if it was not what they had hoped for, and then trying to find something, often additional contact, which made it better for the client.

I try to find a way to get the client on board with the fact that the court's not going to agree with that and it's not going to happen and try and get them on board with that decision so that they can back it up. And then try and find other elements that make the decision more palatable for them like trying to achieve something with contact maybe, so whatever I do, I try and get some positives out of it for the clientso I try and bring it round to a positive for the client. It's quite difficult sometimes. (Solicitor 32)

Parent's lawyers were not solely focused on their client's wishes in relation to outcome. Many referred to their additional responsibility for the child and the importance of helping parent clients think about what was really best for their children. This was not just a matter of fitting the client's case to the demands of the welfare principle (Children Act 1989, s.1(1)), it was a matter of good practice (Law Society 2010, para 5.1.1). The role of acting for parents was seen to encompass remaining '*child-focused...achieving the right outcome for the child whilst protecting the rights of the parents as much as possible.*' (Solicitor 16)

Somehow that very delicate position that we're meant to take – which is always to have the child in our mind – and so when a parent is acting in a way that's not child-focused, somehow reminding them of that and at the same time acting for them because they are the client, not the child. (Solicitor 2)

It could be difficult to maintain this focus and at the same time convince clients that they were being represented. However, beliefs about the importance of children being brought up by their own families, the dangers of care and the importance of parents believing they had been treated fairly (see 2.4 above) made it possible to square the circle. In addition, a feeling that good decisions had been made for the child enabled parents' lawyers to feel positively about their work in the most common cases where the parents were unable to make the necessary changes to succeed in court. Clare's solicitor felt very positively about her client's case, (as did Clare) because the children were thriving in a good foster placement and Clare had a good relationship with their carers:

There's a huge amount of reward in representing these people and in lots of cases – you don't necessarily receive a happy outcome for your client but there's a slight spin-off because you think, well, this child – I don't have that very often, which is a shame – but there are some cases where it's obvious that the parent couldn't care and therefore the child is going to be better off placed with ... and the ones that I particularly like where their parents are able to continue having an ongoing relationship with their children and this case, Mum's case, is a classic example of that. (Clare's solicitor)

Any general views about the aims of representation were apt to be reshaped by the client as the representative/client relationship developed and the lawyer began to assess the specific issues in the case.

5.2 Being Appointed

Half the parents represented by the case study lawyers had no prior experience of care proceedings, no legal advice before the care proceedings were started and no existing relationship with a family lawyer who could act for them in their care case. The other half had some experience of the family justice system. Dawn was an exception; her older son was already the subject of proceedings when concerns were raised about the younger son. '*An acrimonious pre-proceedings meeting*' led to an application in respect of him with Dawn instructing her current solicitor. Two other mothers, Barbara and Lauren had previous experience of care proceedings relating to their children, and two fathers, Robert and Sean, had partners with this experience. Colleen had obtained injunctions against her children's father because of his violence and Trevor had been involved in an extremely acrimonious private law dispute with his former partner which resulted in a referral to the local authority by the judge (Children Act 1989, s.37). Trevor's solicitor had referred him to a colleague who specialised in care work. Barbara could not find the solicitor who had acted for her before, but although the solicitor she then approached located him at another firm, he declined to act because of pressure of work. Consequently the new solicitor continued to act for Barbara, but advised her partner, who had attended the appointment with her, to find another solicitor because it appeared there might be a conflict of interest between the parents.

The local authority had sent letters before proceedings in five of the cases and this had resulted in four of the parents taking legal advice before the proceedings started. Clare, Jeff and Dawn had attended pre-proceedings meetings at the local authority with their lawyer; Bernie's lawyer had written to the local authority in response to their letter but received no reply; Kevin, who was on the run from the police, unsurprisingly, failed to turn up for his meeting. Emergency action was taken to protect Colleen's, Evie's and Hayley's children. In the other cases, the local authority had proceeded directly to care proceedings either because there was an immediate need to secure the children's care or because there appeared to be no alternative to court action.

Parents found their solicitors in a variety of ways: using a list provided by the local authority, the telephone directory, through word of mouth, walking into an office off the street or being referred by another lawyer. Within firms, the selection of solicitor largely depended on availability. Solicitors routinely took any case where they had time to see the client, making checks only for conflicts of interest such as a colleague already being instructed by another party to the case. Clients seeking to transfer from other solicitors were an exception. Almost all of the solicitors interviewed were reluctant to accept such clients who were seen as likely to be particularly difficult, '*complainers*' who have '*fallen out*' with their solicitor, and whose cases would need more

time than would be covered by their subsequent share of the legal aid fees. Also, where the new solicitor being approached knew the original solicitor, they usually believed that the advice given to the client was likely to be the same as they would give themselves. Less frequently, the new solicitor might recognise that the client's current firm had little or no experience in care proceedings, in which case they might take the case on.

The majority of the parents contacted their solicitor shortly before one of the early hearings. In part this reflects the study design, which recruited the case study sample through contact with solicitors and clients as at soon as possible after the start of proceedings. However, it is not unusual for parents, particularly fathers, only to seek representation well after the proceedings have started. In the *Care Profiling Study*, 48 per cent of the fathers who participated only obtained representation after the first hearing and another 10 per cent were unrepresented throughout. Solicitors commented that they commonly had to represent clients whom they had only just met, or even that they only met the client for the first time actually in court:

That's what I mean when I say sometimes the client walks through the door – it's very rare there's a gap between seeing them and there being a hearing. She came in, there was a hearing, there had been previous hearings, ICOs had been made – but she hadn't attended those hearings. (Solicitor 13)

This meant that they had little time to establish what the issues were, to explain what was likely to happen or to establish rapport. This process was made more difficult where clients did not bring any court papers and could not give a clear account of what had been happening, as frequently occurred.

Barbara's solicitor first met her the afternoon before the first hearing and had not had time to assimilate the large batch of papers she had brought with her. The local authority had been unable to locate Kevin and his partner initially to serve the papers and it was more than 3 months before Kevin was located and formally notified. It was another three months before Kevin and his partner instructed their solicitors. Kevin's solicitor was telephoned the day before the IRH and asked to attend a hearing the following day. She saw her client for the first time at court, just before the hearing.

Most of the parents retained their original solicitor throughout, but Josie was referred to another firm at an early stage after her first solicitor identified a conflict of interest. Carly's original solicitor, who was a member of the Panel, passed on her case to a colleague in her firm half-way through so that she could prioritise acting for children. Her colleague was not a Panel member but had more experience of acting for young mothers.

There was frequently a disjuncture between the work needed to set the foundation for representation and the time available for this. Court timetables meant that there was usually only about a week between the start of proceedings and the first hearing. Delayed instruction reduced this, allowing very little time for client and solicitor to get to know and trust each other. Clients were highly stressed, fearing the loss of their children's care and their

role as parent, facing the might of the local authority, the complexities of court proceedings and an imminent hearing. Solicitors needed to obtain a lot of information from their clients so that they were prepared for the imminent hearing. Clients who were anxious and distressed needed information and reassurance but this could not realistically reflect the client's view that there was nothing wrong with their parenting and they were being unfairly targeted by social workers. Clients therefore would need some difficult and unwelcome advice but solicitors also had to establish that they were acting *for* them.

Overall, the initial appointment with a parent in care proceedings laid the foundations for a professional relationship which was likely to last at least a year. Both the limited time and limited information solicitors had at this stage meant that much advice was quite general and directed at maximizing the opportunity for the proceedings to end positively for the client. They did this particularly through encouraging clients to co-operate with the local authority, a message which parents, in denial about the need for concerns about their parenting, cannot have expected to hear.

5.3 Acting for Parents

The classic account of legal representation – *the lawyer advises; the client instructs* provides few hints about the work of representation as it applies to parents in care proceedings. Solicitors recognise that resolution of the parent's case (except in a very few cases of contested injuries or illness) depends far more on changes in the parent's life than on legal argument. In this context 'advising' necessitates covering a wide range of subjects beyond the law, particularly the client's relationship with social workers, and 'taking advice' particularly at the beginning of the case is likely to have more influence on outcome than 'giving instructions'.

It's about 25% law, 75% counselling really. It's not really counselling, but it's helping people understand. Our job as lawyers is to make them understand the evidence, how it fits the law and where it leaves them – and the options of being able to challenge. We're not counsellors – but we are! That's part of our role, in that it's helping them to understand. (Solicitor 5)

Giving advice was an essential preparation for obtaining the client's instructions about what the client wanted their lawyer to do at the first hearing. Clients needed to know what the court could decide at the end of the proceedings, what it was likely to do immediately as well as the options open to them at this point before they could give instructions. Only when they understood these could the client make an informed choice. This was the case even where the parent appeared already to know what they wanted to do.

She'd been through the process before, so she had some idea of what to expect which is why she chose not to engage with the local authority while she was pregnant because she thought the less information they had, they might just go away and leave her alone. I have to say the first time I met her,

she was clear what she wanted – but I had to discuss with her the possibility – what I tend to do is go through what the options are – what the outcomes could be. Option one child stays with you, option two child is placed within the extended family, option three child is placed with foster carers, option four child is adopted – so go through the full range. So the position always is aim to have the child returned to your care ... (Solicitor 13)

Advice

The most important aspect of advice, referred to by almost all those interviewed, including judges and magistrates' legal advisors, was to persuade parents of the importance of co-operation with the local authority. Clients typically considered that they were being unfairly targeted by local authority social workers. These views had to be challenged from the start. Parents were told that they needed to co-operate and that this meant turning up to all appointments and contact, on time, and providing any information the local authority sought. Some solicitors gave clients diaries to help them keep a track of hearings and appointments.

Well – I said that the main thing she needed to do was co-operate. I always advise parents that they should co-operate with social services. There was absolutely no point in doing anything else, and I advised her to accept any offers of help. ... the best thing I could suggest was that she did as she's told – basically. (Solicitor 38)

I'm just honest with them – I really am honest with them. 'This is what the local authority is saying, these are the reasons why they're saying that. You either work with them or you think they're against you.' That's what I've always tried to do – there's no point in hiding it from them. 'This is how it is basically – can you see these are what the concerns are?' It's about getting your client to recognise the concerns – once they've understood the concerns – then it's much easier to work with them. But they're often not able to change. (Solicitor 29)

Parents who could accept that that they had problems or recognise that the local authority had genuine concerns about their children's care were in a better position to make the required changes. Solicitors considered that it was crucial to be *honest* or *realistic* with clients from the very beginning, so as to manage the client's expectations, not to give them false hope and to ensure that the client understood right from the start what they were facing. This could mean very stark and unwelcome advice at the first meeting:

I tell them from Day 1 that it is highly likely that the plan will ultimately be placement, that there's a lot that we need to go through before we get to that stage and a lot is very dependent on their actions to see whether we can turn matters round. One of the things I say a lot to them is: I can only work with the ammunition you give me. If you continue to take drugs, go on the streets, then you're giving them their case. If however you attend CDT, go to rehab clinic, turn up for every contact, then there's a very good chance that we can turn it round, make an application for you to go into assessment, that sort of thing. I

think you have to be very honest because there's nothing worse than getting to the end of a case where they really think they're going to get the child back and they don't. (Solicitor 16)

Such advice was not without hope – clients were given the message that adoption was not a foregone conclusion and could be avoided if they could use the available services to make the necessary changes. It was not enough just to give up drink or end a violent relationship, the local authority had to be able to see this had happened through the parent's genuine engagement with helping services. Towards the end of her case Carole finally achieved the insight to enable her to give up drinking. However, the fact of her abstinence was not enough to allow the return of her child, given her insistence that she could do this on her own without the support offered to her, and its fairly short duration.

Not all solicitors felt it appropriate to take this approach at first meeting when the information they had about the parent was limited to what the social worker included with the application and what the client disclosed. Solicitors treated this information with caution, clients were not always truthful and might give a very partial account, and social work statements could also be slanted.

I think you can form a view about a case fairly early on.... Not really from the local authority papers because they're often inaccurate - but I think meeting a parent and seeing what they're all about - you can probably formulate a view as to their prospects if you like, reasonably early on. I think it is part of the job then to guide them and to try and encourage them to go in the right direction - in terms of assessments, engagement... (Solicitor 23)

The messages about co-operation and change could be delivered or repeated as evidence emerged:

Generally I try and break it down for them as the case progresses, so I don't ever get them in here saying, 'Oh by the way, you're never going to get your child back.' I never do that, I always try and break it down for them. So when someone comes in, it's quite negative towards the parent, I'll explain to them why it's negative and what they could do, how they could change things to make it better. I always try and break it down for them so it doesn't all come to one blow for them. That's how I try and do it – step by step. So I always give them – 'make the changes – alternatively you run the risk of losing your child'. (Solicitor 29)

Advice about co-operation with the local authority and other services was integral to making clear the limits of the lawyer's powers and the client's responsibility to deal with the concerns about their parenting. Lawyers could only '*advise clients about what they needed to change*', they could '*not sort out*' their client's lives and had to '*work with the ammunition*' the client provided. Getting this message across right from the start not only maximized the time the parent had to make changes it also made it clear that only the client could ensure that they kept their children.

Advice that the parent had to listen to the social worker and change their parenting was not easy to give effectively or to accept. It was not what parents, who came challenging their treatment by the local authority, expected to hear from the person they had chosen to represent them. Hayley's solicitor commented:

She was extremely prickly at the outset, very difficult to work with, but at the same time, I think she knew herself what she had to do. So even though she would have sat there and given me the impression that she hated my guts and thought I was talking nonsense, actually she was taking it on board – which she did do mostly. But she was very, very difficult to deal with in the beginning, understandably perhaps.

Barbara's solicitor subsequently attributed the breakdown in her relationship with her client in part to the fact that she pressed her to co-operate with an assessment the local authority wanted and was thereby perceived as not being on Barbara's side.

A second strand of initial advice involved explaining the legal process. Solicitors could outline the main parts of the process but could not predict what would actually occur or how long the proceedings would take because this depended on so many factors. Talking through the proceedings provided an opportunity to explain what the local authority's concerns appeared to be from the documents, to indicate the likely initial decision by the court and to discuss what the parent wanted to happen. In the example below both solicitor and client were very clear that she could not care for her baby and the client's parents were offering care:

When I first see parents, I explain to them that there are two stages to the court granting an order – the first is that the threshold has got to be crossed – I don't say 'the threshold' – I explain that it's the facts that they're relying on – and that the facts that they rely on are at the time they have to take protective measures, etc. And with Mum, given her mental health difficulties, it would be quite easy for them to establish that the threshold had been met. The second stage is: what are they going to do with the order, if the court grants it? And that takes us onto the Care Plan. And if the court is satisfied that the plan is appropriate, then they will make the order. Given her vulnerability, ...I didn't think that they would say that she was capable of caring for the child in the community, unsupervised. She was very nervous. She was moving into a new area, into a new home. She wasn't confident at looking after herself at that stage, so she was quite amenable actually to saying, 'No, I'll allow the baby to go to my parents.' So that wasn't a real difficulty with her. She was very much focused on what's best for the baby. (Solicitor 16)

Where the court's likely course of action at the first hearing could be predicted from the documents filed at application, solicitors could advise the parent that their options at this stage were limited. Opposing actions which the court would regard as necessary for children's safety would only serve to suggest that the parent had failed to consider the children's wellbeing and could be discouraged.

In this case, there were clear injuries – there was dispute about how those injuries had been caused. They had clearly been caused in the care of one or other of the parents – it seemed to be dad. She was still in a relationship with dad. She wasn't going to end that relationship. She accepted his explanation that it was an accident. And on that basis, I said to her that in my experience the court would grant an ICO and that a court would endorse the plan to remove the children whilst investigations were undertaken. So the advice I gave her was to cooperate and to agree to the order or, at the very least, if she didn't feel able to agree – as many parents don't – is that she adopted the position of she neither agrees nor opposes and effectively leaves it for the judge to decide whether the order is warranted or not. The judge did feel it was warranted and the order was made. And then effectively the advice that I gave in that particular case was to cooperate. (Solicitor 6)

The approach of 'not agreeing but not opposing' was suggested to parents both when ICOs and final care orders were being sought and clients were thought to have no prospect of any other outcome than the order the local authority sought. Solicitors offering it to their clients were recognizing both the real difficulty parents had in letting the local authority (or sometimes relatives) care for their children and the damaging futility of a fully contested hearing which could only serve to further reduce their client's self worth. However, where children were still at home when proceedings were started and the allegations were primarily of neglect, lawyers were unwilling to advise clients to accept the local authority's case. The information in the application amounted only to untested allegations, which could be inaccurate, and were rejected or denied by clients. This did not provide a sufficient basis for advising the parents to accede to their child's removal, much less that the local authority's case should be accepted. Such a stance was thoroughly in keeping with the High Court's interpretation of the basis for removal under an interim care order (see 1.3, above).

A third strand of advice was the need to focus on the child. This was the perspective of the local authority and of the court, so parents had to understand that the outcome of the case would be determined by the child's welfare, rather than on their rights, their wishes or their ideas about fairness.

The duty of the social worker is this, the court's duty over and above trying to be fair, is looking at the best interests of the child. That's hard for parents to understand. [I tell them] 'It's not because people don't care about you...' Usually – they may not agree with it, but that's - we can only do our best. It's not about them. 'It's not about what you want – it's about what's best for this child.' (Solicitor 28)

Many lawyers (some of whom also frequently acted for children) took this further acknowledging that even when acting for parents they had a duty to the child:

I always have to keep in mind that our first duty is about the child in the case and that's why it's very difficult sometimes to explain to a client... a case

where a child's involved and in care proceedings you just have to keep in mind all the time that you've got to tell your client to be sensible because you've got to keep this child's interest, irrespective of the fact that you're not acting for the child. (Solicitor 32)

Specific advice to accept the local authority's application for an ICO was only given where the facts were overwhelming, reflecting solicitors' commitment to not prejudging or pressurizing clients.

Separate spheres?

Sarat and Felstiner in their major socio-legal study of divorce lawyers concluded that divorce attorneys in the USA separated legal and personal issues and refused to get involved with the latter, taking no notice when their clients raised such matters (Sarat and Felstiner 1995). For care lawyers there is no such easy distinction. The personal is relevant to the proceedings if it impacts in any way on the client's capacity to parent their children. Indeed, the process of representation required lawyers to talk about parent's personal lives, and in turn clients chatted to their lawyers as others might talk to family or friends. Lawyers felt the need to advise clients about personal matters, hygiene and self care, and relationships with partners or boyfriends, because these impacted on their case. Clients had to show that they could look after themselves and prioritize their children's needs. Women lawyers (S28, S16, S39) in all four areas spoke of taking a role different from that of a traditional solicitor, *'like a mum'*, giving *'the sort of advice that you give to your children'*. Giving personal advice was not limited to women lawyers. Some lawyers saw this as legal advice; for others it was social support provided to clients to maximize their chances of succeeding:

Yes, it's a very practical job, I think. The other day I was encouraging a client – one of the main concerns is that she's really agoraphobic and depressed – and I was saying if you want to prove that you can cope with this, you don't need to rely on taxis to get to contact, you need to find a way on the bus to get yourself to contact because that will show them that you're taking on responsibility and that you are able to take it. And she did it. And that's not legal advice. I'm not talking to her about the Children Act, I'm talking about expectations and practical arrangements. (Solicitor 12)

Just give them legal advice, tell them bluntly what is what. Clients phone me up and say "I met a new man on Facebook". I say, "Cancel it – I do not want you having relationships." They say, "What do you mean?" I say, "Don't screw it up by doing that." They respect me because I tell them how it is and because you build up that relationship. But if the social worker said it they'd say, "Oh – they won't let me do anything." They perceive me as being on their side – even if I'm telling them the same thing. (Solicitor 14)

Solicitors considered that the quality of their professional relationship and their clients' belief that they were on their side allowed them to give this advice and made it acceptable to their clients when the same advice from their social workers would have been rejected completely. Barristers, even those who had only met the client at court on the day, were also seen to give

personal advice. Their professional authority rather than any personal relationship allowed them to advise on anything which could strengthen the client's case. Both barristers and solicitors were likely to have been seen by clients as *being on their side*. This *partisanship* (Davis 1988), based on the duty to follow instructions, strengthened the lawyer's position for giving advice but left the client free to ignore it.

She was advised very firmly that she was to cut all ties with him and she didn't follow that advice and obviously the advice in terms of if she wanted to get her child back, she had to break all communications with him. And we had a very, very worrying patch, shortly after the Findings hearing where it looked like the case was going to disappear because she was discovered to have lied about the extent to which she'd been in contact with him over quite a number of months. So we had to pull back from that as well. (Barrister 8)

Although it might be easy to give advice, lawyer's authority did not mean that their advice would or could be taken on board. Colleen, alone of the 16 parents whose cases were followed, managed to do as her solicitor advised, give up alcohol, engage with services, re-organize her life and regain care of her children. Carole only belatedly achieved the insight to follow her solicitor's repeated advice that she needed to give up alcohol. Hayley however, was finally overwhelmed by her need for a relationship with her child's father despite all advice. Many, if not most, of the parents followed in this study appeared genuinely to accept their lawyer's advice, but were simply unable to follow it through however good their intentions. Lawyers were generally sanguine about the limits of what they could achieve:

[D]oing those pep talk things and trying to win people round and not being able to get some to see the light. There are lots who do see the light but can't do anything about it. There are some who refuse to see the light and therefore will do nothing about it. And there are some who just – perversely – put the blame on me for not doing enough – and I don't take it personally by any means – it's a job. I just wish they could see that – there'd be somebody to help them. (Solicitor 18)

However they were not discouraged from advising clients about the personal changes they should make in their lives in order to retain or regain care of their children. Rather, they were able to view other outcomes as positive for their clients.

Instructions

The heart of the solicitor's relationship with the client is the duty to follow the client's instructions. In care proceedings this necessitates seeing the client repeatedly to discuss issues and evidence as the case develops. This can be difficult. Problems in maintaining contact with clients to take instructions was a common experience for parents' solicitors. Solicitors '*tried their best*' to get instructions, continually trying to contact clients by telephone and letter to invite them to make appointments but often went long periods without hearing from their clients, unsure whether they were still interested in the proceedings and without instructions relating to subsequent developments. The frequency

with which clients ceased to contact or respond to their solicitors and then re-engaged meant that solicitors drew no conclusions from gaps in contact during periods without court hearings. Continued engagement with the proceedings was demonstrated more by attendance at court hearings than contact at solicitors' offices. Carole's solicitor had no contact with her between February and June, but she always attended court hearings. Evie '*wasn't the best instructor*' and left her solicitor without instructions for quite long periods before disengaging completely after the finding of fact hearing.

Clients were typically poor at making and keeping appointments; others were exceptionally demanding repeatedly phoning their solicitors, demanding to know about progress and wanting further appointments. Many clients were disorganized and preoccupied; they lacked transport and were short of money for fares. Even in urban areas, travel to the solicitor's office could be difficult and time-consuming. For some parents, mental health problems or learning difficulties made taking a bus extremely difficult. In response to this a few solicitors made appointments to see clients at home; Barbara's, Lauren's, Clare's and Josie's solicitors each visited their clients on at least one occasion. Another solicitor commented:

So often I'm seeing people at home simply because I would rather know that I can nip to someone's home and they're there and I can see them, than have three or four failed office appointments – which are just frustrating...

(Solicitor 3)

Seeing the client's home provided some insight into their world, adding to the picture of their client's prospects solicitors made through meeting them. Barbara's solicitor was '*shocked*' at her obvious poverty and Josie's solicitor saw how dependent she was on her partner and recognized that his ability to care for her and their baby would determine the outcome. One firm made a practice of visiting parents at home because their office was not accessible on public transport. Other solicitors commented that visiting clients at home was inappropriate, beyond what could be expected, and that it was not ultimately helpful to clients to run around after them.

Where clients could not or did not come to the office their instructions were obtained at court. A few solicitors deliberately used court hearings to provide the venue and date for their meetings with clients. Even where clients regularly saw or spoke to their solicitors, taking instructions at court was commonplace – and in particular where documents were filed only that morning, the only way of obtaining the most up to date information and instructions on the latest proposals from the local authority.

Taking instructions on reports and evidence necessitated providing clients with copies which posed further problems. The clients of 11 of the 16 case study solicitors moved during the proceedings without immediately ensuring that their solicitor had their new address. Carole's solicitor lost track of her client for several months after she moved without informing her, finally tracking her client down through the children's guardian. Evie disappeared after the finding of fact hearing, avoiding criminal proceedings. Kevin, Jeff and

Carly did not have their own accommodation but stayed with various friends and in hostels. Lack of settled accommodation could mean a client did not receive items sent by post; Dawn's solicitor used a taxi to ensure her client received sensitive documents. Even if documents could be delivered to clients, not all could read and understand them. Josie, Clare and Evie were not unusual in being unable to read.

My experience in the last two years is I think about 75% of ...parents, are not capable of reading those sort of statements. You do have to sit down and read the pithy bits to them – the bits that actually affect them. (Solicitor 21)

The routine late filing of documents, by local authorities, experts and children's guardians regularly meant that the first opportunity to discuss these and any consequent change of view, with their client was immediately before a hearing. Similarly, barristers usually relied on the morning of the hearing to obtain or clarify the parent's instructions. Getting instructions at court posed particular difficulties. Most courts lacked sufficient interview rooms to allow even one for each case, never mind each party, so lawyers had to use public waiting areas, corridors, stairwells or the court café, all of which could be busy or crowded, to have sensitive discussions with their clients. The waiting areas in the family proceedings court in Area B were frequently bursting, and lawyers struggled to find space to speak to clients, sometimes ending up in the hallway. In contrast it was almost silent in the county court meaning that anyone waiting could easily hear exchanges between lawyer and client. At the final hearing Carly's barrister had thought '*it was not appropriate to bamboozle her in the corridor*' and had managed to find somewhere to take instructions in peace.

Taking instructions at court was also subject to time pressures. Court staff were understandably keen that hearings started without delay although most gave the parties considerable leeway to continue discussions. From the perspective of lawyers and their clients, there was a lot of waiting to get in to court. The county court in Area D was an exception; the judge expected cases to start at the time listed. Consequently and because he had been engaged on another hearing, Sean's barrister, who had not represented him previously, attended the CMC without having had any opportunity to speak to either Sean or the paralegal who accompanied him to court. Short adjournments to take further instructions during hearings occurred in this and other courts.

The need to be available to give up to date instructions was a major reason that parents were expected to attend court hearings. Unless the parent could be consulted, their lawyer could not play an effective part in any negotiation. Consequently, if a parent did not attend, their lawyer might telephone for instructions. Jeff's solicitor repeatedly telephoned him to get his instructions on various options after the local authority and mother agreed supervision orders which would bring the proceedings, unexpectedly, to an end. Lauren's solicitor also resorted to phoning her when the children's guardian provided information which Lauren had not told him. At a previous hearing this solicitor had refused to call his client to get her instructions on the threshold statement because this could not be done by telephone.

The scope of instructions

Mather and colleagues used the analogy of the cab driver in their article about lawyers and their clients negotiating divorce settlements – the client chose the destination and the lawyer the route (Mather et al 1995). In care proceedings, clients appeared to be far more involved in the journey, being asked for instructions on the highways and byways, intermediate stops and whether to approach the final destination with all guns blazing or to accept it as an inevitable journey's end.

Lawyers took instructions on anything and everything to do with the case not just evidence, plans and orders, but also procedural matters and how witnesses were to be treated. In relation to allegations in the threshold statement the court needed to know whether these were accepted or disputed and so parent's lawyers needed to take instructions in relation to each point raised. In the context of disputes about contact, which could include issues about the parent's attendance, presentation and interactions with their child, instructions provided the basis for challenging restrictions or seeking improvements.

Solicitors asked clients whether they were willing to be assessed, knowing that failure to co-operate with any assessments would count heavily against the parent. They also asked parents for views about specific assessments, not because they had relevant knowledge, clients necessarily relied on their lawyer's advice about the suitability of an expert, rather because this made them party to the decision. Later, the fact that an assessment had been done by an expert of the parent's choice might be used in court to justify refusing further assessments. (BO2) Clients who sought assessments were warned that experts were independent, that assessments might be negative and that this could also make it harder for them to keep any children they might have in the future.

Carole was asked whether she would agree to her case being heard when the magistrates' Chair revealed that she knew the social work team leader personally. At the judge's instigation, Sean and his partner were asked for their views about the relatives, who were caring for their son, being parties to the proceedings, despite the case for this being unanswerable. Taking instructions on procedural matters helped to establish that any trial had been fair – any objections had been heard and considered. Orders made by consent could not be appealed. Thus involving parents in these decisions prevented the proceedings being derailed within a system where parents were not expected to accept the final outcome, decisions were frequently challenged and appeals inevitably added to delay.

Instructions about the evidence, particularly whether or not the parent accepted the local authority's threshold statement were very important, but unless there had to be a finding of fact hearing these were generally left until late in the proceedings when all parties could see the implication of any objections. Hayley's solicitor spent over an hour on the first day of the final hearing taking instructions from her about her partner's visits to her home in response to new allegations, contained in evidence the local authority had

obtained from her neighbours. Instructions about what the client wanted, including their response to the local authority's plans, and how they wanted the proceedings to be conducted were repeatedly taken throughout the case.

Taking and shaping instructions

As Judge 1 remarked, *'[Lawyers] are paid to give advice, not just to take instructions.'* The advice given is the product of the lawyer applying their knowledge and experience to the information provided by the client, in the context of other information they have about the case. A client's vague account of the circumstances which had led to the proceedings could only produce general advice about the process and the importance of co-operation.

Most will just sit in front of you and say 'they've taken my child' – why? - 'because they have'. Well they've taken the child because they've got some concerns – 'well I don't know what they are.' So you've got to be quite general in what you talk about. (Solicitor 13)

Similarly, a partial or untruthful account from a client produced very different advice so lawyers changed their advice as the matters became clear. If, as the case unfolded, the evidence became clearer and the advice could also be clearer but this did not necessarily mean that the lawyer obtained clear instructions.

Probably that's the reason they're in care proceedings in the first place. Their lives are going to be somewhat disorganized – and sometimes it's a job to get instructions from them. (Solicitor 4)

Lawyers experienced a range of problems in obtaining instructions. Clients could be hard to engage in discussion about their case because they were too anxious, in denial about what they had done or because learning difficulties, mental health difficulties or substance misuse left them with limited capacity to concentrate. Carly was very easily distracted and on one occasion became more interested in the view from the conference room than talking to her lawyer. She rarely made any response to what she was being told so it was difficult for her lawyers to tell whether she had understood. Clients had their own priorities or issues. Sean was more interested in talking about a new business venture than discussing whether he would give evidence. Another client only responded to his lawyer's questions about a psychologist's assessment, *'It's not right'* and then focused on his views of the care system. Other clients were according to their lawyers *'untruthful'*, *'self-serving'* or *'evasive'*. One solicitor reflected on the problems this created for taking instructions:

With this particular client, understanding when he's actually giving true instructions, and what instructions would be self-serving and that you want to hear. The truth is a very movable feast, but having worked with this client for six or seven or eight months now, and seeing his story change. It's quite apparent that his story and instructions change when he thinks it might be to his advantage. So it's actually leapfrogging that process and getting to the

kernel of what the instructions are so that you're not on the back foot and caught out when he's giving evidence. (Solicitor 21)

Hayley, evidence of whose continued relationship with her abusive partner emerged at the final hearing, continued to mislead her solicitor about the extent of his visits, initially stating that he had come only once or twice but eventually admitting that he had visited daily for a couple of hours. This solicitor commented that Hayley had found it easier to speak to her clerk than to her and had even asked her clerk to discuss with Hayley whether someone else should represent her. Other clients seemed to respond in ways designed to confuse not clarify and never actually gave their solicitors the information they sought (BO8). Where clients frequently changed their mind or did so abruptly and irrationally lawyers were unsure whether these views were their true instructions (S 33). A client who had long supported the placement of her child with relatives fell out with them and wanted him adopted by strangers. Her lawyer reflected, *'I don't think she actually meant that, it was just how she was feeling at that time.'* (S 13)

Other clients were *'deeply suggestible'* and thought to be too easily influenced by their lawyer, so it was difficult to know whether they were merely agreeing with their lawyer's advice or saying what they wanted the lawyer to do. A solicitor commented, *'You have to be careful to ask open questions when taking instructions'*, and this was *'more difficult than cross-examination'*. (S21). It appeared that when lawyers were desperate to get instructions they resorted to closed questions.

Carole's solicitor was concerned that her client *'has a high regard for me and will listen to me – I'll have to be careful not to over-influence her. Obviously I will follow her decision.'* She went on to describe how scary it is having such vulnerable and dependant clients, adding that it would be irresponsible to encourage a fight.

Both barristers and solicitors were observed to take their clients instructions after *'giving them their options'*, listing the choices available to them at the particular point in the case.

So I like to empower them to make the decision. I would never ever force a client to do anything ...but I always give them the options.... (Barrister 6)

This process involved making clear what the lawyer thought the court's decision would be. The nub of *'taking and shaping instructions'* is finding the very narrow line between giving advice and following instructions – which gets to be most difficult for the most painful decisions – whether to let the child go or not. Lawyers had to find a way of advising their clients on what they thought would happen, without actually telling them what to do. Establishing that a client really was giving instructions not to contest either a final order or an ICO could be a very painstaking process indeed.

Carly's solicitor and barrister individually and together went through her

options on the morning of the final hearing where the local authority wanted care and placement order. The initial discussion lasted around half an hour. The barrister explained the views set out in the reports of the guardian and the psychologist. Both thought that Carly's baby could not wait for her to become able to care for her. She added that she thought the judge would agree. Carly had already been told this by her solicitor. The barrister then said if Carly wanted the court to hear the psychologist give evidence she could ask for adjournment. If the court refused the adjournment, there were two options, either the court could hear all the evidence, including from Carly, or Carly could not consent but not oppose the making of a care order. Further patient explanations and questions produced no response from Carly, and the barrister suggested that she should leave the solicitor to speak to Carly and her mother. Carly's solicitor asked Carly to explain the situation to her mother, which she did, and then left mother and daughter to talk together. Twenty minutes later they all went into court but the barrister obtained a 30 minute adjournment so that she could continue to take Carly's instructions. Carly's solicitor then told her barrister that Carly did not want to give evidence. The barrister and solicitor then spent another half an hour talking to Carly to check that she understood.

Lawyers had a number of ways to ensure that they had clear instructions. They wanted to know that the client had understood the position. Both the fact that the client had obviously listened to advice and had the capacity to understand the issues were reassuring. Carly's ability to explain to her mother what she had been told gave the lawyers the first sign that she had understood. Lawyers questioned their clients both asking them if they understood and to explain what it meant. Carly was asked by her solicitor, *Does it mean you're just giving up your child?* and she replied, 'No.' Her barrister then said:

Do you want to know what I'm going to say to the judge? That you've always wanted to care for Abi, that you understand the problems of the timescale for Abi, that you'll be able to care for children in the future but that you understand it is too late for Abi Do you understand? Is that how you feel? Carly replied, 'Yes'

Questions about instructions were repeated to check that the client was consistent, particularly where the client's instructions did not follow their lawyer's advice. After Sean's decision to support his older son's adoption by strangers, rejecting both a placement with his relatives and continuing contact he was asked three times if that was what he wanted. Instructions had to be 'informed' so it was important that clients understood not only what they had been told but the implications.

I do make it very clear to them that my opinion is this but if you want me to go along these lines I will, but the consequences will probably be this, this and this. But obviously you can only lead your client so far and ultimately you have to conduct the case as they want you to. And as long as I've told them what the consequences are going to be, I've got no difficulty in doing that, as long as they understand the consequences. (Solicitor 16)

In an attempt to ensure that Sean really understood the implications of his decision about Ashley, his barrister talked to him about children's need to know about their family, explaining that children often wanted to find their parents when they were 13 or 14 but that adopted children did not have this option. She told him about an adopted friend of hers and said:

I'm sitting here – being objective. It's your decision, but I wouldn't want to sit here and not tell you how Ashley might feel in the future. You and Mum need to understand the implications of wanting Ashley adopted outside the family, if he can't come back to you. The court might decide anyway that the best thing is for Ashley to stay with your sister. So you have to think about what you want to do, Sean, if Ashley isn't returned to you.

None of this altered Sean's view.

Lawyers also discussed with each other whether the client's instructions could be accepted. Second opinions could readily be sought where a solicitor and barrister were both at court, as in Carly's case. Sean's barrister discussed his client's instructions both with his solicitor and the mother's barrister who had given similar instructions. Barristers were seen as more able to get clients to see the realities of their situation, and for this reason solicitors arranged conferences with counsel. A solicitor reflected:

[t]he longer I do this, the more surprised I am, when I listen to a lot of barristers, when I instruct barristers to do hearings, contested hearings, it staggers me how much they almost persuade the clients to ... and that might be right ... but they encourage the clients not to do things, not to oppose. (Solicitor 7)

A barrister saw being able to get parents to accept that continuing to contest was pointless as being one of the two things that barristers do best:

I think that [one of] the two things that barristers do best is giving unpalatable advice in a way that is compassionate to the mother or the father who are going to lose their child or children, getting them to accept that you are helping really to spare the agony for them by not putting them through a contest that's hopeless – that's just overwhelming.... (Barristers' Focus Group)

In addition to Carly, both Evie's and Trevor's barristers appeared to get their client to accept rather than contest a key issue. On the first morning of a finding of fact hearing which was listed for 2 days in the county court, Evie's barrister went through the medical evidence to establish which, if any, of the injuries to her children she would admit. There was no other possible perpetrator. Using the photographs, taken when the children were first removed she repeatedly asked whether Evie could recognize marks on their bodies, and how they had been caused, eventually suggesting that she might have lost her temper and slapped her child. Evie who had mental health problems initially said she could not remember but eventually accepted that

she might have done so. The barrister told her that it would be better to admit she had caused the injuries than for a judge to find that she had done so and lied about it. She then turned to another line in the threshold statement – that Evie’s children had lacked appropriate supervision. Evie’s comment as she readily agreed to this appeared to indicate that she had not understood this allegation, *‘If the children cried, I would run to them straightaway.’* Other aspects of the threshold statement were also agreed and this element of the case completed in a 5 minute hearing. This process avoided the need for Evie to give evidence, something she was terrified of but which the barrister never mentioned in trying to get her agreement. It also avoided a 2 day hearing which would have been extremely unpleasant and upsetting for Evie.

Trevor, who was not offering care of Bianca after informing the local authority of the mother’s neglect, had refused to be assessed during the proceedings despite advice, taking the view that he had previously enjoyed regular contact with his daughter for several years and no one had ever had concerns about his parenting. He was outraged that the final care plan, which provided for his sister to care for Bianca under a care order, only allowed him contact four times a year and instructed his solicitor to contest this. Trevor’s barrister quickly gained his trust, convincing him that he should accept this contact, which would be reviewed regularly:

Yes and by the end he was great – he’d completely rolled over by the end, and was very pleased, just kind of totally trusted me to run his case to the best of –

Overall, lawyers shaped their client’s instructions in two ways. They clarified the options for them, ensuring that they understood the consequences of the choices they made. Occasionally they used their skills to convince clients not to contest when the outcome was a foregone conclusion and the client was very vulnerable. The substantial number of unsuccessful contests and the number of contested hearings lasting less than a day gives some indication of lawyers’ willingness to let clients decide how they wanted their case to be argued while hoping to convince them finally not to pursue matters. In the *Care Profiling Study* 23% of cases involved at least one matter which was contested at the final hearing but three quarters of these cases lasted less than one day (Masson et al 2008, 55). Only Carole contested the final hearing despite advice that she would not succeed; Sean’s changed instructions left Ashley’s relatives to argue alone that they should continue to care for him. Hayley’s lies left her trying to claim that she should regain her son’s care when she had undermined the basis for that decision.

Following instructions

The lawyer’s duty to follow instructions is fundamental to the relationship between lawyer and client and was clearly recognised as such by lawyers participating in this study. It was the *‘client’s prerogative’* to reject the lawyer’s advice. Lawyers were *‘bound’* by the client’s instructions both in the sense that they had *‘no option’* in the matter and to the extent that what lawyers could say in negotiations or advocacy was limited by the instructions.

I've got to act on my client's instructions and I can't say anything that is contrary to those instructions, so if [other lawyers] say something to me, I just say 'I'll discuss it with my client. Those are my instructions,' and they understand that. We all understand that we are acting for our client; we can't really say anything that we're not instructed to say, so I just shut up. (Solicitor 19)

Hayley's solicitor was understandably annoyed when the local authority solicitor suggested that it might be better for her client to admit breaches of her partnership agreement with the local authority by allowing her former partner into her home. Despite her angry reply, *'Are you teaching me to suck eggs? You know we are all bound by our instructions'*, she obtained further instructions to make concessions, but the evidence still showed a very different picture of Hayley's relationship.

It was the lawyer's responsibility to prepare and pursue cases according to the client's instructions to the best of their ability. Most lawyers professed to have *'no difficulty'* acting on instructions but one referred to it as *'a problem'* another that it was a *'bit tricky'* acting for the Official Solicitor who wanted further assessments when the local authority insisted that it was obvious Clare could not parent her children. Other lawyers made substantial efforts to get clients to think again. All regarded it as important to check that they had understood the client's instructions, and the client had understood the implications but where satisfied of this, they had to follow the instructions. It was irrelevant that they considered the instructions *'unrealistic'*, *'ridiculous'*, *'not in the child's interests'*, or that following them would damage the client's case, lead to an *'unpleasant'* and futile contested hearing, prolong proceedings or increase their cost.

There was no support from any of the professionals for Kevin's baby to be cared for by the grandparents who were already caring for his four older children. Nevertheless, their solicitor was instructed to apply for a residence order. Although none of the other lawyers thought the grandparents would succeed, they would not accept the local authority solicitor's suggestion that the application could be dealt with in half a day on submissions. They estimated that the number of witnesses would involve a two day hearing. The grandparent's solicitor commented rather apologetically, *'my instructions are to apply.'* Both Sean's solicitor and barrister were shocked at his decision to support his son's adoption by strangers rather than remaining in the care of his relatives, particularly because he had affectionate contact throughout. They recognised that Sean was heavily influenced by his partner but his repeated, firm instructions, rejecting all contrary advice left them no alternative. The barrister commented, *'Well he's scuppered his chances of ever keeping children.'*

Although the duty to follow instructions is extensive and can have negative consequences for clients who do not accept advice, it is not unlimited. Lawyers owe duties to the court not to mislead the court or pervert the course of justice, and to report to the Legal Services Commission where *'the client has required the case to be conducted unreasonably or so as to incur an*

unjustifiable expense to the Fund or has unreasonably required that the case be continued.’ (LSC, *Funding Code Procedures* 2008 C44 (i)) A proposal in 2007 to require reporting wherever the client had no reasonable prospects of achieving the result they wanted might, which might have necessitated a different approach by Carole and Trevor’s lawyers and those representing the grandparents in Kevin’s case, was not implemented (LSC 2007).

Lawyers were also concerned to maintain their credibility with the court and with colleagues. Where they had instructions which they regarded as unreasonable, rather than reducing efforts on behalf of their client they signalled using code, ‘*I am instructed to...*’ or ‘*I have not seen evidence to support my client’s case but I will put forward my client’s views*’ (CO1). One junior barrister suggested that doing this was ‘*not to try and attribute the blame...but because your reputation is such a huge thing...*’ Judge’s recognised this professionalism and preferred dealing with unrealistic applications to litigants in person. Nevertheless, solicitors reported that they occasionally ‘*sacked*’ clients because their instructions were unacceptable or because they had physically threatened them, their staff or other parties.

Unrealistic instructions most commonly related to contesting applications for ICOs or final care orders, and arrangements for contact. In relation to final care orders particularly, the duty to follow instructions was buttressed by the universally held view that clients had a right to their day in court (see 2.3, above). Parents should not be expected to give up their children without a fight, even if they had no prospect of caring for them. Parents were believed to be reassured that they had done everything they could, and likely to regret giving up. This did not mean that parents were encouraged to contest hopeless cases, or that efforts were not made to ensure that they fully understood the implications of contesting. Rather, that they were always given options about how their case was run:

What I’ll say is ‘How do you want me to play this? Are you going to go down all guns firing and throw as much mud as possible, or do you just want your day in court?’ And there’s a difference. Some people say, ‘I want that social worker in the box and I want to make mincemeat out of her.’ Some people will just want to tell the judge how they feel. So I’ll always let them decide how I run the case.... (Barrister 6)

5.4 Negotiation

The importance of negotiation in the care proceedings process was outlined in 2.4, (above). Whilst pre-court negotiations involving lawyers for all the parties were limited substantially to Advocates’ Meetings in Area D, they occurred regularly before all types of hearing in the other three areas, and often included members of the social work team and the children’s guardian. Negotiation was used to agree issues so that draft directions could be provided for the court in accordance with the PLO. The emphasis in Area D on judicial case management meant that there was considerably less negotiation outside Advocates’ Meetings, which were conducted strictly according to the PLO. Nevertheless, there were some informal discussions

between lawyers in the Advocates' room before hearings relating to the most recent developments. This part examines how and what parents' lawyers negotiated in care proceedings.

As described previously (see 2.4, above), discussions amongst the small community of lawyers working in care proceedings who knew each other well were generally relaxed and occasionally drifted into social conversations once agreement had been reached, during the wait for court. Tensions occasionally arose where an 'outsider', most frequently a barrister, adopted a more forceful tone (Observation in Jeff's case) or the local authority was unwilling to accommodate the parent's position in any way. Discussions between the lawyers contrasted with the more stressful and emotionally draining discussions with parent clients. It was possible to identify a range of approaches in parents' lawyers' discussions and negotiations with the other lawyers and professionals. Sometimes parents' lawyers spent most of the time with the other lawyers, leaving briefly from time to time to consult their clients; at other times they remained with their clients except for occasional and short meetings with the other lawyers. It is not possible to say whether this was a question of the lawyer's style, the chemistry of the group or the pressures of space and time at individual hearings. As already described (in Chapter 3), there was recognition of the position of clients, waiting for their hearings during these periods of negotiation.

Negotiations took place with all the other lawyers, sometimes together and sometimes separately, and, as Mather et al (2001) found in their study of divorce lawyers, with the lawyer's own clients. Lawyers sought to reassure their parent clients that they would put their case as well as they could whilst at the same time seeking to *persuade* them to agree to compromises suggested by the other parties. Not all such proposals were acceptable; the lawyer had to believe that the concession benefitted their client or was the best which could be achieved. For example, at an early stage, Carole's solicitor rejected the suggestion that her client should agree to Ben's placement in foster care, asserting that her client's care was not '*that bad*'. Through negotiation with their clients lawyers sought to shape or change their instructions. They did not merely '*give clients their options*' and let them choose but advocated for a particular proposal, indicating its advantages and the poor chances of getting anything better. Sean's barrister went to considerable lengths to explain why it would be better for Ashley to be brought up by relatives rather than adopted, referring to his need in adolescence to understand his origins and the fact that he would only be able to access birth records at age 18 if he were adopted. Both this barrister and the mother's barrister negotiated jointly with their clients, at the judge's behest, to persuade them to agree to Ashley's carers being made parties, (even though the carers had an unanswerable case for party status, having cared for Ashley for over a year). Seeing the clients together appeared to be the only workable approach given that Sean would not do anything which his partner opposed. Stressing that it was in the parents' interests for the relatives to be parties and that fairness required this, the lawyers obtained their reluctant agreement. Other parents who were resistant to proposals were frequently told, '*We would probably not do better with the judge.*' Where parents appeared willing to

agree, their lawyers sought to establish whether there was anything they would like to add with a view to seeking some adjustment for the parent. Ensuring that the parents got something out of negotiations was important, not just for the parent's self esteem and to encourage their continued co-operation but also for the lawyer's view about their own influence on the case:

And then try and find other elements that make the decision more palatable for them like trying to achieve something with contact maybe, so whatever I do, I try and get some positives out of it for the client so they come away feeling, yeah, okay, they had to accept that maybe they'd lost their child, but they were going to get some contact. (Solicitor 32)

Parents' lawyers sought to get the other parties to accept their client's requests particularly about arrangements for contact but also other issues such as the family name used by the child after placement with relatives (CO6). If proposals were not fully accepted, they sought a compromise which clearly took account of the parent's view. They also sought to clarify the local authority's expectations and how the case would be presented, including the witnesses called and the approach taken in cross-examination. Hayley's solicitor and the local authority solicitor agreed that proving Hayley's continued relationship with her abusive partner did not require calling her neighbours (who had informed the local authority and provided witness statements) to give oral evidence. They were taken aback when the child's solicitor, whom they thought had agreed with this approach, sought witness summonses for their attendance.

The search for compromise also involved testing the water to see if other parties, particularly the children's guardian, accepted their point of view. For example, Trevor's solicitor tried to get the children's guardian to agree that Trevor should be allowed unsupervised contact but the guardian accepted the local authority's stance on this. Through negotiations the positions of the various parties coalesced and alliances were forged over procedural and substantive issues – the need for assessments; joint instruction and the sharing of assessment costs; timetabling; the conduct of hearings; ICOs; and contact. Alliances were not static but shifted throughout the proceedings as issues, parents' and children's circumstances changed and the focus altered; Jeff's case illustrates this. In discussions before the first IRH, the mother's solicitor and children's guardian formed an alliance against Terry's barrister to resist the proceedings being diverted by Terry's claims for residence and contact. During the same discussions the children's guardian and Jeff's solicitor opposed the local authority's position that it would have no involvement in any private law proceedings. In discussions before the second IRH seven months later, the children's guardian and local authority were agreed about the level of Jeff's contact. The solicitors for the mother and Terry agreed that they would pressure Jeff's solicitor to accept this level of contact. At the following hearing, the local authority lawyer took up a suggestion from the children's solicitor's that Jeff's contact should be dealt with in private law proceedings and announced that she was now only seeking a supervision order. With the exception of Jeff and his solicitor, all the parties were content because their chief concern had been ending the

proceedings, which had lasted more than 60 weeks and were very stressful for the mother. In Sean's case, a shift in the local authority's position from supporting Ashley's placement with his relatives, to accepting the guardian's recommendation of placing him elsewhere for adoption with his brother, had a cataclysmic effect on the proceedings.

Alliances with the children's guardian were most sought after both by parents and by the local authority because of the special status the guardian held as independent child welfare expert. If the children's guardian were not at court, the children's solicitor could act as a proxy, but only to the extent of the guardian's instructions. Support from the guardian strengthened the parent's case, either achieving a compromise or persuading the judge against the local authority's position. Numerous examples were observed. The support of the guardian for placement of Colleen's son with his grandmother resulted in the local authority deciding not to seek an ICO to place him with local authority foster carers. Similarly, the guardian's agreement with Carly's barrister that the baby should not be removed under an ICO led the local authority to propose a written agreement setting the terms for Abi remaining at home. The impact of having the guardian on side was also plain when the judge in Area A refused an ICO which had been contested by the mother's barrister who had support from the child's solicitor (AO12).

An alliance between the parents could place them in a stronger position than either would have been expressing conflicting views. Although the issue was finally determined by the judge, the fact that both Josie's solicitor, instructed by the OS, and the father's solicitor supported an assessment by an independent organisation appears to have influenced the decision to direct this, despite the high cost.

There were four major issues other than timetabling and hearing arrangements which dominated prehearing negotiations – interim care arrangements (discussed in 2.4, above); the appointment of experts (including the allocation of the costs of this between the parties); the local authority's threshold statement; and arrangements for contact. Negotiations relating to these issues *differed*, whilst all parties had views on assessments which impacted on the evidence available for the proceedings, only the local authority had concerns about costs because legal aid funded assessment costs for the parents and the child. The threshold was largely seen as a matter between the local authority and the parent whose care was in question. Discussions about the threshold were usually bilateral with both the local authority and the parent's lawyer seeking concessions in the form of amendments to the threshold in order to avoid a contested hearing. In contrast, contact negotiations generally put the parent's lawyer in the position of supplicant, seeking to increase their client's contact with no bargaining chips just a different perspective about the best arrangements for the child. Parents' views were generally sought before negotiations on assessments were opened. There was no advantage and considerable disadvantage to parents if their assessment was ordered but they failed to comply. Negotiating the threshold and contact both involved the active engagement of parents;

lawyers moved repeatedly between their client and the local authority team in order to reach agreement.

Expert assessments

Getting permission for independent assessments to build their client's case was an important part of representing parents. Lawyers recognized that they needed to establish their client's trust. Clients did not trust the local authority and would not trust the court unless it was given an independent view.

[N]ot necessarily my lack of trust. Certainly most of the social workers in this area, most of them, are very experienced, very good, and I have no criticisms of them ... they might get it wrong but generally ...do a good job. But my clients don't trust what they say ... (Solicitor 32)

Making sure they 'were assessed properly' (S 23) and securing second opinions in injury cases (LAS 4) was part of getting the client 'the best deal' (B 5). Identifying the sort of expert evidence which could counter the local authority's view of the parent's care, finding an expert willing to do this within the court's timescale and getting a direction for the expert's appointment were important (and time-consuming) aspects of representing parents. For example in Carly's case conflict arose between the local authority who asserted strongly that the assessment of Carly's capacity to parent should be done in-house and Carly's solicitor, backed by the child's solicitor, who did not feel confident that it would be done properly but should be conducted independently by a more expert assessor. After considerable discussion, agreement was reached on the basis that an agreed letter of instruction would be provided to the local authority assessment team, the assessment would be preceded by a meeting of the professionals involved and there would be monthly progress reports to ensure the assessment remained on track

It was generally not difficult to get the other lawyers' agreement for assessments through discussions at the CMC. The view that it was 'only fair' to allow independent assessments was widely held and local authority objections were often only to paying part of the cost. Judges acknowledged the expectation that they should control assessments but were unwilling to refuse applications because of the negative approach taken by the Court of Appeal when assessments had been refused (eg *Re K.* (2007); *M (A Child)* (2009); *D Mc G v Neath Port Talbot County Council* (2010)). Where judges readily ordered assessments despite objections from the local authority, there was little point in the local authority rejecting suggestions out of hand, rather lawyers focused on the selection of expert and the terms of the instruction. Clare's solicitor had sought a psychological assessment for her client during the pre-proceedings phase but the local authority had resisted even though the need for this had been identified in the core assessment. In discussions before the CMC the local authority lawyer first asserted that no further assessment was required, but later accepted as if the matter was never disputed. In Josie's case, failure to agree an assessment resulted in

contested proceedings for a direction. The judge expressed misgivings about the proposals and its cost but nevertheless agreed it should go ahead.

Later in the proceedings when assessments were likely to prolong the case, they were more likely to be resisted but this was not inevitable – a case was observed where the local authority barrister's objection to an assessment for a father who had failed to attend a previous assessment was discounted. (CO9) A solicitor representing a mother recounted a similar case:

*I had a case today where we've had a parenting assessment within the proceedings and the father didn't engage with the assessment at all. It was pretty negative and now father wants an independent social work assessment and everybody seemingly is saying, 'Fine, off you go and do it'. We've had to advise our client, she probably really doesn't want to get involved in it. But do I think it's a complete waste of public funds? Yes. Have I voiced my concern? Yes. Is anybody bothered? Well, seemingly not. Maybe we shouldn't allow it. But I think sometimes we need to be **robust** where the evidence already exists. (Solicitor 37)*

Such a robust view was taken in the contested hearing about assessments late in Bernie's case, when both Bernie and Patrick's father sought assessments. This issue was made more complex by the very substantial delays which had already occurred, concerns about the suitability of Bernie's brother as a carer for her son, Patrick, which needed further work or assessment and Patrick's attachment difficulties. Neither of the parents had been individually assessed; a psychological assessment of Patrick had considered their parenting, suggested further assessments and raised concerns about Patrick's proposed placement with Bernie's brother. Bernie's solicitor had not previously sought an assessment because she thought her client's lack of insight would be '*found out*' but now thought an assessment could be helpful. However, she was anxious in case further delay led to the brother dropping out and a plan for Patrick's adoption, which Bernie desperately wanted to avoid. Patrick's father, who had demonstrated little interest in the proceedings early on, was now represented by a barrister who argued strongly for his assessment, unconcerned that the placement with Bernie's brother might be lost. The differing stances of the parents' representatives precluded an alliance between them; Bernie's lawyer's arguments supported the guardian's position rather than that of the father's barrister. It appeared that neither parent's representative expected to succeed in getting an assessment ordered; Bernie's solicitor advised her client to see if this could be arranged through her GP. Following a hearing lasting an hour and 20 minutes and an hour of deliberation, the magistrates refused both parents' applications.

Observations also revealed that discussions about instructing experts were sometimes unfocused (observation in Jeff's case) or that a rather casual approach was taken with the mere suggestion by one party of the possibility of an assessment being taken up vigorously by another as essential (observation in Bernie's case). Although lawyers suggested that '*hopeless applications*' for assessments would be unsuccessful (B 5), that all depended

on what was considered to be in that category and what purpose the assessment was intended to serve. Where the assessment is intended to help the parents accept their inadequacy or the court's fairness, the fact that sufficient information was known or the outcome was obvious appeared unimportant. The use of expert assessments as a basis for testing parental commitment, finding an agreed solution, encouraging parents to accept the inevitable or '*counselling them out*' led to a generally relaxed view to negotiating about experts. This was compounded by lenient views amongst judges and magistrates' legal advisors who recognized that expert evidence could avoid contested hearings and made it easier to justify decisions if the case remained contested at the final hearing.

In the prevailing financial climate, the cost of assessments was regularly a disputed issue, with some local authorities refusing to make contributions to further assessments. Local authority lawyers felt an obligation to try to limit assessment costs for the authority:

[W]e're continually being told [by our management] we've got to save money and cut corners and refuse to pay our share of things or pay at all – we have to object and sometimes it's clear the court can't possibly make a decision without there being an assessment. Of course the Local Authority need it – either they haven't had time to do the assessment or they haven't got the skills. (LA Solicitor 3)

Frequently the legal representatives of the other parties would make a token attempt to persuade the local authority to contribute, but did not press where the local authority line was known to be firm. For example, during the hearing about Bernie's assessment (above) her solicitor countered the local authority's barrister's objection to paying for this, telling the magistrates that she did not expect this. The issue of allocating costs between the parties was sometimes left for adjudication by the court. In Carly's case, the grandmother's advocate pressed the other parties to contribute to an assessment of her client. The local authority resisted this on the basis that the assessment would duplicate work already done by themselves. There was, however, no serious consideration as to whether this assessment was necessary, the other legal representatives remaining non-committal. This issue was framed as a dispute over costs and put to the judge. Having established that the proposed assessment could be funded by the LSC, the judge decided that the grandmother should bear the costs of the assessment.

Threshold

The threshold statement was the subject of negotiation in most of the cases. There was no case in the sample where the parents disputed the whole basis of the local authority's intervention, such cases are highly exceptional. No negotiations over the threshold took place in Kevin's and Barbara's cases. Neither Kevin nor the mother attended their IRH and there was substantial and irrefutable evidence of significant harm. The local authority solicitor asked the magistrates to make findings on the basis that the parents were '*not contesting but not consenting*' as she had indicated at the Advocates' Meetings. In Barbara's case the local authority's withdrawal of its application

(and its earlier attempt to obtain an ICO) meant that the threshold was hardly discussed. Indeed, difficulties in proving the original threshold together with the likely disastrous impact on the new-found agreement between Barbara and the social worker of attempting to do so, seems to have led to the local authority's application to withdraw. In Colleen's case, the discussion was brief, as might be expected given the general agreement that the children should be returned now she had completely re-ordered her life.

The threshold might be discussed between the lawyers at any hearing and was frequently discussed before several hearings. Negotiations became more focused at the IRH with the aim of clarifying areas of disagreement and limiting the extent of evidence and debate at the final hearing. Although the local authority's evidence might be sufficiently clear earlier in the proceedings, the possibility of developments, or new allegations, which would cast a different light on the matter of harm meant that lawyers were not anxious to finalize the threshold early on:

One of the problems though with getting the threshold sorted early on is that it is always open then to people to read, isn't it, and say, 'well, there was this issue and there was that issue or we need to add something else to the threshold, like there's another sibling coming along, oh right, we need to beef it up a little', or the parent says, 'oh, that was wrong'. (Barristers' Focus Group)

Solicitors used the threshold document to help parents understand what they needed to do if they were going to succeed in retaining or regaining care of their children and therefore considered the local authority's case with them at an early stage. For example, Barbara's solicitor spent much of her first one and three-quarter hour meeting with both parents reviewing the threshold with them. However, they often left further detailed discussion with their parent clients about the threshold until the later stages of the proceedings when the likely outcome of the proceedings was clearer to both the lawyers and the parent. There were a number of reasons for this: explaining the concepts of 'threshold' and 'significant harm' to parent clients was seen to be difficult for example for Jeff's and Carole's solicitors; assessments which indicate the parent's inability to care for the child in the future could make it less important to focus on specific allegations (as in Bernie's case); and parents were often more willing to accept their limitations and agree aspects of the local authority's case later in the proceedings, after independent assessments. Also, drafting a statement for the parent, which referred to each of the local authority's allegations (which appeared to be expected in Area D) was *time consuming* (S 26). This was problematic where the parent claimed not to be able to recall facts such as missing medical appointments (DO6) or failed to see their solicitor (DO3, Kevin).

There was some general discussion between all the parties' lawyers about the focus or tone of the local authority's threshold document, particularly about whether there was enough in it to satisfy the test in s.31. However, negotiations chiefly occurred between the parents' lawyers and their respective clients, and between the parents' lawyers and the local authority

lawyer. These negotiations concerned the wording of the threshold statement – what allegations the parents accepted and which they rejected, and whether it was possible for the statement to be amended to omit or alter items which were not agreed. In Carole’s case these negotiations occurred on the morning of the first day of the final hearing. Carole’s solicitor had already filed a statement from Carole responding to the threshold statement and the main focus of the final hearing was the care plan, with Carole arguing that she had given up drinking and could care for Ben. In discussion with her barrister, Carole accepted all the allegations except that her son went to school unkempt and was soiling. Carole’s barrister then spoke to the local authority’s barrister who was unwilling to compromise over these aspects of neglect. The hearing started without a final agreement but was adjourned for further discussions. During the adjournment further discussions between the barristers led to these concerns being termed ‘poor toilet hygiene’, which Carole accepted. A search for wording which parties could agree and would also allow parents to retain some self-respect also occurred in the cases of Bernie, Jeff and Trevor.

In Evie’s case the negotiation went beyond the wording. When Evie’s barrister took her instructions about the injuries to her children (see 5.3, above), Evie admitted causing most of the injuries but asserted that injuries to her younger child had been caused when the police removed the children from her care. Following discussion with the local authority lawyer and the child’s solicitor, the local authority lawyer agreed that the threshold should be based on actual harm to the older child and risk of harm to the younger child so that a contested hearing could be avoided. Negotiation with the parent client could be quite hard, with parents who were unwilling to accept allegations which were clearly supported by evidence being warned as Carly was, ‘*They are saying if you don’t agree you will have to give evidence.*’ Conversely, representing parents in negotiations with the local authority looked like plea bargaining, with parents’ lawyers defending their clients from the allegations which they found most unacceptable on the basis that they had ‘*already accepted so much*’ as Carole’s solicitor did.

Negotiation of the threshold could have major implications for the future if concerns were dropped on the basis that a case could be proved without them:

The other thing is – some fact finding cases if there are serious allegations about a parent – you can achieve then, if you can avoid findings of sexual abuse or whatever else is alleged against the parent. You could have a case where that’s alleged but also neglect issues. If you get a finding then that sexual abuse didn’t occur but that neglect occurred and therefore the children can’t be looked after, they have lost the child to that extent, but preserved some sort of reputation which may be of relevance for the next child – for the future. (Solicitor 26)

Judges were almost invariably content to accept an agreed threshold without delving further. However, the judge in Area D appeared alert to the importance of full thresholds. The local authority lawyer was questioned as to

why an allegation in Dawn's case had been dropped in the final threshold, and insisted on hearing evidence about it.

Contact

Negotiating contact involved seeking agreement between parents and professionals with conflicting perspectives of rights and welfare, and different understandings about the contact arrangements which would best meet the child's needs. For example, Carole was concerned that Ben would feel bereft if her contact was reduced from weekly to monthly when he was placed with long-term foster carers but the social worker and guardian considered that weekly contact would not help Ben settle into the placement and give him mixed messages about returning to Carole. Jeff's contact could be very stressful for Julie but restricting it to twice a year might make him less willing to leave her alone at other times and more likely to bring new proceedings. For local authorities, contact also involved issues of resources – the availability of contact centres and the costs of supervision.

For parent's lawyers improving contact arrangements demonstrated to the client that their lawyer was achieving something for them, which was important at the early stages of the proceedings for gaining trust and keeping parents engaged in the process. Contact also carried the possibility of strengthening (or weakening) the parent's case through opportunities it gave parents to show the quality of relationships and their commitment to their children. The plan to return Nate to Hayley was due in part to the quality of their interaction at contact; the guardian was very impressed by Hayley regularly bringing suitable, home-cooked food for her son. Parents' lawyers recognised the difficulties faced by parents in continuing their role and relationship with their children through contact. The formality and unnaturalness of meeting your child at a contact centre and being observed was emotionally upsetting for both parents and children. There were practical problems about timing and venue which made attending contact more stressful so that the parent was less relaxed and happy with their child. Securing contact arrangements during the proceedings which worked well for both parents and children was therefore an important goal for parents' solicitors and for their clients.

Parents were expected to prioritise contact above all else; parents frequently had to leave court hearings early, often having spent hours at court waiting, so that they did not miss contact. Colleen and Bernie had to be excused from hearings which were (or were expected to be) contested because they had to get to contact.

Punctuality for contact was also a particular issue of parental discontent. Whilst parents were expected to attend promptly, they regularly told their solicitors that their children were brought late to contact centres. Not only did this mean that parents lost valuable time with their children it indicated to them how little value social workers put on their relationship with their child, and the application of double standards. Unlike other matters which were negotiated contact was not all or nothing, each aspect of the arrangements was a bargaining chip with the number of hours, times, frequency, location

and supervision all being matters where adjustments could be sought through negotiation. In BO7 significant changes to contact were made only when the mother and grandmother asked for this. Despite some attempt by the mother's barrister to protect her contact, the local authority planned a temporary suspension whilst the child settled in with a new carer, a paternal relative. This was particularly difficult for the mother because it meant no contact at Christmas. In response to her barrister's explanation of this plan, that such restrictions were usual '*in a case like this*' the mother specifically asked him to see if the social worker would agree to pre-Christmas contact for the maternal family at the grandmother's home. This was readily agreed by the social worker to the relief of the local authority's barrister although overall there was less contact than the mother (and her solicitor) had hoped the barrister would secure.

Contact notes, records of observations, usually by social work assistants, gave the local authority team, the guardian and the parent's lawyers a valuable indication of how parent and child interacted. Parent's lawyers checked the accuracy of these notes with their clients; Bernie's solicitor immediately challenged the social worker when the notes showed Bernie had missed contact when, in fact Patrick had been on holiday with his foster carers. Parent's representatives were also seen to resist reductions in their client's contact where the reasons given were not supported by the contact notes (BO6, BO7, CO7).

At the end of proceedings, contact arrangements could show the parent that they had not lost completely. Where children were to be placed permanently with relatives contact arrangements might be set out in an agreement or a court order to provide clarity. Indeed, in AO10 the caring relative's barrister (new to the case) was surprised that the social worker, guardian and both parents' lawyers considered this unnecessary because of the unusually high degree of trust between the parties. If a care order were made, contact arrangements would be continually reviewed. Negotiation at the end of the proceedings nevertheless gave the parent's lawyer a chance of influencing the starting point for their client, Carole's barrister, for example, was keen to have the possibility of overnight contact for Ben included in the final care plan, even though this would not bind the local authority because she thought it would help ensure its future consideration. Another solicitor told of a case where she had been able to persuade the mother to accept this placement and negotiate substantial contact:

I negotiated – we didn't have a contested hearing because the father was having the child. [Mother] wasn't happy about it because there was a lot of conflict between them, but I actually spoke to her quite firmly, I said 'You know – if it's not the father then you're really looking at adoption because you haven't had any assessment and I'm sorry to say a baby would be easily adoptable.' I told her quite bluntly – some people wouldn't have done that but I think I probably had to because we would have had a contested hearing anyway and my feeling at that point was that I had to negotiate contact for her. So I wanted her to keep in contact. So I negotiated and got her twice a week contact which was a little bit more than they were offering. (Solicitor 10)

Successful negotiation could mean a substantial reduction in the length of the final hearing, for example from one and half days to less than half a day in CO6. Conversely, where negotiation was unsuccessful social workers would be pressed to justify their contact plans. The father's barrister in Bernie's case did this receiving assurances that reviews of contact would reflect Patrick's wishes, which she used to persuade her client that this was the best outcome he could get.

Lawyer's negotiation of contact was clearly 'in the shadow on the law' (Mnookin and Kornhauser 1979) with lawyers referring explicitly to what the judge would like or do, in order to make parents realise that nothing better was likely to be achieved through discussions with the other parties (BO7 CO6). Children's guardians' views about contact were extremely influential; support from the children's guardian entrenched social workers' positions or encouraged them to adjust plans. The guardian's suggestion that Clare could have tea with her children rather than playing with them provided the basis for a compromise over contact. In Jeff's case, the lawyers and the guardian considered a range of possibilities for Jeff's contact but were unable to bridge the gap between contact which would enable Jeff to have a relationship with his child, which he said he wanted despite failing to attend contact (or discuss it with the social worker) and more limited contact to allow the child to know about Jeff, which was all that the local authority was prepared to offer. Jeff's solicitor was unable to shift either the local authority or to get her client to agree what was proposed. A contested hearing was only avoided by the other parties accepting the local authority's proposal for a supervision order, which ended the proceedings without a need for a contact plan.

Where negotiation failed issues might be dropped to be taken up later or pursued in advocacy. Representatives used negotiation out of court and advocacy in court to put forward their client's case and negotiated with their clients to win acceptance of compromises they or other parties suggested. Unless everything (or nothing) was agreed, negotiation interacted with advocacy to shape the resolution of the case.

5.5 Advocacy

Although much was resolved in pre-hearing negotiations, parent's representatives had to be prepared to pursue their client's case requesting a further assessment, testing the evidence for allegations or challenging the care plan in court. Advocacy, in the sense of putting a persuasive argument - making submissions - could be required at any hearing and occurred at some point in each of the case studies. However, only the cases where an interim order, the threshold or the care plan was actively contested demanded detailed cross-examination of witnesses.

Solicitors have traditionally been heavily involved in advocacy in care proceedings. Prior to the Children Act 1989 these proceedings were only held in magistrates' courts, which were seen as largely a place for solicitors. Solicitors could also appear in wardship cases in the higher courts because

they were heard in chambers and a few did so. Care work attracted solicitors who wanted to do court work and provided them with opportunities to develop their advocacy skills. Indeed opportunities to do advocacy was one of the factors which brought many solicitors into care work.

Advocacy by solicitor or barrister?

Fundamental to the solicitor's role, affecting the volume of work they had to do, their relationship with their client and the fees they earned for the case was the decision to represent the client at court themselves or instruct counsel. The majority of solicitors did at least some court work for parents in care cases; a substantial number, at least 40 per cent of those interviewed regarded themselves as *advocates* and undertook most or all of the hearings in some of their care cases. However, some solicitors, including three interviewed in the study were effectively *office-based* and routinely instructed counsel for hearings. Others instructed barristers because they considered that this was best for the client.

In contrast, Bernie's and Hayley's solicitors, who each represented their client at the final hearing, believed that it was better to undertake advocacy themselves. Carole's solicitor also stressed the importance of doing her own advocacy – and intended to – but a number of factors conspired to prevent this. Bernie's solicitor said that she felt more fully engaged in cases where she did the advocacy. Hayley's solicitor considered it *unnatural* not to represent her clients in court:

I think it's just a natural conclusion to meeting the client and taking the case in the first place. It's about that ability to have some influence on how the case ends up really. It just strikes me ... I suppose I find it odd, because I've always worked this way, I came into the firm and I was trained to be an advocate, and it just seems unnatural to me that you are the one who spends all that time getting to know this person, taking their instructions, helping them to shape their case, and then at the most crucial point you hand it over to someone else. That doesn't feel right to me.

There was also criticism of barristers. Solicitors commented negatively about barristers (sometimes instructed by other parties) who lacked familiarity with care work or with the details of the case and consequently provided parents with a poor service. Such advocates were an inevitable (but uncommon) consequence of late instruction, which could leave the parent with a barrister who the solicitor would not have or had not chosen who had insufficient time to prepare for the hearing. Critical solicitors remarked that they could represent clients as well as counsel. The judge in Area D justified requiring solicitors' attendance when counsel were instructed to ensure, '*for parents*' that someone with detailed understanding of their case was present. (DO5)

For most solicitors instructing counsel was a decision requiring careful balancing. The following quote encapsulates many of the issues solicitors weighed up when deciding whether to use counsel:

I think there are probably 3 sorts of circumstance. One is where my diary just compels it. One is where I want to put some distance between myself and the client. If a client is hugely difficult, very, very violent or very, very unwell, or very, very emotional or hugely identified with the cause, it can be very helpful to have that distance. 'I'll sit next to you in court but Mr X or Mrs X will be your voice.' And the third situation is when either the complexity of the case or the length of the case means that it will take me out of the office too long. But, having said that, I enormously enjoy being an advocate. I'm in court 4 days a week, 5 days a week very often, and it's the most important part of my career. But you can't go wrong having counsel - if chosen well. (Solicitor 33)

Where solicitors had colleagues who also did this work there was the possibility of sharing the advocacy. Six of the solicitors interviewed stated that their preference, or their firm's policy, was to keep cases within the firm, wherever possible. The decision to instruct counsel for a particular hearing thus involved the solicitor considering not only the needs of the specific case but their colleagues' availability and the demands of their other cases.

Certainly everything in the FPC we will cover in-house – the chances of all five of us being unavailable is fairly minimal. The solicitor who is not on the panel will do some of the hearings in the FPC as well – so between six of us we can usually cover all those. But in order to do that, you do make decisions about some of the 'higher weight' cases being allocated to counsel – so that again, you've got consistent representation – but you've done that to manage the overall diary sort of thing. Generally we must do 80-90% in-house. (Solicitor 3)

Availability is crucial. Solicitors cannot be in two places at once (although a court clerk complained that they sometimes delayed hearings by trying to be). In the family proceedings court, solicitors tried to agree dates for hearings which they would all be able to attend, a practice facilitated by having family cases heard on specific days of the week. This practice also made it easier to arrange cover from colleagues so that only one member of a firm attended the court on any day. Those who worked part-time, as five of those interviewed did, and those with larger case loads, were more likely to be unable to undertake hearings. Workload made it more difficult for solicitors to spend time at court, particularly for longer hearings. It was difficult to find time in crowded diaries to do the work required to prepare for contested hearings, or to do the work which they would have done had they not been at court. The majority of the solicitors interviewed did not undertake advocacy on cases lasting more than a day and only very few considered doing so for hearings listed for three days or more:

I'm in court two or three days every week. Final hearings become complicated – can be 5 days – also there are [my] child care arrangements. There is time when the kids will be away over summer and I thought "Fantastic – I can do a contested hearing". I have done them and I will do them and I do submissions – but not more than 2 days because it's catastrophic to be out of the office for so long. (Solicitor 14)

Undertaking advocacy was also partly a commercial decision. The legal aid rules on use of counsel in magistrates' courts and the fact that preparation for hearings had to come out of the fixed fee were factors in the mix, (see 4.5 above, for further discussion).

A major concern for solicitors who had the time to undertake advocacy was their responsibility to do the best for their client. What was considered best depended on the client, the case and the nature of the hearing as well as the solicitor's skills. Sean's solicitor commented:

I'm still very much on a learning curve and it's knowing your capabilities and I've got to think, I can't do a disservice to my client, so I'd rather have a barrister on board, not over advice, but to have a more supportive network and get to a point where I think, I can do that.

Even directions hearings could require substantial knowledge and skills but more frequently in negotiation than in advocacy. The final evidence, including that provided by assessments depended on earlier directions. Failing to secure the right directions in the case could mean there was no evidence to support arguments which counsel wanted to use at the final hearing. This provided another reason for involving counsel early on.

There were a number of particular features which solicitors identified as precluding them taking on advocacy in a case. Many of these related to contested cases, for example, cases with finding of fact hearings; with contested expert evidence; and cases involving injuries, with complex medical evidence. Such cases involve detailed cross-examination, which was not routinely necessary in care cases. Constraints on spending time away from the office meant that few solicitors developed this skill, the specific knowledge required, or had confidence in their abilities at this level. Some solicitors did not want to have to make technical legal arguments, for example about the test for removal under an ICO or the court's power to order residential assessments (both issues which were in flux around the time of the fieldwork). Other solicitors just referred to *complex* cases, a word used variously to describe, the facts, issues, arguments and law which could make advocacy too stressful or too time-consuming for them to handle even at a directions hearing. Solicitors instructed barristers for contested ICO hearings for Barbara, Carole and Colleen. There was nothing intrinsically complex about these cases although the local authority's vacillation and intransigence made the day highly stressful for Colleen. Carole's solicitor was unavailable for this hearing, which was arranged at short notice, and Barbara had made it clear that she expected a barrister. Where the client had instructed the solicitor late in the proceedings, instructing counsel provided someone else to take on part of the work within the short time available.

Solicitors also instructed barristers to undertake advocacy *to distance* themselves from the client or, as two barristers put it, when they wanted '*to hide behind counsel*', a perspective which magistrates' legal advisors shared. (B 6; FGB; FGLAD) Where solicitors had very limited instructions, a barrister could tell the judge this without having to answer questions about their client's

continued interest in the case. If a client was unwilling to accept the solicitor's advice, a barrister might be able to get them to 'see sense' and not to contest a hopeless case. The barristers for Carly, Evie and Trevor each performed this role to some extent at the final hearing. Trevor's solicitor commented that she had a reputation for representing difficult parents. Clients who were unreasonable, untruthful or aggressive all came into this category. One solicitor commented that, unlike barristers, she felt she had to believe in her clients to represent them well. She would therefore find it difficult to advocate for a parent who denied injuring their child in the face of strong evidence to the contrary:

Theoretically, I would do my best for them and put their case in the best possible way. I suspect what I'd do is get a barrister because... I would find that so difficult if I didn't believe them. My temperament is such that I would find it so hard to put their case, knowing that they were lying that I would be too churned up by that, that's absolutely not ... that's where barristers have a skill that I simply don't have, of just doing the job, just advocacy without the connection, or something. That's such a difficult thing for me. (Solicitor 2)

Working with counsel

Instructing counsel had a further advantage – it meant that there were two people to manage the client and consider the legal and evidential aspects of the case. This provided the solicitor with *another brain* or *fresh eyes* and provided *another source of advice*, over above that provided by colleagues. Working with barristers provided the solicitor with '*a more supportive network*' and '*the right counsel [could] teach you*' and assist the development of skills. It also freed up the solicitor to support particularly vulnerable clients in the courtroom. Carly's solicitor said she would appoint counsel for the final hearing because, '*I will need to be with mum – she will need me*'; and Carole's solicitor planned to instruct counsel for the IRH so that she could attend and '*give Mum some tlc.*' It could be particularly important to have two representatives for a client where the client was very stressed by the court experience and became emotional. It simply was not possible to focus on the judge in front of you if you had to deal with a parent behind you who was finding it difficult to understand what was going on (S 37). Another said:

I do the directions hearings – but [counsel] did the final hearings and the really good thing about that was that it needed the two of us to control her because she's a very emotional girl and if things are not going right, all sorts of threats are bandied around and she becomes really upset, so to do the advocacy and to manage her would be impossible, to be honest. (Solicitor 10)

Instructing counsel could also *give the client confidence* and give the solicitor time to focus on *developing their relationship* with the client, one of the reasons Barbara's solicitor gave for instructing counsel for her. In contrast, other solicitors used advocacy as a way of building their relationship with their client through the repeated discussion they had with them at court before hearings.

Continuity of representation

There was one very major disadvantage in using counsel for more than one hearing. It was *'by no means easy'* to secure continuity which was referred to *'as a luxury no one could afford.'* As a consequence, clients might be represented by two, three or more different barristers during a case. Solicitors understood that clients expected continuity; one commented that her clients generally expected her to represent them and that quite often *'she had to sell the idea of having a barrister'* by stressing their greater expertise. Others recognized that some clients needed continuity. Another said,

Clients have enough on their plate [in care proceedings] without different faces and different people and different approaches to contend with at every time they go to court. (Solicitor 6)

However, Kevin's solicitor's approach was to *'dip in and out'* as appropriate and referred only to the client's wishes not maintaining continuous representation. Both judges and barristers also preferred that clients experienced continuity although neither seemed to expect it in practice. Indeed barristers were critical of solicitors for wanting to do some of the hearings rather than instructing them throughout, *'something which would get worse because of the [fixed] fee regime'* because solicitors were *'expected or enjoined to do their own work'* by their firms.

I think a major problem for us nowadays is whether solicitors choose to instruct counsel at all. I have always believed that a proper service to parents particular needs to be consistent throughout and I have always liked to act to the very end. That is becoming more difficult because solicitors themselves come in and out of cases. I've been told 'I want you to do the final hearing but I'll do the directions hearings' – which doesn't work... (Barristers' Focus Group)

Where the solicitor wanted a barrister for the whole case and instructed counsel early in the proceedings continuous representation was more likely. But such an approach was generally reserved for *'more weighty cases'* such as those involving disputed injuries or illness, not the more common cases heard in the county court. As well as making early decisions about the use of counsel, some solicitors said that they chose chambers which gave *'a commitment'* to continuity of representation or would not use chambers who changed counsel on them. Others identified particular clients, such as those with learning difficulties who were anxious about meeting new people, for whom special care needed to be taken to ensure continuity. And where parents were going to be represented by a new barrister some solicitors ensured they were met at court and introduced to counsel. Not all parents were provided with even this level of service. We observed one Pre Hearing Review on a contested case where the mother's counsel – a late substitution for the person instructed by her solicitor, arrived with the solicitor's clerk twenty minutes after the mother had been told to arrive (and arrived) (BO7). Two other mothers also met new barristers, who were substitutes for the counsel originally instructed, at court, without any support from anyone they

knew from their solicitor's firm, one at a CMC and the other at an IRH. (DO6) One of these three counsel was a specialist in ancillary relief who rarely handled care cases (DO3).

Barristers' perspectives on continuity

Taking on single hearings was a common experience for less experienced barristers. Similarly, experienced barristers, who did heavy trials, knew that others would have done the directions hearings because they were rarely available to do these. Ideally, counsel for final hearings would be booked well in advance. However, this was not always possible. Requests to appear for single hearings often appeared at the last minute when the solicitor or barrister instructed originally was unable to appear due to illness or the overrunning of another case. Barristers would pick up the brief and bundle only when they returned from court the previous day with little time to prepare for the next morning. This posed two difficulties— they had to get to grips with the case and to establish rapport with the client. In order to understand the issues in the case, the barrister had to read the bundle, no mean feat given the very substantial amount of paperwork care cases accumulated and the limited time available. The following example was echoed in the accounts of barristers in the other areas.

[I got the papers] by fax at 7 pm the evening before. That was because the brief that was floating round chambers had utterly disappeared. But that's not unusual. So that was a lever arch that came via fax in about 8 chunks and that was a solicitor who was obviously fighting shy of giving the client really, really tough advice. ...The brief was very much 'I'm coming to court, I'm attempting to give the client realistic advice and she won't take it. I know it's not your case but I need somebody to tell her how the land lies.' (Barrister 8)

Not only did such cases mean working into the night and 'always being exhausted', barristers acknowledged that their work for a single hearing was more limited than what might be done knowing that they would have a longer term involvement.

I did [a single hearing] for a colleague of mine here – she was on holiday I think. The impact is that you have to read it all and then you know you're only going to – you wouldn't read – I probably wouldn't read all of that if I was going to – I mean I wouldn't read all the contact notes if I was going along to a directions appointment. (Barrister 4)

You read – in all cases your first read is really telling – and if you do your first read really thoroughly, that sets you up really for the whole of the rest of the case. And points just lurk in your brain. So when you come back you can spot ... Now, coming in for the first time cold and knowing that you're only going to do it once (Barrister 8)

Barristers felt the need to maintain a strong position with other lawyers in the case and to demonstrate their competence before the judge. Experience, which helped them to know what they had to read, and self confidence enabled them to manage single hearings but they recognized that sometimes

they had to '*wing it*'. (B 3) There were even greater problems where papers were not in the bundle. Even small pieces of missing information could leave the barrister unclear about points which turned out to be crucial. (B 2) In contrast, being instructed for the whole case from the start meant that the first reading would be the foundation of further work; re-reading strengthened this knowledge. Even where they were not instructed from the start, barristers gained '*more of an overall picture and feeling of involvement*' (B 2) through taking a series of directions hearings on a case.

Secondly, barristers recognized the importance of establishing a relationship with a client, which was not possible if they were only asked to take a single hearing. Although they were observed to be highly adept at making the initial connection with a new client just met at court (see also Maclean and Eekelaar 2009), this created an additional strain for barrister and parent.

*That has a different element to it because you haven't met the client then. And I'm always very conscious that the client is thinking 'Who the hell are you? Why is somebody else here?' And so the first thing you have to do is put them at ease. I've read the papers. I understand. I've got my instructions. I always tell them a bit about myself, just so they know, and I explain to them whether they're going to have to talk or say anything because actually what they're thinking of is **rabbit in the headlights** – 'am I going to have to say anything?' That's probably all they're thinking. (Barrister 7)*

Barristers new to cases were observed demonstrating to clients that they were fully conversant with the case. Having identified the client from the solicitor's description or with the assistance of a third party, occasionally even the researcher, they approached them directly, introduced themselves and immediately talked about their discussions with the solicitor or previous counsel. However, not all succeeded in establishing rapport.

Lack of continuity could have a major impact on the course of the case and in the progress made in narrowing issues. Directions hearings determined what evidence and assessments were sought and thus the information available for the final hearing.

Directions hearings can have more impact on how a case can turn....it's only when you start to do bigger hearings, you realize actually if only that had been done at that stage, it could have changed a lot. So you've got to think of everything. (Barrister 7)

One local authority solicitor complained that counsel taking single hearings '*don't know the case*' and another that counsel went over matters which had been dealt with and disposed of at previous hearings. This was reflected in some observations. For example, a barrister standing in at an IRH could not give a clear account of her client's views (DO6). The hearing concluded without progress having been made in narrowing the issues, a provisional listing for a 4.5 day contested hearing and a second IRH. Another barrister, at a CMC following a fact finding hearing, appeared unfamiliar with the evidence and had no suggestions about the expert who should be appointed to advise

on the risk the father's behaviour posed to his children (DO5). Barristers in the focus group discussed the provision of attendance notes telling solicitors (or subsequent counsel) what had happened at a hearing. Whilst some considered writing these an essential part of the job, others noted that they were not '*getting paid*' to do this - meaning that there was no separate item in the Family Graduated Fee Scheme for providing such accounts. Without such summaries it was not surprising that subsequent hearings went over old ground.

There could also be adverse financial consequences for barristers standing in for single hearings. Bar etiquette meant that the barrister originally instructed would usually take further hearings for the same client, and could not appear for any other party to the case. Being '*used*' for a single directions hearing might result in having to turn down more lucrative work to represent the local authority at the final hearing. Barristers relied on their clerks to prevent this by using their knowledge of the solicitors who rarely used counsel. Protecting a barrister from this type of clash might mean selecting for the single hearing someone who did not usually do care work as in the CMC mentioned above (BO3), a practice which could work against the interests of the client and the case.

Overall, lack of continuity seemed likely to produce a more stressful and less satisfactory experience for parents. They were faced with a need to explain to another stranger what had happened to their children and often deeply personal aspects of their health and life. It was easy to see why parents might find it difficult to have confidence in a system where their representation was provided in such a manner. Discontinuity also could also increase costs with each barrister claiming for reading the bundle.

[I]t can happen that some poor punter gets five or six barristers, and they'll all read [the case papers]. And that means that bill for that client will look ridiculously high as against [mother] who had me all the way through and I'll only have put down for reading it once – I won't put down – there again – it's open to fraud and people do. (Barrister 4)

Selecting counsel

Most solicitors either had between 1 and 12 favorite counsel who they would first seek to instruct and/or relied on between 1 and 3 sets of chambers for counsel. Only two indicated that they operated without any list. One, who regularly attended court with counsel, was very familiar with all the local barristers and well known to the clerks in at chambers, was content to leave choice of counsel to them (S 18). The other, who did almost all his own advocacy, relied on recommendation from chambers on the rare occasions he wanted to instruct counsel (S 22). Solicitors selected from their list according to the particular skills required for the case.

I have a counsel who's like a Rottweiler and I have a counsel who's nice and gentle. And the counsel who's a Rottweiler used to be a solicitor – a bloody brilliant barrister and she will invariably pull it out of the hat and everybody at

[X local authority] hates her because she will just fight and fight and fight – and that’s what the client needs to see. (Solicitor 14)

There are different people that we’d use for different things as well. There are certain people who would have absolutely no interest in sitting watching Mum sob, so you wouldn’t use them for that. And there would be other people who have a criminal background which would be superb for a non-accidental injury case. We do try and pick for the job rather than just ring up and say, ‘Who’s available?’ (Solicitor 9)

Carole’s solicitor, who stressed the importance of continuity, had difficulty both representing Carole at court and finding an appropriate barrister for her client because a variety of different factors intervened to prevent this. Carole was represented by three different barristers, by her solicitor and a colleague from the firm. One issue was timing – there was limited availability to cover a contested hearing in a holiday period when the solicitor was on leave. Another was the client’s preference; Solicitors were keen that parents were content with the barristers they had selected. Carole had not liked the barrister who represented her at the contested hearing. A third factor was counsel’s competence – the solicitor had heard from other lawyers present that the second barrister had not represented Carole well. Finally, illness prevented the solicitor from appearing for one hearing. Carole’s solicitor recognized that the third barrister was a good fighter but not suitable where the parent really needed support rather than a contest. The solicitor therefore chose the first barrister to represent Carole at the final hearing.

Four solicitors spoke specifically of ‘*matching*’ counsel to the client. They sometimes asked clerks to ensure that counsel’s gender or background fitted their requirement but recognized this as being something which was not generally acceptable, and possibly not legal. One solicitor instructed a barrister with a Nigerian background for a mother from Nigeria, Another justified the need for female counsel:

I always try and match the barrister to the person – we’re not meant to do it from the gender point of view but there are times when I have to choose the barrister - right sex with the right client – I will phone up and say I know there are rules about this but I need someone for this because simply the person won’t open up to sort of the wrong sex. I’ve got one or two men out there who’ve got such anger management problems that they’re just not going to take it from anyone other than a man and experience has shown that there are – sort of - the right people for the right clients. So one has to be careful that the clerks accommodate me and understand where we’re coming from. (Solicitor 1)

As well as making positive decisions about the barrister they wanted to instruct, solicitors also indicated to clerks that they considered some barristers unsuitable. ‘*Young*’ and ‘*inexperienced*’ (S 24) barristers were most likely to be considered unacceptable although a local authority lawyer remarked that care cases were now given to very junior barristers.

Late Instruction

Hearings were generally fixed well in advance, although the final hearing might not be fixed until the IRH, in accordance with the PLO. Nevertheless, six of the eight barristers interviewed gave accounts of cases where they had been instructed very shortly before a hearing. These complaints have to be considered in the light of the way barristers organized their work and responded to the expectations of clerks, willingly taking every case and frequently preparing cases the night before a hearing. Although instruction at short notice could be because the client had only just contacted a solicitor, it was more frequently because the solicitor had made a late decision to use counsel or the chosen counsel was unavailable. Kevin's partner had a hearing following last minute instructions and both Carole and Carly's barristers, who had previously represented their clients, only received the papers shortly before the final hearing. There were at least eight cases observed during 24 (non case study) observation sessions where a party was represented by someone who had been instructed or received the papers only shortly before the hearing. Where instructions had been provided in good time, late delivery of the papers had a similar effect, leaving too little time for preparation. Barristers regarded late instruction as '*the nature of the job*' but it was also '*unnecessary and unfair*' on them and created '*a lot more stress*' (B 3). It was also '*unfair to clients*' (B 4) and put them and their barrister at '*a huge disadvantage*'. (B 2)

As with other single hearings barristers had to find what time they could for preparation, working late and starting early before court. One barrister reflected that solicitors seemed not to recognize the work required:

You work here until 11 o'clock – and be back here at 6. It happens - it's not worth moaning about it – there are days when you've finished at 10. Solicitors just have this wonderful idea that counsel just turn up and crack everything, but I tend to find that the ones that crack are the ones that I've prepared within an inch of their life – and that's why they crack. They don't see it that way! They just see it, 'You're finished at half past ten you can go for a coffee now!' (Barrister 6)

Late instruction for finding of fact or contested final hearings would pose the greatest difficulty because of the need to master a huge volume of evidence. This did not occur in any of the few contested final hearings observed in the study, but was reflected on by interviewees:

I didn't realize just how complex it was when I first picked it up because it looked like 2 or 3 lever arch files, and I thought, well, I won't start it on the Friday, I'll start it on Saturday afternoon. And when I picked it up on the Saturday afternoon, I was horrified and I spoke to the previous barrister and she said, well, yes, it took me a long time to get to grips with this. That was terribly stressful because, when I turned up at court on the Monday morning, I had to say to the judge 'I've not been able to get into this, I cannot do it'. (Barrister 2)

On occasion barristers might have no alternative but to seek an adjournment

but there had to be a good reason. The judge in the case outlined above agreed but lawyers did not indicate that adjournments except for brief consultation were readily sought or obtained. Adjournments could allow a case to be better prepared but they also increased costs for the local authority and the LSC, wasted court time and delayed the outcome for the child and family.

Research for the LSC suggested that there might be an *over supply* of family barristers (Ernst and Young 2009) because there was insufficient work available to allow each barrister to charge for 35 hours per week, which they admitted was an unrealistic utilization rate (para 1.5). Any reduction in supply needs to take account of the availability of solicitors who undertake advocacy and the way the system operates in practice. The Ernst and Young Report, written before the increase in case numbers and the reduction in the numbers of firms offered a legal aid contract in July 2010, concluded that there might be an *excess of demand* for care work by solicitors (para 1.5). Even at the end of 2009 solicitors interviewed for this research were reaching their limit in terms of case numbers. This was one reason they relied on barristers for advocacy. Barristers fully engaged in hearings, are not available to prepare other cases except at short notice, with the consequences discussed above. Moreover, unless there is a more fundamental change in care proceedings, for example really reducing the number of hearings, not just re-labelling them as the PLO did, cutting the number of barristers will make it more difficult for solicitors to match counsel to client and to re-instruct a barrister who acted in an earlier hearing. Overall, this may only serve to increase costs as several barristers are paid to read the same bundle, and to reduce quality for clients.

Final Hearings

The five Ds – diary, distance, difficulty, dispute and duration, discussed above, were reflected in the decisions made about representation at final hearings in the case studies. In ten of the 14 cases where details were obtained, at least one parent or relative was represented by a barrister at the final hearing. Twelve of the parents, who still had representation at the end of the case, were represented by solicitors and 12 were represented by barristers. Only Barbara was unrepresented; Evie and Bernie's former partner, Lee, whose neglect had precipitated the original use of police protection, had ceased to give instructions to their solicitors. Carole's former partner's solicitor was also without instructions and attended the final hearing only to withdraw from the case. In contrast, there were only two cases where the children's guardian was represented by a barrister. In Bernie's case, the children's guardian had been very concerned about the plan to place Patrick with his uncle, and in Sean's case, the relative carers were contesting the plan recommended by the children's guardian to place Ashley for adoption outside the family. The more common representation of children's guardians by their solicitors reflects both the power of the undertaking of personal representation given for this work and the different status and role the solicitor for the children has in the proceedings:

[W]hen I'm acting for children I will almost always do all my own advocacy. Apart from the fact that you should, it's also easier in many respects because you - unless you have a particularly difficult guardian or unless, but even if you're acting for the child - it's quite different, and you are looked at and listened to in a slightly different way. (Solicitor 30)

Barristers represented parents in three of the four final hearings which lasted more than a day; these four hearings were all contested. Only Hayley was represented by a solicitor at a contested final hearing. This case had been expected to end with Nate's return to Hayley, under either a care or supervision order, but just before the hearing the local authority got wind of her continuing relationship with Nate's father and the plan was changed. Barristers were less likely to be involved where the final hearing took place in the family proceedings court; the fee scheme makes no allowance for solicitors attending with counsel there. Carole had a barrister for a final hearing in the FPC but she was contesting the plan that Ben should not be returned to her and be placed in foster care. No barristers were involved for parents in the other four final hearings in the family proceedings court where details were collected. In contrast, in the county court, at least one of the parents had a barrister in eight of the nine cases with final hearings. Colleen was the exception. Hers was a '*happy case*'; her children were being returned as she had demonstrated to both the local authority and the children's guardian that she could give up alcohol, was free of the relationship with her violent former partner and had got her life back on track, focusing on her children.

Undertaking the advocacy for a contested final hearing requires substantial time for preparation. Examples given by both barristers and solicitors indicated similar amounts of time for a four day hearing. Preparation before the hearing would take around eight hours with further preparation of around two hours each evening. Pre-hearing preparation had to be done, even though a parent might be persuaded to withdraw their opposition. Despite the introduction of IRHs it was not suggested that more parents who opposed care plans were willing to drop their contest earlier. Indeed, only after he or she had evaluated the evidence fully could the barrister give the parent a strong indication of their position, even where this was repeating earlier advice from the solicitor.

Advocacy Styles

Solicitors recognized that different barristers approached advocacy in care cases differently. Some sought to match the barrister with their views of what the case and client required; barristers might take a more, or a less legalistic approach, with the former seeking to test the local authority's evidence to destruction.

I suppose there are different styles of advocacy and the way barristers run cases. My instinct would always be to go for the least legalistic, most commonsense outcome if you possibly can because the whole point of our

involvement is to try and make the best outcome possible out of human mess. And if you can avoid taking legal points, you should. (Barrister 8)

They might be dogged fighters - 'Rottweilers', or more skilled at supporting parents to accept the inevitable loss of their children to care. Judges expected barristers to do the best for their client, which meant '*giving dispassionate advice*' (J 2) and fighting when there was a case to fight:

It's difficult because of the duty of care they owe to the client, but on the other hand, it really is – you're probably saying 'If your client's got a good case – fine – you come in and you fight the case. But if you, knowing as a professional experienced in this type of work, believe that the client really – this isn't an application that stands much of a chance, then for goodness sake, be honest to the client. Don't try and fly the flag when there isn't a flag to fly. (Judge 4)

Magistrates' legal advisors who had far less power in the courtroom than judges took a negative view of those who sought to challenge every bit of evidence presented by the local authority.

It's a very adversarial one and you argue to the minutiae because eventually you'll wear somebody down that they'll give in. So the first line of defence is attack. And we do have some advocates who fall into that and they'll never change and so it's about managing those people as well as managing the proceedings, which is always difficult... (Legal Advisors' Focus Group)

However, this was not a practice observed; the most legalistic arguments were in Colleen's case where the local authority disputed the legality of placing Colleen's son with his grandmother who had not been assessed.

Where it appeared inevitable that the court would make a care order but the parent insisted on continuing the fight, despite advice to the contrary, counsel might adjust their approach. In one observed final hearing (AO11), which had been listed for 2 days, the mother's barrister told the other lawyers that she had no instructions to call off the contest and the case must be done properly. She rejected the suggestion that her client give evidence first, an approach sometimes used to shorten hearings. In the face of a damning psychiatric report all the lawyers, the social worker, the children's guardian and the psychiatrist agreed not to be too hard on the mother in court. A similar discussion took place in another case with a request to the children's guardian '*not to put the boot in - it would be too cruel.*' (AO7) Barristers displayed sensitivity when cross-examining parents in some other cases but in Carole's case the approach was more detached. By contrast, both the local authority barrister and the children's solicitor cross-examined Hayley in detail about her relationship with her (former) partner, his visits to the house, and her application for an injunction, all questions which appeared to be designed to show the court that she was lying.

Advocacy at final hearings

There were four distinct goals for advocacy at final hearings. Advocates sought to undermine the local authority's case; to achieve positive outcomes for their client; to undermine the professionals, particularly to give the social worker a hard time; and to allow the parent to come out of the proceedings with a vestige of self respect if they achieved nothing else. These goals were not necessarily compatible, nor were all in sight. Only if the application was contested and oral evidence was given, rather than the case being dealt with on submissions, was there an opportunity to get witnesses to retract or support a parent. Where adoption was the inevitable outcome and the parent was not contesting this, the focus was on preserving the parent's dignity. Advocates also recognized that the end of the case did not end relationships between parents, children and their children's carers, particularly where children were placed within the family. Final hearings handled badly could rebound negatively on children's future care.

Contesting care cases necessarily involved undermining the evidence. Although Hayley had accepted the original threshold, the new issue of whether she was continuing her relationship with Nate's father was tested by oral evidence. There was nothing Hayley's solicitor could do in the face of clear evidence from a neighbour that Nate's father had been in the house when the children's guardian called, or that Hayley had deliberately sought him out at the end of the third day of the hearing.

Where the threshold has been conceded, the focus shifts to undermining the care plan, either on the basis that the experts' evidence was unreliable (either because the assessments were poor and or reports were out of date) or the social worker had misunderstood them. This was the focus of the contest for Carole. Sean's case involved a dispute about Ashley's care but Sean and Nadine were supporting the local authority's plan, which was contested by Ashley's carers. Despite recognizing that the relatively short period that Carole had abstained from alcohol would not convince anyone that she could remain sober permanently, Carole's barrister tried to get the expert in substance misuse to accept that she had now changed sufficiently to care for Ben. Although the expert accepted that the recommendation of 12 month's abstinence was arbitrary, he also noted that Carole had shown little insight in the past and he knew nothing of her motive for now ceasing to drink. Re-examination by the local authority barrister reinforced the negative opinion – Carole had not made use of specialist services and her abstinence was '*in its infancy*.' Carole's barrister's efforts to get either the child psychologist or the social worker to support more contact with Ben for Carole were similarly unsuccessful.

The mother's barrister in AO7 elicited positive remarks from the psychologist about the mother's contact and a more muted acceptance of the benefit of contact from the social worker. This was important in the context of long term placement within the family where relationships were strained and the carers found it hard to accept the mother's visits. She also obtained positive remarks from the family support worker, albeit undermined by the view that the mother could not cope with more than one child or if she maintained her relationship

with the father. Similar attempts by the father's solicitor were unsuccessful, reflecting the professionals' view that the father was an uncompromising character who had not engaged with the professionals. Attempts by the parents' lawyers to get their clients to acknowledge their gratitude to the relatives had very limited success with the mother accepting that she got on with them 'sometimes' but the father refusing to thank them because 'we don't get on'. However, the decision by the relatives' barrister not to call his clients avoided the court becoming a site where the family conflict was played out. These were not the only examples. Carole's barrister got the social worker to acknowledge that there were positives in Carole's situation, her contact and Ben's relationship with his siblings, and Hayley's solicitor was able to get the social worker's agreement to positive statements about her commitment to Nate, which had resulted in the (abandoned) care plan. No efforts were made by their barristers to get positive statements about Sean and his wife, which reflected their personal disapproval of their clients' stance. The focus of the final hearing was the relative's challenge to the care plan, which the parents supported, rather than their care.

Although barristers professed that they were willing to make social workers squirm if that is what their client wanted, unless this was effectively linked to undermining the care plan it was a strategy which indicated the parent's case was weak and it could even make it weaker. At a contested hearing for an ICO, Lauren's solicitor took the children's guardian, who had only just been appointed, to task for failing to see his client, or to speak to the service which knew Lauren best, her therapists. It appeared that his goals were to undermine the support the children's guardian was giving to the local authority's case and to give the guardian an unpleasant experience. Neither approach seemed well-judged. The guardian had been unable to get any reply from Lauren by phone, had been in court all day and had assumed (as others would) that Lauren's relationship with her therapist was confidential. After this aggressive questioning, it was unsurprising that the magistrates refused the adjournment Lauren's solicitor requested and went on to make the ICO. In AO7, the father's solicitor was similarly aggressive in questioning the social worker, who had refused to promote the father's contact because she was not sure it was in the children's best interests. While focusing on this point gave the impression that the social worker had a personal grudge against the father, it also reinforced for the court her evidence of his unreliability. In addition the father's inability to get on with the social worker appeared to be mirrored in the way his solicitor dealt with her.

Magistrates' legal advisors were also concerned that barristers' discussions with clients about the way they would handle the hearing could cut across their decisions. Parents could have their expectations unrealistically raised and be left with a feeling that they had not had a fair hearing.

I think the challenges are where the advocate believes the fair hearing is to cross-examine, you know, cross-examine the social worker, 'Did Mum hold the baby like that?' That is one of the challenges for us around fair hearings because obviously the parent has been given an expectation of what's going

to happen at that hearing and that may be completely different as to how the court is going to manage that hearing... (Legal Advisors' Focus Group)

This could be avoided where order made it clear that the final hearing was on submissions. Judges too were wary about trying to control the court by intervening during evidence or cross-examination.

As already described in Chapter 3, judges and magistrates did not often speak directly to parents at the end of a case. When they did, this was usually in response to remarks from the parent's advocate. Barristers prided themselves on being particularly adept at saying something positive about parents at the end of proceedings:

I still think that there is an art in advocacy that we do better than most solicitors in giving them a little dignified speech, a bit of dignity, to the judge about the 'give up'. They don't consent, they don't oppose, and then going through in the papers what is positive about them in respect of their children and of giving them that at least to go away with and think, well, my barrister did stand up for me, at least to that extent. (Barristers' Focus Group)

5.6 Supporting Parents

There is a further aspect of representing parents in care proceedings which goes beyond advice, taking and following instructions, negotiation and advocacy - support. Lawyers supported their clients during the proceedings, and especially at the final hearing. Parents' fear and anxiety were obvious at court; mothers were seen physically shaking as they waited, and sobbing during hearings. For many lawyers, support was an inherent part of the relationship of trust they sought to establish with their parent clients. These lawyers recognised that their clients were 'very needy' (S 30; S 16) and that care proceedings could be 'hugely painful' (S 38). However, there were different views about how far solicitors should go in supporting clients who wanted to regain care of their children. Some recognized that parents needed to demonstrate that they could do things for themselves rather than expecting transport to be arranged to take them to contact (S 12) or to see an expert, for example. Others were prepared to do far more:

[If I'd been acting for the parents] ...in both cases I would have tried to go out and see them at home more. I'm told that in the mother's case she did go out, send somebody out, but I'm not sure whether that was the case with dad. I know it's not ... some people have got mixed feelings about that and I can understand that, but sometimes I think these are such vulnerable people that to get to a solicitor's office is one step too far for them. (Solicitor 2)

Providing support was not just a matter of the way lawyers chose to relate to their clients, judges, other representatives and clients themselves expected the parent's lawyer to do this. 'Supporting the client through the process' (J 1) was part of the representative's job. Indeed, a local authority lawyer was

critical of a mother's solicitor because of her absence at the end of a final hearing when the court had ordered the children's removal:

I do think that perhaps on the last day, when we all knew really what was going to happen – it was quite an obvious case – I think she should have been there – that's my own personal opinion because I think that mother needed that support. She got that support actually from the social worker but really it's a difficult position for a social worker to be in. (LA Solicitor 2)

Similarly, a judge also commented negatively to the researcher about a case where a parent with learning difficulties was left to find her own way to a distant court where she was represented by a barrister whom she had never met (AO12).

The support lawyers provided for their parent clients was largely emotional, encouraging them not to give up, reassuring them and listening to their concerns. Beyond this they might assist parents to access services or treatment either through their G.P. or by telling them about what was available - counselling from Relate, community drug and alcohol services, self-help groups –or at least 'signposting' them to organizations who do this. Lawyers saw this as 'social work', which they took on with the hope of getting others 'to actually support' (S 30) their clients. Encouragement and talking about services was a way of helping clients to get help for themselves.

It's a lot of encouragement and a lot of support, a lot of guidance. It's like non legal - in fact it's almost partly social work in some ways, because you are there to support, guide, assist... (Solicitor 23)

Occasionally lawyers went beyond this; Carly's solicitor went to some lengths to find her suitable accommodation where she would have some support for her learning difficulties. Other lawyers drove clients to court, provided coffees or money for lunch. However, they were also open to criticism if they did too much for clients, for example cleaning their homes (LAS 4), something a couple of solicitors admitted they had done. Support was not just about trying to strengthen the client's case, it continued where parents no longer had the prospect of avoiding a care order. Supporting parents so they might feel better about themselves and enable them to make the best of the outcome, remain involved in their child's life through contact. Carole's solicitor said in an interview shortly before the final hearing where she expected to represent Carole:

Carole is going to lose Ben – a Care Order – what she needs is counselling more than anything else – lots of love and affection and helping her to let go and get the best that she can in difficult circumstances, and also to feel she hasn't given Ben away.... She's not going to get him back – because he needs a lot. But what she can do – if she's positive and if she goes about it the right way – is she can make sure she maintains a good relationship with him. It's not one of those cases where the child gets adopted and she's never going to see him again. So she can – and what I've got to build her up – and why I don't want [the barrister] to do it – I need to do it to build her up to what

she can give her son, notwithstanding the fact that he is in care. So it is a counselling role as much as anything else – and we're not trained for it.

Lawyers' support for their clients was necessarily limited; support was a secondary role, lawyers' caseloads meant that they had little time to provide this alongside the pressures of case preparation and were generally not trained counsellors:

My job is a legal job and you don't have time to handhold clients as much as they need, so, yes, it was key having [the community psychiatric nurse] there... Obviously after I'd given [mother] some of the information, it would be difficult for anyone to cope with that information and a lot of people have friends or family to talk to. She had no one and she needed specialist help and that's why I couldn't have seen her, given her the information and just left her, I couldn't. If she tried to kill herself or something, I couldn't live with that. (Solicitor 36)

The position of parents at court has been discussed (see Chapter 3, above). The need to support an isolated parent in the courtroom was one reason for instructing counsel. It was not possible to answer client's questions and provide reassurance at the same time as focusing on addressing and responding to the judge.

If you're trying to do the advocacy on your own sat in front of the judge, you've got a lay client behind you who's not got capacity for whatever reasonyou need somebody there, a solicitor needs to be there to tell the client what's going on, and you can't very easily do that if you're sitting in front of the judge. (Solicitor 37)

Also, the way the parents were represented at court - by a solicitor who acted for them throughout, a barrister who took their case repeatedly or discontinuously, with different people appearing at each hearing, necessarily impacted on the support available to them. Solicitors sometimes attended court mainly to provide support but both time and fees were an issue. Carole's solicitor represented Carole at the IRH so she could support her (see 5.5, above) but a barrister handled the final hearing alone. Carole's solicitor had already done more work than was covered by the fixed fee and instructed counsel for the final hearing – even under the previous fee structure she could not have claimed payment for attending the FPC because she had instructed counsel. The barrister sought a brief adjournment and took Carole out of the court room when discussion about the plans for finding carers for Ben proved too distressing. Another solicitor, despite having told the client that she was unable to do so, remained at a final hearing because her client was so upset, and was thanked by the mother for this (AO11). However, not all parent's representatives appeared to see supporting the parent at court as part of their role. A paralegal attending a hearing where a barrister was representing a mother sat nearer to the father's solicitor than her own client, who was visibly shaking during the hearing. Similarly, another barrister ignored her anxious client and immersed herself in her newspaper during the wait between pre-hearing discussions and the hearing.

The end of the proceedings ended the representative's support; some legal professionals were acutely aware that social work support also ended for parents whose children were placed elsewhere. Legal advisors commented that '*one of the gaps in the system was the lack of aftercare for parents*' FGLAD. The local authority lawyers, social worker and the children's guardian all discussed how Hayley might be supported after the final hearing; even the judge expressed concern about her welfare and urged her not to contact Nate's father. After one observed final hearing, the lawyers expressed huge concern to each other about the plight of the mother whose family were '*useless*' expressing relief that the children's guardian was so sympathetic and was driving the mother home at the end of the case (AO11).

5.7 Conclusion

Lawyers are *passage agents* (Glaser and Straus 1968) accompanying their clients physically and emotionally through the process by which their status is fundamentally changed. Women who lose their children to adoption are 'unmothered' losing the status they had as carers and the everyday joys of watching their children grow up. Even those such as Carole, Bernie and Clare, who could realistically expect to maintain some relationship with their children, lose much of their mothering role and fall into the stigmatized group of mothers without custody (Babcock 1998). Fathers experience some of the same transition but fathers are less likely to be caring for their children at the start of proceedings (Masson et al 2008, 17) and being a non-resident father carries less stigma.

As passage agents, lawyers '*interpret, define and legitimate*' the process of care proceedings '*serving as an expert guide and sign reader, able to predict the shape of the [proceedings] and having the ability to alter*' this (King 1981). They do this by explaining the process and, advising parents of their options. Lawyers representing parents in care proceedings in this study sought to change the shape and speed of the process, helping parents to travel down byways of assessment in the hope that these, or the time they took, would enable their clients to demonstrate their capacity to parent. Lawyers assisting parents through care proceedings often recognised early on that their client's passage would not end well, and that they were powerless to secure the outcome which the client wanted. In such circumstances they generally allowed the proceedings to take their course, following the client's instructions, and only sought to bring proceedings to an end by encouraging their client to give up where they considered that contest itself would damage the client further.

Viewing lawyers as passage agents should not mask the quite different ways they represented parents. Some variation must be expected in any personal service which has to respond to the individuality of clients, the factual matrix of the case and the practice context of the court and local authority. However, despite general agreement between lawyers about the importance of ensuring that parents had every chance to present their case, a fair hearing and could

fight for their child, there were considerable differences in the ways lawyers provided representation for parents. Although the differences were not so great as to make it possible to identify distinct styles of representation, there were three clear dimensions where differences were observed: the extent to which representation was personal, involved the giving and accepting of advice, and included more general emotional support.

Representation could be a very personal service, provided by the lawyer the parent had selected; alternatively, it could be a task readily sub-contracted to colleagues and advocates. Although this depended, in part, on the demands of the case – the lawyer's skills, preferences and availability were crucial in ordinary cases which did not demand heavy advocacy skills. Thus for one client representation might mean regularly being with their lawyer at court, with opportunities to build a relationship over time, whilst for another, court hearings would involve repeated encounters with unknown representatives. This had implications not only for the way the client experienced the proceedings, potentially it could impact on the way they heard the messages about their parenting. Another element was the extent to which the lawyer was willing to give advice, and thus to shape the instructions they received, rather than merely to follow the client's instructions. Most but not all of the lawyers observed appeared to accept that they should give advice, and sought to present advice clearly in ways which parents could understand. Naturally, some were more adept at doing this, and some clients were more (or less) receptive. This was not simply related to the nature of the lawyer client relationship; barrister's advice was accepted by clients who had only just met them. Trevor, for example, accepted his barrister's advice about contact although he had been resistant earlier in the proceedings. Thirdly, there was the issue of support. Some (mostly female) lawyers offered support to at least some of their clients, which went beyond dealing with the proceedings themselves.

The impact on the public purse of these different ways of representing parents was likely to differ substantially, with representation by a single solicitor costing less than cases using counsel (Masson 2008), and with a series of different barristers being most expensive. This relates to the fee system, which fixes the fee paid to a solicitor for preparation, and currently provides higher rates for advocacy by barristers than by solicitors. In addition, each separate barrister who prepares the case has to read the documentation, so that additional work is incurred where there is no continuity of representation. Proposed changes to the advocacy fee system, which equalise rates for advocacy will not completely resolve this. Additional costs will always be incurred where more than one lawyer has to read case documentation. It is therefore in the interests of both clients and the tax payer for parents to be represented by a solicitor who has the skills, confidence and time to undertake the advocacy required, rather than brief counsel. There will always be cases where case complexity demands the skills of specialist advocates, and cases where a specialist advocate can gain the parent's consent to a settlement which their solicitor could not. However, maintaining sufficient numbers of highly skilled solicitors working in public child law is likely to be the best way of ensuring parents (and children) are adequately represented and

costs are contained.

Chapter 6: Reflections and Questions

In this chapter we reflect on our findings focusing on the practices we have observed and consider their implications by raising a series of questions for policy makers about the development and reform of care proceedings.

6.1: Reflections

Much of what has been revealed in this exploration of the work of lawyers representing parents in care proceedings mirrors approaches and behaviours found in studies of how lawyers operate in private family law. The processes by which parents' legal representatives are expected to 'educate' (Mather et al. 1995) their clients into an understanding as to why the local authority's application has been made, and the 'translation' of their cases (Sarat and Felstiner 1996) whereby they should come to co-operate with the local authority rather than fight it, are in many ways similar to methods found in disputes about children between parents. We found the same 'community of practice' (Mather et al. 1995, 2001) whereby lawyers exert 'collegial control' as a group and how, as repeat players in the same courts involving the same personnel, they have to guard their credibility and reputation with the court and other parties, thus modifying their partisanship.

Public law cases manifest the culture of settlement found in other areas of family law, through the process of 'litigotiation' (Galanter 1984) and bargaining 'in the shadow of the law' (Mnookin and Kornhauser 1979, Eekelaar et al 2000). The numerous hearings typical of care proceedings present negotiating opportunities just as in private law child disputes (Davis and Pearce 1999) and the courts do not exert control over this - giving scope for as much as possible to be settled between the parties.

However, the pressure for settlement is tempered by a far greater willingness by the courts to adjudicate than in other areas of family law. Only about 5 per cent of ancillary relief claims are adjudicated (Davis et al (2000)); in contact cases, only 11 per cent of Hunt and Macleod's sample ended with a contested final hearing and a third of these were settled during the hearing (Hunt and Macleod 2008). Levels of contest at final hearings are far higher in care proceedings; in the *Care Profiling Study* almost a quarter of cases which ended with a final hearing were contested. (Masson et al 2008) There is enormous sympathy accorded to parents in this situation, giving rise to a respect for their right – and possibly their need – for adjudicated outcomes, in an atmosphere in court very different to the often somewhat exasperated air around the perceived trivial squabbling of disputing former partners, with District Judges pressing for further negotiation and where failure to settle is seen 'as tantamount to an admission of professional failure.' (Davis et al 1994). It is ironic that while in private law disputes the legal representatives may wish to avoid adjudication because they cannot be sure of the outcome, in most care proceedings cases, where cases conclude by an adjudication, the outcome is all too predictable. However, reputations are not going to be

lost in the shared knowledge that a parent will not win but deserves to be allowed to fight their case.

A further way in which legal representation in public law *does* resemble practice in private law is the way in which certain ‘welfare knowledge’ has come to be shared and accepted by all the professionals involved – both legal and ‘welfare’ practitioners, and also the judge. The concept of the ‘hybrid practitioner’ (Davis and Pearce 1999a) is a clear feature of care proceedings, where professionals of all disciplines could be observed in discussion without it necessarily being obvious who is who. The shared beliefs, as described in Chapter 2.4 have created a deeply ingrained culture underlying the handling of these disputes.

While the PLO, and earlier attempts to streamline care proceedings, encourage and reinforce many of the features present in the way these cases are handled – parents’ representatives giving realistic and appropriate advice to their clients, a co-operative and constructive approach between the legal representatives on all sides, and a bias towards settlement, it has not proved possible through structural modifications to contain care proceedings cases and make them more manageable and child-focused. The culture remains the same.

While this study was not focused directly on the process of care proceedings, that is the context in which the parents’ legal representatives operate. The understandings derived from this research prompt further reflections on the problems inherent in the process as it currently operates.

It is only too clear that the reforms of the last decade: the introduction of the Protocol for Judicial Case Management, the PLO and the PLO revision are based on assumptions about the way care proceedings are dealt with in the courts, which do not reflect practices we observed. The foundations for strong judicial case management were lacking and courts were heavily dependent on the parties to decide which issues required determination by the court and when this should occur. Judges often knew too little about cases on which directions were sought and were more confident in the parties’ lawyers than in their own ability to steer cases appropriately.

Similarly, the introduction of fixed fees assumed that solicitors were in control of the volume of work each case required and could reduce this; efficiency savings would maintain profitability and service at lower costs. However, this model was not reflected in the reality of practice. Profitability in a fixed fee regime encouraged taking on more cases and servicing them by increasingly relying on colleagues or counsel to undertake hearings. Consequently, clients were less likely to get the personal service, which parents in care proceedings value (Freeman and Hunt 1998). Had the PLO succeeded in reducing the number of hearings and expectations about expert assessments, as was originally intended, lawyers might have been able to adapt their practice in other ways. As it was, they appeared caught by the demands of courts and clients. The increase in case numbers added to the pressure.

The *Care Profiling Study* identified major differences between courts in terms of the length of proceedings, the use of expert evidence and the number of cases contested at interim stages. The reasons for this were not related to the cases before the courts, which appeared comparable across the county courts, and could not be explained using only a file-based study. These factors were somewhat inter-related – cases with experts tended to take longer, as did disputed cases. Some disputes related to the appointment of experts, but this did not explain why appointing experts was far more contentious in some courts, or why the outcomes of such disputes usually favoured local authorities in one court and parents in another. It appeared that there was something in the way the system worked which meant that the child's journey through care proceedings was more arduous in some courts than others. Longer proceedings are also more expensive to the legal aid fund (Masson 2008), to local authorities and to Cafcass (Plowden 2009).

This study observed differences in the way the individual courts operated. This is not to say that different courts would have made different orders in any of the cases – it is not possible to make that judgment. However, the time taken to reach a decision does have a very substantial effect on the lives of the children concerned (Ward et al 2006; Beckett and McKeigue 2009) and on those of their parents. Parents also have quite different experiences in care proceedings, not simply related to their engagement in the process and the orders made in respect of their children but also the way they are represented and how the court hearing their case functions. For some parents representation provided a single supportive professional to guide them through the process; for others it involved a changing cast of advocates more or less familiar with their case (see Chapter 3 and 5.6).

This study has provided the opportunity to understand more about the factors which contribute to these differences, individually or in combination, and produce what might be termed the court culture in care proceedings.

Judicial leadership is clearly important, but the capacity of any judge to direct the way their court is run also depends on the size and cohesiveness of the judicial team and the way care work is managed. Lack of judicial continuity does not only impact on individual cases. The judge in Court D was able to impose his style on cases because no other judge was dealing with cases differently in that court, and lawyers knew well what to expect. However, judicial leadership does not necessarily ensure a focus on the child. In contrast, the constantly changing cast of magistrates' legal advisers in the FPC in Area B added to the perception that the court had no control on cases, and may have contributed to the disregard of directions and drift in the cases observed.

The lawyers for parents, children and local authorities generally co-operated constructively with one another, and with the court. However, lack of continuity in the representation of any party within a case impacted on co-operation, particularly where one representative took a view which others could not support. Parents' representatives based their advice for or against contesting on the basis of their knowledge about likely outcomes. In

situations/circumstances where the judicial decision could not be predicted, perhaps because of the state of the law or the inconsistency of the court, disputes were more likely to progress into court. An inherent tension existed between the co-operative efforts of the lawyers (as promoted by the PLO) and the parallel imperative for judicial management, particularly where judicial consistency or continuity were lacking, creating an unstable balance.

The culture of proceedings was also influenced by the local authority and by cafcass. The lack of a guardian at the beginning of proceedings was a factor in drift, undermining the idea that timely decisions were important for children, even though individual guardians might emphasise this. Similarly, where local authorities generally complied with directions, they could contribute to a sense of purpose in proceedings, and at least not add to delay. Conversely, where a local authority was routinely unresponsive or lax with regard to directions, the will of the other parties or the court to challenge this could be lost. There was no point bothering to raise this – complaints and further directions would have no effect.

Other factors also impacted on what the court was like as a place to work, or to have one's case considered. Outward appearances could make stronger impressions on those who were not familiar with the legal process than the way cases were progressed. The court architecture, particularly whether there was space to discuss cases privately or this had to be done in public areas, especially if these were crowded. The courtroom layout could make it easier or more difficult for parents to communicate with their lawyers, and to hear what was going on. Listing arrangements could produce longer waits, giving more time to lawyers for discussion but leaving parents uncertain about why they had to be there, undermining messages about the importance of attending court. Long waits wasted parties' and professionals' time generally where these extended beyond the time spent in negotiation, suggesting their time was of little account. The way court staff and ushers greeted and marshalled parties also impacted on parents' experiences of attending court.

Against this backdrop of varied leadership and different settings there was a strong sense of unity amongst the lawyers, including the judiciary about the important issues in care proceedings. This common ethos, discussed in 2.4, above led to a focus on determining afresh whether the parent might be able to care even where there was a long history which strongly suggested the contrary, potentially over and above the making of decisions within the child's timescale. The court's often detailed involvement with the child's care during the proceedings appeared give little consideration to the impact of the proceedings on children's current lives. Setting a timescale was ineffective against the prevailing view that cases took the time they needed to take. It could even be counter productive – timescales were routinely missed and neither legal representatives nor professionals seriously expected cases to be completed within 40 weeks.

6.2 Questions

This study was not directed towards policy development but sought to understand how lawyers represented parents in care proceedings and the impact they had on the court process for deciding these cases. It provides a rich, research-based description and analysis of the care proceedings process, equalling and updating the seminal work by Hunt and colleagues at the introduction of the Children Act 1989 (Hunt et al 1999). It is the task of the Family Justice Review and the Munro Review to develop new models for child protection, including for cases where the state has to take over responsibility for securing the child's future care without the parents' agreement.

Rather than seeking to produce proposals, this study has prompted questions about the future operation of the care proceedings system, which should inform those Reviews.

Representation

Could the care proceedings system operate effectively if parents were represented by lawyers with far less knowledge and experience than those currently undertaking this work?

How can the limited funds available for legal representation be expended to ensure that parents continue to have access to specialist practitioners committed to this work?

What will be the future role of Children Panel membership now that its effect on solicitors' remuneration is limited?

Case management

How can the court ensure that its directions are complied with? And what should its response be where this does not happen?

Can proceedings be refashioned so that they are completed within a realistic time scale for the child simply by ensuring that there is more active judicial case management?

What additional resources can be provided to create a court environment where judges have sufficient knowledge about all the cases for which they are responsible to enable them to manage these cases effectively?

What training and support should be provided to assist judges to develop the confidence to make decisions in care proceedings without so many additional expert assessments and within a shorter period from the application?

Contested proceedings

Does fairness require that parties be permitted to contest any issue given that this will almost certainly prolonging the proceedings and have serious negative consequences for the child?

If not, who should have the responsibility of ensuring that unarguable or weak points are not allowed to prolong proceedings?

Scope of proceedings

What are the advantages for children of the court determining the arrangements for contact after the final order in cases where the local authority will retain responsibility for the child's future care under a full care order and be required to consider contact in regular reviews?

Culture of care proceedings

How can the ingrained culture and approach to care proceedings be changed while retaining fairness for parents?

How can the care proceedings system ensure that more attention is given to the timescale of the child who is the subject of proceedings?

Summary of Findings

Process

- This study indicates that the structure for handling care proceedings provided by the PLO has failed to reduce the length of cases or numbers of hearings, or to impact on the underlying culture of care proceedings.
- Case studies lasted longer (average 57 weeks) than the 40 week default target and involved greater numbers of hearings (average 7.25) than the 4 provided by the PLO structure. These figures echo the early findings of Jessiman et al (2009).
- Late service of documents, often at the last minute, was almost routine - particularly by local authorities.
- Late service and failures to comply with directions caused many key stage hearings to be ineffective and made it impossible for legal representatives to arrive in court with fully-fledged positions.
- Judges felt they had insufficient time to prepare properly for assertive case management. It appeared unrealistic for courts, with limited time, to challenge or second guess details of draft orders negotiated by the parties' legal representatives. Costs sanctions are not available to control cases in the context where every party is publicly funded.

Lawyers' place in the process

- There was in each area a nucleus of solicitors handling the bulk of care proceedings, who typically shared a similar ethos.
- Parties' legal representatives generally worked together co-operatively and constructively to progress cases to resolution.
- Court case management was effectively devolved to the group of legal representatives who operated a process of project management, largely by consensus, with little independent oversight or control.

Shared ethos

- The removal of children from their parents weighs very heavily on all involved, resulting in a tendency to delay decisions to give parents the best chance to prove themselves, even at the cost of delaying decisions for children.
- It was universally considered by lawyers and other professionals involved in care proceedings that Care Orders are draconian

measures, giving parents absolute rights to contest their case, however apparently hopeless.

- A culture of settlement is tempered by the ethos, shared overall, that parents should have every chance to contest. The court is always willing to adjudicate contested cases. Fighting care applications was viewed as therapeutic for parents in some cases.

Parents

- Parents were able to access committed and able legal representatives and generally attended court hearings and remained engaged in the legal process.
- The court environment created an alien and lonely experience for parents, with inadequate provision for waiting before hearings or for discussion with their lawyers which often had to be conducted in public areas within earshot of strangers.
- Parents are required to attend directions hearings, demonstrating their commitment and also providing the opportunity for their legal representatives to take instructions for the hearing, often in response to new input from the other parties.
- Parents generally did not appreciate why they were expected to spend extended periods at court for directions hearings. While most accepted this meekly, others were unable to control their anxieties and anger on the court premises.
- Parents – the only participants with a personal stake in the proceedings – were routinely excluded from pre-hearing negotiations. Few questioned this, but most found it uncomfortable and difficult.
- The majority of court rooms were in traditional formal style, leaving parents separated from their lawyers often sitting at the back, often out of hearing and only peripherally involved.
- More modern courtrooms, laid out as a square of tables where all parties could face each, other allowed parents to sit with their lawyers where they appeared more fully engaged in the proceedings.
- Some judges and magistrates took care to acknowledge parents in court, but more often parents were ignored at directions hearings. Some parents were not even addressed at substantive hearings.

Lawyers

Solicitors:

- There was a high level of specialisation in public law; two thirds of the public law solicitors interviewed for this study devoted 70% or more of their time to it.
- Female lawyers (and other professionals) predominate in care proceedings.
- The majority of solicitors worked in firms with family law departments with colleagues with whom to discuss their work and to share court hearings.
- More than half the solicitors interviewed were partners in their firms, reflecting the perceived importance of this work which was not an area of law from which more senior solicitors moved on.
- The population of solicitors handling care proceedings appeared to be an aging one with few younger solicitors opting for this area of law – as noted also by the Law Society and ALC.
- Panel members saw their membership as crucial to the quality of their work, giving an all round understanding of the issues. This view was endorsed by judges who considered this expertise was essential in avoiding delay.
- Panel membership required several years' experience in public law. However, not being on the Panel did not necessarily indicate lack of experience. Some very experienced solicitors preferred to act only for parents and not to join the Panel.
- While all considered representing parents to be the more difficult work, two thirds of Panel members were equally happy to represent both parents and children. Most of these considered that a mixed caseload was essential to their understanding of the perspectives of both parties.
- A minority (1/3) expressed a preference for representing only children, finding a professional client easier to handle and that they could have a greater impact on the outcome of cases.
- Solicitors acting for parents had to cope with a clientele notable for its chaotic lifestyle, with clients frequently failing to attend appointments, an inability to read or understand written documents and in a highly emotional state. Clients often failed to inform their solicitors of changes of address.
- Very heavy workloads were sustained through deep interest and commitment. Lawyers expressed high levels of motivation, arising

from a combination of the intrinsic challenge and interest of the work itself, together with a sense of public service and social justice.

- Most solicitors reported long working hours, often taking work home in the evenings and at weekends.
- Generally solicitors felt unable to control significantly the amount of work required in their cases, seeing this as led by the demands of clients, the other parties and the court.
- Most solicitors currently engaged in this work expected to continue despite changes to legal aid, working longer hours to maintain income. It was generally accepted that a career in legal aid funded work meant that solicitors would earn only a fraction of what they could expect from privately funded work.
- Solicitors generally disliked fixed fees, preferring to be paid for work actually done. The notion of swings and roundabouts was not considered to be a realistic model in public law given the lower volume of cases handled by individual firms (in comparison to criminal law).
- There were signs that excessive demands from rising case numbers were overwhelming some solicitors, tipping them into a state of frustration and demoralisation, with some turning away new clients towards the end of the study.
- Some solicitors responded to the new funding regime by ensuring that they did their own advocacy as much as possible to top up fixed fee payments.
- A small number of firms appeared to be re-organising office systems to handle cases on a production line basis towards the end of the study period.

Barristers

- Care proceedings work was not considered suitable for handling by newly qualified barristers. More senior barristers tended to move on to more lucrative areas of law.
- Barristers were generally loathe to turn away any work offered, even at the cost of routinely working late evenings and weekends.
- Less experienced barristers found the intensity of the work and intrinsic stresses of court advocacy very difficult to handle and some barristers felt that their work had negatively impacted on their private life.

The task of representation

- Solicitors aimed to enable clients to understand the process, make it work in their clients' interest and secure the best possible outcome for them, that is for the parent to continue to care for their child, but where that was not possible - a placement with relatives, continued contact. Stranger adoption without contact was considered a last resort.
- Most solicitors additionally felt they had some responsibility to remain focused on the child's welfare when representing parents.
- Solicitors frequently started to act for parents after proceedings had begun. Early preparation and advice was frequently undertaken at short notice.
- Lawyers recognised the importance of being realistic with parent clients about their need to co-operate with the local authority and the importance of focusing on their child's welfare.
- Advice to parent clients was not limited to narrow legal issues and extended to matters of their lifestyle, parenting and self care.
- Parents' instructions were regularly taken at court. This was convenient for both lawyer and client and essential given the routine late filing of statements and reports. It also overcame the difficulties of communicating with clients without settled accommodation or reliable phones and who could not read well.
- Representing parents meant acting on parents' instructions; lawyers influenced instructions through the advice they gave but accepted that clients were free to ignore this.
- Lawyers were unwilling to reject parents' instructions as unreasonable, a position supported by judges who strongly preferred parents to have representation rather than to appear as litigants in person.
- The view that even unreasonable instructions had to be followed was bolstered by a general belief that parents were entitled to 'their day in court.'
- Wherever possible lawyers sought to further their client's case through direct negotiation with the other lawyers. The appointment of experts to conduct assessments, the exact wording of the threshold statement and the frequency of contact under the final order were regularly determined through negotiation.
- Parents' lawyers advised their clients to concede where the local authority's case was strong AND clients were considered too emotionally fragile to cope with contesting it.

- Contact arrangements could provide an opportunity for the lawyer to achieve something which made the outcome more palatable for their client.
- Many solicitors were experienced advocates who appeared regularly at directions hearings. Pressure of office work and other cases; the fee regime; case complexity and lawyer's skills the duration of hearings; and the need to support or distance themselves from difficult clients led solicitors to instruct counsel, particularly for final hearings.
- Continuity of representation was highly valued by solicitors and barristers but hard to achieve in practice. Lack of continuity in representation raised legal aid costs and appeared likely to make court a more stressful experience for parents.
- Some solicitors recognising their clients' isolation sought to support them both inside court and more generally; others appeared not to view this as part of their role. Lawyers themselves lacked training for this role.
- Representation was a tailored service, which reflected the demands of the case, court and client and varied according to the style and preferences of the lawyers involved. At one end of the spectrum parents had a personal supportive service, at the other formal representation by a series of different lawyers, not all of whom were familiar with their case.

Appendix 1: Pen Pictures

BARBARA

Barbara had already had 7 children removed from her care over 20 years. Following Annette's birth Barbara underwent a long assessment placement before finally being allowed to take her home. A long history of improvements and regressions followed. The local authority initiated these proceedings when Annette was aged 12 and Tony 9, both living at home with their parents who are married. Barbara, now in her 50s, suffers from a number of physical disabilities, including severe arthritis, partial deafness and a speech impediment. Her history had left her with extreme distrust of anyone perceived as 'authority', in particular the local authority. The father, who is fit and healthy, is employed, working very long hours. The application arose from numerous referrals for neglect from the children's school, coupled with Barbara's intransigence.

Barbara, who was unable to trace the solicitor who had represented her in previous proceedings had telephoned a new solicitor's firm at random. This solicitor is long qualified with several years experience in care proceedings, representing parents. On the day before the first hearing Barbara's solicitor met both parents for nearly 2 hours, taking instructions on the threshold. She identified and contacted Barbara's previous solicitor, who had moved to another firm, but he declined to take the case. Barbara's solicitor advised that the couple should be separately represented, given hints of animosity between them. Given her background and volatile nature, Barbara was not an easy client, frequently shouting, stomping off, and making difficulties over every detail of proposed agreements with the local authority.

At the start of proceedings, Barbara was vehemently opposed to the local authority. The first hearing was not contested due only to the absence of the guardian. The local authority sought to work with the family in the form of intensive support/assessment, pending a contested hearing. With great difficulty her solicitor persuaded Barbara to accept this high level input from Children's Services subject to some modifications. For the second hearing in week 6 Barbara's solicitor briefed counsel, expecting a contest, but the local authority perceived the parents to have engaged and decided not to seek removal, on the basis of a formal agreement, hammered out over 3 hours in court prior to the hearing. Barbara was represented by male counsel on that occasion, appearing to relate well to his humour and enormous patience. It transpired that the psychologist identified earlier to assess the family as a whole was now unable to do this work.

At a third directions appointment (week 12), it appeared that Barbara's co-operation was breaking down and neither parent attended court. Her solicitor was herself experiencing difficulties in making contact with Barbara and was therefore unable to advise and keep her engaged. A new guardian had become involved, when the first became ill, and had been refused access to the children on 3 occasions. Barbara's solicitor agreed to help with this. After extensive discussion a new psychologist was agreed and a CMC listed. Shortly after that hearing, Barbara's solicitor and the guardian went together

to Barbara's home and were finally let in. With considerable patience, over time the guardian gradually established a rapport with Barbara. Both parents attended the CMC in good humour. During a long period of waiting, both parents spent time with their solicitors discussing benefits, finances and housing, concerns having emerged over the family's state of poverty. However, a month later, Barbara 'sacked' her solicitor. Her solicitor was disappointed, and frustrated at the pressure from the other parties to press Barbara too hard – "She blames me for helping everyone else" - specifically when trying to persuade Barbara to give access to the psychologist. At two subsequent hearings, Barbara accepted the offer of sitting in with her husband during discussions with his solicitor.

Difficulties encountered by the psychologist in seeing members of the family resulted in long delays, requiring a further directions appointment when an agreement was hammered out whereby Barbara finally consented to the psychologist seeing the children. The IRH was postponed to a date 10 months after the CMC. The psychologist's report, finally completed after further delay, pointed to concerns but did not recommend the children's removal. The local authority were then late in filing their evidence and "struggling" with their plan. Finally, at a directions hearing 14 ½ months from the start of the case, the local authority was granted leave to withdraw the application, the guardian expressing herself satisfied that the children were safe and happy. Her investigations had revealed the scope and extent of Barbara's physical difficulties and support was offered, with some acknowledgement that these difficulties had been a significant cause of the family's problems. Barbara, whose relationship with her social worker appeared to have improved dramatically, addressed the court to request ongoing regular support from Children's Services and extra help when needed.

Application withdrawn

64 weeks

BERNIE

Bernie, a single mother in her late thirties, lives with and cares for her elderly parents. She has problems with alcohol - her mother is an alcoholic. Bernie's only child, Patrick, aged 3 ½, was found wandering near a busy road and taken into police protection. At the time he had been having weekend contact with his father, Lee, who had left Patrick on his own while visiting friends. Lee received a police caution and made allegations concerning Bernie's alcohol problems. Bernie agreed to the local authority accommodating Patrick whilst the police investigated neglect and possible abuse. No action was taken against Bernie, her explanation for Patrick's grazes and bruises being accepted as being caused accidentally. Care proceedings were started two months later on the basis not only of the incident when Patrick was with Lee, but also conditions at Bernie's home and her inadequate supervision of Patrick.

Bernie's solicitor, a member of the Children Panel since its inception, works almost exclusively on public law children matters in a high street firm. Bernie

was referred by the firm's criminal department which she had consulted during the police investigation. The solicitor provided pre-proceedings advice, corresponded with the local authority, and then represented Bernie throughout the proceedings, appearing at all the numerous hearings except for two which her colleague attended on her behalf. The solicitor was unsure of the extent of Bernie's problem with alcohol but her initial view was that the basis for the application was 'thin' as Bernie never showed any signs of having been drinking at office appointments or at court hearings. However, she continually advised Bernie to give up drinking, engage with treatment and to get her own accommodation. Bernie was compliant with Children's Services throughout, but although apparently engaged and listening to her solicitor's advice, was unable to follow it through and it gradually became clear that while admitting to her drinking, she was in denial as to its significance.

Patrick's care proceedings, which remained in the Family Proceedings Court, were blighted by the incompetence of the local authority both in terms of inadequate social work and failure to comply with directions, and by the court's failure to respond to this or to provide hearings in accordance with listing. Appointment of the guardian was delayed and lack of continuity was a general feature. No fewer than seven lawyers represented the local authority; there were at least four different social workers, and court hearings were handled by a number of different magistrates' legal advisors.

The application for an interim care order was 'more or less conceded' at the first hearing. The issues early in the proceedings were further assessments of Bernie, following the local authority's positive viability assessment, and the arrangements for her contact with Patrick. Bernie's solicitor identified centres where her client's parenting could be assessed. The guardian opposed a residential assessment because Patrick was settled in foster care, and other centres were considered unsuitable because Bernie was not living independently or had yet to undergo detox. Finally, following an assessment from a local substance abuse unit that Bernie was not ready to undergo detox – a pre-requisite for the chosen assessment centre - Bernie's solicitor decided not to press for immediate assessment at the (third adjourned) CMC. A psychological assessment of Patrick was ordered due to concerns of the guardian. By this point (four months into the case) Bernie's estranged brother had become aware of the proceedings and offered himself as a possible carer. The local authority was directed to undertake a viability assessment. While Bernie was not enthusiastic at the prospect of Patrick living with her brother she preferred this to the possibility of adoption, hoping in any event to have Patrick returned to her care.

When the case returned to court five months later, ostensibly for the IRH, neither the psychologist's report nor a special guardianship report on Bernie's brother had been completed and Patrick's father Lee, who had instructed a solicitor nine months after the proceedings started, was seeking to be assessed as his son's carer. Further failures by the local authority resulted in a series of hearings without progress over the next three months. As time passed tests indicated that Bernie was reducing her drinking and talked of finding her own accommodation. The SGO report was finally received on the

day before the adjourned IRH and the psychologist's report that morning, and the IRH was further adjourned. The local authority was ordered to provide a statement explaining their non-compliance with directions. At the next hearing, Lee, represented by an assertive barrister, was determined to seek a psychological assessment on the basis of a recommendation in the earlier psychologist's report. Although not convinced that Bernie was ready for the parenting assessment which would follow, her solicitor decided to seek a similar assessment for her client, which would proceed alongside further assessments of her brother and not be a cause of further delay. However, neither the local authority nor the guardian favoured these further parental assessments, considering that their potential as carers had been adequately covered in the psychologist's report. Bernie's solicitor remained concerned about the brother's assessment which was not entirely satisfactory.

The parents' applications for assessment were made at a contested hearing, but were, as expected by both legal representatives, refused by the magistrates. It thus seemed likely that Patrick would live with his uncle. Introductions were started and an IRH was listed 16 months after the care application, to give time for the placement to be tested. At the IRH the focus turned to arrangements for Bernie's contact after Patrick's placement, and to the support available from the local authority for the uncle. Again the local authority had failed to clarify plans and provide documents for the hearing and appeared also unwilling to provide support for the placement, causing threats of judicial review from the other parties.

The case concluded at a 'repeat' IRH (designated as such to save further local authority court fees). Yet again local authority documentation was received only the day before this hearing. Whilst contact had not been proceeding as planned at the previous hearing, it transpired that this was due to a misunderstanding over the arrangements by Bernie and her brother, rather than to any dispute. A comprehensive agreement setting out expectations of Bernie and a schedule for contact for the next 6 months was agreed without difficulty. The recently appointed 5th social worker in the case was someone known to the legal representatives and inspiring of confidence. Patrick had settled well in his new home and, by agreement, a Special Guardianship Order was made to the brother supported by a 12 month Supervision Order.

Special Guardianship Order, Supervision Order

78 weeks

CARLY

Carly, aged 17 years and with learning difficulties, lives with her mother, her 8 year old sister and her own baby, Abi. The family had been known to Children's Services for several years and a pre-birth assessment had been carried out. Carly co-operated and the file was closed. However, following what the guardian referred to as a "summer of madness", including several violent incidents between Carly and her mother, inappropriate visitors to the home, unhygienic conditions, and allegations that Abi had been left in the care

of the 8 year old, care proceedings were started. Abi was then aged 10 months.

Carly's first solicitor was on the Panel. Working part-time she was not always available to represent Carly at court hearings, briefing counsel on those occasions. Four months into the case, Carly was transferred to a second solicitor within the firm for internal workload reasons. The second solicitor, not a Panel member, specialised in representing parents - particularly young parents and those with learning difficulties. During the course of the eight hearings, Carly was represented by four different advocates with one barrister appearing 3 times, including at the final hearing. Carly attended every hearing, the first few together with Abi and her mother, always appearing impassive and unresponsive, making it difficult to gauge her understanding. She appeared to engage more readily with her second solicitor, becoming more responsive – even a little truculent.

At the first hearing of the case in the FPC, Carly was represented by counsel, in the expectation of a fully contested ICO for Abi's removal. However, given uncertainty on the day over court time, an agreement was negotiated with the local authority, keeping Abi at home. The involvement of the Official Solicitor was also mooted and the case transferred to the County Court. It remained there even though referral to the OS was discounted almost immediately.

At the next hearing a week later, the local authority still sought to remove Abi but was not supported by the guardian, who together with Carly's counsel, stressed that there had been no breaches of the agreement. The guardian, satisfied with the home environment, sought a paediatric assessment of Abi. Carly's counsel sought a psychiatric assessment for her, complaining at the local authority's lack of preparation for the case. The case was listed for a contested ICO in a month, by which time the local authority had decided against removal, given Carly's continuing co-operation.

By the CMC at week seven, evidence from a psychologist suggested that Carly would be unable to parent Abi on her own, but might cope with family support. At the Advocates' Meeting the parties agreed that a full family assessment was required. Debate as to who should do this was resolved at CMC by an agreement that the local authority carry out a package of work, reporting back to the parties on a monthly basis. The case was listed for pre IRH review in 4 months. After 2 ½ months this assessment was not going well and Carly was advised strongly by her solicitor to "raise her game." Two weeks later, following further violence between Carly and her mother, there was an emergency hearing. Carly reluctantly followed legal advice to allow Abi's removal pending a full contested hearing 2 weeks later. The ongoing family assessment was also highly critical of Carly's mother, with adverse implications for Carly's case to parent Abi with family support. At the hearing listed for the contest, Carly accepted her solicitor's advice not to contest (without consenting to) the ICO – on the basis partly that she was unlikely to succeed, but also that while her mother and Abi's father were being assessed (as potential carers), time could be used for a further assessment of herself. The judge was positively disposed to this. However, two months later, the

psychiatrist's updating report failed to recommend further assessment for Carly, who herself appeared to recognise that the prospects for Abi's return were diminishing. By the time of the IRH – 10 months from the start of the case – the local authority was proposing adoption, assuming Carly's acceptance. However, Carly's solicitor asserted her right to a contested hearing. Despite some scepticism from the other parties, it was agreed that papers could be disclosed for a free viability assessment of Carly's parenting, which would not delay the hearing.

The final hearing, listed for 3 days, took place in the 50th week. Counsel was briefed, but her solicitor also attended to support Carly – considering this a necessary duty, irrespective of the costs implications. Counsel advised strongly that despite slight hints of possible future improvements, the child's timescale was now the issue and the court would be highly unlikely to delay further. After an hour's consideration, including a talk with her mother, Carly accepted the option of 'not opposing but not consenting' to a Care Order with Abi being placed for adoption. The hearing was completed in under half an hour. Counsel commented on Carly's unusual lack of emotional response.

Care Order

50 weeks

CAROLE

Carole is a single parent, an alcoholic, with three children: one adult, a teenager and 10 year old Ben. The younger two lived with her, her adult daughter nearby – they considered themselves to be a close family unit. The children's father had not been involved with the family since Ben was two. Two years before these proceedings, Carole had accepted a referral for detox and rehabilitation, leaving the two younger children in the care of the older daughter. However, she had not completed the programme because her daughter was unable to continue caring for the children. The local authority case centred primarily on neglect, including Ben's non-school attendance – exacerbating his learning difficulties - and Carole's lack of engagement with Children's Services. Carole's view was that these problems had arisen at a time when she was ill and in financial difficulties, but that things were now improving.

Carole consulted her solicitor, an experienced care solicitor, a year before these proceedings because of threatened proceedings in relation to her daughter's non-school attendance. A Letter before Action had been sent 18 months previously. The local authority case to remove Ben under an ICO was supported by the guardian, who suggested very generous contact in recognition of the particularly close bond between Carole and Ben. The case was listed for a contested hearing in the FPC. The parties used three hours spent waiting for the court to be available, negotiating, but failed to reach a compromise. Carole's solicitor felt strongly at that time that her client's circumstances over the period of Children's Services involvement with the family had not changed sufficiently to warrant Ben's removal. The extent of Ben's non-school attendance was also disputed, but Carole was now willing to work with the local authority. However, the court was finally unable to provide

sufficient time for a contested hearing on that day and gave another date in two weeks. Carole's solicitor saw the intervening period as an opportunity for Carole to demonstrate her new resolve and strongly advised her to start attending a community alcohol unit.

Carole was clearer on the facts around Ben's school attendance at the next hearing, at which she was represented by a barrister. The local authority were in difficulties finding a suitable foster family for Ben, as their intended family was on holiday. While counsel for the local authority negotiated a comprehensive agreement for Ben to remain at home under an ISO or an ICO with a strong social work support package pending a contested hearing, the social worker continued searching for a foster placement for Ben. When this appeared successful, the hearing was held up for it to be finalised. The barrister commented 'It's all being done on the hoof', as the local authority planning repeatedly changed, making the putting together of a working agreement even more traumatic for Carole. With persuasion from her barrister, Carole accepted this plan seeing this as a final opportunity to prove herself over a two week period (over Christmas) pending the contested hearing. The search for a foster carer finally proved unsuccessful. The magistrates, displeased with yet further delay on the day set aside especially for this hearing, made their feelings clear to the local authority and ordered an ISO, with the support package.

By the date listed for the contested hearing, the agreement had broken down and the local authority again sought an ICO and Ben's immediate removal. The hearing date was between Christmas and New Year when neither Carole's solicitor nor the previous barrister were available. Carole was represented by a less experienced barrister at this hearing which lasted two days, when the local authority application finally succeeded. Ben was removed directly after the hearing in the early evening with police assistance, as he tried to run away.

The CMC took place two months later. Carole was represented by a third barrister, her solicitor having been taken ill the previous day. Ben was reportedly unhappy in his foster placement and Carole had found the intervening period very difficult. A psychiatric report on Carole stated that she had poor insight into her drug and alcohol use. She claimed that her drinking was not a significant problem, in that she never became drunk. However, she again accepted advice to stop drinking completely and to attend an alcohol unit for support, if this would help to get Ben back. An IRH was listed in 4 months; meantime there would be further assessment of Carole and Ben.

During this period a viability assessment of Carole's daughter as a potential carer for Ben proved negative. Ben's father had also entered the picture after 8 years, seeking contact with his son, though not wishing to be considered as a carer. Carole failed to attend for liver function tests and alcohol support units. A psychological assessment of Ben recommended that he should not be returned to his mother's care and suggested that his learning difficulties were caused by alcohol foetal effects. Carole's solicitor who had initially supported Carole's opposition to Ben's removal, now appreciated that

because of his learning difficulties, Ben needed more than 'good enough parenting' and advised Carole that as she had not made the required changes she was unlikely to succeed in a claim to have Ben returned home. Carole, shocked by the psychiatric report nevertheless accepted it and reluctantly acknowledged that Ben would not be returning to her. However she wished Ben to stay with his current carers, with whom he was now happy. She focussed on the possibility of working towards his return after a further period when she could work to beat her alcoholism.

In the event, the IRH was postponed twice – once because the guardian was not satisfied with local authority planning for Ben - and did not take place until 10 months after the CMC. At that hearing it transpired that Ben's carers had indicated several months earlier to the local authority that they did not wish to care for him long term but that the local authority had done nothing to find alternative carers. Carole had by then changed her mind about accepting a Care Order, claiming to have stopped drinking 3 months earlier and because of the failure of the local authority to formulate a satisfactory plan for Ben. A final hearing date was set in 3 months time – the first date available for a 3 day hearing which all parties could attend.

The position of all parties remained the same by the date of the final hearing, except that Ben's father had given no further instructions to his solicitor. Carole still wished to oppose the making of a CO; the local authority had made no further progress towards finding a new long term foster placement. Threshold was agreed before the start of the hearing, but no further negotiation was attempted. Evidence heard over two days, included the views of the two experts that Mum's now six month abstinence from alcohol did not yet amount to sufficient progress to risk Ben's return to her care. Clear advice was given that she should engage with alcohol support services before again offering care. The hearing was harrowing for Carole who pursued her case to the end. While appreciating that Carole had made progress in addressing her problems, the Magistrates accepted the professional evidence and made a final Care Order, urging the local authority to prioritise Ben's placement.

Care Order

73 weeks

CLARE

Clare's five children had been voluntarily accommodated for a year when care proceedings started. The local authority's main concern was the allegation of over chastisement of the children by Clare's husband. Clare herself has learning difficulties, as do 3 of the children. She and her husband were living in the same property, but separately, pending a divorce initiated by Clare. The children were with three different foster carers – the youngest two (aged 6 and 5) together, the middle two (aged 10 and 8) together and the oldest, aged 14, elsewhere.

Clare's solicitor became involved before the proceedings started, attending meetings and communicating with the local authority. There was agreement

on the need for a psychological assessment of the whole family, but not over who should carry this out. Clare's solicitor was surprised when the local authority decided suddenly to initiate proceedings given that there appeared to be no precipitating event and the parents had been entirely co-operative. He queried this at the first hearing, referring to the case of *Re L.* [2008] 1 FLR 575. The local authority responded that they needed now to make long terms plans and were concerned as to the precise nature of the parents' relationship. The solicitor's main concern at the first hearing was to obtain an assessment of Clare's capacity both in relation to the court proceedings and generally, not satisfied that the local authority were providing appropriate support to Clare or fully understood her condition. Clare was assisted at this hearing, and in future hearings, by an advocate who had also accompanied her at earlier meetings with the local authority and helped her in understanding documents. All parties agreed on the need for the case to be transferred to the County Court on the basis of the number of children, their differing needs and placements and the possibility of the involvement of the Official Solicitor (OS) on Clare's behalf.

The OS became involved, though no caseworker was in place for the CMC in week 9. Clare's solicitor was frustrated at this hearing because although the local authority had again agreed that Clare should be assessed, it now appeared to have decided against this. With the OS finally in place by the next hearing, the solicitor briefed counsel to handle the advocacy so that he himself could focus on liaising with the OS and supporting Clare. The OS was insistent that a psychological assessment investigate whether Clare could care for all five children or just the oldest. This was opposed by the local authority, partly on the ground that Clare's contact with the children, while reliable and regular, was limited in what she could offer them, and also because, when asked outright, Clare had admitted to the social worker that she did not think she could care for any of the children. However, the OS sought to have Clare's real wishes fully explored, given her suggestibility and the likelihood that her husband's bullying had undermined her confidence. Her solicitor considered that the local authority were pre-empting the outcome of the case by reducing Clare's contact and criticising rather than providing her with appropriate support. After a long day of discussion in court, the local authority finally accepted the need for the psychological assessment.

By the IRH in week 37, the psychologist had recommended that the children should not return to Clare, but that contact should be maintained because of their attachment to her. The Care Plan provided for long-term fostering of all 5 children with face to face contact four times a year plus indirect contact. Negotiation involving the OS resulted in contact at a slightly higher level. Clare, who was by now happily with a new partner, appeared sad but content with this outcome. Care orders were made at that hearing.

Care Orders

37 weeks

COLLEEN

Colleen was an alcoholic and the mother of four children aged between nine and two years. Her relationship with the father of her three younger children was marked by serious domestic violence and Colleen had obtained an injunction against him. One night the children were found looking for their mother who had collapsed in the street and were taken into police protection. Colleen provided details of relatives who might care for the children; whilst this was being considered the children were placed in two separate foster homes. Care proceedings were started a few weeks later.

Colleen's solicitor worked in a small specialist family law firm where she had a heavy caseload, acting almost entirely for parents in care proceedings. She acted for Colleen throughout, instructing the same barrister for two hearings: once when she was engaged in a final hearing on another case and again where the interim order and care plan were contested. Both fathers became parties to the proceedings but the father of the youngest children ceased to give instructions and his legal aid was discharged four months into the proceedings. The father of the eldest child, who had been in prison when the children came into care, was made a party and participated throughout, supporting the placement of this child with his own mother, who also became a party.

Throughout the proceedings Colleen kept regular contact with her solicitor and her relationship with the social workers was good. She followed all the advice she was given, co-operated with psychological and parenting assessments, worked with services for alcohol abusers and victims of domestic violence and maintained good contact with all her children.

The first placement of the older children broke down and the second placement was in difficulties - the oldest child had made complaints about the way he was treated to his teacher and the guardian but the social worker had apparently taken no action. Colleen wanted these children to be placed with relatives but the local authority was unwilling to do this until the family indicated which relatives should be given priority and they had been assessed. Disputes about this issue resulted in the case being transferred to the county court and two additional hearings, the first of which was adjourned after more than five hours of discussions between the parties' lawyers and the social work team. Whereas the mother, father, relatives and guardian agreed that the eldest child should live with his paternal grandmother the local authority asserted that this was impermissible under the Placement of children with parents etc Regulations 1991 (1991 SI 893) without a full assessment. A senior manager vetoed placement with the paternal grandmother even though the social worker considered this appropriate and no other placement had been identified. In addition the guardian insisted that the placement should be under an ICO and rejected the proposal of avoiding the regulations by having an interim residence order. When the matter came back to court the following week the local authority was represented by counsel who over the course of the morning obtained approval from all concerned for the eldest child to live with his grandmother under an ICO and a written agreement clarifying local authority expectations of his parents and grandmother.

The next hearing was ineffective because no-one from the social work team attended court and the local authority legal team had failed to serve the amended threshold document on the other parties. By the next hearing, designated as a CMC, the case had been transferred to a new social work team. The mother accepted the local authority's threshold and with the guardian agreed a detailed plan for her to have increasing contact with the children, with the intention that, if all went well the three youngest would return to her. An IRH planned for 6 months later did not take place but the case was listed for a 3 day final hearing. In the event the final hearing lasted only five minutes. By this time the three younger children were living with Colleen full time. Supervision orders were made in relation to all four children, a one year order for the three younger children and a three year order for the oldest child who was to remain with his grandmother.

Supervision Orders

58 weeks

DAWN

Dawn is a divorced woman in her 40s, addicted to heroin, with two sons, the older being also involved in drugs and crime. Paul, aged 9, was living in a shared care arrangement between his father and Dawn. The local authority had serious concerns about Dawn's failure to control her older son and allegations that she supported his drug abuse, including supplying drugs. During care proceedings relating to the older brother, Children's Services found that Paul had left his father to live with Dawn and been present when his brother overdosed. Paul refused to return to his father and, at an 'intimidating' pre-proceedings meeting, Dawn was persuaded to agree to his accommodation in foster care. Care proceedings were instituted a few weeks later.

Dawn's solicitor, who was also acting in the proceedings relating to Paul's brother, is a partner in a large local firm with an 'overwhelming' public law caseload - mainly parents. She instructed counsel for this case, but also attended most of the hearings herself, which is often her practice. The two were able to advise Dawn jointly in court, though her solicitor saw Dawn as wanting 'representation not advice'.

Dawn was intensely bitter about the involvement of Children's Services and from the start her solicitor had difficulty getting her to co-operate with court directions, which exposed her representatives to strong criticism from the court. Dawn's statement was filed late because she ignored arrangements to sign it, she did not comply with directions for drug testing or attend appointments for a psychological assessment and sometimes failed to attend hearings or left before they were finished. The solicitor also had difficulty in maintaining contact with Dawn, who moved at least 3 times during the proceedings without informing her. Dawn was angry and resentful in meetings with her legal representatives, repeatedly blaming the local authority and threatening to walk away from the proceedings.

Dawn's barrister, who acted throughout, was patient and sympathetic but firm. At the first IRH, on her very clear advice, Dawn accepted that there was no chance of persuading the court to rehabilitate Paul to her care within these proceedings but that she should focus on sorting out her life with a view to applying to discharge a care order in 18 months time. Dawn appeared resigned to Paul living elsewhere, and the focus of representation became her contact with Paul. She was prepared to accept Paul living with his father if that was what he wanted – although he was adamantly refusing even to see his father at the time. However, that hearing also considered the assessment of his father as a potential carer, and therapy for Paul, a matter which the local authority was finding difficulties in arranging, requiring several extra review hearings. However, his older brother's second overdose shortly after the completion of his proceedings then cast a shadow over planning for Paul who was severely affected by this.

Despite her earlier instructions Dawn attended a final hearing intent on seeking Paul's return and rejecting the local authority's written agreement about contact. Her representatives worked hard to regain her co-operation; the barrister proposed amendments which Dawn reluctantly accepted and also got her agreement to most of the facts in the threshold statement. The local authority was content but the judge was not and required evidence from both parents, the social worker and guardian. This posed further problems for Dawn's representatives over the 2 day hearing because she had left court and refused to give evidence in the presence of Paul's father. The judge invited applications for a witness summons which was duly made. Dawn's barrister's cross-examination of the social worker elicited support for her contact with Paul, but the cross-examination of Dawn by the local authority barrister and the child's solicitor focused on her relationship with Paul's father and her drug misuse. The judge found against Dawn on each of the points she denied in her evidence. In the course of this hearing the inadequacy of the local authority's planning was exposed and the judge set a further hearing to consider the care plan, which now proposed Paul's eventual rehabilitation to his father. Paul had, after several months, re-engaged with his father with whom he was enjoying contact.

Since the purpose of the next hearing was to review local authority planning for Paul Dawn was advised she need not attend. Her lawyers therefore had no instructions when the focus changed following a distressing contact between Paul and his mother. On the guardian's application, an order for no contact was made, the judge leaving Dawn to appeal or apply for discharge if she wanted contact. Further drug testing was ordered of Paul's father, who had earlier been shown to be a user, together with further expert evidence about Paul's needs.

Dawn attended court for the second IRH three months later, when it transpired that Paul's father was still smoking cannabis on a regular basis, despite his assurances that he could stop at any time. The local authority put their plans for Paul's rehabilitation to his father on hold, pending further testing, the judge expressing profound disappointment.

Dawn failed to attend court at all for a second final hearing of three days, 84 weeks from the start of the case, despite daily phone calls from her solicitor. The local authority still planned for Paul's eventual rehabilitation to his father, despite continuing positive drug tests, on the basis of evidence that the tests may not be correct. However, the guardian opposed the plan, concerned not only about the drug use, but also over his capacity to care for Paul's emotional needs as he moved towards his teenage years, favouring a high quality foster placement instead. The judge was inclined to agree with this approach, but accepted the local authority's plan for further drug testing of Paul's father and a transition period of rehabilitation to his care. The order of no contact to Dawn was replaced by an order putting contact at the discretion of the local authority. Rigid conditions for its reinstatement were set out and contact would in any event take place only three times a year. However Dawn had not re-engaged with the local authority by the time of the third final hearing five months later, and did not attend court when a final order was made for Paul to live with his father under a Care Order.

Care Order

106 weeks

EVIE

Evie was a member of a traveller community who had experienced a traumatic childhood when her mother had left her with her father who physically and sexually abused her. Evie subsequently moved to live with her mother and had 2 children by her violent partner. Evie suffered from severe mental health problems and was prone to violent outbursts. During the proceedings she was charged with ABH following an incident when she had hit a stranger who tried to help her while distressed. The proceedings started after Evie's mother informed Children's Services about bruising to her grandchildren. Evie explained how some minor bruises occurred but not those which caused most concern. The children remained in their grandmother's care throughout the proceedings.

Evie's solicitor was an experienced care solicitor in a small specialist family law firm and only represented parents. Because of the suspected non-accidental injuries, the proceedings were immediately transferred to the County Court. Evie's solicitor appointed an experienced care barrister who represented Evie at every hearing. The solicitor had great difficulty contacting Evie throughout the case, so felt unable to build rapport with her. However, Evie only missed one court hearing, always attending with her mother's support. As the children were considered to be safe with their grandmother, the focus of the case, supported by the guardian, appeared to be on Evie's needs, apart from establishing the non-accidental nature of the bruises.

For the first CMC, the local authority had produced a paediatric report as well as a parenting assessment of Evie. As Evie did not accept responsibility for all the bruising, the judge agreed to an independent paediatric report, as well as a psychiatric assessment of Evie. A Fact Finding Hearing was timetabled. A second CMC (so designated) took place 3 weeks later, ostensibly to consider the issue of contact. Evie's barrister, supported by the guardian, was seeking

a further independent parenting assessment with a specialist knowledgeable about Evie's community. There was a dispute about the need for this assessment, its timing and who should pay for it. The judge made it clear that he considered it necessary and that costs should be shared between all parties, but made no order concerning costs. Within a few weeks there was a further hearing about the costs of this report at which the local authority were ordered to share costs jointly with the other parties.

The Fact Finding Hearing took place just over 4 months later, though before a different judge due to listing difficulties. In the pre-hearing negotiation Evie conceded responsibility for the main injury to one child. The barrister was concerned to be clear that Evie really did concede the cause of the main injuries though she maintained she had no memory of the occasion. Conflicts between the paediatricians' reports about other injuries were then resolved by telephone. Evie's barrister and the other advocates, particularly the children's solicitor, were very concerned about her giving evidence, as they believed this would not help her mental health problems. The local authority accepted eventually that there was sufficient evidence for threshold. Evie's barrister persuaded her to show contrition, which she readily did. This was immediately put in a statement signed by Evie, thus removing the need for her to give evidence. After more than 3 hours of concentrated negotiation, the Fact Finding Hearing lasted 5 minutes, with total acceptance by the judge of the agreement as presented to him.

Within a month, Evie had disappeared. Her solicitor's legal aid certificate was discharged and Evie was neither present nor represented at the final hearing. Both children were to remain with their grandmother under a Special Guardianship Order.

Special Guardianship Order

25 weeks

HAYLEY

Hayley was the young mother of Nate who was 14 months old at the time he was taken into care. She lived with Gary, Nate's father, who was twice her age. As a child, she had been inadequately parented and sexually abused by a family member. Gary's children from a previous relationship had all been adopted. Hayley had abused drugs and alcohol since her very early teens and had received a suspended sentence for theft. She was currently at the curfew stage of a Supervision Order. Hayley and Gary were known to Children's Services but their parenting was thought to be 'good enough' until a street fight involving the police at which Nate was present. Because Hayley was arrested, Nate was immediately accommodated. Local authority concerns about the parents' lifestyle of drugs and alcohol, combined with Gary's emotional and physical abuse of Hayley and the potential effects on Nate, led them to issue care proceedings. There was initially no firm care plan, more of a 'wait and see' approach.

Hayley contacted her solicitor the day after her arrest. Until a couple of months prior to the Final Hearing, the solicitor found Hayley 'very prickly',

overtly hostile and antagonistic, although her para-legal established a working relationship with her.

The case had been transferred almost immediately to the County Court. At the CMC stage, the judge considered transfer back to the FPC but wanted to retain the case until the psychologist's report on the parents had been completed. By this time, 4 months after Nate was accommodated, Hayley was on a Methadone programme and Gary had started to attend a domestic violence course, although there were questions over his engagement with it. Hayley was due to attend a similar course. She had been having excellent contact sessions with Nate and the solicitor was hoping to get these increased. The main local authority concern about whether Hayley and Gary could prioritise Nate's needs over their own in relation to domestic violence was also muddled at the time by exchanges between Hayley, her social worker and the guardian about possible sexual abuse of Nate, although these were very quickly resolved as misunderstandings. Hayley was upset that the decision about whether to allow Nate to return to live with them had been put off until the IRH to be held 3 months later. Her solicitor reassured Hayley that the longer she was able to show her ability to stay 'clean', the greater her chances of Nate's return. However, in all the advocates' minds there was concern about Gary's commitment to the domestic violence programme and Hayley's probable inability to separate from him.

After an inconclusive report from the psychologist on Hayley and a negative one on Gary, the guardian postponed writing her own report until after the IRH to gauge the judge's response to the reports, as well as hoping to get a better idea from other evidence that might be presented to guide her recommendation. At this stage, 7 months on, the options for Nate appeared still to be open – adoption, rehabilitation or another lengthy postponement, as Hayley's solicitor made clear to her client. She even went further by suggesting that if Hayley were prepared to separate from Gary, her chances of having Nate returned home would be greatly increased. At the IRH, it was agreed that further questions needed to be put to the expert to clarify the risk of rehabilitation. After the hearing, Hayley's solicitor also stressed to her that the court was concerned about her apparent unwillingness to accept the seriousness of the emotional and physical abuse she had been experiencing and its potential effect on Nate. At this stage, she managed to get Hayley to accept that what she had experienced was domestic violence and that actually it had been worse than she had previously admitted.

In the next 4 months between the IRH and the Final Hearing, a new social worker was appointed who appeared to have found a way of persuading Hayley that she could live without Gary. He moved out of the family home 2 months before the Final Hearing. Hayley continued to be 'clean'. In the week prior to the Final Hearing, she took out a non-molestation injunction against Gary after he punched her in the face and, she claimed, was continually harassing her in and around the family home. The solicitor expected a short Final Hearing, with the LA plan being gradually to rehabilitate Nate.

As a result of continuous revelations from Day 1 of the 4 day hearing, there was clear evidence that Hayley had deceived everybody, including her very supportive social worker and the guardian, into believing that Gary and she had separated. The extent of her lies was such that she could no longer be trusted to keep Nate safe. Hayley was ruled out as a potential carer and further assessments were refused. Gary took no part in the hearing but indicated support for Hayley through his barrister. Whether this was 'support' or 'control' was an issue of debate between the judge and the expert. All the expert witnesses, the advocates and the judge acknowledged Hayley's exceptional bond with Nate. The judge ordered an ICO and Nate was to stay with his foster carers until a meeting of the Adoption Panel was due to take place within a few weeks. The judge wanted a 'best interests' decision before making a Placement Order. The next hearing took place 4 months later due to listing problems and Care and Placement Orders were made.

Care and Placement Orders

46 weeks

JEFF

Jeff was living with his partner Julie and her five children when proceedings started. The local authority had been involved with the family for some time, concerned over neglect issues and domestic violence. The couple's child Arun was just two weeks old when the application was made, on the basis that a partnership agreement was breaking down due to Jeff's aggression and the risk of his violence to Julie and the children; he had a previous conviction for assault on a small child. The other children in the household were a six year old with special needs whose father, Terry, had regular contact, and three teenagers whose father had just been released from prison. All three fathers had histories of violence including domestic abuse, and relations between them were antagonistic, particularly between Jeff and Terry. The father of the teenagers, though referred to from time to time during the proceedings, was not involved, though occasionally made threats, adding tension to the already fraught family dynamic.

At the first hearing the local authority sought to have Jeff removed from the family home through an Exclusion Order, leaving the children in Julie's care under an ICO. Jeff's solicitor, whose firm had acted for Jeff in previous criminal proceedings, had to contain his client's abusive behaviour despite the proposed orders being agreed. Jeff agreed to a psychiatric assessment to explore his ability to change and to attend anger management sessions. He accepted supervised contact with baby Arun three times a week.

By the time of the CMC a month later, Jeff's contact had been reduced because of his having missed a number of sessions. He still had no permanent accommodation and there were suspicions that he was visiting the family home, in particular one night when the police were called by neighbours and saw someone running from the house. Jeff strenuously denied these allegations, but complained about the police raiding the house in the middle of the night and waking the children. Neither the psychiatric assessment nor the anger management sessions had started. Although a

long wait for the hearing caused restlessness and tension between all the parties, Jeff was quiet and calm in court. Assessments of all three parents were ordered.

By the IRH – six months from the start of the case – Jeff’s assessment was cautiously optimistic about his ability to change and he was attending anger management sessions. The local authority planned to increase his contact, gradually working towards overnight stays at the family home. Julie and also the guardian supported this plan. Julie was perceived now as coping well with the children on her own. However, Terry was unhappy at the prospect of Jeff moving back into the family home and thereby having contact with his child. Terry enjoyed regular contact with his child, but difficulties had arisen when this child had been returned home with a bruised leg. Despite this, Terry flagged up his intention of applying for a Residence Order and the impact of this possibility was discussed at some length. The IRH was adjourned to give time for assessment of Jeff’s introduction back into the family home. However, 3 weeks later, following an assault by Jeff on Julie’s 16 year old daughter, the Exclusion Order was reinstated at an emergency hearing.

The case drifted for 2-3 months due to sickness and changes of social worker. At the next hearing for directions Jeff exhibited extreme anger, making threats of physical violence, punching the wall and kicking a door, before leaving court early. An IRH finally took place in week 60, which Jeff attended calmly. The local authority, satisfied that her relationship with Jeff seemed finally to be over, now planned for the children to remain with Julie under a Supervision Order. Jeff’s contact was to be reduced from once a week to twice a year. Jeff, who had not actually had contact for some 5 months due to failures to attend and incidents of verbal abuse, was not satisfied with this plan and again left the court early, making it impossible for his solicitor to take instructions during discussions with the other parties. Satisfied that his child was safe with Julie, Terry was no longer considering a Residence Application. The other parties tried unsuccessfully to persuade Jeff’s solicitor to encourage him to accept a compromise of contact four times a year; it appeared that a contested hearing would be necessary to resolve contact arrangements. However, by the next hearing three weeks later, the local authority had concluded that Jeff’s contact was now properly a private law matter. Jeff’s solicitor who had not anticipated this was annoyed, but the other parties, although somewhat surprised, accepted this as reasonable. Proceedings were concluded with a 12 month Supervision Order; the possibility of supervised contact for Jeff remained open.

Supervision Order

63 weeks

JOSIE

This case concerned newborn baby Donna, the first child of Josie and her husband Paul. Both parents, who are in their 30s, have learning difficulties – Paul’s borderline, but Josie’s very severe. The couple lived independently in local authority housing, with some support from Josie’s brother who lived nearby. Donna was removed from her parents’ care before Josie left hospital due to concerns for her safety because of her parents’ limitations – one specific allegation being that Donna had been left on a table in a room by herself.

Josie’s solicitor took the case over from another solicitor in its early stages, when a conflict of interests was identified by the first solicitor. Paul was separately represented. At the first observed hearing – listed as CMC - in the County Court, both the new solicitor and the barrister already briefed by the original solicitor were present – this being the first time that either had met Josie. At that stage, the solicitor felt that Paul’s capacity might allow the parents to resume care of Donna. A psychologist’s report had been obtained confirming Josie’s lack of capacity to instruct a solicitor and the Official Solicitor had been approached, but not yet taken on her case – which was therefore technically ‘in limbo’ with Josie unable to give instructions herself but with no one to do this on her behalf. The CMC was therefore adjourned for two weeks.

There followed a series of two further CMCs to settle the issue of the parents’ assessment. The local authority’s initial proposals appeared muddled and incomplete. However, an alternative plan supplied by a unit approached by Josie’s representatives was considered by the other parties and the court to be weak and insufficiently tailored to these parents. On reflection Josie’s representatives had some misgivings themselves. In court discussions involved phone communication with the OS caseworker, who was generally content to leave decisions to Counsel. On one occasion however, the caseworker was unavailable, which created some uncertainty in the case. The parents were briefed at every stage – always together – Josie never speaking but always looking to Paul to speak for her. Delay in identifying and agreeing the form of assessment was accepted by the judge, anxious not to deprive the parents of their right to an independent assessment and to forestall any later claim of breach of their rights. A combination of the two proposed assessments was finally ordered in the 20th week of the case. The IRH was listed for week 35.

Some weeks before the IRH the parents’ independent assessment proved to be negative. Solicitor and Counsel agreed that it should be accepted that the parents were unable to care for Donna. When briefed, the OS required her solicitor to establish Josie’s wishes and feelings – somewhat unrealistically in the solicitor’s view. Both parents were advised together by their solicitors at a joint appointment that it was now unrealistic to pursue their case and they sadly accepted this. Josie’s brother emerged as a potential carer for Donna. The IRH ordered a full assessment of him, alongside twin-tracking for adoption. Alternative dates for a Final Hearing were listed – the first in 12 weeks, should the brother’s assessment prove positive and a second should

adoption prove the only option. The prospect of adoption would have necessitated additional OS procedures and with judicial time constraints have delayed a final hearing for 3-4 months. In the event, assessment of Josie's brother proved positive and Donna's placement with him and his partner under a Care Order, with very restricted contact to the parents, was ordered at the Final Hearing. As a precaution against inadvertent meetings between the parents and Josie's brother, or the parents not quite understanding that they should not pay visits, her brother and his partner moved with Donna to a new location, and a consequence of this placement meant that Josie's brother was no longer able to support the couple.

Care Order

45 weeks

KEVIN

Kevin in his late twenties had a long history of heroin and cocaine use supported through burglary and shoplifting. He and his partner, described as a good mother until drug use wiped her away, lived with their 3 children, all under 5, and his partner's 9 year old child from an earlier relationship. The family had been known to the Children's Social Care Department since 2005; failure by the parents to keep medical appointments for the three-year old who has a major genetic disorder led to a child protection plan. There were other concerns: lack of school attendance for the 5 year old, the father taking the children with him to burglaries, and the children being left with and then removed from their maternal grandmother. Considerable conflict between the paternal and maternal families resulted in little support to the grandmother but in competing offers to care for the children who needed to be kept together.

The case started with an emergency application for an ICO which the local authority sought so that the grandmother, who was caring for the children, could resist the mother's demands. The parents' whereabouts were unknown and neither had notice of the hearing. ICOs were made for 2 weeks so that the parents could become involved in decisions about assessments. Kevin was arrested between the first and second hearings but despite being in custody could not be located and served with the papers. He had still not been served by the CMC although a further arrest made this possible subsequently. His partner had also not been served but was known to be pregnant, with the baby expected in three months. The local authority was planning that the grandmother should care for the children as their special guardian. A second emergency application was made after the baby was born. Both sets of proceedings were heard in the FPC.

Kevin's solicitor, from a firm handling crime and family which had represented him in criminal cases, was a young woman, working part-time. She mainly acted for parents in care cases and intended to join the Children Panel. She experienced continued difficulty in obtaining instructions from her client; Kevin never kept appointments and appeared peripheral to the proceedings. Kevin's solicitor had only had one telephone call from him just before the IRH asking her to attend the hearing. This pattern was repeated throughout the proceedings. Kevin's failure to attend the IRH left his solicitor without

instructions so she could play only a limited part in contentious discussions about the local authority's revised care plan to remove the children from their grandmother and place them in foster care. In the event, the court agreed with the other parties that there should be an adjournment to allow a contested hearing about this. Kevin's solicitor subsequently established that he supported the mother having care of the baby and the grandmother's keeping the 4 older children and the baby if the mother could not do so. The adjourned hearing was the only hearing Kevin attended. There was no contest. The dispute between the grandmother and the local authority about her care of the four children was dissipated with an agreement for her further assessment and that they should remain with her. Kevin's solicitor engaged in discussions with the other advocates resulting in this agreement, sought contact for Kevin and introduced him to the baby's social worker. Kevin appeared to be in an aggressive mood in discussions with her at court.

Kevin's solicitor attended the remaining stages of these proceedings, with few instructions. Kevin did not oppose the local authority's facts and reasons; he accepted the care plan for the 4 children to remain with their grandmother and for his contact to be supervised. Residence, supervision and contact orders were made in relation to the 4 older children.

There were three further hearings, none of which Kevin attended before final decisions were made for the baby, who has the same serious genetic disorder as her brother. Kevin's solicitor was unavailable for the next hearing where the grandmother unsuccessfully sought an interim residence order for the baby and instructed a barrister. At the IRH, Kevin's solicitor indicated that he attended to oppose the care order even though he had yet to attend her office and sign a statement; the listing for the final hearing was, nevertheless, reduced to one day. At the final hearing Kevin's solicitor told the court that she was not in a position to oppose the applications. Care and placement orders were made, dispensing with both parents' consent to the baby's adoption.

Care and Placement Orders

54 weeks

LAUREN

Lauren gave birth to Chloe as a teenager. As a result of previous care proceedings brought in response to frequent requests for respite care, Chloe lived with Lauren's mother under a Residence Order with ongoing support from Children's Services. This family presented as smartly dressed, well spoken and educated, and often spoke of their rights in relation to Children's Services and demanded a better service in relation to Chloe. Lauren and her grandmother were also involved in Chloe's care, all three experiencing difficulty because of her increasingly wilful behaviour. Care proceedings were issued once more when Lauren's mother left Chloe, 9 years old, at the Children's Services office, stating that she could no longer cope without additional support. Lauren and her mother were both parties to the proceedings. Chloe then made allegations of physical abuse against her grandmother's new partner which resulted in a child protection investigation. The allegations were considered to be untrue and were withdrawn. Chloe

went to live with Lauren (no order) at her great-grandmother's home. A new social worker, who the family found difficult to work with, was appointed.

Lauren's solicitor was a very busy care solicitor who mostly represented parents. Lauren was concerned initially at not being more actively involved in pre-hearing negotiations and at several hearings her solicitor discouraged her from speaking for herself. The solicitor did however transmit her views very clearly to the other parties and the court.

At the CMC it became clear that Lauren's grandmother was not coping well with the situation. An educational psychologist, involved because getting Chloe to school had always been difficult, suggested that Chloe's erratic behaviour might reflect attachment disorder. After some dispute about the cost, the local authority agreed to a report on mother and daughter by a psychologist proposed by the guardian, together with therapeutic support for Chloe.

By the time of a review hearing, 2 months later, Lauren's grandmother had thrown Lauren and Chloe out and Lauren's mother was adamant that she no longer wished to be a primary carer for Chloe. Lauren and Chloe moved to rented accommodation nearer to Chloe's school, and the situation appeared calmer though none of the promised support had yet materialised. In pre-hearing discussion, Lauren's solicitor insisted on more support for her, although Lauren's demands and responses to offers of help were becoming unpredictable.

An IRH was arranged for 5 months time in anticipation of the psychologist's report being available but was adjourned for a further 2 months as no-one from Children's Services attended court and the psychologist's recommendations had not been considered by the local authority. This report indicated that both Lauren and her mother also had attachment problems, but was supportive of Chloe staying with Lauren with local authority support. In this 7 month period, several changes occurred which impacted on the future progress of this case: the guardian went on long-term sick leave never to return, a 3rd social worker and a new Team Manager took over the case, and Lauren became pregnant by her new partner. New social work input had released more support. Chloe was responding to therapy. Lauren's new partner was helping with disciplining Chloe. Lauren was also to receive therapy.

At the adjourned IRH the Care Plan was a SO with continuing therapy and support for Chloe and Lauren. The Final Hearing did not however go ahead because checks on Lauren's new partner revealed confusing information about his past requiring further investigation and a risk assessment. The local authority agreed to his remaining with the family under a working agreement and an ISO. A shortage of social workers to undertake the risk assessment meant that a further IRH could not be arranged for another 4 months. Within 5 weeks, disclosure about the new partner resulted in an emergency hearing where the ISO was renewed. Arrangements for the IRH were again derailed when Chloe alleged that Lauren's new partner had hit her, quickly followed by

Lauren herself revealing that he had abused her. When the social worker made it clear that Chloe would otherwise be removed, the new partner left the family home. A few days later, both mother and daughter withdrew their allegations but the social worker was reluctant to allow his return until the results of the investigation were known.

Lauren, at this stage heavily pregnant, was finding it increasingly difficult to care for Chloe on her own and made several requests for respite care increasing the local authority's concern about lack of stability for Chloe. When Lauren was unexpectedly hospitalised, an emergency foster care placement was arranged for Chloe. Although Lauren agreed to accommodation for Chloe and the plan remained rehabilitation, the local authority now wanted the control of an ICO. The new guardian, concerned about Chloe's disrupted care, supported the local authority application for an ICO, particularly because of Lauren's propensity to change her mind. At a hearing 3 weeks later the magistrates rejected an application by Lauren's solicitor for an adjournment because Lauren was not present. Following a contested hearing they made an ICO for 8 weeks. An IRH was listed in 3 months time. The case by then would have been going for 19 months; the care plan remained eventual rehabilitation for Chloe. Lauren had no support from her family and the local authority was considering proceedings in relation to Chloe's sibling.

Case not concluded

ROBERT

Robert was the partner of Gill, a woman who had already had 3 children (two aged 16 and 12 in separate foster placements and one aged 6 adopted) and was a member of a family well known in the local area for criminality and drug and alcohol abuse. Robert had a full-time job and, apart from one teenage incident, was law-abiding. Both were in their early 30s, had been together for 2 years and lived at his parents' home for several months until the baby's birth. Gill had been attending various drug and alcohol rehab programmes with relative success although still taking drugs during the pregnancy. The local authority took proceedings, when the baby was born, obtaining an ICO at the first hearing which the parents did not attend. The baby stayed in a special care unit, visited daily by both parents, and after a month went into the care of her paternal grandmother.

There was some uncertainty over the baby's paternity. Robert's parents, however, appeared determined to care for the baby even if it transpired that their son was not the father. Gill was finding it hard to attend all her drug rehab sessions and appointments but, knowing she had the support of Robert's family, was determined to be there for this child as she hadn't been for her previous 3 children. To Robert, Children's Services and the courts were an alien environment. Being involved with Gill had also brought him into contact with the police and also meant that he was not able to stay at his parents' home where he had lived all his life because his baby was being cared for there.

At the CMC, 6 weeks after the baby's birth, the first time Robert had attended court, DNA tests and psychologist and drug and alcohol reports on Gill were ordered. By the time of a Directions Hearing 6 weeks later, DNA tests showed that the baby was not Robert's. His parents, however, had decided to continue caring for the baby.

Robert wished to continue to be involved in the proceedings, but was unable to do so because, not being the father, he no longer qualified for non-means-tested legal aid and his earnings were such that he could not obtain public funding. Gill lapsed in her attempts to stay off drugs and alcohol. Robert's parents decided that they no longer wanted to care for the baby who was placed in foster care but Robert and Gill continued their relationship. After a succession of ICOs and psychological and drug and alcohol reports on Gill, a contested final hearing resulted in Care and Placement Orders just over a year after proceedings commenced.

Care and Placements Orders

53 weeks

SEAN

Sean was considerably younger than his partner, Nadine, and easily manipulated by her. Nadine had had a child from a previous relationship adopted. Both had histories of alcohol and drug addiction, and Nadine had resulting mental health problems. When Carl, their second child, was born, he was immediately accommodated with foster carers. Care proceedings were already underway for his 15 months old sibling, Ashley. Ashley had been born prematurely with drug withdrawal symptoms and, although he had gone home for a brief period under an ICO issued in the County Court, he was accommodated with foster carers due to Nadine's severe depression. At the age of 5 months Ashley had been placed with a couple from Sean's close-knit extended family. Sean and Nadine's contact with Ashley was sporadic.

Prior to Carl's birth Sean and Nadine were making good progress in managing their addictions and their ability to parent the coming child was being assessed. Care proceedings were issued - also in the County Court - for Carl and psychiatric reports on both parents ordered. The two sets of proceedings ran concurrently at subsequent hearings, although at different stages in the PLO.

Sean had instructed his solicitor in previous criminal proceedings. In the early stages of the care proceedings, he was represented at court by a succession of barristers but, after Carl's birth, by the same barrister for all but one hearing.

By the time of the CMC for Carl (also an IRH for Ashley) 10 weeks after Carl's birth, Sean and Nadine were continuing to make good progress but the psychiatric report recommended intensive cognitive therapy for Nadine and indicated that it could take a significant amount of time before she would be able to parent, though not ruling this out altogether. The psychiatrist's concerns did not extend to Sean, who was having regular, very positive

contact with Carl. Neither parent was seeking contact with Ashley. The local authority appeared unwilling to make a commitment to the recommended therapy and further assessments of Nadine, and was pressing for a Final Hearing about Ashley because of concerns about further delay. The plan was for Ashley to stay with the relatives although there was uncertainty whether this would be under an SGO or a Care Order. The reasons for this indecision were not entirely clear but appeared to be caused partly by the relative carers changing their minds and also, in the event of a Care Order, the need for them to be approved as foster carers. The interim care plan for Carl was adoption.

At the next hearing, 5 weeks later, Sean and Nadine unexpectedly told the court that they no longer wished to be considered as carers for Carl and thought it best for the children to be adopted together outside the family. Sean's representatives questioned his support for this, as Sean had maintained and enjoyed contact with Carl. However, Sean emphasised his agreement with his concern about rifts within his extended family, exacerbated by the current situation. At this stage, the guardian still supported the local authority's discrete plans for the 2 children; the plan for Ashley appeared to moving in the direction of an SGO but a CO was not being ruled out completely. Concurrently in the hearings there were unresolved discussions about whether Ashley's carers should be made parties to the proceedings, dependent on the local authority's stance in relation to the final order being sought. The judge adjourned the hearing for a week to enable all parties to reflect on the parents' changed position and its possible affect on the local authority's care plans, emphasising his concern about further delay in relation to Ashley. At this subsequent hearing (designated IRH), the two sets of proceedings were consolidated and a Final Hearing planned for 2 months later. This was then put back another 4 months because the guardian in the meantime had changed her views to favouring a sibling adoptive placement, so supporting the parents' position. There was also an ongoing assessment of another relative carer in relation to Carl. The judge was concerned about yet further delay but wanted a thorough consideration of potential permanency plans, so ordered reports on attachment, sibling adoption and family dynamics. The local authority was unhappy that the Final Hearing in relation to Ashley, for whom they were now seeking an SGO, did not go ahead.

By the time of the next hearing (another IRH) 4 months later, the local authority's position had changed to supporting the guardian's view on a sibling adoptive placement, a view also supported by the experts. After some discussion, the relatives were made parties to bind them to the court's decision to be made at the Final Hearing in 3 weeks time. At that hearing both parents gave evidence as did the relatives. The local authority, experts and guardian agreed that adoption together would be the right outcome for the children, to a large extent because of the parents' failure to give assurances not to disrupt Ashley's current placement. Care and Placement Orders were made for both children. The resulting decision was clearly stated to be no reflection on the relatives' care of Ashley over the past 18 months. An overriding concern of the court was a smooth transfer for him to a bridging

placement with Carl's foster carers until an adoptive placement was found. The local authority could offer no certainty about when this might be.

Care and Placement Orders

Carl: 43 weeks; Ashley: 99 weeks

TREVOR

This case concerned Bianca, Trevor's six year old daughter. Care proceedings arose out of a private law dispute between Trevor and Bianca's mother, who had been married, but acrimoniously separated for the past 3 years. Bianca had remained living with her mother, but in the course of long running contact and residence proceedings, concerns over Bianca's care and issues relating to her mother emerged, prompting the District Judge to make an ICO on the court's own motion – and proceedings were subsequently taken up by the local authority. Bianca was placed with Trevor's sister where she remained throughout the proceedings. Concerns about the mother included drug and alcohol abuse and possible mental health issues. Concerns over Trevor centred around a number of previous criminal convictions – largely dismissed by him as youthful indiscretions. Concerns about Bianca had been raised by her school – she had significant educational needs and required a high level of parenting. Trevor is single in his 40s. He has a number of other children, each living with their mothers, with whom he has contact and good relationships.

Trevor's solicitor has been a Panel solicitor for the past 12 years or so, 60% of his work being in public law. Trevor came to him from a colleague in the firm who was handling his private law dispute. The solicitor viewed Trevor's case as an unusually simple one – local authority concerns being mainly focussed on the mother. Trevor was not offering care himself and content for Bianca to remain with his sister. He was enjoying regular contact with Bianca, although both parents' contact was supervised. Trevor found this difficult to accept, given that he had enjoyed unsupervised contact prior to the care proceedings and that the concerns focused on the mother and not himself. However, the local authority adamantly insisted on supervision, given Trevor's criminal convictions.

The first hearing observed was a CMC three months into the proceedings. His solicitor argued strongly on Trevor's behalf for contact to increase and be unsupervised, but to no avail. He suggested that Trevor might want to take this further by making an application for contact. However, while Trevor appeared interested, he did not pursue this option. Psychological assessments were arranged for the mother, Bianca and Trevor, and also drug and alcohol testing for both parents. In the event, Trevor did not keep appointments either for the assessment or testing. His solicitor reported that he saw or heard very little from Trevor between court hearings, surmising that he was in fact sufficiently content with the situation.

An 'adjourned CMC' took place five months later, at which it became clear that the mother was pushing for the return of Bianca. Her sister had also decided to offer care and was to be assessed. Trevor's sister had already had a positive full assessment. The IRH took place five months later. Despite

strong advice, the mother was determined to pursue her claim for Bianca's return, and a five day final hearing was listed.

Trevor's solicitor briefed a very experienced counsel, being unable to handle a 5 day hearing himself. Counsel met Trevor on the morning of the hearing. All parties apart from the mother were in agreement that Bianca should remain with Trevor's sister – the mother's sister's assessment having been negative. Trevor was adamant that he wanted more and unsupervised contact, having never understood or accepted restrictions typical in care proceedings. Counsel advised that the court was extremely unlikely to order this, but nevertheless promised to fight his case. The psychologist's report on the mother was not available on the first day. It appeared on the second day, revealing that the mother had been lying about claimed improvements in her lifestyle and she was finally persuaded to give up the contest. Trevor accepted counsel's advice that assurances of a review of his contact were the best he could expect at the current time.

Care Order

61 weeks

Appendix 3: Orders in care proceedings

Care Order (CO) (Children Act 1989, ss.31, 33). An order which requires the local authority to receive the child into their care and look after them. The order lasts until the child reaches the age of 18. It gives the local authority parental responsibility and the right to determine in consultation with the parents, the child and significant others the way the child is to be cared for in the future.

Interim Care Order (ICO) (Children Act 1989, s.38). A short term care order made within care proceedings and lasting in the first instance up to 8 weeks. Interim care orders can be renewed repeatedly for 4 week periods. This is generally done administratively with the agreement of the parties.

Contact order A contact order under Children Act 1989, s.34 regulates contact between a child who is the subject of a care order and others, usually the child's parents or other family members. The order may permit contact at specific times etc, makes it subject to conditions such as supervision or allows the local authority to refuse it. Similarly, a contact order under Children Act 1989, s.8 regulates or bars contact with a child who is not the subject of a care order.

Placement Order (Adoption and Children Act 2002, s.21). An order authorising a local authority to place a child for adoption with prospective adopters chosen by the children's services authority. It gives the local authority parental responsibility for the child and suspends existing contact orders. Placement orders are a key step towards the adoption of any child in care.

Residence Order (RO) (Children Act 1989, s.8). An order which settles the arrangements for where and with whom the child will live. The order gives the person with the order parental responsibility for the child. Where a residence order is made in care proceedings the local authority has no continuing rights or duties in respect of the child, other than those it owes to children in general but it has a power to provide financial support for the child.

Special Guardianship Order (SGO) (Children Act 1989, ss.14A-14G). This order of is intended for use in relation to those children for whom adoption is not appropriate, who cannot return to their birth families, but who would still benefit from a legally secure placement. It provides the carer, usually a relative, with more powers and increased security compared with their position under a residence order.

Supervision Order (SO) (Children Act 1989, ss.31, 35). A supervision order puts the child under the supervision of the local authority, who allocates a supervisor from its children's services department to advise, assist and befriend the child. The supervisor has the power to direct the person caring for the child or a person with parental responsibility to take certain action, for example to attend or make the child attend meetings or courses. A supervision order can last for 12 months and be renewed for up to 3 years.

Interim Supervision Order (ISO) (Children Act 1989, s. 38). A short term Supervision Order made within care proceedings. Where the court makes a residence order in care proceedings it must also make a n interim supervision order unless it considers that the child's welfare does not require it.

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