

---

# Private and public children law: an under-explored relationship

---

Andrew Bainham\*

---

**Keywords:** Public – Private – Law – Children – Relationship

*Legal disputes concerning children are divided conceptually into private or public law. This binary classification disguises the reality that many such cases are hybrid, containing elements of both. The high incidence of these cases requires consistency in the fundamental principles which govern private and public law.*

*It is argued in this paper that the welfare principle now dominates all children proceedings to the extent that the public law threshold, thought to be critical to state intervention, is often marginalised. Welfare also now governs adoption law, notwithstanding that adoption is today primarily a child protection mechanism.*

*The involvement of local authorities in private law proceedings invites a reappraisal of the courts' powers; the differential treatment of relatives in the private and public law is questionable; the basis for compulsory state intervention at the interim stage of care proceedings is arguably insufficiently rigorous; and the heavy reliance by the state on the relatively nebulous concepts of neglect and emotional harm calls into question the adequacy of the statutory threshold. It is finally questionable why the concept of the 'good enough' parent applies in the public but not in the private law, yet the state removes children from parents to alternative carers under both.*

## INTRODUCTION

Private and public children law are conceptualised as distinct from one another. Everyone can understand the difference between the role of the courts in disputes between parents over residence or contact and judicial scrutiny of state intervention to protect a child from inadequate parenting. When in the 1980s the private and public law were the subject of reform proposals, these were initially separate exercises undertaken by the Law Commission<sup>1</sup> and the then Department of Health and Social Security<sup>2</sup> respectively. A quarter of a century later the *Family Justice Review*<sup>3</sup> thought it

---

\* Barrister at 14 Gray's Inn Square, University Reader in Family Law and Policy, formerly Fellow of Christ's College Cambridge.

I am most grateful to Jonathan Herring for his helpful comments on an earlier draft of this paper and for bringing a number of important sources to my attention. I also acknowledge with gratitude the thorough and constructive comments of the two anonymous referees which have led to some significant changes being made. The views expressed here are mine alone. They reflect my many recent experiences when appearing in the family courts in private and public law children cases. They are not however supported by empirical data and that limitation should be borne in mind by the reader.

<sup>1</sup> Law Commission, *Review of Child Law: Guardianship and Custody*, Law Com No 172, HC 594 (HMSO, 1988).

<sup>2</sup> Department of Health and Social Security, *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (HMSO, 1985) followed by the White Paper, *The Law on Child Care and Family Services*, Cm 62 (HMSO, 1987).

quite appropriate to have separate chapters on the private<sup>4</sup> and public<sup>5</sup> law. And when the government announced a substantial withdrawal of legal aid from, inter alia, children cases it felt able to distinguish clearly between private and public law cases.<sup>6</sup>

It is surprising how little attention has been given to the connection between the private and public law. The assumption apparently made by commentators, law reform bodies and governments alike is that it is a substantially unproblematic relationship. In the Children Bill 1989 Parliament seized on what was then thought to be an historic opportunity to legislate a complete code governing both the private and public law.<sup>7</sup> The Law Commission was aware of the need, as far as possible, for common principles to apply as between the two and indeed the central principles in Part I of the Children Act 1989 have general application in children cases.<sup>8</sup> The Commission declared in 1988 that 'the private and public law should be consistent with one another and the relationship between them also clear and fair'.<sup>9</sup>

No-one seems at any point to have appreciated that it may be difficult to categorise cases as either private or public. The truth is that an increasingly common phenomenon in the courts is the private law case with public law elements and the public law case with private law elements. Such cases can be termed 'hybrid' as they are neither truly private nor public law cases. These cases are not exceptional but extremely common in the author's experience. Yet more striking is the way in which a private law case can turn public, literally overnight, and a public law case can conclude with matters being returned to the private law arena. The family courts are used to dealing with this sort of case all the time. But how do these things happen?

The following section examines the way in which a private law case can contain public law elements and vice-versa. It goes on to note how a private law case may turn into a public law case or a public law case turn private. The next section considers the conceptual and theoretical differences between the private and public law, particularly the significance of the public law threshold and its relationship with the welfare principle. The argument is presented that in practice the threshold plays only a marginal role in many public law proceedings which are in fact dominated, as are private law proceedings, by the welfare principle. The adequacy of the interim threshold and the basis for removal of children at the interim stage is questioned, especially where this is based solely on neglect or emotional harm. In short the

<sup>3</sup> *Family Justice Review: Final Report* (MoJ, 2011). This was followed by the Ministry of Justice and Department for Education, *The Government Response to the Family Justice Review: A System with Children and Families at its Heart*, Cm 8273 (TSO, 2012). A number of the *Family Justice Review's* recommendations are included in the Children and Families Bill 2013.

<sup>4</sup> *Family Justice Review*, chapter 4; *Government Response*, Section F.

<sup>5</sup> *Family Justice Review*, chapter 3; *Government Response*, Section E.

<sup>6</sup> Only the former is to be subject to the removal of legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The changes took effect from April 2013. Legal aid remains available for cases in which there is acceptable evidence of domestic violence or risk of child abuse under Sch 1, paras 14 and 15.

<sup>7</sup> The then Lord Chancellor, Lord Mackay of Clashfern, described the coincidence of the private and public law reviews as 'an historic opportunity to reform the English law into a single rationalised system as it applies to the care and upbringing of children'. See 'The Child and the Law': Child and Co. Lecture (1988).

<sup>8</sup> The three central principles set out in s 1 of the Act are the 'welfare principle' (s 1(1)); the 'no delay principle' (s 1(2)); and the 'no order principle' (s 1(5)). It should be noted however that the 'no order' principle only applies where the court is considering whether or not to make one or more orders under the Act in relation to a child.

<sup>9</sup> Law Commission, *Review of Child Law: Guardianship and Custody*, Law Com No 172, HC 594 (TSO, 1988), para 1.3.

argument is presented that both the interim and final thresholds have been insufficiently robust in maintaining appropriate separation of the private and public law spheres in relation to the crucial matter of compulsory intervention. The next section draws attention to anomalies in the courts' powers in relation to private and public law cases and to the differential treatment of relatives in the private and public law which, it is argued, is questionable. There is then a brief discussion of adoption which may also be characterised as a private and public law hybrid, but with an increasing emphasis on its use as a child protection mechanism. Again it is noted that it is the welfare principle which now dominates adoption proceedings. The article concludes with some suggestions for achieving greater harmony between the private and public law while at the same time marking more strongly the distinction between the two on the critical matter of when the state may intervene compulsorily in the family.

## CONFLUENCE OF THE PRIVATE AND PUBLIC

### Private law cases with public law elements

The reason why some private law cases ought not to be seen as purely a matter of private law is because of local authority involvement in them. An ostensibly private law case can bear a close resemblance to care proceedings where, in addition to local authority participation, the child is made a party and a guardian is appointed.<sup>10</sup>

Where a family is known to the local authority, there may very well be existing assessments or the subject children may have been, or may still be, 'children in need'<sup>11</sup> or subject to child protection plans.<sup>12</sup> In these circumstances, it is likely to be the local authority and not Cafcass<sup>13</sup> which is asked to produce the relevant welfare report and hence to exert a major influence on the outcome. If the court is sufficiently concerned with what has come to light, it may instead direct a section 37 report<sup>14</sup> to be prepared by the authority. If the case remains contested to a final hearing, the local authority social worker who is responsible for the relevant report will usually be required to attend court to give evidence.

<sup>10</sup> The child is party to public law proceedings and the appointment of a children's guardian is the norm. A guardian must be appointed for the child unless the court is 'satisfied that it is not necessary to do so in order to safeguard his interests' (Children Act 1989, s 41(1)). In the private law children are rarely parties but they can be joined and a so-called rule 16.4 guardian (formerly rule 9.5 guardian) can be appointed in accordance with the criteria laid down in the Family Procedure Rules 2010, Practice Direction 16A. In general this is done where there is 'an issue of significant difficulty'. The local authority is not a party in private law proceedings, even where it has an involvement. This has implications for the powers of the court. See below.

<sup>11</sup> Under Children Act 1989, s 17.

<sup>12</sup> A higher form of intervention where the authority has child protection concerns arising from the assessments which it has carried out. Child protection plans are not on a statutory footing but are the subject of extra-statutory guidance, the most recent version of which is Department of Health, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*. March 2013. It can be viewed online at <http://www.workingtogetheronline.co.uk/documents/Working%20TogetherFINAL.pdf>

<sup>13</sup> Cafcass (Children and Family Court Advisory and Support Service) will be the usual choice to provide a reporter to prepare a welfare report for the Court in a disputed private law case under Children Act 1989, s 7.

<sup>14</sup> A s 37 direction is used where the level of concern is higher than normal in private law proceedings in that 'it appears to the court that it may be appropriate for a care or supervision order to be made'. The authority is directed to investigate the child's circumstances and must report to the court within 8 weeks on whether or not it intends to apply for a public law order, provide services or assistance for the child or his family or take any other action with respect to the child.

A number of factors may account for the involvement of local authorities in private law cases. First, many of these cases are characterised by substance abuse, domestic violence, police call outs and a history of criminal offending. It is not surprising in these circumstances that the local authority will have had concerns about the well-being of the children. Secondly, there may be an understandable reluctance on the part of the authority to issue public law proceedings. The high cost of issuing proceedings,<sup>15</sup> of the proceedings themselves and the overwhelming cost of long-term substitute care, should this prove necessary, are substantial deterrents. An attractive alternative for the authority is therefore to avoid all this and instead seek to influence the outcome of private law proceedings.<sup>16</sup> If the authority can be satisfied that the child is safe with one parent but not the other, it can try to engineer this outcome; and placement of the child in the family is now a statutorily required preference, where a child is a 'looked after' child.<sup>17</sup> Thus, for the authority to achieve this outcome in private law proceedings may be a much quicker way of getting to the result it desires.

No-one is entirely sure what the impact of the withdrawal of legal aid from private law proceedings will be. It seems likely that the more serious cases will remain before the courts while less serious cases are likely to be diverted into mediation. If that is what does happen, we can expect the proportion of private law cases which feature local authorities to increase.

### Public law cases with private law elements

The most obvious and extremely common way in which a public law case may have private law elements is through the availability of private law orders. If, for example, there is a negotiation at the interim stage of care proceedings which results in the child concerned being placed with a relative while assessments of the parents are carried out, this can be achieved by the court making a residence order in the interim in favour of that person. To take another example, suppose that care proceedings are moving towards a negotiated conclusion in which the mother will not contest that the child should remain in the care of the father. However, she has anxieties that he may take the child abroad and deprive her of ongoing contact with the child. This anxiety can be

---

<sup>15</sup> Court fees payable by local authorities on issuing public law proceedings were increased dramatically by the Family Proceedings Fees Order 2008 (SI 1054/2008) and the Magistrates' Courts Fees Order 2008 (SI 1052/2008) from £150 to £5,000. The increase gave rise to substantial concerns which led to unsuccessful judicial review proceedings by four local authorities. See G Eddon and J Ward, 'Increases to Court Fees' [2008] Fam Law 416. The judicial review decision is reported as *R (Hillingdon London Borough Council) and Others v Lord Chancellor and Secretary of State for Communities and Local Government* [2009] 1 FLR 39 and for commentary on it see N Arnold, 'Judicial Review of Public Law Fees: the Judgment' [2009] Fam Law 63.

<sup>16</sup> It should be recalled however that there are statutory restrictions under Children Act 1989, s 9 which generally prevent local authorities from seeking s 8 orders themselves. The underlying rationale is that they should use the public law route of seeking care or supervision orders prescribed by Parliament and should not have available to them the broader basis for making court orders on the application of the welfare principle. To allow them to do so would undermine the purpose of having a statutory threshold, though the inherent jurisdiction is available to them in limited circumstances defined in s 100.

<sup>17</sup> Children Act 1989, s 22C as amended by the Children and Young Persons Act 2008.

met by the making of the private law prohibited steps order<sup>18</sup> in the public law proceedings, a residence order in favour of the father and a 12 month supervision order to the local authority.<sup>19</sup>

It is also possible to have in essence a private law contest in public law proceedings. Take the following example.<sup>20</sup> The local authority's final care plan in public law proceedings relating to twins is for a special guardianship order in favour of the paternal grandparents. The young father however decides to contest this believing that he is able to look after them himself under a residence order. A final hearing takes place in the public law proceedings. In form this is a public law case, but in reality it is a private law dispute under a public law umbrella.

### **Metamorphoses: private turns public and public turns private**

We have noted above that cases can have both private and public law components. What should also be appreciated is the way in which a case can effectively undergo a metamorphosis. It can begin as a private law case then turn into a public law case or, vice-versa, it can start as public law proceedings which turn private.

A private law case can change into a public law case where the local authority eventually considers that the threshold for public law proceedings is crossed during the currency of private law proceedings.<sup>21</sup> This can arise where, for example, the authority has been supporting one parent as sufficiently up to the task of raising the children and a protective factor in relation to the 'problem' parent. Let us suppose, for example, that the mother is a chronic alcoholic with a record of neglecting the children. The father, on the other hand, is seen as sufficiently able to provide 'good enough' care for the child, having separated from the mother. The authority supports a residence order to the father provided that the mother's contact with the child is heavily circumscribed and initially supervised. Then the authority discovers that, contrary to its expectations, the parents have resumed their relationship, the father is misusing drugs and both parents have been dishonest in their dealings with the allocated social worker. In these circumstances the authority may conclude that 'enough is enough' and issue public law proceedings. The private law case is then likely to be consolidated with the public law case, but it is the latter which will now be the dominant application before the court. Private has turned public.

More common than this is the converse situation. The court is not confined in public law proceedings to making the public law orders for care or supervision, but may instead make the private law residence order or, perhaps more likely, a special

<sup>18</sup> It is acknowledged that in one sense there is no such thing as a 'private law order' or a 'public law order' in the sense that both types of order may be made in either private law or public law proceedings. For the purposes of this article, the term 'private law order' is used to describe those orders, principally s 8 orders, which are overwhelmingly granted to private individuals, though in limited circumstances some of them can be made in favour of the state acting through the local authority. The term 'public law order' is used to describe care, supervision and related orders which are made almost entirely in favour of local authorities.

<sup>19</sup> This was the package of final orders in a case in which the author was counsel for the mother.

<sup>20</sup> An example based on a case in which the author was counsel for the father.

<sup>21</sup> For a recent example see *A City Council v M, F and C (By her Children's Guardian)* [2013] 1 FLR 517, [2012] Fam Law 1313 where there had been a succession of fraught private law proceedings following transfer of residence from the mother to the father, ongoing disputes over the child's care and contact which led first to s 20 accommodation and ultimately to the authority seeking and being granted a care order.

guardianship order.<sup>22</sup> Because of the emphasis now placed on kinship care and keeping the child in the wider family wherever possible, as opposed to the more drastic solutions of long-term fostering or placement for adoption, many care proceedings do conclude with one of these orders. In fact it would not be an exaggeration to say that every public law case which concludes either in the child remaining with or returning to a parent, or being entrusted to a relative, turns private. The point here is that public law proceedings must conclude in some way. Once they have concluded, any further disputes between the various members of the family are returned to the private law arena and will have to be the subject of fresh private law applications by those affected.

If, for example, care proceedings conclude with a residence order in favour of a grandparent and the mother is later unhappy with the amount of contact she is allowed by that grandparent, it will be for her to bring private law proceedings for a contact order. It should also be noted that the public law supervision order is habitually granted by the courts alongside residence orders with a view to the local authority overseeing matters, usually for the immediate twelve months following the conclusion of care proceedings. While it lasts we again see a mixing of the public and private in essentially complementary orders. Another way of looking at this is that there is a 12 month postponement of returning the case entirely to the private sphere.<sup>23</sup>

All of this suggests that careful thought needs to be given to how consistent the principles governing the private and public law really are; whether, when it is warranted, the distinction between the public and private is sufficiently maintained; and whether there are any significant anomalies in the courts' powers which are in need of rationalisation.

## FOUNDATIONS OF THE PRIVATE AND PUBLIC LAW: THE WELFARE PRINCIPLE AND THE THRESHOLD

When the Children Act 1989 was crafted it was abundantly clear that the welfare principle was to be the central principle in children law. While it would be given free reign in the private law, it would *not* however in the public law. This was central to the philosophy of the Act. The welfare principle as a basis for taking children into care was expressly rejected by the *Review of Child Care Law* in 1985 which took the following position:<sup>24</sup>

'... grounds which look only to the best interests of the child or are based on a broad criterion, such as "exceptional circumstances", would provide insufficient protection against unwarranted interventions where parents were "good enough" but not providing as well for the child as a local authority or foster parent might. Further, they would provide insufficient guidance for the courts and practitioners and thus increase the risk of inconsistent and subjective judgments.'

<sup>22</sup> Whether special guardianship orders are to be categorised as private law or public law orders is a moot point. They are contained in the private law section of the Children Act, Pt II as amended (s 14A–F) but are much more common at the end of care proceedings as a long-term child protection mechanism. A similar point can be made about adoption orders discussed below.

<sup>23</sup> In fact there is more than a suspicion that local authorities will often not do a great deal under a supervision order and are looking to extricate themselves from the case as soon as possible. In those situations, the supervision order perhaps performs the rather less obvious role of a 'face-saving' device for the authority. Without it, it might be suggested that the authority was not justified in launching public law proceedings in the first place.

<sup>24</sup> Department of Health and Social Security, *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (HMSO, 1985), para 3.27.

This fundamental underlying philosophy has been reasserted comparatively recently by senior judges and commentators alike.

Baroness Hale of Richmond, the principal architect of the Children Act, said in her judicial capacity in *Re SB*:

'It is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society.'<sup>25</sup>

Cobley and Lowe in a recent academic treatment of the subject went so far as to say:

'... since on the one hand, the making of a care order can lead to the child's eventual adoption thereby transferring parentage altogether, and on the other hand not making an order could lead to the child's death at the hands of the parents, it is surely the most serious decision a civil court can make.'<sup>26</sup>

Accordingly, as is well-known, the Act established a threshold which must be crossed, essentially based on actual or anticipated significant harm to the child.<sup>27</sup> Writing in 1990, Eekelaar and Dingwall<sup>28</sup> saw the superintendence of the threshold as perhaps the most important function reserved to the courts while many other matters were appropriately the province of local authorities:

'It is a feature of child protection law that issues occur across a continuum and do not easily break down into neat categories. But it has long been accepted that, where the law allows the executive to intervene in important ways in people's lives, it is the unique role of the courts to decide whether the conditions permitting such intervention have been satisfied, irrespective of the implications for policy or administrative convenience. This is the cornerstone of the idea of the Rule of Law.'

What all of this presupposes is that the threshold is an effective barrier to state intervention. It will be argued here that there is evidence to suggest that it is not and that the threshold frequently has only marginal significance in public law proceedings. These are in reality dominated, just as are private law proceedings, by the welfare principle.

In analysing the operation of the threshold it needs to be appreciated, but seldom is,<sup>29</sup> that there are *two* thresholds and not one – the *interim* threshold and the *final*

<sup>25</sup> *Re SB (Children)* [2009] UKSC 17, [2010] 1 FLR 1161, at para [7].

<sup>26</sup> C Cobley and N V Lowe, 'The Statutory "Threshold" under section 31 of the Children Act 1989: Time to Take Stock' (2011) 127 *Law Quarterly Review* 396, at pp 396–397.

<sup>27</sup> Children Act 1989, s 31(2) provides:

- 'A court may only make a care or supervision order if it is satisfied –
- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
  - (b) that the harm, or likelihood of harm, is attributable to–
    - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
    - (ii) the child's being beyond parental control.'

<sup>28</sup> John Eekelaar and Robert Dingwall, *The Reform of Child Care Law* (Routledge, 1990), at p 46.

<sup>29</sup> C Cobley and N V Lowe, 'The Statutory "Threshold" under section 31 of the Children Act 1989: Time to Take Stock' (2011) 127 *Law Quarterly Review* 396 do not distinguish between the two or mention the interim threshold or its significance at all in their otherwise rigorously thorough article on the interpretation of the threshold.

threshold.<sup>30</sup> Where a local authority is intent on removing a child from the family, it is the former which is of much greater significance than the latter. This is for the self-evident reason that where concerns are sufficiently serious to suggest removal they will not wait for a final hearing which can be many months away.<sup>31</sup> In fact it is the *removal* question and not the threshold at all which tends to be the focus at the interim stage. The issue of the interim threshold, in the author's experience, is often side-stepped by the court and parties alike on the basis that the parents will acquiesce in an interim holding position, neither agreeing to nor contesting the facts asserted by the authority in its interim threshold document.<sup>32</sup>

It is sometimes asserted that the reason why parents seldom dispute the interim threshold is that local authorities only bring care proceedings in serious cases. Any contesting of the threshold at this stage would therefore be doomed to failure. In fact, it is suggested, that this is not the reason. There are two other better explanations of this phenomenon. The first is that the threshold requirement at the interim stage is set so very low that the chances of opposing it are slim if the parent has any significant history which could be thought to raise child protection concerns.<sup>33</sup> The second, in the author's experience, is that there will be an acute perception on the part of the parent, if not immediately then certainly after receiving advice, that the best chance of resisting removal of the child in the long-term will be to co-operate with the local authority and be seen to be doing so. Indeed, it is a feature of care proceedings that any lack of co-operation with the authority during the proceedings, *a fortiori* any dishonesty in the relationship, will most definitely be held against the parent.<sup>34</sup> In some cases this lack of co-operation can take on disproportionate significance and appear almost to become the major basis of compulsory intervention. In this distinctly authoritarian and coercive environment, it is scarcely surprising that few parents have the stomach to contest threshold at the interim stage.

The interim threshold was considered sufficiently inadequate by the higher courts as a basis for removal, that they have been obliged to fashion their own ground to govern this.<sup>35</sup> In a recent decision the Court of Appeal has emphasised again that the issue of whether there are grounds for the interim removal of the child is a quite separate question which the court must address after it has concluded that the interim threshold

---

<sup>30</sup> In fact the reality is that there are *three* thresholds since there is a now well established *independent* requirement for the removal of children from their parents at the interim stage. See below text accompanying footnote 35 et seq.

<sup>31</sup> The *Family Justice Review*, however, proposed and the government has accepted that there should be a normal time limit of 6 months for the duration of care proceedings. For a critique of this proposal, expected to be implemented in the Children and Families Bill 2013, see J Masson, 'A Failed Revolution: Judicial Case Management of Care Proceedings', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretny* (Intersentia, 2012), at pp 277, 287–289.

<sup>32</sup> For the author's view of this practice see A Bainham, 'Interim Care Orders: Is the Bar set too Low?' [2011] Fam Law 374.

<sup>33</sup> A history of substance abuse, relationships in which there has been domestic violence, mental health problems, previous removal of a child from his or her care, are all matters which will make it extremely difficult to mount an effective challenge to the interim threshold which, under s 38(2), merely requires the court to be satisfied that there are 'reasonable grounds for believing' that the statutory threshold may have been crossed in relation to the subject child. The authority is not required to prove anything at the interim stage and the court will make no findings on the matters asserted by it.

<sup>34</sup> For a good illustration see the now infamous case of *EH v London Borough of Greenwich, AA and A (Children)* [2010] EWCA Civ 344, [2010] 2 FLR 661.

<sup>35</sup> The leading case being *Re LA (Care: Chronic Neglect)* [2009] EWCA Civ 822, [2010] 1 FLR 80 followed in later decisions including *Re S (Authorising Children's Immediate Removal)* [2010] EWCA Civ 421, [2010] 2 FLR 873.



has been crossed.<sup>36</sup> This was never envisaged by Parliament and is certainly not in the Act. The courts have themselves imposed the requirement that the child's safety demands immediate separation from the parent. Prima facie this looks like an important check on the power of the state; though this too is in danger of being watered down by decisions of the Court of Appeal<sup>37</sup> which interpret 'safety' to include not merely the threat of physical harm but also 'emotional safety' or 'psychological welfare'. The difficulty with this is that it leaves open the prospect that the nebulous concept of emotional harm<sup>38</sup> will result in the welfare principle being smuggled in to the removal issue. It is worth considering what difference there is, if any, between a finding that the child will suffer emotional or psychological harm if not removed and a finding that it is in his or her best interests to be removed.<sup>39</sup>

It might be objected that there *is* a clear difference. 'Harm' is defined in the Act to include 'impairment of health or development' and 'development' is defined to include 'emotional development'.<sup>40</sup> For the threshold to be crossed, therefore, the harm (whatever it is) must be 'significant' and this stands in contrast to decisions taken purely on the basis of the child's best interests which need not make any reference to 'harm' whatsoever. The difficulty with this argument is, first, that it overlooks the *independent* nature of the interim threshold test and the removal test. Children are not removed at the interim stage on the basis of the interim threshold being crossed. That has been specifically rejected by the courts as an adequate basis for doing so. They are removed because their *immediate safety* demands it. This has nothing to do with the statutory definition of harm. Secondly, the court is not concerned with *proof* of anything at the interim stage. While therefore it may be reasonable to remove a child at the interim stage on the basis of risks which are clearly apparent, as where there is a palpable risk of physical harm or where there has already been serious neglect, it is a very different matter to do so where there is an absence of these risks. Emotional harm is an inherently more contested matter which is likely to require expert psychological evidence to establish.

In saying this, it is accepted that emotional harm can arise from exposure to domestic violence and the Act explicitly recognises this.<sup>41</sup> Removal at the interim stage can however be justified in the context of exposure to ongoing domestic violence

<sup>36</sup> *Re B (Refusal to Grant Interim Order)* [2012] EWCA Civ 1275.

<sup>37</sup> *Re GR (Care Order)* [2010] EWCA Civ 871, [2011] 1 FLR 669 following the Court's previous decision in *Re B (Care Proceedings: Interim Care Order)* [2009] EWCA Civ 1254, [2010] 1 FLR 1211.

<sup>38</sup> 'Emotional abuse' is defined in *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, March 2013* (<http://www.workingtogetheronline.co.uk/documents/Working%20TogetherFINAL.pdf>) as: 'the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child's emotional development. It may involve conveying to a child that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may include not giving the child opportunities to express their views, deliberately silencing them or 'making fun' of what they say or how they communicate. It may feature age or developmentally inappropriate expectations being imposed on children. These may include interactions that are beyond a child's developmental capability, as well as overprotection and limitation of exploration and learning, or preventing the child participating in normal social interaction. It may involve seeing or hearing the ill-treatment of another. It may involve serious bullying (including cyberbullying), causing children to feel frightened or in danger, or the exploitation or corruption of children. Some level of emotional abuse is involved in all types of maltreatment of a child, though it may occur alone'.

<sup>39</sup> Indeed it is interesting to note how the Court of Appeal couples together 'emotional safety' and 'psychological welfare' (emphasis added).

<sup>40</sup> Children Act 1989, s 31(9).

<sup>41</sup> Children Act 1989, s 31(9) as amended includes within the definition of harm 'impairment suffered from seeing or hearing the ill-treatment of another'.

because the risk here is palpable, not least that the child may suffer *physical* harm by being caught up in the crossfire. It is not necessary to rely on emotional harm. Contrast this with emotional distress which a child may experience if separated from siblings (who have already been placed in foster care) at the interim stage. The distress may very well be real, but it stretches the imagination to regard this as a matter of *immediate safety*. It is surely a matter of *welfare* which should be properly determined when the final threshold and final placement is being considered by the court. The danger with relying on emotional harm as a stand alone justification for removal at the interim stage is that this may be no more difficult to establish than that the child's welfare appears to favour such removal. But this is precisely what the more exacting 'safety' test is designed to prevent.

When it comes to proving that the final threshold is crossed at the final hearing, this 'crucial line' as Cobley and Lowe call it,<sup>42</sup> is often simply negotiated and will be the subject of a real contest in only a minority of cases. By the time of the final hearing, a parent will have to decide whether or not to contest the final threshold. In many of these cases, the reality is that there will be pressure from the court, in part arising from a lack of available court time, to present an agreed threshold document to the court. It is not uncommon for judges to invite advocates to go outside court and settle it so that the court can concentrate on the 'real issue' which is seen as the long-term placement of the child. The frequent result is that concessions are made on both sides. The parent will concede that the threshold is crossed, but will look to the authority to remove from the threshold document some of the allegations which are not accepted.

This sort of compromise is commonplace and where it occurs, for all the theorising about the importance of the threshold, the reality is that it has never received serious judicial consideration at any point in the proceedings. Its function is principally jurisdictional. The reason why the threshold has to be addressed, at least to some degree, is that the court will lack jurisdiction to make a public law order, whether care or supervision or indeed by extension a placement order<sup>43</sup>, unless there is a formal finding that the threshold has been crossed.

Where public law proceedings end with a private law order, such as a residence order or special guardianship order, as a matter of strict law it is not necessary at all for any findings to be made on the threshold as these orders do not depend on this. It is therefore possible for public law proceedings to conclude without the need for the threshold ever to have been even addressed by the court. In practice however the threshold is likely to be considered for two reasons. The first is that private law orders are, in the author's experience, commonly accompanied by a supervision order in favour of the authority so that the latter can keep a watching brief on the situation.<sup>44</sup> The second is that the authority may wish to 'bank' threshold findings for the future. If, for example, there is the possibility of a private law residence or contact dispute arising after the conclusion of public law proceedings, it will be useful for the court in those subsequent proceedings to be aware of findings against a parent such as neglect of the child, perpetration of domestic violence or a history of mental health problems. Perhaps more significantly, if the court was dealing with a mother who is still of

---

<sup>42</sup> C Cobley and N V Lowe, 'The Statutory "Threshold" under section 31 of the Children Act 1989: Time to Take Stock' (2011) 127 *Law Quarterly Review* 396, at p 397.

<sup>43</sup> A compulsory placement for adoption can be made only, inter alia, where either the child is already subject to a care order or the threshold conditions are met, or the child has no parent or guardian (Adoption and Children Act 2002, s 21 (2)).

<sup>44</sup> Supervision orders can be made for up to one year but may be made for a shorter period (Children Act 1989, Sch 3, para 6(1)).

child-bearing age or a young father, there is the distinct prospect that she or he may have further children and that those children may become the subject of subsequent public law proceedings. The findings in the earlier proceedings would then be highly relevant to those later proceedings.

The picture presented above is typical of many care cases in which the principal basis of the proceedings is neglect and/or emotional harm. It is clearly not representative of cases based on physical harm in which there may well be a substantial dispute about whether the injuries were accidental or non-accidental and, if the medical evidence suggests the latter, a serious issue as to who was responsible.<sup>45</sup> Cases of alleged factitious illness are another example.<sup>46</sup> In such cases threshold issues are likely to be hotly contested and indeed there have been a significant number of appeals to the higher courts on these issues. Similarly, where sexual abuse is relied upon, it can be notoriously difficult to prove<sup>47</sup> and has likewise given rise to major questions about the evidential requirements of the threshold. However, what needs to be grasped is that these cases, though undoubtedly important and troubling,<sup>48</sup> are not typical of public law proceedings. Statistically, neglect and emotional harm account for the great majority of cases in which children are the subject of child protection plans and, by extension, in due course the subject of public law proceedings.<sup>49</sup>

A recent report by the House of Commons Education Committee<sup>50</sup> notes that to March 2011, neglect accounted for almost 43% of cases of children subject to child protection plans. Figures released by the NSPCC<sup>51</sup> reveal that the percentage of neglect cases did not vary greatly between 2007 and 2011 and also establish that emotional harm was consistently in second place in terms of the categories of abuse. In each of these years it accounted for over twice the aggregate number of cases which relied on physical harm or sexual abuse. Put another way, physical harm and sexual abuse consistently account for less than 20% of all cases resulting in child

<sup>45</sup> The higher courts have been much exercised in recent years by threshold difficulties in cases involving uncertain perpetrators. The leading cases are *Lancashire County Council v B* [2002] AC 147, *Re O and N; Re B* [2003] UKHL 18, [2003] 1 FLR 1169; *Re SB (Children)* [2009] UKSC 17, [2010] 1 FLR 1161, *Re F (A Child)* [2011] EWCA Civ 258, [2011] 2 FLR 856 and, most recently, the decision of the Supreme Court in *Re J (Children)* [2013] UKSC 9, [2013] 1 FLR 1373, SC; see S Gilmore, 'Re J (Care Proceedings: Past Possible Perpetrators in a New Family Unit) [2013] UKSC 9: Bulwarks and logic – the blood which runs through the veins of law – but how much will be spilled in future?' [2013] CFLQ 215.

<sup>46</sup> See for example *P, C and S v United Kingdom* [2002] 2 FLR 631.

<sup>47</sup> As to which see particularly the House of Lords decisions in *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 and *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141.

<sup>48</sup> The most notorious of such cases in recent years being that of 'Baby P'.

<sup>49</sup> *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children, March 2013* (<http://www.workingtogetheronline.co.uk/documents/Working%20TogetherFINAL.pdf>) defines neglect as 'the persistent failure to meet a child's basic physical and/or psychological needs, likely to result in the serious impairment of the child's health or development'. Neglect may occur during pregnancy as a result of maternal substance abuse. Once a child is born, neglect may involve a parent or carer failing to: (i) provide adequate food, clothing or shelter (including exclusion from home or abandonment); (ii) protect a child from physical and emotional harm or danger; (iii) ensure adequate supervision (including the use of inadequate care-givers); or (iv) ensure access to appropriate medical care or treatment. It may also include neglect of, or unresponsiveness to, a child's basic emotional needs.

<sup>50</sup> *Children First: The Child Protection System in England*, HC 137 (TSO, 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/137.pdf> (last accessed 16 April 2013).

<sup>51</sup> NSPCC, *Child Protection Register for England* (NSPCC, 2013) [http://nspcc.org.uk/Inform/research/statistics/england\\_wdf49858.pdf](http://nspcc.org.uk/Inform/research/statistics/england_wdf49858.pdf) (last accessed 16 April 2013).

protection plans and the percentage has been decreasing further in recent years.<sup>52</sup> The interaction of the threshold with the definitions of neglect and emotional harm is therefore a matter of considerable importance but, as indicated above, this is seldom something which is seriously scrutinised by the courts.<sup>53</sup> The view of the House of Commons Education Committee is that the criminal law definition of neglect<sup>54</sup> may require attention<sup>55</sup> but that the definition used in the civil law is broadly satisfactory and unproblematic.<sup>56</sup>

In *Re L (Care: Threshold Criteria)*<sup>57</sup> however Hedley J warned against the dangers of equating 'significant harm' with harm attributable to 'commonplace human failure or inadequacy'. He was very clear about the importance of the threshold in such cases. This was a case involving parents with learning disabilities, who were inadequate but not malicious, in which the children had been adversely affected by the experiences which flowed from this. Citing the now famous dictum of Lord Templeman in *Re KD*,<sup>58</sup> he said:

'... society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others will flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.'<sup>59</sup>

<sup>52</sup> It should be borne in mind that it is not unusual for children to be registered under more than one category in combination and that neglect and emotional harm are often relied on either interchangeably or together. Subject to this, the figures indicate that physical and sexual abuse aggregated accounted for 19.71% in 2007, 18.49% in 2008, 18.77% in 2009, 17.65% in 2010 and 16.84% in 2011. See *Children First: The Child Protection System in England*, HC 137 (TSO, 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/13705.htm>, para 37.

<sup>53</sup> Indeed, the Court of Appeal has recently acknowledged in *Re B (Care Proceedings: Appeal)* [2012] EWCA Civ 1457, [2013] 2 FLR (forthcoming) that there was little direct authority on the meaning of significant harm but said that it did not want to attempt a definition. It felt that to do so would potentially inhibit the family courts as they attempt to deal with the infinitely variable problems which come before them. It should be recalled that there is a partial definition of 'harm' in s 31(9) and of 'significant' (where the harm alleged relates to the child's health or development) in s 31(10). It is striking that neglect is nowhere expressly mentioned in these definitions despite its overwhelming statistical importance.

<sup>54</sup> Children and Young Persons Act 1933, s 1(2)(a) defines neglect as failure 'to provide adequate food, clothing, medical aid or lodging'.

<sup>55</sup> For academic treatment of the subject see R Taylor and L Hoyano, 'Criminal Maltreatment: The Case for Reform' [2012] *Criminal Law Review* 871–882.

<sup>56</sup> *Children First: The Child Protection System in England*, HC 137 (TSO, 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/13705.htm>, at paras 41–50. It is acknowledged however at para 41 that: 'it can be hard to pin down what is meant by the term'. <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/137.pdf> (last accessed 16 April 2013), at paras 41–50. It is acknowledged, however, at para 41 that 'it can be hard to pin down what is meant by the term'.

<sup>57</sup> [2007] EWHC 3527 (Fam), [2007] 1 FLR 2050.

<sup>58</sup> *Re KD (A Minor: Ward: Termination of Access)* [1988] 1 AC 806 where he said: 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'

<sup>59</sup> [2007] 1 FLR 2050, at para [50].

The danger is that in a very large number of public law proceedings where neglect or emotional harm are relied upon, there is no serious testing of whether the harm which it is asserted the child has either suffered, or is at risk of suffering, in fact goes beyond commonplace human failure or inadequacy or is something more serious which really justifies a compulsory order being made.

## **SOME FURTHER IMPLICATIONS OF THE PRIVATE AND PUBLIC COMPOUND**

### **The court's powers**

When the law was reformed in 1989 the intention was that as far as possible the court's powers in private and public proceedings should be aligned. Hence, as a general principle, private and public law orders could be made in any of the newly defined 'family proceedings'.<sup>60</sup> It would be possible for the private section 8 orders to be made in public law proceedings, as they very often are, subject to restrictions on their being sought by local authorities.<sup>61</sup> It would not however be possible to make the public law orders for care and supervision in private law proceedings as the Act established the new principle that these orders might only be made on the application of local authorities.<sup>62</sup> Children could not be made the subject of public law orders at the behest of others or of the courts' own volition because the statutory child protection responsibilities are placed only on local authorities. It was provided however that the court in private law proceedings might direct a local authority to investigate a child's circumstances and report to the court within 8 weeks on whether or not it intended to issue public law proceedings and, if not, what other action (if any) it proposed to take.

The section 37 direction can be characterised as a form of public law order within private law proceedings, albeit that the court cannot require the local authority to seek a care or supervision order.<sup>63</sup> Where the authority participates in private law proceedings, but does not issue proceedings itself, this amounts to a judgment by the authority that its concerns have not reached the level required to cross the public law threshold. The court is currently powerless, even if it takes a contrary view about the level of seriousness, to go beyond requiring the authority to investigate and report. The decision remains with the authority. A case can be made for saying that this is a matter which should be in the hands of the court given that safeguarding concerns are already in the court arena. This might be thought especially important in those cases in

<sup>60</sup> Law Commission, *Review of Child Law: Guardianship and Custody*, Law Com No 172, HC 594 (HMSO, 1988), para 1.10 noted: 'Consistency, clarity and simplicity in the courts' powers could best be achieved by a single set of statutory provisions dealing with all of them.' The key provision in the Children Act 1989 is s 8(3) which widely defines 'family proceedings' and in particular, for the purposes of this paper, includes private and public law children proceedings and adoption proceedings.

<sup>61</sup> The restrictions are in Children Act 1989, s 9. Their rationale is that local authorities ought not to be allowed to circumvent the statutory threshold for public law orders by seeking private law orders instead as a means of gaining compulsory control of children.

<sup>62</sup> With the sole exception of another 'authorised person' (Children Act 1989, s 31(1)). Only the NSPCC has been authorised and it is understood that little use is made of this power to initiate public law proceedings.

<sup>63</sup> The Law Commission's (rather unconvincing) reasoning for not permitting a court to direct the local authority to seek a care or supervision order was that: 'If there is a case for an order, the authority will presumably be under a statutory duty to apply for one' (Law Commission, *Review of Child Law: Guardianship and Custody*, Law Com No 172, HC 594 (HMSO, 1988), para 5.5). This takes no account of the reluctance which authorities may have to seek such orders because of the cost and commitment of personnel involved.

which the court is of the view that the authority's unwillingness to issue public law proceedings has been influenced by strategic cost-saving decisions.

This is not the only limitation on the courts' powers over local authorities in private law proceedings. In public law proceedings they have power to direct often expensive assessments of parents which are resisted by authorities themselves.<sup>64</sup> Those authorities can effectively dodge that expense by not issuing public law proceedings at all but rather seeking to influence the outcome of private law proceedings in which they are not parties and therefore not susceptible to court-directed assessments.

Take, for example, the position of a young, inexperienced first-time mother who has a record of unstable housing, substance abuse and keeping company with risky individuals. If the authority commences public law proceedings, it can confidently be anticipated that it will either offer her assessment in a mother and baby foster placement or residential placement or will be directed to do this by the court. But what if that same mother is initially assisted by the maternal grandmother who then decides not to relinquish control of the child to the mother at all but instead to apply for special guardianship in private law proceedings? The local authority produces its statutory special guardianship report<sup>65</sup> and recommends a special guardianship order in favour of the grandmother. In that event the court is powerless to direct the authority to do a parenting assessment of the mother. The court's power is limited to the more drastic course of refusing to make the order sought at all and it may well be reluctant to go this far. Paradoxically, therefore, the mother may be in a far worse position and at greater risk of losing the care of her baby in private law proceedings than perhaps she would have been in public law proceedings, despite the widespread perception that the latter are more draconian and a greater intrusion into family life.

A similar point can be made of the courts' powers to order contact between parents and children, surely the most critical matter during children proceedings whether public or private. When the legislation was drafted a clear distinction was drawn between children who were 'in care' and those who were not.<sup>66</sup> The courts were to retain control over contact where the child was in care including the important power to order local authorities to allow contact or to provide more than they were offering. A parent is able to challenge this and contact can be denied for only up to 7 days where there is an urgent need.<sup>67</sup> Thereafter there must be judicial authorisation. It was thought that the position would be quite different where parents consented 'voluntarily' to 'accommodation' of their child with others under a so-called 's 20 agreement'.<sup>68</sup> Since the authority would not acquire parental responsibility under this legal arrangement,

---

<sup>64</sup> Children Act 1989, s 38(6). The provision has given rise to extensive litigation, especially on the distinction between assessments (which can be ordered) and treatment or therapy for a parent (which cannot). See particularly the House of Lords decision in *Re G (Interim Care Order: Residential Assessment)* [2005] UKHL 68, [2006] 1 FLR 601.

<sup>65</sup> Required under Children Act 1989, s 14 A(7) and (8).

<sup>66</sup> The Law Commission, *Review of Child Law: Guardianship and Custody*, Law Com No 172, HC 594, (HMSO, 1988), at para 5.7 in proposing the power to order contact where the child was 'in care', appeared to think that the situation where the child was *not* in care could be adequately controlled by the powers to order contact which the court had more generally in family proceedings viz s 8 private law contact orders. This reasoning is defective because such orders cannot be made *against* local authorities, only private individuals.

<sup>67</sup> Children Act 1989, s 34(6).

<sup>68</sup> In essence, under Children Act 1989, s 20 accommodation may not be provided for a child where anyone with parental responsibility objects to the arrangement (s 20(7)) or withdraws consent after the child has been accommodated (s 20(8)).

there could be no question of it denying contact to the parents and that indeed is the legal position.<sup>69</sup> The reality is however very different.<sup>70</sup>

What this reasoning fails to appreciate is that s 20 agreements are often not alternatives to public law proceedings *but are an integral part of them*. A common scenario is that the authority issues care proceedings and at the interim stage negotiations take place at court involving the authority, parents and the children's guardian. Often the result of such negotiations is that the child is temporarily accommodated by relatives or foster carers while assessments of the parents take place. Importantly there will be a written agreement between the authority and the parents which is likely to be quite restrictive of contact between the parents and the children. In these cases, if there is then a dispute about the amount or nature of contact being afforded to the parents by the authority, the court is powerless to make an order regulating contact. It is true that the parent retains the power to withdraw his or her consent to accommodation. However to do so is likely to lead, in the author's experience, to immediate escalation in the level of state intervention. The authority may simply restore the matter to court and seek an interim care order with a care plan of removal.

Exactly the same applies where the child is left at home with one parent under successive interim supervision orders. Again, since the child is not 'in care' there is no jurisdiction to make a contact order against the local authority. The only contact order which could be made is the *private law* section 8 contact order, but this can only be made between individuals and not against local authorities. In some cases, because the authority judges that contact with the parent is not in the child's best interests, there can be a total denial of contact which could go on for many months, perhaps even a year or longer. The parent, unless there has been an interim care order, has no means of challenging this, unlike the position where the child is subject to an interim care order. The key point to make is that the parent's position is again paradoxically weaker in the case of the 'voluntary' accommodation of the child than in the supposedly more serious, compulsory care context. It would make a great deal more sense to rationalise the court's powers by enabling the court to make a public law contact order in these circumstances.

### The standing of relatives

Relatives, particularly but not exclusively grandparents, are treated differently in the private and public law. Again, contrary to what might be thought and expected, they are treated with a good deal less respect in the private law than they are in the public.

In the private law, they are not automatically entitled to seek section 8 orders but require the leave of the court, a significant hurdle which is not always cleared.<sup>71</sup> The recent *Family Justice Review* considered the leave requirement and concluded that it should be maintained despite pressure for change especially from grandparents' groups.<sup>72</sup> This was accepted by the government in its response.<sup>73</sup> Two reasons are

<sup>69</sup> See particularly *R(G) v Nottingham City Council* [2008] EWHC 152 (Admin), [2008] 1 FLR 1660, at para [18] in which Munby J (as he then was) castigated the local authority for removing a child at birth without either parental consent or a court order. This it was not allowed to do 'as the result of a decision taken by officials in some room'.

<sup>70</sup> For a critical analysis of how local authorities respond to child protection crises whether by accommodating children, seeking emergency orders or police assistance, based on empirical research, see J Masson, 'Emergency intervention to protect children: using and avoiding legal controls' [2005] CFLQ 75.

<sup>71</sup> Children Act 1989, s 10(1)(a)(ii).

<sup>72</sup> *Family Justice Review*, paras 4.41–4.48.

relied upon. First, it is said that there is no evidence that courts refuse leave unreasonably or that obtaining it is slow or expensive for grandparents. Secondly, it is said that the requirement prevents hopeless or vexatious applications.

The attitude in the public law to grandparents and other relatives could hardly be more different. Amendments to the Children Act 1989 brought about by the Children and Young Persons Act 2008, make it a legal requirement that local authorities explore *first* the possibilities for placing a looked after child with relatives in those cases in which it is not consistent with the child's welfare or reasonably practicable for the child to be placed with a parent.<sup>74</sup> The state has expressed a clear preference, and imposed a statutory obligation on local authorities, to give precedence to care within the family over substitute care outside it. This is an approach which, in any event, is arguably mandated by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).<sup>75</sup>

The impact of these requirements in public law proceedings is striking. Local authorities, judges and magistrates all focus intently on whether there is *any* viable relative who could effectively save the child from substitute care. It is common practice, in the author's experience, for local authorities to conduct viability assessments of those putting themselves forward as potential alternative carers. The list can sometimes be a long one. Where the viability assessment is positive, the authority is likely to conduct a full kinship assessment or (alternatively) special guardianship assessment where it appears that the relative or friend concerned wishes to apply to be special guardian. Long-term substitute care, whether adoption or long-term fostering, is only likely to be the option of choice where there is no suitable relative coming forward.

Again therefore in this context, we do not see a uniformity of approach as between the private and public law. It could be argued that the different treatment of relatives in the private and public law is justified. In private law proceedings the child is usually living with at least one primary carer parent. The leave requirement may be thought defensible to protect that family unit from disruption which could have a negative effect on the child. In contrast it might be said that in public law proceedings there will have been a determination (or it will still be under consideration) that the parent is unable to care for the child. Therefore, rather than being seen as a threat to the child's family unit, relatives are rather perceived as providing a potentially new and safer family unit.

Notwithstanding these arguments which, it must be conceded have certain validity, from the perspective of relatives themselves, the child's wider family have much better standing in the apparently more serious public law than they do where there is simply a private dispute within the family. Unwilling to accept without question the legitimate interest of relatives in the private law, in the public law relatives are relied on heavily by the state as the means of avoiding the drastic solution, a cynic might say overwhelming

---

<sup>73</sup> *Government Response*, para 74.

<sup>74</sup> Section 22C(3), (4) and s 22 7(a).

<sup>75</sup> For a detailed discussion of the position of grandparents under the ECHR see S Choudhry and J Herring, *European Human Rights and Family Law* (Hart Publishing, 2010), at pp 270–276, especially at 271 where the authors note that: 'It is perhaps surprising that there is no special status that applies to grandparents in English law.'



cost,<sup>76</sup> of long-term substitute care. The arguments for maintaining the leave requirement are less than convincing since an unmeritorious case will not ultimately succeed applying the welfare principle.

### ADOPTION: A PRIVATE AND PUBLIC LAW HYBRID

Is adoption a matter of the private or public law? Changes to the law in 2002, implemented in 2005,<sup>77</sup> explicitly put the welfare principle centre stage.<sup>78</sup> Those changes were always controversial.<sup>79</sup> There is an argument that, notwithstanding the central position of the child's welfare, there are provisions in the Adoption and Children Act 2002 which recognise what is at stake for parents and afford some protection of their legal position. Thus, two factors in the statutory checklist which applies to adoption focus on what the child may *lose*, as oppose to gain, from adoption in terms of the potential loss of existing family relationships.<sup>80</sup> The Court of Appeal has also emphasised that in dispensing with parental consent, the Court must be satisfied that the child's welfare *requires* this.<sup>81</sup> This, it has been held, has a connotation of the imperative; adoption must be *demand*ed by the child's welfare rather than merely being a reasonable or desirable option<sup>82</sup> and that this captures the essence of the Strasbourg jurisprudence which requires that adoption be *necessary*.<sup>83</sup> It has also been emphasised by the Court of Appeal that the court must give active and detailed consideration to special guardianship as an alternative disposal.<sup>84</sup> These interpretations of the legislation have by no means convinced everyone that the separate interests of parents in the adoption process are as well protected now as they have been historically. Sonia Harris-Short's view is that 'the likely practical effect of the Court of Appeal's decision [in *Re P (Placement Order)*] is that once adoption is deemed to be in the best interests of the child, parental consent will be dispensed with without further thought or consideration'.<sup>85</sup>

<sup>76</sup> For a damning critique of the dissonance between government rhetoric on the state's commitment to the welfare of children in the care system and its unwillingness to resource the system properly see A MacDonald, 'The Caustic Dichotomy – Political Vision and Resourcing in the Care System' [2009] CFLQ 30.

<sup>77</sup> Adoption and Children Act 2002 largely implemented on 1 December 2005.

<sup>78</sup> *Ibid*, s 1(2) provides that 'the paramount consideration of the court or adoption agency must be the child's welfare throughout his life'.

<sup>79</sup> In particular, the interdepartmental group which conducted a major review of adoption law was explicit in its rejection of the welfare principle as a basis for dispensing with parental consent to adoption. See Department of Health and Welsh Office, *Report to Ministers of the Interdepartmental Working Group, Review of Adoption Law* (HMSO, 1992), at para 12.1.

<sup>80</sup> Adoption and Children Act 2002, s 1(4)(c) refers to 'the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person'. Section 1(4)(f) refers to 'the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant including –

- (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
- (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
- (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

<sup>81</sup> Adoption and Children Act 2002, s 52(1)(b).

<sup>82</sup> *Re P (Placement Order)* [2008] EWCA Civ 535, [2008] 2 FLR 625.

<sup>83</sup> *Re Q (Adoption)* [2002] EWCA Civ 1458, [2012] 1 FLR 1228.

<sup>84</sup> *Re I (Adoption: Appeal: Special Guardianship)* [2012] EWCA Civ 1217.

<sup>85</sup> S Harris-Short, 'Holding Onto the Past? Adoption, Birth Parents and the Law in the Twenty-First Century', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at pp 147, 156.

Adoption in the modern law is first and foremost now a long-term child protection mechanism and in essence an integral part of the legal apparatus for permanent placement outside the family.<sup>86</sup> There is no better illustration of this than the procedural consolidation of a local authority's placement application with the final hearing of its care application. While clearly some adoption applications can be seen as matters of private law, particularly those by step-parents, and in that sense adoption can be viewed as a private law/public law hybrid,<sup>87</sup> it is the public law adoption which is increasingly common. This did not stop Martin Narey in his report on adoption,<sup>88</sup> writing the entire document as if the welfare principle uncontroversially governed child protection law. There is not so much as a whiff of the threshold in this report despite the fact that he is very much preoccupied with child protection.

Narey is very critical of the notion that the child's best interests should be balanced with parents' rights. He relies on the Children Act having established that the child's best interests are paramount and that the welfare checklist requires children's wishes and feelings to be taken into account 'whereas the parent's wishes and feelings are not a primary issue'.<sup>89</sup> He goes on to say that the paramountcy principle has not been challenged by the European Court of Human Rights and that the English courts have found it to be compatible with Article 8 of the ECHR.<sup>90</sup> From this he draws the following conclusion:

'Legislation and case law therefore sends a clear message that the job of social workers, the courts and all those involved in the child protection process is to be unequivocally the champion of what is best for the child'.<sup>91</sup>

This is a gross distortion of what Parliament and the courts have determined is to be required for child protection. It is *not* the case that the parental position is irrelevant. Society entrusts the care of children to the legal parents unless and until they are shown to be not 'good enough'. This reflects the initial assumption most societies wish to make about who is best placed to care for children in the first instance. There is an obvious *de facto* connection between the child and the parents arising from the biological link and the birth process. Thus a widely agreed starting point is that it is in the best interests of children that the birth parents are given first opportunity to raise them. Moral obligations are also thought to arise at birth, which in turn give rise to legal

<sup>86</sup> It is indeed ironic that just at the point where adoption is much more a matter of public than private law, the welfare principle dominates it and the traditional safeguarding of the parental position has been significantly diluted.

<sup>87</sup> Wardship can be similarly viewed in that it straddles both the private and public law. For a concise examination of the modern role of wardship which looks at its uses in both the private and public law spheres see N Lowe, 'Inherently disposed to protect children: the continuing role of wardship', in R Probert and C Barton (eds), *Fifty Years in Family Law: Essays for Stephen Cretney* (Intersentia, 2012), at p 161, especially at 167–173.

<sup>88</sup> Martin Narey is now the government's ministerial adviser on adoption. (See *The Narey Report on Adoption: Our Blueprint for Britain's Lost Children*, reported in *The Times*, 5 July 2011.) The report is available at <http://www.mnarey.co.uk/adoption-advisor.php>.

<sup>89</sup> *Ibid*, at p 4.

<sup>90</sup> In fact the position is a good deal more contested than he implies. For academic treatments of the issue see S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453 and J Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' [1999] CFLQ 223.

<sup>91</sup> *The Narey Report on Adoption: Our Blueprint for Britain's Lost Children*, reported in *The Times*, 5 July 2011.

obligations imposed on the parents.<sup>92</sup> It is at least arguable that these moral and legal obligations should confer concomitant rights on parents to discharge them.<sup>93</sup>

So far as the ECHR is concerned, the temporary nature of alternative care and the state's primary duty to work towards reunification of parent and child are cardinal principles.<sup>94</sup> Although therefore Narey's primary focus is in reality on child protection, he has effectively lifted the unqualified welfare principle from the private law and sought to transplant this into the public law. It cannot be assumed that children will thank the state for interfering and removing them from their birth family if that family was able to offer at least an adequate standard of care, especially bearing in mind the poor standard of care and instability in placements which many of them receive at the hands of the state. It is a fair assumption that many children would prefer to remain at home and there is little evidence that many parents willingly place their children in state care.

## CONCLUSIONS

The conventional division of private and public children law is to some extent a false dichotomy. It is not difficult to point to cases which are truly matters only of private law. Thus where parents are arguing only over contact arrangements and the family has never been known to the local authority, this is a pure private law matter appropriately governed by the welfare principle. Equally, there are cases at the other end of the spectrum which from beginning to end concern only the public law. Where, for example, there has been serious non-accidental injury to a child, there are no alternative family carers available or put forward by either parent and the only option is long-term substitute care, this can be seen as a pure public law case. But between these two extremes, there are many cases which are hybrids.

Many of these cases involve a convergence of the private and public law. As such it is appropriate that there should be consistency, as far as possible, in the powers available to the courts and the principles which they apply. Where a local authority is heavily involved in private law proceedings it may be seeking to influence the outcome and to avoid for itself the commitment of resources involved in issuing public law proceedings. There is a danger of inconsistency, with some apparently serious cases progressing in this way while less obviously serious cases are the subject of public law proceedings. Where the court in private law proceedings believes the threshold is crossed, it is arguable that it should have power to direct the authority to seek a public law order. Where there is an issue of parental fitness, the court should be able to direct it to conduct assessments of that parent, just as it can in public law proceedings in which the authority, as applicant, is a party.

Conversely, in public law proceedings, it may be appropriate for the court to make greater use of essentially private law orders than it is now able to do. The current law governing contact orders should be urgently reformed to enable the court to order local

<sup>92</sup> As to which see J Eekelaar, 'Are Parents Morally Obligated to Care for their Children?' (1991) 11 *Oxford Journal of Legal Studies* 51. Eekelaar's thesis is that all persons have duties to promote human flourishing and that the parental role is socially allocated. It is not universally agreed that parents *should* automatically be entrusted with the care of their children from birth. For a comparatively recent manifestation of the argument that inadequate parents should be 'screened out' from the outset see J Dwyer, *The Relationship Rights of Children* (Cambridge University Press, 2006).

<sup>93</sup> For further discussion see A Bainham, 'Is anything now left of parental rights?', in R Probert, S Gilmore and J Herring, *Responsible Parents and Parental Responsibility* (Hart, 2009), at p 23.

<sup>94</sup> The locus classicus being the decision of the European Court of Human Rights in *Johansen v Norway* (1996) 23 EHRR 33 in which the Court emphasised the temporary nature of alternative care.

authorities to allow contact at the interim stage of care proceedings where matters are proceeding either by agreement or under an interim supervision order.

While the convergence of the private and public may be generally welcomed and thought consistent with the original intentions of those who conceived the Children Act, the one area in which the two should be sharply differentiated is in relation to the fundamental basis upon which the state may intervene compulsorily.<sup>95</sup> It is here that the distinction has become controversially much less marked than was intended. This has come about for a number of reasons. First, the interim threshold is seldom challenged and children therefore often enter care<sup>96</sup> without any serious judicial consideration of the threshold conditions. The primary reason why the authority seeks an interim care order is to enable it to acquire parental responsibility and share this with the parents.<sup>97</sup> The author has suggested elsewhere<sup>98</sup> it is not appropriate for a care order, interim or otherwise, to be made without proper testing of the threshold. The way around this dilemma is to reform the law to allow the court in public law proceedings to make use of the private 'parental responsibility order'. If this could be sought by the authority parental responsibility could be obtained, but without all the negative connotations of the child entering care and without any impression of pre-judging the threshold conditions.<sup>99</sup> It is fair to say that, to a degree, the problem is ameliorated by the insistence of the higher courts on a more exacting threshold for compulsory *removal* and by the fact that this is usually heavily contested. Even here there are signs that the more onerous requirements for interim removal may have been unconsciously relaxed by allowing a danger of emotional harm or psychological welfare by itself to satisfy the test.

There is reason to question whether the threshold itself is in need of reform in view of the very great reliance in public law proceedings on the categories of neglect and emotional harm and in practice the domination of those proceedings by welfare considerations. The notion of the 'good enough' parent can become obscured where courts in essence by-pass the threshold and move straight to the 'welfare' or 'disposal' stage. At this stage, it is often said that what the children now require is *more than* good enough parenting but this was never intended to be the basis for compulsory state intervention. Neither has adoption historically been dominated to the extent that it now is by the welfare principle. We should continue to question this at a time when adoption has very largely become associated with child protection.<sup>100</sup>

<sup>95</sup> It should be noted in passing that there is an argument that a lesser threshold should be required for supervision orders than for care orders. This was explicitly rejected in the Department of Health and Social Security, *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (HMSO, 1985), at para 18.18 because it was not felt that anything less than the satisfaction of the threshold grounds proposed for care orders could justify compulsory state intervention even at the level of supervision.

<sup>96</sup> It should be emphasised here that an interim care order is a care order and that the child enters care under it (Children Act 1989, s 31(11)).

<sup>97</sup> This is however a form of 'sharing' in which some are more equal than others. The local authority can and certainly does control the exercise of parental responsibility by the parents (Children Act 1989, s 33(3)).

<sup>98</sup> A Bainham, 'Interim Care Orders: Is the Bar set too Low?' [2011] Fam Law 374.

<sup>99</sup> The courts' official attitude is that there is no prejudging of the threshold conditions by the making of an uncontested interim order. See particularly *Re G (Minors) (Interim Care Order)* [1993] 2 FLR 839 in which the Court of Appeal described the order as a neutral and effective way of preserving the status quo. Few parents are likely to view it in that way. For discussion see D Howe, 'Removal of Children at Interim Hearings: Is the Test now set Too High?' [2009] Fam Law 374.

<sup>100</sup> On the interrelationship between so-called 'fast-track' voluntary adoption and the public law duties of local authorities see the controversial decision of the Court of Appeal in *Re C (A Child) v X, Y and Z County Council* [2007] EWCA Civ 1206, [2008] 1 FLR 1294.

In private law proceedings an argument can be made for requiring a threshold to be surmounted where the dispute is not between parent and parent but between a parent and someone other than a parent. It is not clear why good enough parenting on the part of a parent is sufficient where the state intervenes through the local authority but not where the state intervenes in private disputes through the courts.<sup>101</sup> The higher courts have been less than clear on whether a presumption in favour of the parent is appropriate or not in these circumstances and have expressly rejected the application of the concept of the good enough parent in the private law.<sup>102</sup>

It might be thought that the central concern arising from the blurring of the distinction between the private and public law is erosion of the parental position. While this is undoubtedly true, it should also be recalled that the unwarranted removal of a child from a parent is something which violates not only the rights of the parent but also those of the child.<sup>103</sup>

---

<sup>101</sup> One important factor to be borne in mind here, however, is the status quo argument. Where the non-parent has already been caring for the child (especially if this has lasted for a significant period) this is a matter which may count strongly in favour of that person as indeed it did in the Supreme court decision in *Re B (A Child)* [2009] UKSC 5, [2010] 1 FLR 551.

<sup>102</sup> Compare the decision of the House of Lords in *Re G (Children)* 2 FLR 629, [2006] 2 FLR 629 with that of the Supreme Court in *Re B (A Child)* [2009] UKSC 5, [2010] 1 FLR 551. For the author's appraisal of these decisions see A Bainham, 'Rowing back from *Re G*? Natural Parents in the Supreme Court' [2010] Fam Law 395. See also the recent decision of the Court of Appeal in *Re B (Transfer of Residence to Grandmother)* [2012] EWCA Civ 858, [2013] 1 FLR 275 in which the Court allowed a mother's appeal against the transfer of residence from her to the paternal grandmother and directed a more extensive retrial. The Court took the view that grandparents were manifestly not on an equal footing with parents and that inevitably there were disbenefits for a child to be brought up by an adult of a different generation to either of her parents. That said, as has been pointed out by Gillian Douglas at [2012] Fam Law 1208, the Court's principal concern was to ensure that there was a thorough investigation of the child's welfare rather than to accord an 'additional status' to the mother.

<sup>103</sup> Over the years there have been a number of examples of the courts' concern about over-zealous intervention by local authorities. *EH v LB Greenwich* [2010] EWCA Civ 344, [2010] 2 FLR 661 is a good example. For another recent example see *Re A and C (Equality and Human Rights Commission Intervening)* [2010] EWHC 978 (Fam), [2010] 2 FLR 1363 and for commentary on it see J Herring and M Dunn, 'Safeguarding Children and Adults: Much of a Muchness?' [2011] CFLQ 528. The 'unknown perpetrator' cases (see above, fn 45), for all their legal nuances and technicalities, are consistent in deciding that the final threshold cannot be crossed on the basis of suspicion alone. For a recent research project which compares the progress and outcomes of a sample of maltreated children who either returned home or remained looked after by local authorities see J Wade, N Biehal, N Farrelly and I Sinclair, *Research Brief*, DFE-RBX-10-06 (DFE, 2010). See also E Giovanni, 'Outcomes for Family Justice Children's Proceedings – a Review of the Evidence', *Research Summary 6/11* (MoJ, 2011) which looks at outcomes in both public and private law proceedings.