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Justice, speed and thoroughness in child protection court proceedings: Messages from England

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ABSTRACT

This paper reports and assesses the outcomes of a pilot programme in London to reduce the duration of child protection court proceedings. The initiative, known as the 'Tri-borough Care Proceedings Pilot', was intended to reduce the usual duration to 26 weeks, ahead of national moves in that direction. The paper locates the issue of court delay in a wider political and child welfare context, highlighting the dilemmas of balancing principles of family autonomy and child safety, support and protection, thoroughness and speed, welfare practices and court processes. It compares the policy, legal and court contexts in the USA and England, showing that what might appear at first sight a local initiative actually relates to a much wider, long-lasting and international debate about how to reach important decisions about children in a reasonable timescale. The paper concludes that there will always be, and must always be, tensions between the courts, national government and local welfare agencies. The pilot shows that greater speed can be achieved by a concerted effort from all the agencies, but at the same time the division of powers and responsibilities is a bedrock for protecting individual rights in liberal democratic societies. Welfare and legal practitioners alike need to appreciate this tension in child protection policy and practice, and resist recrimination when there are differences of opinion. Knowing that other countries face the same challenges can help to promote a more realistic and sophisticated understanding of the dilemmas and the implications for practice, and so help to bring about better decisions for children.

1. Introduction

In countries that place high social value on both family autonomy and the well-being of children, there will always be tension and controversy about the 'right time' and the 'right way' for the state to intervene to protect children from harm. This is further intensified in liberal capitalist societies such as (but not only) the USA and England, where there is a wariness about the state taking away choice and control from individuals, as reflected in Ronald Reagan's famous quip, "The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'" These ideological misgivings are compounded by financial and fiscal concerns: extensive state services are likely to be expensive, and require high levels of taxation. In what circumstances, therefore, and to what extent, should states prioritise voluntary engagement with families, supportive services (on a long-term basis if necessary), and tolerance of different lifestyles? When is greater compulsion required, swifter and more decisive intervention, and a priority on child safety over parental rights? The challenge, of course, is that these are not simple either–or choices; rather, both the supportive and the protective approaches are socially and politically approved in some ways, and mistrusted in others (e.g. see Dingwall, Eekelaar, & Murray, 1983; Parton, 2009).

These political dilemmas overlap with debates about children's needs and rights. The immediate priority is their physical safety, but beyond that there has long been awareness of the enduring psychological harm caused by early experiences of abuse, neglect and instability, and of children's psychological needs for secure attachments to safe and reliable carers throughout their childhoods and into adulthood (Howe, 2005). This in turn has led to concern, over many years, about the psychological harm caused to children by lengthy periods of uncertainty and delay in ensuring that they are brought up in a safe and secure setting (whether that is with their parent(s), kinship carers, adopters or long-term foster carers).

The notion of 'permanence' has acquired prominence in child welfare policy on both sides of the Atlantic because it brings together the political and the psychological, offering a way forward that appeals to both perspectives. In both countries, the first permanence option is for children to remain with or return to the parent(s), provided it is safe to do so, reflecting the political priority on family autonomy and psychological research on the importance of family ties. In both countries many children do return home from care within a relatively short period of time and without the involvement of the courts (for England, see DfE, 2013; Sinclair, Baker, Lee, & Gibbs, 2007; for the USA, Children's Bureau, 2013; Courtney & Hook, 2012b). For children who cannot go

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home, the principal permanence options are adoption or kinship care, and then long-term foster care.

In the USA and the UK, there is a long history of concern about delay in reaching decisions on children involved in court cases to protect them from harm or neglect (known as juvenile dependency hearings in the USA, and care proceedings in England). The USA has federal requirements about the timescales of such proceedings but even so there are often delays (discussed in Section 2.3). In England, the issue was one of the reasons for a review of the family justice system in 2010–11 (FJR, 2011a,b). This proposed a statutory time limit of 26 weeks for care proceedings (save for 'exceptional cases'), and the courts and welfare agencies across the country have been working towards this since summer 2013. It became a statutory requirement when the Children and Families Act 2014 came into force, in April 2014.

But the emphasis on permanence and timeliness brings its own challenges. The imperative of swiftness, important though it may be to minimise psychological harm to children, fits awkwardly with the gravity of the decisions to be made. Such life-changing matters require thorough evaluation and proper consideration. The 26 week target has, inevitably, provoked concern from family rights campaigners and parents' advocates about the risks to fairness and thoroughness (Bar Council, 2012; TCSW & FRG, 2013).

This paper reports on an evaluation of a pilot programme in London, the 'Tri-borough Care Proceedings Pilot', which ran from April 2012–March 2013. It was intended to work towards the 26 week target ahead of national moves in that direction, and offer lessons for other areas in how best to achieve it. We describe the pilot and the main findings, and reflect on the wider challenges of balancing support for families and protection for children, thoroughness and speed, welfare practices and court processes. In order to contextualise the pilot and draw out the wider debates, we start by comparing key elements of the policy context, legal framework and court processes in England and the USA. We write as English researchers and acknowledge that this shapes our view of the American landscape, but there is considerable interest from policy makers, academics and welfare practitioners about the possibilities and limitations of learning from other countries, and we hope the paper will contribute to that discussion; and even when there are no direct lessons to be transferred, a benefit of international comparisons is to help one look at one's own country in a fresh light. What might appear at first sight a local initiative actually relates to a much wider, long-lasting and international debate about how to reach important decisions about children in a reasonable timescale.

2. Permanence, the law and the courts

In both the USA and the United Kingdom, child welfare policy and legislation reflect wider concerns about family autonomy and permanence. The importance of timely decision-making for children has been recognised in both countries for at least four decades. One of the seminal texts in this field for instance, Goldstein, Freud, and Solnit (1973), was written by three psychoanalysts, two American-based and one British-based. It looked at 'all legislative, judicial, and executive decisions generally or specifically concerned with establishing, administering or rearranging parent–child relationships' (page 5), emphasising the harm caused to children by protracted periods of uncertainty. A well-known British text published in the same year (Rowe & Lambert, 1973) concerned itself with 'drift' across the whole care system, not just delay within the courts, and had at its core the same concern about the psychological harm that delay can cause to children. Recent research, on both sides of the Atlantic, into the impact of abuse and neglect in a child's early years on their neurological and psychological development, has further raised awareness of the importance of clear assessments and decisive intervention (Brown & Ward, 2012; Center on the Developing Child, 2012).

In both countries, there have been numerous policy initiatives over the last twenty years to promote adoption as a way of ensuring permanent, safe and loving homes for children in care who cannot go back to their birth families. In both countries, adoption proceedings are separate from child protection proceedings, but child protection cases may end with an order that permits the relevant agency to place the child in a prospective adoptive placement without the birth parents' agreement. In the USA this is called termination of parental rights; in England the equivalent step is called (since 2006) a placement order. This does not actually terminate the parents' 'parental responsibility' (the term in English law for parental rights and duties), but allows the local authority to restrict their exercise of it, and to share parental responsibility with the prospective adopter(s) once the placement is made. When the adoption order is finally made, this extinguishes the parents' parental responsibility and gives it solely to the adopter(s).

However, the fact that a child is available to be placed for adoption does not necessarily mean that he/she will be. Some of the children are 'hard to place' because of physical or intellectual disabilities, or other health needs. Others have significant emotional and behavioural difficulties because of their experiences, and some are too old to be easily placed for adoption — hence the emphasis on timely intervention and decision-making.

2.1. Permanence and the law in the USA

In the USA, the primary responsibility for child welfare services is with the individual states, each with its own legal and administrative system. However, in order to receive federal funding for certain programmes, states must comply with federal legislation and requirements (CWIG, 2012a; Keenan, 2006). States are required to make 'reasonable efforts' to prevent the removal of children from their families, or to reintegrate them if they have been separated (Berrick, 2011; CWIG, 2012a), and there is a strong emphasis on timescales for decision-making. Nationally, of the 241,000 children who left care in the year ending 30 September 2012, just under half did so within a year, and just over half went back to parents or other primary carers; but of the 102,000 children waiting to be adopted, more than half had been in care for over two years (Children's Bureau, 2013: 3, 5). The Adoption Assistance and Child Welfare Act 1980 established a time limit of 18 months after the initial placement in out-of-home care for the court or relevant administrative body to decide the long-term future placement for child. The Adoption and Safe Families Act 1997 shortened the time limit for decision-making by requiring 'permanency hearings' to be held no later than 12 months after the child enters care. It also required that states initiate proceedings to terminate parental rights after a child has been in care for 15 of the previous 22 months, but allows for this not to happen if the child is in kinship care or it is not considered to be in the child's best interests (CWIG, 2012a; Edwards, 2007). It introduced financial incentives for states to increase the number of adoptions. There is still the requirement of reasonable efforts at reunification, but states are allowed to specify exceptions where services are not required. They are also expected to make reasonable efforts to find adoptive placements for children, including concurrent planning for rehabilitation or adoption (D'Andrade & Berrick, 2006). Critics have argued that the time limits are too rigid and have not been backed up by sufficient resources to improve welfare and court practice (Guggenheim, 2000; Guggenheim & Gottlieb, 2005).

More recently, the Fostering Connections to Success and Increasing Adoptions Act 2008 gave increased support for kinship placements, by introducing federal funding for states to make assistance payments to kinship carers who had taken on legal guardianship of the child, and for programmes to help strengthen family links. An emphasis on kinship care is consistent with the wider social and political emphasis on family autonomy and self-responsibility, and a relatively restricted role for the state.

Kinship care may be arranged under a range of different legal arrangements (CWIG, 2010, 2013). Federal legislation requires states to consider giving preference to an adult relative over a non-related