

THE PRINCIPLE OF A SINGLE NAMED GUARDIAN FOR THE CHILD THROUGHOUT CARE PROCEEDINGS

The principle of a single named guardian being appointed by the court to act as the children's guardian throughout proceedings is now being undermined, firstly because Cafcass has been declared by its Chief Executive to be on an emergency footing and secondly because the organisation supported proposed amendments to s41 Children Act 1989. The latter have been abandoned for the time being, following opposition from the Family Justice Council and the Interdisciplinary Alliance for Children. In this context, a range of specialists with long-term experience and interest in law and social work relating to children in the family justice system were invited to contribute their respective views on the value of the current law and what any alternative might mean. Their responses are set out here.

Joan Hunt, Senior Research Fellow, Department of Social Policy and Social Work, University of Oxford

In 1999, in an article for this journal, I wrote the following words:

'Like others who have been strongly in favour of a unified service ... I am acutely conscious that in ten years' time we may look back on the current provision for children in public law proceedings and rue the day an integrated service ever came into being.'

(Hunt J (1999) 'A Combined Family Court Service: issues from recent research' *Seen and Heard* vol 9(2) 17–32, at p21)

The proposal to amend s41 of the Children Act 1989 may be the tipping point. Clearly it is not essentially a crisis response to an unprecedented surge in applications – that is the purpose of the President's Interim Guidance. Rather, it seeks to address a dilemma that has faced Cafcass from its inception: how an organisation which is demand-led, with little control over the deployment of resources, can manage a fixed budget. The proposed change offers, at one stroke, the chance for Cafcass to seize control, placing itself in a much more powerful position, not only in relation to the courts, but also to its own practitioners. In grasping this opportunity, however, the government and Cafcass management risk wrecking one of the most successful innovations in the family justice system over the past 20 years, the 'tandem system' of separate representation for children subject to public law proceedings.

Requiring social work practitioners and lawyers to work in partnership, with the guardian in the driving seat, was an unlikely recipe for success. One of the key elements in this, in my view, has been the guardian's unique position, so different from a local authority social worker, as an independent professional responsible for their own decisions, with a high degree of autonomy over the organisation of the work and the responsibility to work solely to promote the child's interests. Making the agency, rather than the court, responsible for allocation fundamentally alters this dynamic. The balance of the relationship will be further tilted if there is no longer a single guardian for a case and when the guardian's involvement is episodic rather than continuous, both implications of the proposed change. Ultimately, we may finish up with a system which is more akin to a solicitor acting for the child, 'advised' by a guardian, whose main contribution is to provide a welfare report, perhaps on the basis of fairly limited enquiries.

This is a very far cry from the system that has pertained until now, in which, as research has amply demonstrated, the guardian plays a dynamic and interventionist role, not only advising the court and instructing the solicitor, but assisting with case management, 'oiling the wheels' of the court process and acting as an agent of change. Indeed, over the years the role of the guardian has become ever more central to proceedings and the added value of the guardian's contribution widely appreciated. It is hard to imagine how that powerful and pivotal role could be sustained by discontinuous input from a guardian, still less a succession of guardians, who will, inevitably, lack the credibility and authority that comes from an intimate and ongoing knowledge of the case.

It is ironic that this change is being sought now, because of the surge in applications by local authorities. Thus at the very time when local authorities may be bringing more borderline cases to court, the government and Cafcass are seeking a change which will weaken the safeguards for the child against unwarranted removal from the family or unnecessary placement with unrelated carers.

Even where this is not the case, children subject to care proceedings, who have probably already experienced a great deal of change in their lives, need continuity in their representation if they are to be able to trust the guardian sufficiently to voice their wishes and feelings and to participate effectively in proceedings. Discontinuity also imposes a strain on parents and may reduce the number of cases where the eventual outcome is agreed because the guardian has acted as a catalyst for change in parental attitudes.

In raising these objections to the proposal I do not wish to downplay the current problems, or to deny the inherent dilemma Cafcass faces in providing even a 'good-enough' service with limited resources, both of money and of personnel. Rationing is a reality for all public services, even in less straitened

times, and it may be that providing high-quality representation for all children, while ideal, is not achievable. If so, targeting children most in need is likely to be a better option than spreading resources thinly. However, there needs to be an open debate on how any such rationing of Cafcass services should be accomplished, rather than achieving it by the back door, and the courts need to play a key role, rather than being sidelined. The President, in his *Interim Guidance*, has already indicated a readiness to address the current difficulties, while emphasising the temporary and emergency nature of the measures to be taken. The impact of these measures needs to be evaluated before anything more drastic is done. To rush into changing primary legislation in this way is ill-advised and likely to have adverse consequences for children.

Alan Bean,
Solicitor, Birmingham, and Co-Chair of the Association of Lawyers for Children

On 20 October 2009, I attended a meeting of Cafcass's Legal Liaison Group. I asked that the agenda include discussion about the rumoured intention to amend s41 of the Children Act 1989 as part of DCSF-sponsored legislation in the coming session. I wanted to know how such a move could possibly be of benefit to the children for whom children's guardians are appointed. Readers of *Seen and Heard* will need no reminding as to the critical importance for children not only of early appointment of a guardian, but also of continuity of appointment and the opportunity to build up a relationship of trust with the child/children whose lives are being turned upside-down by care proceedings.

As a Children Panel solicitor, it is relatively easy for me to explain to children that a court is now involved in their lives and that the court has appointed a children's guardian to look after their best interests until the judge decides what is best for them. If the changes that are being proposed actually come about, it is going to be much more difficult for a child to grasp what Cafcass stands for (as an acronym and as an organisation). I know how hard it will be for that child to form any sort of relationship of trust with a shifting population of assigned employees – it's difficult enough for children to deal with the changes in social work personnel assigned to them over the duration of their case.

Did Cafcass support this change, I asked? Cafcass, their Director of Policy was at pains to point out, has no public policy function. Yes, but did he support the proposed change? We were told that both the Chief Executive and Director of Policy did indeed support the proposed change. Why, I asked? We were told that these amendments were long overdue and were, in effect, overlooked when Cafcass was established – they were supported because they would remove the source of tension within Cafcass caused by children's guardians having to be accountable to both Cafcass and the courts.

Not only is there no benefit for the child in this, but I would also suggest that there is nothing unusual or wrong with this type of tension within organisations. As Judith Timms observed in her address at the reception held by Nagalro earlier this year to mark the 25th anniversary of the guardian service, such tension is ‘inherent in the need to maintain the independence of professional opinion, whilst at the same time maintaining the dual accountability to both Cafcass and the courts’. She went on:

‘Guardians appear before the court and are personally appointed by them as independent expert witnesses in their own right and their professional opinion is sought by the court in that capacity. The role dictates that it may not be subsumed within a line management structure. At the same time, Cafcass is responsible to Government for the overall management and standards of service delivery.’ (Timms, J. (2009) Twenty-five years of the guardian service – where next? *Seen and Heard* vol 19(2) 41-53, at p48

Many types of structure are specifically designed to operate with component parts in a state of tension. There is nothing intrinsically wrong with forces pulling in different directions, provided that, overall, they are in equilibrium. Any organisation that employs or manages professionals has to deal with tensions arising from organisational pressures versus the need to exercise professional judgment. We have only to think of doctors and their health trust managers, judges and the court service, barristers and their clerking teams. I think that all professionals working within the family justice system are familiar, on a daily basis, with the need to maintain such tensions in a state of equilibrium.

As the solicitor for a child, I have to balance my duties to the court, the professional conduct rules by which I am bound, the time constraints imposed upon me by a heavy caseload, the need to generate sufficient fee income, working practices within my firm, the requirements of the child or children in an individual case, the vagaries of the fixed-fee payment system, and the twists and turns in cases which make it impossible accurately to predict my workload. I am accountable to the individual practice for which I work, to the Solicitors Regulatory Authority which has oversight of my profession and to the court in any particular case. These tensions are held in a state of equilibrium by many different support systems and safety valves which have evolved for this purpose. Some examples of these are:

1. The tandem model of representation, in place for 25 years now, which provides solicitors with quality instruction on behalf of the child and a ‘critical partnership’ with the children’s guardian.

2. Tried and tested means of spreading the load at times of excess demand, with Children Panel colleagues, solicitor agency arrangements and specialist members of the Bar.
3. Professional organisations, online forums and (we hope) quality line management and understanding within our individual firms.

However, that equilibrium is at risk of being undermined by fundamental and insufficiently thought-out change. Obvious examples of this are the original proposals of the Legal Services Commission for funding Phase 1 and more recently Phase 2 of fixed fees in family cases. Each proposal threatened to destroy the solicitor half of the tandem model by making it financially impossible for lawyers to continue to do their part of the work. Thankfully, common sense eventually prevailed on both occasions, but only after enormous effort on the part of representative bodies.

Now it is the turn of the other half of the tandem model, the children's guardian, to be threatened by equally fundamental and ill-conceived change. At the time these words are written, the proposals are still shadowy and they have not been fleshed out in any way. The DCSF and Cafcass were left in no doubt by the Family Justice Council, meeting on 19 October 2009, as to the strength of opposition to proposed changes to s41. There are indications that the proposals may not see the light of day, but that will not, of itself, remove the threat. The full-frontal assault may be abandoned, but a more insidious process, stifling the ability of children's guardians to perform their role properly, will continue. The pool of self-employed children's guardians will shrink further (as set out in the letter of 23 September from the Chief Executive to self-employed and bank staff) and full-time staff will have further batches of cases dropped on them without regard to their capacity to do the work. More full-time staff, whose long experience and wisdom cannot be replaced, will leave for good.

If there really are child-centred reasons for changing the law, then by all means let us have the debate. My belief, however, is that there are no such reasons. Cafcass, as an organisation, needs to understand that it employs a professional staff, and employs them to exercise professional judgment. This is what everyone else in the family justice system understands to be their primary function. In the coming year, we need to foster a genuine understanding and appreciation of the nature of children's guardian's work, as enshrined in s41, and a commitment to preserving that.

If we can bring about such an understanding and appreciation, in place of the current rhetoric around 'tidying up anomalies', 'safeguarding roles' and 'zero tolerance', then there is every chance that the inherent tensions will be accepted and successfully managed. This, in turn, will allow the system that has developed over the past 25 years for safeguarding the interests of the child in public law proceedings to be brought back into an enduring equilibrium.

Nicholas Crichton,
District Judge, Inner London Family Proceedings Court

First as a solicitor, and then as a District Judge, I have been involved in family and child protection work for some 38 years. During this time there has developed what is often referred to as a ‘Rolls-Royce’ service for children – the ‘tandem’ model of children being represented by a children’s guardian together with a solicitor. This model was developed from the tragic case of Maria Colwell in the early 1970s. It was felt that Maria would not have been returned to the care of her mother, and therefore would not have been killed by her mother’s new partner, had she had an independent voice in the proceedings.

The ‘tandem’ model was enshrined in our legislation in s41 Children Act 1989 and has become a model which is admired and envied throughout the world. The court appoints a single named guardian to represent a child in care and related proceedings. The child then has his or her own ‘champion’ who carries out an independent social work assessment of the child’s circumstances and makes recommendations to the court as to what is in his or her best interests. I had the privilege of chairing the Inner and North London Guardian *ad litem* Panel committee for five years before Cafcass was introduced. In that capacity, as well as in the capacity as a District Judge, I have had the benefit of witnessing the true value of the model working for the benefit of children.

Government now seeks to amend s41 by legislating for the court to appoint Cafcass the organisation, rather than an individual named guardian, to carry out the role and function of the children’s guardian. This seems to me to represent a very significant weakening of the model. Children need a single guardian to represent their interests throughout the case. The older child needs to know that there is one person in whom he or she has developed trust and confidence to represent his or her interests. If the proposed amendment passes into legislation we will have done away with one of the most significant strengths of our system. Cafcass would then be able to appoint a series of different professionals to parachute in and out of the case from time to time, which, in my opinion would present no kind of a service to the children whom we seek to serve.

In my view, to respond to what is hopefully a short-term difficulty by amending such a fundamental provision in the Children Act would represent a wholly disproportionate response. It must be resisted.

Jane Fortin,
Professor of Law, University of Sussex

Some might say we are in the process of throwing the baby out with the bath water. In the late 1990s, the tandem system of representation for children involved in public law proceedings in this country was applauded throughout Europe as ‘far superior to all other practical solutions adopted so far’. By early 2009, this superb system was already diminished. Overall, however, it retained the respect it deserved. Though expensive, the virtually automatic appointment of a guardian and solicitor to children involved in care proceedings could still be justified with little difficulty. The dispute is a three-cornered one between local authority, child and parents. The children involved have no choice over the initiation of the application, nor any control over the process, and the outcome will materially affect their way of life, if they are taken away from home or deprived of their liberty.

No system is perfect and problems can arise, particularly if children’s solicitors, guardians and courts fail to respect the child’s party status. Admittedly, children’s guardians do not always develop a comprehensive understanding of children’s needs through their interviewing, or even always spend very much time with them. Nevertheless, it is clear that under the procedures operating before the introduction of the PLO, the work of most children’s guardians was very highly regarded by local authorities and courts alike. The vast majority of children’s guardians developed an excellent rapport with the children involved during their detailed work on their cases. Indeed, this on-going one-to-one relationship provided the children with a point of stability at a time of great confusion and uncertainty in their lives, when social work personnel would often be coming and going. Sometimes, it was only by the end of the case that children had built up a relationship with their guardians and trusted them sufficiently to express their views candidly. Furthermore, by the final stages of the proceedings, guardians’ detailed knowledge of the case, gained through many hours of work, not uncommonly influenced the local authority’s preparation of its care plan. It also affected the court’s own handling of the local authority’s application, with the guardian sometimes taking a very active role in ensuring that the child’s position was adequately safeguarded. The courts often relied on the guardian to remedy what they believed to be the local authority’s own flawed assessment of the parenting qualities of the parents.

In early 2009, I considered it still too early to gauge how the work of children’s guardians would be affected by the procedural changes introduced under the PLO. Only time could tell whether these changes to the guardian’s role would fatally and permanently damage the way in which children are represented in public law proceedings. By then, however, many had already indicated grave reservations about the way in which the PLO would undermine guardians’

contribution to children's welfare in care proceedings. As Alistair MacDonald pointed out, under the new arrangements, although parents are entitled to legal assistance from a very early stage in the local authority's involvement, children do not receive independent representation until the later issue of the local authority's application. This particular concern was echoed by the authors of the recent evaluation of the PLO. Furthermore, during that early stage, collusive agreements might be reached between the local authority and parents, which have little to do with the child's best interests.

There were also cogent fears that the extremely detailed guardian's report produced for the court at the final hearing would become a thing of the past. Under the PLO, guardians are required to produce various much shorter 'analyses' of the key issues much earlier in the process, combined with recommendations, possibly before they have got to know the background to the case sufficiently well. Nagalro's compelling view was that by channelling the guardian's work in this way, the courts would lose the guardian's broader perspective gained only by following a care case through from start to finish. Furthermore, by producing a very early position statement, the children's guardian might be seen by 'each side' as having formed an established position, thereby undermining his or her ability to broker an agreement between the local authority and the child's parents. The absence of the traditional detailed guardian's report at the final hearing might undermine the courts' ability to consider all the issues in the case, including all aspects of the child's needs, together with an assessment of any last-minute changes in care. Most worryingly, the children's guardian might not have gained the child's confidence until the end of the proceedings, thereby undermining the value of views reached any earlier about the child's own wishes and feelings regarding the outcome of the case.

Sadly, it seems matters are now going from bad to worse. Arguably the tandem system of representation has been the victim of the butterfly effect – the creation of Cafcass with its staffing problems, the growing involvement of Cafcass in private law disputes causing further staffing problems and the introduction of the PLO had all already undermined the working practices of children's guardians. Finally the panic caused by the Baby Peter tragedy led to mounting delays in the allocation of children's guardians being addressed by 'emergency interim measures' – with current plans to make these measures last indefinitely. Not only is there to be a considerable reduction in the time children's guardians are able to spend on each case, but plans to amend s41 of the Children Act 1989 place the whole concept of the single named guardian itself under threat. Children's own rights in this gloomy scenario seem to have been forgotten.

Details of references cited here can be found in the new edition of Jane Fortin's *Children's Rights and the Developing Law* (Cambridge University Press, 2009, pp277–281).

Michael Griffith-Jones

Independent social worker; formerly a self-employed guardian for 25 years and the first Chair of Nagalro

Nobody would have considered the possibility of changing guardians mid-case before Cafcass. Why not?

The individual guardian is appointed by the court under Children Act 1989 s41 to safeguard the interests of the individual child. Both government practice manuals for guardians (1992 and 1995) emphasise the personal professional autonomy of the guardian. To see why this is necessary, reread the Field-Fisher report (1974) to see how Hove Juvenile Court should have heard from someone independent who had spent sufficient time with Maria Colwell and family members, so as to appreciate why she was so distressed, calculate risk and to give the court a picture of her needs, wishes and feelings.

It has recently been recognised under the PLO that there needs to be judicial continuity – an odd moment therefore to suggest an end to guardian continuity! Perhaps this change is now being considered so that Cafcass can put its own ambitions – ‘The whole point is to make sure the right decisions happen ... for the long term greatness of the organisation’ (from Operational Priority 5, Cafcass Business Plan, 2009–11) – ahead of the needs of the children whose interests guardians are meant to safeguard.

Consider two current examples of this subversion of purpose: first, Cafcass recently allocated to every London guardian seven more public law cases; management knew they could not do the necessary work on these, but this removed the organisational embarrassment of unallocated cases. Second, the President’s Interim Guidance for England creates a temporary opportunity for Cafcass to disrupt continuity of allocation because of the, in large part self-inflicted, allocation crisis. Already Cafcass managers are talking of institutionalising these changes long-term.

Any amendment to s41 is to allow Cafcass to dilute the role of guardian, possibly allocating tasks to different people, having a Cafcass officer dip in and out of a case, or not allocating one at all, according to the organisation’s needs. Cafcass believes it should be able to prioritise cases; this means, in effect, some children’s interests will not be independently safeguarded.

There is no point in going through the motions of safeguarding a child’s interests – you either do it, or you don’t – there is no halfway house; it is deluded to pretend otherwise. Many Cafcass managers are at a disadvantage in understanding this, as they do not properly appreciate the role of a guardian, having come from different backgrounds. This managerial confusion is perhaps compounded by the post-Laming substitution of the word ‘safeguarding’ (the same word used in s41 for the guardian duty) for ‘child protection’.

Intake and duty teams, being introduced by Cafcass, absorb resources that

could be devoted to single guardian allocation; create additional confusion within and without the organisation and, most importantly, for the children and families; and undermine the tandem model of representation. Once established, these systems will be hard to relinquish. To safeguard a child's interests, the guardian has to absorb all written material (not just court papers), so as to appreciate an accurate history of the child as an indicator of what the future may hold. A series of guardians can only guess the evidence that is not available – there will instead be a series of fragmented snapshots held by different individuals.

The guardian has to gain the trust of the child in order to obtain his or her views and understand how the family functions, so as to establish capacity for change, whilst establishing the professionals' views and what these are based on. The Climbié report, like many of its predecessors, emphasised the importance of practitioners understanding what a day is like in the life of a child when assessing risk and the child's needs; this applies at least as much to guardians as to local authority social workers. The effectiveness of the role is, in large measure, dependent on the quality of relationships made by the guardian. The guardian must ensure that all necessary evidence, both fact and opinion, is placed before the court and so instruct, or inform when not instructing, the child's solicitor to represent the child appropriately. This robust working relationship is, of necessity, an individual and ongoing one.

To safeguard a child's interests, the guardian has to find all the pieces of the jigsaw and put them together. The work is about people's lives, so is infinitely nuanced. Change takes place during the proceedings, both in the family and among the professionals, and needs to be witnessed; as a party to the proceedings the guardian is part of the process of change. To safeguard the child's interests, the guardian has to assess what has to change, how such change can take place and how the court can facilitate such change. This is a continuing process, which cannot be managed by different people, nor, indeed, by one person paying the case occasional externally determined visits (Cafcass, wrongly, seems to believe this can be done adequately by phone, rather than in person).

Only a single guardian appointed on Day One of the proceedings (or, better still, appointed at the pre-proceedings stage when, alone of the parties, the child is currently unrepresented), can successfully carry out these tasks and be challenged in court by other parties. Guardians know the frustration and fury children and families experience when there is a change of social worker – any proposal to compound this by changes of guardian cannot be described as 'putting children first'. A child in care proceedings is already exposed to a succession of new and potentially frightening experiences. One stable element should be the guardian, who can guide the child, with his or her solicitor, through the complex process, and ensure the court has all the information it needs. Duty, intake, support workers and changing guardians cannot do this. It

is not only dangerous practice; it would also be a gross injustice to the child at an unimaginably vulnerable point in his or her life to impose such discontinuity.

Anna Gupta, Head of the Department of Health and Social Care, Royal Holloway College, University of London

Following the 1974 Field Fisher inquiry into the death of Maria Colwell in the mid-seventies highlighting the need for independent representation of children in care proceedings, the guardian *ad litem* service was developed as a response to dissatisfaction with the level of protection afforded to children and past failure to listen to the child's voice. Following the implementation of the Children Act 1989, the role of guardian *ad litem* was expanded. However now 20 years later the children's guardian service is in crisis and the government is proposing an amendment to s41 Children Act 1989 that will further weaken the ability to safeguard and represent the interests of children. The significance of this amendment for the well-being of society's most vulnerable children will be compounded by the wider context of children's services, as currently there is much concern about local authorities' abilities to carry out their child protection role.

Following the publicity and reports surrounding the death of another child, Peter Connelly, there has been a dramatic rise in the number of care proceedings over the past year. This has resulted in considerable delay in the appointment of a children's guardian in some areas of the country. As a result, the President of the Family Division published Interim Guidance in July 2009 aimed at addressing these problems. He stated that the changes, which include the use of duty systems, with the consequent risk to continuity of a children's guardian, would be temporary and will be reviewed in April 2010. There is, however, a great risk, particularly given current pressures on public funding, that should the amendment be passed, the acceptance of not having one named guardian throughout the proceedings will become 'custom and practice', because of expediency rather than the needs of the children.

The role of the children's guardian is two-fold as it involves working in 'tandem' with the child's solicitor both to provide the court with as full and accurate an analysis of the child's life and functioning as possible, as well as ascertaining the child's wishes and feelings and ensuring that the court is aware of them in making any decision about the child's future. For both it is crucial that there is continuity of one guardian having responsibility for safeguarding and representing the interests of the child throughout the court proceedings.

In order to undertake an effective assessment, ascertain and represent children's wishes, the guardian has to develop a relationship with the child. Many of the children involved in care proceedings will have experienced considerable loss and fractured relationships with adults, including, given the

current difficulties in recruitment and retention, social workers. Frequently, the guardian is the only social work professional involved throughout the proceedings. In this context it is particularly important for the child to have continuity in their relationship with the professional charged with representing their wishes and feelings. Developing a trusting relationship and truly understanding the perspectives of children who may have been abused, have insecure attachment relationships and have feelings of ambivalence or conflicts of loyalty to parents and carers takes time and considerable skill. The quality of the *listening* is crucial and needs to involve observation, attention to the way in which the child expresses their views, as well reflection on professionals' own responses to the child's statements. The most effective way to achieve this, both in terms of the guardian's ability to carry out his or her functions, as well as how the child experiences the service, is to have a guardian who can build rapport, gain a child's trust and convey to the child that they are being listened to and their perspective valued over a period of time. A service that involves more than one person acting in this role will inevitably result in a less effective service to children.

In the wider debate about social work, many academics and practitioners have been promoting the case for relationship-based social work practice and critical reflection. Last year's review of serious case reviews by Marion Brandon and colleagues makes a compelling case for assessments to be based on the systematic collection of information and evidence, including observations and analysis in a context that recognises the interactive effects of vulnerability and risk, resilience and protective factors. Meeting with family members and critically reflecting upon other professionals' assessments in light of their own experiences is an important part of the role of the children's guardian. The children's guardian is required to provide an independent oversight of the case, which includes critically appraising the local authority's interventions and plans, and the potential for change in parents over time. The ability of guardians to do this will be severely compromised if they are not involved continuously throughout the proceedings. The credibility and weight given to the evidence of the guardian may well decrease as a result, with a consequent weakening of the representation provided for children.

There are many compelling reasons for maintaining the current system of the court appointing a named children's guardian. The proposals for the amendment of s41 would appear not to be supported by the available evidence about effective social work practice with children and families. The government and Cafcass's interests may be served by the change, but it is unlikely that those of the children will be.

Judith Masson,
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The Care Profiling Study (Masson *et al.* [2008] Ministry of Justice) was a detailed analysis of a sample of 386 care cases started in 2004, drawn from court files in eight areas of England. It was commissioned jointly by the Ministry of Justice and the Department for Children, Schools and Families to provide baseline data on the operation of care proceedings before the reforms introduced in April 2008. As such, it provides historic data on the operation of care proceedings in what may to some now seem like a golden age.

Although Cafcass was perhaps under less pressure in the financial years from 2003–4 to 2006–7, during which these cases were before the courts, it was by no means problem-free. The difficulties surrounding its establishment and the highly critical report of the House of Commons Committee on the Lord Chancellor's Department were relatively recent and recovery was at an early stage.

These difficulties were clear from the delays in appointing guardians to the cases in the sample. Delay was noted in the appointment of the children's guardian in almost 40 per cent of cases, and in nearly 12 per cent of cases there was no guardian appointed by the first hearing in the county court. As a consequence, the court appointed the solicitor for the child in nearly 60 per cent of cases. Delays were not as prolonged as appear to be occurring currently, but in 2.5 per cent of cases no guardian had been appointed by day 60, the latest date for the CMC under the old Protocol.

Despite these difficulties, very few children experienced a change in children's guardian during the proceedings. There were only 12 cases, 3.1 per cent of the sample, where this occurred. The cases where there was a change of guardian occurred in only four of the eight areas covered, which were the four largest metropolitan areas included. However, the reasons for change of guardian recorded in nine of the 12 cases did not suggest that the way guardian services were managed or administered had any bearing on this. Five cases involved a change because of the guardian's health, three guardians ceased to work for Cafcass and one asked to be removed from the case because of a conflict of interest.

The very small number of cases where the guardian had to be replaced should not be surprising. The approach to appointment which operated in these courts was for the court to provide details of the case to Cafcass and for Cafcass to notify the court of the person it thought should be appointed. This avoided overloading individual guardians and appointing people where conflicts (such as recent employment by a local authority involved in the case) could readily be detected. Thus there did not seem to be a need for Cafcass to be able to run the guardian system like a football squad and substitute key people to keep the ball in play.

About twice as many children experienced more than one solicitor, which probably reflects the volatility of the legal market, with lawyers changing firms, firms merging, lawyers retiring and so on.

Apart from the impact on the child, there is a very good reason why a system with a person-power crisis should not move to a system that involves increased numbers of people taking responsibility for the same case. Case transfer involves substantial additional work. Files read and understood by one person need to be read and understood by another. Introductions to family members have to be repeated – all additional work, which if not done will undermine the credibility and authority of the children’s guardian and of Cafcass itself.

Guy Mitchell,
Formerly employed as a children’s guardian in Cheshire; now an independent social worker

I worked as a children’s guardian more or less continuously between May 1984 and March 2009. I can still recall the first telephone call. If memory serves, it was on 27 May 1984, the first day in the life of the new system. It was an access application pursuant to the Health and Social Services and Social Security Adjudications (HASSASSA) Act 1983. It was the beginning of a love affair with the work.

During the following 25 years there were times when I was doing other work besides my guardian work. Indeed, in the beginning it was virtually an unpaid hobby, in addition to the day job, which in my case was that of a Senior Social Worker in Liverpool. For six years I taught on the social work qualifying courses at what was then the Liverpool Polytechnic. I continued with guardian work. In January 1992 I left academia and went to work for what was then the Boys and Girls Welfare Society (BGWS), which had the contract to provide a GALRO service for Cheshire, Halton and Warrington. For the next 12 years I worked full time as a GALRO. Mostly, I don’t think that I did a bad job. I certainly loved the work. There were no delays in the appointment of guardians on our patch – ever. The atmosphere was excellent – bracing and supportive. We had regular supervision – contrary to popular managerial belief, we were never unaccountable. In addition, we had regular meetings at which (among other things) we shared our experiences of cases. And of course we were accountable to the court and sometimes subject to searching cross-examination. But the job was personal. If we got it right, it was down to us; so too, if we got it wrong. And it would all come out in the ritualised conflict that was the hearing.

Cafcass was set up in April 2001 and in 2002 we had to choose – were we going to transfer to Cafcass and continue to be guardians, or were we going to stick with BGWS and work as independent social workers? I had loved BGWS

and was deeply suspicious of Cafcass, which had managed (among other blunders) to alienate most of the self-employed guardians in England and Wales, so I elected to stay with BGWS. But I missed the role, so, in February 2004, I went to Cafcass so that I could carry on doing the work that I most enjoyed. I left in March this year. Enough was enough.

During the last 30 years, I have watched with dismay the state-sponsored evisceration of local authority social work. I haven't the space to analyse that tragedy here. But one of its most obvious manifestations has been the dreadful turnover of social workers. It got to the stage where I promised myself I would throw a huge party when I eventually worked a case in which the social worker at the beginning of the proceedings was the social worker at the end of the proceedings! So far I have not had to pop a single cork. Incidentally, my wife and I foster an 11-year-old girl. She is on her eighteenth social worker and she had ten during her care proceedings.

Guardians have become used to the fact that these days they are usually the only social work professional in harness from the beginning to the end. That personal/professional continuity seems to me the very least we can offer children and young people who are otherwise so let down by all the systems. Then came the Cafcass bureaucracy and the alarming increase in applications (public and private), with dreadful delays in the appointment of children's guardians and children and family reporters. As to the first, all of us had observed the unhappy reality that local authority social workers were being increasingly infantilised and diverted from casework to keyboard, thereby losing all meaningful touch with their clients. Now it was happening to us as well. As to the second, these were changes that were largely outwith the control of either local authorities or Cafcass. But the response ... the proposed amendment of s41, which will require the court to appoint Cafcass as an organisation to represent children in specified proceedings instead of a named guardian is a thoroughly bad idea. Its objective is simply to allow Cafcass not to field a children's guardian and so save money. Managers will decide which child does, and which child does not, get a guardian and their decision will have nothing to do with the needs of the child and everything to do with the budget. So much for *Every Child Matters*.

What makes this worse is that now is a very hard time for lawyers representing children as well. A perfect storm is brewing – pressure on local authorities to cut back and to hurry, pressure on the family justice system to cut back and hurry, pressure on lawyers to do it quickly and cheaply, and pressure on Cafcass to make invidious selections from an already highly 'selected' group of children. Of course, you can always find people who will undertake this obnoxious task if you pay them enough. It's only a matter of time before we are invited to believe that this is progress, or 'moving forward' as managers and politicians like to say. Bit tough on the children though.

Mervyn Murch CBE, Emeritus Professor, Cardiff University

Three longstanding contentious issues underlie the recent controversy concerning the Cafcass and DCSF proposal to amend s41 of the Children Act 1989 by removing the requirement for a personal appointment of a guardian in specified proceedings. The first is an issue of individual or corporate responsibility; of whether the guardians are to be regarded essentially as officers appointed by and accountable in specific cases to the court, or whether it is the organisation of Cafcass itself, as a non-departmental public body, which is to be nominated as being primarily accountable for the work of the guardian (and by implication also that of all family court advisers). The second is the tension that inevitably exists between, on the one hand, frontline practitioners exercising professional discretion and, on the other, service administrators and managers responsible for allocating limited resources provided by central government in a fair and effective way. The third is a tendency for large service bureaucracies, particularly in British social work, to develop extended hierarchical and costly chains of command. These can lead to delay in decision making and become unnecessarily self-perpetuating. In considering the controversy concerning the role of the guardian in respect of s41 it is instructive to look briefly at the history of our court welfare services and to see how these three related tensions have played out.

Take first the probation service, which pioneered civil work in both magistrates' domestic proceedings courts and in the divorce courts. In the post-war period this service was administered by county Probation Committees comprised of magistrates, sometimes with a co-opted local judge. It received a mix of funding from central government (Home Office) and local government. The administration element was relatively small and 'flat' – a chief or principal probation officer supported by a number of administrative secretaries. This Probation Committee was responsible for allocating individual probation officers to specific petty-sessional divisions operating from a number of local offices usually located near to the local magistrates' court. In probation orders and (in the case of civil work) matrimonial supervision orders, the court specified that the client or child would be placed under the supervision of an individual probation officer (often named) assigned to that particular petty-sessional division. Likewise in adoption proceedings individual probation officers were appointed by the court to be guardians *ad litem*. Oversight of these individual officers was exercised by a local magistrates' case committee.

By contrast, when a child was placed under the supervision of the local authority's children's department (as they were before the local authority allied personal services were combined into single social services departments following the recommendations of the Seebohm Committee), responsibility was effectively transferred from the judiciary's own court-based social work service

to the Executive in the shape of the local authority. It was then left to the local authority to decide which social worker was to carry out the supervision. These arrangements seem broadly in accordance with the constitutional principle of the separation of powers underpinning the independence of the judiciary, although, in typically pragmatic British fashion, no rigid distinction was made, particularly as the funding of the probation service and its civil work derived from central and local government.

Looking back, one can also see that the Home Office, reflecting the policy of successive governments to conduct the war against crime, wanted to increase its control of the probation service and to prise it away from its close working relationship with the courts – a long-term strategy that was aimed at linking probation to the penal services, thereby concentrating resources on the community supervision and treatment of offenders. To this end, together with the appointment of prison welfare officers, it encouraged the service to appoint Home Office-approved middle managers in the form of senior probation officers and assistant chief probation officers. They were to take over responsibility for supervision of individual officers' work from the local magistrates' case committees. Thus the scene was set in the late 1960s for the probation service to become a hierarchical line-managed service with progressively stronger administrative links with central government. Many ambitious officers gladly accepted these developments, because, in common with developments in local authority social services departments, the main route for professional promotion and advancement was into administrative management and away from hands-on professional practice.

In the case of child-care work we now know that this served to weaken the skill base at the coal face, which in turn created the need for ever stronger compensatory supervision and a restriction of the individual officer's exercise of professional discretion. Moreover, gradually the hitherto close day-to-day working relationship between 'courts and their probation officers' withered away as courts had to deal increasingly with the senior management of the service over such matters as the allocation of cases. The relatively small, flat and supportive management regime gave way to a more hierarchical line-management structure which engendered a more authoritarian mindset. Over the years, this has periodically aggravated the tension between managers and professional practitioners.

Initially, the exception to this evolving process concerned civil divorce court welfare work, pioneered in the late 1960s by a number of principal probation officers working closely with the local professional judiciary in the higher courts and the Royal Courts of Justice in the most complex cases. In time, this new emergent court welfare development irritated the Home Office, which tried to limit the service's resources for civil work to 10 per cent of its central government allocation; a move which provoked a reaction amongst many civil

work specialists and helped to foster the idea of a separate civil family court welfare service.

A rather similar story concerns the establishment of the separate guardian *ad litem* service following the recommendations of the Field Fisher Inquiry into the Maria Colwell tragedy. This resulted in s64 of the Children Act 1974, which provided for the appointment of guardians *ad litem* in unopposed revocation of care proceedings. Guardians were drawn from a list of child-care practitioners held by local authority probation departments. Judith Timms has recently explained (*Seen and Heard* (2009) Vol 19(2)) how this service worked, and also how solicitors in care proceedings increasingly sought reports from independent social workers in cases where there were questions about the competence of local authorities bringing the case and about their judgment of what was in the best interests of the child. These developments led to pressure to establish special independent panels of guardians which the courts could draw on in the absence of court-based machinery to administer such a service. Again, as a typically pragmatic solution, local authorities were required to set up panels of independent social workers to act as guardians for courts in neighbouring authorities. These came into operation in May 1984 with a limited form of management structure primarily to route a request for a guardian from the court to an appropriate and available panel member. Guardians were selected and drawn from either neighbouring local authority child-care staff, or from fee-attracting independent social workers often working part time for voluntary child-care organisations.

As Stephen Cretney wrote in his *Family Law in the Twentieth Century: A History* (OUP, 2003), the guardian is primarily a representative of the child, rather than an agent for the court, but their role clearly combines elements of the social worker making enquiries, the advocate protecting the child's interests, and also the independent expert presenting an informed view to the court. However, both welfare officers and guardians also had specific duties in common to the court, and there was a longstanding professional debate about the wisdom of requiring local authorities to administer the guardian service.

In this brief foray into the historical background to the current controversy about the proposed amendment to s41 of the Children Act 1989, it is worth mentioning the opinion of the Finer Committee on One Parent Families (1974), which amongst other things recommended the establishment of a unified local family court, an objective to which the current government is still apparently committed. The Finer Committee envisaged the family court having its own court welfare service and had this to say:

'there should be no conflicting demands on the time of the welfare officers or on the way they carry out their function. They should be entirely available to service the courts' needs' Vol 1 p191.

Between 1987 and 1990 my colleague Douglas Hooper and I conducted an inquiry concerning the support services which formed part of the infrastructure of the family justice system in England and Wales. This was funded by the Nuffield Foundation and occurred during the run-up to the Children Act 1989 implementation in 1991. In the resulting publication, *The Family Justice System* (1992), we set out in some detail the case for an integrated court welfare service and various options as to how it should be managed and organised (see Chapters 7 and 10). One argument was that the panels of guardians should be absorbed into a separately organised civil division of the probation service. The overwhelming evidence that was received rejected this option in favour of a new specialist service combining the civil work of the probation service and panels of guardians; we set out the arguments in favour of such a new service in the following way:

- i. *‘The main advantage of a specialist court welfare service, as the Finer Committee pointed out, is that there would be no competing demands made on its time and resources. It would therefore be able to concentrate on meeting the particular needs of courts and on the development of skills and knowledge associated with the particular short-term welfare task associated with court-related work.*
- ii. *The management structure would be geared entirely to the perceived needs of the service and the judiciary. Its mode of management could therefore be directed more towards facilitating and supporting rather than supervising and controlling, given that staff would be selected with an appropriate level of training and experience.*
- iii. *If we are right in our belief that administration of GALRO panels is generally cost effective and much less expensive than the comparable unit cost both in the probation service and local authority social services departments there could well be important financial savings from organising the proposed integrated court welfare service on a similar basis. In our opinion this is a matter which needs closer scrutiny. We advance the idea not because we want to see a service “on the cheap” but because we consider the new mode of operation might, by reducing overheads and keeping management to an essential minimum, offer the best value for money. In addition this would be in line with the modern tendency to develop “a flatter, less hierarchical management structure.”*

Later, we commented:

'We do not want to see the development of yet another elaborate hierarchical social work supervisory structure, a criticism we could level at both local authority social services and probation. In certain respects both these services give the impression at times of there being almost as many chiefs as Indians. Court-related social work does not in our opinion require this form of management. The provision of professional consultative and peer group supervision is more appropriate. Rather, we favour employment of small well paid teams of highly professional staff mostly full time but supplemented as necessary by part-time freelance staff, all progressively co-ordinated and managed through a small fairly "flat core" managerial and administrative structure.'

It is for others to decide whether these ideas still have relevance to the current controversy concerning the amendment to s41. I merely observe that the current economic downturn and high levels of public debt are likely to result in major cuts in public services after the next election. This, coupled with increasing demands on the family courts both in the public and private law field, which may well be the product of increasing levels of family stress arising from unemployment, housing repossessions and rising poverty, are all likely to increase further the strain on the resources of the family courts and Cafcass. In these circumstances, there is, in my view, a case to review administrative and management structures within the family justice system as a whole, with a view to ensuring that they are as lean and efficient as possible, eliminating lengthy chains of command and shortening communication channels in order to avoid delay. The aim must be to concentrate resources at the frontline, with Cafcass field staff working in close collaboration with the judiciary to represent children and their interests in proceedings.

Suzette Waterhouse,
Self-employed guardian, Oxfordshire

Twenty-five years of being a guardian - almost half my life! (and nearly three times as long as the three successive chief executives of Cafcass have had in post) – but I have combined this with other professional work, including research, fostering and adoption, child guidance and child protection agency work. Not only am I lucky enough to have enjoyed a diverse and stimulating career, but this breadth of experience has (I hope) been to the good fortune of the children I have served.

My diversity of experience, however, is certainly not unique and has been equalled and exceeded by very many guardian colleagues, who, choosing not to

be part of a managed hierarchical agency, enjoyed the freedom and effectiveness of this ‘coalface’ practitioner work.

I am old enough to remember well how the roots of the service lie firmly with the Maria Colwell tragedy – a nine-year-old brutally murdered by her stepfather after being rehabilitated home against her wishes, as no one listened to her views or what her school teacher observed – and the legislation by Parliament that followed creating the guardian *ad litem* service. This was a gold standard intended to protect children subject to court proceedings and allowed for a special and experienced social worker to be appointed by the court just for the child – in order to ensure that the child’s views and perspective remained the focus of the proceedings and the child thus protected. The purpose was to ensure the guardian was completely independent of any other interested party and would be able to have the freedom to make wide-ranging enquiries in undertaking the role.

Guardians *ad litem* became fully operational in 1984 and for the ensuing 25 years we have had a unique role, being personally appointed by name for the child by the court. I have loved this task and worked hard to help the role to evolve and develop. Every case is unique and in many ways the role requires individual interpretation for each child. As a guardian, I take personal responsibility for this time-limited piece of inquisitorial work – ensuring all the pieces of the jigsaw about the child are in place, which thus allows the full picture to emerge. I work directly with the child and in tandem and partnership with the child’s solicitor to bring about the best outcome possible in invariably complex circumstances.

Importantly, for the majority of the life of the service I have been child-led and not organisationally-led in a flat, responsive structure which gave freedom to think ‘outside the box’ about what was best and safe for the child. Case law and, for example, the Toni-Ann Byfield enquiry, further emphasised that the fundamental requirement underpinning the guardian service was the need for the guardian to make their own independent, unfettered and thorough assessment of the child’s wider circumstances separately from the local authority.

The personal responsibility for a child that a guardian took on, reflected in the named appointment, ensured a stable and individual service for the child no matter what. Guardians doggedly kept with cases whatever the wind and rain of their own domestic circumstances, and have been proven to be committed to the work for many years with great job satisfaction.

Over the last three or four years, however, the personal and independent aspects of the job have been shockingly eroded by encroaching bureaucratisation (the tendency to manage an organisation by adding more control, adherence to rigid procedures and attention to every detail for its own sake). Top-down changes have been made by those who have never or rarely practised in

this specialised role. Emphasis has been placed on management, efficiency, hierarchical oversight, form filling, procedures and ticking boxes. Contract managers for the self-employed seem to have no interest in any reflective or supportive discussion with me about the difficult issues I am wrestling with. Rather, I am told that they are there to ensure that I comply with Cafcass standards, observing, for example, that my case plan may be inadequate as it lacks 'goals, steps and destination' based on the *Every Child Matters* outcomes that I am expected to record in detail to demonstrate what my intervention has achieved. This was said by the manager within days of the court, parties and solicitors commenting in the same case as to how very helpful my intervention and reports had been, especially in actively negotiating the best outcome for the children concerned.

The irony is that, at my coalface, all this expenditure and oppressive oversight has added very little value to my service to the children. I am less supported and less effectively appraised than at any other time during the last 20 years. Indeed, the organisational demands keep me looking over my shoulder constantly as to what Cafcass will think of me wanting to do another home visit to check round the house and children's bedrooms, to visit the relatives living 50 miles away, to make my own detailed assessment of the quality of contact between parent and child, to interview a step-parent's probation officer in person and inspect this file, to keep in touch with the child on a monthly basis. Will this meet the *ECM* outcomes? Am I going beyond Cafcass's current economy measures? How can I shoe horn my input to ensure it evidences their criteria for 'outstanding or good' practice, as I am not permitted to be 'satisfactory or inadequate'?

Amending Children Act s41 so that the court appoints Cafcass rather than a named person to be children's guardian would complete this sad change from individual service to bureaucratic behemoth. Our individual commitment for each case would be wrested from us and we will have come full circle back to the situation that caused the service to be invented in the first place. A distant organisation would be appointed to provide a service for the child without personal responsibility. And this at a time when the case of Peter Connelly has further emphasised the need for professional expertise and to have the confidence to go that extra mile in terms of wider enquiries and unannounced visits to assess the full picture. Many of my colleagues have felt defeated and have left the service (although I am sure that their personal commitment to the children would draw many back in quickly if the landscape changed). I too feel almost defeated and it is a sad way to end my years of commitment to the children's guardian concept, but, much worse, it is a dreadful and unnecessary loss of all the positive developments that came from Maria Colwell's tragic death, developments which could well have helped save Peter Connelly, had care proceedings been commenced.