

Parents' Representation Study

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Context

Care proceedings are brought by local authorities when they have serious concerns about children's care, which are unable to be resolved by agreements with parents. Neglect is a common feature, and many parents' lives are marked by substance abuse, domestic violence and mental health difficulties. Parents are represented in court proceedings by lawyers, funded through legal aid. The cost and duration of these proceedings has led to procedural reforms and the introduction of fixed fees for solicitors.

About the Study

The study, conducted in 4 court areas in England and Wales, explored the work of lawyers representing parents in care proceedings through observation of hearings (109); interviews with legal professionals involved in care proceedings (61); and focus groups with solicitors, barristers, judges and magistrates' legal advisers. Sixteen cases, selected to reflect the different circumstances where care proceedings are brought, were followed from an early hearing to completion of the proceedings, with a researcher shadowing a parent's representative in discussions with their client, with the other parties' lawyers and in the courtroom. The study provides an in depth account of the task of representation and court processes in care proceedings under the Public Law Outline (PLO).

Key Points

- The operation of the care proceedings system is heavily dependent on a small number of specialist solicitors who devote most of their time to this work. Not all are members of the Law Society Children Panel.
- Lawyers doing this work, including judges and local authority representatives, viewed the State's powers as draconian, justifying parents' absolute rights to contest, however hopeless their case.
- Parents were able to find committed and able lawyers, generally attended court hearings and most remained engaged in their case.
- Solicitors carried very heavy workloads, sustained by their commitment to this work, so as to meet the demands of cases and maintain profitability within the fixed fee regime.
- Solicitors aimed to enable parent clients to understand the process and make it work in their favour. Most also felt some responsibility to consider the child's welfare.
- Most lawyers gave realistic advice and identified options for parents. They stressed to parents the importance of co-operation with the local authority.
- Negotiation between lawyers had a greater role than judicial case management in shaping the progress of cases.

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Findings

The parents

There were 11 mothers and 5 fathers in the case study sample, 1 of whom did not live with his child. The mothers in 14 of the 16 cases were initially seeking to care for their children, as were 6 of 14 fathers who were parties to the proceedings; the main focus of 6 fathers was contact. During the proceedings, 3 of the 16 case study parents had a another child, all were made subject to care proceedings.

Nearly all the families had multiple difficulties. Seven of the parents were substance mis-users; at least 4 mothers were in a violent relationship; and 3 had learning difficulties, 2 of whom needed to be represented by the Official Solicitor. These factors, often combined with limited co-operation, resulted in social work concerns about child neglect. In addition, the children of one mother had been seriously physically abused.

The circumstances which resulted in care proceedings also meant parents were not easy clients; 3 parents could not read and 11 moved accommodation during the proceedings without informing their solicitor.

Five parents received pre-proceedings letters from the local authority and 4 of these obtained legal advice before the care application was made. There were 3 cases where children were removed through emergency action and 4 where the children were accommodated before care proceedings were started.

Twelve of the 16 case study parents were engaged with the proceedings throughout, and 9 attended every hearing. Only 4 parents gave oral evidence. Parents generally did not understand why they should attend directions hearings and there was little attempt by judges, magistrates or legal advisers to communicate with them, either by speaking directly or using non technical language.

The lawyers

Solicitors

The solicitors acting in care proceedings were highly experienced professionals, specialising in this work; three-quarters were members of the Law Society Children Panel. Most were women and most

worked full time. Ninety per cent had been qualified for more than 5 years and half for 20 years or more. More than half were partners in their firms. Four-fifths worked in generalist high-street firms and the rest in specialist family law firms; very few were the only lawyer doing public law children work in their firm.

The caseload of a third of those interviewed consisted almost entirely of care cases and for another third it took up 70% of their time. Most lawyers who did other work combined care with private child law, a few also acted for criminal clients.

They were highly motivated, committed to providing representation in care proceedings, generally for parents whom they considered to have the greatest need for skilled representation. Two-thirds of the Panel members were equally content to act for parent or child and most thought that experience of both enabled them do a better job. Commitment and motivation were sustained by the interesting nature of the work, the challenges it presented and for many, the opportunities for advocacy. High motivation sustained heavy workloads but towards the end of the study some solicitors were showing signs of burnout.

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

Typically lawyers accepted every client who presented (with the exception of those seeking to transfer from another solicitor) and managed the workload by using colleagues or counsel to conduct hearings when necessary. The fixed fee regime necessitated high caseloads to maintain profitability. Solicitors did not consider that the concept of ‘swings and roundabouts’ - balancing cases which were profitable under fixed fees with loss-making ones applied, given the volume of cases typically handled. Solicitors interviewed towards the end of the study (2 years after the introduction of fixed fees) identified cases where preparation for the final hearing had not been covered by the fee or the firm had made a loss. There were signs of changes to

parents' representation in response to the fixed fees; it was becoming less personal with more delegation of hearings to colleagues or counsel, and increased use of paralegals.

Barristers

The majority of the barristers encountered during the study were juniors with 12 or more years call and more than 7 years experience in public law; all of those interviewed spent at least 50% of their time on care work, generally combining it with other family law work, including for private clients. Barristers preferred to be instructed throughout a case, rather than merely to undertake advocacy when the solicitor was unavailable, a practice which they considered was becoming more common. Barristers were concerned about the reduction in fees with the introduction of the Family Advocacy Fee Scheme, some indicated that they will cease to do this work

The task of representation

Solicitors aimed to help their parent clients to understand the care proceedings process, make the process work in their clients' interests and secure the best outcome for them. The best outcome was viewed as securing the child's return, failing that, placement with family or foster care with contact. Stranger adoption without contact was seen as the last alternative. Many parents' lawyers felt that they also had some responsibility to focus on the child. Solicitors recognised that local authorities brought cases for good reason and did not expect that many parents would succeed in retaining care.

Lawyers usually met parent clients for the first time shortly before a court hearing, not always the first hearing in the care proceedings. The process of establishing rapport with the client and preparing for the hearing were undertaken together, often with limited time. Most lawyers sought to be realistic in the advice they gave and stressed to parents that they should co-operate with the local authority. Lawyers were clear that parents' actions determined whether they retained or regained the care of their children. They repeated and reinforced messages to parents to support and encourage them to attend appointments and contact on time, maintain sobriety etc. Solicitors supported clients through the care proceedings, recognising that many parents lacked other supporters. Meetings with clients frequently took place at court. The need to consult parents on documents filed at the last minute, parents'

unreliability over appointments and transport difficulties contributed to make this common practice.

“Our job as lawyers is to make them understand the evidence, how it fits the law and where it leaves them – and the options of being able to challenge. We're not counsellors – but we are! That's part of our role, in that it's helping them to understand.”

Lawyers represented parents according to parents' instructions but many also shaped those instructions through the advice they gave. Vulnerable clients who would be damaged by contesting an unanswerable case were encouraged not to fight. Judges expected that clients were given realistic advice but strongly preferred parents to be represented and therefore accepted that lawyers would not always be acting on reasonable instructions.

A major part of representation was negotiation with other lawyers. Issues such as the instruction of experts, contact during the proceedings, the threshold statement were frequently agreed; only where matters were not agreed were they left to the judge.

Most solicitors working in care proceedings undertook some advocacy. They instructed barristers when they were unavailable, for long hearings, where the evidence was complex or the client needed their support. Barristers might also be instructed where parents were rejecting the solicitor's advice. The legal aid structure was also a factor in solicitors' decisions about using barristers; some considered it more cost effective to do as much of their own advocacy as possible. Although both solicitors and barristers valued continuity in representation, frequently this was not provided for parents. Heavy caseloads and large numbers of hearings prevented solicitors attending every hearing for parent clients. The undertaking that solicitors give as Children Panel members meant that representing children was prioritised. Solicitors sought to select barristers to fit the needs of the client and the demands of the case.

Different approaches to representation, particularly the extent to which solicitors acted as advocates impacted on the representation provided for parents. Some parents whose solicitors undertook most of

the advocacy received a very personal service, other parents met a changing cast of barristers at court, seeing their solicitor infrequently.

The Process of Care proceedings

Care proceedings did not conform to the process set out in the PLO; there appeared to be little change in practice compared with the *Care Profiling Study* of applications made in 2004. In three of the 4 study areas there was little evidence of active judicial case management; rather cases were managed through joint discussion between the legal representatives. Judges trusted the advocates, sometimes felt insufficiently familiar with cases and were reluctant to impose their authority. In the fourth area the judge adopted a strong inquisitorial mode, discussing the direction of the case with the advocates rather than accepting their proposed directions.

Advocates' meetings were usually held before the key stage hearings, but did not appear to reduce the duration of negotiations immediately before hearings. Generally lawyers would have preferred to include social workers and guardians in these meetings and in one area, they were routinely included.

The duration of cases was not controlled; the average number of hearings was 7.25 and the average length of the 14 concluded cases was 57 weeks. Reasons for the extended length of cases included late service of documents and expert reports. CMCs and IRHs were frequently ineffective; repeat key hearings were commonly held.

Lawyers for parents, children and local authorities, magistrates' legal advisers and judges shared a strong common ethos. They saw care proceedings as involving '*draconian decisions*' giving parents an absolute right to contest, indeed contesting was frequently seen to have a therapeutic value for parents. Children were best brought up in their family; local authority care was viewed with scepticism. This ethos rather than the formal structure in the PLO determined the way cases were dealt with. Cases took as long as they needed to take to ensure that every possibility to avoid local authority care was explored.

"We're talking about the most draconian decision that a court can now make, once they got rid of the death penalty, of removing a child from a family. It's not an area – no area of law is for messing around in – but it is the most draconian."

Of the 15 completed cases 5 had contested final hearing, and in 3 others a contest was avoided, 2 through the advice of the parent's lawyer and 1 by the decision of the local authority to seek only a supervision order. In another case a contested final hearing was expected but the parent did not attend. In the remaining 6 cases the parent did not contest the proceedings; 2 retained or regained care of their children following changes during the proceedings but the other 4 did not.

The most common plan for the children's care at the end of the proceedings was a long term placement with relatives (6 cases); in 4 cases adoption was planned; in 2 cases the children were to be placed (or remain) in long term foster care; the children in 3 families remained with or returned to a parent with whom they were living at the start of proceedings

Further details of the research

This ESRC-funded Study was undertaken by Julia Pearce, formerly Research Fellow and solicitor, Judith Masson, Professor of Socio-legal Studies and Kay Bader, Research Fellow, from the School of Law, University of Bristol.

Further details of the research and findings are contained in the research report: *Just Following Instructions? The representation of parents in care proceedings*, School of Law University of Bristol (2011) which can be downloaded without charge along with further copies of this summary at:

www.bristol.ac.uk/law/research/researchpublications/

The *Care Profiling Study* (2008) – a quantitative analysis of care proceedings by the same research is available on the Ministry of Justice website at:

<http://www.justice.gov.uk/publications/research030308.htm>

Judith Masson is currently directing a further ESRC-funded study on the pre proceedings process for care proceedings.