Sir Potter and his Chamber of Secrets

The most powerful secrets undermining the Family Justice System

The much anticipated journalistic foray into the Family Courts is due to debut in the Spring, with journalists being allowed greater access into these courts, but what appears to be an unclenching of the iron fists of the law, is nothing more than a spasm, for just as quickly as Jack Straw promised to open up the courts, he simultaneously removed any incentive for the press to report by overturning the landmark ruling in Clayton v Clayton which effectively allowed families and specifically children, to be identified. Whilst identifying parties purely for the purpose of pleasing the press is not a rational reason for doing so, the underlying importance of humanising these cases and allowing parents and children to make themselves known if they feel aggrieved should be a fundamental right no government should ever have the power to tamper with.

These measures will effectively gag children in care too, making them unable to have a 'voice', the very thing Sir Potter promised every child in England as recently as July of last year. This right too it seems, was promised in a moment of exuberance and perhaps slight defensiveness under the glaring eyes of an angry public but has now also been reneged upon primarily because of political pressure. The internal complaints procedures for children in care are also cumbersome and hard to access and now children in care will be left unable to speak out should they be suffering, as the only tangible lifeline has been taken away from them.

The level of spin that we now see in government when dealing with Family Law Matters is creating repercussions throughout the system, which itself is spinning out of control. Other than having to deal with sound bite sincerity, the public now has to contend with the fact that the law now seems completely unable to protect them with any certainty. Mr and Mrs Webster, the parents whose children were removed from them and placed into care due to flawed medical evidence may never have their children returned to them. How could this be, you might ask? Did the courts discover that Mr and Mrs Webster were in fact aliens from another planet, hell bent on taking over the world, one infant at a time? Was it the case, perhaps, that Mr and Mrs Webster were offered their children back but turned the court down on the grounds that they were enjoying their sabbatical from parenting too much? No, the real reason was this: that the interests of Public Policy would be undermined and therefore could not possibly create an opportunity to redress the disastrous outcome of this most startling of cases.

Yet, what is the purpose of policy if it is not restorative? Do we not look to policy as a means of protecting the most important rights in our society? The notion that safeguarding semantics has become more important than safeguarding a nation's liberty within the preservation of the family unit is one that the judiciary upholds today and is exactly why the nation views the legal world with such horror. When a war of words becomes an internal process which seeks only to polish punctuation it has become irrelevant.

Enter discretion, the judge's most powerful ally against injustice and the only tool available to override poorly drafted or insufficient legislation. The judge could have used his discretion to return Mr and Mrs Webster's children to them but chose not to. Why? The answer may lie in looking at the case back to front. Mr and Mrs Webster have four children, three of which were adopted in 2005. Adoption orders once complete are viewed as binding and all parental rights and responsibilities are

transferred to the 'new' parents. Was the judge's concern that the children had settled in with their adoptive parents and that to move them would cause them emotional harm? Did the judge take the view perhaps that the adoptive parents, who adopted in good faith, were entitled to keep the children in their care and that as the law viewed adoption as final, the judge was unable to reverse the finality of the process? It certainly seems that these factors played a part in the judges' decision making process but what of the extenuating and arguably far more weighty factors? When legal complexity comes down to a question of degree, to err on the side of myopia on these matters creates consequences no sane person would care to shoulder.

This question of degree is what undoubtedly has sent the nation into a frenzied state of shock over the Websters' case. It may well be that the Webster's three children had settled into their new home and that the adoptive parents loved them as if they were their own biological children. However, the emotional trauma of a child growing up in an adoptive home and wondering why they could not be with their natural parents when no sound reason was given, is arguably a trauma that will last a lifetime, compared to the short destabilising period of being removed from an adoptive home and back into the equally loving arms of one's parents. As someone who has always wanted to adopt children, the idea of having to return an adopted child back to their biological parents would be incredibly hard, even after four years and instinctively, it is easy to empathise with how painful a process that must be. Yet love is an altruistic philosophy and no loving adoptive parent would keep children in their care knowing that they had been wrongfully removed and that their parents were out there fighting to get them back.

The Webster's children will now grow up in a home without their natural parents and as they become old enough to understand the suffering they and their parents went through, the emotional trauma may well be far greater than ever imagined. The very thing our policy tried to prevent will come to fruition after all and may see the Webster's children suing the government in what may turn out to be one of the most infamous cases of our time.

Problem solving has clearly become a problem in and of itself in the Family Courts and the question of degree has become lost in legislation's own narcissistic pursuits. Another decision which highlights a host of problems is the recent case of Holmes-Moorhouse v London Borough of Richmond Upon Thames [2009] UKHL 7. Very much like the Webster's case, this case turned on semantics, a dance of words which resulted in a father being unable to have contact with his children for an indefinite period of time because the courts felt unable to trump a local housing authority's policy. Whilst this in some respects was understandable, largely due to the fact that the local housing authority were facing a shortage of properties to allocate out and had a people on a priority waiting list that they alleged could not be trumped or bumped down, the judgment itself is astounding because whilst it acknowledges that these issues are real and cannot be ignored it does not even attempt to tackle the problems in this case and resolve them.

Even more distressing is the admission of Baroness Hale of Richmond in the judgment, acknowledging that at the inception of these proceedings, during a period of time where the House of Lords was not even involved, the necessary parties did not do all their homework to establish even the most basic facts about the children in question and the parenting of these children, a seminal issue which ran at the heart of the subsequent shared residence order that was made. It may have been the case that these facts could never have been established with any certainty, but

where steps are not taken in the first instance to meet any and all eventualities, by the time a case makes it up to the House of Lords, as this one did, the judges are almost dispensing justice blind. Suddenly, I am not so enamoured with the concept of blind justice.

In this case, the Local housing Authority asserted that it had the right to prioritise people according to its policy and the father in question asserted that he could be defined as a priority under the authority's policy by virtue of his court order stating that he needed to be housed immediately in order for contact with his children to commence. The only indisputable facts were that the housing authority had a list of people that they deemed more needy, which was never clarified or verified and that the housing shortage meant that the father would have to wait. This rather begs the question: why make an order dependent on a third party, in this case the Housing Authority, before checking to see if that third party could facilitate the order? It is unsurprising to note that no efforts were made to see if the alleged priority list was filled with individuals who had a greater need that the father in this case but without being pedantic about it, one could assume this was so.

As a result, the House of Lords were under an implied duty to resolve the inadequate solution and offer up another, which they did not. Instead, they debated the finer points of the wording of the local authority's housing policy against their own legal jargon and concluded that prior judgment made was irrational on the grounds that it stated that scarce housing resources could not play a factor in determining whether the father should be housed as per the Order. For my money, this prior judgment may not have had its head in the right place, but the heart was all there and whilst Moses LJ's assertion may have been viewed as an oversight, it was an endearing one and one which showed an inherent desire to problem solve, a desire which is quite obviously missing from the judgment in the House of Lords.

Thankfully, not all cases turn out like the ones above and in the recent case of C (A Child) [2009] EWCA Civ 72, Wilson LJ insisted that the child in question not be put up for adoption and remain with her grandmother instead, despite the violent protestations of the local authority. For this week, Judge Wilson is my pin up in my study.

Where cases are not prepared properly and find themselves climbing up the precarious court ladder, the higher courts inherit the 'bad' bundles before them, filled with shaky evidence, some factual some circumstantial and some expert evidence that is unchecked and sometimes unreliable, the result of which is that the truth becomes more and more elusive until eventually, the very purpose of the case being presented seems to fade, buried forever, inside the pages of the barrister's lever arch binders. Could it be that our courts have become nothing more than solution cul de sacs and our families are being left for dead at this deadest of ends?

There is still time for Sir Potter to wave his judicial wand and breath life back into our Family Courts; but to do that, he will need to face the ghosts of Christmas's past, present and future and conjure up ways of lifting a curse which our Family Justice System suffers with daily and which affects all those families that come before it.

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