

Waiting for court decisions A kind of limbo

One of the specific objectives of the Children Act 1989 was to reduce the duration of care proceedings, since it was recognised that a long period of uncertainty was likely to be harmful to children. But care proceedings have in fact been increasing steadily in length since the Act was implemented in 1991. **Chris Beckett** presents the evidence for this, reviews the available literature on the possible reasons and suggests that further attention needs to be given to the effects on children of such delays, which could be considered a form of 'system abuse'.

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Key words: care proceedings, Children Act 1989, court delays, length of care proceedings, duration of care proceedings, system abuse

Introduction

In a study on the duration of care proceedings published in 1993, Thomas, Murch and Hunt began by quoting Roy Parker's introduction to *Children Who Wait* (Rowe and Lambert, 1973):

Waiting on the actions of other people is an unsettling and frustrating experience. When one's whole life context may depend on what these others do or do not do then the waiting is charged with alarm and trepidation. Add to this a wait which is protracted and which no one seems inclined or able to end with a firm decision. Go further still and imagine you are a child carrying these huge burdens of uncertainty and anxious doubts and you may gain some inkling of the feelings of the children.

As Thomas *et al* (1993) observe, 'exactly the same applies to children caught up in the often painfully slow process of court proceedings' (p 3). While they wait for courts to reach a decision, children are inevitably suspended 'in a kind of limbo'.

One might add that waiting for court decisions may be *more* difficult for children than some other kinds of delay – such as waiting for a suitable placement.

For one thing, by definition, there is no settled future goal towards which a child and her carers can aim. There is also necessarily a degree of conflict between the adults involved in the child's life, and the child has to cope with the anxiety of this without the security of a permanent attachment figure to whom to turn.

Additionally, delays create case management problems for the agencies looking after the children in the interim; however much one might wish it were otherwise, in the real world such problems often translate into further disruption of children's lives. For example, an American study by Bishop *et al* (1992) examined the impact on children of the Boston juvenile court process that lasts an average of one-and-a-half years. They found that the children waiting for a decision 'experienced an average of more than two foster placements' (p 472). So these children, in fact, did not in most cases have even the relative security of a single placement, albeit temporary, to see them through the 'limbo' of waiting for a court decision, but had to deal with the additional stress of placement changes. It would be interesting to know how British placement statistics compare, but certainly moves of this kind during court proceedings are far from unknown on this side of the Atlantic.

Prolonged court proceedings, then, can be harmful to children in a number of different ways. Recognition of this fact is not in itself particularly new. 'The scandal of delays in the Juvenile Court' was the title of an article published 20 years ago (Nightingale, 1979), while the 1980s saw a growing awareness that the problem was getting worse. A measure of this deterioration was provided by the Thomas *et al* study mentioned above. They looked at care proceedings in 14 courts over a period from 1986 to 1989 and compared their results with an earlier study (Murch and Mills, 1987) which dealt with the years 1983–86. They found

that 'for all types of case and all courts, the mean number of weeks from the first to the final hearing almost trebled from 5.9 in Study 1 to 14.2 in Study 2' (p 37).

Clearly this was a worrying trend and it was recognised as such, so much so that addressing the problem of over-long proceedings was seen as one of the main aims of the new Children Act. 'After the Welfare Principle, the need to avoid delay is one of the most important policies underlying the Bill,' declared the then Lord Chancellor in 1989, in a House of Lords debate on the Bill which was to become the new Act. 'It is therefore proper that it should appear in Clause 1' (Debs, 1989, cited by Butler *et al*, 1993).

Reforms under the Children Act 1989

The need to minimise delays is enshrined in the very first section of the Act, for section 1 (2) states:

In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

This is further backed up by section 11 (in relation to private law cases) and section 32 (in relation to public law), both of which specify that courts should draw up a timetable and give such directions as necessary to try and ensure that the timetable is adhered to.

Avoiding delay is again emphasised in the accompanying guidance to the Act published by the Department of Health. In 'An introduction to the Children Act 1989', under the heading 'Less delay', we find: 'The Act makes it clear that delay in court proceedings is generally harmful to children and should be avoided . . .' (Department of Health, 1989, para 1.19). In the guidance and regulations relating specifically to court orders it is suggested that harm is caused to children by delays:

. . . not only because of the uncertainty it creates for them but also because of the harm it does to the relationship between the parents and their capacity to co-operate with one another in the future.

Progress of a case is therefore to be controlled by the court (rather than the parties) . . . (Department of Health, 1991, para 1.8)

The measures introduced under the Act can be summarised as follows:

- As noted above, sections 11 and 32 were intended to put the courts in control of the timetable. As Booth (1996) puts it, 'Parliament has vested the responsibility of case management in the court and this cannot be abrogated.' So the courts have the responsibility of 'preventing time-wasting procedures and curbing the over-adversarial approach' (pp 53 & 54).
- The specific tool by which this responsibility was to be exercised was the innovation of directions hearings, separate from the substantive hearings, which were intended to deal with the various logistical problems that might interfere with the smooth running of a case. A pre-hearing review could be held prior to a hearing to give final directions in order to 'cut out the dead wood and ensure its readiness' (Booth, 1996, p 17).
- By introducing a single jurisdiction which covered the Family Proceedings Court (administered by magistrates), the County Court Care Centres and the High Court, the Act provided flexibility. It was hoped that the ability to move cases across the three tiers of courts would ensure that 'each case is heard by the tribunal most appropriate for it and that by transferring a case from one court to another listing problems should be eased and unnecessary delay avoided' (Booth, 1996, p 60).

Commentators at the time were optimistic that such measures could result in shorter court proceedings. 'The legal process . . . has to be speeded up in the interests of the child . . .' wrote Packman and Jordan (1991), in an article on the new Act:

. . . and courts and their officers must work to timetables to avoid the damaging effects of delay and long drawn-out decision-making. A child is a person, but a person with a different developmental

timescale that should not be jeopardised by ponderous Dickensian proceedings. (pp 323 & 324)

‘Although no formal limits were set for the maximum duration of proceedings,’ wrote Hunt (1996, p 12), ‘a target of 12 weeks was common currency at the point the Act was implemented.’

The continuing problem

Sadly, as practitioners in the field will be well aware, ponderous Dickensian proceedings have not gone away. In fact the opposite is true. Since the implementation of the Children Act, care proceedings have become steadily longer. Children continue to wait for many months – or even a year and more – for a decision to be made about their long-term future. Indeed, as one writer observes:

Despite the express provisions of the legislation . . . delay in public law litigation has become one of the biggest problems arising out of the implementation of the Children Act. (Allen, 1998, p 170)

Hunt (1996), a co-author of the Thomas *et al* study (1993), reported on a survey carried out over three different local authority areas over the first two years of the Act’s implementation. This found that ‘care proceedings are longer under the Children Act, by an average of about five weeks’ (Hunt, p 12) than proceedings under the Children and Young Persons’ Act 1969, although shorter than previous wardship hearings. In the project described by Hunt’s paper (covered in full by Hunt, Macleod and Thomas, 1999) it was found that only one in ten cases were completed in 12 weeks while 46 per cent took twice this long, 15 per cent three times and six per cent four times. In other words, one-fifth of cases were taking longer than eight months. The longest case encountered lasted 78 weeks (Hunt, p 317).

This study only covered the first two years of the Act, but even at this stage there was some evidence that the problem was getting worse:

Only 35 per cent of cases beginning in the second year of the Act [were] . . . completed within 20 weeks, compared to 46 per cent in Year One, while the proportion meeting the 12-week target dropped from 15 per cent to 7 per cent. (Hunt, 1996, p 12)

Another study carried out in the early days of the Act by Butler *et al* (1993) looked at decided cases in five South Wales Family Proceedings Courts and seemed to paint a less gloomy picture. According to this study most public law cases were dealt with by the courts within 16 weeks and *all* public law cases involving children in the 0–11 months age range within this timescale. But it is important to note that this study covered Family Proceedings Courts only and not the more complex cases transferred to higher courts. Between 11 per cent and 19 per cent of public law Children Act cases are heard in higher courts (figures derived from *Judicial Statistics, Annual Reports 1992–98*).

Again, it is also important to be aware that this study related to the period immediately after the implementation of the Act. Court proceedings grew steadily longer in the subsequent years, as is very clearly demonstrated by data collected by the Children Act Advisory Committee (CAAC) 1994, 1997. These data are summarised in *Table 1* (overleaf).

As the table shows, over a period of less than four years the increase in the average length of proceedings was 43 per cent. At the end of 1996, children were waiting an average of seven to eight months for court decisions, as against five months at the end of 1993. The average wait was now nearly three times the 12 weeks timescale hoped for at the beginning and more than twice the wait that occurred under the old legislation in the period immediately preceding the Children Act.

Causes of delays

The court process

Hunt *et al* (1996, p 317) found ‘no association . . . between the characteristics of cases and their duration’. Similarly, Bishop *et al*, 1992, p 465) wrote that:

Table 1

Average length of care and supervision proceedings (in weeks: rounded to nearest whole number)

Court	Sample at March 1993	Sample at March 1994	Final quarter 1995	Final quarter 1996	Percentage increase in length 1993–96
High Court	34* ³	44* ³	48	64	88%
County Court care centres	30* ³	37* ³	44	50	67%
Family Proceedings Courts* ¹	21* ³	22* ³	28	29	38%
Weighted average for all courts* ²	23	25	30	33	43%

*¹ Figures based on quite a small number of returns

*² Calculated using the total number of cases brought respectively to each tier of court during the relevant half-year (the latter figures being obtained from CAAC, 1997)

*³ These figures from CAAC (1994). The 1995 and 1996 figures are from CAAC (1997) which gave quarterly figures rather than a single sample in March.

Of the more than twenty variables examined, including severity of mistreatment . . . no meaningful pattern emerged that could predict delays.

They concluded that:

. . . the court process itself was the major influence on the length of proceedings, particularly the use of experts and the level of court at which the case was finally heard.

Looking at the reasons for delay under the Children Act, Allen (1998) suggested that causes of delay include:

- issues to do with poor management by the courts, including failure to control the timetable, poor communication between tiers of court and poor listing practice within courts;
- lack of court time;
- a proliferation of parties to proceedings;
- a proliferation of expert witnesses;
- the need to undertake thorough assessments;

6. lack of expertise on the part of lawyers, including failure by lawyers to provide realistic time estimates, 'sloppy preparation of document bundles' and 'lack of expertise in child law'.

He added:

. . . the retention of arrangements under which children's proceedings are handled by three separately organised courts, and the consequent failure to establish a proper family court, has hindered progress . . . (p 170)

With the benefit of hindsight, expectations at the outset that the Act could actually reduce the length of court proceedings seem rather optimistic when one considers the greatly increased complexity of the process. As Hunt *et al* observed (pp 281 & 282):

- The process of preparing each case is necessarily more thorough than formerly because of the stringent threshold conditions, the wider ranges of options to be explored and the generally increased complexity of cases.
- The production of evidence is more time consuming, not only because more is required but also, for example, because it is 'written rather than oral and tends to be sequential'.
- Hearings also need to be longer because, among other reasons, 'judges are unable to read the greater volume of evidence in advance', there are more witnesses, 'more issues to be argued about' and more legally represented participants.
- There tend to be more hearings because of directions appointments and the separation of directions and interim hearings.

Use of expert witnesses

The 'proliferation of expert witnesses' (Booth, 1995, p 45; 1996, p 16) is one cause of delay that I suspect will be particularly familiar to practitioners in the field. Hunt (1996) found that, among the professionals involved in the court

process, there was 'a remarkable consensus on the major problems: assessments, experts, and above all, lack of court time in the higher courts' (p 13). In another study, Plotnikoff and Woolfson (1994) found assessment by an expert to be the factor most often selected by their respondents as the cause of delay in cases studied.

Parkes (1999), in a small unpublished study of the relationship between delays in care proceedings and the use of expert witnesses, confirmed that cases involving experts took longer, though he noted that these also tended to be the more complex cases. He concluded that on the whole the resulting additional delay could be described as 'purposeful' rather than 'drift'. However, he argued that in the current context there is an over-emphasis on the use of experts and a lack of recognition of the skills of social workers by the courts, as well as a lack of self-confidence on the part of social workers themselves.

Certainly Cohen (1996) has assembled several extraordinary examples of judges, sometimes in the most extreme and intemperate of language, discounting the ability of social workers to act not only as witnesses, but even to exercise the parental responsibilities placed upon them for children in care. ('What's that, a diploma in knitting?', one judge is reported to have commented on the letters after a social worker's name.) Increasing reliance on 'experts' is not surprising if the agency primarily responsible for looked after children is so little trusted by the courts. Some of the comments collected by Booth (1996) from local authorities gave a very worrying picture of the prevalent atmosphere. She observed:

A matter of major concern raised by every local authority consulted was the lack of credibility given by the court to the evidence of social workers. It was said that social workers find court appearances stressful and that many were terrified by the prospect . . . Stress-related illness connected with court appearances was said to be commonplace . . . Aggressive and hostile cross-

examination could undermine the standing of the social worker . . . One local authority reported that social workers had resigned as a result of their court experiences . . . Because the evidence of social workers carries little weight, local authorities . . . often felt compelled to instruct experts, despite the cost, to deal with matters which could otherwise be dealt with by their social workers . . . (p 29)

There is at least now a general recognition that overuse of 'experts' is a problem – and a contributory factor in delay. This has led to various initiatives, including new developments in case law and the setting up of an Expert Witness Group to provide some oversight and guidelines in relation to the recruitment and use of experts in this context. It is probably too early to know what impact these have had on the use of experts generally, and on the duration of proceedings in particular.

Volume of cases

Another factor leading to the lack of court time must surely be the increasing number of care proceedings brought to court each year. Over the period 1992 to 1998 care applications made annually in England and Wales increased steadily year on year, contrary to hopes that the Act would lead to a less confrontational approach and fewer care applications (a further instance of the Act signally failing to live up to expectations). The number of applications in 1998 (6,728) was more than two-and-half times that for 1992 (2,657). To look at it in another way, the figure for 1998 constituted nearly 40 per cent of all public law applications under the Children Act in that year, while the figure for 1992 was under a fifth of that year's public law Children Act applications (see Table 2 which uses figures derived from *Judicial Statistics, Annual Reports, 1992–98*.)

Why this explosion in the number of care applications occurred in the six years following the implementation of the Act is an interesting question which is outside the scope of this article.

Table 2
Public law applications under the Children Act 1989 in England and Wales (compiled using data from Judicial Statistics 1992–98)

Year	No. of care applications (and care orders made)	No. of public law applications*	No. of public law applications other than care applications	Care applications as a percentage of public law applications
1992	2,657 (2,263)	15,031	12,374	17.7%
1993	3,798 (3,249)	16,754	12,956	22.7%
1994	4,973 (4,169)	18,660	13,687	26.7%
1995	5,027 (4,238)	17,136	12,109	29.3%
1996	5,117 (4,427)	16,066	10,949	31.8%
1997	5,665 (4,958)	17,942	12,277	31.6%
1998	6,728 (6,017)	17,284	10,556	38.9%

* Includes care order applications, supervision order applications, contact applications for children in care, applications to discharge care orders and supervision orders, refusal of contact orders, EPOs, secure accommodation orders and section 8 order applications.

Management of court time

Though lack of court time is an important part of the problem, it does seem clear that there are also issues to do with the way time is managed and with the content of time spent in court. Booth (1996) found, for example, that:

District judges needed more training on case management so they have the necessary confidence to refuse requests for unnecessary reports and requests for party status. (p 70)

Allen (1998, p 170) observed that ‘It is a well-known fact that the spinning-out of a case can be, and is, used as a weapon in itself.’ It would be an interesting exercise to analyse the contents of court hearings in care proceedings in order to determine what proportion of these was of direct relevance to the question facing the court: Do grounds exist for the making of an order, and would the making of an order be in the interests of the child? My own experience suggests that an unnecessary amount of time is spent on issues which are not of direct relevance. For example, a good deal of time seems to be spent on picking over the detail of the local authority’s actions in a case, or in argument over very minor issues to do with

the day-to-day arrangements for the children involved. As a result, delay can be self-perpetuating because the longer a case goes on, the more such issues arise. Each new holiday, for example, has the potential to generate hours of argument about the detailed arrangements to be made. This can result in time set aside for hearings being used up, and additional hearings needing to be fitted into crowded court timetables.

Cohen (1996, p 23) gave an interesting illustration of the way that effective management of cases within the courts can greatly reduce the time spent in court. He reported that two adjoining family courts – one in Leeds and one in Sheffield – have adopted very different styles of dealing with these cases. ‘In Leeds, up to ten days can be set aside for contested final hearings, and numerous expert witnesses are used.’ In Sheffield, by contrast, thanks to ‘efforts by the multi-agency family court business committee to give greater status to court evidence from social workers and to crack down on the use of experts’, the maximum time set down for hearings is four days, the style is non-adversarial and ‘90 per cent of cases “settle” and result in agreed orders and care plans’.

With regard to Cohen’s comparison between Leeds and Sheffield, the CAAC figures do not enable us to compare the average length of hearings for the two areas in Family Proceedings Courts. However, they do allow comparison between the respective care centres. The five quarterly average figures from the last quarter of 1995 to the last quarter of 1996 varied in Sheffield from 36 minimum to 45 weeks maximum. In Leeds over the same period, 45 weeks was the minimum and 52 weeks the maximum. So these figures do support the view that a different culture in Sheffield resulted in shorter hearings.

Certainly the quarterly data collected by the CAAC (1997) indicated very marked differences between the length of hearings in different courts. In the Pontypridd County Court care centre for example, over the period September 1995–December 1996, the average length of hearing was between 22 and 37 weeks.

In the Newcastle care centre over the same period the average never fell below 45 weeks and went up to 60 weeks. Even more extreme was the Carlisle care centre where the average hearing length recorded for the last quarter of 1995 was 106 weeks, or more than two years.

The way that different arrangements can result in different timescales is further illustrated by a comparison between the scene in the UK and in the USA. In their study of severely abused children brought before the Juvenile Court in Boston, Massachusetts, Bishop *et al* (1992) looked, among other things, at the average length of time that elapsed from the filing of a 'care and protection' petition in court to the court's final disposition. The care and protection petition is an application for the judge to transfer custody of the child from the parents to the state. As noted earlier, they found that the average length of time that this took was one-and-a-half years, indicating that the problem there is even more severe than in the Welsh and English courts.

Conclusion

Commenting on the US scene in 1992, Bishop *et al* observed:

... there is currently no ongoing effort to assess (a) the specific reasons for delays (b) the impact of warranted or unwarranted delays on the child's current functioning, or (c) the long-term effects of delays on the child's development. (p 472)

These comments seem to remain valid in Britain today, if not in relation to the first point then certainly in relation to the other two. There *is* a body of British research, as we have seen, relating to the causes of court delays, but what seems to be missing as yet is any detailed consideration of the consequences of such delays for children. Perhaps this is because we still find it hard to see the court process itself – consisting, as it does, of exhaustive and scrupulously balanced deliberations about what is in the best interests of the child – as being capable in itself of being profoundly harmful to children.

Yet it is possible to argue that keeping children waiting in this 'kind of limbo' is not only likely to be harmful, but can also quite accurately be described as a form of abuse. Specifically, it can be categorised as 'system abuse', which according to the National Commission of Inquiry into the Prevention of Child Abuse, occurs 'whenever the operation of legislation, officially sanctioned procedures or operational practices within systems or institutions is avoidably damaging to children and their families' (Williams *et al*, 1996). Delays in some kinds of court cases may be regrettable, or even distressing, without necessarily being abusive to anyone. But children have a different timescale and, in care proceedings, they have a unique and terrifying amount at stake. A year-long hearing for a three-year old means she spends a third of her entire life in limbo. This occurs at a particularly formative part of her life, a time when traumatic experiences can very easily leave permanent emotional scars, affecting her ability, over all the rest of her life, to form relationships, to parent and to contribute to society.

Some delay, of course, is inevitable. The decision as to whether a child should be removed from her parents on a long-term basis is a matter of such magnitude that it inevitably and quite properly will take some time. But the fact that there are substantial differences – between England and the USA, between different courts within England and Wales and between different points in time in the same courts – does demonstrate that there is scope to do things differently.

In the report of the Inquiry into child abuse in Cleveland, Butler-Sloss (1987) memorably commented:

There is a danger that in looking to the welfare of the children believed to be the victims of sexual abuse the children themselves may be overlooked. The child is a person and not an object of concern. (p 245)

Whatever the intentions of the Children Act, it would appear that when a child enters the court system she is still in

danger of becoming an 'object of concern' – or perhaps an 'object of contention'. Her history and her future are exhaustively discussed, but her needs in the here and now are still too easily forgotten.

References

- Allen N, *Making Sense of the Children Act* (3rd edition), Chichester: Wiley, 1998
- Bishop S, Murphy M, Jellinek M, Quinn Sister D and Poitras Judge F, 'Protecting seriously mistreated children: time delays in a court sample', *Journal of Child Abuse & Neglect* 16, pp 465–74, 1992
- Booth Dame M, 'Delay in Public Law Children Act cases', *Representing Children* 8:4, pp 41–8, 1995
- Booth Dame M, *Avoiding Delay in Children Act Cases*, London: Lord Chancellor's Department, 1996
- Butler I, Noakes L, Douglas G, Low N and Pithouse A, 'The Children Act and the issue of delay', *Family Law* 23, pp 412–14, 1993
- Butler-Sloss Lord Justice E, *Report of the Inquiry into Child Abuse in Cleveland*, London: HMSO, 1987
- Children Act 1989*, Chapter 41, London: HMSO
- The Children Act Advisory Committee, *Annual Report 1993/4*, London: Children Act Advisory Committee, 1994
- The Children Act Advisory Committee, *Final Report*, London: Children Act Advisory Committee, 1997
- Cohen P, 'Silenced witnesses', *Community Care*, 11–17 July, pp 22–3, 1996
- Department of Health, *An Introduction to the Children Act 1989*, London: HMSO, 1989
- Department of Health, *The Children Act 1989: Guidance and Regulations, Vol 1: Court Orders*, London, HMSO, 1991
- House of Lords Debates, Vol 512, 8/11/89, col 720ff, cited by Butler *et al*, 1993, as above
- Hunt J, 'Care proceedings under the Children Act: the continuing problem of delay', *Childright* 129, pp 12–4, 1996
- Hunt J, Macleod A and Thomas C, *The Last Resort: Child protection, the courts and the 1989 Children Act*, London: The Stationery Office, 1999
- Judicial Statistics, Annual Reports (for 1992–98), London: Lord Chancellor's Department.
- Murch M and Mills L, 1987, *The Length of Care Proceedings*, Bristol: Socio-Legal Centre for Family Studies, Bristol, cited by Thomas *et al*, 1993, see below
- Nightingale G, 'The scandal of delays in the Juvenile Court', *Justice of the Peace*, March 1979, cited by Thomas *et al*, see below
- Packman J and Jordan B, 'The Children Act: Looking forwards, looking back', *British Journal of Social Work* 21:4, pp 315–27, 1991
- Parkes N, *A Study of Delay in Care Proceedings and its Relationship to the Use of Expert Witnesses*, Unpublished MSc dissertation, University of Bristol, 1999
- Plotnikoff J and Woolfson R, *Timetabling of Interim Care Orders Study*, London: Department of Health, 1994, cited by Parkes, as above
- Rowe J and Lambert L, *Children Who Wait: A study of children needing substitute families*, London: BAAF, 1973
- Thomas C, Murch M and Hunt J, *The Duration of Care Proceedings: Replication study*, London: HMSO, 1993
- Williams (Lord Williams of Mostyn, Chair), *Report of the National Commission of Inquiry into the Prevention of Child Abuse, Vol. 1: The Report*, London: Stationery Office, 1996