

## **Evidence submitted by Sarah Harman, Solicitor**

### **INTRODUCTION**

1. I am a solicitor with more than 25 years experience in family cases, mostly dealing with child protection cases. In 1995 I was appointed as an Assistant Recorder in the civil courts, and sat in private law family cases until I resigned in February 2004.
2. More recently, I have specialised in the field of clinical negligence, dealing particularly with women's health cases.
3. I was the solicitor instructed by the mother in the case of Re B, which (with the case of Re U) was considered by the Court of Appeal earlier this year Re U (a child) and Re B (a child) (serious injury: standard of proof) [2004] EWCA Civ 567). These were two "test cases" where mothers had been diagnosed with Munchausens syndrome by proxy and separated from their children. The appeal was heard post-Canning to establish if any lessons from the Canning, Patel and Clark criminal cases could be learned in the family jurisdiction.
4. I was seriously criticised by Mr Justice Munby in the case of Kent County Council v Mother, Father and B [2004] EWHC 411 (Fam). I disclosed documentation from the case to my sister the Solicitor-General, the Minister for Children Margaret Hodge MP and members of the media and misled the court as to these disclosures to the extent that I informed the court about them some two weeks after they were made.
5. I make submissions for consideration in respect of the two following issues which are part of the brief of the inquiry:
  - (i) Whether the family court system is being run effectively.
  - (ii) Whether people using family courts are getting the service they deserve.

### **SUBMISSION**

6. My submission to the inquiry is that the restrictions imposed by section 12 of the Administration of Justice Act 1960 are quite inappropriate for a modern family court. We should follow the Australian and Canadian family courts which are open but still are founded on promoting the best interests of the child. The evidence upon which judgments are made and the judgments themselves should be made available to the public, and as Canada and Australia have shown, this can be achieved while ensuring the identity of the child is not revealed
7. I believe that this "secrecy" prevents society having any knowledge of the workings of our family court systems, ascertaining whether or not our family courts are fair and in touch with current mores, or knowing whether our family judges are serving society as a whole in the best way possible.
8. I further believe that users of the family courts, particularly those who feel aggrieved (for instance where diagnoses of Munchausens syndrome by proxy, or non-accidental injury are made) are prevented from having reasonable discussions with close family and colleagues about their cases, are denied the right to obtain support from their communities, their churches and their MPs, and most importantly are denied the right to

search for alternative diagnoses in difficult child protection cases.

9. In making these submissions I would (ironically) refer to a comment made by Munby J in the B judgment which was so critical of my actions. He said in paragraph 103:

We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system. This is something that has to be addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence. Open and public debate in the media is essential.

10. But apart from making that comment, Munby J gave the most restrictive interpretation of section 12 of the Administration of Justice Act 1960 to the extent he condemned Mrs B for seeking advice and support and encouragement in her case from her local MP. It may well be said that such a view is in conflict with the law of parliamentary privilege. It is a view that is as far divorced from reality as is possible. There can be few MPs who have not assisted constituents over family court issues. Are they really in contempt? Does this indicate a senior family judge out of touch with the real world?

11. At the present time a Parliamentary Committee is considering some amendments to the Children bill which will allow for some disclosure of information from the family courts to outsiders in certain limited circumstances. The proposal is that parties in proceedings can talk about their cases to various individuals "to obtain appropriate advice and support", to statutory agencies, to MPs and for "approved research to be undertaken". This represents a considerable "loosening up" of the restrictions of the Administration of Justice Act 1960 as interpreted by Munby J. However, it gives no opportunity for the work of the family court system to be appropriately scrutinised from outside.

12. Over the last few years the small but powerful "fathers lobby" has insisted that the family courts are unfair to fathers and favour mothers. My experience as a part-time family judge and as a solicitor does not support that view in any way. But secrecy lends itself to such assertions being made and gathering momentum. If we are to have confidence in our family justice system, this demands transparency.

13. Very few people would disagree with the fundamental principle that the welfare of the child must be paramount. Transparency and openness must be balanced against the welfare of the child. I am not suggesting in any way that openness should be achieved at the cost of the child. I look at it another way. It is the most draconian step in a child's life if he/she is deprived of a parent's care, love and affection. If justice is to be done to a child, where the court proposes to intervene and remove him/her from the family, then this is not simply a private matter but an issue for the whole of society. The level at which the courts intervene to separate families needs to be achieved by a justice system which is seen to work effectively and fairly.

14. An examination of the Australian and Canadian family court systems indicates that they operate with openness and transparency and still aim to meet the welfare of the child principles. Achieving such a balance is not easy. There may be gains and there may be some losses. But how can any democratic system justify the restrictions on openness imposed by the Administration of Justice Act 1960, a statute passed in an entirely different era as far as the care of children is concerned, and at a time when the welfare of the child was not paramount! (The paramountcy of the child's interest was only introduced subsequently)?

15. There are of course obvious difficulties in opening up the family court system. Salacious media reporting intimate family details and expert witnesses being vilified are reasons often given for keeping our family courts secret. The Canadian experience shows that firstly that the media are not particularly interested in reporting family cases, secondly that the judiciary there are sensitive to such possibilities and can close courts from time to time. Judges in those jurisdictions are astonished—perhaps even appalled—that our system upon which theirs is founded is so restrictive.

16. Australia and Canada are not the only jurisdictions which operate with more openness than our own. New Zealand, after extensive consultation and with some trepidation, is moving towards a system similar to those in Australia and Canada. Ireland is now enabling court reporters to attend family court proceedings. I believe that we need to move in that direction also.

17. I would point out that our system is not only secretive but inconsistent. Appeal court judgments in family cases are published and, curiously, in view of the fact that children should not be identified, the appeal court reports contains the child's actual initials (though not the names), which can lead to identification.

It was quite extraordinary in the report of the Re U and the Re B appeal that both children's actual initials were used but a greater degree of protection was accorded to the experts who were known as eg Dr X/Dr Y rather than their own initials. Do we have a family court system which puts the protection of experts as a higher priority to the protection of children?

18. I believe the committee needs urgently to consider ways to modify our family court system so that it can function in a transparent way but at the same time maintain the confidentiality of the children involved. These two concepts are not incompatible. Closed courts where decision making is not open to scrutiny is incompatible with a democratic society.

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