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## RADICAL CHANGE THROUGH CONVENTIONAL MEANS

**Emily Buss, J.D.\***

### I. INTRODUCTION

In his article in this volume, *Justice Denied: Delays in Resolving Child Protection Cases in New York*,<sup>1</sup> Professor Martin Guggenheim paints a devastating picture of the harm caused to children by the very courts employed to protect children from harm. These courts, overwhelmed by the number and complexity of the cases before them, routinely take years to decide which families deserve to get their children back from temporary foster care, and which families do not. In the course of this delay, families that belong together are always harmed, and not infrequently destroyed.

Professor Guggenheim points to the problem of court delay as just one example of the state's failure to function as a substitute parent. From this example and others, he concludes that state intervention in parenting should be kept to a bare minimum. I agree both that the state makes a poor substitute and that most children should therefore remain with their parents of origin, even where those parents are far from ideal. But there will still be many cases where child maltreatment is serious enough to require intervention, and thus it is essential that we fix the problem of court delays.

I propose a shift from our traditional adversarial court process to an inquisitorial process, where fact-finding is led by the decision-maker, traditionally called a judge. I further propose that each decision-maker with authority over child protection matters be assigned precisely one case at a time. The supply of inquisitorial judges could come from the ranks of the erstwhile (or potential) guardians ad litem and court volunteers, who would be trained in the law and, most particularly, the heavy preference for keeping children in their families of origin.

This solution, I think, would not only improve both the pace and quality of decision-making in child-protection cases, but also resolve the

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<sup>1</sup> 12 VA. J. SOC. POL'Y & L. 547 (2005).

considerable disagreement among child advocates about the role children's legal representatives should assume in these proceedings. Assigning the well-informed, best-interest focused representative the role of judge rather than the role of advocate should improve the quality of both judging and advocacy on behalf of the child.

## II. REASONS FOR COURT DELAYS

The slow pace of child protection proceedings in court has many origins, some more legitimate than others. It is clear that one source of delay is simply the overwhelming size of each judge's docket, which can be blamed on both the state's failure to provide adequate resources to these courts and on the state's failure to screen out many cases from the court system altogether. But even a multifold increase in the number of judges presiding over these cases, or a multifold decrease in the number of cases filed in each judge's court, would leave those judges overwhelmed by the volume and complexity of the cases before them. In this regard, child protection cases look nothing like the election cases to which Guggenheim compares them.

Child protection cases require judges to reach conclusions about unknowable facts and to make predictions about matters that elude prediction. To make matters worse, the court's conclusions and predictions can have profound, life-affecting consequences for an innocent child. While the law defines the relevant questions, the answers must come from somewhere else, from some combination of intuition and social-psychological savvy, which are hardly the judges' special expertise. Moreover, the best material with which to build these answers is the details of the child's life – details about relationships and intra-familial treatment that are unlikely to come out with any clarity in the context of a court proceeding.

The worst judges try to avoid as many of these difficult decisions for as long as possible, hoping that the case will ultimately solve itself as various possible solutions drop away. The best judges do what they can to move the cases toward final resolution, invoking the help of experts, lay witnesses, and lawyers to help them get it right. But these experts, lay witnesses, and lawyers need time to do their job, whether it is performing an evaluation, rearranging their schedules in order to testify in court, or developing a case for a client. For both groups of judges, delay becomes a false comfort. The harm caused by delay is less

obvious and intimidating than the harms that might come from swift judgment.

The complex web of parties and lawyers involved in these proceedings makes it particularly difficult for even the most conscientious judge to resolve a case expeditiously. Unlike the election cases cited by Guggenheim, which generally involve a single challenger, or class of challengers, against a single candidate for office,<sup>2</sup> a child protection case will involve at least a child welfare agency, two parents, and a child.<sup>3</sup> The numbers increase with multiple children, not only because the children's relevant facts and interests will vary, but also because they may have multiple fathers. Certain jurisdictions also add foster parents to the list of parties under certain circumstances, or otherwise confer on them the right to be present in court.<sup>4</sup>

These are just the parties. Now add all their lawyers. Under most circumstances, each parent is entitled to his or her own lawyer. In addition, the child welfare agency has a lawyer, and, sometimes, the state has a separate lawyer.<sup>5</sup> Finally, children often get multiple representatives, not to differentiate among the positions of the various children in one family, but rather, to differentiate among the various roles children's representatives can take. I will return to this issue of roles in the next section and argue that this oversupply of representatives for children could be diverted to more productive ends. For now, suffice it to say that a child in a case might have a lawyer and a guardian,<sup>6</sup> a lawyer and a Court Appointed Special Advocate (CASA),<sup>7</sup> an attorney

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<sup>2</sup> For example, *Stoppenbach v. Sweeney*, 746 N.Y.S.2d 328, 329 (App. Div. 2002), the case Guggenheim cites as his prototype.

<sup>3</sup> The child is often, but not always, identified as a separate party. Even when she is not, she is clearly identified as a subject of the proceeding, with interests distinct from the parties in the case.

<sup>4</sup> See Michael G. Walsh, Annotation, *Standing of Foster Parent to Seek Termination of Rights of Foster Child's Natural Parents*, 21 A.L.R. 4th 535 (1983) (West, updated 2004).

<sup>5</sup> This appears to be the practice in Cook County, Illinois, where the Department of Children and Family Services and the State generally have separate counsel.

<sup>6</sup> See, e.g., HAW. REV. STAT. ANN. § 587-34 (Michie 2003) (making a guardian ad litem mandatory, and a separate attorney for the child discretionary).

<sup>7</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-221 (West 2003) (providing for counsel and a guardian ad litem or CASA in cases alleging abuse and neglect).

ad litem and a CASA,<sup>8</sup> or a guardian and a lawyer for the guardian,<sup>9</sup> just to name a few of the more popular combinations.

The more people involved in a hearing, the harder it is to schedule a hearing at all, let alone a hearing long enough to hear all the parties' evidence and resolve all the relevant issues. Judges will often delay a proceeding altogether to allow a parent to obtain a lawyer or to allow a parent's lawyer to gather information, even if the parent or lawyer can be faulted for the lack of preparation. Judges tend to be generous with these continuances, for fear that a subsequent due process challenge could impose a far more serious disruption on the progress of the case. Judges will also delay proceedings to await the input of a child's lawyer, guardian, or CASA, depending on the representational structure involved. These latter delays are driven less by concerns about process than by concerns about substance. Judges defer heavily to the judgments of those charged with representing children, particularly where they perceive those representatives as well-informed about children's circumstances.

Even when every party has a well-prepared lawyer present, the presentation of evidence will likely proceed in a manner poorly designed to make good decisions as quickly as possible. In our adversarial system, each lawyer generally presents his case in its entirety (with opportunities for other parties' lawyers to cross-examine his witnesses), before any opposing lawyer has an opportunity to offer any evidence of her own. While a judge could shuffle the order in which evidence is presented, she is unlikely to be prepared to do so if she sits as a passive decision-maker and is hearing the evidence for the first time.

Because lawyers must be prepared to rebut all possible evidence and arguments, good preparation generally means over-preparation. Lawyers must guess at the trial strategy of other lawyers and be prepared, with witnesses and arguments, to respond to all the possibilities. This is a particular problem in child protection cases, in which very little pre-trial discovery occurs between parties. This sort of preparation is inordinately time-consuming, not only for the lawyers, but also for the witnesses. A witness who has reluctantly agreed to miss

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<sup>8</sup> See, e.g., ARK. CODE ANN. § 9-27-316 (Michie 2003) (allowing appointment of an attorney ad litem to represent the child's best interests, and authorizing appointment of a CASA as well).

<sup>9</sup> See, e.g., N.C. GEN. STAT. § 7B-1108 (2003) (directing that a guardian ad litem be appointed to represent the best interests of the child, and a lawyer be appointed to assist the guardian, where the guardian is not a lawyer).

work, or to leave a child with a babysitter, will often spend the day in court and never get called to testify, either because he proved unnecessary, or simply because the court ran out of time. These days lost in waiting increase the witness's frustration with the system and decrease the likelihood that he will return the next time he is called.

Another cause of delay in the cases that require a trial is the strong preference for settlement and the high proportion of cases that reach agreement just before (and because) a trial is scheduled to begin. This culture of agreement has both a positive and a negative side. Because the stakes are high (potential loss of one's children) and the outcomes unpredictable, many parents will agree to unreasonable conditions in order to buy time and attempt to pave the way for their children's return. But in many cases, agreements reached between parents and a child welfare agency will craft a beneficial compromise that is better for the child than any of the outcomes sought by the parties from the court. Moreover, it is generally assumed that parents who agree to make some changes voluntarily are more likely to follow through than if those same changes are imposed on them by the court. At least some portion of the agreements reached serve families well.

Unfortunately, however, these agreements are unlikely to occur before the trial date. This is in part because these agreements require all parties and lawyers to meet together (an event that rarely occurs except in court) and in part because the parties and lawyers need the motivation of trial (the risk of loss and the prospect of a lot of hard work) to reach agreement. The likelihood of courthouse settlement makes some sense of the enormous caseloads assigned to judges every day. For the majority of cases, being assigned a trial date is a necessary and sufficient condition for settlement. But for those few cases that will not settle, the enormous docket guarantees that their trial will have to be rescheduled. To find a clear date, judges will generally have to look months ahead.

The reasons for court delay in resolving child protection cases are a mix of good and bad. But whether for good or bad reasons, these delays produce bad outcomes for children and their families. Any attempt to address the problem of delay within the existing court structure will be too small to make an impact. Instead, I propose a significant restructuring of the decision-making process designed to address the complexity of these cases, and to place decision-making authority in the hands of those likely to be best informed. The restructuring would change the process in two significant respects. First, it would change the

role of the judge from passive adjudicator to active fact-finder. Second, it would assign a single case to each judge. Although these changes would require the system to employ many new judges, I suggest that our current system already has a promising source of case-specific fact-finding judges in the form of guardians ad litem and court volunteers.

### III. THE INQUISITORIAL MODEL

Under the inquisitorial model of adjudication employed in much of the world, judges lead the factual investigation of the case.<sup>10</sup> They call witnesses to give testimony, commission experts to render opinions, and search for relevant documents.<sup>11</sup> Judge-controlled fact-finding has several advantages over lawyer-driven systems, advantages that are magnified in the context of child welfare proceedings where time is critical and the lawyer-driven process is particularly cumbersome.

Where judges control the factual investigation, they can adapt the sequencing of the investigation to meet the needs of the case and the participants.<sup>12</sup> If, for example, all other issues in a proceeding will be affected by the judge's determination of a party's emotional stability, the judge can identify this issue early in the case and arrange for an assessment before she takes any other action or imposes additional court burdens on litigants and witnesses. Where multiple witnesses may have something to say that bears on an issue, a judge can schedule the witnesses in the order she thinks will likely yield the best information fastest.<sup>13</sup> The judge's ability to prioritize within the factual investigation process will improve the system of decision-making in two respects. First, it will allow a judge to concentrate her investigation on the evidence that matters to her as decision-maker. Second, it will give lawyers, parties, and witnesses advance notice of the hearing schedule, reducing the time spent in preparation and sitting idly in court waiting rooms.

While the inquisitorial process is often contrasted with the American adversarial process, the distinction is somewhat misleading. Lawyers in inquisitorial systems still play the role of partisan advocates, pushing the

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<sup>10</sup> I am indebted to John H. Langbein's *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985), for my basic understanding of these systems.

<sup>11</sup> *Id.* at 827-29.

<sup>12</sup> *Id.* at 830.

<sup>13</sup> *Id.* at 828.

judge to rule in their client's favor on questions of evidence and law.<sup>14</sup> The lawyers' role in making legal arguments matches that role in the adversarial system. In both systems, the lawyer argues for an interpretation of the law, and an application of that law to the evidence presented, that favors his client's position. In the fact-finding process, lawyers operating in inquisitorial systems routinely call the court's attention to important witnesses whom the court has overlooked, suggest questions to be asked of testifying witnesses, and identify weaknesses in the testimony of witnesses whose testimony may hurt their client's case. In contrast to the adversarial system however, a lawyer in an inquisitorial process cannot prevent judges from accessing relevant information. In a system where fact-finding is controlled by the judge, evidentiary omissions inspired by lawyers' strategy or inadvertence are largely eliminated.<sup>15</sup>

Of course, an inquisitorial system is only as good as its judges, who need to have enough time available for each case to engage in a swift and effective investigation of the facts. In the next section, I propose a mechanism for expanding the number of judges dramatically, a mechanism that depends, in part, on a shift to the inquisitorial approach.

#### IV. A SOURCE OF INQUISITORIAL JUDGES

I propose shifting one group of individuals identified as "children's representatives" into the role of fact-finding judges. More specifically, I would target for the shift those representatives whose current role is to identify the child's best interests in the proceeding. These representatives are sometimes called guardians, sometimes guardians ad litem, and sometimes Court Appointed Special Advocates (CASAs). I propose shifting these "best-interest" representatives into the role of inquisitorial judges because their best interest orientation better qualifies them to be decision-makers than advocates. Before elaborating on this proposal, I offer some relevant background about these guardians and volunteers and discuss where they currently fit in the array of children's representatives in court.

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<sup>14</sup> *Id.* at 824.

<sup>15</sup> *Id.* at 831, 835.



Although all children involved in child protection proceedings are entitled to a legal representative,<sup>16</sup> the role of that representative varies widely from one jurisdiction to another and is poorly defined in many. There is considerable disagreement between those who favor a “traditional attorney” model, in which lawyers take direction from their child clients as they would from adult clients, and the “best interest” model, in which a representative (sometimes, but not necessarily, a lawyer) advocates for what she believes is in the child’s best interests. Those who defend the traditional attorney model<sup>17</sup> argue that children are entitled to have their views pressed as zealously as those of the other parties, that these views are often wise and, in any event, need to be taken into account, and that the traditional attorney role is far more likely to inspire the trust the child requires to engage honestly and productively in the court process. They also argue that it is the role of the judge, not the lawyers, to sort out what is, ultimately, the right outcome for the child.

To these arguments, advocates of the best interest approach have one particularly powerful response: If the child’s representative does not bring all the important evidence in the case to the judge, who will? Parents’ lawyers, of course, often have strong, client-motivated reasons to avoid learning and revealing the truth. Child welfare agencies are hampered by oversized caseloads and bureaucratic constraints. The child’s representative, in contrast, is well-suited to discover crucial information, because he has superior access to the child, and generally has the time and motivation required to chase down the relevant facts. Children’s representatives are self-identified children’s champions, who come to their role with considerable enthusiasm and commitment to their clients.

In some jurisdictions, this argument convinces lawmakers<sup>18</sup> to cast the child’s single representative in the best interest role. In others, it leads them to add an additional representative. In these latter jurisdictions, children often have a lawyer advocating for what they

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<sup>16</sup> Federal legislation ties federal funding for state child protective service systems to the state’s provision of legal representation for children. See 42 U.S.C. § 5106 (Supp. II 1996).

<sup>17</sup> I am one of these, and set out these arguments in somewhat greater detail in “You’re My What?” *The Problem of Children’s Misperceptions of their Lawyers’ Roles*, 64 *FORDHAM L. REV.* 1699, 1703-05 (1996).

<sup>18</sup> In some jurisdictions, the role is determined by legislation, in others by the courts, through individual court orders and through case law development.

want, and some other individual, who may or may not be a lawyer, advocating his own views of the child's best interests.<sup>19</sup> Under the first approach, the child becomes the only party in the case whose views are not being pressed by a lawyer in court. Under the second, the child is forced to accommodate the intrusions of an extra representative and the court absorbs another source of delay.<sup>20</sup> Neither of these harms would need to be imposed if the best interest representative was charged with deciding the case, rather than simply passing on the results of his top-quality fact-finding to a passive and overwhelmed judge.

Three attributes qualify these children's representatives for the role of inquisitorial judge. First, their role in the process currently matches the fact-finding role of the inquisitorial judge. They discover all relevant facts and ensure that the decision-maker has access to the most relevant information about the child and her family's circumstances when deciding the case. Second, their caseloads tend to be small. In the case of the volunteers, they are normally assigned a single sibling group at a time. Third, they are highly motivated. More consistently than any other courtroom players, children's representatives – whether they are acting as traditional lawyers or best interest advocates – have a passion for their work.

The fact-finding methods of children's representatives are far better than those a traditional judge would likely develop if she suddenly found herself in charge of the fact-finding process. Representatives routinely seek out witnesses where they work and live, to gather information in the least intrusive and most authentic setting. When they see the value of convening a meeting among a number of players, they take it upon themselves to coordinate the time and place of the meeting to facilitate everyone's attendance. Granted, these logistics would become considerably more complicated if all the lawyers and the parties were required to attend the meetings, but the delays caused by these coordination issues could be markedly reduced by the decision-maker's flexibility about time and place. Moreover, these opportunities to take testimony and otherwise gather facts in surroundings that are comfortable to the parties would likely produce better information for the fact finder. Fact finders are likely to learn much more about the

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<sup>19</sup> See *supra* text accompanying notes 6-9.

<sup>20</sup> In some jurisdictions roles are assigned to maximize both harms, as in jurisdictions where the lawyer is charged to act in the child's best interest, and an additional court volunteer is appointed to develop the facts of the case for the court in greater detail.

families they are assessing if they meet with them in the contexts in which they live their lives.

Compounding these representatives' fact-finding advantage are their small caseloads. To be clear, some children's representatives have enormous caseloads. That is, their caseloads are significantly smaller than the caseloads of the judges who hear the cases, but far too big to allow for the sort of exhaustive fact finding I am describing. Note that in such cases, it will be equally impossible for these representatives to achieve the aims they are currently expected to achieve. This suggests that the best interest model can only be practiced ethically if the representatives' caseloads are very small. Fortunately, many jurisdictions provide for a system of fact-finding representation that provides each case with its own representative – whether it is the central legal representative in the case or a supplementary volunteer. The Court Appointed Special Advocate (CASA) Program is designed to give each child or sibling group its own fact-finding representative, and is committed to expanding to meet the needs of all children in these proceedings.<sup>21</sup> Presumably, the added responsibility of acting as inquisitorial judge would make this attractive pro-bono or reduced-compensation work for a large number of lawyers as well.

The final advantage of this group of fact-finding representatives is their attitude. These people come to the work voluntarily — indeed, many of them do the work for free. Those who do paid work will also commonly tell you that they are doing precisely what they went to law school to do. This is not something you often hear from the other lawyers involved in the process, or even the judges, who are frequently required to do their time in juvenile court before they are allowed to take on the more respected work of criminal cases or “major” (i.e., commercial) civil litigation. This is not to say that there are no juvenile judges or lawyers for parents who are enthusiastic about their jobs and do them with passion. Rather, it acknowledges that the passionate among these other groups of lawyers and judges represent a significantly smaller fraction of the groups as a whole than it does among the children's representatives.

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<sup>21</sup> In their solicitation of donations on their web site, The National CASA Association explains that they are “determined to provide a CASA volunteer for every abused and neglected child.” NAT'L CT. APPOINTED SPECIAL ADVOCOS. ASSOC., *Donate Now!*, at <http://www.nationalcasa.org/htm/donate-1.asp>.

This passion, however, comes with a considerable hazard. Many children's representatives come to their role with dangerous and self-glorifying notions about saving children. You do not hear a lot of young lawyers saying things like "I went to law school so that I could go out and defend families from harmful state intervention." Rather, they took the job to save children from their horribly abusive parents. The big risk in my proposal is that it would give ultimate decision-making authority to individuals who are more inclined to remove children from their homes than are the overworked and deferential passive judges we have now. But there are many reasons to believe that children's representatives can be steered away from their overly intrusive instincts.

First is the law. From the Constitution's strong protection of parental rights to state and federal standards mandating efforts to keep families (nuclear and extended) together, the law deliberately skews decision-making in favor of family preservation. While there have been some modest qualifications to this preference in recent years,<sup>22</sup> the basic preference is still clearly evident in the law.

Second is the set of lawyers charged with enforcing this law on behalf of their clients. Under the current system, children's lawyers are compromised, in whole or in part, in their ability to advocate zealously for the positions of their clients. If the judge were assigned the role of active (and lead) fact finder, the child's representative would be freed of his fact-supplementing responsibilities and could act as a real lawyer for his client. These lawyers, in turn, would have far greater credibility than parents' lawyers in arguing that children want to, and should, go home.<sup>23</sup> In this way, children's lawyers are particularly well suited to enforce the

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<sup>22</sup> The most notable example of this is the Adoption and Safe Families Act (ASFA), whose aim was to speed the achievement of permanency through adoption for some children. Pub. L. No. 105-89, 111 Stat. 2111 (1997) (codified as amended in scattered sections of 42 U.S.C.).

<sup>23</sup> Under the current system, even parents' lawyers, whose ethical obligation to press for the aims of their clients is clear, will sometimes pull their punches to protect children from what they see as potential harm. When I was in practice, parents' lawyers frequently told me that they would not advocate for what their parent clients wanted if they thought those positions were not in the child's best interest. While this comment was often made strategically, just as often it truly reflected how far these lawyers had drifted from zealous representation. It was a drift inspired by the passivity of the judge and a concern that zealous advocacy would be too persuasive, and lead to the wrong outcomes for children. Again, assigning the judge the lead fact-finding role should cure this problem. Parents' lawyers, relieved of the feelings of responsibility for potentially bad outcomes, would be free to assert their clients' rights and interests with greater force and consistency.

family-preservation aims of our laws. And where the child's lawyer can be confident that the judge will act as an aggressive and independent fact finder, he need not fear that his aggressive advocacy of his child client's wish to return home will prevent the judge from learning important information that might counsel against that return.

The third reason to be optimistic about the system's ability to control against unlawful and ill-informed family disruption is that these children's representatives have shown themselves to be open to training, both on and off the job. Their passion for the work makes them quick to see the value of training on issues of law and child development, both of which will help them understand the harms caused by removal and the benefits of keeping children at home.<sup>24</sup> Thoughtful children's representatives tend to develop increasing enthusiasm for family preservation as they do the work. They see how much parents, even inadequate parents, do for their children, and how much these parents and children matter to one another. They see the harm caused to children in foster care when they are separated from siblings, denied parental visits, or moved again and again. They see how hard parents struggle, and how little real help they receive. Our judges see only the outlines of these problems because it takes time and a deeper engagement to see the depth of the problem, and the potential for solutions.

Relatedly, judges who are engaged in active and comprehensive fact finding are far more likely to identify mechanisms for helping families that could actually work. Successful solutions can only come from a genuine familiarity with a family – its problems, its strengths, its sources of support and stress. The single family focus should also help free judges from the inclination to standardize the cases, an inclination very much reinforced by the child welfare agencies which largely control access to services. While our judges can benefit from their experience in a high volume of cases, this experience often causes them to lose hope. In a sense, they are habituated to bad practice and become convinced it is the best the system can do. A fact-finding judge, focused on the particular needs of a single family, and unconstrained by a developed

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<sup>24</sup> For other actors in the system, the enthusiasm for training tends to track their general level of enthusiasm for their role. The judges and parent advocates who have long term ambitions to stay in the field are as eager as children's representatives to improve their knowledge level. But, again, the proportion among them who have those ambitions is smaller.

sense of the status quo, is far more likely to consider unconventional solutions to a family's problems.

## V. CONCLUSION

A transition to the inquisitorial approach would not be easy or without risk, but it seems worth a try. We know the status quo harms children and families. We have no reason to think that any conceivable tinkering within the status quo will make things appreciably better. The system of judicial decision-making we rely upon to make the most delicate and complex decisions about children's fate is poorly designed to do so. This does not mean, of course, that judges do not make good decisions in child welfare cases – they often do. But it means that even when they act most wisely, they must do so through a cumbersome process that imposes considerable harm on children and families. It also means that the wisest judges are handicapped in their exercise of wisdom. They, as much as anyone, could improve decision-making for children by joining the forces of inquisitorial judges.