

**SHARED UNDERSTANDINGS? THE
INTERFACE BETWEEN SYSTEMIC
PSYCHOTHERAPISTS AND THE FAMILY
COURTS**

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Glossary of Abbreviations

AFT: Association of Family Therapy and Systemic Practice

CAFCASS: Children and Family Court Advisory and Support Service

CAMHS: Child and Adolescent Mental Health Service

FJC: Family Justice Council

IFT: Institute of Family Therapy

LAA: Legal Aid Agency

LSC: Legal Services Commission

MoJ: Ministry of Justice

NHS: National Health Service

NICE: National Institute for Clinical Excellence

UKCP: United Kingdom Council for Psychotherapy

Abstract

This qualitative research set out to explore how far understanding is shared between systemic psychotherapists who write expert reports for family courts and the judges who receive them, with particular reference to various concepts involved in the process such as truth, objectivity and expertise itself. Data obtained from semi-structured interviews with systemic “experts” and family judges was analysed using Grounded Theory. In response to ideas emerging from initial interviews, the focus broadened to consider how, despite the potential advantages of a relational approach to this working context, the possibility of these benefits being delivered by the involvement of systemic psychotherapists remained “invisible” to judges. Different beliefs were identified around the idea of being able to assess openness to change without actually introducing change. The complexity of cases and the responsibility of making hugely significant decisions about children and families were seen to require family judges to be more “interventive” than judges in other areas of law, and systemic experts to be more “certain” than in other contexts. The values, beliefs and sources of knowledge which inform the ways in which experts and judges reconcile those challenges and tensions within the context of a rapidly changing family justice system were compared. Some ideas were generated both about ways of supporting and enhancing these professional roles, and about implications for practice.

Chapter 1: Introduction

The focus of my research and of this thesis is the interface between systemic family psychotherapists who act as expert witnesses in conducting assessments for the family courts and the judges who receive their testimony. This testimony is always given in the form of a written report and sometimes, in addition, by the giving of evidence in person during the hearing. This process involves complex areas of interaction and information exchange (for example, the way the expert conducts the assessment, the way the conclusions and observations are communicated in writing, the meaning that is given to that writing, or to verbal testimony about it, by the judge and the decisions that are reached as a result). There may be different ways of understanding or explaining those complexities and the research question:

“Judges in the family courts and the family psychotherapists who make reports to them: how far is understanding shared about the nature of this process?”

is intended to explore not only those potential differences, but any similarities.

My interest in this question is informed by personal experience at two levels. The first is that of working in the public sector as a systemic and family psychotherapist over many years in both child and adolescent and working age mental health services. The prospect of being required to make a report to a court of law or to appear before one was generally regarded both by myself and the majority of colleagues with great reluctance, and the possibility of becoming involved in legal process, or a request for an expert report being the only reason for a referral, would affect the likelihood of a referral's being accepted. There have been occasions when family court judges have requested or even ordered that specific therapeutic

interventions should be made and I have wondered what knowledge of clinical practice and theory is informing that request.

Alongside this experience I live with a family court judge. I do not believe he is unique in his profession in the openness he has shown to the usefulness of systemic ideas in thinking (in general, rather than in specific cases) about children and families and their relationships. Family court judges have to make decisions about incredibly complex issues which have a far-reaching significance for the welfare of children. Lord Justice Thorpe (2001 p xi) commented “Perhaps the profoundest advance in the family judicial system over the past decade has been the recognition that good results depend upon interdisciplinary collaboration. The bond between the judge and any expert concerned with child health and development is particularly close since in some degree they share the daunting task of deciding the future of the child”. Joanna North, a psychotherapist who works as an expert witness, commented (2009, p13) “I have grown to have a deep respect for the way that judges draw on as much information as possible in order to make fair-minded and appropriate decisions – about the most difficult matters such as removing children from the care of their parents..”

I am aware that nothing in my clinical training has prepared me for the possibility of working within a legal context. I began this project with a hypothesis that some of the concepts which in my clinical training were regarded as fundamental to clinical work, such as “objectivity- in- parenthesis” (Maturana 1988 p41) or the “not-knowing” approach (Anderson and Goolishian 1992), might find short shrift in a world which demands objectivity and expertise of the clinicians who appear before it (Re R, 1991). Raitt and Zeedyk (2000, p4) define the function of an expert witness as “to provide to the “trier of fact” (i.e. the jury or the judge) knowledge that is considered to be so specialist, abstract or complex that it requires an expert to explain it”. Similarly one might contrast Andersen’s (1992) espousal of the “both-and” position with the comments of Lord Hoffman in Re B (2008): “If a legal rule

requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. ...The fact either happened or it did not".

Some fairly cynical comments have been made about the relationship between psychological therapies and the judiciary. Richards (1988) argued that some judges appear reluctant to pay attention to findings emerging from psychological research: "the general ethos of judgments is that what is good or bad for children and what constitutes an appropriate environment for development is something that can be derived from common sense and the experience of everyday life" (p172). King and Piper (1995, p 54) comment that "...experts may be selected and their opinions heeded according to whether their perspective on child care coincides with that of the judge deciding the case". Despite the advances in this area that Lord Justice Thorpe identified in 2001, he was still of the opinion in 2007 that "lawyers are generally cautious of dialogues with other learnings". Yet units have evolved (for example, the Centre for Mediation and Conflict Resolution at the Institute for Family Therapy and the Marlborough Family Centre) which, unlike the agencies in which I have practised, have developed a specialism in making systemic assessments for the courts. There are also systemic psychotherapists working in specialist court assessment services (Millard 2008). I was interested in how they have managed to do this and whether there is useful learning for both systemic thinking and the judiciary in trying to understand more about the process. I was also convinced of the efficacy of a systemic approach in other contexts and wondered how far this was transferable. My own curiosity on this matter coincided with the following factors which created some external rationale for undertaking this research.

In recent years there have been some very high profile court cases that called into question the quality of medical expert witnesses in certain types of case. In the context of this proposed research it is interesting that there was particular concern that claims of "certainty"

were being made where it did not appear that these claims were well founded. As a result, in 2004 a report was commissioned from the Chief Medical Officer, Sir Liam Donaldson. The result, "Bearing Good Witness: proposals for reforming the delivery of medical expert evidence in family law cases" was published in 2006. The key proposal was that the National Health Service (NHS) should establish teams of specialist doctors and other professionals within local NHS organisations to improve the quality of the medical expert witness service by introducing mentoring, supervision and peer review. There was no formal input from the systemic psychotherapy discipline as a whole on this important development. Lord Justice Wall commented (2007, p20) "the problems the family justice system now faces in relation to expert witnesses has (sic) much more to do with supply and demand, and the reluctance of the expert witness to give evidence, than with any anxiety that the experts themselves will prove unreliable". Research which might inform systemic practitioners' connection with this issue therefore seemed timely.

There appeared to be a lack of professional training in this area at least on the judicial side, and there has been little previous research. Findings might potentially have some use for the future training either of systemic psychotherapists in writing reports for court or becoming an "expert", or for the training of the judiciary in the particular expertise of systemic psychotherapists.

The Family Justice Council (FJC) was established in 2004 with the aim (FJC website 2009) of "stimulating better and quicker outcomes for families and in the family court service. The Council sits between government and the courts of the family justice system." Part of the FJC's business plan for 2008/9 in connection with this objective was to examine the use and role of experts in the family justice system and I hoped my research might contribute in some way to this objective. I obtained the support of the Chair of the Experts' Committee of the FJC, Lord Justice Thorpe, in undertaking this research, presumably on the basis that it might contribute to the improvement in quality of expert reports.

Παντα χωρει, ουδεν μενει. Δις ες τον αυτον ποταμον ουκ αν εμβαιης

("All things are in flux. You cannot step into the same river twice" Heracleitus quoted in Plato Cratylus 402a)

This quotation encapsulates my experience of conducting a research project over an extended period of time (the proposal was approved in July 2009). Not only have new ideas constantly emerged, both through encountering previously untapped resources (new participants, new articles, journals and books) and through revisiting "old" resources, but the wider world moves on, the goal posts change, and what was taken for granted at the beginning becomes a distant memory. The pilot projects set up in response to "Bearing Good Witness" have been evaluated and the FJC has commissioned its own research into the quality of expert reports (both of these are discussed in more detail subsequently). In addition there have been major shifts of policy which have challenged my original assumptions on the relevance of my research. The most significant changes have been the Family Justice Review in 2011 which encouraged less reliance on expert witnesses and stronger judicial case management, and changes in Government policy since the election in 2010 with regard to the allocation of legal aid for expert reports in private law cases.

Law, policy and expert witnesses

In order to set the context for this research I will summarise here developments and shifts in direction in law and public policy which have had a significant impact on the subject matter. I have chosen to take as my starting point the Children Act 1989, as the comments of all the participants in the research are located in practice since then. The research is limited to family courts in England.

I would consider the following initiatives or legislation to be the most significant in relation to the role of the expert witness in the family courts:

- The Children Act 1989 in opening up the field for more "psychological" experts

- The Woolf report 1996 in encouraging joint instruction of experts
- The Children Act 2004 in emphasising the role of the NHS in offering expertise to the courts
- Bearing Good Witness (2006) in setting out to improve the quality of expert reports, to recruit more experts and encourage the development of multi-disciplinary teams
- The Public Law Outline (2008) in highlighting the connection between the commissioning of expert reports and delay in resolving cases
- The Family Justice Review (2011) in identifying a trend towards unjustified use of expert reports and in recommending a reduction in their use in order to reduce delay
- The Legal Services Commission's (LSC's) changes since the 2010 election in payment rates for experts and in restricting the availability of legal aid in most private law cases. (The LSC was replaced by the Legal Aid Agency (LAA) in April 2013 as a result of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. Throughout this thesis I have tried to use the title which fits the period under discussion rather than repeat this explanation).

It is almost as if a wheel has come full circle in the last 20 years: from a huge expansion in the role to ever-narrowing parameters. These shifts in policy will be explored in more detail in the literature review which follows, but the assumptions upon which the initial rationale for this research was based have become increasingly unreliable, and the conclusions to be drawn less straightforward than I imagined at the outset. The impact of these changes will be explored further in the discussion and conclusion.

Chapter 2: Literature Review

This is a topic on which there is very little directly relevant literature but a huge amount which is contingently relevant. I have decided to manage this by beginning with a thorough review of what is directly relevant and then attempting to give an overview of other areas which have some bearing on the subject. As I explained in the introduction, there will be a focus on the period since the Children Act 1989 as this coincides not only with changes in legislation which had enormous implications for expert witness reports, but also with the period on which all the participants in the research have based their comments. The review will concentrate on the question: “how far is understanding shared about the nature of the process?” rather than on descriptions or factual accounts of practice, and will (again in line with the limits of the research) privilege material which relates to the English family courts.

What have systemic practitioners written about writing reports for court?

Tuffnell (1993) analysed reports written for the family courts by child psychiatrists, looking for reports which showed evidence of a systemic approach (defined as containing information about legal and family systems, interpersonal rather than individual description and more emphasis on feedback loops), a family therapy approach (containing enactment, reframing, positive connotation, circular questions and a neutral stance) or neither. Her hypothesis was that, given that (p414) “the role of the expert is ... to provide an opinion or story which both encompasses and reinterprets the facts”, a systemic or family therapy approach might be distinguished by containing information relevant to the unit rather than the individual family members. Of the 28 reports analysed, 10 showed evidence of a systemic approach and six evidence of a family therapy approach. One of the participants commented (p418): “I find little opportunity to use a systemic approach in this kind of work – I also doubt that lawyers would appreciate it”. The advantages of a systemic/family therapy approach were seen to be the opportunity to offer advice on avoiding conflict and also on what therapeutic work might

be possible and how to create the context for it; disadvantages included the lack of an empirical base, the possibility that circular descriptions might imply avoidance of personal responsibility, and the difficulty of maintaining a circular description of interactions when faced by a lawyer seeking to represent a client's "truth" and a judge seeking to fix responsibility.

Tuffnell et al also identified (1996 p 365) that "feedback to experts by 'user' groups such as judges is often lacking", and conducted a survey of judges as to what elements they would like to see included in reports. These included: a statement about factors which might bias the expert's opinion, (such as previous contact), a summary of the hypotheses guiding the assessment, and an opinion about the nature, causes and consequences of actions and occurrences: all preferably within about 20 pages!

The experience of being a family therapist and an expert witness in a case where the father in a family had killed the mother was explored by Kaplan (1998); the case was to determine which set of grandparents should care for the children. Kaplan felt that his role as expert was (p480)" not to simplify matters for the court, but to add complexity" and to (p481) "describe the issues and connote the motives and intentions of the adversaries in ways that counteract competitiveness and enhance co-operation". He identified the difference that such an approach could make as understanding and communicating the child's point of view, exploring and influencing the family's view regarding the child's best interest, positively connoting the motivations of the competing families, and challenging the two options assumption. Kaplan describes negotiating with a barrister (p491) about her cross-examination: "it would be against the interests of achieving a satisfactory resolution for her to attack Sheila in the witness box with the same rigour that her client had been attacked". Sharing this anecdote with judges and asking for their opinions about Kaplan's intervention became an addendum to the judicial interviews.

The increasing trend for courts to request professionals to act as expert witnesses alongside a reluctance among the professionals to comply created a difficulty for Sluckin (2000) in that his “ability to believe in and sympathise with all the viewpoints put forward” would not fit with the court’s need to decide between opposing views. He also initially shared the consensus of opinion in his multi-disciplinary team that reporting to the court “contaminated” the process of developing a confidential relationship with families as well as compromising a non-judgmental position. However, he subsequently described his exploration of the relationship between the therapeutic and legal contexts (“two seemingly irreconcilable worlds” p37) which resulted in a conclusion that systemic ideas could reconcile these different contexts by seeing the expert witness as working within the hermeneutic or interpretive tradition, for example by offering an overview of interpretations of meaning in a way that assists the judge to know how to go on, working towards reconciliation and promoting dialogue. Systemic ideas such as double description, objectivity in parentheses, the not-knowing position and social constructionism (these ideas will be referenced in more detail later in the literature review) might conflict with the courts’ requirement for a definitive view, but Sluckin suggested that this dilemma could be resolved by representing himself as (p39) a “different sort of expert from the one who believes his expertise comes from the resource of a more valid set of knowledge”: an expert who can use “systemic eloquence” (Oliver 1996) to coordinate with and join the grammar of multiple contexts.

A special edition of *Context* featured a number of articles describing systemic practice in various contexts where there is a statutory element. In their editorial (p1) Gorell Barnes and Cooklin (2003) highlighted the responsibilities of therapists to use their systemic abilities to promote reparative thinking and ameliorate the damage which can be done, particularly to children, within the court process.

It is also argued (Cooklin 2003) that an expert has an opportunity to comment, often to useful effect, on deficiencies in services being offered to children and families. However, he

was also concerned that the adversarial nature of court proceedings can be damaging to relationships, and that the increasing “medicalisation” of the law (which connects to the increasing use of experts) has not only encouraged (p4) “the origination and then overuse of ‘syndromes’” such as “parental alienation syndrome”, but also, by its focus on the deficiencies and pathology of the individual, deflected attention from wider systemic problems and possible solutions. The requirement that “findings of fact” remain the province of the judge alone can also lead to situations where an assessing therapist may be so anxious to avoid taking a position on an allegation as to imply disbelief. However, Cooklin also suggested that the formality of the court context could not only enable families to feel that justice had been done, but also to hear things in a new way. Finally he defined several elements of “systemic wisdom” in the legal context: recognition of the multiple impacts on children and families; awareness of the multiplicity of connections (including culture and ethnicity) in the child’s wider system and the professional network; knowing how to promote the possibility of change; recognising the circularity of relationships and understanding recursive loops.

“Anyone who has been at the receiving end of ‘smart’ cross-examinations...will know that seeming even-handedness, self-reflexivity and self-disclosure can all be reframed as muddled thinking, prejudice, political correctness or plain waffle” (Asen 2003, p8). Despite this experience, Asen argues that having a regard for the welfare of children offers a rationale for taking up this challenge. Like Cooklin, Asen expresses wariness of a trend in private law cases towards “mother blaming”; in this connection he identifies (p9) a cohort of “so-called ‘independent’ experts” with these “strong views” and has for the time being decided that for this reason (“so distant from the systemic framework that I still espouse”) he has no wish to be involved in private law cases: “but then, does one collude with this trend if one withdraws from the field....what then about the children’s plight?” His suggestion that a team approach can be one solution to such dilemmas is also advocated by Fyvel and Mandin (2003).

Writing for a multi-disciplinary audience within the family justice system rather than a systemic audience, Asen (2007) describes many systemic features of the way his team assesses families for court (although he does not explicitly name them as such). He asserts that a family assessment is not merely a static snapshot of a situation, but an interactive process. He advocates transparency within the process (for example, by not reading the “bundle” of court papers or having meetings with professionals which exclude the family) in order to create a new therapeutic alliance with the family. The setting of tasks and giving of positive and negative feedback over time allows the potential for change to be tested, and work is carried out in different contexts and live interactions encouraged. His team also work with several families together which enables families to see patterns and interactions similar to their own but from an observer position.

The preference of adversarial contexts for dichotomies, clarity and certainty, wanting experts to be experts, caused Smith (2003) to find her work with the legal system a struggle. She stresses the importance of being aware of context, and gives a case example to illustrate how the process of formal assessment for court and the privileges it confers of bringing combinations of people together can of itself bring about change (in this case, a father recognising that his pursuit of contact was not in his daughter’s best interest because he had heard that she did not desire it from her directly rather than from her mother and maternal grandmother). She describes using the systemic concept of the multiverse to inform the provision to the court of a best and worst case scenario. She also stresses the importance of identifying the research evidence for recommendations, as well as the strengths and resources of families. She describes seeing evidence-giving in public law cases as a therapeutic intervention at many levels, but primarily a message of compassion to parents. Smith also comments with surprise on the lack of cross-fertilisation between public and

private law, and also on how little training she had to take on the work, most of her learning being done “on the job”.

A systemic model of assessment for court was developed by Blow (2003) which aspires to (p22) “perturb all the players” (that is, professional networks and agencies as well as the families involved), by using a circular rather than a linear concept of causation and moving the focus away from finding one truth to reflecting on how things have come to be the way they are and the possibilities for change. She believes that such an approach is only possible within the context of joint instruction (that is, instruction by all the parties to an action). A case example is given which illustrates how the aim is achieved of going beyond individual narratives to an account that (p23) “speculates about the gains and losses involved for everyone in order to come to a new narrative that can encapsulate all the different stories”. Blow describes seeking feedback from the professionals involved and was told that systemic assessments had been particularly valued where there were entrenched difficulties and different opinions among the professionals; the involvement of children was especially appreciated.

There may be contradictions between an “orderly and standardised” legal structure and “messy, complex and unpredictable” psychotherapy. (Charles 2005 p51). Charles argues (p52) that legal conversations are seeking truth and therefore incompatible with a systemic perspective where “multiple explanations...are seen as valid” and describes how his courtroom account of his view of the diagnostic manual DSMIV as “a way to describe a situation and symptoms ...that is not the whole person” was presented as discounting the validity of DSMIV, so that he was required to pay particular and unfamiliar attention to his use of language, assumptions and metaphor. He gives (p64) a list of questions that therapists should be prepared to face under cross-examination on the subject of what he calls “clinical epistemology”.

A systemic psychotherapist who works with families involved in care proceedings, (Davis 2009) argues that psychotherapy has the potential to make an enormous contribution to the mental health and well-being of families in these situations. He considers that the systemic perspective is particularly helpful in making sense of the involvement of professional networks in families' lives. He identifies (p27) a particular skill required as being communicating essential complex matters "in a more straightforward but nevertheless coherent fashion".

Chimera and Marsden-Allen (both experienced systemic practitioners who act as expert witnesses) presented a workshop at a systemic conference in 2009 entitled "The Court as a Reflecting Team". Their stated aim was to "debunk the myth that doing court work is not compatible with systemic thinking" and to think how the potential for the court process to be therapeutic could be enhanced. Among the arguments put forward by systemic workshop participants (personal communication 2009) for court work being incompatible with their thinking were the adversarial, "right/wrong" nature of the proceedings, the delay (too late for an intervention), the need for certainty and truth, the vested interest (the therapist is being paid) and the need to take an "expert" position. The presenters argued for seeing systemic court work as a different sort of expertise where the assessment is an intervention in itself, with an emphasis on change, on addressing issues of disempowerment and on highlighting patterns. They asserted that the process enables reflection at multiple levels: with individuals and their families, with other involved professionals, with lawyers and guardians, and with the judges and the court system. Chimera (2010) responds to a suggestion from family law solicitor Gregorian (2010) that family therapists should become involved in private law disputes as a more effective alternative to mediation. Although uncertain as to how this might happen, she agrees that systemic approaches can help to reconcile previously conflicting marital narratives, and advocates that systemic practitioners own their expertise on the needs of children when parents separate, and use it to "educate" parents. Her experience as an expert witness has informed an opinion that (p54) "under the auspices of a

judge who is sensitive and empathetic to the needs of children” the court arena can offer the possibility of change and positive intervention. Her view is that a systemic “expert” brings to the process a relational rather than an individual perspective, an appreciation of context, a tendency to avoid blame and above all the promotion of the voice of the child.

Gorell Barnes (2010, personal communication), described the way she uses attachment theory in her work with families before the family courts in conflicted private law proceedings. Her perception is that “family courts make all sorts of attempts not to operate in an adversarial way”, and that the court process can act as affect regulator, the ritual being soothing and containing of difficult emotions. It also creates the possibility of saying what needs to happen in a family, an intervention which is “essential but not in the therapeutic canon”, as well as centralising the voice of the child. She argued that there is a “problematized division” between therapy and what the court requires and also that the outcome and the therapeutic effect of the assessment depends entirely on “the sympathy and understanding of the judge”.

A number of the articles referenced above refer to the reluctance of systemic/family therapists to become involved in the court process. Woody (2007) (an American lawyer: I have been unable to trace anything similar in English professional journals) gives advice to family therapists on how to avoid getting drawn into the role of expert witness even if they are subpoena’d as a “fact” witness . Woody argues that there are strong ethical and practical reasons for avoiding the dual role.

There is some literature by systemic practitioners who are working alongside the family courts although not directly as expert witnesses. Blincow et al (2007) are part of a multi-disciplinary mental health team including a systemic psychotherapist who argue for the introduction of “resilient therapy” (which aims to develop personal characteristics such as hope, bravery and self-efficacy) in the context of what they call a “therapeutic assessment”

for court. Gee (2007), a family therapist and mediator, identifies the importance of talking to children about the impact on them of matrimonial disputes.

There is also a body of literature on reconciling systemic approaches with working in statutory contexts. For example, Crowther et al (1990) describe the dilemmas of a multi-disciplinary family therapy team in managing the expectations of referrers that they would offer expert opinions, against their own wish not to be involved in helping families and simultaneously making decisions about them. They resolved this by acknowledging the statutory context but maintaining a position of neutrality by the use of such questions as (p113) "how are you going to persuade Social Services to get off your backs?". They also separated the roles of therapist and "reporter".

Lang et al (1990) suggest that Maturana's (1985) concept of domains of professional practice can be useful in managing such tensions. Court work would fall into the domain of "production", where certain norms (such as legislation) are taken for granted and there is consensus about ways of doing things. Therapy would fall into the domain of explanation where the focus is the elaboration of multiple accounts and perspectives. Decisions about which domain has the higher context at any point in time are taken in the domain of aesthetics where the professional is (p 44) "playing out a particular moral commitment" as well as paying attention to maintaining a neutral position.

The tendency for professionals working with families to act as if there is a normal ideal of "family" to which they must live up is challenged by McCarthy (1994). She advocates a "fifth province" approach (the term refers to the ancient Celtic myth of a fifth province in Ireland) which represents a disposition towards tolerance and empathy and (p233) "highlights an ambivalent social domain which is constituted in the holding together of contradictory and often non-equal positions..and reincludes a focus on marginal versions of reality and lifestyle". This does not preclude having a preference for a particular way of seeing a

situation, but requires a focus on the effects of dominant discourses. This is particularly relevant where the opinions of professionals are accorded significant influence.

This review of systemic literature on the process of reporting to family courts shows some sense of potential tension between ideas. On the one hand writers express doubts about the compatibility of systemic ideas such as circularity, objectivity in parentheses, the not-knowing position and self-reflexivity with the court's need for truth and certainty. On the other hand they reveal a strong sense not only that they have a duty to use their skills to promote the welfare of children and families wherever they can, but also that a systemic approach has much to offer the process. Frequently cited advantages in using such an approach include the promotion of co-operation, reconciliation and dialogue, the possibility of wider system analysis as well as the opportunity for using the court process in itself to promote change. These practitioners have obviously devoted much time and energy to making sense of the apparent contradictions and providing a rationale for their decision to undertake the work. This raises the question whether there are any features or characteristics of their thinking, training or ethical position which set systemic "experts" apart from their colleagues who do not undertake the work, or whether their careers have simply evolved differently.

What has been written about reports for court for or by clinicians from other therapeutic disciplines?

There is more literature in relation to forensic work for other disciplines, particularly child psychotherapy, psychology and psychiatry. These include dedicated journals (the Journal of Forensic Psychiatry and Psychology) and text books (for example Welldon and van Velsen (eds) (1996), Black et al (1998), and Bond and Sandhu (2005). Much of the practice described is work with offenders rather than acting as an expert witness. Youell (2002) and Tydeman (2007) have written about their work in a multi-disciplinary service assessing families for court, but the focus is on the particular contribution of child psychotherapy in that

context. Where the role of the expert is discussed, for example in Welldon and van Velsen (1996) p251, the advice tends to the practical (content and headings) rather than to “fit” although the possibility of “feelings of anxiety induced by what may be perceived as a strange, threatening or even hostile atmosphere” are conceded. All draw a clear distinction between putting oneself forward as an expert witness (which requires therapists’ reflection on “whether they have the relevant qualifications and practical experience in the field in question” (Bond and Sandhu 2005 p61)) and becoming involved as the treating therapist.

One of the principle challenges of the work is seen as being the different ways of thinking and understanding between the world of therapy and the legal world; see for example Bond and Sandhu (2005 p4): “the therapist’s trained intuition is a valid source of information...intuition is of much lower standing in law and is often treated with suspicion. Lawyers tend to approach human experience in a very different way”. Similarly Kennedy (2005) comments on the difficulty for an expert witness of finding a language that the court can understand but that does not dilute the expert’s opinion. The court is defined as a place where words are given (p216) “almost magical status”; and where words can (p217) “give the impression that we all know what we are doing, when quite often we are struggling with uncertainty”.

Strasburger et al (1997) argued that there is an irreconcilable role conflict in serving as both a psychotherapist and an expert witness: (p449) “treatment in psychotherapy is brought about through an empathic relationship that has no place in, and is unlikely to survive, the questioning and reporting of a forensic evaluation. To assume either role ..is to compromise one’s ability to fulfil the other”. Other legal requirements which are identified as irreconcilable with therapy are the search for truth, the reasonable degree of certainty, the emphasis on pathology, the outer, “real” world, time limits and constraints on confidentiality.

A multi-disciplinary team set up to carry out assessments for court in response to the proposals made by the Chief Medical Officer Sir Liam Donaldson in his report “Bearing Good

Witness” was described by Millard (2008). It is interesting that the original team included a systemic/family psychotherapist in addition to other disciplines, but the rationale for the skill mix is not explained. If one analyses the number of disciplines and professions which constitute all the pilot teams set up in response to “Bearing Good Witness”, systemic psychotherapists represent 5%.

The Psychotherapist (the journal of the United Kingdom Council for Psychotherapy (UKCP)) produced a special edition on expert witnesses in Spring 2009. North in the editorial comments on her discovery in acting as an expert witness that (p13) the British justice system has a “human face” and on her deep respect for the effort that judges put into making well-informed decisions about children. Braier (2009) identifies the difficulties of working therapeutically with “findings of fact” for example in relation to abuse which is denied by the parent. Westmacott (2011) suggests that the courts are not good at identifying the most appropriate expert to instruct or in understanding significant issues (such as the distinction between psychiatry and psychology) and argues therefore for increased dialogue between lawyers and psychological experts.

It is interesting that where textbooks are discussing this issue in relation to the talking therapies generally rather than to specific professions (for example Kennedy 2005), there is often a notable and surprising omission (“when it comes to interviewing and assessing children and families, a number of different professionals have a role to play, including the child psychiatrist..the child psychotherapist,.. the clinical psychologist..and social workers.”) One wonders how far the “visibility” of systemic and family therapy in this context is connected to the way in which expert witnesses are recognised and recruited (given that, as Bond and Sandhu (2005) point out, there is no fixed test to qualify as an expert witness), and to the part which personal and geographical connections play in developing inter-professional knowledge. Mitchels (2009) who is both a solicitor and an expert witness, describes always choosing experts whose work she knows, or who are strongly

recommended by trusted colleagues. The Dartington Conferences (a series of interdisciplinary conferences on the theme of family justice) appear to have evolved from the existence of a course on forensic psychotherapy at the Portman Clinic and to have thus developed the reputation of privileging a psychodynamic approach. Research (Brophy, Wale and Bates, 1999) shows that psychiatrists and psychologists are the major providers of expert evidence.

In comparing the position of other “expert” disciplines to the process of preparing reports for court with that of the systemic “experts”, there seems to be a much greater emphasis on distinguishing – indeed keeping clearly apart – the functions of assessment and offering therapy. This is in direct contrast to the systemic writers who see the possibility of change occurring in the assessment process as a positive advantage and even something at which to aim. Within the psychodynamic model there is a clear belief that the reporting process would have a negative impact on the relationship with the “client” which would preclude the possibility of any useful therapy. In contrast the emphasis within the disciplines of psychiatry and psychology tends towards diagnosis and the application of tests and screenings which can produce results which appear more “scientific”. It will be important in analysing the data, particularly the judicial interviews, to see whether and how far these distinctions and beliefs emerge. It will also be important to pay attention to the process by which mental health practitioners become “recruited” as experts in order to have a better understanding of whether the preponderance of psychological and psychiatric “experts” is the result of systemic practitioners failing to make themselves available for the role for whatever reason or not being given the opportunity.

What has been written about reports for court from a legal perspective?

In considering the legal literature on expert witnesses I include references to expert witnesses in general but exclude material which relates to any kind of expert evidence other than psychological. Mackay et al (1999) in explaining the admissibility of psychiatric and

psychological evidence (which was first allowed in 1896), refer (p322) to the “sceptical and cautious attitude” towards it of the judiciary, and draw attention to the “Turner Rule” of 1975 which states that the qualifications of an expert do not necessarily make his (sic) opinion on matters of human nature within the limits of normality any more helpful than that of the jurors (this being in a criminal context).

In this part of the review I have chosen to summarise only those aspects of the literature which relate to the more complex philosophical and ethical elements of the interface between systemic therapy and the family courts: there is a great deal of practical advice (for example, about the layout of the report, the arrangement for payment of fees, the timetable for various stages of the proceedings) which are not significant to the research question.

Brophy et al (2001) describe (p10 -11) the Children Act 1989 as creating “a new and very different landscape for the work of expert witnesses in child proceedings” in that courts in public law cases now required more help in establishing whether a child was suffering, or likely to suffer, “significant harm” (the “threshold” question). The 1989 Act required experts to advise on what might happen to children as well as what had happened: it also broadened the field of harm to include emotional and psychological damage as well as physical, thus opening up more possibilities for experts other than the purely medical to become involved. Brophy (2001) also describes a number of research projects on experts undertaken during the 1990s (Bates and Brophy 1996, Brophy et al 1999) which identified how demand began to exceed supply and raised concerns about the quality of reports.

Lord Woolf (1996) in his review of the wider civil justice system identified the cost to the system of appointing many experts as interfering with access to justice. Different parties to proceedings were each instructing their own expert (the “hired gun” or as Woolf more diplomatically says the “partisan advocate”). This led in 1998 to Part 35 of the Civil Procedure Rules which emphasised (para 35.3) the expert’s overriding duty to the court rather than to an individual party, and also encouraged (para 35.1 and 35.7) the appointment

of one expert jointly instructed by all parties to give evidence only on “that which is reasonably required to resolve the proceedings”.

In 2003, the *Every Child Matters* Green Paper was published to consult on the proposals made in the report of the same year of the formal enquiry into the death of Victoria Climbié. These proposals were broadly supported and subsequently enacted by the Children Act 2004. Its main purpose was “to create clear accountability for children’s services, to enable better joint working and to secure a better focus on safeguarding children” (Explanatory notes summary para 4 2004). The relevance of this Act to the area of expert witnesses is in section 11, which clarifies that the National Health Service is expected to play a greater part than previously in procedures to safeguard children. This may have created expectations that more professionals working in the health service would be prepared to take on the role of expert witness in private as well as public law cases in the interests of joint working around children.

The Review of Child Care Proceedings System in England and Wales (2006) identified a number of issues as being significant for outcomes for families and children and for efficient use of resources, which include (p3) : “unnecessary delay, which is caused by a complex set of drivers, including .. expert evidence that takes a long time to commission and / or is requested late in proceedings and / or does not provide suitable guidance for the court”. The concern about delay and its negative impact on children (the average time taken for public law cases was identified as being 51 weeks in care centres and 42 weeks in magistrates’ courts) led in 2008 to a new Public Law Outline with its emphasis on agreeing timetables for all aspects of the proceedings and on strong judicial case management. A new Practice Direction for Experts was associated with this initiative. The pressure to produce reports within a certain time frame (family judges in the Midlands Region at the time of writing are only commissioning reports from experts who can deliver reports within three months) inevitably affects both the nature of the reports and the ability and willingness of practitioners to undertake them.

Alongside these changes, the Legal Services Commission, the body responsible for administering the annual £2 billion legal aid budget, and thus the payment of the majority of expert witnesses, were concerned at the ever-increasing cost of experts. It identified (p3 of the 2008 Alternative Commissioning of Experts Pilot) an increase in cost of 50% over the 2 years to April 2007, as well as problems of a shortage of suitable experts. It therefore commissioned a pilot project to recruit the multidisciplinary teams envisaged by Donaldson. Further pressure was put on the LSC's budget following the election of the coalition government in May 2010 and legal aid became unavailable to most private law cases in the family courts. The Consortium of Expert Witnesses (2010) report to a parliamentary select committee identified that funding issues were a major factor in deterring experts from acting for the courts. The rates payable to experts have reduced and an informal survey undertaken by the Thames Valley Child Care Group in 2012 shows that many are withdrawing their services as a result.

The report of the Family Justice Review (Norgrove, 2011) comments (p117) on a trend towards "increasing and unjustified use of experts". A recent file study by the Ministry of Justice apparently showed that experts were used in 92% of care proceedings, with an average of 3.9 reports per case. Concern focuses not only around the delay involved for the child, but also on the effect of repeated multiple assessments. Norgrove's recommendations include greater judicial involvement in establishing a clear reason why an expert report is needed and setting out the questions the expert is to be asked to address. He also suggests another (wider) pilot on the use of multi-disciplinary teams for expert assessments with more involvement from the NHS. This is significant for potential systemic experts as so many systemic therapists work in the NHS rather than privately. Other ideas include "in-house" experts working permanently as part of the court team, and "hot-tubbing" or the giving of concurrent evidence to develop an in-court dialogue where several experts are involved. The judicial proposals for implementation of the review (Ryder 2012) include the comment (p8)

that reports are often “long on records and short on analysis” and that experts are “misused and overused”. Additional training is planned for the judiciary on the use of expert evidence.

Lord Justice Wall on becoming President of the Family Division in 2010 emphasised the need for judges to become more active or “interventionist” in case management (for example, in a discussion in October 2010 on the radio programme “Law in Action”). It remains a question of current debate as to exactly how far this intervention should extend in the matter of commissioning and instructing expert witnesses. Pearce et al (2011) identified (p59-60) an “increasingly heavy emphasis on experts’ views in terms of parenting capacity and children’s needs. These views have replaced both social work and legal judgments on welfare issues. Lawyers rely on experts for the content and direction of their advice, and therefore seek assessments to provide them with a foundation for their representation. Where experts’ opinions are adverse to the parent, representation can involve strong encouragement to settle. Judges rely on expert evidence in coming to their decisions. In this way judges share the burden of these difficult decisions with knowledgeable, independent professionals. Cases come to decide themselves through the accumulation of expert evidence.” Experts are usually suggested and identified by the parties’ legal representatives rather than by the judges, so there is an element of networking which will be further discussed in relation to my research findings.

Practice Direction 35 (2012) outlines the requirements for “experts and assessors”: “Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation... experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate...Experts should consider all material facts, including those which might detract from their opinions. Experts should make it clear when a question or issue falls outside their expertise; and when they are not able to reach a definite opinion, for example because they have insufficient information”.

There is also some relevant case law: for example *Re R* (1991) emphasised that expert witnesses should be objective by including relevant facts even if those facts do not support their opinion. *Re M* (1994) stressed the importance of experts being fully instructed, making sure that all the evidence on which the report is based is available to the court, and being kept up to date on developments in the case. Wall, a high court family judge, in his handbook for expert witnesses (2000), emphasises as the highest context in the role of the expert that of helping judges to make the “right” (p1) decision about a child’s welfare; he also comments on the non-adversarial nature of the process (the expert should not be supporting one side against the other) and distinguishes the confidentiality of the court (that is, only certain parties are allowed access to information) from the idea that anything can be kept confidential from the court. Where a judge is attempting to establish a “fact” (for example, whether or not an injury occurred), he advises (p11) that the “safest way of expressing your opinion about a... particular condition is that it is ‘consistent’ or ‘inconsistent’ with a given set of facts”. Experts are free to express opinions providing the opinion relates to a matter on which they are “qualified” to give expert evidence. This point is amplified in the (2008) practice direction for experts in family proceedings relating to children, which refers to the duty (p6) to confine their opinion to questions “that are within the expert’s expertise (skill and experience)”; reports are expected to “make clear which of the facts stated ..are within the expert’s own knowledge” and to highlight whether a proposition is a hypothesis (especially if controversial) or (p8) “an opinion deduced in accordance with peer-reviewed and –tested technique, research and experience accepted as a consensus in the scientific community”. Malek (2010), writing on the rules of evidence, illustrates this distinction by comparing an expert’s ability to (p1075) “identify facts which may be obscure or invisible to a lay witness”, such as a microbiologist identifying a microbe, from the inferences which are drawn from those “facts” (“the question of subjective assessment and interpretation which is the essence of opinion evidence”).

Cantwell and Mantle have both written extensively about the ethical and practical issues connected with assessing families and writing reports for court from the perspective of the Children and Family Court Advisory and Support Service (CAFCASS) practitioner. I have chosen to reference those articles which connect significantly either to systemic ideas or to issues which emerged during the research. Cantwell (2004) suggests that the kind of assessment which might assist the court would include thoughts as to how courts could assist families rather than become part of the problem, creative hypotheses about the function of entrenched conflict, and a broad understanding of how the parents' life experience connects to their current behaviour. He also identifies the scarcity of any resources such as family therapy to which families may be referred subsequently. In 2007 he talked (p747) about the relevance to private law cases of the systemic idea of "stuckness" and the way in which the professional system can become part of the problem. Cantwell (2010) highlights that whilst CAFCASS officers are very well-versed in responding appropriately to some aspects of safeguarding, it is much more difficult to identify the emotional abuse connected with conflicted private law cases. Mantle (2003) writes about the difficulties of representing the child's voice in report writing and (2008) presents research findings which illustrate ways in which "assessment" for the court can merge into "intervention".

The major theme that emerges for me from this review is the number of drivers that have been apparent over recent years within the overarching framework of safeguarding children.

These include:

- the desire to improve the quality of expert evidence
- recognition of the need to increase the pool of available experts
- the need to reduce reliance on experts and the associated cost
- the helpfulness of good expert input in making complex and life-changing decisions about families

- the need to keep proceedings (and therefore the time taken for assessment) as short as possible
- the need for impartiality
- the need for advocacy of the marginalised
- the relative benefits of assessment by a single expert or a multi-disciplinary team.

It is obvious that these drivers often conflict with each other and that the relative weight given to each changes according to Government and legal policy. It will be interesting to reflect how experts and judges compare in the way they make sense of and work within this confusion.

What research has been done about writing reports for court?

King (1991) interviewed seven mental health professionals who acted as experts for the courts and concluded (p277) that “the impression gained from several of the interviews was that the legal rules and procedures, far from assisting in the search for truth, actually obstructed that search”. Information about relationships was considered too complex and inaccessible to be translated into legal language and one psychiatrist commented (p278) that she was disturbed by the way the law “required her to turn something which is not objective into objectivity for the sake of the kind of dialogue that we must have in court.” Other participants were unhappy about the adversarial nature of the process in which judges became “aloof arbiters” and the inappropriateness of making once and for all decisions about children.

Tuffnell, Cottrell and Giorgiades (1996) compared the views of child psychiatrists, judges and other parties to family cases such as guardians ad litem as to what constitutes good practice for expert witnesses. They identified (p365) that “feedback to experts by ‘user’ groups, such as judges, is often lacking” and (p366) that “little is known about how expert reports influence judicial decision making, and we know of no evaluative studies”. To date I have not found any research in the field of family law that has filled this vacuum since. Genn

(2008), in her Hamlyn lectures reviewing civil justice, commented with surprise on the lack of research in this country into how judges make decisions, compared with other jurisdictions. Herlihy et al (2010) analysed the assumptions about human behaviour made by judges in making judgments about asylum claims. Some doubts were raised as to how far the assumptions were in line with current empirical evidence. A similar question is raised by Kaganas (2011), who analysed judgments in contested contact disputes.

Brophy and Bates (1998) researched the commissioning of experts by guardians ad litem in complex cases following the Children Act 1989, using a case vignette. They identified that the majority of experts appointed were child psychiatrists (some on the basis of a “national” reputation). Factors influencing choice of expert in addition to reputation included experience in a particular field (e.g. child sexual abuse), status, location and personal knowledge. One respondent (p52) stated: “I’d want a child and family psychiatrist for this, probably a ‘systems’ person”. Most guardians favoured assessments over time with a particular emphasis on capacity to change. There was agreement about the limited availability of trusted experts, and it appeared that local availability and familiarity with the quality of assessment likely to be produced were possibly as influential in the choice of expert as perceptions of boundaries between different disciplines. The authors commented on the lack of any formal system of mandatory training and accreditation for experts, as well as the lack of peer support. Brophy Wale and Bates (1999) conducted a national survey of the use of experts in child care proceedings. They found that the great majority of expert reports were sought from psychiatrists and psychologists (this does not of course preclude their being systemic in orientation, but it does suggest that systemic psychotherapy is of itself not necessarily as highly valued).

Brophy et al (2001) researched the views of medical consultants who were involved as experts in public law cases. A number of tensions were identified between the discourses of law and “child welfare knowledge” which included:

- the ethics of making recommendations about future treatment: should these be based on the child's needs or what was actually available? Is it appropriate to make a recommendation for another clinician to follow up?
- is one working for the court or the child? Is one "doctor to the family" or "an adviser to the court" (p26)
- The needs of the court for "hard" (physical forensic) evidence against the "soft" evidence of psychiatric and psychological experts. Whilst it was felt that in America this had resulted in "medicalised" language (e.g. sexual abuse accommodation syndrome), there was evidence that in this country there was an ongoing negotiation to resist pressure to oversimplify: one participant commented (quoted p 84) "I never cease to be amazed at how competent good child care lawyers are in grasping the important basic issues"

Other significant findings were that consultants felt that the possibility of cross-examination ensured a "well-disciplined framework" (p87) to their reports and saw it as part of the job, and also that some pitched their reports to parents ("I try to explore in my report ways in which the family could be helped by reading [it]" quoted p64).

Brophy et al (2005) interviewed ethnic minority parents who had been involved in care proceedings and their solicitors about the experience. In relation to expert reports, they found that there was considerable variation in the extent to which attention was paid to the family's cultural and religious background. This led sometimes (more likely in the case of psychological assessments) to a sense of having been treated unfairly. Brophy's (2006) review of research findings in relation to care proceedings confirmed the view that the majority of expert reports (other than paediatric) are provided by psychiatrists and psychologists, and also highlighted once again the shortage of experienced and trusted people to undertake the role.

Concerns about the quality of experts' reports had been raised by the quashing in 2003 of Sally Clark's conviction in 1999 for the murder of her baby sons, a conviction which had been largely based on the evidence of paediatrician Dr Roy Meadow. In his introduction to *Bearing Good Witness* (2006), the Chief Medical Officer Sir Liam Donaldson cites the Clark case, along with others, as being the context for "growing public unease about miscarriages of justice arising from the quality and validity of evidence given by medical expert witnesses in the courts". He therefore sought to review "the use of medical expert witnesses within the family courts, and specifically in public law Children Act cases. It aims to identify the main problems with the current system and make proposals both to resolve them and to secure a sustainable supply of competent, quality-assured medical expert witnesses for care and supervision cases in the future." A quantitative survey of clinicians was undertaken to assess their experience or otherwise of acting as an expert witness, and their attitudes towards undertaking this kind of work. The survey concluded that, although it had been set up in response to concerns about the quality of expert evidence, the problem was actually more of supply. Clinicians were deterred by lack of training, fear of finding the court process stressful and time consuming, and the possibility of referral to the General Medical Council (the report only looked in detail at medically qualified expert witnesses and although other disciplines were consulted, these do not appear to have included a solely systemic body such as the Association of Family Therapy and Systemic Practice(AFT)). Donaldson's recommendations (p27) that "NHS Trusts ...with substantial paediatric, child psychology and psychiatry and/or adult psychology and psychiatry services, should provide medical expertise to the Family Courts through the formation of groups or teams of clinicians within the same specialty or on a multi-disciplinary basis. Teams may include other specialists from within the trust.." opened up the possibility for a wider range of professionals to be involved in this work. Subsequently (2008) the Legal Services Commission initiated a pilot project whereby six multi-disciplinary assessment teams were set up on the model suggested by Donaldson across the country; only two of those teams included systemic psychotherapists. The pilot was evaluated by qualitative research undertaken by Tucker et al (2011); their conclusion was that use of the pilot teams had been too limited to evidence definitively the value of multi-disciplinary teams. However, it

was argued that these teams had potential for increasing the supply of quality-assured experts although lawyers (both judges and solicitors) would need to be persuaded to give up some of their current control over the choice of expert. An interesting finding (p31) was dissatisfaction among the key stakeholders (guardians, solicitors and judges) with the mix of experts within the teams: the ideal model was felt to be (p87) “ a multi-disciplinary team capable of providing a ‘one-stop’ approach in the majority of cases. This suggests that expertise in paediatrics, adult psychiatry and psychology, and child psychiatry and psychology are all required within the team” (note that systemic therapy is omitted again). The recommendation was for further trials, with the suggestion that in order to maximise the possibility of a successful outcome the NHS would need to become more involved.

A study was recently (Ireland 2012) undertaken on behalf of the FJC into the quality of expert reports in the family courts. The experts evaluated were all psychologists and the criteria used to evaluate quality were:

- ability to show appropriate qualifications and expertise for the instruction given
- the correct use of evidence based, current and valid assessment tools in any psychometric assessment
- avoidance of irrelevant comment or observations about subjects of assessments
- transparency of methods used for assessment, including whether any other individuals have undertaken any part of the assessment
- the importance of drawing report conclusions that are clearly grounded in the facts adduced, and relevant to the instruction provided.

The conclusions were that further research was needed, and that it would be helpful to extend this to other disciplines. Particular concern was raised about the fact that some of the “experts” were not appropriately qualified, and that nearly all of them were full-time “professional experts” rather than having an ongoing connection with practice: that is, expertise was seen to be enhanced by continuing clinical practice. Such findings contribute

both to an increasing scepticism about the usefulness of expert evidence and to more recognition of the need for well-informed legal participants in the process of commissioning expert reports : for example Cooper (2012) reports on a debate hosted by the Family Justice Council in October 2011: “Experts in the Family Courts: are they worth it?” The conclusion was (p 197) that “generally... they are and when they are not, the problem sometimes lies with an erroneous judicial decision or a less than ideal letter of instruction”. (The “letter of instruction” is the document which encapsulates the questions that the court requires the expert to answer. The content is agreed in principle by all parties at previous hearings but is usually prepared not by the judge but by one of the solicitors.)

A multi-disciplinary assessment team at the Maudsley (Redfern et al 2012) reviewed cases assessed over a period of a year for public law care proceedings. The team’s composition is psychiatrist, psychologist and social worker. The team identified the usefulness of the team approach in identifying previously unrecognised developmental disorders, educational and mental health needs and in creating opportunities for disclosures. They also found that parents were sometimes better able after the process to prioritise their child’s needs, thus reducing the court time spent on contested cases.

It is hardly surprising that the research highlights many of the same issues in relation to mental health professionals acting as experts as have already emerged from other literature. I would highlight particularly misgivings about the compatibility of different discourses, discomfort with the forensic setting, and the lack of feedback for experts on how their work is received. What provokes further thought is the overwhelming emphasis on public law. I am left wondering how the situation compares in private law cases and how one should understand the comparative lack of research in this area. I am also curious that the lack of any requirement for formal training or accreditation for experts has previously received so little attention until the recent (2012) FJC report. Should we be concerned if an expert is “full-time” rather than having a foothold in other types of practice? What is the

relevance of this issue for systemic experts? Finally Cooper's (2012) research raises a new question about the quality of the letter of instruction, and in turn about relevance of shared (or otherwise) understanding not only between experts and judges but between experts and other lawyers involved in the process.

How far is understanding shared? What are the areas or issues with potential for a difference of understanding?

"Interference of the law and other social discourses does not mean that they merge into a multi-dimensional super-discourse, nor does it imply that information is 'exchanged' among them. Rather, information is constituted anew in each discourse and interference adds nothing but the simultaneity of two communicative events" (Teubner 1989).

"One clear example of a psychological version which will not fit easily into law is that of Family Systems Theory" (King and Piper 1995).

"I find little opportunity to use a systemic approach in this type of work – I also doubt that lawyers would appreciate it" (child psychiatrist who acts as expert witness reported by Tufnell 1993).

"I have long thought that we are the only institution left that believes in Objective Truth. Good luck to Sue from me - I can see that she is actually onto something..." (anonymous comment from a senior family judge in 2009).

(Doctor member of the FJC's experts working group referring to a recent public law case)

"the expert ...reports...demonstrated both conflict of 'observed fact' as well as conflict of interpretation. This is partly due to the very different natures, professional cultures and epistemologies between law and medicine..." (Payne 2012 p 1386)

These quotations encapsulate a general sense from the literature review to date that while it may be possible for systemic ideas and approaches to be useful in a legal context, there is

some potential underlying incompatibility (possibly in terms of epistemology – how we know what we know- or ontology – what our beliefs are about the nature of reality and truth) to which attention will need to be paid in order to achieve this. In this section I will try to locate this more firmly by looking at similarities and differences in the underlying beliefs and theory of both contexts. My own experience in training as a systemic therapist is that there has always been a strong emphasis on connecting the daily practice of the discipline to its theoretical and epistemological underpinnings, and this interest was certainly shown by the systemic participants, as will be evidenced in the analysis of their contributions. When I wrote the proposal for this research I wondered whether there would be the same interest from the judiciary. I asked a family court judge to suggest some relevant up to date reading on the philosophy and theory of law and was told “I can’t help: I haven’t studied any jurisprudence for forty years”. To an “outsider” who has been trying to review the relevant legal literature there seems to be some distinction between case law/practice issues and academic analyses on the nature of law and the two spheres do not appear often to cross-reference each other: for example Hart’s Concept of Law (1961) does not reference any case law. Galanter (2006) argues that legal academics, judges and lawyers are more attracted by “text” than by “context” and more interested in the deconstruction of arguments than the collaborative process of exploring the legal world.

An exhaustive review of the theoretical underpinnings of the practice of either systemic psychotherapy or the law is beyond the scope of this project and I have therefore tried to use some examples to give a flavour of different viewpoints from the two discourses: this will include differences within each discourse as well as between them.

For the last thirty years there has been a trend towards post-modernism in family therapy: for example in the introduction to their collection of papers on therapy as social construction, McNamee and Gergen (1992, p2) refer to therapeutic discontent with the traditional or “modernist” view of “therapist as scientist” as a “gathering storm”, and also identify (p4) “ a

generalised falling-out within the academic world with the traditional conception of scientific knowledge”, whilst Held (1995) critiques “antirealist therapies”, which illustrates the tradition of debate within the discipline about the usefulness of post-modern ideas. Rivett and Street (2009) say that it is not surprising that family therapists became excited by post-modern ideas as within the discipline there was a tradition of seeking exotic and challenging philosophical ideas.

I have chosen to take as a starting point for looking at attitudes to this “post-modern” thread within systemic therapy the Leeds Family Therapy Manual (Pote et al 2003) which has been accepted as the definitional standard for research purposes and lists eleven “organising principles” for systemic practice. (I am, however, aware that there many different strands of systemic thinking and that there might be considerable argument about the interpretation and application of these principles. This might be affected by the date of the therapist’s training or even by the theoretical orientation of his or her training establishment). Below I have selected and summarised those principles which have particular relevance for the process of reporting to courts and will concentrate on connecting them with some key theorists within the systemic literature, and in considering them in relation to the legal literature.

The central focus is on the system and relationships rather than the individual; in understanding relationships and difficulties within systems it will be important for the therapist to consider the connections between circular patterns of behaviour, and the connections between the beliefs and behaviours within systems. It is easy to forget that systemic/family therapy is a relatively new discipline but from its beginnings in the 1950s (Bateson et al 1956) through subsequent theorists (for example, Satir 1967, Walrond Skinner 1976, Burnham 1988, Jones 1993, Dallos and Draper 2005) this principle has remained unchallenged. The reason I have chosen to highlight it here is because most of the experts instructed by the courts are, by training and practice, experts in **either adults or**

children and reports may therefore be more likely to be about individuals. Personal communication (2012) with a number of experienced “experts” attending a workshop on using attachment ideas in making assessments revealed a great deal of discomfort and lack of confidence in the idea of moving away from individual towards relational assessment.

People cannot make assumptions about what meaning will be attributed to the information they offer/contribute to others. The importance is stressed of giving precedence over the concept of a single external reality, the idea that meaning is created in the social interactions that take place between people and is thus context dependent and constantly changing. It will be necessary for the therapist to be alert to their own constructions, functioning and prejudices so that they can use their self effectively with the family.

Maturana (1988) has been particularly influential on the theory and practice of systemic therapy in advocating the position that “facts” and “reality” are constructed in interactions between people, and that therefore we cannot claim to have any “objective” knowledge of the world or to be able to pass that knowledge on either because there is nothing “out there”, or because we cannot be sure of “knowing” it accurately. There may therefore be multiple truths about any situation depending on the position from which it is seen and who is seeing it. There can be no guarantee that a communication will have the same meaning for the communicant as was intended by the communicator. Equally influential have been the ideas of social constructionism (Shotter 1993 and 2004, Pearce 1994, Hoffman 2007) that meaning and the “realities” of daily living are created and maintained within communication and social interaction.

This position would appear to be inconsistent with the idea that it is possible to give an entirely “objective” report as required by the practice directions for experts, or even that law is open to the influences of other disciplines. The “closed” nature of law has been argued by other theorists than Teubner: for example the positivists Kelsen and Hart. Kelsen’s (1970)

theory of law was that it should be “objectivist and universalistic. It aims at the totality of law in its objective validity ...in this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgments” (p191-2). Similarly Hart (1958 p 601-2) argued that a legal system is a “closed logical system in which correct legal decisions can be deduced by logical means ...without reference to social aims, policies or moral standards”.

However, there is also a strong strand of thinking within legal theory and practice which challenges this positivist position. Wendell Holmes said (1918) that “A word is not a crystal, transparent and unchanging, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used.” American Realist Llewellyn (1930 p 34) questioned the relationship of the “facts” on which the court makes a decision to “the brute raw events which happened long before”. (Sheppard (2008 p xii) said of Llewellyn that he “saw law as much more the result of events than of logic...[Llewellyn] would say that rules alone are worthless and that the law is best seen as what officials do in fact”).

From a critical legal perspective Goodrich (1987) discussed the connection between the “sciences” of linguistics and jurisprudence, and criticised the idea of law as a closed autonomous system, arguing (p80) that a “positivistic conception of the unity of law and of the determinate language of the normative order” consciously or unconsciously leads to elitism and exclusion from participation in the legal process. He further identified the rhetorical or persuasive aspects of legal discourse, which confers on itself the possibility of “relexicalisation” (p180) or of appropriation of other languages or vocabularies. Goodrich called for the development of an interdisciplinary study of law which might “critically articulate the internal relationships it constructs with other discourses” (p 212). Smart (1989) saw the use of the term “law” as a claim to power which “disqualifies women’s experience and knowledge” and allows judges to exercise “legal imperialism” (p13) and to encroach into the

domains of other discourses (such as the emerging “psy” professions) by retaining the authority drawn from legal scholarship. Valverde (2003) suggested that the “epistemological workings of law” (p3) could not be reduced to any one general thesis and that different fields and situations exhibit different logics. She argued (p225) for the “continuing importance of intermediate and *hybrid knowledges*” (my emphasis).

Cotterrell (2001), a socio-legal theorist, challenged the logic of Teubner’s theory on the basis that conflict between law and other subsystems of society must surely be in a strict sense impossible, because they do not recognise each other: “Each sees nothing to oppose” (p92). Cotterrell suggested that what can actually be experienced are “stable patterns of action and understandings, associated with particular groups or social environments” (p99) and that these should be the focus of enquiry. Elsewhere (2006) Cotterrell proposed (p3) that “...law has no unified way of looking at the world, no “truth” of its own... Legal ideas are the varied understandings of lawyers, judges and other participants in legal processes.” Even a classic textbook on the rules of evidence (Malek in Phipson on Evidence (2010 p1070) contains the surprisingly post-modern comment that “the distinction between fact and opinion is ultimately one of convenience rather than an objective reality; all sensory data is mediated by our powers of perception, assimilation and expression”. So it appears that my original assumption of a clear dichotomy between systemic postmodernism and legal modernism was far too simplistic. In particular it will be interesting to consider how far the interactions between experts and the judiciary are contributing to the development of “hybrid knowledges”.

Also challenging in this context may be the “second order cybernetics” idea that any “observation” cannot be seen as objective because the presence of the observer will affect the observed system. The theory that the prejudices and assumptions of the observer will affect both what s/he observes, how s/he observes it and the conclusions that s/he draws

from the observation has also been hugely influential on systemic practice (Hoffman 1985, Atkinson and Heath 1990, Cecchin et al 1994).

Anderson and Goolishian (1988) argued that in the field of therapy individuals and families should be seen as the “experts” on their lives and a “not-knowing” or **non-expert** stance should be advocated for systemic therapists. This idea has provoked much continuing discussion within the field; Cade for example (1992) took issue (p30) with the “current pre-occupation in our field (dare I say, sometimes a somewhat sanctimonious one) with denying completely the validity of the role of expert, or even of expertise itself” and argued that the role of expert can be taken in an empowering way. The debate continues (Larner 2000, Anderson 2005); with Rober arguing (2005) that the “not-knowing” stance pays too little attention to the practitioner’s inner dialogue and Anderson saying in 2007 (p49) that the therapist uses knowledge as “food for thought and dialogue” rather than being “authoritative, objective or instructive”, offering knowledge in a “tentative and provisional manner”, and in 2012 (p10) that “creating theories..truths...realities or how-tos is an interactive interpretative process of social discourse” resulting in the elimination of the “dichotomy between knower and not-knower” through taking a stance (following Shotter 2004) of “witness” not “aboutness”. Ireland’s (2012) research has shown that in the instruction of expert witnesses there are difficulties even about the practical definition of what qualifies someone to be seen as an expert, and I can find no evidence of any epistemological or philosophical attention being paid to the question.

On the question of “prejudice”, Genn (2008) highlights the lack of any research in this country (at the time of writing) on judicial decision making. Research from America suggests that alongside the “legal model” (interpreting the law as well as possible) sit the “strategic” model (considering the effect of the decision on broader outcomes) and the “attitudinal” model (decisions based on personal preferences, preconceptions and values). Whilst the American Realist Frank ‘s (1931) view that “the stimuli affecting the judge x the Personality

of the judge = Decisions” was described by Leiter (1997 p 269) as an “extreme”, Lord Carnwath’s (2013) claim (p19) that his approach has been to consider whether something had gone wrong which required the intervention of the court, and “if the answer appears to be yes, then one looks for a legal hook to hang it on”, appears to fit Frank’s equation. However, I have been unable to identify much legal literature which evidences any interest in reflecting on the effect of personal “prejudices” in judicial decision making; presumably if individual judges were to make such reflections publicly (as many therapists do) they might offer grounds for appeal from any future decision: see for example the appeal in *Timmins v Gormley* (1999). On the other hand Thorpe (1997) reflecting on what judges stand to gain from a greater understanding of the theories of Winnicott, Bowlby and Anna Freud, commented (p 6) that one gain was the possibility of better understanding of oneself: “there is an obvious risk that the decision may be dictated or distorted by a pre-disposition...the danger is the prejudice of which he is unaware”. (This article also gives further food for thought on the significance of personal relationships in promoting cross-disciplinary thinking, of which this thesis is one example. Lord Justice Thorpe was married to a child psychotherapist).

The therapist should consider the importance of context, in relation to the cultural meanings and narratives within which people live their lives, including issues of race, gender, disability and class etc.; the therapist should pay attention to the power differentials that exist within the therapeutic relationship, and within the family relationships. The therapist should take a non-pathologising, positive view of the family system, and the current difficulties they are struggling with.

This principle, following for example among many McCarthy (1994), whose “fifth province” approach has been described earlier in the review and Burnham (2012), invites practitioners to take an ethical and reflexive position in relation to social difference and to inequality. Many of the families who come before the courts (particularly in public law cases) are marginalised in various ways. Equally individual family members may be marginalised or

disadvantaged within families, for example by virtue of gender, disability or age. The “expert” and the court process have enormous power over the lives of such families and individuals: power to remove children permanently, to return them to abuse. Judges often refer to the sense of responsibility and stress that they feel in making such decisions (for example Thorpe 2007 and Wall 2010) and an awareness of suggestions of prejudice; for example against fathers. The following is quoted on behalf of Fathers for Justice by Langford (2012): “Family law in this country is a perversion of the course of natural justice. It trashes lives, destroys childhoods, tears families apart, strips them of their savings; it even pitches parent against parent. It criminalises and crushes you before suffocating you with a blanket of secrecy and censorship. It is like being buried alive”. Experts are not immune to such criticism either: John Hemming MP (P v Nottingham City Council & the Official Solicitor 2008) compared them to witch finders and implied that the primary motivation for undertaking the role is financial (para 95): “that essentially is much like the witching courts ... The similarity goes as far as the amounts of money made by various expert witch finders.... ... The outcome for the expert is more money in the bank. The outcome for the other parties to the case is often massive damage to their quality of life (prison, removal of children etc)”. Experts have also been the butt of Private Eye’s satire (2012):



‘Shaken judges’ scandal grows

BY OUR FAMILY COURT STAFF CAMILLA CAVENDISH-SQUARE

A NUMBER of senior members of the judiciary have shockingly been diagnosed as suffering from “shaken Judge Syndrome” or (SJS), after realising that they had been responsible for appalling miscarriages of justice in the family courts.

The judges in question had previously been perfectly happy to order children to be removed from their parents on the basis of “expert” evidence that parents “must definitely have been abusing their kids because it stands to reason”.

When it was revealed that these experts had never met anyone involved in the cases, and were being paid thousands of pounds by social workers for producing nonsensical reports, one judge, Lord Justice Harvey Wallbanger said, “We are all shaken to death by these terrible revelations.

“These so-called experts are clearly guilty of abusing the judiciary and should be removed from their families at once, for this is the only language such people understand”.

Other literature also raises questions about the disempowering or marginalising of certain groups or voices in situations where “experts” are giving evidence (for example Mantle 2003 in relation to children, Raitt and Zeedyk 2000 in relation to women, King and Piper 1995 in relation to “non-experts” in general, and Brophy and Bates 1998 in relation to parents) and will be important to consider how systemic experts think about their relationship with power and with the marginalised and what impact this has.

Systemic therapists have, following Bateson (1979 p15) considered that “without context, words and actions have no meaning at all” and have advocated the skill of speaking into a particular context For example, Cronen and Lang argue (1994 p29), following Wittgenstein’s (1953 para 90, para 304) concept of “grammatical abilities” that “one of the tasks of therapy, consultation or management involves entering into the grammar of the groups which we are working with or relating to at any point”. Shotter (1993) talks about “rhetorical-responsiveness” in focussing on the “formative uses to which words in their speaking are put” and Oliver (1996) develops the idea of “systemic eloquence” or “contexted speaking abilities”. Such ideas, which invite us to consider how we can present our own beliefs, assumptions and practices in a way which will facilitate a “fit” with the contexts into which we are communicating, appear very relevant to the process of writing expert reports. It is worth commenting that there is a power differential for any systemic therapists entering the court process in that they have to “play by the law’s rules” However, Genn (2008) draws an interesting parallel when she argues (p 7) that “effective communication and enabling depends on judges being able to ‘fit’ their approach to the situation and the parties before them”.

I began this project with a hypothesis of potential incompatibility and difference. It seems appropriate to end this literature review with the conclusion that its overall message is to embrace the complexity of the interface between systemic psychotherapy and the law rather

than to try to reduce it to polarities and inconsistencies, and to recognise the enormous variety of beliefs and experience which exists within different disciplines as well as between them. The development of my awareness of this complexity will be explored further both in the following chapter on methodology and in the chapters analysing and discussing findings.

Chapter 3: Methodology

“Judges in the family courts and the family psychotherapists who make reports to them: how far is understanding shared about the nature of this process?”

Rationale for the research

In the introduction I explained the original rationale for undertaking this research. That rationale (of exploring the potential for more systemic psychotherapists to be useful to the family courts by acting as expert witnesses) no longer applies in the same way given the recent changes in the family justice system which have significantly reduced the demand for expert witnesses. Yet some expert witnesses will still be required, and complex family situations will still be the subject of proceedings in the family courts. The question of the compatibility of a systemic approach to this area of practice therefore remains relevant, but the rationale may now include highlighting the implications of the changes for judges, for all expert witnesses but most particularly for the children and families in the system.

What method is implied by this question?

I needed in some way to obtain data both from systemic/family psychotherapists who write reports for courts, and from judges who either commission or receive them. The data should be obtained in a format and analysed in a way which is compatible both with my own epistemological position and respectful of the paradigms of the disciplines who are the “object” of my interest. The questions I wanted to ask were likely to receive complex answers. My curiosity was not informed by an existing body of coherent literature or theory, but by trying to make sense of and compare a variety of “knowledges”, acquired in different ways and contexts. My interest was more than academic: I would like my research to make some contribution, however small, to the disciplines involved which have both enriched my life in different ways.

What kind of data?

It would perhaps have been possible to conduct a detailed analysis of written texts: for example, reports written for court from a systemic perspective, legal judgments which relate to expert reports, or guidelines on how reports should be written or expert evidence given. I could have analysed registers of expert witnesses to attempt to identify how many systemic psychotherapists appear. However, my conclusion was that I wanted to seek to obtain the data for this research directly from professionals connected with its subject matter. An important element in this for me was the hope that the act of my asking some of these questions would of itself stimulate interest in them and possibly further dialogue about them beyond my own “findings”. In this sense it might have some connections with what Kemmis and McTaggart (2000) define as “critical action research”, that is (p568) “the self-reflective collective self study of practice, the way language is used, organisation and power in a local situation, and action to improve things”. I had already experienced this in some small degree in response to initial informal conversations about this project. An important decision was therefore whether I would seek quantitative or qualitative data (or both).

Whose Paradigm? Quantitative or qualitative?

Guba and Lincoln (1994) point out (p105) that historically there has been a heavy emphasis on quantification in science, which results in a “widespread conviction that only quantitative data are ultimately valid, or of high quality”. They go on to critique this position on the grounds that quantitative approaches pay insufficient attention to context and cannot take account of the meanings and purposes of human behaviour. They may also impose an outsider perspective which may have no meaning to those “inside”. In addition generalised conclusions may not fit individual cases and emphasis on “verification” devalues creativity and divergent thinking.

They then proceed to analyse various paradigms (what they define as a set of basic beliefs or first principles which define (p108) “the nature of the world, the individual’s place in it, and

the range of possible relationships to that world and its parts". These paradigms are distinguished by the ontological question ("what is the form and nature of reality?"), the epistemological question ("what is the nature of the relationship between the knower or would-be knower and what can be known?" and the methodological question ("how can the inquirer go about finding out whatever he or she believes can be known?").

I come to this inquiry with a hypothesis that the paradigms of systemic/family psychotherapy and the law might be very different; but even when I first wrote that sentence in my research proposal, I realised that, as I pointed out in my literature review, the idea of one systemic or one legal paradigm is nonsensical. The experience of interviewing individuals "living" in these worlds has only confirmed the naivety of my initial hypothesis. There may be some consensus at some times but paradigms are constantly emerging and evolving in communications between individuals. At the same time questions of ontology (can a systemic/family therapist tell a judge "how things really are" in relation to a family?) and epistemology (what does it mean to be an "expert" family therapist? What kind of knowledge might he/she be laying claim to and how might it be acquired? In what senses can that "knowledge" be shared or passed on to a judge?) are at its heart. I have to take a standpoint (what Willig (2001) calls a "point of departure").

Guba and Lincoln (1994) distinguish between the positions of positivism, post-positivism, critical theory and constructivism; Willig (2001) posits a continuum between naive realism and radical relativist. There are doubtless tens, if not hundreds of other distinctions of standpoint which could be made. Willig for example, quotes Reicher's (2000) distinction between experiential research (which "aims to gain a better understanding of people's ways of thinking and actions") with discursive research "that is concerned with the role of language in the construction of reality". Madill, Jordan and Shirley (2000) distinguish between "realist", "contextualist" and "radical constructionist". For reasons upon which I will expand subsequently I chose to locate myself (at least as a point of departure) somewhere in the

experiential/contextual constructionist camp. I therefore concluded that I was committed to the principle that at least part of my project should be qualitative.

It also seemed to me to be at least a pragmatic advantage, if not also ethically less compromised, that taking such a position might be seen as slightly more neutral or curious (Cecchin 1987) between what I at times conceptualised to myself as the competing paradigms of law and systemic psychotherapy. I hoped it would be easier from this stance to take into account the influence of my training and professional allegiance on the way I approached this research and the analysis of the data.

Complexity and Comparison

My learning in relation to research methodology has been recent and rapid. There was no research element required when I originally qualified and it was only when I began to consider undertaking further training that I started reading seriously around the topic and attending workshops. I have found the most useful experience in preparing to undertake this research was the opportunity to compare methodological approaches in relation to the same data (for example, Burck's 2005 paper), and to try to put approaches into practice, for example during our taught sessions on the doctorate course. I also found the experience of critiquing my final dissertation from a research perspective very enlightening, as it gave me the opportunity to experiment with different ideas of analysis with material with which I was very familiar.

The result of these processes of learning and reflection is that I decided to use Grounded Theory as a method of analysis. Pidgeon (1996) describes (p76) how the Glaser and Strauss, the originators of the term, chose it "in order to express the idea of theory that is generated by (or grounded in) an iterative process involving the continual sampling and analysis of qualitative data gathered from concrete settings, such as unstructured data obtained from interviews, participant observation and archival research". Charmaz (1996 p28) claims that "Grounded theory methods allow novices and old hands alike to conduct

qualitative research efficiently and effectively” She identifies the distinguishing characteristics of this method as including

- Simultaneous involvement in data collection and analysis phases of research
- The creation of analytical codes and categories derived from data, not from pre-conceived hypotheses
- The development of middle-range theories to explain behaviour and processes
- Memo-making (i.e. writing analytic notes to explicate and fill out categories)
- Sampling for theory construction to check and refine the analyst’s emerging conceptual categories
- Delay of the literature review.

The grounded theory method appeared to offer a good “fit” both with my chosen epistemological position (so long as, in Willig’s (2001) continuum, I opt for the “social constructionist version”!), and with the potential data, especially in terms of the lack of substantial pre-existing theory, the potential for constant comparison and for refining emerging categories to change the focus for future data generation, and the potential for analysing and comparing data of various kinds.

I did consider using discourse analysis. Burck (2005, p251) describes how discourse analysts “focus on the way societal discourses are taken up in personal interactions and how discourse is shaped through power relationships, and examine its effect on social identity and relations”, whilst Potter and Wetherell (1987, p55) describe how a discourse approach “shifts the focus from a search for underlying entities – attitudes – to a detailed examination of how evaluative expressions are produced in discourse”. At a workshop about discourse analysis (Speed, 2009, personal communication), there was something of a debate amongst the participants as to where they would place themselves in the realist/contextualist /radical constructionist continuum. I had to conclude, that despite having always considered myself

a bit of a radical, I do believe that it is useful to discuss people's experience (as a practising psychotherapist, how can I not?), and recognised that it was trying to understand professionals' experience of their working worlds, rather than the role of language in the construction of their reality, which fascinated me. I was also concerned pragmatically that using the words "discourse analysis" in connection with my research might suggest the possibility (following for example Foucault 1980) of its involving the deconstruction (or even criticism) of judicial power and thereby lessen the likelihood of judicial participation on the grounds of having some political implications. In the writing up of my findings and subsequent exploration of further reading (for example comparing the ethic of rights with the ethic of care) I have recognised how valuable a discursive analysis of the material would also have been.

Data collection and analysis – the theory

The proposed method of data generation, in addition to the study of relevant texts, was by interview of professionals who have practical experience of the issues in question. I decided to conduct semi-structured interviews, that is (following Kvale 1996 p124)" interviews which have "a sequence of themes to be covered, as well as suggested questions. Yet at the same time there is openness to changes of sequence and forms of questions in order to follow up the answers given and the stories told by the subjects".

I planned to analyse transcripts in accordance with Charmaz's (2006) guide to the practical application of grounded theory, that is moving from initial line-by-line coding ("what is being done here?") to focussed codes which "are more directed, selected and conceptual" (Charmaz 2006 p57), and use "the most significant and or frequent earlier codes to sift through large amounts of data". An important element of this process is memo-writing which give the researcher "a space ...for making comparisons...and for articulating conjectures about these comparisons (p72-3) and which cumulate in the integration of categories into a 'theory'". The emphasis is on constant comparison.

Charmaz highlights (p166) an apparent dilemma in that students submitting a research proposal will have been required to have evidenced some prior knowledge of the literature relating to their chosen topic, although classic grounded theorists (Glaser and Strauss 1967) advocate delaying the review of literature until after the analysis has been completed in order to “avoid importing preconceived ideas and imposing them on your work”. Some of the literature to which I have referred earlier in this thesis has been familiar to me for many years; some I have discovered and a considerable amount has been written since I started the research. It does not seem to be any more problematic to reflect on the preconceptions I am bringing to my data from reading than the ones I am bringing through other life experiences. In my experience the process of “constant comparison” has involved a recursive relationship between the data and “new” and “familiar” literature. I thought it would also be important not to delay the analysis of data until all the interviews are complete, so that later interviews might reflect ideas or questions grounded in the earlier ones. I also hoped to interweave the systemic and judicial interviews to the same purpose. This decision proved fruitful and I will say more about it when I review the development of the semi-structured interviews. I was initially keen to try to conduct all the interviews within a year but for this reason actually allowed two years for the interview phase in my bid to the Ministry of Justice. I had anticipated that it might be appropriate to delay the recruitment of some of the research participants (both judicial and systemic) in order to apply what Charmaz (2006) calls “theoretical sampling” which (Hood 1983) “allows you to tighten up what I call the corkscrew or the hermeneutic spiral so that you end up with a theory that perfectly matches your data. Because you choose the next people to talk to...based upon the theoretical analysis and you don’t waste your time with all sorts of things that have nothing to do with your developing theory”. Again I will say more about this in the review of selection and recruitment. I have learned a lot from attending the seminars where other students’ research is presented and have taken the opportunity to attend data analysis sessions throughout the process of data collection and analysis in order to generate alternative viewpoints to my

own. I have also been hugely indebted throughout to the availability of my research colleagues and supervisors to help me to reflect on how I am positioning myself in these processes.

Quantitative element

I also considered simultaneously undertaking some quantitative research. I was not aware of any statistical information as to how many of the approximately 700 systemic psychotherapists registered with UKCP act as expert witnesses and write reports for court. As part of the research for "Bearing Good Witness" (Donaldson 2006), a questionnaire was circulated to doctors enquiring whether they currently acted as an expert witness, and if not, what were the reasons; if so, the frequency and any training that had been received. (A copy is attached as Appendix 1). I thought it would be very interesting to be able to replicate this exercise to some extent for the systemic discipline, and I obtained the necessary PSI licence to allow me to adapt Crown Copyright material for this purpose. This would create some opportunity for negative case analysis (Willig 2001 argues for the exploration of cases that do not fit as well as those that are likely to generate new insights). For example, it might be possible to ask respondents who had never acted as an expert witness, and had no intention of doing so, whether they would be prepared to be interviewed. I did not imagine that this survey would result in findings which could be generalised: the principal purpose would be to increase awareness and discussion of the recommendations of "Bearing Good Witness" (Donaldson 2006) across the systemic discipline by summarising them as the context for the questionnaire, to get some sense of the proportion of respondents who do act as expert witnesses, and possibly to compare the responses to question 5A ("why are you not willing to act as a witness") with the emerging data from my interviews.

The feedback from the panel which reviewed my research proposal was that I would be taking on too much to include this quantitative element. I chose to ignore this advice and with the support of Peter Stratton, Academic and Research Development Officer for AFT,

wrote a short piece about it which was published in Context (Hickman 2009), a journal which is circulated to all the systemic psychotherapists who are members of AFT. This invited interested readers to complete an on-line survey (Appendix 2) which as far as possible replicated that sent to doctors in preparation for “Bearing Good Witness”; but I was as interested in the possibilities of raising awareness of and interest in the topic through the article as I was in receiving replies. This was just as well: because I received a sum total of one reply from someone who used to act as an expert witness but was deterred by fear of adverse publicity and being referred to a professional body. It would be tempting to see this as an indication of a lack of systemic interest in the topic, but there are of course many other ways of understanding it. At least I was spared the necessity to analyse another large quantity of data.

Recruitment and Selection of research participants

I have felt throughout the gestation of this project that the active participation of members of the judiciary would greatly enrich it. However, I was initially informed that the Ministry of Justice (MoJ) would not approve this “unless you can come up with a very strong business case which clearly demonstrates the work’s potential benefits to the judiciary and/or the HMCS”.

At this point I contacted Lord Justice Thorpe, as Chair of the Experts’ Committee of the FJC, which was established in 2004 with the aim (FJC website 2009) of “stimulating better and quicker outcomes for families and in the family court service. The Council sits between government and the courts of the family justice system.” Part of the FJC’s business plan for 2008/9 in connection with this objective was to examine the use and role of experts in the family justice system. I explained my proposal briefly, highlighting its potential for fitting with the FJC’s business plan in relation to experts, and asked for his support. I was pleased that he offered this (Pidgeon 1996 p84 comments that the validity of qualitative research is connected with “the notion that grounded theories should ‘work’, ‘fit’, and be recognizable

and of relevance to those studied”) and I subsequently put together a formal business plan which was submitted to the MoJ at the end of March 2009 (a copy is attached as Appendix 3). I received an initial favourable response with the proviso that the President of the Family Division “would need to know which areas and which Judges are to be considered before giving his formal agreement to them being approached.”

The necessity to do this meant that I had to make some fairly speedy decisions about the number of judges that I wished to interview, and for how long. I assumed that the cost of judicial time, both in financial terms and in terms of its impact on listings, would be a significant factor in the MoJ’s decision. I also had to consider that as a sole researcher there would be a limit to the amount of data that I would be able to transcribe and analyse. The number of “five to seven interviews of up to 90 minutes each” was arrived at on the basis of these two considerations, with the advice of supervisors and fellow-students.

I then discovered that I was expected to nominate my preferred judicial participants, having had up to that point no idea whether, if I received official approval for the research, I would have any say in the selection of participants or whether that choice would be made for me. It will be seen that I had asked that if possible the participants should come from different levels of the judiciary (district, circuit and high court judges) and reflect diversity in gender and ethnicity; also that I would prefer to interview judges with whom I had no direct or indirect connection through my partner. I resolved therefore to try to apply these criteria in my own nominations. The research was limited to the family courts in England.

Alongside my communications with the MoJ, (which were suspended whilst I sought and obtained ethical approval from the University), I had succumbed to a combination of enthusiasm and anxiety (fear of not being able to recruit suitable participants) and quickly recruited three systemic participants opportunistically, that is on the basis of names recommended to me or known to me as systemic psychotherapists who regularly write reports for family courts, without much thought about the process. I then realised that I

would need to be able to give a more thoughtful account of my choices and began to pay more attention to the working context of potential participants, how closely they might be connected to me or to each other, their gender, ethnicity, their geographical base (to avoid a bias towards London) and whether they have written or presented anything on this topic. The final four systemic participants were therefore selected for a combination of the following reasons:

- Being part of a pilot family court assessment service set up as a result of the recommendations in Bearing Good Witness
- Having written or presented on the topic of acting as an expert witness from a systemic perspective (one of the participants was recruited as a “negative case” on this basis, having become disenchanted with the process)
- Increasing the diversity of participants
- Increasing the geographical scope of the study

Having recruited the systemic participants, it occurred to me that it might be possible to achieve some kind of geographical fit between them and the judicial participants (for example, if a systemic participant regularly reports to a specific court, to try to interview a judge sitting at that court), and that in turn influenced my comments to the MoJ on the nominations which would be most helpful. I also asked for permission to interview two specific judges who have either expressed a particular interest in the interface between the “psy” professions or who were involved in relevant initiatives. As a result of this I was able to achieve an out-of-London geographical match between the judges and the systemic participants in three cases, as well as one of the specific requests, which produced some very useful data for comparison. I should perhaps say at this point that the pool of people involved in this field, both from the judicial and systemic positions, is so small that I thought there was a very real possibility of participants being identifiable, at least to each other, and I

have tried to minimise this possibility both by being as vague as possible about work settings and by not referring to gender.

One of the judges nominated by the President's Office as being willing to be interviewed was known to me personally through my partner; but in addition to wanting not to look a gift horse in the mouth, I felt the usefulness of his senior position outweighed the possible disadvantage. Several of the other judges made the connection with my partner although I had never met them personally and had not mentioned him to them. I will discuss this further in thinking about self-reflexivity.

Of the final participant judges two were from the High Court, three circuit judges (two designated family judges) and two district judges. Five were men and two were women and they were all white British. Their length of experience on the bench (including time spent as deputies prior to full-time appointment) varied from eight years to twenty, with an average of 16 years. Five had previous experience as family barristers (for an average over twenty years) and two as family solicitors (average 18 years; though one had come to family work via specialising in youth crime). Three of the judges did some other work (civil and crime) alongside sitting in family courts. The proportion of public to private family work they undertook (a subjective estimate on their part rather than based on records) varied according to the context in which they were sitting (the highest being 90% public to 10% private and the lowest 50/50). They were all very familiar with receiving expert witness reports, estimating that they featured in at least 50% of cases heard (less commonly in private law cases). The estimated number of those cases in which the expert was required to give evidence in person varied from 20% to 80%.

Five of the systemic psychotherapists interviewed in the course of this research are women and two men; six white British and one black British. All have completed a four year advanced clinical training in working with individuals, couples and families. This is a training recognised within the NHS to be equivalent to that of a clinical psychologist. As is common

for systemic psychotherapists (it has been a requirement for admission to a recognised training course for several years), all the systemic participants have another professional qualification, either as a social worker, clinical psychologist or doctor, and it was usually the practice of this first profession that offered the opportunity to begin to work with the courts (for example, as a child protection or Child and Adolescent Mental Health Service (CAMHS) social worker). If that type of experience is included, the average length of experience in writing expert reports is over 20 years. Two of the participants have either stopped doing this kind of work or are considering doing so. The split between public and private varies enormously (again this is based on participants' subjective estimate) from 100% private to 90% public, as does the estimate of frequency of giving evidence in person from "seldom" to 50%. For some participants the public/private split has also changed over time because of resourcing issues (expert reports are paid from the LSC ("legal aid") budget. It should be pointed out that none of the systemic participants acts as an expert witness full-time; the role is usually undertaken in a private capacity and combined with other systemic activities such as therapy, consultation, supervision and training.

Validity?

The recent debate about the criteria which the National Institute for Clinical Excellence (NICE) uses in relation to "evidence based practice" in psychological therapies and its insistence on randomised controlled trials has highlighted that a quantitative approach to what constitutes validity and quality in research is still predominant. Madill et al (2000) comment (p17) "...criteria such as objectivity and reliability are appropriate to the evaluation of qualitative analysis only to the extent that it is conducted within a naive or scientific realist framework". The criteria by which this research will be judged will vary depending on the context in which it is being evaluated: academically, I need to evidence awareness of and consistency within a theoretical framework; pragmatically, the question may be whether it interests or is of any use to anyone. Henwood and Pidgeon (1992) comment (p100) "the researcher should always bear in mind that methods are not so much valid in and of

themselves, but rather will be more or less useful for particular research purposes". They distinguish between research which aims to "discover" and that which aims to "generate" and I see this research as aiming to do both. I have attempted to meet the following criteria for quality which they suggest for grounded theory analyses: fit, integration of theory at different levels of abstraction, visibility of the researcher's position, documentation of the process, analysis of negative cases, sensitivity to negotiated realities and transferability. As Madill et al (2000), Reicher (2000) and Willig (2001) point out, quality criteria will inevitably vary between methodologies.

Interviews

When I wrote the research proposal I included some possible questions that might be asked in the semi-structured interviews, such as:

- What do judges understand by the term "systemic" and what would they consider to be the particular "expertise" of systemic clinicians?
- Would they be able to identify any occasion when a report written from a systemic perspective was particularly helpful or unhelpful?
- What similarities and differences of understanding do systemic "experts" imagine there may be between them and the judges who will be the recipients of their reports about the meaning of words commonly used in this context, such as "fact", "opinion", "truth", "observation", "knowledge", "expertise", "reality" and "objectivity"?
- How does their thinking about this issue affect the way they write their reports and their interactions with the families who are the subject of them?
- Have there been any particular interactions with the family justice system which have informed their thinking on this issue?

- How do systemic experts think about issues of marginalisation or disempowerment in their work for courts and how does this affect the way they write their reports? (a question which was prompted by the literature overview).

I became more aware of the possibility that these questions were in some ways embedding my “competing paradigms” hypothesis, and, perhaps more importantly, my “them and us” or “judges as objects of ethnographical study” stance. For example, I was assuming common understandings and knowledges with the systemic participants and thus co-constructing a certain identity as an interviewer (Jorgensen 1991). This is also evident in my letter to participants (Appendix 4). I therefore thought further about these questions both in supervision and in my peer group by getting someone to interview me about the presuppositions I am bringing to the interviews. Gubrum and Koro-Ljungberg (2005) stress the importance of being clear whether the interview is seen as “neutral data collection” or “interpretive and interactive event”, and in thinking about the practical aspects of the interview such as who is in control, what language is used, what roles are assumed, what “borders” are being made? Similarly Charmaz (2006), who has been my main source of advice on the practicalities of using a grounded theory approach, distinguishes (p32) between an “objectivist” researcher’s emphasis on chronology, events, settings and behaviours, and a “constructivist”’s emphasis on assumptions, implicit meanings and tacit rules.

The main conclusion of this reflection was to try to develop open-ended questions that facilitated comparison of key ideas and values between judges and systemic experts (“how far is understanding shared..?”) rather than focussing on potential differences. These questions were explored in two pilot interviews (one with a systemic expert and one with a family judge), to see how well they fitted. Both pilot participants were already known to me personally and gave me some feedback about the questions. As a result I noticed some omissions (for example in the judicial interview I failed to ask about experience prior to

appointment), and some particularly useful questions were highlighted (the impact on families of being involved in a legal process). I also explored some issues with my interviewing style (for example, sharing a hypothesis for comment) in a peer-group seminar. The systemic pilot interview, after consultation with my supervisor, was retained for data analysis; I considered my connection with the judicial pilot participant to be too close for inclusion.

Data collection and analysis – in practice

I have attached as Appendices 5 and 6 the lists of judicial and systemic questions with notes to indicate questions which were added in response to new ideas being generated as the interviews progressed. For example, the first judicial interview alerted me to the question of “attraction” to working with families and the idea that family judges differ from other judges in many ways, and a question on that topic was retained throughout and also included in the systemic interviews. Likewise the idea of assessment for the purpose of report writing having a therapeutic effect was raised by a systemic participant and explored with subsequent judicial participants. I would view these as examples of what Charmaz (2006 p 102) would call “theoretical sampling”, that is the process of “constructing tentative ideas about the data, and then examining these ideas through further empirical enquiry”. I was able to a large extent to achieve my aim of “interweaving” the judicial and systemic interviews chronologically so that they might inform each other in this way. I did consider whether in later interviews I should exclude certain questions (for example, “what constitutes a good report?”) as having reached “saturation” (Glaser 2001 p 191), that is the point when the gathering of data no longer generates fresh ideas, but each time there was some new nuance and I never made the decision. (This fits for me with Dey’s (1999 p 257) challenge to the idea of saturation in that inevitably the subjective selection of data for coding leaves open the possibility of unnoticed difference.) This posed some dilemmas in managing the increasing number of questions within the same time frame. Throughout I asked supplementary questions (“please say more about X” “what does X mean to you?” to expand

implied meanings or tacit rules. I took a list of questions with me to the interviews, initially written on prompt cards and latterly printed out (I thought the cards would be less intrusive, but in fact they were more so and one participant commented on “taking you away from your cards”.)

I audio-taped the interviews (which all took place at the participant’s work place) for subsequent transcription. After an initial scare with my first judicial interview I learned to make sure that I had advance security clearance for my recorder (they are banned in most if not all court buildings). For the most part this worked well but I had one total disaster (operator error) with a judicial interview where I finished up with only six minutes of recording. I had not taken any detailed notes while the interview was progressing (I made a practice of only noting particular points to which I wished to return in order to maintain eye contact) but wrote down as much as I could remember immediately after this debacle. The judge in question was kind enough to make comments and corrections to these notes and my supervisor agreed that these could form part of the data analysis so long as their source was made clear. I did not feel it was appropriate or practical to ask for a repeat of the interview but as it offered one of the geographical “fits” I was anxious not to lose it completely. I ensured that all codes derived indirectly were distinguishable from those taken directly from transcripts.

I understand that there is considerable debate about the technicalities of transcribing (Potter and Hepburn 2005, Smith et al 2005), as to exactly how much information should be included in terms of interviewer’s contributions, non-verbal communications, pauses, tones and inflections. I have included all the interviewer’s contributions and any “gross” non-verbal behaviour which is detectable from the audio-tape, such as sighs, laughter, and intakes of breath. Further details of the recording of pauses and emphases are included in Appendix 7.

I have struggled both with the principles and the pragmatics of coding my transcriptions. My computer skills are minimal and I have therefore used tables to correlate the text and the codes (two examples are shown in Appendix 8 and 9). Charmaz (2006, p 46) describes coding as “the pivotal link between collecting data and developing an emergent theory to explain these data”. I tried to follow her advice (p49) to “remain open, stay close to the data, keep codes simple, precise and short, preserve actions, compare data with data and move quickly through the data”. Applying these principles to my first two interviews (one judicial and one systemic) involved collating and comparing the codes on tiny slips of paper to experiment with the process of establishing what Charmaz calls (p57) “strong analytical direction” with the aim of developing more focussed coding. Early on in the process I experimented with creating a “mind map” of connections and ideas (Appendix 10). I quickly realised firstly that it would be totally impossible to keep track of slips of paper from fourteen interviews, secondly that I had quite a number of codes which seemed irrelevant to the research question (such as anecdotes which illustrated particular points), thirdly that Charmaz’s advice to focus on action was resulting in my thinking about the process of the interview (“what is being made?”) to the detriment of noticing content, and finally that I was developing some new ideas which were more about connection and similarity than about difference and lack of fit.

I used supervision and student seminars to explore my difficulties, taking samples of data and asking other researchers to code them for comparison. I decided that I did not find Charmaz’s distinctions between and explanations of line by line and incident by incident coding (p50 – 53) very helpful. For example, I could not make sense of the idea that one could make a useful interpretation of a set of words which were demarcated from other words solely on the basis of the width of the page on which they were written. I connected Charmaz’s idea of “action” with Pearce’s (1994) account of “speech acts” as (p119) “configurations in the logic of meaning of conversations” and wondered how far it would be

possible for individual codes to reflect the conversational context of the extract of data to which they related. I noticed that every time I revisited a coded text I wanted to change the code in some way, and wondered how one knows when the “definitive” code is reached and whether it matters if the answer is “never”. I found Rennie et al’s (1988) suggestion (p142) of “meaning units” as a more helpful way of thinking about separating text for the purpose of coding. My experience of trying to keep track of data for the purposes of comparison (whether paper or electronic) suggested the metaphor of codes as labels. Ultimately I concluded that I had to have the confidence to find a way to undertake this process in a way that made sense to me, rather than seeking after an elusive “right” way that might not exist. My criteria for the analytic unit of data are that it should have coherence and completeness as a speech act (not necessarily grammatically but in terms of meaning) and should be as short as possible (if it is possible to separate into another concept or idea then do so). My criteria for codes are that they encapsulate an idea or practice that relates in some way to the research question, that they are as short as possible, that they give as much sense of context as possible and are not dependent on adjacent codes for the meaning to be clear. I have been keen to look for what Charmaz calls (p55) “in vivo codes” that is, innovative terms used by participants that capture meaning or experience (an example might be a judge’s (J40) use of the phrase “avoiding too much blood on the floor”). The codes were all numbered and referenced by participant (e.g. A32) so as to facilitate finding the relevant original text.

Some of the data (for example, a long discursion in interview B about the judge’s clerk’s illness) was never divided into analytic units. As a result of the initial review conducted after I had coded the first two interviews, some of the analytic units in later interviews were not coded, and some codes initially allocated were not used. The two examples of coded text in Appendices 8 and 9 are intended to show the “extremes” of my experimentation with length and style of both analytic units and codes to arrive at more focussed coding. Once the coding was completed I “extracted” all the codes from each interview to serve as a summary

of the interview and to facilitate quick and frequent comparison of the data and begin to develop categories. Appendix 11 gives examples from two interviews. At this point I began to appreciate the potential for codes to act as “labels” or “pointers” to locating similar ideas or connections (hereafter referred to as clusters) between interviews. The process of extraction offered an opportunity to revisit decisions both about the meaning units (some were further separated and some amalgamated), about the wording of the codes and about the relevance of the codes to the research question (some were added and some discarded).

Some of the connections emerged “top-down”, that is, having recognised an interesting idea in one interview (for example, the idea of change occurring in the assessment process) I asked a question about it in subsequent interviews (theoretical sampling) and then analysed the answers to that question. I presented some ideas around this at a symposium with fellow students, and as a result wondered whether this approach was sufficiently rigorous. I therefore developed all subsequent clusters and categories by a process of ensuring that every “extracted” code was attributed by reference number to a cluster (on a piece of paper) somewhere. (A very few codes were discarded as irrelevant to the research question at this stage. I should also clarify that I have used the word “cluster” here to describe a collection of codes which “go together” in connecting to a common topic or theme, but without quite forming a category. This is not what Charmaz (p86) means by the word). This meant that I was able to identify other codes which were relevant to the issue of change in assessment, even if their emergence was not connected to the asking of the question (Appendix 12). At this stage I experimented with transferring the data to NVivo software but found it too unwieldy to manage the multiplicity of clusters, and eventually used a cut and paste approach to generate electronic clusters which included the full text of the codes as well as the reference number. This enabled easy comparison when I began to write up the analysis.

I have struggled throughout with the idea of writing memos, which Charmaz (2006 p 72) describes as the “pivotal intermediate step between data collection and writing drafts of

papers”, vital because the act of putting thoughts on paper stimulates analysis early in the research process. Charmaz gives several examples of her own memos (for example on suffering as moral status on p 73) which are beautifully crafted and apparently “finished” in a way that I have never achieved. Fortunately she does allow for this to be done in “any – and every – way”, and the ways that have worked for me (particularly when I remembered to date them!) include:

- Short “bullet point” ideas saved on the computer, for example on how professionals develop and maintain belief in their own competence 26/4/12 (Appendix 13)
- Pieces written explicitly for discussion in supervision which were later incorporated in the writing up, for example “use and awareness of self” (Appendix 14 – also undated), which probably come closest to Charmaz’s model, or the second draft outline for data analysis (Appendix 17).
- Hand-written notes, for example on change in assessment (Appendix 16)
- Notes made in preparation for and during supervision and consultation with the group
- What Charmaz (p 86) calls clusters and I would call mind maps (Appendix 15)

These have all helped me to move to a position where I could begin to identify emerging major categories such as “beastliness” and “potential for change” and to think how it would make sense for these to be written up. One of the things I have found most challenging is to move from a diagrammatic model which shows data clusters in circular relationship to each other and can encompass overlap, to giving a written account which inevitably requires a linear progression.

I noticed when I began to write up the analysis that although I found the “extracted” codes in their various forms (as a summary of a whole interview or as illustrative of a cluster or

category) very helpful as a way of navigating the data, it was also important to check these out where possible with the original text. For example, I had coded one section as follows:

“F46 becoming aware of other professionals’ anxiety

F46a becoming aware that judges don’t know what to do”

(this is incidentally an example of a meaning “chunk” which I had decided to sub-divide after initial coding). The text actually read: “...I think I just became aware of how anxious most of the professionals can be around those families and how judges often really really do not know what to do”, where the repetition of the word “really” conveyed for me a sense of urgency which the code had entirely failed to capture. Similarly I feel that “E276 developing co-incidence of view across professions” fails to do justice to “but I think that nowadays there’s um at least there’s um a very fine um co-incidence of view about these cases generally, and how to approach them and what’s relevant or irrelevant between the lawyers and the judges who often now are very very expert in them and the psychologists/psychiatrists” I am sure there are countless other examples of subtlety of language and emphasis which have been lost in this process.

Reflections on the research process: “Negotiating the Swamp” (Finlay 2002) and “Mea Culpa” (course handbook 2008)

This section will explore issues of reflexivity as well as sins of omission and commission (my interpretation of the phrase suggested by my course handbook may be overly influenced by my convent education), and aspects of the process which in hindsight would have benefitted from being handled differently. I have experimented with different locations for it within the thesis, given that it is both the context for the findings, discussion and conclusion and contextualised by them, and I hope that it will be read in that framework even though its final location is within the methodology chapter.

Willig (2001) defines as a measure of quality in qualitative research the location and identification of the researcher’s own position and influence on the process, whether it is

called “reflexivity” (Henwood and Pidgeon 1992) or “owning one’s perspective” (Elliott et al 1999). Wren (2004) defines reflexive researchers as those who “are...prepared to make their project itself an object of study” and “accept that... no observations...no accounts from interview subjects...have an unequivocal or unproblematic relationship to anything outside the empirical material” (p476). This implies the need to develop an awareness of the “taken for granted” by “approaching and re-approaching the empirical data, operating each time at a different level of interpretation” (p477). Finlay (2002) identifies (p209) the “muddy ambiguity” involved in defining the practices of reflexivity and suggests five categories: (i) introspection; (ii) intersubjective reflection; (iii) mutual collaboration; (iv) social critique; and (v) discursive deconstruction. I was interested in these distinctions and have experimented with attempting to fit the following reflections into this model, signposting these attempts with italics. I have also interwoven some reflections into other chapters of this thesis where they fit: Russell and Kelly (2002 para 10) claim that “one way to gain greater understanding of reflexivity is to examine the process of research as it unfolds across the different stages of the research endeavor” (sic).

In retrospect I think I paid insufficient attention throughout the process to the difficulties posed by my allegiances in different ways to the two groups of participants involved in my study. On the one hand I “took for granted” that I “knew” to what beliefs, values and theories the systemic participants would subscribe; and on the other I allowed my personal relationship with a judge to prejudice me in favour of the opinion that they do a hard and lonely job (*an example of reflection as introspection?*)

The first of these assumptions emerged when I was challenged very strongly at the beginning of the interview by one of the systemic participants on the language I had used in my initial approach and information letter (see appendix 4), where I claimed a particular interest in the meaning attributed to “fact”, “opinion”, “truth”, “observation”, “knowledge”, “expertise”, “reality” and “objectivity”. This elicited a request to define what I meant by

“systemic”: “ You see the reason I asked you the question is because I would see the bunching together of those eight terms as coming from a particular aspect of systemic thinking which I would not define as systemic thinking ... as representing one very limited view of systemic thinking”. Although this episode vastly increased my awareness of the possibility of wide variation in the way systemic therapists would view certain situations, it was not until the last systemic interview that I asked the same question in return, and even then only at the suggestion of colleagues on the course:

“How would you position yourself theoretically within the broad systemic...and I was struggling for what word to put here, because this is a new question, but I've finished up with “church”.. does that, that question give you a sense of what I'm asking? About a range of theoretical positions systemically and how would you position yourself within those?”

I think it would have been helpful to have included this question throughout the systemic interviews, if only to remind myself about my own prejudices on the matter.

I also think that I had allowed my personal acquaintance with and respect for several family judges to “bias” my disposition towards them. I had a sense of theirs being a difficult and often thankless task to which they brought commitment and dedication and because of this was more prepared to notice evidence which supported this view than the opposite. When I identified this dynamic I made a point of rereading the full text of all the judicial interviews and comparing them with the codes I had allocated in case I had missed any negative evidence on this point. This sense of “allegiance” was supported by several of the judges referring to my partner (and his possible impact on my understanding of the topic) during interviews; for example:

“SH: You can't give me a reference for that can you?”

Bryn: Re G, Re G yes I can (*long pause while searches law books*) You have a comprehensive case indexer living with you...”

and

“Jay: Now I emphasise, well you know all this don’t you, I mean you’re married to a care judge (*laughs*)”.

I should make it clear that I took particular pains to avoid using the personal connection to recruit the judicial participants and that all the nominations were made by the office of the president of the Family Division. However, my partner is obviously a quite well known fish in a comparatively small pool and the connection must obviously have influenced the process in some ways although it would be hard to identify how - an inclination to be helpful was certainly universally evident but the most helpful gesture (the gift of some relevant books) came from a judge who so far as I am aware was not aware of it. I do not know how I could have avoided this dynamic, given the topic and the methodology (*an example of inter-subjective reflection?*)

I also regret being so transparent about my hypothesis in my initial approaches to potential participants. Although its inclusion did not preclude the emergence of other equally and possibly more interesting issues, it pre-determined the shape of the semi-structured interview in terms of the questions asked. It is possible that because I had committed myself so firmly to the idea of exploring connections or disconnections at an epistemological level, I was less open, at least initially, to noticing patterns at the level of emotion or ethics.

I also had difficulty at times in concealing my hypotheses during interviews. The most flagrant occurred during the systemic pilot:

SH One of the things that I think I have found in looking at some of the literature so far is that there is a lot of concern that certain voices aren’t heard very much in the process of expert reports, particularly children’s voices or parents’ voices ((Alex: um) and I, I kind of wonder whether you...I suppose I have a bit of a hypothesis that ...I’ll

put that on the table now, that a systemic position may have a particular ability to kind of bring forth those... more marginalised or less heard voices and I wondered.. do you agree with me?! (*laughs*)

Alex: (*Also laughing*) I definitely agree with you because I think that's, that's our strength"

I did recognise the inappropriateness of this intervention and brought it for supervision with my peer group. Although I developed new hypotheses during the course of the research I tried to frame future questions around them more in terms of points of view expressed by other people such as previous participants than in terms of my own ideas: for example (to Jay) "some judges have talked about the assessment process and the writing of the report as creating an opportunity to bring about some change for the family. What would be your view on that idea?"

I talked earlier in this chapter about the idea of this research having some elements of action research in that simply by asking questions it had the potential to have some practical effect on the thinking of other professionals in the family justice system. The experience of engaging in conversation with senior judges about systemic therapy and having their attention did at times go to my head. Bryn's account of a presentation to judges on different types of therapy, but which might not have included systemic, elicited an offer from me to provide names of potential systemic presenters for future events. At one point the balance of the interview with Kim was completely subverted by Kim asking me a series of questions with the result that I moved into the position of interviewee and sharer of opinion and passion:

"SH ... I think we have an enormous amount to offer... (^^^)..So ...I'm banging my drum here. This is a completely...

..K: I understand it, it's not something that I've given a lot of thought to

SH Um I shouldn't be doing this in an interview because I'm meant to be being a neutral...*(laughs)* so I shall have to write a big explanation, a self-reflexive comment on what I've just done *(laughs)* But yes, I, I would, I think we have a lot to offer

K: I'm sure you have. "

On the one hand I can see that my part in this exchange is completely inconsistent with accepted standards of research practice, but on the other hand I cannot regret being seduced by Kim's invitation into this conversation (Kim's own passion for creative practice in the family courts and informal style may have set the context for this). However, I do think that I muddied the waters for myself in these episodes of becoming a more "active" researcher and wonder if I could have achieved the same effect by trying to hold on to the ideas and recreate the exchange at the end of the interview (*an example of mutual collaboration?*). I have noticed the same "passion" in my writing up of findings: for example referring to finding it "shocking" that systemic practitioners were so overlooked in the consideration of relational questions (*an example of discursive deconstruction?*). On reading a draft one of my supervisors challenged this use of language and asked if I was really "shocked", and after some thought I concluded that I had been (in the sense of experiencing a direct challenge to the assumptions underpinning my professional life), so I let the word stand.

Another aspect of the judicial recruitment process which I regret is the failure to recruit any judges from ethnic minorities, although I did particularly request that this possibility be taken into account in the nominations. However, this is unsurprising given that figures supplied for 2012 on the Ministry of Justice website show that only 4.2% of judges in all areas of law (I have not found a breakdown for family judges) whose ethnicity is known are classified as black or from an ethnic minority. The ethnicity of 18% is not known; whether this shows a lack of rigour in collecting the data or a reluctance on the part of judges to define themselves I do not know. The percentage of women is 22.6%, although they are even less well represented in more senior posts (for example, 17% in the High Court). The low

representation of ethnic minorities in the judiciary might be considered to be of particular concern in relation to the fact that children from these groups are so over-represented in the population of looked after children (Harker 2012 p2 quotes a figure of 9% in contrast to 3% of the general population) (*an example of social critique?*).

There are a number of questions that I wish I had asked during the semi-structured interview. For example, given the criticism that emerged in Ireland's (2012) research for the FJC of experts who had no foothold in practice, it would have been useful to know what proportion of the systemic experts' time was spent in doing "expert" work and what was the focus of their systemic practice for the rest of their time. Some of the answers to this can be inferred from the interviews but it would have been helpful to be clearer about this. I also wish I had asked the systemic therapists more about how they understand and manage the issue of "confidentiality"; that is, how they talk to families about the fact that the relationship will be the subject of a report to court and what impact they think this has on the process. This question was asked in some of the interviews but not all (getting lost in the process of revising the question order and the technicalities of question prompting). I think it would have been helpful to have a more rounded collection of opinions because this was an issue which the judges felt particularly relevant to the issue of the psychotherapists acting as experts.

I should have been more systematic about keeping a research diary: I began well but soon lost the routine and discipline. I do have a "paper trail" in that the development of the content and order of the questions in the semi-structured interviews can be tracked in relation to the answers from previous interviews, but a properly maintained diary would have made the process more transparent. There were some occasions when I omitted to date my recording of connections or ideas. Although I tried to be very rigorous about accurate numbering of my "meaning chunks", there were instances where I lost track of the number sequence with the result that there were initial instances of duplication. (*an example of confession!*)

At the beginning of this thesis I identified the swings of policy and procedure which have impacted on expert witnesses in the family courts over the last twenty years. In the process of undertaking this research there have also been swings both in the sense I made of the data (about which I will say more in the conclusion) and in the way I related to the research question. What began as an academic interest (“how do people make this process work theoretically?”) acquired a practical slant (“what might people do differently?”). The final chapter of this thesis, therefore, will also include some recommendations. I hope that these may encourage some continuing engagement with the dilemmas, not only on my own part but hopefully more widely in the systemic and legal communities.

I have come to appreciate that my own recursive movement between text, codes and written analysis constantly generates new ideas, and that I am never going to be satisfied that I have arrived at a definitive analysis of the material. If one then takes into account the stimulus to one’s thinking of the new perspectives of others generated in response to the data and to my analysis, the impossibility of arriving at an “end” becomes even more obvious. One of the most challenging aspects of this process is to know not only when to present one’s own analysis, however imperfect, but how to present it in a way which best facilitates the continuing evolution of creative responses to the material. The next chapter will put that aim to the test.

Chapter 4: Findings

Introduction

As I explained in the methodology section, I have attempted throughout to disguise the gender of participants in order to minimise the possibility of their being identifiable. To this end, to add some sense of the real people involved and to facilitate the making of connections between individuals' comments on different topics, I have given them androgynous names rather than numbers in this analysis. The systemic participants are Alex, Chris, Fran, Gerry, Les, Nick and Pat; and the judicial participants Bryn, Dale, Evelyn, Hilary, Jay, Kim and Mo.

In order most effectively to address the nub of the research question –that is, how far is understanding shared? - I have analysed the data of these two groups separately, and for clarity have signposted in each section whether systemic or judicial perspectives are being analysed. Each section concludes with a comparison of the data to address the research question, and with some thoughts on the implications of this process.

The structure of the analysis has emerged from the data and includes some unanticipated sections. Participants volunteered interesting ideas about aspects of the interface between their worlds, and connections and differences between their ways of thinking about and enacting their roles that I had not anticipated. It has been a challenge to arrange these in a clear and coherent way because they so often overlap and interconnect.

An aspect of the findings which will not be overtly discussed in the analysis but may be evident at times, is some difference between the two groups in the discursive style of the interviews. In general the systemic interviews were longer (although I set the same context for both groups in making the appointments) and the style more tentative – there are more pauses, more half sentences, more hesitations. I connect this both with a theoretical

commitment to a “both/and” position (Andersen 1992) and the practical daily experiences of working in less formal settings, whilst judges’ professional utterances are likely to be continually subject to recording and transcription, as well as having the function of “laying down the law”.

Final outline for categories/subcategories	
<i>Systemic views</i>	<i>Judicial views</i>
<i>The elements of a good report and the skills required of an expert witness</i>	
Elements of a good report:	
Practical and presentational “Articulating how you have come to think the things that you think” “Taking a position” Introducing new ideas What it’s like to be with the family Respecting difference Keeping the expert in the picture Suggesting interventions	Looking to the past Looking to the present and to the future Answering the questions Professional and unbiased analysis Keep it short! Show your workings
Skills required:	
Generic interviewing skills Therapeutic skills that have been adapted to context Skills in writing reports Courtroom skills Experience in court	Experience in court
How far is understanding shared?	
Introducing new ideas Answering the questions/taking a position Unbiased analysis/keeping the expert in the picture Skills Required	
<i>The suitability of a systemic approach to working as an “expert” in the family courts</i>	
Considering the wider network Thickening Description Challenging Assumptions/ looking at context Holding multiple positions/tolerating uncertainty A relational model Giving voice to the marginalised A useful technique Theoretical dissonance Negotiating the relationship Truth seeking Short time frame Hedging and Fudging/taking a position Helping the court with difficult questions An adversarial context Lack of recognition, respect and tradition	Psychotherapist as third best Relationships in psychotherapy Truth seeking Subjectivity/objectivity Sources of judicial knowledge about systemic/family psychotherapy Choice of experts Helping the court make complex decisions
How far is understanding shared?	

<i>Change in assessment and in the court process in general</i>	
	Therapeutic aspects of the judicial role
How far is understanding shared?	
<i>The distinctive features of working in family justice</i>	
The “attraction” of working with families in the justice system	The “attraction” of working with families in the justice system
How far is understanding shared?	
Less adversarial and more inquisitorial? Judicial “intervention”	Less adversarial and more inquisitorial? Judicial “intervention”
How far is understanding shared?	
“Hybrid knowledges”?	“Hybrid knowledges”?
How far is understanding shared?	
<i>Working with relationships in the family justice system</i>	
Distinctions between public and private law. Beastliness	Distinctions between public and private law Blood on the Carpet
How far is understanding shared?	
<i>Learning on the Job</i>	
How identity as an expert emerges Lack of feedback Formal learning opportunities	Listening down the years Use of personal experience Ongoing learning opportunities “Sitting-in”
How far is understanding shared?	
<i>Working with inadequate resources</i>	
How far is understanding shared?	
<i>Desired Changes</i>	
Systemic suggestions	Judicial suggestions
How far is understanding shared?	

The elements of a good report and the skills required of an expert witness

One of the aims for this research project was to increase the potential for systemic psychotherapists to be helpful to the family court system. It seemed important, therefore, to explore how far the judges and the systemic “experts” agreed about what constitutes a “good” report, and the appropriate skill set, so I asked them directly about their ideas on this point.

Elements of a good report: systemic views

Practical and presentational

Only two of the seven participants (Nick and Les) stressed the importance of layout: of having short, numbered paragraphs for ease of reading, with a summary at the beginning, although Nick acknowledged that it is hard initially to get used to this discipline. Nick felt that commercially available templates were helpful, and Les had found the experience of being involved in public enquiries a useful preparation.

Chris commented that it is not necessary to repeat the history: “because I’m not, I’m usually not the first professional to be involved, and also like there’s a stack of papers and no-one’s reading them anyway I have come to think”. Chris also said that it is hard to know whether reports are the right length because of the lack of feedback (an area which will be explored in more detail elsewhere)

Les and Gerry both commented on the impact of being in a legal arena on their approach to the management of the practicalities of writing the report. Gerry tries “not to write notes which could be helpful to the lawyers if they sub-poena’d them” and Les said “[reports] need to be crisp, people put way too much kind of content in, you now, going on and on about

process stuff and it's like, look, the more we do that, the more we're opening up the door to allow everyone else in the court to interpret the process"

"Articulating how you have come to think the things that you think"

The majority of systemic participants commented on the importance of explaining the basis on which any opinion or ideas expressed had been reached (and making a clear distinction between "facts" and opinion). This might include explanations of theory and knowledge base, making the evidence clear, explaining what had been done and what documents had been read, and showing what hypotheses had been considered and favoured.

"Taking a position"

"I think that all I'm ever doing is punctuating a view of a family or a situation at one particular point in time and answering, helping the court answer some really difficult questions". Some participants' comments on the issue of giving a clear opinion suggested to me that they had given a lot of thought as to how to articulate the requirements of the expert role within a systemic framework: Alex commented:

"I can take a position and for me that's part of the identity I am calling into being; I am calling into being the identity of the expert at that point in time...so for me I don't think it's a conflict, I think I'm acting into the identity I'm being offered at that point in time".

Alex described this as "fitting with the court's story" and might be seen as an example of a "contexted speaking ability" or "systemic eloquence" as described by Oliver (1996). Others took a more "taken for granted" approach: Nick commented that is important to answer the questions you have been asked and Les that you should offer your "best professional guess". Some subtle distinctions were made on the question of whether it was appropriate for the report to offer alternatives: Chris' view was:

"again, what's the role of the expert witness? It's to give the facts of...the psychological state of somebody or the psychological consequences of x or y, it isn't just to lay out 'well it could be this, it could be that, it's a bit of this, it's a bit of that'",

whereas Pat said: “I think there’s something about offering alternatives as well, different possible trajectories if that’s relevant”.

Introducing new ideas

Two participants talked about the importance of the report introducing new ideas to the legal system. This might either be through enabling the creation of new ways for people to be portrayed (Alex gave an account of a mother who had been seen as not co-operating well with professionals who was able to change the way she was seen by the court as a result of her work with Alex) or through “breaking out of the old circles” and unsticking some repetitive patterns. Again this touches on the issue of the possibility of change occurring through the process of assessment which will be explored much more fully elsewhere.

What it’s like to be with the family

A majority commented on the role of the report in giving a sense of what it is like to be with the family, by including their thoughts, words and a “sense of the dialectic” and by giving examples of different views within the family and some sense of how things have come to be as they are and how conflicts and difficulties have arisen. There is an expectation of a relational rather than an individual account, whilst at the same time emphasising the needs of the children and engaging with their position as individuals.

Respecting difference

Alex and Fran both commented on the importance of bringing forth suppressed or unheard views and stories and giving voice to more marginalised family members or ways of thinking. Alex gave an example of introducing the question of how a dual heritage child could be helped to make sense of her origins when the white mother (separated from the child’s black father) was apparently oblivious to this issue. Fran talked about managing the issue of allegations and counter-allegations concerning domestic violence and the importance of finding a way of respecting both narratives and addressing everyone’s logic.

Keeping the expert in the picture

Two experts talked about the importance of being aware of and making evident in the report their impact on and involvement in the system being assessed. Alex described feeling that a commissioning guardian ad litem was expecting a particular “pro-mother” position to be evident in the report and struggling to reflect that dynamic in the final report. Gerry commented that it is bad for the expert to be “left out of the picture” in the report by “pretending” that totally neutral questions were asked.

Suggesting interventions

Chris alone commented that it is not helpful to recommend interventions without identifying resources where those interventions might be available.

Skills required: systemic views

The systemic therapists made distinctions between those skills which are an expectation of their normal professional role and the skills which have had to be developed or adapted specifically for the expert witness task. I shall keep that distinction in analysing their ideas.

Generic interviewing skills:

Alex identified that talking to people and “meeting them where they are” is part of “what we do”, with the aim of exploring stories, understanding how things have come to be as they are and finding out what people want to do differently. Alex, Fran and Les all talked about the importance of untangling and remaining even-handed between the many narratives or stories that might be around (Les thought there was a possibility in expert witness work of there being more “dissonance” between narratives than normally in therapy) with the hope of creating “new and unstuck” narratives: what Fran called “emotional not practical truths”.

Alex and Fran both talked about the importance of bringing forth subdued voices and particularly of sharing the experience of the children. Alex talked about “enriching but challenging” a family’s account, and Gerry about not being afraid of asking awkward

questions and “pushing the system beyond the limit of tolerance” in order to get it to act out (there is probably a wide variation among therapists as to how far these positions would be regarded as part of “normal” therapeutic interaction).

In terms of helpful systemic theory Alex and Nick both mentioned the usefulness of the (2002) article by Blow and Daniel which introduced the idea of frozen narratives as a lens for making sense of post-divorce contact disputes. Fran commented that not much had been written systemically about working as an expert witness. Pat uses ideas from attachment theory.

Unsurprisingly given the emphasis in systemic practice (following Bateson 1979) on the usefulness of binocular vision or a “double description” , five of the therapists interviewed cited the advantage of working with a colleague, particularly to resist “entanglement “ ,to retain even-handedness and to introduce a different perspective. Gerry suggested doing joint interviews with other professionals involved in the case such as guardians ad litem or social workers in order to save time in creating opportunities for exploring differences of opinion. Nick, who works in one of the pilot assessment teams set up in response to Bearing Good Witness (Donaldson 2006), felt that working in a multi-disciplinary team offers more support and containment to the expert and allows for more creativity and access to different opinions and expertise. Pat emphasised the importance of having good supervision.

Therapeutic skills that have been adapted to context:

Chris talked a lot about how court directed work requires different skills from therapy, seeing it as being much more directive, more focussed because of the limit on the time one would be involved with a family so requiring “brevity and intensity” and including elements of psychoeducation and coaching. This makes sense in the context of Chris’ unquestioning commitment to the idea of enabling maximum change within the process, whilst feeling that being directive may be less helpful to the family than a “normal” therapeutic approach. Alex also identified the short term nature of the work and the “minimal engagement” or reluctance

of families as requiring different skills from therapy, comparing it to working with families and young people in school settings. Fran identified that undertaking a therapeutic assessment has a wider context than therapy and can create helpful distancing.

Skills in writing reports

Chris and Pat talked about the importance of the skill of being able to articulate what you are thinking and to show how you have arrived at your conclusion so that the judges can see the basis of it, with Gerry spelling out that thoughts should be phrased in a way the court will understand, because they will not be interested in “systemic tangles” (this comment will be explored further elsewhere). Pat commented that it is necessary to be able to distinguish opinion from fact and Gerry elaborated on this idea in stressing the importance of making distinctions in the report between inferences from observation, reported speech and beliefs about beliefs, and explaining that one cannot “know” the experience of others, only what they say. Nick mentioned the necessary skill of writing “convincingly and carefully” and of making it clear to the court that nothing is simple or black and white. Both Nick and Les felt that it was important to be able to use and integrate research based evidence into the report.

Courtroom skills

It is interesting that only three of the systemic participants talked about the courtroom experience in the context of necessary skills, although all seven had interesting accounts to give of courtroom experiences. Nick talked about the importance of using “bread and butter” therapeutic skills such as thinking process, scanning the room, “working the relationship”, engaging with people and being reflective not reactive, using words carefully, thinking about how one is coming across, reflecting on one’s thoughts and deciding when to share them. Nick distinguished these from specially acquired skills such as knowing about procedures, coming across with authority and authenticity and not going outside the remit, also mentioning the possibility of making oneself vulnerable. This theme was developed more strongly by Les, who talked about the importance of being able to think in the witness box

and knowing how to argue with lawyers and other experts in a “non-hysterical way” in order to justify one’s opinion and avoid the possibility of “humiliation”. Pat thought that experts need a “thick skin” and the ability to understand themselves and to tolerate intense feeling; Les also mentioned the potential for being exposed to disturbing accounts of abuse and violence.

Experience in court

Anxiety about having to give oral evidence in court was one of the significant factors identified by Donaldson (2006) as deterring doctors from taking on the expert witness role. Alex specifically identified this as one of the factors which deter fellow systemic therapists: “I think it’s usually about the court appearances”. I asked the systemic participants about the frequency and quality of their court appearances and their accounts would seem to complement and illuminate what has already been said about courtroom skills. There is also an opportunity to compare how the experts’ expectations of the judges in the courtroom compare with the judges’ sense of their responsibility to the experts. The frequency of being called to give oral evidence varied between “a low proportion” of cases to about half (only a rough estimate was invited). Fran felt that the more experienced the expert becomes the less likely s/he is to be called; also that there is an increasing tendency to save money by not calling experts. Pat felt that the likelihood of being called is higher in high conflict private law cases.

Alex described feeling unsupported by a judge when accused by a barrister of having “made something up” (the information referred to had been included in some of the court bundles – the collection of papers placed before all the parties to the case - including that supplied to Alex, but not to the barrister and his client). Alex talked about losing confidence and having to become defensive, feeling that the barrister was out of order and the judge should have intervened. Gerry on the other hand thought that most family judges were good at “putting down aggressive barristers” and only got rattled in exceptional circumstances. Les felt that

barristers were disrespectful of experts and their expertise, assuming that they “understand what it takes years to learn”, and telling others what to do in a way which they would not tolerate themselves. Les described feeling unprotected and outnumbered at times, with a sense that judges and lawyers were completely unaware of the effect of “having to field questions from five different people, all right, for hours and hours going over the same ground, having to explain things to people in a really hostile environment”. Les also thought that sometimes judges form too “fawning” a relationship with an expert who is familiar through regular court appearances.

Interestingly some of the skills necessary for the expert role which were less familiar to the systemic participants were also sources of satisfaction and even enjoyment, such as the intellectual challenge, and actual writing of the report,. Gerry also admitted enjoying times when the drama of the court was helpful for people and also “even though I know I shouldn’t, um winning my point”. Nick talked about balancing the stress of giving evidence against the enjoyment of the other aspects of the work. These included being in a position where it was acceptable to lay claim to “a level of knowledge and expertise which I can find ways of sharing with people” (which resonates with Cade’s (2002) article on being an “unashamed” expert). Pat enjoyed finding coherence, seeing the logic of the system and generally being a “little Poirot”!

Elements of a good report: judicial views:

“Well the best analysis of an expert report was one given at a presentation by Dr Danya Glaser, and she said what is required is a history, a diagnosis and a prognosis” (Bryn)

Looking to the past

Bryn commented that it is important for the judge to understand the “factual basis” on which the expert is reporting. Other judges wanted to receive an analysis of how the problems arose over time, the nature or causes of psychological injury and a document which

demonstrated understanding of the background. On the other hand, Dale and Mo commented that it was a waste of money and “irritating” for the expert to rehearse the history because it is the judge’s job to have read the papers and know the history.

Looking to the present and to the future

Despite the above quote from Bryn, I found that other judges did not use the word “diagnosis”. I had originally intended to separate out the “present” and the “future” in analysing their comments. However, it seemed that the two were intertwined: Evelyn, for example, required a report to “judge the quality of a relationship” and to address a parent’s capacity for caring, as well as offering a “clearance of safety”. Jay wanted an insight into current mental functioning in order to understand parenting capacity for the future and barriers to understanding and Bryn feedback on “capacity for action”.

Hilary was alone in saying that good reports should aim to achieve change, “convince” parents to change and “give clues” for change (whilst commenting that because funding is only available for assessment it is not acceptable to say this!) Hilary talks of seeing the report as having multiple audiences, that is the families and local authorities involved as well as the court (those systems being seen as dynamic not static). The question of change in the process of assessment is explored more fully elsewhere.

Answering the questions

Dale, Hilary, Kim and Mo all commented specifically on the importance of the expert answering the questions that s/he had been asked (that is, in the “letter of instruction” which is sent to the expert commissioning the report and clarifying the specific questions that the court would like answered. A number of other interesting issues have emerged in relation to the drafting and acceptance of letters of instruction which are addressed elsewhere).

All but two of the judges interviewed specified that they wanted an opinion (although, as Bryn was keen to clarify, not a decision, that being the role of the judge.) Dale expects the expert to take a position and make a recommendation without ambiguity, a clear view being

more helpful than “on the one hand, on the other”; Bryn says that it may be acceptable to offer alternative hypotheses , or to say that it is too soon to decide or that more evidence is needed. Kim wants advice and recommendations; Hilary talks of “speaking to” the judge and recommending action to the local authority.

Professional and unbiased analysis

Several judges commented on the unhelpfulness of (quoting Dale) “polarised reports which are very obviously not neutral”. Jay described the need to factor out personal feelings, and to avoid being driven by pre-conceptions or pet theories. Evelyn felt that the move towards joint instruction (i.e. one expert being commissioned) had made it easier for experts to deal with things “straight down the middle” and Hilary and Mo referred to the need for “lack of partiality” towards any party in the proceedings. The helpfulness of “analysis” was identified by the majority of judges.

Keep it short!

Research by Tuffnell et al (1996) identified that 20 pages was the length of report preferred by judges. Five of the seven judges interviewed identified brevity as a desired quality in an expert’s report, with Evelyn specifying a length of ...20 to 30 pages. Jay talked about the huge amount of paperwork connected to cases in the family courts and how insufficient time is allowed for reading, so that judges are often reading reports in their “own” time in the evenings. Dale, Evelyn and Jay all recommended summarising findings at the beginning of the report and including supporting information in appendices. (A letter of instruction mentioned (para 17) in a 2013 case in the High Court – Re CtL and CmL – included a judicial direction “that your report shall be no longer than 10 pages. Any need to refer to interviews or observations should be included as an annexe”. The subsequent judgment referred (para 32) to the “tedious, even mind-numbing detail” of the 74 page report eventually produced). The President of the Family Division (Munby 2013) recommends (p820) “more focus on *analysis* and *opinion* than on history and narrative” with a suggested

length of 25 pages. Dale and Evelyn both mentioned their dislike of jargon and technical language and Evelyn specifically commented that theoretical explanations were unnecessary.

Show your workings

Hilary emphasised this message with an anecdote about being penalised in an arithmetic exam for not showing workings even though all the answers were correct. Bryn and Mo explained that judges need to know the basis upon which an opinion is reached so that they can evaluate one in the context of the other.

Skills required: judicial views

Interestingly the judges were more interested in identifying skills connected with the courtroom than with the writing of the report. So while the importance of being able to express oneself clearly and concisely in good English (Evelyn, Hilary, Jay and Kim) and of analytic skills (Hilary and Kim), was stressed, more emphasis was placed on what Evelyn called “thinking on your feet” and Hilary “coping with challenge”, that is, not being fazed, holding one’s ground, not losing one’s temper or getting rattled, being “robust but not arrogant” and generally “keeping a cool head”(Jay), a “calm overview” and “calmness under fire” (Hilary and Kim).

Experience in court

After I had heard Alex’s account of feeling that the judge had not offered protection, I asked the judges what expectations they imagined the experts would have of them and how they would see their responsibilities towards the expert in the courtroom.

Bryn’s view was that the expert was entitled to expect the judge to “hold the ring” and to ensure that proceedings were civilised and that the expert was not exposed to unreasonable questions. Dale talked about intervening to prevent discomfort, embarrassment or difficulty to the expert or “hostile” cross-examination; Dale would also establish a dialogue with the

expert in order to “test my own theories”. Evelyn recognised that judicial criticism of an expert witness could be very damaging and takes care to balance negative with positive comments, whilst commenting that it is not the judge’s role to protect the witness from proper questions. Hilary distinguished between “nannying” and protecting from unfair bullying. Jay advised experts to “expect attack” whilst seeing it as the judge’s role to protect from unjustified attack. Mo talked about the expert’s evidence needing to be put to the test in cross-examination (“the hammer and the anvil”) and expects professionals to be able to look after themselves and not be over-protected.

Bryn and Evelyn talked about the temptation for experts to exceed their brief by making judgments and decisions, and explained how this is likely to get the judge on his/her “high horse”.

How far is understanding shared?

An important factor to recognise in considering the interface between expert witnesses and the judiciary is that whilst at some levels it could be seen as a collaborative process or even one where the expert by definition “knows” more than the judge, the legal structure creates a power imbalance. The experts’ actions are controlled and determined not only by statute but by the power of the judge to lay down what happens within the process, and the expert has to act into a context over which s/he has no control. Chris talked about the experience of “not being embedded in this world and being a visitor to the world”. The experts’ experience of feeling unprotected, outnumbered and lacking in confidence may be exacerbated by this imbalance of power.

The two systemic participants who emphasised the importance of summarising and making the report easier to read appear to have understood the judges’ requirements well, and Chris had grasped the challenge of working with “a stack of papers”. There also appeared to be a consensus in principle on the importance of “showing your workings”/“articulating the basis of how you have come to think what you think”. What might be more problematic are the

questions of how far to include a theoretical framework for thinking (which would usually be an expectation of a systemic report) and how and when to include reflections on the dynamics of the wider system (see for example Alex's account of the influence of other professionals).

Most of the judges commented on the importance of getting a sense of the quality of relationships and more specifically the potential for parents to care appropriately for their child. However, it seemed that some judges felt that this opinion might be reached on the assessment of an individual rather than a relationship: Jay for example said "The...apparent presentation which I as a layman see and the actual psychological functioning of the parent may well be two very different things...I've been much better able to form a view about the parent's ...parenting capacity having got this insight into the way their mind works". Gerry on the other hand focuses on interaction: "I like the judge to be able to sort of imagine that he was living with the family. I want to bring it to life so that it's, it, he gets a sense of who these people are and how they live", whilst Fran says "I will try to create a narrative of how relationally this has come about". However, Gerry also tells an anecdote about a well-known family judge: "I'd written this report and I thought it was not bad and she said 'well, you haven't given a very interactional description, Dr X, of the way this family operates' and I thought 'wow' so that was an interesting eye-opener!" It will be useful to pay attention to the difference of emphasis given to individual and relational assessment in analysis of other areas of data.

Introducing new ideas:

Only two of the systemic therapists specifically identified the introduction of change or "unstuckness" as being a feature of a good report, although it is obvious from their answers to other questions that they all believed that change of some kind was inevitable in the process. It was clear from answers to other questions that the judges want to know about the capacity for change and some named the capacity of the process to create change (Bryn

comments: “people are ...able to change: they change within the court process”) but only Hilary identified the eliciting of change as a desideratum in the report, whilst commenting: “We mustn’t call it that because the LSC won’t pay for it”. This ambivalence around the naming of change will be another area for further and fuller consideration and exploration.

Answering the questions/taking a position:

The judges clearly wanted unequivocal answers to the questions the experts had been employed to answer that would help them in the making of difficult decisions. Bryn commented specifically on how much the judges rely on experts in making complex decisions and wondered whether too many answers are expected of them. On the other hand the judge does not want the expert to go beyond his/her remit by pre-empting the judge’s role in being the final arbiter on the issue in question. The systemic experts’ answers suggested that they might have different ideas about the possibility of reaching an unequivocal position. For me this connects to a systemic tension around the idea of “knowing” (Les specifically advised against “going into court with a ‘not-knowing’ position”) which was identified in the literature review and will be explored more fully elsewhere in this analysis in relation to the way in which the systemic experts make sense of the expert role within a systemic theoretical framework.

Unbiased analysis/keeping the expert in the picture

Experts are legally required to approach their role with “objectivity”. In family law the historical context for understanding this word is the idea of the expert as “hired gun” who is recruited to give evidence in a situation because of his/her known bias towards a particular position and who will therefore be expected to be partisan towards one party or position in a hearing. It is in this context that I understand the judges’ use of words such as “neutral”, “straight down the middle”, “factoring out the personal feelings”, “avoiding partiality”. On the one hand this fits with systemic ideas about neutrality as respecting and understanding the logic of all positions (Cecchin 1987) and Fran’s comment about “emotional truths”; on the

other hand Gerry's idea that the effect of the expert's beliefs and actions on the process of assessment should be clearly evident in the report does not fit so well. Alex's account of choosing to introduce to the assessment the "subjugated story" of dual heritage (not a question that had been asked) could be described as acting on a personal "prejudice" and therefore not wholly impartial. What is the effect on the judicial system of believing or of having to behave as if one believes that complete impartiality is achievable?

Skills Required:

Several points strike me in comparing the expert and judicial comments on this point. Firstly, the systemic experts were connected in emphasising the relevance of their therapeutic skills to the role, even in the sense of highlighting how they had had to adapt them or how different they were in some ways. I wonder whether in the light of the difficulties they face in undertaking the role, and their awareness that it is comparatively unusual practice within the systemic field, there is a certain element of self-reassurance in this. The judges focussed more on the courtroom skills than the report writing skills, even though they acknowledged that the majority of cases before them do not involve court appearances. One conclusion might be that this is an area where experts are most likely to be found wanting by the judges, for example by not holding their ground, losing their temper, getting rattled or going outside their remit. This is in contrast to the experts' review of required skills where only three mentioned courtroom skills. Could this reflect a lack of opportunity (or a lack of awareness of opportunity) for acquiring or developing courtroom skills in the same way that confidence and competence in therapeutic skills can be enhanced through training? Alternatively, are courtroom skills seen as being different in some way, a matter of temperament or character ("having a thick skin") rather than something that can be taught or learned?

I was struck by the military symbolism used by the judges in talking about experts' appearances in court ("calmness under fire", "attack", "hostile"). I do not expect these comments to reassure any potential experts who are currently deterred by the possibility of

appearing in court! The adversarial aspects of court process will be discussed further in the next section.

The judges seemed to be describing a fine balance that they would need to consider between allowing the experts' evidence to be put to the test by the parties to the case and paying attention to the comfort and protection of the expert. One might imagine that exactly how this balancing exercise is shown in practice varies enormously from judge to judge. I have tried throughout this analysis not to identify the gender of any of the individual participants in order to minimise the possibility of their being identifiable in a limited field. However, I think it is relevant at this point to say that it was not possible to make any connection between the gender of the judge and their position on the testing/protecting spectrum. In contrast one of the female systemic experts identified a dynamic which could result in distinctions being made according to gender and discipline between "hard and "soft" experts; for example a female psychologist might be seen as soft and a male psychiatrist as hard. Smart (1989) comments (p86) on the connection that is often made between the adversarial style of many legal systems and "masculine aggressive verbosity and machismo" but argues that rather than making naturalistic assumptions ("men are aggressive therefore suited to law") we should deconstruct the discourses by which law and masculinity/femininity, and the overlaps between them, are constituted. The same argument would apply to constructions of gender and hard/softness in the "psy" professions.

So far some differences and similarities of thinking between the judicial and the systemic participants on what constitutes a good report/expert, have been identified. The next section will consider the implications of these differences and similarities for deciding how well a systemic approach is suited to the process of acting as an expert.

The suitability of a systemic approach to working as an “expert” in the family courts

Systemic views

Unsurprisingly most of the systemic psychotherapists interviewed argued with conviction that their discipline has a huge amount to offer to the process of writing expert reports, although they also recognised that some aspects of their theory and practice fitted less well than others within a legal discourse. I will summarise the general comments first, before analysing in detail the systemic ways of thinking and practising that were felt to be particularly well suited to the forensic arena as well as those which were seen as more problematic.

Alex argued that all expert reports should be systemic, and that a systemic report “strengthens the expert’s hand” by bringing a different quality that is lacking in reports by professionals from other disciplines. Chris said that the families involved would benefit if more systemic experts were working in this area: a demand for Chris’ services in cases where family dynamics were a feature had developed because they were seen as helping to shift cases stuck in the court system (a comment which Nick also made. The question of whether assessment is seen as a process involving change is so significant that a subsequent section will be devoted exclusively to it). Chris felt that a systemic approach could be even more helpful with earlier involvement. Fran and Nick commented on how well “systemic complexity” fits with the complexity of family court process and Fran claimed that judges value it and that systemic experts “have a huge amount to offer”; Les, who has a first qualification as a psychologist, said that that discipline could not offer the same advantages as systemic training.

So where are these strengths seen to lie? (Although I have attempted to cluster the data and make some distinctions, many of the clusters overlap and it has been a challenge to distinguish these strands of thinking from each other without being repetitive. There is also

some overlap with the data on what constitutes a good report, given that the respondents would define a good report by its systemic qualities!)

Considering the wider network

Alex thought that looking at how systems relate to each other is a systemic strength, illustrating this with an account of seeing a guardian ad litem triangulated in the family system to the extent that the children of the family saw her as taking the mother's side. Alex described how systemic training strengthened resistance to the possibility of becoming collusive in this pattern, and enabled it to be reflected in the report. Chris talked about a case where a previous expert had alienated the professionals working with the mother and created schism; Chris was able to create new conversations with the other professionals in a way that moved things on, seeing giving voice to all parts of the system equally as a systemic strength. Gerry claimed that a systemic approach can be more comprehensive and lessened the possibility of repeated assessments by thinking:

“about the whole system um and try and keep knitting the bits together instead of flying, you know you have a learning disability assessment and an alcohol assessment, a psychiatric assessment, a risk assessment for sexual abuse all over the place”.

Les argued that systemic practitioners are better able to recognise their own position in the system and to point out patterns of interaction repeating over time (for example, how early abuse can be relived in later relationships), while Pat saw “widening the lens” and changing perspectives as a systemic strength.

Thickening Description

Alex talked about the expectations of the expert's role:

“.. I have to fit with the description that's already in the court, the court's got a story and part of what I see myself doing is fleshing that out, making it bigger, making it

richer and making it thicker um and that to me fits with what I do” (that is, as a systemic practitioner).

Alex describes getting feedback on more than one occasion from individuals assessed, whatever the outcome of the case, that they were pleased that the court had seen a “bigger picture”. This might involve looking at resources as well as deficits, getting both sides of a story and enabling people to show different aspects of themselves. Gerry’s idea of giving the court

“a picture which the judicial process doesn’t give them access to of the family so that they have a more human and specific... (5)...image”

might also fit this description.

Challenging Assumptions/ looking at context

Alex saw the systemic expert’s skill as lying in enriching but challenging the family’s account, in deconstructing ideas, turning questions around and enabling the development of alternative narratives. Chris described the systemic strengths of offering different ways of thinking about the meaning of experience, and adding new and different ideas. Fran describes moving away from the idea that professionals have a monopoly of sources of wisdom. For example, grandparents may be seen as being obstructive because they are “trying to get this biological parent out of this child’s life” when it might be more helpful to try to understand the logic behind that position (“a different era, where clean breaks...would be what’s expected of you”). In this way, a new story may emerge, for the court if not for the family, instead of “going round and round the same old circle”. Gerry identified the potential for challenging “the desperate attempt to find individual diagnoses all over the place” as well as “a lot of the assumptions and language that gets used”, for example barristers asking questions about bonding:

“moving from you know individual labelling to um even if you have got labelling to seeing it in an interactional context, I think that is something we can contribute”.

Les also gave an example of how “being able to look at the meaning of, of behaviours within a context” can change views about how things are understood:

” so thinking about some of the reports that I wrote about the transgenerational transmission of trauma for example, that was a really key idea and concept for judges to get a hold of and barristers, and that came from a syst..., from thinking systemically”.

Holding multiple positions/tolerating uncertainty

The therapists see the generation of many new and different ideas as requiring a parallel skill of being able to make sense of holding or moving between what might appear to be seen as conflicting or inconsistent positions. Thus Fran talked about the skill of “holding different ideas as contingent” and described as “absolutely key”

“holding multiple positions: which is why it worked very very well when two of us worked together, it was invaluable, because one of us could hold as the observer in the room other positions, which might be the court’s position or it might be the children or the other partner and really kind of weaving that into the process of the work”.

Fran considers that this ability is a way to try to map a system and to understand it. Chris identified the systemic skill of being able to hold multiple possibilities in mind, describing a case where a boy accused his father (separated from the mother with whom the child was living) of having hit him so that contact was stopped. Chris’ ability to hold open the possibility of other positions and hypotheses allowed the explanation to emerge that in fact it was the travelling that was involved in the contact with his father that was really distressing the boy but the father was unable to hear that, so the child made the accusation of violence. The discomfort of being unable totally to discount the possibility of violence is obvious from Chris’ account:

“while still holding....because I had to hold in mind that this guy could have been...once I met him and he was 6’5” and was very temperamental, it seemed to fit

that he might have indeed have been out of control and he was in a cer..., to a certain extent...but I think it was that sense of keeping open to hypotheses that I could do in a way that used my skills”.

Gerry thought that a systemic approach could give a “more human and specific” picture than would be available from other kinds of report with more information on what the options are. Les emphasised the importance of developing multiple narratives and hypotheses, exploring underlying meanings and reframing behaviours in a way which had the potential to activate compassion and understanding. Nick stressed the helpfulness of a systemic report being able to work with different assertions of ‘truth’ and ‘reality’, and to describe different perspectives:

“and I think it just kind of makes everything much more multi-levelled, you know, multi-layered (SH um) er it’s very complicated and I think that’s the main strength. I think also that we’re, that we’re able, we’re trained to tolerate um... (1)... living with that sort of uncertainty.”

Pat also talked about using the concept of “safe uncertainty” (probably referencing Mason 1993) as a guideline.

A relational model

Chris was of the opinion, having always been more interested in the relational aspects of human life than in individuals, that the emphasis on individual assessment in the family courts, and the tendency towards an individual focus in letters of instruction, is unhelpful. This point was illustrated by a case example, where the issue was disputed residence between the child’s maternal grandmother, with whom the child had been for three years, and the child’s mother, who had a history of drug and alcohol abuse but had since “got herself together”. The family story was that the mother had been abused by her mother’s partner. A psychiatric expert assessed the grandmother’s ability to care for the child in question, and the mental health of the mother, but made no comment (because they had not been asked to do so) on the crucial relationship between the grandmother and her daughter.

“The lawyers of the granny were very happy with the report and thought it was very clear that they were seeing the problem as lying with the young woman....the lawyers of the young mother were contesting and so nothing happened. So the clients didn’t...it never...changed anything, things stayed exactly as they were and now they’ve asked me to try to do something because they decided that someone needs to try to do something within the families”.

Chris’ sense was therefore that the other professionals involved had concluded that an assessment approach which focussed on relationships might succeed where others had failed. Chris argued that all work in the family courts is about relationships and that therefore an approach in which relationships rather than individuals are at the centre is particularly suited to this context.

Gerry made the same point, stressing the importance of showing the meaning of individual behaviour in interaction rather than in a “vacuum”, and suggesting, for example, that it is more helpful to think about “the nature of the relationships between the mother and the child” than to talk about “attachment”. Nick, who has experience of working in a multi-disciplinary assessment team, said that within the team assessing the impact of parental relationships is seen as the “dead centre” of a systemic remit and may even be part of a “psychiatric” assessment; however, it is sometimes difficult to convince referring professionals of this. Les and Pat both saw the ability to locate the behaviour of individuals and families in context as a particular systemic strength. Pat gave an account of a recent instruction where “in spite of the fact that they’ve had lots of assessments, that parenting information isn’t there”.

Giving voice to the marginalised

Alex felt that working from a systemic perspective “gives me permission” to bring forth marginalised voices and to argue for doing that when writing the report or talking to solicitors (the introduction of the dual heritage issue, which was discussed in the section on what constitutes a good report, illustrates this in practice). Chris talked about the systemic

strength of giving voice to all parts of the system equally, and, for example, helping women who might have been “overpowered” in a relationship to “find their voice”. Fran and Nick both stressed the importance of getting children’s narratives into the system as they can easily be overridden by adult voices, Fran feeling that mediators were too fearful of engaging with children. Nick makes a point of using children’s own words in writing reports in order to promote their views, and said that this practice has resulted in the judge wanting to meet the children involved in a case, and the children wanting to meet the judge. Les felt that the systemic approach’s potential for promoting social justice, creating different perspectives on dominant discourses and giving an audience to subordinated narratives had been one of the main incentives to getting involved in forensic work in the first place.

A useful technique

Alex and Nick both named the use of genograms (relational diagrams developed in systemic practice) as enhancing their reports. Interestingly a “social work statement and genogram” are listed as specific documents to be annexed by Practice Direction 36C.

Theoretical dissonance

The systemic experts varied in how far they identified problematic areas of practice or theory. Alex and Fran were both very clear that they did not see any “conflict”:

“I don’t see any contradictions whatsoever between being a systemic thinker and doing this kind of work ...because being aware of the context in which you are working is something you should do in any kind of work...”

Chris and Nick both felt that acting as an expert witness fitted some beliefs but not others. Gerry felt that there was no conflict experienced personally but others might find it more difficult depending on how they interpreted what it means to be systemic: “I think the problem is more with the people who define themselves as systemic than with the courts actually”; although on reflection Gerry identified a colleague who might have fallen into that category and commented: “I know she uses this kind of language much more than I would although

actually working together there's no conflict so I think a lot of this is language rather than actual thinking".

Negotiating the relationship

I was interested in how the systemic experts explained their role to the families they were assessing and how this influenced the subsequent relationship, given that their relationship with an individual or family was not usually freely sought but requested by the court and would certainly not be subject to the usual understandings of confidentiality in that everything relevant would be reported to the court. Alex was very clear about the importance of informing families at the beginning that their thoughts were wanted and that they would be shown the report and have an opportunity to challenge what was said, even though Alex would reserve the right to disagree. Alex referred to the systemic idea of domains in talking about this issue (see my discussion in the literature review of Lang et al's 1990 paper on domains of action). Alex described how the process of continually working hard to engage a reluctant mother in the process in this way had had surprising therapeutic effects by enabling strengths and resources to be identified as well as deficits. I was interested that when I asked Alex about the effect of my interview in highlighting issues this was the area identified as being the most significant.

On the other hand neither Nick, Pat nor Chris show families the report in private law cases, because of timing issues (although for Chris public law would be different, and factual inaccuracies would be corrected). Pat was not even sure that it was legal to show families the report before it was submitted to the court. Chris also talked about the importance of working in a particular way to develop a relationship with the subjects of the report, recognising the "scariness" and fraughtness of the process, and the fact that families are often powerless and coerced, as well as possibly being under financial pressure in the private law cases. Chris emphasised the importance of being clear about the time frame and the focus of the report, and clarity of explanation was also stressed by Fran, Pat and Nick.

All three of them (in different contexts) had leaflets available so that families would know what to expect.

Gerry makes a point of specifying when accepting instructions that the letter of instruction would be read and explained to the family by the solicitor before the assessment began in order not to “waste” the first interview (although this does not always happen as it should). Gerry also explains that the priority is to represent children’s best interests so that parents will not necessarily know what their children have said, and finds that clarifying issues beforehand “forestalls complaints”. Nick also talked about the difficulty if families had not seen the letter of instruction and clarifies with families that the duty of the expert is to the court rather than to any party, how notes will be taken and how everything will be reported back. Nick felt that the legal professionals who were familiar with the process could be very helpful in preparing families for the assessment, helping them to understand the mandate and to get the most from the experience.

Les described using the overarching context of the court process as a way of getting families to reflect on their relationship with wider society, how they are perceived by figures in authority and what they would need to do in order to satisfy the court that it does not need to intervene.

These systemic experts do not see a conflict in using their therapeutic skills in this context, because they have developed a theoretical frame for making sense of the apparent dilemmas, and developed practices of transparency, openness and explanation to circumvent them. The Marlborough Family Service, which undertakes assessment for courts, has developed this idea more formally in the practice of the initial “network meeting” for adults only which is attended by the key professionals and the parents or other primary carers. This discusses the letter of instruction and decisions are then made as to the form and duration of the proposed assessment and this is summarised in a subsequent letter.

This process and its effects have recently been the focus of doctoral research by Phillippe Mandin.

Truth seeking

Chris identified this as a problematic area, thinking that the court is looking for “the truth” and wants the expert to say what is wrong while a systemic expert is not trying to arrive at a truth but simply sharing a way of thinking. Fran used the concept of “emotional truth” as distinct from “practical truth” to encompass differences of opinion or belief about something which the court had defined as a “fact” and which had therefore to be treated as true for practical purposes. Gerry commented that a “finding of fact” is “really” the judge’s opinion:

“the fact about truth..., obviously everybody knows within the legal profession that truth is the truth being used by a particular party at a particular time”.

Gerry commented that in this context the concepts of “reality” and “objectivity” would have “certain problems” but was the only systemic expert to name them specifically as potentially problematic. Gerry also pointed out how confused families get around different “truths” established by different thresholds of proof between the criminal and family courts (for example, it can be found as a “fact” that X abused Y even though X has not been found guilty of the abuse in the criminal court); Gerry’s view is that this even confuses some experts, although the problem is not as pressing for mental health experts as, for example, paediatricians. Les considered that the court believes in objective truth and wants a clear path to be defined. Les had worked with some children who were due to give evidence about being abused and felt the need to prepare them for the possibility of the alleged abuser not being found guilty by stressing the importance of the child knowing “your truth” (perhaps a similar idea to Fran’s “emotional truth”?) Nick mentioned the difficulty of accepting that one has to work to the judge’s fact even if one is not sure that one agrees with the finding, and considered that the legal system adheres to “evidence” whereas this is not a systemic concept.

Short time frame

Chris commented that it is hard to know what one thinks in a short assessment frame, and that it is easier to be systemic on private law because one has “longer to mess around”; Chris thought that having more time for assessment helped to create more ideas, and for the expert to be more confident. At the same time Chris wondered whether the idea of a longer time frame helping was an “illusion” and more connected with a personal reluctance to be “certain” and a sense that a longer time frame contributed to “feeling better” as a result of “not being certain too quickly”. Fran on the other hand felt that it was important to stand firm on the amount of time needed and that “nothing was going to be lost by making it six months instead of three”. Nick’s opinion was that the court context may not allow enough time to form a “therapeutic relationship”, and Pat felt pressured to “report too quickly” resulting in a “snapshot” rather than a “bigger picture”. Pat wanted at least twelve weeks to allow for six sessions, recognising the importance of gaps between sessions.

The idea that a minimum length of time is needed to do a thorough assessment seems to me to be connected to two “therapeutic” positions: that part of the assessment is based on the therapist/expert’s sense of the nature of the relationship that is formed with the person or persons being assessed, which will inevitably take some time to develop, and that time is also needed for change to take place (hence Pat’s emphasis on the length of time between sessions). These positions are both potentially in conflict with the requirements of the court: firstly on a practical level because there is a huge emphasis on reducing delay in court proceedings, and secondly on a theoretical level because in legal terms change is not the purpose of the assessment.

The Children Act 1989 spells out (S 1 (2)) the general principle that in court proceedings regarding children’s upbringing any delay “is likely to prejudice the welfare of the child”. The whole thrust of the Norgrove (2011) Family Justice Review and of Ryder’s (2012) judicial

response was to reduce the “unconscionable delay” inherent in the system as it has developed in the last twenty four years:

“The average care case in county courts now takes over 60 weeks and many take much longer – an age in the life of a child” (Norgrove p3).

The time taken to obtain expert reports was identified by the Family Justice Review (p117) as a significant factor in creating delay and this is supported by research findings (for example Ward et al 2012). Even prior to the publication of Ryder some courts were only instructing experts who were prepared to report within a three month time frame (Cooper 2011). The justice system is now producing (and educating the judges in) psychological evidence for this emphasis on reducing delay: see for example Brown and Ward (2013) on the need to make decisions based on the needs of the child at different developmental phases. The implications of this issue for systemic experts who are keen to take their time over assessment cannot be overlooked and will be covered more fully in the discussion section.

Hedging and Fudging/taking a position

Whilst being very clear that being required as an expert to take a position was not problematic but an aspect of professional identity that was called into being by the context, Alex at different points in the interview used the words “I kind of hedged one [question] because I was kind of unsure...” and “I think that was where I kind of felt like I fudged it” [in relation to a question as to the most appropriate residence for a child] and describes questioning the decision reached in the report. Similarly Chris described being reluctant to be as certain as the legal system wants one to be, and feeling that in one case the judge had been frustrated:

“and then I start maundering (? wandering) around in a systemic psychotherapist way. That isn’t what they wanted; they wanted me to say ‘yes she will’ or ‘no she won’t’ and also I have always tried to stay curious about everybody’s position and not necessarily neutral you know in the way that we do or we don’t but to be seen as

someone who is not too much in alliance with either at different points and so it does mean that there can be a certain..what might be interpreted as wooliness?"

Chris thought this might cause irritation ("I was a bit irritated with myself in a way") and questioning of the expert's professionalism. Fran on the other hand was clear that holding multiple positions could be distinguished from not being able to make up one's mind. Gerry said that it was important to recognise that the court was not interested in "systemic tangles", that the expert is being paid to make a recommendation and give a clear opinion. Les explicitly commented "don't go into court with a not-knowing position" (a reference to Anderson and Goolishian 1992) because the expert is being paid to know. Les added that it can be possible to reconcile different ideas by taking a "best guess" position, but on the whole judges prefer experts to state a preference for one position rather than another, avoiding waffling and mind-changing. Nick talked about helping the court to understand that nothing is simple and black or white, whilst still being irritated by the "lack of certainty" (which Nick connected with a social constructionist theoretical position) in the "family therapy community". Pat (a self-defined social constructionist) explored the concept of "systemic expert":

"... (2)...It's, it's almost a contradiction in terms isn't it? Because, because of the whole thing about 'oh no we don't have expertise, we're not experts, family therapists are not experts' but I think we've shot ourselves in the foot with that one to be honest because of course we have expertise. Why would anybody come for any kind of therapy if they weren't coming to someone who knew something about it?! So it's that idea about what are the boundaries of our expertise I guess".

Gerry also felt that the theoretical position of some systemic practitioners (particularly the "dangerous" ideas of Maturana) could be thought of as wearing "destructive blinkers" and located them as their own worst enemy.

Helping the court with difficult questions

Most of the systemic experts commented specifically on the difficulty of the decisions that judges in family courts are being asked to make. Alex talked about “giving” the judge an idea of the complexity, “enabling” thinking and “offering” a position; but of seeing the expert’s role as distinct from the process of decision making:

“because I think we’re in two very different domains, I think the domain they’re in is difficult and I don’t want to be (*laughs*) part of, of that, I really don’t.”

Chris talked about giving “true help” to the court in answering some really difficult questions, recognising that the judge has to make a yes or no decision and needs to know where the expert stands: in this context experts who seem out of their depth, anxious, or lacking in confidence or competence are no use. Fran has become more aware of the anxiety of other professionals and that judges often “really really do not know what to do”; Fran also talked about seeing solicitors working to change their own clients and not knowing how to manage the process: it can then be “time well spent” to acknowledge their frustration and help them manage the process better. Gerry told a story about being rung on a mobile phone whilst in a restaurant abroad and suddenly realising that what had been anticipated as a five minute call was in fact a conference call from the court which lasted an hour and a quarter :

“then at the end after an hour the judge wanted to ask me questions, you know he was telling me about his quandary and I said ‘well I quite understand your quandary but you know I couldn’t really answer it for you, this is what I think (SH yes) but actually I can’t decide it for you” .

Les felt that judges were quick to remind experts that they are the ones who make the decisions but “actually once I, you get into that frame of saying, ‘I don’t have to make the decision, my job is to, is to aid the court and to give the judge the material that they need to make the decision’, that’s quite liberating”. Nick talked about recognising the constraints within which the judges have to work and growing in respect for the way decisions are made. Further on in the interview, when talking about the emotional impact of working in public law

family cases, Nick wondered about the amount of support available for judges and what it is like to hear a continuing succession of painful cases:

“how do you, how do you deal with all that level of stuff and decision making? um and they’re big, ... (1)...unpleasant decisions for anybody to have to make (SH um)”.

An adversarial context

In a later section of the analysis which addresses the ways in which family law is different from other areas of law, I will explore further the question as to exactly how far the process is adversarial. For now I am focussing on interactions which the systemic experts have experienced as adversarial and how far they feel able to manage this within a systemic approach. Systemic practice emphasises collaboration; it might therefore be expected that an adversarial atmosphere would be uncomfortable for systemic experts. As I have already described, Alex found one experience of cross-examination particularly unsettling, thinking that the barrister’s use of language was “inappropriate” and more suited to the criminal than to the family court. Fran felt that courts tend to go for the middle ground or “fair division of the child” which implies an adversarial context. Gerry commented that barristers were prevented by their adversarial role from thinking out of the box and that the “one-sided” thinking of advocates is “anti-systemic”. However, Gerry was also of the opinion that whilst an adversarial system can result in aggressive barristers, such barristers are improper in the family courts and most judges are good at “putting them down”. Les, who made the distinction between “hard” and “soft” experts, blamed the adversarial nature of the court for confrontations between these positions (although it would be fair to say that these comments related to a less recent part of Les’ forensic experience). Nick felt that the pressure for certainty and firm diagnoses came more from the lawyers than from the judges, but that they are only doing what the system requires: “I think the system is you know often pretty awful (SH um) and protracted you know and keeps things going and er it’s still too adversarial, it promotes that (SH um)”.

Lack of recognition, respect and tradition

One of the systemic experts was unsure how aware judges were of their professional discipline and its implications in terms of what might be expected from the report. Alex did not know if judges were aware of the distinguishing qualities of a systemic report but assumed that good feedback about systemic reports might indicate awareness. Some of Alex's first instructions had come via guardians ad litem who had attended training courses run by Alex, suggesting that the personal connection was significant. Nick, Pat and Chris were more certain that neither judges nor other legal professionals know what are the skills of a systemic therapist, although some other professionals such as guardians might. (This is particularly significant in the case of solicitors, who are often responsible for suggesting which experts should be approached in a particular case and in drafting the letter of instruction.) Nick explained that in the multi-disciplinary team systemic input is never requested by the instructing solicitors, and has to be explained and justified by the team, though the local judges are more familiar with the idea and will sometimes suggest it. Chris thought that the small number of systemic therapists and the fact that they are spread out might account for this: also that it is not clear who speaks for the discipline

“or how clear we are about what we can do in those contexts.... (*passage describing psychologist colleague who does cognitive assessments*) but the skills they're calling upon are the ones that they know quite clearly what they do and the psychiatrist is obvious so I think it isn't so obvious what we do and you know what our expert witness, where is our expertise.”

Thus it seems that judges assess Chris' professional status more by workplace than by discipline. Nick considered that judicial knowledge, increased reliance on and increased recognition of the usefulness of the discipline could be developed through systemic presence in multi-disciplinary court assessment teams. Chris felt that the lack of a systemic tradition of doing expert witness work and the smallness of the profession made it hard to strategise for the recognition of the potential usefulness of systemic experts.

It is not only judges whose familiarity with systemic therapists is relevant to the question as to whether they have a useful role to play as expert witnesses. Experts are often nominated or suggested by other professionals such as solicitors, guardians, CAFCASS staff or social workers, although they have to be agreed by the judge. They are usually sounded out as to availability and willingness to act by solicitors, who are also responsible for drafting the letters of instruction, which include the question/s the expert is required to answer. Although this aspect of the process did not feature sufficiently in the systemic experts' interviews to include fuller analysis, Chris and Nick both described problems with this process owing to the lack of knowledge of the "instructor" about the nature of their expertise: Chris, for example, was asked for a diagnosis in the formal instruction despite having agreed verbally that the assessment would be relational.

In addition I have already indicated that there is a strand of opinion among the systemic experts that the systemic profession has "shot itself in the foot" or been its own worst enemy in emphasising certain theoretical positions – principally the disclaiming of expertise. Other participants commented on feeling that gender might disadvantage some experts, with male experts getting into bantering dialogue with judges while females might be more tentative or reserved. Pat, Les and Chris commented that courts often assume that doctors are "senior" in some way to any other discipline. Finally Pat highlighted the recent development of the omission of systemic psychotherapy from the Legal Services Commission's 2011 approved list of expert professions, so that special approval is required for a systemic report.

Judicial Perspectives:

None of the judges professed awareness of having received reports directly from a systemic/family psychotherapist, although two commented that they had either received a joint report to which a systemic therapist had contributed or a systemic report attached as an addendum to the main report. This was despite the fact that three of the judges were sitting

in courts where systemic expert participants had regularly contributed reports. One of the judges even named a systemic participant but was unaware of her discipline. Similarly when asked how much they knew about systemic psychotherapy answers ranged from Mo's succinct "zero!" to Dale's "not a great deal".

Psychotherapist as third best

I also asked what discipline of expert judges would normally expect to be instructed for what type of question. All the judges would want to instruct a psychiatrist where mental illness were in question, for example (Dale) to know how far "illness" was a contributory factor in a parent injuring a child. Psychologists might also be instructed for behavioural or cognitive problems (Bryn) or for assessment of intellectual functioning or to understand the internal workings of the brain (Jay). Dale would go to a child and adolescent psychiatrist for assessment of the impact of warring parents on children, because s/he might be able to offer ideas as to how the behaviour might be changed, while Mo would approach a psychologist where there were issues concerning behaviour and to consider the future possibilities for family relationships. Bryn would ask a psychiatrist whether an individual or a family would benefit from a particular therapy because therapy would be the "recommended treatment". Evelyn answered:

“(5)...well where you've got a child or parent with a possible mental illness then you reach for the psychiatric report; absent that, I think you would reach for the psychological report

SH So the psychotherapist would be quite a long way down the...

E the psychotherapist would be quite a long way down the, down the line

SH down the line, yup

E I think you'd really want a consultant psychiatrist or a chartered psychologist but if you couldn't get any of those you'd content yourself with a psychotherapist

SH Definitely third best?

E I think so”

Thus there was a strong presumption that a psychotherapist was ruled out by definition from being suited to the expert role, and because there was no recognised experience of systemic reports having been received, no opportunity for that presumption to be challenged. The reasons for this are largely connected with the judges' understanding of the relationship between psychotherapist and "client", rather than the areas which the systemic group identified as more problematic, although some comments emerged which connect with those such as the search for truth, the meaning of objectivity and the usefulness of taking a position.

Relationships in psychotherapy

The judges saw the role of psychotherapy as treatment: for example Bryn expected that a systemic report would address the appropriateness of treatment and how it would help: "I wouldn't necessarily expect the psychotherapist to have the um the sort of background that would lead them to the initial broader analysis of the problems that a family or people have." Bryn, Dale and Kim regarded systemic or family therapy as something that might be recommended by another expert. There was a consistent assumption that psychotherapists do not offer to do assessments because they are constrained by in certain ways: for example, Bryn was confident that psychotherapists do not offer to do assessments because of "confidential rapport" and Dale that giving evidence would be seen as compromising the therapeutic role. Kim thought that family therapists were deterred from acting as experts "because of the confidentiality issue". Evelyn said that judges:

"have clear principles against drawing those who are working in a therapeutic environment with a family into a court arena where they may be required to criticise A and praise B and so in relation to therapists who are actually administering therapy (SH no) we steer clear of them".

The task of the therapist is broadly understood to be “listening and absorbing” whilst probing for underlying difficulties, rather than offering the explanations and opinions required by the court. Any reports which might be received were expected to be limited to broad assessment of the progress of therapy (possibly with the client’s agreement) or whether clients had engaged with work which the court had considered might be helpful. Kim described having seen reports of systemic therapy appended to an expert’s report and thought that:

“they’re much more “up here” to the person we’re talking about... (*passage describing context of appended report*)...It takes me one step closer to the person I am having to worry about”.

Truth seeking

Bryn talked about the importance of facts being supplied to the expert and the necessity for the court to “find” facts if they were not clearly established. Bryn expected experts’ professional training to lead them to believe what they are told and that medical people are more trusting and less cynical than the courts. I now wonder if Bryn was subtly suggesting that the fact-finding process minimises the possibility of gullible experts being deceived! Bryn also saw what happened in the court process as part of the facts of the case and distinguished between the family and other courts in that family work is about deciding what is going to happen rather than what has happened. Dale said that establishing the truth is the main task of family work and also emphasised the importance to this end of the judge paying attention (“eyes and ears are on alert all the while”) to process in court. Mo distinguished between finding the truth and “finding a fact” which is accorded the status of truth for the purposes of the legal proceedings.

Subjectivity/objectivity

I asked the judges what objectivity meant to them. Dale defined it in terms of avoiding polarised positions, not getting enmeshed, and not sympathising with one side. Evelyn

talked about the need to “play it straight down the middle” and Hilary about being disinterested and having no agenda or partiality (Mo also defined objectivity in terms of lack of partiality). Jay stressed the importance of factoring out personal feelings and not allowing oneself to be driven by preconceptions or pet theories.

Interestingly, some of the judges also spoke spontaneously about subjectivity, both in relation to the expert witness and to themselves. Hilary recognised that the subjectivity of the expert could affect the assessment, but also that “I don’t suppose we can any of us shed subjectivity completely”, although that should be the aim. Hilary and Kim both discussed the welfare checklist which is prescribed for judges to use in cases involving children as an attempt to set an objective standard which in practice had to be applied subjectively – Hilary described the process as using “structured discretion”. I had an interesting exchange with Jay on a similar point:

“SH How far do you think it’s possible to shed pre-conceptions?”

Jay I don’t think you can shed your pre-conceptions, I think the key thing, and this is something which judges have to bear in mind too, is to be aware of what your preconceptions are and make sure that they don’t drive the conclusions which you reach. Pre-conceptions of course could be, I’m the one who used it, could be a slightly loaded word, one might think of one’s experience of life

SH Systemically, there’s a systemic theorist who calls them prejudices which is an even stronger word

Jay Yeah well, they all mean the same thing depending on which angle you look at them from, don’t they?”

Mo talked about the possibility that judges have a “natural preference” to keep a family together, but that “subjective preferences” should be kept in check applying the “overriding objective”.

Dale commented that:

“I think anyone who’s been in the family justice system for a bit, whether as a barrister, solicitor, or as a forensic expert, rapidly assimilates the philosophies and the guidelines that underpin what we do. So you find that everyone’s moving in the same direction and concentrating on the same issues”

I subsequently asked for a further explanation of this and received this reply:

“The philosophies and guidelines which underpin what we do are essentially these –
Wherever possible consistent with their welfare needs, children should be brought up by their parents or within their natural families.

Placing a child in care on the basis of a plan for adoption would always be a matter of last resort.

In the private law context, consensus between parents is infinitely preferable to a solution imposed by the court.

The court, in whichever context, will always strive to protect children from harm.

Delay in the court process is inimical to a child's welfare.”

Sources of judicial knowledge about systemic/family psychotherapy

Bryn, Dale, Evelyn, Hilary, Kim and Mo claimed to have learned more about mental health and therapeutic issues, and particularly about systemic/family psychotherapy, from hearing cases over the years than from formal training. Bryn had also been informed by having friends in the field and by personal experience of mental health issues within the family. Dale had never done any reading or judicial training on family therapy but had learned through reading expert reports. Bryn remembered:

“.. years and years ago we had a presentation on different types of therapy from someone who sort of described all the different types of therapy that there were, hundreds and hundreds (SH oh right) and tried to explain the difference, analytic and cognitive analytical theory, cognitive behavioural therapy and all the rest of it”

but could not recall whether family therapy had featured in this presentation. Evelyn called judicial training “pie in the sky” because there is simply not the time available to take it; Mo could not manage more than 10 hours per year. Jay described trying to prioritise training in family work (having a caseload which includes some civil cases) and reading the Judicial College website to catch up on the content of any relevant courses missed. Hilary was the only judge who claimed with certainty to have received any formal training on the systemic approach.

Choice of experts

Jay and Kim both felt that there were also problems in this process from the judicial point of view: Jay described having to trust the advocates through not having access to information, or sufficient time, that would enable challenge to their suggestions for appropriate experts, and sometimes being disappointed by expert reports. Jay thought information about experts’ suitability was exchanged by word of mouth, and felt that judges being more active in this area might be desirable (as recommended (2011) by research conducted by Pearce and Masson on the representation of parents in care proceedings) but was not practicable. Kim would prefer to have more input into the choice of expert:

“I’d prefer they came into court and said ‘Judge, we’re having a discussion as to what we need in the way of experts’ reports, can we draw you into that discussion?’ because I think that’s more helpful. If people come into me and say ‘We’ve already agreed’ and the parents’ solicitor is saying ‘well we’ve already agreed that we want a report from Dr Snooks’ and I actually don’t agree with it, the perception of that party’s fairness of the process if I say ‘no, you’re not having that’, they think you’ve prejudged them and it’s gone already”.

Helping the court make complex decisions

Despite their concerns that experts were used too often, that sometimes inappropriate choices are made, and that there can be a wide variation of opinion on the same issue

between experts, the judges were keen to point out how much they rely on them when it comes to making really difficult decisions, and how harmful “bad” expert advice can be. Bryn for example had requested a report on the impact of a child giving evidence; the expert had recommended that it was important for the child’s voice to be heard, but Bryn had realised subsequently that this had not been helpful. Bryn felt that there was a dearth of appropriately qualified experts and was keen to encourage any untapped source of expertise; but also wondered whether judges sometimes expect too many answers of the experts. Earlier in the interview Bryn had described how experts rely on and trust what is said to them by the people they are assessing, whereas judges are “more cynical”. Subsequently in commenting on the lack of able experts, the “imprecision” of their work and the possibility that judges might expect too much of them Bryn observed:

“the lawyer wants precision and the doctor... (1) tries things out, we’ll try this, we’ll try that, inevitably because they, it’s an uncertain field”,

going on to say that experts would offer as much certainty as they can. It is also clear from the judicial definition of a good report that the judges in this project find certainty much more helpful than uncertainty.

How far is understanding shared?

It is impossible to compare the systemic experts’ views of what makes their discipline particularly suited to the process of assessment for court with judicial views because the judges were totally unaware of it’s being used in that way. All that can be said is that if one looks at the judicial definition of a good report most of the qualities claimed for the systemic approach would be among those identified as desirable by the judges. The exceptions are probably the relational model (simply presumably because the judges are more used to reports and assessments being of individuals) and more significantly the whole question of the toleration of uncertainty and the ability to take a firm position in relation to the questions asked of the expert. The issues of the meaning of “truth” in different contexts and the

implications of using the title of psychotherapist also merit further analysis. The significance of all these potential differences of understanding will be explored more fully in the discussion section.

Another aspect of the suitability of the systemic approach to the expert role is its relationship with the idea of change and how well it fits with forensic process. This emerged with such emphasis from the data that I have analysed it separately in the following section.

Change in assessment and in the court process in general

The issue of how far the process of assessing an individual or family might bring about what I have chosen to call “helpful change” or have a therapeutic effect was not one which was reflected in the questions asked in my first two systemic interviews. However the idea emerged so strongly in my interview with Chris (and was also clearly present when I revisited Alex’s and Bryn’s interviews in the light of Chris’ comments) that I subsequently included a question about it in all interviews, including the judicial.

Systemic views

Alex felt that by aiming in the assessment to create a “bigger picture”, and to focus on strengths and resources as well as deficits, an opportunity was created for individuals and families to be portrayed in new ways, and that such shifts could have significance for the outcome of cases. Alex described work which resulted in a mother thinking of herself very differently, with consequent therapeutic effect. Alex believed that the subsequent decision of a younger child to move back to live with this mother “had something to do with what they were hearing and what she was hearing about herself”.

Chris in talking about what was rewarding about working as an expert identified the satisfaction in being able to facilitate change, such as enabling families in private law cases to stop being in court, and subsequently commented: “that’s how I treat my role as expert in any case whatever they want to call me, is doing a therapeutic assessment, I’m always doing that”. Chris saw creating an enabling relationship with the family as part of that process. At the same time Chris recognised that there would be no payment for “anything that *they* (my italics) call therapy”.

Fran went further in saying that there was an external expectation that the assessment would bring about some change, largely as a result of having a relational focus rather than a linear individual assessment. Fran saw the ability to begin to involve people in thinking about the possibilities for change, however stuck patterns of behaviour seemed to be at the time,

as “one of the keystones” of the work, emphasising that assessing the possibility for change is the only way to be useful. Fran thought that there had been a time when the judge “would say, you know, ‘oh I think they need more therapy’ nudge, nudge, wink, wink, ‘we’ll ask for another assessment’ but we don’t get that any more”. Like Alex, Fran talked about creating a new narrative which brought about changes in behaviour through changing beliefs about relationships (for example, introducing new ways of understanding disputed accounts of the same event). Fran also considered that that could be created by considering the effect of marginalisation on families in the court system and “trying to convey that you really will listen even though you’re not necessarily agreeing with what the person says, I think that’s a very important part of the therapeutic process”. Fran also described working with a couple where there had been a breakdown of contact but feeling that there was a “wave that we could ride”. Fran attributed the swelling of this wave to work which had already been done by the guardian (although Fran did not think that the guardian was fully aware of the effect of her own work).

Gerry considered that the fact that families have no choice about the process means that they “have to listen” in a different way from how they may listen in other contexts, and that the “drama” of court is helpful for some, resulting in long term change in some cases. Gerry spelt out the dilemma hinted at by Chris and Fran: “I think this is an interesting problem because I do see the assessment as an intervention and this isn’t the way the Legal Services Commission thinks about it, they think it’s an assessment” (the LSC is the body that approves the appointment of experts and administers their fees). Gerry, like Fran, argued that it is impossible to assess the potential for change (which is often what the expert is asked to assess) without a trial of change. Gerry’s opinion was that the judges and other lawyers understand this dynamic but that it does not fit the model required by the administrative system and that it is not possible to talk openly about this dilemma:

“I mean I, I always make it explicit but I still think they’re not, they can all sort of nod wisely but they’re not allowed to say it or they don’t feel they’re allowed to say it

SH There's a constraint around the language?

Gerry There's a conspiracy around the language, yes!"

Interestingly Pat also talked about the need to "whisper" the idea that some judges allow more extended assessments because they recognise the potential for change.

Les also thought that regardless of the outcome in court a good expert assessment could have therapeutic effects and keep cases out of court. This might be by offering an opportunity to make sense of an experience or inviting the participants to see things from a different perspective by asking what systemically would be called "circular questions" (Burnham 1986 pp 108 - 125). Questions could include asking why the parent thinks the social worker doubts his parenting ability or what would need to change for the child to come home. Unlike the other systemic experts, Les was not convinced that the judges were aware or made use of this potential.

Nick also believed that particularly in the private law cases there could be a sense of their being pervaded by frustration and the hope that "somebody like you will be able to sort this lot out". Nick emphasised that a "proper" assessment would involve meeting a family three or four times and forming a relationship with them "and as we all know, assessments are interventions". In expanding this idea, Nick talked about the potential for that relationship to be containing, and for questions to be asked that had never been asked before, so that while change may not "be on the agenda", in undertaking the assessment, it is not off the agenda either, and "I work from the assumption that my, our involvement has the potential of creating some change".

Like Chris, Pat was and is drawn to the work by the high potential for change when families are "in extremis". Pat's view was that the expert position made it more possible to explore options for intervention and to introduce alternative ways of seeing families such as explaining the context of behaviour such as external threats to the family from local gangs.

As well as the therapeutic potential in the assessment process, the systemic experts recognised some activities or effects which could be described as therapeutic in other aspects of the court process. Chris, for example, had noticed judges talking to children more about their dilemmas in making decisions, or writing to children to explain their decisions. Fran felt that although judges in private law might be geared towards compromise and “meeting in the middle”, in one case she remembered

“one very robust barrister saying ‘this is ridiculous, this child can’t go on seeing her dad in the contact centre, it’s got to move on’ and I think I was slightly kind of saying ‘yes but’ and actually I think she was right. I think her saying ‘it’s got to move on’ was very well timed and it did move on”.

Fran thought that it could be useful for judges, experts and other lawyers involved in cases like this to develop dialogues and have conversations outside the court room about this kind of issue.

Gerry had witnessed judges intervening personally in cases, for example trying to make a positive engagement with families. Both Gerry and Les felt that this could potentially be helpful but equally there was potential for damage to be done. Nick felt that the respect shown by judges to the parties, and their commitment to ensuring a fair process, was therapeutic. Like Chris, Pat had found judges

“thoughtful and child centred generally speaking... (2)... able to be child centred I mean (*some text omitted*)... that judge was very..., asked some very penetrating questions you know and er really made us think and made us defend our position very clearly but was willing to go with, in a very child-centred way, with reunification”.

Some judicial interventions were considered to be unhelpful; for example, Fran thought that judges getting frustrated with conflicted parents and using their authority to “chasten” them only made them blame each other more. Gerry was annoyed by judges who were committed to a particular belief system or theory such as parental alienation which might

result in unwanted contact being enforced. Les talked about a parent in a public law case who said

‘look, it’s like they put you in a bull ring and run you around and around until you drop dead from exhaustion ... (4)... you know, constant assessments’.

Judicial Views

Some judges were very emphatic that a clear distinction must be made between assessment and treatment. Bryn recognised that people might change in the court process, but went to great pains to find for me the case reference (Re G 2006) that established ‘The court has no power to make an order for an assessment if the main purpose is to provide a continuing course of psychotherapy to the mother’. Bryn pointed out that Baroness Hale had said in this case that treatment was a matter for the health authority and Bryn felt that the furthest judges could go in the matter of helping families to access treatment was to lean on the local authority.

Hilary felt that a report could and should have some therapeutic effect by drawing the attention of various captive audiences, especially the parents, to the possibilities of change, and should be aiming to achieve some change, because families are dynamic, not static. That emphasis on creating a context for change should be an aspect of the assessment process as well as the final report but “we mustn’t call it that because the LSC won’t pay for it”.

When I shared this comment, Jay was very clear that “ that’s not the goal of the expert: the goal of the expert is to use their expertise to answer the questions they are asked; of course the recommendations they make are likely to influence the outcome of the case to a greater or lesser extent but I think they would be losing the plot somewhat if the way their reports were written had that in mind to any extent”, and later summarised the High Court’s view on this matter as “it’s not the job of the legal aid fund to help someone become a better parent”. Jay’s view was that although people do learn things in assessments, that is not the object of

the assessment, which should be delinked from therapy as far as possible; any shift or change is secondary to the main objective. Kim on the other hand thought that ideally change should happen as part of the assessment, but realistically it was likely to be a by-product. Mo thought that for the expert to have a change agenda would imply a lack of objectivity and was therefore undesirable.

There were thus two main strands to the judges' thinking about the possibility of change in the assessment process, and a considerable variation of opinion as to its desirability. The first strand was that the achievement of change was specifically excluded, both by case law and by the terms of reference of the LSC as an object of the assessment process; on this point the judges varied from what can only be described as subversion (Hilary) to compliance (Jay). The second strand was that any intentionality towards change on the part of the assessor would compromise the objectivity required of the expert. This was expressed most clearly by Mo but was also reflected in general judicial discomfort with the idea of psychotherapists acting as experts.

As was explored in the section on the potential usefulness of a systemic approach to the expert role, the very title of psychotherapy creates an expectation that treatment will be the object of the relationship and that assessment will be seen as incompatible with it, because of potential breaches of confidentiality and compromise of the therapeutic relationship. Jay and Mo were also concerned that psychotherapists (unlike other experts) develop the sort of relationship (presumably a partiality?) with their clients which makes it impossible to remain objective. It is encouraging in one sense that the judges have paid attention to the views of some psychotherapists and respect the special status of some kinds of therapeutic relationship. However, taking this position on board so whole-heartedly does seem to have closed down their openness to other ways of understanding a therapeutic relationship. In the course of my interview with Kim we got into a conversation about my own beliefs about the potential for a systemic approach to be useful to the courts (an episode which I will be

exploring in more detail in relation to my interviewing style!). Kim remained convinced that I would be fighting a losing battle if I were to argue for more systemic psychotherapist experts because they would be deterred by the need to compromise therapeutic confidentiality.

Therapeutic aspects of the judicial role

When I began to interview the judges it quickly became clear that they viewed family law as allowing the judge to be more active in ways that could be thought of as therapeutic (the “difference” of family law from other areas of law will be explored further in the next section). For example, Dale described “feeling that I’m trying to mediate, conciliate, achieve a better outcome”. I subsequently included a question for the judges about what aspects of what they do as a judge or the court process in general they considered to be therapeutic. Evelyn thought it was important for judges to listen carefully to parents’ complaints in order for them to be able to let off steam rather than keeping things bottled up so that they could move on more easily. Hilary aimed to work in such a way that “most” of the process was therapeutic, talking about a united multi-disciplinary effort to work simultaneously at the levels of content and process:

“but you do notice it when the lawyers and the experts are working towards a, an improvement or whatever it might be, you know and so er the way people cross-examine, the way people present their evidence, the way experts word their reports, the way they describe their conclusion, all of them have you know sort of double edge really, that they are saying what they think and why they think it, but also how they would like it to be used”.

Jay talked about the therapeutic effect of parents knowing that they had fought for their child, and like Evelyn and Kim, mentioned the importance of listening to people, treating them with respect and giving them an explanation.

In preparing the literature review I had read an article (Kaplan, 1998) about a family therapist who was working on a case where the father had killed the mother. The issue was which of

the families would have responsibility for raising the children. The author described talking to the advocates involved in the case in order to try to persuade them not to exacerbate the already difficult relationships between the two families by aggressive cross-examination. I thought this was an interesting example of an expert taking a very active step to promote change and at the end of the judicial interviews gave the judges a brief account of what Kaplan had done and asked their opinions about it.

Bryn and Dale felt that it should not be necessary for the expert to take that action, because either the judge or the barristers should realise the need for sensitivity. Bryn compared a recent case where wealthy parents had lined up five days in court with QCs over disputed contact:

“So I went into court and I sat down and I said: ‘Everyone’s come here to spend five days, but what I can guarantee is that at the end of slinging mud at each other across the court for five days with very very experienced barristers asking awful questions over..Things will be much worse between you, family relationships will be much worse, your chance of agreeing as to what will be the best for the child will be hopeless. It will do a lot of harm and I have to tell you it’s not going to happen in my court, I’m just not going to do it. Now you’re going to go away and adjourn and sort this out’. And they did, it worked! But so they did, but er um they don’t always do what they’re told”

Dale called Kaplan’s action “admirable”, and commented that the court case in such cases is often the watershed which functions to “draw the poison” from the problem. Evelyn and Jay thought that Kaplan should have consulted the judge as it was unhelpful to create the possibility of being seen as taking sides, but Evelyn thought the judge would have encouraged the intervention. Hilary said that judicial ignorance was bliss in this case, Kim that it would probably elicit official disapproval, and Mo was the most disapproving, thinking that this practice would contravene Bar Council guidelines and that the justification for it was “too woolly”. The huge range of judicial opinions on this issue was very helpful to me in

challenging any simplistic assumptions that it would be possible to identify one judicial position.

I was able to establish over the course of these interviews, though I obviously did not share this at the time, that one of the judicial participants had received reports from one of the systemic participants who was very committed to the idea of therapeutic assessment. It is interesting that this position was visible to the judge, whose comment was that the assessment and the therapeutic side were more closely entangled than would ordinarily be seen with expert reports.

How far is understanding shared?

In the literature review I identified that a key principle of a systemic approach is the idea that an observer cannot help making a difference by the very act of observation: a theory which is sometimes called (for example Hoffman 1985) second-order cybernetics. It seemed clear from my interviews that all the systemic participants subscribed to this theory. Most of the judges spoke as if they believed that providing the expert remains “objective” in the sense of lacking partiality to any position or person, it is possible to undertake an assessment which does not influence what is being assessed and which somehow gives a picture of some kind of reality: Jay for example said “examples of psychological reports which have been helpful is when they have given me a real insight into the mental functioning of a parent in a case..um...where because I’ve read the psychological report I can have a much better understanding of the way the parent presents.” The judge who came nearest to a “second order” way of thinking was Hilary, who talked about families being dynamic not static. It seemed that some of the systemic experts were frustrated by this lack of common ground. Chris for example, when asked whether judges’ understanding of the process of assessment and reporting might be improved in any way, said

“.. this whole thing about assessment, therapy, what it means to be engaged with people, human beings, at this point of stress, in order to try to find a way out of a

situation that has clearly deteriorated either within the home or within the relationships and how to redefine the notion of what working with somebody...that assessing..(2)...well either assessing whether work is possible is always part of what you're doing but you also have to do a bit of work”.

Gerry was equally direct, but with a more practical slant:

“.. I do see the assessment as an intervention and this isn't the way the Legal Services Commission thinks about it, they think it's an assessment, I've, you know I've repeatedly argued that you can't assess people's potential for change without a trial of change, um, and your assessment is to assess people's capacity to adapt and do something different, so you have to do something, and in the legal thinking they find that idea difficult, but though the judges understand it perfectly well, it's, it's only the , it's actually the LSC that find it difficult “.

The significance of this statement lies in the fact that no expert can be instructed or commissioned without the approval of the LSC so if the second order issue is not visible to them it has to remain “underground”, unrecognised and unspoken. To name it would be to make it even less likely that change could be on the agenda.

I have already commented on the significant changes which have happened in relation to expert witnesses in family law since I first conceived this project in 2009. The latest development at the time of writing (February 2013) is that whereas previously expert evidence would be heard if it was “reasonably required” now judges will apply a tougher test and only allow the evidence if it is “necessary”. This surely makes it even less likely that the beneficial effects of independent expert assessment which both judicial and systemic participants in this project claim to have identified could be reproduced in the future. Earlier in this section I referred to the possibility that family law creates opportunity for judges to be more active and “interventive” than in other areas of law. The next section will explore this idea further, as well as looking at other ways in which working in the family courts may differ from working in other forensic settings.

The distinctive features of working in family justice.

When I began this research I was expecting to find a number of areas where there were some gaps of understanding between the judges and the systemic experts about certain key concepts; and certainly a few, though not as many as I imagined, have emerged. What I did not expect was that such a strong sense would emerge, particularly from the judicial participants, of the “separateness” of family law from other areas of law, and the opportunities which it offers to them to do something different. The systemic experts (apart from Les who had some experience working in civil law and crime) were not in a position to make this comparison, but there were connections in the ways that they talked about their experience of working in the family court system. This section will include three subsections which are quite diverse from each other and for ease of understanding I have analysed and compared these separately.

1) *The “attraction” of working with families in the justice system*

Systemic Views

This is not a question that I asked specifically of all participants (though on thoroughly reviewing what has emerged from the data, I wish that I had). I did ask the systemic participants what drew them to the court work. There seemed to be two main strands to their answers.

Firstly they seemed to share a satisfaction in redressing power imbalances and giving voice to the marginalised, whether at the level of the child within the family, the woman within the couple or the family within the family justice system. For example, Alex found that any apparently contradictory aspects of the expert role were reconciled by the idea of “taking the child’s side”; bringing forth marginalised voices and ensuring that families felt they had been treated justly. Chris found intellectual and practical interest in applying a systemic perspective to situations where the state was intervening in families’ lives. Fran commented that the process “gets to your sense of justice” and was interested in the potential for the

legal system to redress power imbalances within families (for example in abusive relationships) whilst also recognising the possibility of power imbalances being replicated within the legal process and wanting to be able to challenge this. Fran saw advocating the childrens' position as the cornerstone of court work, while Nick expressed equal passion about foregrounding the interests of the children and ensuring that their voices were heard. On a more abstract level Les was drawn by the possibility of pursuing a social justice agenda and highlighting dominant and subordinated discourses.

The second major strand of connection was around the reward of being able in Chris' words to "facilitate some sort of change". Gerry talked about the "very nice warm fuzzy feeling" of being able to avoid contested hearings and Pat said that it was "lovely" to be able to reach agreement in public law cases and get the family on board for thinking about change. Pat's "passionate belief" that children are best raised in their own families where possible was also a strong motivator.

Other "attractions" of the work included intellectual challenge, and enjoying the interviewing and writing of the report. Gerry also admitted enjoying times when the drama of the court was helpful for people and also "even though I know I shouldn't, um winning my point". Nick talked about balancing the stress of giving evidence against the enjoyment of the other aspects of the work. Pat enjoyed finding coherence, seeing the logic of the system and generally being a "little Poirot"!

It is hardly surprising to find such a strong interest in and commitment to the wellbeing of children and families but it does raise the question as to why so few systemic therapists are moved or attracted to direct their passion along this particular pathway.

Judicial perspectives

Although I did not ask all the judicial participants specifically about this issue some comments emerged spontaneously from their interviews. In my first interview I asked Bryn

how account was taken of the effects of the court process on the present and future emotional wellbeing and relationships of the participants. The reply was:

“To me it’s the great attraction of family work, what makes it totally different from any other sort of work actually. Because crime, the criminal court is deciding what happened and the civil court is deciding what happened, was it a breach of contract, was there a road accident. But actually although in the family court you need to know what’s been going on, it’s about what’s going to happen

SH Or what is happening

B or what is happening, and the thing that strikes has always struck me is that the actual court process is part of the facts of the case and the parents respond to being in court and it brings about change sometimes”.

Dale was interested in securing favourable outcomes for people, particularly children, commenting that the judge’s traditional role was less important than the interests of the child, to the extent that he or she almost becomes one of the professional team working around the child. The judge requires great sensitivity to the participants, watching for emotional reactions. Evelyn found the scope for proactivity in the resolution of family problems a source of satisfaction:

”and sometimes, perhaps outside the tramlines of a conventional court hearing, you could achieve something, a way ahead, or a limited way ahead, or the next step ahead at least. So I really felt that (*identifying text omitted*) there was a role to be constructed in the resolution of family problems”.

Evelyn talked about how times had changed from when judges sat back and listened from a very great height, and how they are now making themselves more accessible to the public and coming across as real people. Like Bryn, Hilary felt that being aware of the impact of the court processes was part of being “family-minded”, alongside the application of “structured discretion”, and like Jay drew attention to the different status of “facts” found in the family

court from those in the criminal court. Mo wondered if family judges have a natural preference to keep families together.

How far is understanding shared?

The judges and the systemic experts seemed connected in appearing to find a lot of “job satisfaction” in making a difference in people’s lives and in changing things for the better, or at least ensuring that they did not get any worse. The judges placed more emphasis on the potential for working creatively “outside the tramlines” whilst the potential for highlighting and challenging injustice and marginalisation was an important concern for the experts. I wonder if this difference is connected to being inside or outside the system, and how possible it is for judges to talk about lack of justice when in a sense they may be expected to embody it? Certainly Kim gave a clear example of acting to address an imbalance of power (refusing to allow the cross-examination) without naming it in those terms.

2) Less adversarial and more inquisitorial? Judicial “intervention”

In a recent case (Re C 2012) Sir James Munby, President of the Family Division, said that it was fundamental in family proceedings for the judge to have an essentially inquisitorial role, “his (sic) duty being to further the welfare of the children which is, by statute, his paramount consideration”, this role allowing a much broader discretion than in civil jurisdiction (compare this with Hilary’s comment about “structured discretion”). The Ryder (2012) proposals also stress the inquisitorial role of the family judge. Hilary and Jay both commented on how this might look in practice:

“Family cases are a bit different, the procedural structure is basically adversarial but courts are required to adopt a quasi-inquisitorial approach and to try so far as possible to move the parties towards reaching their own agreement through negotiation and settlement”.

My understanding of the distinction between the two models is that the inquisitorial approach allows the judge, and indeed other parties to the process, to have a much more active role in

determining not only how the case should proceed but how the “facts” at issue should be explored. In contrast, an adversarial position requires conflicting positions (e.g. between prosecution and defence) to be “fought out “with the judge as referee rather than active participant). Bottomley and Roche pointed out as long ago as 1988 that it is misleading to characterise family law in purely adversarial terms, seeing it rather (p 95) as “a modern amalgam of traditions...which has continued to emphasise ...the importance of the court’s responsibility for enquiry”. However, whilst the overall approach in family law may be inquisitorial, there may remain adversarial aspects (for example, parents may have opposing positions in private law cases or in public law may see themselves in opposition to the local authority); and a legal system framed in terms of rights may also encourage contesting positions.

Systemic perspectives

I have already described how the systemic experts can experience adversarial attitudes as unhelpful to families and “anti-systemic”, and it seems relevant in thinking about what is distinctive about family justice to explore the dichotomy between adversarial and inquisitorial processes. Several of the systemic participants were keen to advocate a more inquisitorial approach, for example Alex had thought a dialogue that had developed in the court between her and the judge had been very helpful and Fran argued for therapists to work alongside lawyers before cases get so entrenched in the court system”. One might see an inquisitorial system as more likely to result in dialogue (while an adversarial system might tend to bring forth monologues) and therefore probably more attractive from a systemic/social constructionist viewpoint (see for example Bertrando’s 2007 book about the “dialogical therapist”). The continuing interest in this dichotomy is evidenced by the recent (May 2013) suggestion by a contributor to the AFT discussion forum that the statement “Dialogue is just two monologues clashing” should be an essay topic for trainees.

Within the inquisitorial frame there is a huge emphasis on family judges becoming more interventive (Wall, Law in Action interview 2010 , Norgrove 2011, Ryder 2012) in order to take more active control over the management of the case and to try to reduce delay. There is also a strong emphasis (as there would be in therapy!) on continuity of personnel, particularly the judge. I was curious about the use of the word “intervention” which is also commonly used in a therapeutic sense to describe the actions of the therapist which are intended to facilitate the process of change (although I found no evidence of any awareness of that nuance of meaning in the judicial context) . I therefore asked the systemic therapists how they understood the use of the word in a forensic context and what they thought about the effectiveness of judges’ “interventions” .

Fran was not aware of the active encouragement for judges to “intervene” but when I offered an example (Bryn’s account of refusing to go ahead with the five day trial) “would applaud that actually *provided something else happens (my emphasis)*” Fran had other ideas for judicial interventions such as having court review dates booked six months ahead so as to give some structure and support to plans approved by the court (maybe suggested by the pattern of regular reviews of care plans for children who are looked after?) , and also making it possible for children to read all the court statements as part of bringing them “right into the middle of the process” in a way that they are not currently. Gerry envisaged judges being interventive as engaging with the family and trying to get them to realise that they could play a more positive part in the process, though having concerns that they might do something “stupid”. Nick thought it might mean judges being more directive of the parties at an earlier stage or possibly insisting for example in private law cases that families go through a mediation process. Pat was approving of judges having a stronger hand on case management and had had good experience with “thoughtful and child-centred” judges.

Les on the other hand had a much more negative view of the process and as a result was no longer acting as an expert in the local court. Judicial intervention was seen as “telling people

what to do”, and feeling entitled to instruct the expert on what type of therapies should be offered. Les could understand that some initiative was needed to stop cases dragging on for years but was not sure that an “authoritarian linear way of dealing with things was going to solve the problem”, calling instead for a more negotiated and less adversarial framework, which takes account of other professionals involved such as social workers.

Judicial perspectives

I did not ask the judges about the impact of this “mixture” of adversarial and inquisitorial processes and they made no comment about it, other than seeing a need for evidence to be tested in cross-examination (as evidenced in the section on courtroom skills). However, it seems clear from their comments about what draws them to family law that the flexibility and creativity allowed by an inquisitorial framework, and the potential for “intervening”, are part of that attraction.

Dale felt that judges have a responsibility to use their wisdom and experience to intervene and that it would be “a rum do if I were sitting there like a pudding”. Dale gave an example of rejecting a local authority’s care plan because no thought had been given to continuing sibling contact. Dale stressed the need for not making up one’s mind too early so that the parties felt they were being denied a fair hearing, but at the same time they should be given a sense of where the judge thinks the case ought to be going. Hilary felt that being interventionist involved “ a balancing exercise because we have to remain judges even though we do quite a lot which is not judgely in a way, it’s difficult...” and talked about “walking a tightrope” to ensure fairness. In this context Hilary talked very disarmingly about dreaming about cases and about trying to look “Delphic” whilst imagining “a big bubble above my head as to what I’m really thinking”. (This connected for me with what Sachs (2009) says about the “tock-tick” working of the judicial mind - moving constantly between one viewpoint and another -when preparing judgments, as well as the process which Chris and Alex described as “hedging and fudging”).

Several of the judges felt a huge responsibility in that, compared with decisions made in other areas of law, the decisions that are made by family judges are going to have lifelong implications for the children and families involved. Bryn wanted potential experts to be reminded of this. Dale talked about the judges needing to remember that families would be living long term with the consequences after the end of the case, and Hilary about “the story continuing”.

Kim gave several examples of taking very active interventions, for example, refusing to allow a further assessment of a parent in order to avoid more delay for the child in the resolution of the case, refusing to allow the cross-examination of an abuse victim by the abusive litigant in person, refusing to allow a guardian who had not spoken to the child on whom she was reporting to give evidence, and holding a very high number of regular hearings in order to that a mother could gradually be convinced with the safety net of the court that it was safe for the child’s father to share residence. Kim felt that any one of these interventions could have been appealed or challenged and that it was only through family judges being full-time in the family courts that they would develop the experience and confidence to take the risk. Mo’s ideas about judicial intervention focussed on minimising delay and applying scarce resources to many demands. Thus there was a wide range of views as to how far “outside the tramlines” it might be appropriate to go which resonates with the very different experiences the systemic participants had had of judicial intervention, and raises the same question about how much is known about the practice of individual judges.

How far is understanding shared?

The systemic experts seemed more aware of and more troubled by the adversarial aspects of the process than the judges. This is hardly surprising given that most if not all of the judges had had long experience of advocacy in an adversarial setting before their appointment whereas for experts it was largely unfamiliar and off-putting. It seemed to me

that Jay neatly captured these different emphases in making a distinction between an inquisitorial approach (which was the focus of the judicial comments) and adversarial procedures which had impacted more on the experts. (perhaps akin to the distinction which Burnham 1992 made between systemic approach, method and technique). This disparity of focus is obviously connected with the fact that the experts are entering into unknown territory and having to play by unfamiliar rules: Chris talked about “not being embedded in this world and being a visitor to the world”. Within this fluid structure It may be difficult for experts to know how to place themselves, what to expect, or how to make sense of this uncertainty in any given moment.

With one exception the experts were generally positive about the inquisitorial actions or “interventions” they had witnessed or heard about, although there was some concern for the damage that might be done inadvertently. There is obviously potential for a huge variety of practice which may be subject to little scrutiny beyond the possibility of legal appeal. Judicial interventions can provoke strong reactions and one wonders what oversight and understanding there is of the different ways in which family judges interpret this requirement of their role. This will be explored further in the discussion section.

3) “Hybrid knowledges”?

In the literature review I raised the question as to how far family law might be a legal area in which what Valverde (2003) calls “hybrid knowledges” may be evolving in the interactions between legal and “psy” discourses. This question obviously has huge implications for this research not only in terms of how far understanding is already shared between judges and systemic experts but what potential there might be for greater shared understanding in the future.

Systemic views

Bryn's comments about the different ways of thinking between the "medical" and legal professions (alongside the comment that lawyers are "more cynical") led me to ask all the participants about their views on this. It should be noted that systemic participants might distinguish not only between legal and "psy" discourses, but also between systemic and other "psy" perspectives. Chris for example answered by giving a case example which distinguished a relational approach to thinking about families from the individual approach shown by experts from other disciplines as well as the judges. Fran thought judges and lawyers are aiming to be very pragmatic, and to get decisions made and things sorted as quickly as possible. Fran thought that judges generally engage very well with systemic ideas but that they did not want too much complexity from the expert. Gerry talked about judges relying on "homespun thinking", that is opinions formed through life and experience rather than formal training. Gerry felt that this was not necessarily "any worse" than systemic professionals' thinking, however, the fact that judges are organised by caselaw means that they have a limited range of decisions open to them. Les felt that judges had a different concept of time, being very focussed on the here and now, and that sometimes care plans were made which did not meet the developmental needs of the child over time. Nick's experience suggested that the nature of family court work encouraged a systemic disposition in the judges, whereas Pat thought the fact that judges rarely see children makes a big difference to their way of thinking. However, Pat also saw a shift in the judiciary over time, especially in the higher courts, away from a "good parent/ not good parent" dichotomy towards more appreciation of complexity. When asked for a possible explanation of this shift, Pat said with a laugh "maybe we've had an impact!" Which raises the question: how would it be possible to know what has an influence?

Judicial views

The judges varied in their ideas of the difference between judicial and "psy" thinking (and it is important to remember that they would be thinking about psychiatrists and psychologists in

relation to this question) Dale felt that there are “remarkable similarities” and that everyone in the justice system, whether lawyer or expert assimilates the same philosophies and guidelines and is moving in the same direction. Evelyn thought that there was no clear dividing line, and that a “coincidence of view” is developing. Hilary thought that judges were more “case hardened” (exactly what was meant by this I omitted to clarify, but it connects for me with Bryn’s word “cynical”), and also that judges took the long view and decided in the light of the whole picture; similarly Mo felt that judges take a much wider view of the whole system than experts usually do. My understanding of this comment is that while the expert is focussing on the individual or family that s/he has been instructed to assess, the judge is also looking at professional networks including internal court processes and timetables, resources, policies and procedures and the legal as well as the social implications of decisions.

How far is understanding shared?

I asked Dale to clarify the nature of the “philosophies and guidelines” which were seen as being commonly shared with the following result:

“Wherever possible consistent with their welfare needs, children should be brought up by their parents or within their natural families.

- Placing a child in care on the basis of a plan for adoption would always be a matter of last resort.
- In the private law context, consensus between parents is infinitely preferable to a solution imposed by the court. · The court, in whichever context, will always strive to protect children from harm.
- Delay in the court process is inimical to a child's welfare.”

These are the principles set out in Part 1 of the Children Act 1989, but also supported by the European Convention on Human Rights, particularly article 8, and the United Nations Convention on the Rights of the Child, which include the right to know and be brought up by one's parents. Bainham (2005) points out (p40) that the thrust of these principles, with their emphasis on parental responsibility and on avoiding state intervention wherever possible (the "no order" principle) could be seen as the "privatisation" or "deregulation" of family life (comparing this with the contemporaneous privatisation of industries), strengthening the position of parents in relation to the state or local authorities. It is obvious that in one sense law does create a common knowledge, because everyone is bound by it, and I found no evidence in my interviews that Dale was wrong in claiming a shared commitment to the principles outlined above. The interest lies in how much understanding is shared in the interpretation and daily practice of those principles: for example, how far issues of marginalisation on grounds of gender or race are addressed, and how far the "political" aspects of legal processes are acknowledged. Another issue raised is how appropriate and desirable it is for judges to claim knowledge of other disciplines such as the "psy" professions. Both these questions will be explored further in the discussion section. Finally research participants talked a great deal about the particular emotional impact – on themselves as well as on the children and families concerned – of involvement in family court proceedings. There was concern especially about children involved in private law disputes. The next section will consider this in more detail.

Working with relationships in the family justice system

They fuck you up, your mum and dad.

They may not mean to, but they do.

They fill you with the faults they had

And add some extra, just for you.

Philip Larkin This be the Verse.

This poem was quoted in a judgment (CP v AR & Anor [2009]) by Lord Justice Wall (so famously that I understand the case in which he did so is now known informally as “Re F”) and for me encapsulates an issue which has emerged as preoccupying all of my research participants: their desire to alleviate the distress arising from unhelpful patterns of interaction which have been established within families, whether maliciously or unintentionally.

Systemic views:

Distinctions between public and private law.

I had not considered when I began this research that participants might have different things to say about these two aspects of family law, as well as changing patterns of connection with each (for Chris practice changed from a predominance of public law cases to mostly private, whilst Nick’s has gone in the opposite direction). Fran highlighted the dynamic that public law involves much more working with other professionals such as social services and that relationships may need to be “smoothed over”; also interventions from other agencies are still “rolling on” while the case is proceeding. Nick felt that there was an expectation in private law cases that the expert would somehow “sort it out”, a pressure which was not felt in public law. Nick commented on the distressing aspects of public law in that a lot of blame was thrown about with a painful impact on everybody. However, the main difference for several participants was the “beastliness” of private law cases.

Beastliness

Several of the systemic participants talked about the “beastliness” (Fran’s word) of working with conflicted parents, how hard it was to handle the dynamics and how the children’s voices in these situations were not being heard. Pat talked about being driven “crazy” by private law cases, referring to the “excruciating” suffering of children involved in them. Gerry, who mostly specialised in public law cases, described working with private law cases as “hell”. Chris was worried about the financial pressure on families involved in private law disputes and quoted a case where a single mother bankrolled by her mother had nearly been bankrupted, incurring debts of £30,000. Nick talked about the loudness of parents’ voices overpowering the voices of their children. There was complete unanimity in emphasising the distress of children involved in conflicted private law cases and the inadequacy of the system to address it. Yet this is not an issue which appears to be causing much concern outside those professionals directly involved and one has to wonder whether more attention should be paid to it.

Judicial views:

Distinctions between public and private law.

Only Kim and Mo made any comment about distinctions between public and private law. Kim echoed many of the systemic comments (for me the long pauses and repetitions suggest the considerable impact on Kim of working with these cases):

“(10)...private (*assume “public” meant in the light of following comment*) law the focus will always be the safety of the child, and I’m not talking about physical safety, you know what I’m talking about, I’m talking about emotional safety much more often than physical safety..(4)... so that’s the underlying... (2)... driver for public law. Private law is more complex, it can involve that but it’s the whole... (4)... understanding – can anybody understand the way these parents treat each other and their children. The whole – you’re much less involved, as an expert, you’re much less involved in

understanding the different roles of the people in the process than you would be in public law. In private law you've got to understand the incredibly complex, complex dynamic of some of these families"

Mo commented only on the pragmatic difference that there are more experts in public law and disputed cases. However, there were more judicial comments on the potential for distress in family proceedings and the need to manage it.

Blood on the Carpet

Both Bryn and Kim commented on the tremendous stress that must be involved for parents in having their private lives made public. Jay and Kim found a common metaphor in their desire to avoid "blood on the floor", that is to manage proceedings with a view to minimising distress. Kim talked about the importance in public law cases of creating space where parents could come to a better understanding of what their children needed from them and how it was that they had not been able to provide it. Jay explained that part of what makes a family judge is the ability to give parties "a pat and a stroke", and to say or do something which will help them to be more understanding or respectful of the position of the opponent. Jay described trying to find time to talk informally to parents

"because I think it's, I think it's important, if one can achieve it, that they, they go away from the court feeling that they are people who've been doing their best, perhaps not very adequate best, that they've been listened to, and that their view has been treated with respect."

How far is understanding shared?

It is interesting that both groups appear to find the conflicted private law cases more emotionally taxing than the public law. The following two extracts give an opportunity to compare "systemic expert" and judicial analyses of a similar family interaction:

Pat (expert)

:” the child who’s denigrating the father just is...I feel he’s just being torn apart, (*some text omitted*) when he came down with his mother, (*some text omitted*) she said he just harangued her the whole time, called her a f**ing bitch because she was making him come and see the father (*some text omitted*) and so I commiserated with him about that and asked him how he wanted the session to run with his dad and he had some ideas and brought the dad in and we had a lovely session, a brilliant session (*some text omitted*) and then I’m told by the mother that the child is saying to her that he can’t really express himself. So how you keep the voice of the child – I’m seeing him with his mother tomorrow – how you keep that voice authentic (SH um) is really hard, it’s really hard, because kids are trapped in these horrible processes”

Bryn (judge):

“I’ve had one case recently of an intractable contact dispute which you will understand. And they ...the...as I understand the sort of general syndrome if one could call it that of the um.....determined mother who stops all contact I say determined because...with hesitation because that’s not quite the word I suspect in most cases it’s an emotional block that operates not a callous calculated intention to stop it. But that then leads the child to find some way of feeling comfortable with their situation and having to resolve it by developing quite a deeply expressed hatred of the absent parent”.

I would argue that these accounts are connected not only in the attention paid to understanding the complex dynamics of relationship involved in such situations, and in not attributing “blame”, but also in recognising the difficult experience of the child. I will say more about this issue in the discussion chapter. The next section will focus on the process by which judges and systemic experts have acquired the professional knowledge and

identity which has informed their comments to date, and the implications of this for their interactions with each other.

Learning on the Job

From the beginning of this project I had been interested in the process by which systemic therapists had been recruited to the expert role and what training had been helpful to them in that process. Bearing Good Witness had established the need to attract more skilled professionals to the task and it seemed important to cast some light both on what informal factors might be involved in doing this as well as more formal factors such as the availability of appropriate training. I had also been told by what was then the Judicial Studies Board (now the Judicial College) that there were no training materials available to the judiciary on systemic psychotherapy, so I was interested to explore both how much the judges knew about the discipline and how that knowledge had been acquired. My semi-structured interviews therefore included questions on these areas. However, what emerged was a much more complex picture than I had expected of the circular relationship between practice and learning, and between confidence and competence. What was especially interesting was that this seemed to apply as much to the judges as to the experts.

Systemic Views

“SH What experiences do you think have been the most helpful um in preparing you for and developing your skills in being an expert?

Les... Well, just doing it, the (*laughs*) accumulated experience of doing it um so I learned on the job really”

How identity as an expert emerges

For most of the systemic therapists the move into the expert witness role happened almost by accident rather than being a definite career choice. Alex, Chris, Nick and Pat were dually qualified as social workers and had had some experience of working in statutory contexts or doing some sort of assessment for social services departments whilst working with risky families who were involved in care proceedings. (Alex commented that colleagues were

often reluctant to take on any work involving the court). This led naturally to being invited to become involved more formally, for example by joining a specialist business or team or being invited to work with a colleague who was already undertaking expert work. Fran, Les and Gerry had also become involved in court as a result either of working in a context where there was more exposure to contact with forensic processes (such as a rape crisis centre where reports were required on the psychological effects of sexual violence) or of working with a colleague who was already involved in court work.

All felt that the most helpful learning in relation to undertaking expert witness work had come either through practical experience in various contexts or through observing other people, either other experts or even the lawyers. Alex had adapted pre-existing skills acquired from different working contexts and areas of systemic practice such as teaching (bringing forth subdued voices), clinical work (engaging reluctant families) and working in schools (working in the short term and with minimal engagement). Les felt that a psychology background helped with skills of analysing and weighing evidence and made it easier not to get “bogged down”. Nick had found making formal presentations and evaluating research evidence (which involved reading huge amounts of material and “separating the wheat from the chaff”) a useful preparation. Chris, Fran, Gerry and Pat all identified working with a more experienced colleague as the most significant factor in their learning; Fran and Alex still preferred working with a colleague as it helps to share the difficult aspects of the work as well as allowing a different perspective on process, even though both had moved on to working independently as an expert some of the time. Fran identified the work of a number of systemic theorists as influential even though “they don’t specifically write about this area” including Cecchin for prejudices and context, and Asen for “thinking about ways round impasses” (both are well known systemic practitioners and writers), as well as other colleagues who have helped on an informal level.

It seemed that there was a common theme for the experts that through their initial exposure to the work (usually “on the back” of an already involved organisation or individual) they would gradually acquire a reputation and identity as an expert, which would lead to their being approached to undertake further work by people familiar with what they had already done. Thus personal acquaintance and connection with professionals such as guardians ad litem or solicitors would lead to further instruction in other cases, developing their experience and reputation further. Chris and Les both said specifically that they had never sought out the work or advertised, but had responded to approaches. As a result there was a sense that “you are only as good as your last case” (to adapt an idiom of which I have been unable to find the source): Alex, for example, was concerned that the goodwill of a guardian ad litem who had previously been a source of several commissions might have been lost by Alex’s latest report taking a position which did not “favour the mother” as much as the guardian might have expected. To some extent the reputation of the professional who recommends the expert to the court is also on the line: Alex reported one guardian’s comment:

“well when we go into court I need to know that whatever you put into your report you can represent otherwise it makes me look like a fool”

so that the expert’s ability to be able in court to articulate and defend the position taken in the report becomes a factor in being instructed.

Lack of feedback

There appeared to be no formal mechanism for feedback to the experts on how their reports or performance in court had been received by any of the parties, including the judges, with the result that the experts were often left trying to make sense of outcomes in other ways, being approached again in the future being one of the most important. Judicial feedback was rare but much valued when it was received:

“but he (the judge) asked for myself and the, the guardian to come into court and he thanked each of us. He thanked me for the way I’d written the report which he said

was helpful to his decision making and that felt really, really good, it's the one and only time a judge has actually..he, he he said 'I'd like to see you in the court' and so we went into the court and he said that and that was really nice."

Chris also commented on the infrequency of judicial feedback and also raised the question of how much it feels possible to rely on it:

"because the judge was very nice about my being respectful to everybody, and that respectfulness being helpful. However, that was a very interesting one, he did decide himself that it was I who had finally said what ought to happen when in fact it wasn't, or what would be damaging or not because the whole point was that I'd just sort of mandered around the place and didn't actually say. So it's very interesting when in his summing up where I was he said C has been very helpful (*laughs*)"

Nick had noticed that judges familiar with multi-disciplinary team reports were asking more often for there to be systemic involvement.

It seemed that the way the families involved felt about the process might be important as well as how the professionals had reacted. Alex gave several examples of experiences which had provided useful feedback, including being approached by one of the parties after a case to offer some private therapy and being phoned with the outcome by a father after the case had finished, and even the meaning given to receiving a smile from a mother who had been the subject of a report. Les told a story about being informed by a guardian about the death of a young person who as a result of Les's intervention had been able to have a final unsupervised contact with her mother. Les was deeply touched both by having made a significant difference in the young woman's life and by the fact that the guardian had noticed this enough to contact Les with the information and concluded: "So that's what makes you think why you might want to do this work". Nick was very pleased to have got some positive feedback from children who were seen again about a year after the initial assessment had been completed, but felt that such opportunities were all too rare.

All the experts were keen to receive more feedback: not only about the format of the report and whether it has been written as required (length for example), but also about usefulness, about the way the case was concluded and about longer term outcomes for the children and families involved. Nick commented on how hard it was to get feedback from the parties, and even when formal requests for feedback are sent to the instructing solicitors, it is only received in 30% to 40% of cases. Pat said that the outcome was not seen as the expert's business by other professionals and that sometimes the expert contacts the family to find out what has happened.

I was surprised by how eager the experts were to get any kind of response to the work they had put into a report and how much could be read into what seemed to be fairly insignificant exchanges. There was a sense that they had made a big investment in engaging and making a relationship with the families which was abruptly truncated by the court case. This disconnection was heightened by not knowing what had happened to the families subsequently. This meant that as well as leaving a possible emotional aftermath the opportunity was lost of reflecting in the light of subsequent events on their formulations and the sense they had made of family dynamics. It also seemed unhelpful that there was so little formal feedback about the usefulness or quality of their reports, which could have helped not only them but others to develop their professional skills. It appeared that there might be a circular connection between the confidence which comes from getting good feedback in whatever form, which then provides encouragement to continue to make oneself available for the work, which in turn contributes to the further development of the competence which should be essential to the work, and thus to increased confidence.

Formal learning opportunities

Because on the whole the systemic participants' expert work was often a minor part of their practice, it seemed that there might have been less attention paid to accessing specialist supervision or continuing professional development in working as an expert than in other

areas of their practice. Chris was very clear that more would have been beneficial: there had been some meetings with other systemic experts but there had not seemed to be much systemic training on this topic. Fran thought that there was little systemic literature relevant to the expert witness role. Chris was one of a number of participants who commented specifically on the helpfulness of Blow and Daniel's (2002) article on post-divorce processes and contact disputes, and Alex mentioned Tuffnell's (1993) research on the relevance of a systems approach to psychiatric court reports in child care cases. Otherwise the theoretical ideas used to support court work practice tended to be more general, for example genograms, structural ideas, attachment theory, transgenerational scripts, narrative and solution focussed approaches were cited as being influential. Only one participant mentioned having completed formal expert witness training.

Being approached to take part in this research project appears to have provoked some interesting reflections on the usefulness of devoting time to thinking about making sense of the expert role systemically. Alex and Pat felt that the interview had brought out some ideas about the development of an "expert identity" over time and had highlighted aspects of practice which were particularly strongly espoused. Chris felt that the interview had highlighted how valuable it was to allow time and space to think about the issues discussed. Les valued the interest shown in working as an expert and commented that one of the reasons for no longer acting as an expert was that

"really nobody cares about it, so you put all this thought and time and energy and sensitivity and hold all these incredibly traumatic distressing stories and in the end nobody really gives a damn; so that bit about you're interested, so I thought, yeah, it's amazing to have somebody actually interested in wanting to know about this as an experience because it's one really powerful part of my own professional development"

I wrote earlier about the "invisibility" of systemic expertise to the lawyers within the family justice system, but I wonder if the court work of systemic practitioners is also "invisible" in a

sense to their therapeutic colleagues. I have no idea how many systemic psychotherapists regularly undertake this work; certainly when I tried to get some idea about this by advertising in a professional journal I had only one response. The people who attended the workshop on court work at the AFT conference in 2011 were on the whole initially of the view that a systemic approach and working as an expert were incompatible, and there is very little literature or continuing professional development on the topic. Several of the participants named each other as learning resources which reinforced for me the conclusion that this is a very small and possibly isolated group who have to be very resourceful to find ways to enhance their practice.

Judicial views

“SH Can I ask what knowledge you do have about family therapy, where have you acquired that?

Dale: Only by, only by listening to the cases down the years. I have never done any reading around the subject. It’s just what I absorb from expert reports I suppose: advice that’s given in court, er reports I’ve read in cases. Nothing I’m afraid more sophisticated than that.

SH I just wondered whether there had been any judicial training for example?

D No, none at all about family therapy, no none”

Listening down the years

I should clarify that the judicial comments reported here only refer to their learning in relation to the “psychological” issues rather than to the legal issues. The quote above encapsulates the judges’ account both of their learning about family therapy in particular and the process of being a family judge in general; that far more is learnt through life or judicial experience than through formal training (both Hilary and Kim made this point specifically). Cited sources of this learning included professional friendships or family connections (Bryn and Jay), expert witnesses via reports or court appearances (Bryn and Dale) and “learning at the coal face” (Bryn, Dale, Evelyn, Hilary, Kim and Mo)

Bryn, Hilary, Evelyn and Jay said that judicial training had been part of their learning (although not as influential as the experience acquired in sitting: Evelyn described it as “pie in the sky”) and Jay had also done research on websites. Mo expressed concern that there was insufficient time to undertake much formal training.

This situation would seem likely to work against the wider involvement of systemic/family therapists in the family courts as well as to limit the amount of formal training on the topic available to judges. To date most experts have been commissioned to write reports at the suggestion of solicitors or guardians ad litem (Brophy and Bates 1998 and 1999, Brophy et al 1999) and judges not often involved (Pearce et al 2011), though Ryder (2012) recommends more judicial involvement. Experts are approached because they are already known to these professionals from earlier cases to be able to produce a report which will meet the court’s needs; experts usually come to the notice of professionals in the first place because they are working alongside someone else who already had credibility within the system (see systemic data on first and continuing involvement). “Known” experts are the ones most likely to be invited to deliver judicial training.

Use of personal experience

Most of the judges had had experience in family law, either as barristers or solicitors, before appointment: Dale said that it was harder for the “money specialists” to acquire the particular skills and knowledge required for family work; but added that their experience as parents and grandparents and their “broad experience of life” would compensate for this. Dale was the only judge specifically to connect “how you were brought up as a child” and the interactions learnt there as being a factor in this learning. However, it is clear that the judges did consider personal life experience was an important factor in becoming professionally competent:

“and I sometimes think that if I have been a good family judge - as I believe I have for a long time - it’s partly because I have so many problems of my own that enable

me to understand personal problems and enable me to empathise with those that have problems like my own or different from my own and so I..I don't let it all hang out I can assure you" (Evelyn)

While being keen "not to let it all hang out", Evelyn also emphasised the importance of judges using their personal experience to make themselves accessible and "come across as real people". Kim thought that the judge shouldn't just sit back but show empathy:

"People say you shouldn't get involved: I don't think you should do family work unless you're prepared to get involved to a degree (SH um) obviously not completely involved, but I want people to know that I bleed, I want people to know that I care what happens to their children".

Kim saw some similarities between the judge's relationship with families and that of a GP in the need for trust to be able to develop; this view was informed by having a GP in the family. One judge had learnt a lot from the experience of a family member with mental illness. Bryn felt empathy with parents who had difficulty in retaining any self-respect while people were "prodding around in their most personal lives and tearing them to bits" and this personal connection informed determination to make the process as acceptable as possible.

Hilary and Kim both referred to the potential for family law to be subjective: for example in what Hilary calls "structured discretion", that is applying subjective judgments to established "objective" guidelines such as the welfare checklist. Hilary comments that the subjectivity of the expert interviewer can affect the assessment and goes on to say that no-one can shed subjectivity completely, although judges should make efforts to avoid stereotyping and compartmentalising their emotions: "getting real but not cynical". Jay also emphasised the importance of being aware of one's own preconceptions and making sure that one is not driven by them. Evelyn gave an account of feedback received from an expert who had felt unfairly treated and described the steps taken to explore this issue further and to make some changes in practice as a result.

I discuss elsewhere the potential for family judges to step “outside the tramlines” and to make interventions which are based either on personal beliefs and values, their own understanding of psychological theory, or their own experience. Kaganas has argued that in both public (2010) and private (2012) law judges’ views about what it means to be a good parent, and particularly a good mother, are having a negative and coercive impact on women, and Wallbank (2010) has also drawn attention to the implications in this context of a “utopian” (p117) vision of gender-neutral patterns of care and responsibilities. It may be that the potential for judges to use personal experience as part of their “learning on the job” would benefit from closer analysis and scrutiny.

Ongoing learning opportunities

Learning from watching judges in practice prior to their own appointment was identified as a significant factor in their learning by most of the judges. However, Hilary and Kim both talked about the fact that once judges are appointed they do not have the opportunity to observe other judges in practice, although they do obviously talk to each other about cases both informally (as Kim said “over a sandwich”) and more formally on judicial training courses. Jay also talked about the unremitting effect of the turnover of cases both in terms of the quantity of papers that have to be read and the difficulty of knowing what effect any judicial intervention has had:

“because they walk out of that door and the next case then comes in and when they’ve walked out of the door that’s the last I see of it”

As with the systemic experts, there seems to be a missed opportunity here for judges to learn both from watching each other and from getting more feedback about the outcome of the case they have decided.

“Sitting-in”

I asked the judges what advice they would give to anyone who was keen to develop their skills in acting as an expert witness. Dale, Hilary, Jay and Mo all recommended “sitting-in”:

that is, observing the processes of the family court. This is an opportunity which is usually offered formally to registrars (doctors whose consultants are acting as experts) via the Family Justice Council, but the judges seemed confident that anyone who was interested would be able to arrange such an opportunity directly by contacting the designated family judge in his or her chosen court.

How far is understanding shared?

When I originally conceived this research project on the interface between two disciplines I had not considered the issue of how a sense of professional identity and competence is acquired and developed beyond a fairly pragmatic curiosity about the availability of formal training on interdisciplinary issues. At that level it seems clear that the participants in this research have shared experience of not finding very much appropriate formal training to support them in developing their knowledge of each other's professional worlds, and of relying considerably on informal learning opportunities. The implications of this will be explored further in the discussion section. The wider issue of how a professional comes to experience her/himself and to be seen as competent and confident is fascinating but beyond the scope of this project to explore further.

This section has explored the processes by which participants have developed the knowledge, beliefs and values which inform their professional actions. The final section of this chapter presents some of the strongly felt ideas and opinions which have emerged in those processes.

Working with inadequate resources

Systemic views

I did not include any questions about resources in my semi-structured interviews. However, almost all the participants commented in one way or another on the resources available for children and families either in the justice system or more generally. Chris, Gerry and Nick described specifically how the role and involvement of the expert was constrained by the funding limits imposed by the LSC. Nick drew attention to the additional cuts in legal aid which were about to come into effect at the time of the interview and would remove almost all private law cases from eligibility, thus reducing even further the money available for expert assessment. Pat considered that the judges were responding to this by writing requirements for therapy or assessment to be funded by the parties into court orders. Sometimes these two concepts could be blurred with the court asking for both at the same time.

The experts also commented on the difficulties and dilemmas created by the lack of resources for families outside the assessment process. Gerry spoke about the position of judges who might have a very clear idea of a family's ongoing therapeutic needs but would not have available any disposal which would provide these. Gerry's belief was that the expert should ignore the resource issue and say what was needed even if aware that it was unlikely to be available. Gerry felt that some experts were influenced by the political climate into toning down their recommendations to fit available resources. This had led at times to Gerry being criticised for recommending resources that the local authority was unable or unwilling to provide. Chris on the other hand felt that it was not helpful

“ for the case, the people, to be able to say well I think this, this and this now go and work on that somewhere else - because there isn't anywhere else that they're going to work on it”.

Les talked about being disaffected by making recommendations for therapy that could not be met. Les was also concerned by the “horse-trading” that could go on outside the courtroom which might result in suggesting inappropriate but cheaper (or available) resources, such as putting a Schedule 1 offender for a non-accidental injury into a Webster Stratton parenting group.

The systemic participants also talked about the impact of financial pressures on their expert role. Fran emphasised the hard and time-consuming work that is involved in producing expert reports and felt that the charge being made for the service was less than what it actually cost. Gerry felt that the financial pressure created a “downer” and the reduction in fees which was being discussed at the time would be a deterrent to continuing with the work. Pat was more dependent on the income from expert work and, noticing referrals “drying up” after October 2011, had felt compelled to “say yes to everything”. This had resulted in Pat’s caseload being overloaded with private law “therapy” cases where “often people feel that if you’re, you know if they’re paying for it then you ought to do what they say and you know to come to the conclusions that, that they have and see things their way”.

Les was wary of the solution whereby the expert offers to do the work s/he is recommending, citing a recent example of a case where an assessment was carried out by an agency based a considerable distance from the court (and family’s) local area. Although the work recommended could have been done in the local NHS, the court accepted the recommendation for the work to be done by the distant private agency, with the local authority having to pick up the bill. Les considered that this set the NHS up as a “booby prize” as well as being disrespectful to the family, and felt that it should be a requirement for all experts to explore the availability of local resources and take account of them in their recommendations for ongoing work. Les deplored the lack of clinical governance for experts and was emphatic that the whole expert “industry” had lost the plot and was feeding off the legal aid budget. Both Gerry and Les thought that too much was being spent on experts and

that it would be preferable to enhance the skills and credibility in this role of local resources such as social workers.

These comments are significant in the context of reductions in finance which are currently being implemented not only in legal aid but in local authority and health spending, which may result in even more difficulties of the type described. I will consider the implications further in the discussion section.

Gerry also commented (in 2011) that the Judicial College has had a number of “pet” experts to train judges on “psy” topics and that these have not always been “the right ones” or the training sufficiently radical. I am not sure what the criterion for being “right” would be, but this comment does connect with my earlier observation that there tends to be a closed and self-perpetuating circle of preferred experts in which process judicial training can also become entwined.

Judicial views

All the judges drew attention to the fact that the intervention of experts is limited to assessment by the Legal Services Commission, following a decision in the House of Lords quoted by Bryn. There was a variation in their attitude to this restriction: for example Hilary was keen to achieve as much therapeutic change as was possible, almost by the back door, while Jay was clear that it was not the job of the legal aid fund to make someone a better parent. Dale was concerned that local authorities were not prepared to pay for assessments, putting more pressure on the legal aid budget. Bryn and Hilary were concerned about the constraints put on the availability of therapy for parents and children by budgetary constraints, and Hilary saw the commissioning of assessments as a gateway to accessing resources for families from the local authorities.

There was some discussion of the role of the NHS, and particularly of CAMHS, in meeting the needs of children in the family justice system. Bryn quoted Baroness Hale (in the House

of Lords decision referred to above) as saying that treatment should be provided by the health services; but as Bryn pointed out, if cases are referred to CAMHS:

“that again is difficult because in a lot of cases they interview the pers...the child, if it’s going to be child..., or that’s where there’s child therapy, and they say ‘well, the child doesn’t need treatment or is unwilling to have treatment’, or more often than not they say ‘we’re not prepared to start treatment until proceedings are over’, so that doesn’t work very well”

Dale and Mo both referred to the many demands on scarce resources. Bryn did mention “Bearing Good Witness” and the scheme to make more expertise available through the NHS, but commented (this was in spring 2010) that it did not seem to be working very well. This was based on trying to contact one of the pilot sites to undertake some work in April and being told that they could not even look at the case to consider acceptance until November. At the same time the site had been in touch to ask why its services were not being used more: thus Bryn’s comment that some therapy resources were completely out of phase with the timetable of the court.

Dissatisfaction with social services’ decision making was expressed by some of the judges. Bryn felt that local authorities are sometimes responsible for unnecessary delay and Kim that they are too “safety conscious” and should assess risk more effectively rather than aiming for 100% safety; Kim felt that it was perceived to be easier to remove children from parents than to put resources in place to support them within their families. Alternatively neglect is allowed to drag on because cases which do not reach the threshold are closed but may be reopened several times before any significant action is taken. Kim stressed that this view was not “anti-social worker” but a recognition of the pressures that are around in an “important and difficult” job. Bryn was also concerned that family group conferences were often “not very well run” and could be used inappropriately for example in cases of domestic

violence . (“A family group conference is a process led by family members to plan and make decisions for a child who is at risk. ...Families, including extended family members are assisted by an independent family group conference coordinator to prepare for the meeting. At the first part of the meeting, social workers and other professionals set out their concerns and what support could be made available. In the second part of the meeting family members then meet on their own to make a plan for the child” – information from the Family Rights Group website).

From the judicial perspective the experts themselves also constitute a resource. Bryn felt that there was a “dearth” of experienced experts and that inappropriate and potentially damaging advice was sometimes given, quoting an opinion in relation to the impact of a child giving evidence, where the expert had proved to be unaware of research evidence. Bryn and Hilary had both had experience of enormous variation in opinion between experts and Bryn wondered if they were sometimes over-influenced by their training institution. Jay felt that experts made a “nice little living” from diagnosing and that better use could be made of the “treating professional” as expert. Kim told a story about an expert who regularly recycles his reports, merely changing the names and personal details whilst including large chunks of his own publications. Kim was also dismissive of lawyers who want experts instructed when the outcome is predictable:

“I said ‘what’s the specific subject?’ well, it’s to do with mother’s recovery’ and I said ‘I don’t need it. I’ve read 50 of his reports this year. They all conclude the same thing: 12 months clean and sober. So let’s not waste 16 weeks getting a report from him, let’s start from 12 months clean and sober”.

As a result Kim felt that it would be helpful if further “template” expert reports, such as that produced by Sturge and Glaser (2000) on the effects on children of domestic violence, could be commissioned on other subjects.

Bryn thought that the distinction between child and adolescent and adult psychiatry could also be problematic, with the former being “more resistant” to categorising mental illness (the implication being that a clear diagnosis is more helpful to the judge).

How far is understanding shared?

It seems that there is common ground between the judges and the experts in relation to:

- A lack of therapeutic resources for children and families who are in distress within the family justice system (not necessarily as a result of being within it – sometimes they are in the system with the aim of alleviating distress that is already being caused – but sometimes as a direct result). Children who are the subject (or object) of private law proceedings may be particularly at risk in this respect.
- An over-reliance on experts and a possible underuse of expertise already existing in the professional network (there is a nice example of parallel comment from Gerry and Jay on this point)

However, Bryn’s comment about the lack of clear diagnosis available from a child and adolescent psychiatrist is clearly at odds with the emphasis placed by the systemic experts throughout their interviews on the importance of assessing relationships rather than individuals. It connects with the disadvantages of having specialists in **either** adults **or** children and adolescents about which more will be said in the discussion section.

Desired changes

Several of the research participants made spontaneous suggestions for changes in the family justice system.

Systemic suggestions:

Chris would welcome the opportunity to work alongside the judge and talk to him or her about making decisions about children. Nick was also keen to work in a more integrated way and possibly to be part of a multi-disciplinary court team. Les felt that generally the system should be less adversarial.

Fran thought that in private law keeping things in the legal system (for example with short review hearings) could provide a containing framework for parents which would keep arrangements on track. Fran also thought that children should be able to read the court statements and be brought more into the middle of the court process.

Gerry and Pat both thought that it would be helpful if judges spoke more to children; although recognising that it is important that the experience should be a positive one for children, Gerry considered that the ritual aspect of being heard is very important to them, and that they often feel that their views have been “twisted” when they are reported to the court indirectly.

Judicial suggestions:

“I’d like to have a team of experts attached to this court. I’d like to go down the road of the French system and where - I’m putting more work on myself –where the judge holds the budget and the parties come into court and say ‘we’ve identified the problems as these, and we’ve come to an agreed list as to what we think the problems are’, and then we give it to the expert team and they decide who in the team can answer the questions that have been asked by the court. And you get one report back (SH um)... (2)... that’s what I’d like SH um. Is it ever going to happen?

Kim Ho, ho, ho!”

Kim also wondered whether too many important decisions about children’s lives were being made by “amateurs” in the magistrates’ court, as well as believing (as explored elsewhere) that family judges should always be full-time. The importance of judicial continuity was also emphasised by Kim, and this is reflected in the aims of the current family justice review.

How far is understanding shared?

As no specific question was asked on this topic the thinking of only one of the judges is represented. However, there is an interesting strand of connection on the idea of a team of experts attached to the court.

The next chapter will discuss in greater detail the connection of these findings to theory, as well as their implications for my own practice, for systemic psychotherapy in general, for systemic psychotherapists who act as expert witnesses already or who may be considering doing so, and more widely for the children and families, and other professionals, who are involved in the family justice system.

Chapter 5: Discussion

The elements of a good report and the skills required

Obviously there would be no basis for claiming that my findings have established a definitive account of what constitutes a “good” report, especially given that “good” is such an imprecise word in this context (I wish I had sought more precision in the interviews). Since I began this project Ireland’s research for the FJC on the quality of expert evidence has been published, as a result of concern that (p4-5)

“Currently courts are left to judge the quality of a report that essentially falls outside their content specialism. Although the quality of the process can be assessed (^^^)...., the specialist content cannot. This is particularly true of family courts where proceedings are private and access to subject specialist reports is not routinely permissible. This restricts the peer review of such reports”.

(My finding that it is unusual for experts to receive feedback on their reports also connects to this issue). Ireland’s team developed a series of proposed quality measures and following consultation a set of standards for experts has been agreed which will be implemented from April 2014. These include (MoJ press release 2013) appropriate knowledge and experience relevant to the case, regulation or accreditation, relevant qualifications and training and compliance with safeguarding requirements.

Ireland’s report was limited to psychologists, but it is interesting to consider how systemic views on what constitutes a good report would fit with her “objective” quality measures. Certainly my systemic participants emphasised the importance of distinguishing between fact and opinion, and paid particular attention to the use of language; the question of method is more challenging. Psychologists are used to using specific assessment tools, whereas the systemic experts may rely on less measurable factors such as the ability to engage in the process and make use of new ideas or ways of seeing things (the “trial of change”). It may thus be harder to show that an opinion is “deduced in accordance with peer-reviewed and

tested technique, research and experience accepted as a consensus in the scientific community” as required by Practice Direction 25. The field of systemic expert witnesses is small and feels under threat from recent changes, but those who are keen to continue this area of their practice may need to think what quality measures specific to a systemic report would look like.

The suitability of a systemic approach to expert witness work in the family courts

A relational model

The whole focus of systemic practice is family and relationships and I found it shocking that thoughtful and well-informed professionals in the field of family law should appear to be unaware of its usefulness in the “broader analysis of the problems that a family or people have” or the ability to “advise you about the ways in which the parents’ behaviour is adversely affecting the child” and “have some innovative ideas as to how they might be persuaded to change their patterns of behaviour”. It seems to me that the “invisibility” to family lawyers of systemic/family practice (other than as a disposal) is potentially resulting in missed opportunities to create deeper, more complex and more rounded accounts of families in the justice system (what Kim called “one step closer to the person I am having to worry about”). However, it might also be the case that the systemic relational approach fits better with an “ethic of care” model than with the “ethics of rights” /individualistic discourse which appears to dominate some aspects of family law (this concept will be discussed in more detail subsequently). See for example Herring’s (2010) argument for the concept of “relational autonomy”, which recognises “the interdependency and vulnerability of both children and adults” (p275).

The voice of the child

In the course of this research I attended a training course for expert witnesses and was struck by the lack of confidence of some of the experts about talking to children. I connect this with the way our health services, and especially our mental health services, are

demarcated between adults and children. In my experience most workers in Child and Adolescent Mental Health Services have a broadly “systemic” approach, even if they are from other disciplines, because they are used to seeing children in the context of their families. Expert witnesses with a background in adult mental health are much more orientated towards the individual and this may contribute to the marginalisation of other family members and especially children. The systemic experts were very aware of this dynamic and appeared well placed to counter it. Ryder (2012) is committed to improving ways to allow children’s voices to be heard and I wonder if one quality standard for expert witnesses in the family courts should be experience of and qualification in working with children and families.

Negotiating the relationship

It seems that systemic abilities to use the concept of domains to negotiate a collaborative relationship with families who might otherwise be the “objects” of assessment open up the possibility for different kinds of information to emerge for the court. I have not yet had the opportunity to read the results of Philippe Mandin’s research on this topic, but it would seem important to any systemic practitioner who is undertaking any work of this kind in the future to become familiar with it, as well as considering in what ways the expert might “warm the context” (Burnham 2005) in order that families might use the experience “more productively, openly and whole-heartedly” (p4-5). This might include preparing leaflets of the kind described by some participants.

Time frame

I think that this issue poses a real difficulty for undertaking a systemic assessment for the family courts. I discussed it recently with systemic doctoral colleagues, one of whom is working in this context. She described how the time for assessment had recently changed from three months to six weeks and how she felt that this was “letting down “ families. Others talked of an “ethical compromise” between the belief that a systemic approach is

more effective and the belief that ideally more time should be allowed. Relevant factors on deciding whether this obstacle can be overcome in particular cases might include:

- The nature and complexity of the questions asked
- The style and orientation of the practitioner (Chris commented that some psychotherapists work naturally in shorter time frames than others)
- Whether there is funding available to involve a team and/or offer more frequent sessions

It may be that for some systemic practitioners this difficulty would present an insurmountable obstacle to undertaking expert assessments. In the conclusion I will consider some alternative ways of introducing a systemic element to family court processes.

Certainty/Uncertainty

It is very clear that those systemic experts who felt they had sometimes been disappointingly uncertain, or who advised against going into court with a not-knowing position, had read well what the judges want from an expert. The judicial interviews clearly identified their sense of having to take enormously significant decisions and wanting clear, well-informed and unambiguous advice (rather than a “systemic tangle”?) upon which they could “rely” (or adopt as a legal truth?) in doing so. Judges have to produce reasoned, sometimes written judgments “justifying” their decisions, with, as at least two of the judicial participants pointed out, the possibility of an appeal always in mind. In that sense there may be in Goodrich’s (1987) terms a “rhetorical” or persuasive element to the use made of the expert report, which in family law may be more likely to be relied upon than case law.

I no longer see this as problematic for systemic thinkers. Most systemic therapists regularly have to take unambiguous positions on issues in the course of their work (what should I do with this disclosure? Is this under 16 competent to make decisions about her own

treatment?) and will know families who find it more helpful when they are certain than when they are tentative. The problem may lie more in becoming more pre-occupied with narrow definitions of words such as expertise (an error into which I think I have fallen myself at times) than in working out how the underlying principles can be applied in practical contexts. The systemic idea of domains (Lang et al 1990) may be particularly helpful in this context.

It may be that the family courts, with what appears from these interviews to be a concentration on future possibilities rather than past events, are less distant epistemologically from the systemic position than other forensic settings. Any differences in philosophical or semantic understanding of the meaning of truth or certainty do not appear to have great practical significance, though the issue of the relative power of different discourses (legal/psy, medical/allied health professions, male/female, white/black) obviously does. Similarly on the question of objectivity: my sense that the judicial definition was not very remote from systemic ideas about neutrality, curiosity and prejudice (Cecchin 1987 and Cecchin et al eds 1994) will have been obvious from the extract I quoted from my interview with Jay. In spite of my initial hypothesis that “objectivity” might be a problematic area, and Gerry’s comment about the “dangerous” ideas of Maturana, my “pre-conceptions” on this matter were not supported by the other systemic interviews.

Truth

I found it fascinating that there appeared to be some common ground in thinking about the search for truth: for example Gerry and Mo gave almost identical accounts of the status of a “finding of fact”. This process would appear to be a good example of what Balkin (2003 p 102) described as law’s ability to create truth : “it makes things true as a matter of law”. It seems important therefore to distinguish between ideas about truth as a philosophical concept and ideas about things that are true as a matter of law, and to decide which of these issues is relevant to this study.

It would be possible to get drawn at this point into a comparative analysis of positivist and post-modern thinking in relation to the nature of truth and reality in systemic practice and the law. I outlined some of the theory very briefly in the literature review. Valverde's (2003) argument for distinguishing between "the capital-T, non-specific 'Truth' that continues to haunt both philosophy and positivist science"(p8) and the notion of "small t" or "local" truths about particular events seems very helpful in considering what concept of truth it is most helpful to consider in the context of family justice. It seems to me that what judges want from expert witnesses is what Wittgenstein (1953 , 179) called "knowing how to go on" in the immediacy and locality of the complex decisions they are called upon to make, rather than something which can be established as universal and timeless. This idea would appear to be supported by Sedley's (2011) summary of his chapter on truth (titled "Rarely pure and never simple"): "how the legal system establishes **the facts on which it is going to adjudicate**. How, **in other words**, do lawyers and judges set about ascertaining **the truth?**" (my emphasis). Possibly Aristotle's concept of "ἡ ἀληθεια πρακτικη" ("practical truth") (Nicomachean Ethics 1139a26-7) would also fit. In this context it might be much easier to conclude that there is not as much distance between the systemic experts and the judges as one might imagine about what it means to seek the truth.

This leaves the question about the process by which a systemic local truth (for example, that there is potential for unhelpful patterns of interaction within a family to change) might be "adopted" (or not) as a legal truth (for example, that there are/are not grounds for making a care order). Goodrich (1987) argues (p180) that legal discourse gives its "authorised users" the power to "assimilate" other languages and vocabularies without necessarily acknowledging that it is doing so. Haack (2008) analysed the process by which scientific truths get entrenched as legally reliable: "Legal truths are made true by legal decisions; and so, sometimes, are scientific 'truths.'" (p586). It is possible therefore that within the "psy" sciences or areas of knowledge some truths may be more likely to be assimilated than

others: for example, ideas about the emotional impact of domestic violence have clearly been fully assimilated, whilst there appears to be still some scepticism about “parental alienation syndrome”. Research in the United States following the Daubert decision (which relied on the assumption that judges would have enough scientific knowledge to gatekeep the admissibility of expert evidence) found “staggering levels of scientific ignorance” (Moreno 2003) and as Sallavaci (2013) comments (p5) “it can be argued that this picture would unlikely be any brighter for English judges.” The “scientific” credentials of the expert may have an important effect in this process: for example, Chris’ legal standing rested on institutional connections rather than professional qualifications, whilst Pat was always assumed to be “junior” to a medical colleague. It could also be argued that clear “diagnosis” (see Bryn’s definition of a good report) and certainty are both easier to understand and give a clearer steer than a report which identifies complexity and ambiguity. Gender may also be a factor: Smart (1989) clearly identified (p2) “how law exercises power and how it disqualifies women’s experience/knowledge”. Two of the female systemic participants in this research recounted experiences of sensing that their contributions were less valued than those of male colleagues.

Invisibility

The systemic experts understood that the lack of a tradition in systemic witness work and a preference for instructing psychiatrists or psychologists made their presence in the family courts as a discipline invisible. Another factor in this is the tendency to use a small pool of known experts in a way which becomes self-fulfilling, so that most of the systemic participants had got into the work on the coat-tails of someone already well-known in the system (usually a psychiatrist) before establishing their own competence and credibility as individuals. Illustrative of the smallness of the pool is the fact that Bryn and Kim both mentioned personally favoured experts which included several names in common with the list of potential experts (psychiatrists) quoted in S (Children) [2010]. (Drs Kirk Weir, Hamish Cameron, Judith Trowell and Danya Glaser).

This view of the limited possibility of systemic/family psychotherapy being of any assistance to the court is reflected in the literature for and about expert witnesses: for example Kennedy (2005) p11-12 “when it comes to interviewing and assessing children and families, a number of different professionals have a role to play, including the child psychiatrist, ..the child psychotherapist,..the clinical psychologist, ..., social workers...”, with no mention of family or systemic therapists. Neither are they visible in Bearing Good Witness, the Legal Services Commission’s brief for the expert witness pilot scheme or the FJC’s research on the quality of expert reports. Psychotherapists are not included in the current fee rates for expert witnesses on the LSC’s website, and systemic/family psychotherapists were not one of the professions represented by the Consortium of Expert Witnesses who reported to the House of Commons in 2010 on the effects of the proposed changes in legal aid.

The “lack of tradition” may also connect with the fact that for most of the systemic experts the court work was a minor part of their practice, with active work with families, training and supervision featuring in the rest of their workload. Most of them had had to contend with an initial reluctance to expose themselves to the adversarial aspects of the work. (This is a deterrent to forensic work also identified by the research done with doctors for Bearing Good Witness (Donaldson 2006)). The only way identified to overcome this reluctance and to become confident about one’s courtroom performance was to expose oneself to it; the more one does, the easier it becomes. Yet Ireland’s (2012) research for the Family Justice Council was critical of experts who did little but forensic work, feeling that they needed a foothold in practice. What is the right balance? Are there other ways to acclimatise to the expert role? The judges’ suggestion about the possibility of “sitting in” (an opportunity to which none of the systemic participants referred) would appear to merit wider publicity for non-medical potential experts of the future.

What the systemic experts showed no understanding of was the effect of their claiming of the title of “therapist” or “psychotherapist”, particularly in the judicial assumption that the

requirements of confidentiality would exclude psychotherapists automatically from the process of assessment. Although the systemic experts were able to give very clear accounts of how they negotiate and manage that issue with the families so that it does not become problematic, this possibility was not apparent at all to the judges..

“Family therapists” continue to debate the usefulness of different titles or descriptions of their discipline in maintaining its credibility and status. “Psychotherapist” might be argued to confer a weightier status than mere “therapist” as well as establishing a clearer framework (e.g. within UKCP) for regulating standards of practice. “Systemic” could be argued to give a more comprehensive and inclusive idea than “family” of the range of relationships to which practice may be applied. What I have wondered in considering the judicial responses outlined above is whether the “psychotherapy” title may also in some contexts exclude the discipline from consideration for certain activities because it carries with it a number of preconceptions or assumptions which may apply more appropriately to other models of psychotherapy. This may also be the case for the solicitors or guardians who to date have been so influential both in recruiting and identifying potential experts and in drawing up the letters of instruction. However, the third “View from the President’s Chambers” (Munby 2013) emphasised (p820) the responsibility of the case management judge to “adopt a more ‘hands on’ approach in approving the final form of both the letter of instruction and, in particular, the questions the expert is to answer. There must in future be fewer and more focused questions”. Judicial training on systemic therapy seems fairly scant; I wonder whether more training in drafting letters of instruction and in thinking how they might be worded to get the best out of the appointed expert’s skills and knowledge would also be helpful.

Recently a group of systemic experts met to consider responding to the recent consultation paper, developed in response to the Ireland report, on creating standards for expert witnesses. I was able to attend this meeting and to feed back some of my ideas about the

perpetuation of “invisibility”. A response was eventually made on behalf of the systemic community as represented by the AFT. As the co-ordinator of the group commented subsequently, “at least it gets our foot in the door”. Another member is drafting a paper on what a systemic report can offer that others cannot, and I am hoping to contribute to that also.

Change in the Process of Assessment

The first significant issue is the variation of judicial understanding of the effect of assessment: does it matter that some judges believe that the process inevitably makes a difference to families in some way even if that is not the intention of the assessor and some do not? Does it matter if judges are not thinking about how the way the assessment is conducted (the type of questions asked, the manner of the assessor) will affect the outcome? I tried to be neutral about this question: but the weight that is placed on the assessment is so great and has such implications for families that I cannot but argue that judges should at least be better educated about different theories of the effect of the observer on the observed, particularly since they are to be encouraged to be more actively involved, for example in drafting questions for letters of instruction and in the choice of experts.

The second issue is that of some judges attempting to inject some “under the counter” change mechanism into families without being able to acknowledge publicly that they are doing so because of the limits on funding . At one level I enjoyed the subversiveness of this idea; but on another I am concerned about hidden and unspoken practices that cannot therefore be subjected to scrutiny. There might be equal concern in this regard about experts who are setting out to pull the wool over the eyes of the Legal Aid Agency. Yet there remains the unanswerable question as to how one is to assess the potential for change (a question which is usually fundamental to making decisions about families, at least in public law)

without trialling it. Is it conceivable that the LAA might be open to some discussion on this matter?

The distinctive features of working in family justice.

“Attraction”

I had not anticipated that this would emerge as a significant cluster. Without wanting to make too much of individuals' comments, systemic experts appeared to be attracted to the work, in addition to a more general and (for therapists) common desire to contribute to helpful change, by the possibility of acting as advocate for the marginalised and by intellectual challenge. The judges were drawn by the possibility of acting and thinking outside the box and engaging in more “therapeutic” activity, or making a difference. I wonder if the therapists had ever considered becoming lawyers, or the judges therapists or social workers? If so, what part did their gender, class, education, family background and financial circumstances play in the decision? I have also wondered what determines whether or not a systemic therapist takes on work as an expert witness: for my participants opportunity and invitation appear to have been more significant factors than inclination.

Family-mindedness

Lord Justice Wilson (2003) attacked what he saw as the “misnomer” of calling family law a “backwater” (Dunn, 1997) and the fact that the private perception of most lawyers in other branches of the law is that family law is the “Third Division., the Leyton Orient of the High Court”. He proceeded to argue that family law is more difficult, and unique in focussing not only on the future, but on the “psychosocial future” of children as well as the practical and economic, pointing out that “*we now realise(my emphasis)* that the continuation of a fruitful network of relationships...is deeply valuable for the child’s sense of identity and of self-esteem...” Wilson goes on to talk about the importance of engaging all the relevant adults in the forensic enquiry and having an opportunity to “*assess the personalities (my emphasis*

again) of the relevant adults”., as well as having a function to educate parents (for example, about the effects of domestic violence), and to allow parties to “feel heard” . He also describes using court process to create a dialogue between alienated family members: “I watched them converse civilly ..and was determined not to interrupt, whether for irrelevance or otherwise. Indeed it hardly mattered what they spoke about” (p3).

I quote this article at length not only because it echoes so strongly the ideas about family-mindedness” which emerged from the judicial interviews; but also because it illustrates a judicial claim to some level of psychological expertise or knowledge (compare for example what Dale said about paying attention to the way all the parties presented in court). It also illustrates a judicial inclination to act therapeutically which is supported by recent research. Eekelaar and Maclean’s 2013 review of judicial working practice in the family courts, based on observation and analysis of written judgments, identified (p79-80) three main roles undertaken: legal activity, management, and “help”, which was further defined as providing information and facilitating an agreed outcome. “Helping” was estimated to constitute 20% of observed activity, and the adjudicating role 47%. Helping functions – showing respect for the parties, empathy and encouragement - were also seen in the written judgments.

Some commentators are critical of judges’ psychological interventions: Reece (2009) quoted a case where the judge talked about the allocation of parental responsibility as significant for the self-esteem of the parent and child, seeing this as potentially over-pathologising of emotion, introducing a “ turn towards the therapeutic” and a culture of vulnerability and victimhood. Cantwell on the other hand (2007) argues that traditionally the law does not deal in emotion , and that (p744) “in part this difficulty is one of culture and training, with legal proceedings being governed by precedent and the concept of justice – both admirable notions, but not necessarily the ideal touchstones when dealing with the emotional ‘messiness’ of many private law disputes”. Hendrick (2011) discussing when a

judge should meet a child, says that the primary purpose is to assist the child in the court process; any information gathered is (p1149) “the icing on the cake”.

It is useful to distinguish between what might be more precisely called “active case management” as suggested by Ryder, and what might be thought of as more creative “out of the tramlines” interventions such as those described by Bryn and Kim, where the judge took an unexpected and possibly legally more challengeable stand such as refusing to allow cross-examination. The participants in my research mostly seemed to lie on the “interventive” side of this debate; but it does highlight the issue as to how judges arrive at the positions and beliefs they do in relation to psychological wellbeing. Ryder (2012) recommends (p20) that “messages from research and child development” are provided to judges but there are potential problems with this. For example, Brown and Ward’s (2013) research on time frames which was recently presented to judges has been critiqued (p9) by Wastell and White (2013) as a “simplistic guide to a complex field of work where knowledge is far from settled” which ignored negative evidence, thus supporting (perhaps unwittingly) what Lloyd-Jones (2013) calls (p8) Norgrove’s “reductive re-balancing (some would say hazardous unbalancing) of The Children Act”.

Judges obviously rely hugely on expert advice, but they also rely on what Gerry called “homespun wisdom” (Dale talked about learning by how you were brought up as a child and Evelyn about how helpful it was to have one’s own problems). In *Re CtL and CmL* (2013) the judge criticised (para 32) the expert witness for asking “senseless” questions about the “physical circumstances surrounding the birth of the children or what her own mother did when she was naughty as a child”. Given that the expert had been asked to “assess attachments”, these questions might not be regarded as senseless in other contexts. Lord Justice Thorpe has written (1997 p6) about what judges might have to learn from the psychodynamic idea of exploring the source of one’s own beliefs and attitudes :”the danger is the prejudice of which he (*sic*) is unaware”. It is my impression that what research has

been done about “what judges know about the world” and “how the things that they know translate into their activity as judges” (Greycair 1995 p 267) is based on analysis of formal judgments. I do not know if it would be possible to explore this further in more direct ways (for example, by interview).

Similarly there does not appear to have been much research on the ways in which family judges exercise what Hilary called their “structured discretion”, for example in relation to the welfare checklist, or on the effectiveness of some of the “outside the tramlines” interventions. Ryder (2012) recommends both the undertaking of a pilot study on providing feedback on outcomes of decisions, and the exploration of more “real case examples” in judicial training, but perhaps what is also needed is more in-depth analysis of the relationship between the two: that is, what assumptions inform judicial decision-making, what impact do those assumptions have on the decision, and what is the effect of the decision in the longer term? Wilson himself acknowledges that “it is not good enough for me to argue that, as a husband and a parent and after a lifetime career in the family courts, I have developed insights into human behaviour which are sufficient to carry me through”, and suggests a solution might be either for the judge to have an expert “top psychiatrist or psychologist (!)” to sit alongside as assessor, or for judges to have more intensive training such as a three month summer course. The whole question of what training and support should be available to judges in managing the emotional complexities of family law obviously merits further consideration. Ryder (2012) also recommends that senior judges offer “supervision and advice” to judges but there is no guidance as to the frequency or nature. If judges are to become more “psy” minded should consideration be given to adopting a more rigorous and “therapeutic” approach to “supervision” for all family judges? This suggestion is supported by Eekelaar and Maclean (2013 p 79).

A groundbreaking project in London called the Family Drug and Alcohol Court was evaluated in 2011 by Harmin et al. The project is aimed at families where children are at risk of coming

into care because of parental drug or alcohol misuse. Unlike normal care proceedings, cases are dealt with by the same judge throughout and there is a specialist assessment team attached to the court. Legal representatives attend the first two court hearings, but thereafter there are regular, fortnightly, court reviews which legal representatives do not attend, unless there is a particular issue requiring their input. The court reviews are the problem-solving, therapeutic aspect of the court process. They provide opportunities for regular monitoring of parents' progress and for judges to engage and motivate parents, to speak directly to parents and social workers, and to find ways of resolving problems that may have arisen.

One of the judges involved in the project has been called a "therapeutic judge" and it has been described (by Joshua Rozenburg in 'Law In Action' March 2012) as blurring the boundary between law and social work. The conclusion of the evaluation was that the project was more successful in keeping children in families and saved money in expert fees. It has been recommended that the project be tried in other courts. Again, this project encapsulates many of the principles of "family-mindedness" or judicial "therapy". Further experimentation with this model is advocated by Ryder (2012) and I would hope that, if this proceeds, more systemic practitioners might become involved.

It also resonates with the Australian based therapeutic justice movement which has produced a bench book for judges (King 2009) which advocates a move away from paternalism and coercion, and promotes judicial involvement with participants through the exercise of an "ethic of care" described by Cannon (2007) as "a respectful and proactive engagement with people involved in the court process, to pay attention to their needs, rather than a neutral but mechanical and unsatisfying closing of files. It is a more exposed judicial role compared to the relatively mute and remote figure who only pronounces at the end and then in detached language".

It would be useful to consider the origin of the concept of the “ethic of care” and how it is compared and contrasted with the “ethic of rights”. The phrase was first used by Gilligan (1982), responding to research which purported to show that women are less morally “mature” than men because they tend to operate morally at the level of convention (conforming to the rules and standards of a group or community) rather than by evaluating those rules and standards by reference to universal principles. Gilligan argued that because in our culture all children are more likely to have a woman as primary carer, for boys gender identification lies in individuation and separation, whilst for girls it lies in attachment and empathy. Rather than being inferior women’s approach to morality is “different” and characterised by being contextual in approach, having as its aim the preservation of relationships by adopting caring practices in concrete situations. She used (p62) the metaphors of the ladder of hierarchy and the web of connection to contrast these positions. Karst (1984) called (American) law “a system of the ladder, by the ladder and for the ladder” (p462). Writing twenty years later, Gilligan (2003) claimed (p156) that “the voice that set the dominant key in psychology, in political theory, in law and in ethics, was keyed to separation: the separate self, the individual acting alone, the possessor of natural rights, the autonomous moral agent” and argued (p160) that “when a relational voice sets the key...it frees the voices of women and men and also the voices of the disciplines from patriarchal strictures”.

I have explained earlier why I took a deliberate decision not to use discourse analysis as a research method, but it has become impossible to ignore it altogether. Gilligan helped me to understand more clearly how relevant to the subject matter of this research are the distinctions which are made in this debate between individual and relational, universal and contextual, masculine and feminine, rights and obligations. The concept of the idea of rights as “personal zones of non-interference” (Karst p471) resonates with Bainham’s description (p49) of the use of the terms “privatisation” and “deregulation” in relation to the Children Act 1989. It touches on the distinctions made between “hard” and “soft” experts (whether

“hardness” and “softness” reside in gender or theoretical orientation), and the fact that psychotherapists are more likely to be female. It relates to the distinctions between family law and other areas of law, and the fact that female judges are so far outnumbered by male judges. It sheds light on the differences and connections between adversarial and inquisitorial systems of justice: as Cockburn (2005) puts it (p77): “The rights approach is adversarial. To have a right is to have a claim to something against someone”. It draws attention to the rights-based legislation within which family justice in this country is framed, challenging us to consider particularly how we can make it possible for children to have a meaningful input into decisions that are made about their lives and avoid their “rights” being exercised or appropriated by adults so that “adult agendas take over and children become symbols rather than real persons” (Smart et al 2001, p22). This seems especially relevant to the plight of children involved in private law cases which so distressed many of the participants in this research.

I have been particularly struck by how well the systemic approach to expert witness work as evidenced in my findings, with its emphasis on context and relationships, and judicial “family-mindedness”, fit with the concept of “ethic of care”. The systemic experts also appear to have offered examples of ways to address the “difficult” question posed by Kelly (2005, p392) as to “*how* we might incorporate children’s voices into legal decision making”. However, I have also begun to wonder whether the “invisibility” of systemic psychotherapy as an “expert” discipline stems at least partly from some incompatibility with a dominant (patriarchal?) “rights” discourse. Karst (1984), however, warns (p471) against abandoning the “rhetoric of rights” while the courts are still using the “language of the ladder”, arguing (p480) that the “perspective of the web of connection can itself aid us in breaking out of the confines of the traditional dual construct of woman and man” (and presumably the other dual constructs I identified in the previous paragraph). Systemic psychotherapists are well placed to connect with members of the judiciary who are faced with situations of complexity, tension and contradiction.

Beastliness/Blood on the Carpet

There was a marked theme which emerged in these interviews on the distress of children involved in conflicted separation. My sensitivity to the issue is connected to some personal frustration in practice over the years at the number of children who are referred into mental health services because they are exhibiting signs of such distress, as if the solution is to “cure” the children rather than address the adult behaviours which are the context of their “pathology”. Smith and Trinder (2012) summarised the evidence for the effects of parental divorce on children’s wellbeing, identifying the quality of the relationships surrounding the child as one of two major factors (the other being poverty): “conflict between parents that is frequent, intense and poorly resolved is particularly damaging, especially where children are..drawn into the conflict” (p432). There have been a number of initiatives to try to change the behaviour of conflicted parents such as in court conciliation, mediation and parenting programmes like the one delivered by the Institute of Family Therapy (IFT) described by Chimera (2010), and since 2009 the first nationally available programme for litigating parents in England and Wales, the Separated Parents’ Information Programme (SPIP). This is a compulsory intervention targeted at parents whose disputes end in litigation. In addition bodies like Resolution and the Association of Family Conciliation Courts have encouraged the practice of “collaborative law”, by training lawyers to work towards resolution of family difficulties rather than adopting an adversarial position. Research conducted by Eekelaar, Mclean and Beinart (2000) found that contrary to popular belief that a lawyer-based system produces acrimony and conflict, family solicitors actively promoted negotiation.

However, there are two difficulties with this type of solution. The first is the ideological objection to “informal justice” approaches as summarised by Roche and Bottomley (1988): that they hide the extension of state control to other “disciplining agencies” (p88) which are harder to challenge, and that they marginalise less powerful groups by diverting them from the legal system. The comment (p87-8) that “many of those involved in championing the

alternatives were offering their own languages....**(especially those with a background in family therapy my emphasis)**" was especially thought-provoking.

Secondly, the availability of such services is variable and subject to resourcing problems: the IFT programme is no longer running. In addition research for the MoJ on the efficacy of in-court conciliation (Trinder and Kellett 2007) found that even where superficially agreement was reached between couples, animosity and conflict often continued to the detriment of children. It further identified (p51) "compelling reasons for focusing interventions on trying to shift parental attitudes and behaviour in conflicted cases" and claimed (p52) "the development of more relationship-based or therapeutically orientated interventions is long overdue". Smith and Trinder's (2012) analysis of the effectiveness of the PIP identifies that its "one size fits all" approach has contributed towards addressing legal and contact conflict but not (p437) "the underlying relationship conflict" which they describe (p432) in terms of "interparental distrust, anger and hurt.. thatfunctions as the source of negative indirect and direct impacts on children". They argue (p445) for interventions which are "therapeutically oriented ...which focus on emotions and feelings and the origins of each individual's conflict".

The situation is likely to become even more problematic with the cuts in funding which came into effect in April 2013 and have removed almost all private law cases from eligibility for legal aid. The significance of this for the welfare of children is that any potential for lawyers to be helpfully involved in conflicted disputes will be dramatically reduced and the number of unrepresented parties (also known as litigants in person) is likely to rise. This trend had been noticed by Chris and Pat: and some negative consequences experienced: Pat had felt threatened and harassed by a father representing himself and had also been the subject of a complaint . This likely effect has also been acknowledged by Ryder when speaking to a public child care law conference in 2012:" What is clear is that the courts will have to deal with a volume of previously represented parents. .. Many will have no idea what a

conventional court process entails and some will have no desire or ability to take it on board". It has even been suggested that the resulting need for extra court time may cost more than the savings in legal aid. This scenario does not bode well for children involved in the process and will create extra challenges for any experts that it is considered "necessary" to instruct.

I have heard some very shocking accounts of children's experiences in conflicted private law cases which appear to be on the verge of emotional abuse if not actually so. Judges do have the power under S37 of the Children Act to direct a local authority to report on any case where the judge considers it might be appropriate to make a care or supervision order. It has been used in intractable contact disputes (for example Re M 2003) and it would be interesting to know how often it has been used in this way and to what effect. Smith and Trinder (2012) argue that there is a very pro-contact stance within the family justice system which disregards some of the research evidence about situations where contact may not be beneficial. I wonder if this is an area which would benefit from wider debate about research findings as well as exploration of other, more therapeutic, models of intervention such as those used in other countries, for example the US and Australia. At the same time Kaganas (2011) cautions us against seeing conflict as invariably damaging rather than part of the process of separation and thereby pathologising "dysfunctional" parents, particularly mothers.

Learning on the Job

If one were to accept the premise that a systemic approach has underused potential to be helpful to the family courts, there is probably therefore some scope for improving the availability and content of formal training on the interface in both disciplines. Given that the possibility of involving systemic expertise may also be "unseen" by other professions who are influential in the process of instructing experts (such as solicitors or guardians) it may be that this idea might also apply to their training. This might go some way to addressing the

issue of systemic “invisibility” within the family justice system and expanding the small pool of established experts. I hope that offering the results of this research both to the original participants, to the FJC and to the Judicial College might contribute to this process.

There is also the potential for increasing the visibility of the systemic experts within their own discipline, to which this research will hopefully make a small contribution. This might include articles in professional journals and workshops as well as publicising opportunities such as “sitting in”. It is also possible that the recent “regrouping” of a number of systemic experts in response to the FJC’s consultation will result in more peer support such as specialist supervision groups

What have become more intriguing to me are the implications of what seems to have emerged as a shared commitment to the significance of continuing practice and observation of others in the development of professional competence and confidence, and particularly in beliefs about the recursive relationship between the two. Kim, for example, stressed the importance for a judge of full-time sitting in order to develop the confidence to act “outside the tramlines” (to use Evelyn’s phrase) in the best interests of children. Alex, Chris and Nick were keen to receive positive confirmation of their competence in order to have the confidence to continue acting as experts. There seems to be a good fit between the claim of the systemic experts that so many of their “expert” skills are rooted in other types of systemic practice such as teaching and therapy and Ireland’s (2011 p31) recommendation to the FJC that an expert should be:

“a senior professional engaged in current practice,(and) continue to hold contracts with relevant health, government or educational bodies...or demonstrate continued practice within the areas that they are assessing (e.g. treatment provision). This is a means of ensuring they remain up to date in their practice, are engaging in work other than assessment, and are receiving supervision for their wider work ..” (Ireland only researched experts who were psychologists, but the remarks seem transferable)

However, there may be a fine balance to be struck between “expert” and “general” practice in terms of optimal skill development and maintenance, given the special skills required by experts (see the “elements of a good report” section”) and the limited opportunities for developing them outside practice. Specialist supervision for expert witness work is obviously important.

It does seem clear that some family judges rely quite considerably on what Dale called “wisdom and experience” and will sometimes override professional recommendations on the basis of their own beliefs and ideas (as in Re CtL and CmL to which I referred earlier) Some of the systemic participants were quite critical of stances taken or ideas expressed by judges, for example in relation to adoption. There is a strong emphasis in systemic practice (see for example Cecchin et al 1994) on paying attention to the source and impact of one’s own beliefs and prejudices. Although several of the judges said that they recognised the need to be aware of their “prejudices”, they seemed to lack some of the resources that are available to therapists, such as supervision, to explore and identify the source of these more fully, and to compare them with “evidence” from other sources such as research. It is interesting that the issue of lack of feedback to judges on outcomes was picked up by Gerry, one of the systemic participants, who described a child protection case where expert evidence about alleged abuse had been rejected by the judge and the child had remained with the parents. Gerry, who became aware of further abuse within the same family in another country took the initiative to ring the judge who had made the original decision to convey this information, thinking that he needed to know that he had made a “bad judgment”. (As I mentioned earlier Ryder (2012) does advocate giving increased feedback to judges on outcomes).

Similarly I am not aware of any support being routinely available to judges to manage the emotional toll of the task they are required to undertake, both in exposure to horrific material and in the responsibility of the decision process, whereas systemic practitioners are required

to undergo regular “supervision” both to support them and to expose their practice to external rigour. Sachs (2009) describes the “tock-tick” of the judicial mind where (p48) “the actual journey of a judgment starts with the most tentative exploratory ideas and passes through large swathes of doubt ..before finally ending up as a confident exposition purportedly excluding any possibility of doubt”. This account resonates with Hilary’s account of the toll that is taken (dreaming about cases) in arriving at decisions in complex cases, and of the need to “disguise the teetering”. Again one of the systemic experts expressed concern for the wellbeing of the judges in this regard;

“but I sort of feel that, that everybody involved in those sorts of cases is impacted upon (SH um)and um ..(2).. er I don’t know how much support um...like for instance, you know, judges who hear stuff coming through the whole time about cases, you know, I sort of just wonder what is that like, you know? How do you, how do you deal with all that level of stuff and decision making? um and they’re big, ... (1)...unpleasant decisions for anybody to have to make”

I have been unable to find any UK research on secondary or vicarious trauma in judges, although I found some examples from the United States (Chamberlain and Miller 2009) and Canada (Jaffe et al 2003). Both identified that judges are vulnerable to experiencing secondary trauma symptoms, with women and the more experienced judges seeming to be at greater risk. In 2007 a 24 hour counselling helpline for judges was set up in this country in response to concerns about the isolating and stressful nature of the work. More regular and formal supervision of the type I discussed earlier might also offer some emotional protection to the judges who are continually exposed not only to the raw emotion and occasional physical violence of the parties in court but also to the details of extremes of emotional, physical and sexual abuse.

Working with finite resources

Some difficult issues were raised by Les' comment on the potential conflict of interest for experts in making recommendations for future therapeutic work, and by the ethical question which divided Chris and Gerry (whether it is useful to identify needs if they are unmeetable). Any resources which are made available to children and families will have to be funded by local authorities or the NHS. At the time of writing there are fairly dire prognostications about further reductions in resources: the Local Government Association has estimated that while total council income in England will have fallen by £7.4bn between 2010-11 and 2019-20 (a real terms reduction of 27%), demand for expenditure, driven largely by an ageing population, will rise by £7bn (14%) (Butler 2013); the Nuffield Trust (2013) is predicting another "decade of austerity" for the NHS. It is hard to be hopeful that more resources will be available or that these challenges can be easily addressed.

Featherstone et al (2013) argue that the present Government's emphasis on the term "child protection" to the exclusion of any discourse about support for already disadvantaged and marginalised families is resulting in increased inequalities and intensifying distances between groups – including, for example, social workers and their service users. The effect of the current changes in relation to experts could be seen as another aspect of that "distancing": and one about which, as practitioners committed to opposing discriminating practices, we ought to be concerned.

A Commission under the auspices of the Kings Fund (2013) is currently seeking views on whether the "post-war settlement", which established separate systems for health and social care, remains fit for purpose. So the future may offer a scenario where there are different or fewer boundaries between safeguarding social workers and therapists in child and adolescent mental health teams, and where the idea of making more use of the "treating professional" in the family courts - advocated by several participants as well as by Ryder (2012) and Munby (2013) - may be more easily achieved.

Desired changes

I wonder if there might also be scope for the dissolution of other boundaries: for example, in the idea of having teams of experts working alongside judges (something like the FDAC model). Several of the systemic experts were keen that judges should speak more to children and this is certainly something that Ryder (2013) is also advocating, both in relation to finding out their wishes and feelings and also in explaining decisions where appropriate. Again this is an area where establishing mechanisms whereby judges could access specialist support and advice might be useful (though careful attention would need to be paid to the quality of that input: see for example Bryn's account of seeking guidance on allowing a child to give evidence).

So What?

What does any of this plethora of ideas and thoughts mean for me or for anybody else? In terms of my current systemic practice, working in a CAMHS team, often with children and young people who are involved in the family justice system, I have learned a huge amount about the processes and practices of the care system as well as about the emotional toll taken on the individuals (including professionals) and families involved. I am much more sensitive to the needs of children in conflicted private law cases. I think this has helped me to be more confident and therefore more containing, particularly in supervision of other clinicians. I am also less anxious about the possibility of somehow becoming involved with a case in the courts. The process has invited me to deconstruct my beliefs about what it means to be systemic. It has shown me that I can see through a major project which involves a huge amount of self-motivation and engaging with some quite intimidating people, including senior professionals in both disciplines who challenged me intellectually and organisationally: for example, to justify my position and to ask questions concisely. This gave me some sense of what a court-room experience might involve for the parties, witnesses and expert witnesses.

At a much more significant level, I believe it has highlighted some important issues for the systemic community (those interested in beginning or continuing to act as experts in particular), for expert witnesses of other disciplines, for family judges and for anyone involved in planning or overseeing the interface between “psy” expertise and the judiciary. I view it as an essential part of this project, and an ethical responsibility, to attempt to share some of the ideas which have emerged from it more widely by writing up aspects of it for publication, not only in systemic and therapy journals, but also in legal journals. I have already undertaken to summarise it for the ad-hoc group of systemic experts who are meeting to respond to the consultation on standards, and I will also offer it to the FJC and Judicial College, as well of course to all the participants.

Chapter 6: Conclusion

Three major themes have emerged from this research, one connected to its original rationale and two which were unanticipated but have significant implications not only for the systemic community but for expert witnesses, judges and the family justice system in general.

The possibility and desirability of systemic therapists involving themselves usefully in the family justice system

The original rationale for this research project was to explore this issue. During the five years since, my views about this have changed. Initially I was not sure that certain epistemological incompatibilities could be overcome. However, in talking to people who had found a way to reconcile these I became convinced that, although significant (and more problematic to some than others), they were of less importance than the benefit that could be brought to families by the introduction of a wider relational perspective to a narrow individualistic discourse. This would imply that I should be aiming to encourage the recruitment of more systemic experts. Latterly the changes to legal aid, and the family justice review's purpose of reducing both the use of expert witnesses and the time available for assessment, have made me wonder how practical or useful this would be.

My research has confirmed that there are very significant and well-founded concerns about the difficulty of getting recognised as an expert or being funded by the Legal Aid Agency; there may be reservations following Ireland (2012), such as those expressed recently on a systemic therapy forum, about whether systemic therapists have the appropriate skills or training in risk assessment to undertake the work. Many may feel that there is too little space (both practically and philosophically) for the creation of a useful relationship with a family, for the possibility of change, or for cherished systemic ideas about multiple realities and the shedding of expertise. Some may feel that they do not have the personal resources to

manage being subject to cross-examination, or of working in isolation. The lack of understanding at all levels within the family justice system of the complexities of the assessment relationship, and the difficulty, if not impossibility, of assessing for change without trialling it, remain problematic. It could be argued that the systemic discipline as a whole has some ethical responsibility to attempt to promote a wider debate on this point.

However, there are very strong arguments for the benefits and relevance of a systemic way of thinking about families in the justice system in terms of its focus on relationship rather than individuals, its ability to bridge the dichotomy between expertise in adults or children, and the attention it pays to issues of marginalisation and disempowerment

So I offer two conclusions which might be drawn from this research on this issue (these “alternative endings” might be seen in the systemic tradition of containing complexity and multiplicity – or, as Alex put it “hedging and fudging!”).

Firstly, that working as an expert witness is either not practical for systemic practitioners or not compatible with fundamental systemic principles, but systemic practice has much to offer in the wider family justice system. There may be other roles beside that of the traditional lone expert in the forensic arena. Time will tell whether the recommendation for further research into the effectiveness of family assessment teams will be followed; but in the meantime the Family Drug and Alcohol Court model is being rolled out in Milton Keynes (so far without a designated systemic post). One would hope that the value of a systemic input to the team, at least in terms of supervision, would be evident. If there is to be further future development of parenting programmes such as previously offered by IFT, I would argue that there should be a stronger and more obvious systemic presence in them. As Chimera (2010) points out, the advantage of having a systemic practitioner involved in such work is that the sessions followed a format rather than a manual and interventions could be tailored to the needs of the particular group.

Another possible avenue for the effective involvement of systemic practitioners in the lives of families who are in, or at risk of entering, the family justice system is the Reclaiming Social Work initiative. This was recommended as a model of good practice in the Munro report (2011) on improving safeguarding practices in children's services and has a strong emphasis on systemic models of thinking about families and their relationship with services, and the inclusion of a qualified or shortly to be qualified systemic therapist in the social work team (Goodman and Trowler 2012). The model is already being rolled out in local authorities (for example Hackney and Cambridgeshire) with training for social work staff being delivered by the Institute for Family Therapy. There is therefore scope not only for becoming involved directly but for contributing to the training and supervision of those doing the direct work.

Secondly, one might conclude that systemic practitioners have skills and knowledge which is well-suited to the expert role and that more should be done to promote their involvement. Current systemic experts are already working on promoting their visibility and collaborating more as a specialist group within systemic practice. This could also involve a more focussed systemic input to judicial training.

Lack of feedback and research

I had not anticipated finding a connection between the systemic experts and the judges in terms of the lack of feedback available to them on the effectiveness of their individual interventions, which have major implications for the long-term wellbeing of children and families. Given the "therapeutic" or "helping" focus of many judicial interventions (Eekelaar and Maclean's 2013 research supports my own findings on this), more research would seem timely on the interface between judges and "psy" knowledges, and on how judges make decisions. We also need to know whether they would benefit from more professional support of the type enjoyed by professionals facing similar emotional demands such as therapists and social workers.

Managing distress in the family justice system

The third thread is the distress experienced by children in the family justice system, especially those involved in private law cases, and the lack of appropriate resources to address it. Connected to that is a concern that there are insufficient resources both to prevent families entering the public law system and to support them once they are in it. Wider and deeper exploration of these issues is also indicated.

Recommendations

I therefore offer the following suggestions for ways of continuing to explore these issues:

- Those responsible for establishing quality standards for experts be invited to consider including experience of (and qualification in?) working with children and families.
- The FJC and the Judicial College be offered the findings from this research with regard to future judicial training
- Systemic practitioners who are interested in becoming or continuing as systemic experts should:
 - become familiar with current research on court assessment processes
 - promote their practice, and the particular relevance of a relational approach in family court work as widely as possible within the systemic community by:
 - offering more “introductory” training for systemic colleagues as well as judicial training
 - writing articles
 - publicising the possibility of “sitting in”
 - establish quality measures for a systemic expert report
 - develop a resource pack of information leaflets
- Further research should be undertaken on

- ways of giving more effective feedback to experts and judges
- the assumptions which inform judicial decisions in family cases
- whether there is a need for more formal or informal (peer) support for family judges

The whole question as to whether there is potential to improve the experiences of children and families in the justice system, whether in public or private legal proceedings, would also merit much deeper exploration.

I commented in the methodology section on the impossibility of being satisfied that one had ever “finished” an endeavour such as this. I was tempted to quote Ovid “iamque opus exegi” but the work is not completed; it is, however, time to launch it into the world. So here is ... the beginning.

“To make an end is to make a beginning.

The end is where we start from”

(TS Eliot Four Quartets “Little Gidding” pt 5)

Appendix 1

Questionnaire used by Doctors.net.uk to collect data to inform “Bearing Good Witness”

PROVIDING MEDICAL EVIDENCE TO THE COURTS

1. What is your specialty? Paediatrician
Child psychiatrist
with psychology?
Adult psychiatrist
with psychology?

2. What is your grade? Consultant
Associate specialist
Senior registrar
Specialist registrar
Staff Grade
Senior House Officer

3. Please tell us where you are based:

- London Midlands Northeast Northwest
South-east Wales and Cheshire Southwest Scotland

4. Do you currently act as a witness for the courts? No
(please answer questions 5A - 7A)
Yes
(please answer questions 5B - 8B)
I used to, but I've stopped
(please answer questions 5C-10C)

FOR THOSE WHO ANSWER “NO”

5A. Why are you not willing to act as a witness? (tick all answers which apply)

- Never been asked
- I don't feel qualified
- I don't get involved in child protection work
- No time to do it
- Too stressful
- I'll get insufficient remuneration for it to be worthwhile
- Worried about adverse publicity
- Fear of referral to the GMC
- I don't know how the courts operate
- I'm unsure about the evidence base
- Adversarial process in court is intimidating/off-putting

- There are always cancellations/delays in the courts
- I don't know how to write a report
- My employer is negative about giving me time off from my clinical work to appear in court
- Other (please specify)

6A. Please rank these reasons in order of importance to you (*starting with "1" against the most important factor*)
(answers will be pulled through from the answers selected for the previous question)

7A. What, if anything, would make you willing to act as a witness?

FOR THOSE WHO ARE CURRENTLY ACTING AS AN EXPERT WITNESS:

5B. Please indicate, in the last five years, approximately how many times you have acted as an expert witness in court proceedings (*even if you did not actually appear in court on all occasions*):

- 1-5 times
- 6-10 times
- 11-15 times
- 16-20 times
- more than 20 times

6B. If you have acted as a witness in the last 5 years, please could you tell us:

- How many times you gave evidence as the doctor who treated the person concerned?
- How many times you acted as an expert witness to the court? (*ie were asked to provide an opinion*)
- How many of each type of cases you did? (*please give number in each category*)
 - Family
 - Criminal
 - Civil
- Whether you did this work within your NHS contract? (*estimated percentage of cases done within NHS contract or outside it*)
 - Within NHS contract Outside NHS contract
 - (*tick if applicable*) I'm not in the NHS
- What is the most you were paid? (*approximate figures*)
 - £ per hour
 - and/ or £ per case
- What is the least you were paid? (*approximate figures*)
 - £ per hour

and/ or £ per case

- Roughly how many cases would you expect to undertake in a year?
- Approximately how many cases a year do you turn down?
- How long does it take you, on average, to produce a report for the court:
 - Number of hours' work preparing/writing it? (*ie chargeable hours*)
 - Total number of weeks needed to produce it?

7B. Have you received any special training to be an expert witness? Yes
No

If yes, please tell us what.....

8B.What, if anything, would make you more positive about being an expert witness?
.....
.....

FOR THOSE WHO USED TO BE AN EXPERT WITNESS, BUT HAVE STOPPED:

5C. Please indicate, in the last five years, approximately how many times you acted as an expert witness in court proceedings (*even if you did not actually appear in court on all occasions*):

- 1-5 times
- 6-10 times
- 11-15 times
- 16-20 times
- more than 20 times

6C. Within the last 5 years, please could you tell us:

- How many times you gave evidence as the doctor who treated the person concerned?
- How many times you acted as an expert witness to the court? (*ie were asked to provide an opinion*)
- How many of each type of cases you did? (*please give number in each category*)
 - Family
 - Criminal
 - Civil
- Whether you did this work within your NHS contract? (*estimated percentage of cases done within NHS contract or outside it*)
 - Within NHS contract Outside NHS contract
 - (*tick if applicable*) I'm not in the NHS
- What is the most you were paid? (*approximate figures*)
£ per hour

and/ or £ per case

• What is the least you were paid? (approximate figures)

£ per hour

and/ or £ per case

7C. Did you receive any special training to be an expert witness? Yes

No

If yes, please tell us what.....

8C. Why are you no longer willing to act as a witness? (tick all answers which apply)

- No time to do it
- Too stressful
- I get insufficient remuneration for it to be worthwhile
- Worried about adverse publicity
- Fear of referral to the GMC
- Adversarial process in court is intimidating/off-putting
- There are always cancellations/delays in the courts
- My employer is negative about giving me time off from my clinical work to appear in court
- Other (please specify)

9C. Please rank these reasons in order of importance to you (starting with "1" against the most important factor)

(answers will be pulled through from the answers selected for the previous question)

10C. What, if anything, would make you willing to act as a witness again?

.....

Medical Expert Witness

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Appendix 2

Questionnaire for systemic psychotherapists [adapted from that used by Doctors.net.uk to collect data to inform "Bearing Good Witness" (Donaldson, 2007)].

PROVIDING EXPERT EVIDENCE TO THE FAMILY COURTS

1. Do you have dual qualification? Psychiatrist
Psychologist
Social Worker
Nurse
Other
None

2. What is your grade? Specialist
Highly Specialist
Consultant

3. Please tell me where you are based:
London Midlands Northeast Northwest
South-east Wales and Cheshire Southwest Scotland

4. Do you currently act as an expert witness for the family courts? No (*please answer questions 5A and 6A overleaf*)

Yes (*please answer questions 5B - 8B page 3*)

I used to, but I've stopped (*please answer questions 5C-10C page4-5*)

FOR THOSE WHO ANSWER "NO"

5A. Why are you not willing to act as a witness? (please mark all that apply with a number to indicate the order of importance, 1 being the most important)

- Never been asked

- I don't feel qualified
- I don't get involved in child protection work
- No time to do it
- Too stressful
- I'll get insufficient remuneration for it to be worthwhile
- Worried about adverse publicity
- Fear of referral to professional body
- I don't know how the courts operate
- I'm unsure about the evidence base
- Adversarial process in court is intimidating/off-putting
- There are always cancellations/delays in the courts
- I don't know how to write a report
- My employer is negative about giving me time off
from my clinical work to appear in court
- Other (please specify):

6A. What, if anything, would make you willing to act as a witness?

FOR THOSE WHO ARE CURRENTLY ACTING AS AN EXPERT WITNESS:

5B. Please indicate, in the last five years, approximately how many times you have acted as an expert witness in court proceedings (*even if you did not actually appear in court on all occasions*):

- 1-5 times
- 6-10 times
- 11-15 times
- 16-20 times
- more than 20 times

6B. If you have acted as a witness in the last 5 years, please could you tell us:

- How many times you gave evidence as the psychotherapist involved in the treatment of the family concerned?
- How many times you acted as an expert witness to the court?
(*ie were asked to provide an opinion*)
- How many of each type of cases you did? (*please give number in each category*)
 - Public Family Proceedings
 - Private Family Proceedings
- Whether you did this work within your NHS contract? (*estimated percentage of cases done within NHS contract or outside it*)
 - Within NHS contract Outside NHS contract
 - (*tick if applicable*) I'm not in the NHS
- Roughly how many cases would you expect to undertake in a year?
- Approximately how many cases a year do you turn down?
- How long does it take you, on average, to produce a report for the court:
 - Number of hours' work preparing/writing it? (*ie chargeable hours*)
 - Total number of weeks needed to produce it?

7B. Have you received any special training to be an expert witness? Yes
No

If yes, please tell me what:

8B. What, if anything, would make you more positive about being an expert witness?

FOR THOSE WHO USED TO BE AN EXPERT WITNESS, BUT HAVE STOPPED:

5C. Please indicate, in the last five years, approximately how many times you acted as an expert witness in court proceedings (*even if you did not actually appear in court on all occasions*):

- 1-5 times
- 6-10 times
- 11-15 times
- 16-20 times
- more than 20 times

6C. Within the last 5 years, please could you tell us:

• How many times you gave evidence as the psychotherapist involved in the treatment of the family concerned?

• How many times you acted as an expert witness to the court?

(ie were asked to provide an opinion)

• How many of each type of cases you did? (please give number in each category)

Public Family Proceedings

Private Family Proceedings

• Whether you did this work within your NHS contract? (estimated percentage of cases done within NHS contract or outside it)

Within NHS contract Outside NHS contract

(tick if applicable) I'm not in the NHS

7C. Did you receive any special training to be an expert witness? Yes

No

If yes, please tell me what:

8C. Why are you no longer willing to act as a witness? (please mark all answers which apply with a number to indicate order of importance, 1 being the most important)

- No time to do it
- Too stressful
- I get insufficient remuneration for it to be worthwhile
- Worried about adverse publicity
- Fear of referral to the professional body
- Adversarial process in court is intimidating/off-putting
- There are always cancellations/delays in the courts
- My employer is negative about giving me time off from my clinical work to appear in court
- Other (please specify)

10C. What, if anything, would make you willing to act as a witness again?

Medical Expert Witness

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Adapted for doctoral research in systemic psychotherapy by Sue Hickman 2009

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Appendix 3

Application to the Ministry of Justice for Research Approval

Details of proposed research

The interface between systemic/family psychotherapy and the family courts: with a particular focus on expert reports

Sue Hickman, MA, CQSW, DST

Potential benefits to the judiciary and to the family justice system:

- The proposed research would contribute to the objectives of the Family Justice Council specifically in relation to Strategic Objective 3 of the FJC's 2008/9 Business Plan "to examine the use and role of experts in the Family Justice System", and more broadly within the framework of inter-disciplinary collaboration.
- The research would provide data with potential for enriching the discussion of this topic in the training and continuing professional development of systemic/family psychotherapists and of the judiciary, and thus in Sir Liam Donaldson's (2006) words "find new ways of working with each other" ("Bearing Good Witness" p2) and determining more common ground about what constitutes a "good report".
- This in turn could result in better outcomes for children and young people who are the subject of family court proceedings.
- The research would make a contribution to the development of multi-disciplinary teams of "experts" within the NHS and the recruitment of more systemic psychotherapists to this role, as envisaged by "Bearing Good Witness".

Although this research is connected with a course of post-graduate study, it would have these clear benefits for the family justice system and is thus in the public interest. As such it has the personal support of Lord Justice Thorpe, chair of the experts' committee of the Family Justice Council, who has indicated that he would imagine I might also rely on the support of the committee.

I will need to submit a final research proposal to the university in June 2009, and it would be helpful to know before then whether I am going to be able to include members of the judiciary. Judges are the most influential and significant "users" of

reports and previous research (Tufnell et al 1996) suggests that the views of judges differ significantly from those of advocates (the other potential source of the “legal” position) in determining what constitutes a good report. In order for the potential benefits to be maximised judicial participation is therefore necessary.

Details of Proposal

The provisional research question is: "Judges in the family courts and the family psychotherapists who make reports to them: how far is understanding shared about the nature of this process?" There are many words and phrases used in this context, such as “fact”, “opinion”, “truth”, “observation”, “knowledge”, “expertise”, “reality” and “objectivity”, which may have subtle differences of meaning for the participants involved depending on their beliefs about the nature of the world and our relationship with it. I am interested in exploring what differences and what similarities there may be between the judiciary and the systemic practitioners in approaching some of these ideas, and the implications for their successful joint working in the interests of children.

I do not envisage that judicial discretion or independence would be impaired by participation in this research or that it is in any way politically controversial.

- The research would be qualitative, with a detailed analysis of data gathered from semi-structured interviews. However, I also want to explore whether it would be possible to reproduce to some extent within the systemic psychotherapy field the quantitative survey conducted for “Bearing Good Witness” (2006), which was restricted to doctors.
- I would like to interview family court judges about their ideas about the concepts above, the source of these ideas (for example, professional training), how they influence their professional actions, especially in relation to expert reports, and whether they would expect systemic psychotherapists to have similar or different ideas. It might be helpful to explore instances where reports written from a systemic perspective have been particularly helpful or problematic, but without going into the details of the case.
- I will also be interviewing systemic psychotherapists who are experienced in writing expert reports in relation to their involvement with the family justice system. The focus of the interviews will be similar.
- I do not have any specific interviewees in mind among the judiciary. However, they would obviously need to be experienced in family work and if it were possible I would like the participants to come from different levels

of the judiciary and to reflect diversity in gender and ethnicity. I am based in Bedford and from a practical point of view it would be helpful to identify participants within reasonable geographical reach. I am married to a district judge based in Milton Keynes and I would need to think carefully about the implications of interviewing anyone with whom he is closely connected. If this research is approved it would be helpful to have guidance on recruitment.

- The research would entail my carrying out a semi-structured interview of up to 90 minutes, with five to seven judicial participants. I would be happy to meet any requirements of the Ministry of Justice in relation to making my thesis, or any subsequent publication, available for comment, and intend to prepare a shorter version or my findings for circulation or presentation to the judiciary as required.
- Interviews would be recorded by audio-tape for the purposes of transcription and analysis. All material in the thesis and in any publications will be anonymised, and will therefore not be attributable to any individual.
- I do not imagine that there will be any need for reference to details of individual cases. If a particular report were discussed this would be in terms of the features which made it helpful or unhelpful rather than in terms of the specific content of the case. If there were any material relating to this topic published by the Judicial Studies Board it would be useful to have access to it, but I understand that there is none.
- I am proposing to fund this research myself and I will be the only researcher involved. The only other parties to the research will be the academic bodies who are supervising and assessing it. They will need to approve the research proposal which I have to submit this summer.
- I imagine the research will be taking place over the academic years 2009/11.
- I am not aware of any other research on this topic specifically. I note that there was no professional body representing solely the systemic field (for example, The Association for Family Therapy and Systemic Practice) involved either in the consultations for “Bearing Good Witness” or the working party on FJC’s inter-disciplinary curriculum.

References:

Donaldson, Sir L. (2006) Bearing Good Witness: Proposals for reforming the delivery of medical expert evidence in family law cases – a report by the Chief medical Officer. Department of Health

Tufnell, G., Cottrell, D. And Giorgiades, D. (1996) Good practice for expert witnesses *Clinical Child Psychology and Psychiatry* **3**, 365-385

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30/3/09

Appendix 4

Letter for participants

Dear

Thank you again for agreeing to participate in research I am undertaking in connection with my professional doctorate in systemic psychotherapy. I am writing to confirm the date, time and venue that we have agreed as follows for a semi-structured interview lasting approximately one and a half hours:

As I have explained before, the proposed focus of my research is the interface between systemic/family psychotherapists and judges in family courts, with particular reference to expert reports. I am particularly interested in what similarities and differences of understanding there may be between systemic “experts” and the judges who will be the recipients of their reports about the meaning of words commonly used in this context, such as “fact”, “opinion”, “truth”, “observation”, “knowledge”, “expertise”, “reality” and “objectivity”. I am also curious about the process by which systemic psychotherapists are invited to write reports as experts, the way they approach this process, and how their reports are received and perceived by the judiciary. This will be explored by interviewing a number of systemic psychotherapists who are experienced in writing reports for court as well as a number of family court judges who are experienced in receiving them, and by analysing the transcripts of these interviews. My hope is that findings might enhance professional training in this interface and encourage more clinicians to consider participating in the medical expert witness service as envisaged by “Bearing Good Witness” (Donaldson 2007). This research project has been approved academically and ethically by the University of East London.

The interviews will be audio-recorded digitally for the purposes of transcription and analysis. All recorded material will be anonymised at all stages of the research process, and will therefore not be attributable to any individual participant. I would like to be able to retain interview data beyond the writing up of the research project so that it can remain a resource on the topic for the future, but if individual participants wish it to be destroyed as soon as the thesis is submitted, or within a specific timeframe, please let me know and I will ensure that this is done. Should you wish to receive a copy of the transcript of your interview once it is available please let me know and I will be happy to supply one. I do not imagine that there will be any need for reference to details of individual cases. If a particular report were discussed this would be in terms of the features which made it helpful or unhelpful rather than in terms of the specific content of the case. However, it is possible that sensitive clinical or judicial material might be inadvertently discussed. In that circumstance I would not use such data in any way which might make it possible to identify individuals, and I will ensure security of the information.

It is also possible that the interview might touch on emotionally distressing topics. Obviously I assume that you may terminate the interview or withdraw from the study at any point for whatever reason and without giving an explanation, or refuse to answer any particular question. Finally I have to address the possibility, however remote, that some question of professional misconduct might arise which would need to be resolved through the appropriate channels.

I would be very happy to make the final thesis available to all participants, to prepare a shortened version of the findings for presentation in any relevant training contexts, and to meet the requirements of the Ministry of Justice in relation to publication.

Yours etc

Sue Hickman, MA, CWSW, DST

Appendix 5

Development of Judicial questions

How long have you been sitting in the family courts? *Included throughout inc pilot*

What experience did you have of family work prior to your appointment to the bench?
Included throughout exc pilot

I wonder if you can tell me how you think the role of a judge in family courts differs from that of a judge in other areas of law? (?Follow up on “family minded”, blood on the carpet” quotes)

Added in response to J1’s comments about the difference between family and any other sort of work 9(542-605). Order changed after ?J2 to follow the completion of the “factual/proportional” questions. Prompts added after J4 and 5 contributed their soundbites

Roughly what proportion of the cases you hear are public and what private law? *Included throughout inc pilot*

Is it possible to give an approximate idea of the proportion of cases you hear which involves an expert report? (clarify at this point that for the purposes of this interview only psychological/psychiatric reports are meant). *Included throughout inc pilot (clarification added after J2) Does the proportion vary between public and private law cases? Added after? SP2.*

Of that number, roughly what proportion give oral evidence? *Included throughout*

What do you personally expect of an expert report? (prompt on length, objectivity, clarity of and rationale for recommendation). *Included throughout*

Some judges have talked about the assessment process and the writing of the report as creating an opportunity to bring about some change for the family: what would your view be on this?

Added for J5 in response to J4’s comments

Could you think about reports you remember as being particularly helpful or unhelpful and identify what factors made them so? *Included throughout*

What differences and what similarities do you see between the way the judiciary think about (and approach?) cases in the family courts and the way the psychiatrists, psychologists and psychotherapists do?

Added after J1 esp 274 “the lawyer wants precision and the doctor tries things out”. Order varies, sometimes before Q abt expectations of expert report

Are you aware of having received reports from systemic family psychotherapists? If so, would you be able to identify and features which distinguish them from reports from other disciplines or professions? Where would you expect their expertise to lie? (probe on extent of knowledge about sfp) *Included throughout*

In what circumstances if any would you order or request a specific therapeutic intervention? *Discarded after J1 made it clear (350) that judges don't have power to order interventions)*
Reworded as: What factors would you take into account in thinking what type of expert (psychiatrist, psychologist or psychotherapist) is best suited to a particular case? Included from J1 onwards

What experiences have informed your thinking about this? (prompt on training) *Included throughout*

What training would you recommend or what advice would you give to any therapist considering taking on the role of expert witness? *Included throughout*

What skills and qualities does an expert need in addition to their "regular" professional skills? *Added as a supplementary in J2 when issue of training for experts is being discussed and retained.*

What do you think an expert witness expects of you in the court process? (prompt on cross-examination) (possible follow up: What kind of occasions might provoke judicial engagement with an expert witness?) *Included throughout*

How much do you take into account the effects of the court process on the present and future emotional well-being and relationships of the participants? *Included throughout exc pilot*

I believe family judges are being encouraged to be more "interventionist": what does this mean to you and what are your views about it? *Added in response to J1's comments about judges becoming more interventionist, and also Sir Nicholas Wall's "Law in Action" comments in October 2010*
Included early on in J3's interview as it fitted with what was said about the role of the family judge

What if any aspects of what you do as a judge or the court process in general would you consider to be "therapeutic" in a broad sense? *Added after SP2 interview, also connected to J1's comments about change occurring in the court process (88-9), and J2's comments about trying to "mediate, conciliate, achieve a better outcome" (375)*

Is there any question that you expected me to ask you that I haven't and that it would have been helpful if I had asked it? *Included for J1, order between this and subsequent question varies, omitted in error from J4 who was in rather a hurry to finish*

Is there anything you would like to add, or any comments you would like to make about the process of the interview?

If time, give gist of Kaplan article and ask for comment.

Appendix 6

Development of Systemic questions

- 1 How long have you been involved in writing reports for the family courts?
Included throughout
- 2 What proportion are public law cases and what private? Has the proportion changed over time: if so, how? In what proportion of cases are you called to give oral evidence?
Not in pilot; included as result of distinctions made in judicial pilot
- 3 How did you get involved in the first place? If you have continued to do this kind of work what has kept you drawn to it? If not, what has deterred you?
First part of question not asked in pilot because information emerged, but seemed essential to include; idea of “attraction”/”being drawn to”/”enjoying” informed by J1 and J2’s comments. Various words tried out after SP2 questioned “enjoying”
- 4 What ideas did you have about what was expected of you? How were those ideas informed? How have they changed over time in undertaking the role?
Included throughout
- 5 What skills and qualities does an expert need in addition to their “regular” professional skills as a therapist?
Included throughout
- 6 What feedback have you had about your reports?
Included throughout
- 7 What’s your current view of what constitutes a good report?
Included throughout
- 8 How would you position yourself theoretically within the broad systemic “church”? How well does this position fit with the role of expert witness? (prompt on objectivity, meaning of expertise etc)
First part included only for SP7 as result of discussion with peers on range of theoretical positions amongst previous participants
- 9 What do you think are the particular strengths of a report written from a systemic perspective? (prompt on power issues, marginalising, wider systems)
Included throughout
- 10 What differences and what similarities do you see between the way the judiciary think about cases in the family courts and the way systemic experts do? (Prompt on how “systemic” are judges)
Included for all but pilot after J1’s comment on lawyers wanting precision and doctors wanting to try things out. Prompt added after SP4 commented on how systemic judges could be
- 11 What if any differences are there between public and private law cases in terms of the experts’ role? *Added in response to distinctions drawn in feedback (Q 17) by SP3*

- 12 What differences if any do you think there are between acting as an expert in a “private” capacity and in the course of employment in the public services? (supplementary on “the whole system is corrupt” comment) *informed by SP5’s comments about the potential for corruption and SP6’s reflections on working in the public sector*
- 13 What is the potential for therapeutic change in the process of making an assessment for court? (prompt on impact on relationship, do you think change is expected by the commissioners?) What do you think is the impact of the interaction with families that it will be the subject of a court report and how do you manage this? *Informed by SP2’s comments and included thereafter. Second part of question got positive feedback from pilot but for some reason not always included thereafter*
- 14 What experiences have been the most helpful in preparing for and developing the role? (prompt on training opportunities)
Included throughout
- 15 If you had the opportunity to communicate with judges about the process or practice of writing a report from a systemic perspective, what ideas would you want to share with them?
Included throughout
- 16 What do you expect of the judges? (prompt on protection in the witness box)
Included throughout
- 17 How far do you think judges take into account the impact of the court process on the present and future emotional wellbeing and relationships of participants?
Included in all systemic interviews after positive feedback to parallel question from J1
- 18 What do you think judges mean when they talk about being more “interventionist” in family cases?
Included in response to comments by J1 and position statement about this time by
- 19 Is there anything you would like to add, or any comments you would like to make about the process of the interview? Do you mind if I just check to make sure I haven’t missed out any questions?
First part of question elicited some useful ideas eg the public private distinction
- 1 Are there any questions that you expected me to ask that I haven’t?

Appendix 7

TRANSCRIPTION NOTATIONS

The transcription notations used were as follows.

... Untimed pause which is noticeable but too short to measure.

..(2).. Pause timed to nearest second.

word Underline - emphasis placed on words by speaker.

(overlap) Overlapping utterance

..... Speaker trails off. If followed by (overlap) then indicates that speaker has been interrupted. At the beginning of a sentence it indicates continuance of statement after (overlap)

(indistinct) Inaudible. This will refer to one or two words. It will be indicated if longer section of dialogue.

(?) Preceding word not 100% clear.

(*laughs*) Non-verbal information

SH Researcher's contributions

^^^ Section of extract left out

Appendix 8

First example of coding

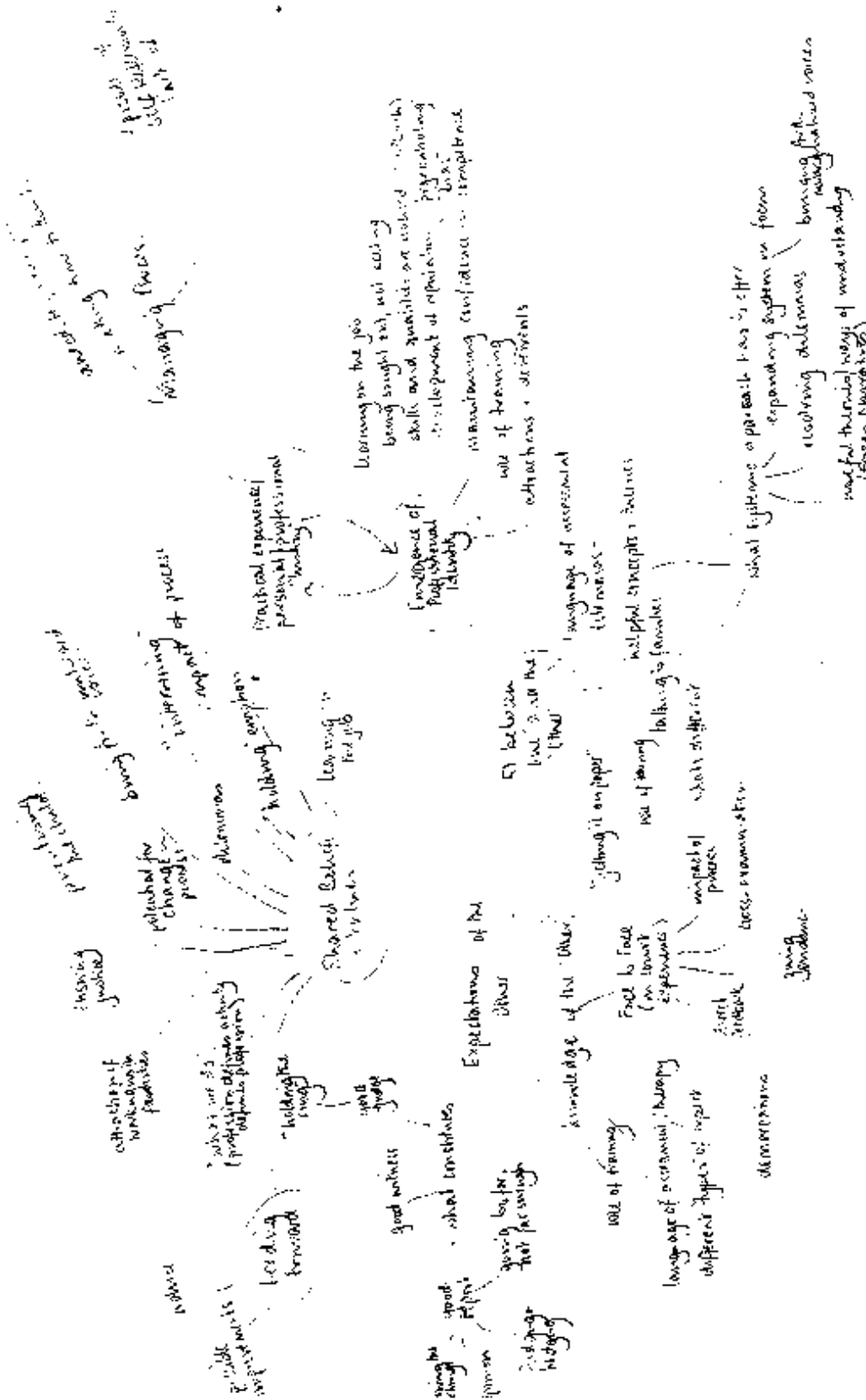
SP1 I'm talking about the families I've seen, yeah...	86 confirming
SH That they've appreciated that...	87 Reflection of confirmation/affirmation?
SP1 Yeah, very often they have, yeah	88 Dance of confirmation
SH I'm going to anticipate a question that I thought might fit in later on,	89 Thinking aloud
but I'm kind of wondering, I guess it might depend on the context how soon the families become aware or you become aware that you might be taking this position in relation to the work you're doing with them	90 Allowing for context
but I'm wondering how you think it, the fact that you are producing something a report for court, how do you think that affects your interaction with families and maybe how you talk about it to them?	91 Asking about impact of court work on interaction
SP1 Well that's generally where we start, I start by telling them I have to produce a report,	A92 keeping families informed about need to produce report
that I want to hear it the way they think about it,	A93 Families thoughts are wanted
that at the end of it or when we are coming close to the end I will also um arrange a time for me to go through what I've written with them,	A94 Families will have chance to go through report
um that I won't necessarily ..change the recommendations or the conclusions that I might have come to,	A95 expert reserves right to disagree
but it gives them a chance to ..hear and see what I'm thinking	A96 expert shares thinking
and if they have a different idea about it I am happy to include that also	A97 expert will include families' thoughts
um ...so...that's generally right from the off, um part of setting the context I, I do that,	98 Stressing importance of beginning from this point
so that ..I think so that they don't go into the court and are surprised by what they hear me say and they know that I am going to say the things I am saying	A99 Shouldn't be surprises in court
and they can also ask me why I am saying the things that I am saying	A100 families should have opportunity to challenge
and usually in the report writing I say their words ;	A101 Using families own words
part of the first of it is about describing the interview and their words	A102 Report includes what family have said
before I go on to make, have a discussion using the theory that I've been using to help me think and give meaning to their words,	A103 report includes SP1's explanation of theory
so that's there and if they think I haven't heard their words as they intended they can tell me that.	A104 Chance for family to clarify meaning
SH Um, er do you think of those kind of interactions as having a therapeutic purpose as well as a purpose of ..information gathering?	105 Introducing own hypothesis
SP1 Yes, I do	A106 assessment has therapeutic effect

Appendix 9

Second example of coding

<p>so you know sometimes in the course of the work, I mean one family an incredible painful case where the mother really after having a lot of, quite a few contact meetings with her children with us decided that she wasn't going to keep pushing for contact with them, she would leave it to them so that was a change that happened in the course of the work</p>	<p>F129 parents changing their position on contact in course of work</p>
<p>so really our task was not to say that we recommended that but that this was a decision and then talk about what might be the likely, talk about what had led up to that decision and what might be the likely consequences and how it would affect each of the children (SH um) and the father and so on and so forth</p>	<p>F130 explaining process of change and likely consequences to court</p>
<p>um so I do see the report as trying to create a new narrative and therefore it is very much looking very hard at what seems to have kept the system which is the legal system stuck before</p>	<p>F131 report trying to create a new and unstuck narrative</p>
<p>um ..(4)..you know one case it all sort of edged around whether a father's new partner had or had not hit the child when the child had been visiting the parent and we were involved I don't know kind of like three years after this incident and the father insisted that this partner had never met the child and the mother insisted that she had and the mother had assaulted the partner so it was a kind of huge battle over the truth</p>	<p>F132 parents battling over the "truth" of allegation of violence</p>
<p>a with that one we actually managed to find a way out of it in the court, it had developed, we did manage to get the father seeing the child partly by getting the mother's mother got involved and was very helpful to us..(2)..and really just trying to find a way of having the father apologise to the child but without having to contradict his own narrative that the mother, that this woman had never met the child because basically nobody knew so that was a kind of complicated one where social services were involved and all sorts</p>	<p>F133 finding way forward that avoids contradicting either narrative</p>
<p>so often I think the conclusions are quite in the kind of realm of more the sort of emotional truths than the sort of logics, it wouldn't be very often that my conclusions would be that you know that the father should have overnight contact on alternative weekends because all that's been done (SH um) you know.</p>	<p>F134 reaching emotional not practical truths</p>

Appendix 10



Appendix 11

Codes extracted by participant

(Bold italics show codes from examples of texts in appendices 8 and 9)

A78 expert's role is to flesh out and thicken description

A79 systemic role is to flesh out and thicken description

A82 client's appreciation of bigger picture being provided

A 83 appreciation expressed more than once

A 84 Creates new ways for people to be portrayed

A92 keeping families informed about need to produce report

A93 Families thoughts are wanted

A94 Families will have chance to go through report

A95 expert reserves right to disagree

A96 expert shares her thinking

A97 expert will include families' thoughts

A99 Shouldn't be surprises in court

A100 families should have opportunity to challenge

A101 Using families own words

A102 Report includes what family have said

A103 report includes SP1's explanation of theory

A104 Chance for family to clarify meaning

A106 assessment has therapeutic effect

A108 questions have therapeutic effect

A109 assessment is in domain of production

A110 inclusive process of assessment is therapeutic

A117 client surprised by report

A118 client expecting to be criticised

A119 expert focussing on strength and resources as well as deficits

A122 Effect on story of self can be more important than court outcome

F118 systemic strength being able to engage people in possibility of change

F119 systemic strength engaging with other sources of wisdom

F120 respecting generational differences

F120a respecting the logic of the system

F121 systemic strength holding knowledges contingently

F122 being irreverent to theory

F124 holding multiple positions as way of mapping a system

F125 distinguishing holding multiple positions from not being able to make your mind up

F126 trying to present a new way of looking at things

F127 considering what's already been said

F128 courts often tending to go for the middle ground/fair division of the child

F129 parents changing their position on contact in course of work

F130 explaining process of change and likely consequences to court

F131 report trying to create a new and unstuck narrative

F132 parents battling over the "truth" of allegation of violence

F133 finding way forward that avoids contradicting either narrative

F134 reaching emotional not practical truths

F135 sometimes recommending something doesn't happen

F136 sometimes recommending separate legal representation

F137 good report addresses everyone's logic respecting difference and dilemmas

Appendix 12

Codes arranged by “cluster”

Change/ therapeutic effect in assessment (systemic)

A 84 Creates new ways for people to be portrayed
A100 using families' own words
A103 checking that intended meaning is heard
A118 focussing on strength and resources as well as deficits
A106 assessment has therapeutic effect
A108 questions have therapeutic effect
A109 assessment is in domain of production
A110 inclusive process of assessment is therapeutic
A117 client surprised by report
A118 client expecting to be criticised
A119 expert focussing on strength and resources as well as deficits
A122 Effect on story of self can be more important than court outcome
A127 positive change in family connected with aspects of her report
A128 expert likes to believe positive change created by report
A130 Change in parent's reputation as result of report
A135 Enriching but challenging clients'account
C93 recognising ability to facilitate significant change
C94 stopping being in court
C125 difficult distinction between assessment and therapy
C126 won't be paid for therapy
C127 entails working quickly
C128 working towards change
C131 nowhere else to do the work
C133 have identified need for quick change

Truth seeking

C258 idea of truth seeking doesn't fit
C260 hard to be as certain as legal system wants you to be
C261 legal system wants you to say this is what's wrong
C283 stuckness is around looking for a truth
C290 systemic ew is not thinking about truth
C291 systemic ew is sharing “way of thinking”
F134 reaching emotional not practical truths
F159 finding of fact as one kind of truth
F160(i) defining truth through connectedness
F160(ii) using finding of fact as “truth” in work with parties
F161 emotional truth vs finding of fact in some cases
F162 living with the court's truth
G47 “finding of fact” is really opinion
G48 all lawyers know truth is the truth used by one party at one time
G49 certain problems with reality and objectivity
G117a never claiming something happened, only that it was reported to have happened
G118 courts liking these distinctions around “truth”
G118a some ew's haven't got hang of these distinctions around “truth”
G120 distinctions around truth informed by “barrister's logic”
G202 awkward if you have to assume “if A then B” eg re injuries
G211 families being muddled by different standards of proof

Appendix 13

Example of “e-memo”

A128 memo

what stories do therapists need to develop about their reports in order to maintain their belief in their competence to do them? How is this connected to the amount of feedback they get about the usefulness of their reports to the court? How far do judges share the experience of not getting feedback about outcomes or having their practice observed by their peers?

Revisited in extracting codes 26/4/12

Appendix 14

Example of memo later incorporated into analysis

Use and awareness of self

“and I sometimes think that if I have been a good family judge - as I believe I have for a long time - it’s partly because I have so many problems of my own that enable me to understand personal problems and enable me to empathise with those that have problems like my own or different from my own and so I..I don’t let it all hang out I can assure you” (E)

The idea that personal experience is a useful lens for judges occurred in several interviews. B cannot understand how people can tolerate being torn to pieces for five days in court; D is a human being first, then partner, then judge, and also comments that although it is harder for money specialists to “steer” cases in the interests of children, most are parents or grandparents with a broad experience of life and so will be able to manage. K connected a sense of the importance of developing trust between the judge and the parties with having a family member who was a GP; trust might be promoted by showing empathy, getting involved, and “letting people know I bleed”. K also wondered how families coped with the experience of appearing in court.

D and K describe a passion or drive to do the work they do which is not intellectual, but about gaining good outcomes for children

Family law is described by H and K to be subjective: what H calls “structured discretion”, that is applying subjective judgments to established “objective” guidelines such as the welfare checklist. H comments that the subjectivity of the expert interviewer can affect the assessment and goes on to say that no-one can shed subjectivity completely, although judges should make efforts to avoid stereotyping and compartmentalising their emotions: “getting real but not cynical”. J also emphasised the importance of being aware of one’s own preconceptions and making sure that one is not driven by them.

E gave an account of feedback received from an expert who had felt unfairly treated and described the steps taken to explore this issue further and to make some changes in practice as a result.

H talked about the toll that is taken (dreaming about cases) in arriving at decisions in complex cases, and of the need to “disguise the teetering”. B commented that judges rely on the expert for help in making complex decisions: “maybe too much”.

It does seem clear that some family judges rely quite considerably on what D calls “wisdom and experience” and will sometimes override professional recommendations on the basis of their own beliefs and ideas. For example, D describes rejecting a care package prepared by a local authority because no provision had been made for the siblings to have contact with each other. Some of the systemic participants were quite critical of stances taken or ideas expressed. Although several of the

judges said that they recognised the need to be aware of their “prejudices”, they might benefit from some of the resources that are available to therapists, such as supervision, to explore and identify these further. The isolation of decision making was mentioned by H (check others). Herlihy et al (2010) undertook an analysis of the assumptions made by judges in asylum cases and compared them with psychiatric and psychological research findings. They recommended further research in the area. I am not aware of any similar research in the field of family law (tho I’m still waiting for an answer from Phil on this point!) and it might be extremely useful.

Similarly I am not aware of any support being available to judges to manage the emotional toll (secondary trauma?) of the task they are required to undertake both in exposure to horrific material and the responsibility of the decision process. Sachs (2009) describes the “tock-tick” of the judicial mind where (p48) “the actual journey of a judgment starts with the most tentative exploratory ideas and passes through large swathes of doubt ..before finally ending up as a confident exposition purportedly excluding any possibility of doubt”. This account resonates with H’s “teetering”

Appendix 16

(J4 87)

It's really astonishing to me that the first comment that comes to mind for this judge is ^{in relation to} ~~that~~ the ~~primary~~ audience of parents or other relatives - not the audience of judge or ~~wider~~ the gathering of parties in court. I had assumed ~~that~~ and asked questions ~~on the~~ ~~in~~ ~~deed~~ the whole basis of the research project ~~is~~ is based on the assumption that the judge ^{sees him or her self as} ~~is~~ the primary audience.

~~However~~ This connects very strongly with comments that previous systemic participants have made about the potential of the assessment process for creating change, but I hadn't expected it to be shared so explicitly.

I asked a follow-up question to make sure that I hadn't misunderstood - and another significant idea emerges - and one that feels slightly or even substantially subversive - that judges are aware that the reports that are commissioned are likely to have some ~~a~~ "therapeutic" impact on the families involved but that there is almost a conspiracy to play this ^{element} down because the Legal Services Commission will not pay for it. This moves the comment into a ~~to~~ ~~rather~~ political arena. I'm immediately thinking - this is fascinating but what can I do with it? If I "publicise" this will it "blow the judges cover" ~~and potentially~~ (because this does fit with things other judges have said more guardedly or obliquely). What are the ethical responsibilities here?

Appendix 17

Draft outline for data analysis systemic clusters	judicial clusters
what constitutes a good report/expert witness	
<p><u>Elements of good report (systemic)</u> Practical issues re presentation/court process: Showing your workings Taking a position Introducing new ideas Understanding the family/formulation Respecting difference Self-reflexivity Ethical dilemma Acting into context</p> <p><u>Skills/abilities required by ew</u> Transferability from therapy Helpful theory Helpful technique</p>	a good report answering the question or making a judgment expert witness skills
can systemic reports be helpful?	
<p><u>What a systemic report has to offer</u> General suitability Finding a fit with court's story/repeating the logic of the system Useful techniques/ways of working/theory Considering wider network Challenging assumptions Keeping open mind/holding multiple positions Offering alternative explanations/options and tolerance uncertainty Thickening description Humanising the image Relational model Enabling change Social justice, marginalised voices Complexity</p> <p><u>Skills/abilities required by ew</u> Transferability from therapy Helpful theory Helpful technique</p> <p><u>Lack of recognition and respect</u> <u>Lack of systemic tradition</u></p>	what expert for what question h/o expert witnesses ews used too much lack of experienced ews unreliability of ews visibility of sfp expectations of sfp BGW
<i>making sense of apparent conflicts,</i>	

<i>inconsistencies, and constraints</i>	
<p><u>court appearance</u> frequency/length Unpleasant experience Adversarial v inquisitorial Wariness re court process</p> <p>Discussing report with family</p> <p><u>Fit/lack of fit ew/systemic</u> General ideas about fit Truth seeking Thinking about context Short time frame Certainty/clarity/complexity/hedging and fudging Taking a position/punctuating at a point in time Objectivity Systemic blinkers</p> <p><u>ew process - practical and ethical issues</u> Finance/resources (<i>further breakdown needed</i>) Relationship with other agencies LIPs Corruption of ew system? Letters of instruction Public private distinctions Respecting the position of the lawyers</p>	<p>facts/truth objectivity/ taking a particular line defensive law in court experience time issues finance and resource issues(<i>further breakdown needed</i>) letters of instruction</p>
<i>emergence and maintenance of professional identity and expertise ("learning on the job")</i>	
<p><u>court appearance</u> frequency/length Unpleasant experience Adversarial v inquisitorial Wariness re court process</p> <p><u>Learning on the job</u> Influence of others/careers/professions Being sought out, not seeking Ew work as thread Competence feedback loop Lack of systemic input on ew</p>	<p>source of knowledge abt psi issues advice to potential ew's ways to learn learning on the job</p>
<i>shared commitment to the wellbeing of children and families</i>	
<p>Foregrounding children beastliness helping the court with difficult questions</p>	<p>avoiding too much blood on the carpet family-mindedness paramouncy of child</p>

	<p>court as "critical moment"</p> <p>reliance on ews</p> <p>frustration</p> <p>ew/jud relationship</p>
<p><i>awareness of the potential for change in assessment and the court process in general</i></p>	
<p>Change/ therapeutic effect in assessment</p> <p>Doublespeak/LSC</p> <p>Judicial emotional literacy</p> <p>What the judges/LSC don't understand</p>	<p>the "therapeutic judge"</p> <p>emotional understanding</p> <p>court's therapeutic potential</p> <p>intervening</p> <p>alternative disposals</p> <p>change</p> <p>ongoing assessment</p> <p>psychotherapy inconsistent with assessment</p> <p>impact of assessment on system</p> <p>Kaplan question</p>

Appendix 18



Charlotte Burck

School of Humanities and Social Sciences, Tavistock Clinic

ETH/11/77

November 26, 2009

Dear Charlotte

Application to the Research Ethics Committee: "The interface between systemic psychotherapy and the family courts: especially in relation to expert reports". (S Hickman).

I advise that Members of the Research Ethics Committee have now approved the above application on the terms previously advised to you. The Research Ethics Committee should be informed of any significant changes that take place after approval has been given. Examples of such changes include any change to the scope, methodology or composition of investigative team. These examples are not exclusive and the person responsible for the programme must exercise proper judgement in determining what should be brought to the attention of the Committee.

In accepting the terms previously advised to you I would be grateful if you could return the declaration form below, duly signed and dated, confirming that you will inform the committee of any changes to your approved programme.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Siriso Jubane', written over a horizontal line.

Siriso Jubane

Admission and Ethics Officer

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