

## **FAMILY LAW COMMITTEE**

Minutes of Meeting

8 November 2011

5.30pm at Martineau, No 1 Colmore Square, Birmingham

### **In attendance**

Claire Darley	Martineau	Vice-Chair (Chairing the meeting)
John Akers	BDFM	
District Judge Dowding	Birmingham County Court	
Karen Moores	Sydney Mitchell	
Sally Stephens	CAFCASS	
Cathy Price	Price Mistry	
Mark Mansell	St Philips Chambers	
Stephanie Brown	No5 chambers	
Jerome O'Ryan	Birmingham City Council	

### **1. Apologies**

Fiona Farrell, Grant Bird, Janine Hall, Joanna Keene, Marc Saunderson, Marie Kilgallen, Philip Barnsley, Vanessa Meachin, Zahra Pabani, Mary Kaye

### **2. Matters Arising**

CD invited comments on the minutes of the meeting of 13 September 2011. CD noted that further amendments to the minutes had been received from Sally Stephens (SS) after the minutes had been uploaded onto the Birmingham Law Society website. Amended minutes will therefore be circulated again. No other issues raised.

### **3. Outcome of the Family Justice Review**

CD invited comments on the Family Justice Review (FJR).

CD noted that from the perspective of the Family Law Committee, there are three goals which can be identified from the FJR as follows:

- a) That child care cases are not to take longer than 6 months in the family courts.

District Judge Dowding (DJD) highlighted that this may actually cause further delay as Local Authorities will delay in issuing proceedings to ensure that all documentation is in order prior to issue.

JO agreed, stating that the goal is aspirational. The key is for the Court to be satisfied from the outset that no further assessments need to be ordered; the six month time frame would be achievable, but unfortunately this is not currently the case.

CD thanked JO for circulating the Local Performance Improvement Group (LPIG) information and asked whether further work was proposed.

JO stated that the next meeting of the LPIG is scheduled for December 2011. The allocation of cases to an appropriate track is to be considered, but there is currently no mechanism for implementing this proposal. Quality of assessments and family & friends issues currently make up 60% of delay issues.

Awareness raising is the key to understanding and reducing delay. There is currently new research on 'mindfulness' which concerns the ways that parents relate to children and improving upon that.

There is also a new Social Work Academy with Birmingham University to improve practice. It is important for everyone to know that education is on the agenda for Birmingham City Council in tackling delay.

JO is to provide feedback on the meeting in December at the next Family Law Committee meeting.

- b) "All issues mediation" and "consolidated Court proceedings"

CD highlighted concerns that although this is a good idea in principle, it may actually increase delay especially with regard to children matters.

DJD stated that there is no further consultation planned with the judiciary in relation to the FJR, so there will not be another opportunity to comment upon this as far as is known. Mediation is not envisaged to be mandatory; the proposal is that all parties will now need to be assessed for suitability for mediation as had previously been the case for publicly funded parties.

John Akers (JA) highlighted that father's rights remain unchanged following the FJR. Pressure from Fathers for Justice and Families Need Fathers had not been successful. Equal parental rights had not proved successful in Australia.

SS commented that there are an equal number of mothers who are unsuitable parents as there are fathers which had not been commented upon in the FJR. CAFCASS often recommends shared residence where the non-resident parent has a lot of contact. Orders that set out arrangements for children between parents and do not make reference to terms such as 'residence' and 'contact' do prove successful as there is no feeling that one parent has 'won'.

- c) Ministry of Justice and Legal Services Commission to monitor impact of Legal Aid reforms.

#### 4. **General Overview of the Application for LSC Contracts from September 2011 – Cathy Price**

CP provided an overview of the application process as follows.

Applications for LSC Legal Aid contracts had to be submitted by 3 October 2011. Preliminary results are expected by mid-end of November 2011. Further verification processes will then need to be carried out as necessary. Final decisions are expected at the end of December 2011. Contracts will start as from 1 February 2012. These will only be interim contracts as a full review of Legal Aid is planned.

It is expected that there will be new legislation from April 2012; however, the general view among practitioners is that legislation is likely to be effective from October 2012.

Legal Aid will only be available for care work, domestic violence, forced marriage and child abduction. There will be no Legal Aid for divorce, financial orders or private law children work.

There is concern that smaller firms will no longer be able to offer deals on costs to private paying clients as it simply won't be a viable option given the fee reduction in Legal Aid funding for family law work.

The view among practitioners is that the withdrawal of funding will reduce the number of Court applications in private child law, but will not have such an effect on financial applications.

DJD highlighted that the number of Litigants in Person is expected to vastly increase.

Resolution and the Law Society are both lobbying the government on this issue.

SS commented that although the government is saving costs in reducing Legal Aid funding, those costs will be incurred elsewhere. Cases involving Litigants in Person are likely to take up more of the Court's timetable to allow fairness and proper conduct of the hearings.

Karen Moores (KM) highlighted that the FJR is based upon the Australian family court model which has not shown delay due to an increase in the number of Litigants in Person; this is as a result of close monitoring of judicial decision making and processes.

CD noted that Helen Dickens is to be invited to feedback on how Birmingham County Court is working with the changes to Legal Aid.

#### **5. Appointment of Guardians in accordance with Rule 16(4) of the FPR 2010**

CD noted that this issue had been raised by SS at the previous meeting. Fiona McCourt is to attend the meeting of the Committee in January 2012 to discuss the number of directions under 16(4).

SS noted that there has been a rise in the number of directions for 16(4) Guardians in both the FPC and the County Court.

If CAFCASS can be contacted at the point at which a 16(4) direction is being considered, CAFCASS can consider with the Court whether that is the appropriate direction or whether another approach would be more suitable. It would be beneficial for Judges to telephone CAFCASS to consider whether a risk assessment would be more appropriate.

Once an order for a 16(4) Guardian has been made, it is very difficult for CAFCASS to challenge that decision. It may be necessary to challenge the appointment on the basis of resources available at CAFCASS.

There needs to be a continuous review process in cases where there had been an appointment of a 16(4) Guardian to consider whether the Guardian is still required ongoing. Appointments can last for years. It is very difficult for CAFCASS to remove themselves, but the allocation of resources must remain proportionate.

DJD commented that it is often the practice to appoint a solicitor as a Guardian in the first instance rather than appoint a CAFCASS Guardian. This takes the pressure off CAFCASS resources.

SS agreed that this is a very good way forward, as CAFCASS can come on board in proceedings at a later stage if necessary.

CD is to circulate the Practice Direction in relation to appointment under rule 16(4) to the Committee.

SS highlighted that there needs to be a level of awareness raising with parents through their legal advisers as to exactly what can be expected from CAFCASS.

Wishes & feelings reports no longer require that the parents are interviewed. Wishes & feelings reports and single issue reports take 6 weeks and multi issue reports take 12 weeks. Work is often carried out by Family Support Workers instead of Family Court Advisers which is often met with derision by parents.

CP suggested that a Resolution mail shot be drafted to highlight these facts to practitioners and request that it is passed on to clients so that expectations can be managed.

DJD suggested that Orders could be drafted by judges to state that the parents will not need to be interviewed for the completion of a wishes & feelings report. This is to be discussed by DJD with members of the judiciary.

#### **6. Committee member nominations for Chair and Vice Chair**

CD noted that Jane Robson had expressed a wish to step down following the Committee meeting in September. Jane may attend the meeting in January where she will officially step down.

CD invited expressions of interest from Committee members for the position of Chair. CD was the only member present to express an interest.

CD to circulate an email to all Committee members inviting expressions of interest in the position of Chair and organising a voting procedure.

Once the position of Chair has been decided, nominations may need to be opened for Vice Chair.

**7. Forthcoming Events**

Fiona McCourt and Helen Dickens are to attend the January meeting.

Jayne Mullen is to present a summary of case law in financial proceedings at the January meeting.

JO stated that it would be useful to add to the agenda possibly as a standing item, the electronic communication agenda. Cornwall and Wolverhampton County Courts have recently utilised electronic filing for bundles.

SS confirmed that CAFCASS has also introduced the Electronic Case File which is entirely paperless.

It would be useful for the Committee to keep abreast of the electronic agenda.

**8. Any other business**

None

# Practice Direction 16A - Representation of Children

This Practice Direction supplements FPR Part 16

## Part 1

### General

#### Reference in title of proceedings

1.1 Where a litigation friend represents a child in family proceedings in accordance with rule 16.5 and Chapter 5 of Part 16, the child should be referred to in the title of the proceedings as “A.B. (a child by C.D. his/her litigation friend).”

1.2 Where a children’s guardian represents a child in family proceedings in accordance with rule 16.4 and Chapter 7 of Part 16, the child should be referred to in the title as “A.B. (a child by C.D. his/her children’s guardian).”

1.3 A child who is conducting proceedings on that child’s own behalf should be referred to in the title as “A.B. (a child).”

## Part 2

### Litigation Friend

#### Duties of the litigation friend

2.1 It is the duty of a litigation friend fairly and competently to conduct proceedings on behalf of the child. The litigation friend must have no interest in the proceedings adverse to that of the child and all steps and decisions the litigation friend takes in the proceedings must be taken for the benefit of the child.

2.2 A litigation friend who is an officer of the Service or a Welsh family proceedings officer has, in addition, the duties set out in Part 3 of this Practice Direction and must exercise those duties as set out in that Part.

#### Becoming a litigation friend without a court order

3.1 In order to become a litigation friend without a court order the person who wishes to act as litigation friend must file a certificate of suitability –

- (a) stating that the litigation friend consents to act;
- (b) stating that the litigation friend knows or believes that the [applicant][respondent] is a child to whom rule 16.5 and Chapter 5 of Part 16 apply;
- (c) stating that the litigation friend can fairly and competently conduct proceedings on behalf of the child and has no interest adverse to that of the child;

- (a) the persons referred to in paragraph 3.3; and
- (b) the litigation friend or person purporting to act as litigation friend.

## Part 3

### Children's Guardian Appointed under Rule 16.3

#### How the children's guardian exercises duties - investigations and appointment of solicitor

6.1 The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –

- (a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained.

6.2 The children's guardian must –

- (a) appoint a solicitor for the child unless a solicitor has already been appointed;
- (b) give such advice to the child as is appropriate having regard to that child's understanding; and
- (c) where appropriate instruct the solicitor representing the child on all matters relevant to the interests of the child arising in the course of proceedings, including possibilities for appeal.

6.3 Where the children's guardian is authorised in the terms mentioned by and in accordance with section 15(1) of the Criminal Justice and Court Services Act 2000 or section 37(1) of the Children Act 2004 (right of officer of the Service or Welsh family proceedings officer to conduct litigation or exercise a right of audience), paragraph 6.2(a) will not apply if the children's guardian intends to have conduct of the proceedings on behalf of the child unless –

- (a) the child wishes to instruct a solicitor direct; and
- (b) the children's guardian or the court considers that the child is of sufficient understanding to do so.

6.4 Where rule 16.21 (Where the child instructs a solicitor or conducts proceedings on the child's own behalf) applies, the duties set out in paragraph 6.2(a) and (c) do not apply.

#### How the children's guardian exercises duties - attendance at court, advice to the court and reports

6.5 The children's guardian or the solicitor appointed under section 41(3) of the 1989 Act or in accordance with paragraph 6.2(a) must attend all directions hearings unless the court directs otherwise.

6.6 The children's guardian must advise the court on the following matters –

- (ii) unless the court directs otherwise, the other parties to the proceedings.

## How the children's guardian exercises duties - communication of a court's decision to the child

6.11 The children's guardian must ensure that, in relation to a decision made by the court in the proceedings –

- (a) if the children's guardian considers it appropriate to the age and understanding of the child, the child is notified of that decision; and
- (b) if the child is notified of the decision, it is explained to the child in a manner appropriate to that child's age and understanding.

### Part 4

## Appointment of Children's Guardian under Rule 16.4

### Section 1 - When a child should be made a party to proceedings

7.1 Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Service or a Welsh family proceedings officer to carry out further work or by making a referral to social services or, possibly, by obtaining expert evidence.

7.2 The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

- (a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;
- (b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;
- (c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
- (d) where the views and wishes of the child cannot be adequately met by a report to the court;
- (e) where an older child is opposing a proposed course of action;
- (f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;
- (g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a

- (c) stating that the children's guardian can fairly and competently conduct proceedings on behalf of the child and has no interest adverse to that of the child;
- (d) undertaking to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right the children's guardian may have to be repaid from the assets of the child; and
- (e) which the children's guardian has verified by a statement of truth.

7.9 Paragraph 7.8 does not apply to the Official Solicitor, an officer of the Service or a Welsh family proceedings officer.

7.10 The court officer will send the certificate of suitability to one of the child's parents or guardians or, if there is no parent or guardian, to the person with whom the child resides or in whose care the child is.

7.11 The children's guardian must file either the certificate of suitability at a time when the children's guardian first takes a step in the proceedings on behalf of the child.

## Application for a court order appointing a children's guardian

7.12 An application for a court order appointing a children's guardian should be made in accordance with Part 18 and must be supported by evidence.

7.13 The court officer must serve the application notice on the persons referred to in paragraph 7.10.

7.14 The evidence in support must satisfy the court that the proposed children's guardian –

- (a) consents to act;
- (b) can fairly and competently conduct proceedings on behalf of the child;
- (c) has no interest adverse to that of the child; and
- (d) undertakes to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right the children's guardian may have to be repaid from the assets of the child.

7.15 Paragraph 7.14 does not apply to the Official Solicitor, an officer of the Service or a Welsh family proceedings officer.

7.16 The proposed children's guardian may be one of the persons referred to in paragraph 7.10 where appropriate, or otherwise may be the Official Solicitor, an officer of the Service or a Welsh family proceedings officer. Where it is sought to appoint the Official Solicitor, an officer of the Service or a Welsh family proceedings officer, provision should be made for payment of that person's charges.

## Change of children's guardian and prevention of person acting as children's guardian.

7.17 Where an application is made for an order under rule 16.25, the application must set out the reasons for seeking it and must be supported by evidence.

7.18 Subject to paragraph 7.15, if the order sought is substitution of a new children's guardian for an existing one, the evidence must satisfy the court of the matters set out in paragraph 7.14.

7.19 The court officer will serve the application notice on –

9.2 The officer must make such investigations as may be necessary to perform the officer's powers and duties and must, in particular –

- (a) contact or seek to interview such persons as appear appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the children and family reporter thinks appropriate or which the court directs be obtained.

9.3 The officer must –

- (a) notify the child of such contents of the report (if any) as the officer considers appropriate to the age and understanding of the child, including any reference to the child's own views on the application and the recommendation; and
- (b) if the child is notified of any contents of the report, explain them to the child in a manner appropriate to the child's age and understanding.

9.4 The officer must –

- (a) attend hearings as directed by the court;
- (b) advise the court of the child's wishes and feelings;
- (c) advise the court if the officer considers that the joining of a person as a party to the proceedings would be likely to safeguard the interests of the child;
- (d) consider whether it is in the best interests of the child for the child to be made a party to the proceedings, and if so, notify the court of that opinion together with the reasons for that opinion; and
- (e) where the court has directed that a written report be made –
  - (i) file the report; and
  - (ii) serve a copy on the other parties and on any children's guardian,

in accordance with the timetable set by the court.

## Part 7

### Parental Order Reporter

#### How the parental order reporter exercises duties - investigations and reports

10.1 The parental order reporter must make such investigations as are necessary to carry out the parental order reporter's duties and must, in particular –

- (a) contact or seek to interview such persons as the parental order reporter thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the parental order reporter thinks appropriate or which the court directs be obtained.

11.1 This Part applies when an officer of the Service, a Welsh family proceedings officer or a local authority officer is acting under a duty referred to in rule 16.38(1). In this Part, the person acting under a duty referred to in rule 16.38(1) is referred to as “the officer”.

11.2 The officer must make such investigations as may be necessary to perform the officer’s duties and must, in particular –

- (a) contact or seek to interview such persons as the officer thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as the officer thinks appropriate or which the court directs.

11.3 The officer must –

- (a) notify the child of such (if any) of the contents of any report or risk assessment as the officer considers appropriate to the age and understanding of the child;
- (b) if the child is notified of any contents of a report or risk assessment, explain them to the child in a manner appropriate to the child’s age and understanding;
- (c) consider whether to recommend in any report or risk assessment that the court lists a hearing for the purposes of considering the report or risk assessment;
- (d) consider whether it is in the best interests of the child for the child to be made a party to the proceedings, and, if so, notify the court of that opinion together with the reasons for that opinion.

11.4 When making a risk assessment, the officer must, if of the opinion that the court should exercise its discretion under rule 12.34(2), state in the risk assessment –

- (a) the way in which the officer considers the court should exercise its discretion (including the officer’s view on the length of any suggested delay in service); and
- (b) the officer’s reasons for that reaching that view.

11.5 The officer must file any report or risk assessment with the court –

- (a) at or by the time directed by the court;
- (b) in the absence of any direction, at least 14 days before a relevant hearing; or
- (c) where there has been no direction from the court and there is no relevant hearing listed, as soon as possible following the completion of the report or risk assessment.

11.6 In paragraph 11.5, a hearing is relevant if the court officer has given the officer notice that a report prepared by the officer is to be considered at it.

11.7 A copy of any report prepared as a result of acting under a duty referred to in rule 16.38(1)(a)(i) to (vi) or (b) (but not any risk assessment) must, as soon as practicable, be served by the officer on the parties.

(Rule 12.34 makes provision for the service of risk assessments.)