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Family Law

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Children, Guardians And Rule 9.5

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Practice Notes for the appointment of guardians ad litem for children in private law cases are a regular feature of the *Children Act 1989* landscape. Now, for the first time, the President of the Family Division has issued a Direction on the subject (*Representation of Children in Family Proceedings Pursuant to r 9.5 of the Family Proceedings Rules 1991* [2004] 1 FLR 1188, reported at **[2004] FAM LAW 459**) accompanied by a fresh Children and Family Court Advisory and Support Service (CAFCASS) Practice Note (*CAFCASS Practice Note (6 April 2004)* [2004] 1 FLR 1190, reported at **[2004] FAM LAW 461**). The extent to which children should become parties to private law proceedings is controversial. On the one hand the absence of party status for most children in private law proceedings contrasts starkly with automatic representation in public law proceedings. On the other hand, the danger is evident of exposing children to the risk of having to make choices between their parents and to manipulation by one or both parents (even more than occurs now).

The right of children to be involved in proceedings about them underpins Art 12 of the *UN Convention on the Rights of the Child 1989* (*UN Convention*) and is protected by Arts 6 and 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*. Article 12, for example, provides that states should:

> 'assure to the child who is capable of forming his or her views the right to express those views freely ... [and] for this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

This does not necessarily mean party status but does protect the right to be involved.

Party status for children in private law proceedings has been on the political agenda for many years. The Children's Legal Centre first started promoting this in the early 1980s. The debate has moved on a long way since the Law Commission asked, in 1986, 'should it be possible in all proceedings either to make the child a party or to order that he be separately represented?' (*Family Law: Review of Child Law: Custody*, CP No 96 (HMSO, 1986), at p 74).

Last year's *NSPCC Review of Legislation in Relation to Children in Family Proceedings* (National Society for the Prevention of Cruelty to Children, 2004) concluded that:

> 'the debate should now move on to which children may need separate representation rather than whether or not they should be allowed to have representation at all.' (p 23)

The rules of court and the new guidance together protect the interests of children better than during the 1990s and also much better than before the Children Act 1989 reforms. However, perhaps the matter is still being looked at through the wrong end of the telescope, as explained below. In this article, the term 'private law' includes applications for s 8 orders and other orders under Parts I and II of the Children Act 1989, which are not specified public law proceedings under s 41 of the Act.

Party Status

The rules of court identify automatic parties and provide the court with a discretionary power to appoint other persons (including children) to be parties (r 4.7 of the *Family Proceedings Rules 1991* (*SI 1991/1247*) (FPR 1991) and r 7 of the *Family Proceedings Courts (Children Act) Rules 1991* (*SI 1991/ 1395*). Except where otherwise stated, the rules are the same in all first instance courts). In the High Court and county court, children (who are still referred to as 'minors' in Part IX of FPR 1991) are only entitled to participate actively (ie begin, prosecute or defend) in private law proceedings through an adult who conducts the litigation for them (FPR 1991, r 9.2). That adult is referred to in the rule as 'next friend' (in the case of an applicant) or 'guardian ad litem' (in the case of a respondent). The adult must act in the best interests of the child concerned but, nevertheless, it is something of a legal fiction to say that, in such a situation, the child is a party. It is a fiction borrowed from general civil litigation. The adult is acting as a party in the best interests of the child. The choice of the adult guardian is governed by r 9.5 of FPR 1991.

The rights of older children were considerably advanced by the provisions of r 9.2A, which enable 'the *Gillick* competent child' (*Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] AC 112) to conduct litigation for themselves, just as an adult can. The frequency with which children, in practice, can take advantage of this rule is not known and is probably being severely curtailed by the decision of the High Court in *Re N (Contact: Minor Seeking Leave to Defend and Removal of Guardian)* [2003] 1 FLR 652. In that case, the test of competence was described as follows:

> 'The essential question was not whether the child was capable of articulating instructions but whether the child was of sufficient understanding to participate as a party in the proceedings, in the sense of being able to cope with all the ramifications of the proceedings and giving considered instructions of sufficient objectivity. In considering this question the court has regard to the nature of the proceedings, the length of time the proceedings had been before the court, the likely future conduct of the proceedings and the likely applications and further applications which would need to be made.'

This test of competency arguably would render many adults incapable of conducting their family litigation, let alone children.

In family proceedings courts, children can equally be made parties to private law proceedings. There is no provision for an adult to act on behalf of the child as guardian. And there is no guidance as to how the family proceedings court should accommodate a child party. Guidance issued around the implementation of CAFCASS suggested that private law proceedings in which children may be made parties in family proceedings courts should be transferred to higher courts. On the face of the rules, it is possible for the child's solicitor to run the case for the child according to the child's best interests, possibly with the advice of an independent social worker or other expert commissioned with the leave of the court (ie the practice that was adopted in county courts before CAFCASS existed).

The position is very different in public law proceedings. In all first instance courts, the child is automatically a respondent (or may be an applicant as of right, for example for discharge of a care order or for contact with a named

person). The child respondent will always be represented by an officer of CAFCASS (called a 'children's guardian' in the rules) 'unless it is satisfied that it is not necessary' to safeguard the child's interests (*Children Act 1989*, s 41(1)). Where a children's guardian is appointed in these public law proceedings, referred to as 'specified proceedings' in the Children Act 1989, that guardian has to appoint a solicitor for the child (FPR 1991, r 11A(1)). The rules of court permit the older child, who is *Gillick* competent and who is in conflict with the recommendations of the children's guardian, to instruct the solicitor for the child directly, see further below.

The circle is completed by the prospective amendment of the Children Act 1989 by s 122 of the *Adoption and Children Act 2002*. Section 122(1) will amend s 41 to permit applications for s 8 orders to be added to the list of specified proceedings by rules of court. This is only an enabling power but, if implemented, would fundamentally change the representation of children in private law proceedings. Such children would come out of Part IX of the FPR 1991 and they would, in future, be represented by children's guardians in all s 8 cases just as in public law cases. Children would have a CAFCASS children's guardian and, unless the rules are also modified, they would be legally represented in all s 8 cases.

Previous Guidance

The Official Solicitor and CAFCASS have issued guidance as to the circumstances in which they should act as next friend or guardian ad litem for a child under r 9.5. Before the most recent guidance issued in April 2004, the guidance tended to merge two issues that should be separated:

* whether the child should be made a party; and

* if so, whether the Official Solicitor/ CAFCASS should act as next friend/ guardian ad litem.

To a greater degree than before, the new guidance separates these two questions. The President's Direction deals with party status. The CAFCASS Practice Note deals with who should represent the child, emphatically leaving the identity of the officer appointed to CAFCASS rather than to the court.

Before April 2004, the *CAFCASS Practice Note* [2001] 2 FLR 151 restated the view that in most private law cases a child's interests would be sufficiently safeguarded by a Children Act 1989, s 7 report (para 4). The same point is found in the pre-CAFCASS Practice Notes of the Official Solicitor (*Practice Note: (The Official Solicitor: Appointment in Family Proceedings) (December 1998)* [1999] 1 FLR 310; *Practice Note: The Official Solicitor: Appointment in Family Proceedings (8 September 1995)* [1995] 2 FLR 479; and *Practice Note: The Official Solicitor: Best Practice on His Appointment as Guardian Ad Litem in Family Proceedings* [1993] 2 FLR 641). These Practice Notes build on the much earlier Practice Direction of 8 December 1981, *Practice Direction: (Child: Joinder as Party)* [1982] 1 WLR 118, and the view of the Court of Appeal in, for example, *Re F (Adoption: Parental Consent)* (1982) 3 FLR 101, where Ormrod LJ said, at p 109:

> 'I would like to suggest to registrars and others who are dealing with these cases that it should not be a routine practice by any manner of means in wardship to make the child a party but that wardship cases should be dealt with just as custody cases in the Family Division arising after divorce is dealt with; that is the Official Solicitor should be used where he is of enormous value, in the difficult marginal cases, where further help is required. Sometimes fresh evidence is required or fresh enquiries are required. In that role the Official Solicitor is invaluable.'

The Court of Appeal confirmed this approach in *Re W (Contact: Joining Child as Party)* [2001] EWCA Civ 1830, [2003] 1 FLR 681, where it was said that the appointment of a solicitor for a 7-year-old child was unusual and only to be considered if the s 7 report is not adequate (para [5]). Similarly, in *Re D (A Child)* [2001] EWCA Civ 1775, (unreported) 8 November 2001, the Court of Appeal declined to endorse the practice in Leeds of using r 9.5 appointments in difficult contact cases, saying that such a development in practice had resource implications that ought to be considered by government before being adopted by courts.

The President's Direction, April 2004

The President's Direction of April 2004 applies where the child may be made a party and the appointment of a guardian ad litem under r 9.5 is being considered (ie not cases where the child is *Gillick* competent under r 9.2A and not specified public law proceedings within s 41). Under r 9.5, the court may appoint an officer of CAFCASS (whether or not CAFCASS consents) to be the guardian ad litem but the rule leaves open the appointment of 'some other proper person (if he consents)' and case-law has established other potential guardians such as a Children Panel solicitor and the National Youth Advocacy Service.

Paragraph 2 of the Direction confirms that the child should only be made a party in a minority of cases where there is an issue 'of significant difficulty'. The court should consider alternative ways forward such as asking an officer of CAFCASS to carry out further work (presumably a family court reporter under s 7) or by making a referral to social services (presumably under s 7 or s 37) or possibly by obtaining expert evidence. The guidance further discourages making a child a party by recognising that to do so may cause delay in the proceedings or other factors 'adverse to the welfare of the child'. The guidance goes on to list 10 examples of circumstances that may justify making a child a party.

If a child is made a party, the guidance also invites the court to consider first whether an officer of CAFCASS should act as guardian. If CAFCASS is the preferred guardian, inquiries must be made of CAFCASS in accordance with the Practice Note, described below. The President's Direction goes on to acknowledge that 'if CAFCASS is unable to provide a guardian without delay or if some other reason the appointment of a CAFCASS officer is not appropriate', a different person could be appointed guardian ad litem under r 9.5. This is a considerable retreat from the position taken in the 2001 Practice Note that 'all private law cases where it is felt necessary for the child to be joined as a party, and all High Court adoption cases, should be referred to CAFCASS Legal.'

This tacitly accepts that, in 2001, the Practice Note expected too much of CAFCASS Legal. It soon became common for CAFCASS Legal to turn down the appointment in county court cases, after a substantial delay for consideration of the case, leaving an officer of CAFCASS in the local area to act instead.

The 10 Examples

The list of 10 examples goes further in trying to distinguish the sorts of cases in which a child may be made a party (the 2001 Practice Note only gave six examples, including the catch-all 'exceptionally difficult, unusual or sensitive issues' formula).

The problem with a list of examples is that it does not indicate the purpose of making the child a party and this is where the guidance again becomes cloudy. The 10 are all cases in which the child is not *Gillick* competent. So it begs the questions as to why do three of the examples focus on the older child, namely:

> 'where the child has a standpoint or interest that is inconsistent with or incapable of being represented by any of the adult parties (3.2), where the views and wishes of the child cannot be adequately met by the report to the court (3.4) and where an older child is opposing the proposed course of action (3.5).'

What is to be gained in those circumstances by making the child a party if the child is not *Gillick* competent?

More likely, what is envisaged by 3.2 (where the child has a standpoint inconsistent with that of the adults) or 3.8 (where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer) is a solicitor for the CAFCASS officer who will then represent the CAFCASS officer's views before the court. In particular, it is often helpful for the CAFCASS officer to have legal representation to investigate factual allegations where a local authority has not brought care proceedings and where the parents themselves may not have an interest in getting to the bottom of what is alleged. In such circumstances, the lawyer for the CAFCASS officer is working to assist the court to investigate the issue alleged. That seems a perfectly proper function of the lawyer/CAFCASS officer. It is not obvious why the child has to be made a party for this purpose other than as a technical matter to enable the lawyer to apply for legal aid.

Two of the other examples given are circular, in that they do not assist in assessing whether a r 9.5 appointment is appropriate, namely 'where a CAFCASS officer has notified the court that in his opinion the child should be made a party' (3.1) and 'where there are complex ... issues that necessitate separate representation of a child' (3.6).

The other examples given in para 3 of the President's Direction indicate circumstances in which the CAFCASS officer may need legal advice (eg 'where there are international complications outside child abduction in particular it may be necessary for there to be discussions with overseas authorities or a foreign court' (3.7) or 'where there is a contested issue about blood testing' (3.10) or 'where the proceedings concern more than one child and the welfare of the children in conflict or one child is in a particularly disadvantaged position' (3.9)). Those circumstances, and the remaining example of intractable private law proceedings where contact is ceased or there is implacable hostility and the child is suffering harm (3.3), are examples where the CAFCASS officer may wish to have independent instruction of an expert. In some cases, the adult parties will be able to arrange this themselves. In others, it may be more appropriate for the instruction to go through the CAFCASS officer and for this purpose, legal advice may be necessary and public funding may also need to be accessed by the children's lawyer.

In summary, it seems that, underlying all of these instances, there are two possible reasons for a r 9.5 appointment: first to enable the CAFCASS officer to obtain legal advice and representation; and secondly to enable the CAFCASS officer to commission expert assessment. In neither of those circumstances is it obvious why the route to achieve this is through making the child a party to the proceedings.

CAFCASS Practice Note: 6 April 2004

The Practice Note clarifies the procedure within CAFCASS when a r 9.5 appointment is directed to CAFCASS. As noted above, the court will first consider whether to approach CAFCASS for the appointment of a guardian ad litem when making a r 9.5 appointment. Paragraph 2 of the Practice Note asks the court to indicate if there is any reason why the current CAFCASS officer should not continue with the case in the role of guardian. The thrust of the guidance in most county court cases is to keep them local and to keep the existing s 7 children and family reporter in place.

The Practice Note asserts that the allocation of a particular officer (or CAFCASS Legal) is a matter for CAFCASS (para 3). Where the case is in the High Court, it indicates that it is likely that the case will be handled by CAFCASS Legal, whereas for county court cases it is likely a local CAFCASS officer will take the case and appoint a local solicitor to represent the child. A decision from CAFCASS is promised within 5 working days of receipt of the papers from the court, which is a considerable shortening of the process in most cases. The Practice Note does not promise allocation by a local office in that time but a decision in principle as to whether the case will be taken by CAFCASS Legal or a local office.

While, on the one hand, the Practice Note envisages that CAFCASS Legal's role will be reined back by removing its filtering role for all CAFCASS r 9.5 appointments, the remainder of the Practice Note from para 10 onwards extends its role. The Practice Note confirms CAFCASS Legal's role if invited to appear as advocate to the court (paras 13-14) and there is a general offer from CAFCASS Legal to provide legal advice to CAFCASS officers or, informally, to judges and other professionals (paras 16-17). There is a duty system for High Court judges to contact CAFCASS Legal out of hours (para 18).

Exceptional Cases

Paragraphs 10-12 of the Practice Note make special provision for exceptional cases. Paragraph 10 identifies cases that should be referred to CAFCASS Legal by the High Court or county court (rather than to a local office). This applies, according to the heading to this section of the Practice Note, 'whether or not involving an appointment pursuant to rule 9.5'. It is presumably envisaged that, if a r 9.5 appointment has not yet been made, CAFCASS Legal will look at the case and make representations to the effect that the r 9.5 appointment should be made if the circumstances require it. These cases are:

* where the children's division of the Official Solicitor or CAFCASS Legal previously acted for the child;

* exceptionally complex international cases where legal or other substantial inquiries abroad will be necessary or there is a jurisdictional dispute between countries;

* exceptionally complex adoption cases (examples are given of suspected illegal payments or placements);

* medical treatment cases where the child is old enough to have views that need to be taken in to account or there are particularly difficult ethical issues such as the withdrawal of treatment

'unless the issue arises in existing proceedings already being handled locally when the preferred arrangement will usually be for the matter to continue to be dealt with locally but with additional advice provided by CAFCASS Legal'.

* any free-standing human rights applications under s 7 of the *Human Rights Act 1998* in which it is thought it will be possible and appropriate for any part to be played by CAFCASS.

In all these cases, the established expertise of CAFCASS Legal is thought to make it the appropriate agency to assist the court. Nevertheless, the court order should simply recite that the named child is made a party to the proceedings and, pursuant to r 9.5 of FPR 1991, a CAFCASS officer be appointed his or her guardian, with the decision as to who is to take responsibility for the case left to CAFCASS itself.

Paragraph 12 provides an additional facility to refer 'other family proceedings in which the welfare of children is or may be in question' to CAFCASS Legal 'where there are exceptionally difficult, unusual or sensitive' factors. Examples are given of death threats made to the child and other professionals necessitating special security measures including false

identities or an example of previous serious misconduct by a local CAFCASS officer.

In each of these instances, it appears that CAFCASS Legal would have the role of assisting the court by the making of further inquiries or by the making of special arrangements. Logically, there is no need in such cases for the child to be made a party.

Re-thinking Party Status

The President's Direction and the Practice Note helpfully separate the issues of making the child a party and the internal allocation of work within CAFCASS. However, neither document assists in identifying the purpose of making the child a party or the choice of guardian made. As indicated above, the primary reason for using the vehicle of r 9.5 seems to be to enable the CAFCASS officer to obtain legal advice and assistance.

The need to consult children in making decisions about their welfare is commonly accepted and understood. The way in which this can best be achieved is probably for there to be a range of interventions. In most cases, a CAFCASS officer will remain the best way to achieve this. In some cases, the child will need to be seen by the judge and, conceivably, will need to attend some court hearings, for example, concerning secure accommodation. In some cases, the child will be assisted by personal legal representation. In many cases (most public law cases for example) the CAFCASS officer will be assisted by legal advice and representation.

The current approach of the court rules is based largely on historical construction (the need to identify 'the parties' to a case and the need for a 'minor' to be represented by an adult guardian ad litem in the High Court and county courts). It would be more efficient and more child-centred to start from a different perspective. The parties and the court should consider how best to ascertain the child's wishes and feelings and how best to consult the child throughout the court process. This would accord with the duty in Art 12 of the UN Convention. Secondly, the needs of the CAFCASS officer for advice and assistance also requires separate consideration. The current rules make scant provision for consulting the child and involving the child in the court process. They also do not allow the CAFCASS officer to obtain public funding in his or her own right. In some cases, an appointment of a child's solicitor under r 9.2A will be the most appropriate way forward. In many other cases, the CAFCASS officer should be made a party and should be entitled to apply for public funding.

This analysis begs the question of what is the difference between a children and family reporter and a guardian. The derivation of their respective roles is largely historical. Greater respect for children's rights in private law proceedings, through the involvement of guardians in private law proceedings, is eroding the difference and the need for any difference in roles.

The basic functions of reporters and guardians are similar as a matter of law. Each has duties of investigation, of report writing, of notifying non-parties of their rights to be made parties and, to a limited degree, each has a duty to consult the child about their recommendations/the decisions of the court - rr 11, 11A and 11B. The precise wording of the court rules differs in certain respects for reasons that are not obvious, for example compare rr 11A(10) and 11B(1) regarding informing the child. However, the biggest difference between their respective roles within the court rules is that the guardian has to appoint a solicitor for the child and instruct that solicitor on the child's behalf unless the child is able to give separate instructions and wishes to do so. The same provisions apply to a reporter who becomes a guardian ad litem under r 9.5 and who then takes on the functions of a children's guardian - r 9.5(6). The reporter becomes a guardian ad litem and takes on the duties of a children's guardian. It could not be simpler, could it?

There is a further difference between guardians and reporters in that guardians have a right of access to social services' records under s 42 of the Children Act 1989, whereas reporters do not have that right. This is surely an oversight because reporters themselves ought to have access to social services' records during the course of their work.

Differences in practice have developed over the years. Probation officers carried out the role now given to reporters and social workers carried out the work of guardians. These differences still exist within CAFCASS and are tied to issues of professional experience and resources. However, essentially the legal task of both reporters and guardians is the same. The degree of their involvement in the case ought to be tailored to the needs of the case rather than the job title.

Within public or private Children Act 1989 proceedings, the court should have power to appoint a children's guardian (rather than a power to appoint a reporter). The term guardian more accurately describes the responsibilities of the CAFCASS officer appointed by the court (see for example the duties of CAFCASS set out in s 12 of the *Criminal Justice and Court Services Act 2000*). That officer should have power to seek legal representation according to the needs of the case. A President's Direction or Practice Note could then be devised to indicate the sorts of circumstances in which (and purposes for which) legal representation of the guardian is appropriate. This would include most public law proceedings but not necessarily all such proceedings and many of the private law cases described in the new guidance. The court should specify the purpose of the appointment of the guardian and the purpose of the appointment of the lawyer. In neither case should it be necessary for the child to be made a party, unless the child is *Gillick* competent. The interpretation of such competence is another story.