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10. Representing the child in private law

10.1 Primary materials

Rule 9.5 of the Family Proceedings Rules 1991 reads:

'(1) Without prejudice to rules 2.57 and 9.2A, if in any family proceedings it appears to the court that it is in the best interests of any child to be made a party to the proceedings, the court may appoint:

(a) an officer of the service;

(b) (if he consents) the Official Solicitor; or

(c) (if he consents) some other proper person,

to be the guardian ad litem of the child, with authority to take part in the proceedings on the child's behalf.

(2) An order under paragraph (1) may be made by the court of its own motion or on the application of a party to the proceedings or of the proposed guardian ad litem.'

See also the **President's Direction, dated 5 April 2004 [2004] 1 FLR 1188 and the Practice Note 2006 relating to CAFCASS** issued in June 2006 replacing that of 6 April 2004.

10.2 Background

Before the Former President's Direction was issued in 2004, applications for appointments under rule 9.5 were rare, occurring in less than 10% of private family cases. Such applications often resulted in delay due to the number of weeks between the issue of a section 8 application, and the appointment of a guardian. Further delays occurred whilst the guardian investigated and the final disposal may have been significantly delayed.Applications were made in cases involving more serious issues.

There has been an increase in appointments since the former President's Direction. She recognised that separate representation might result in delay, but may not have anticipated such an increase in appointments. As a result of this increase the President gave Guidance on 25 February 2005 that after 4 April 2005, save in exceptional circumstances, where a District Judge might make such an appointment, only a Circuit Judge could make such an appointment in private law cases in the county court. CAFCASS was to be consulted and if it was unable to provide a Guardian within the desired time frame another person might be appointed. Presently it does not appear that there are likely to be significantly different resources available to prevent the delays set out above.

Before the 2004 Direction was issued, the following kinds of factual circumstances had been an indicator that consideration should be given to the appointment of a rule 9.5 guardian,

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depending, of course, on the gravity, namely intractable cases, a case with a significant foreign/ethnic/cultural element, significant health problems, violence and/or sexual abuse, and complex family relationships.

Many of the cases requiring a guardian contained one or more of the above factors.

The President's Direction incorporated all of these circumstances, and added other examples, such as where a CAFCASS officer recommended the appointment. The Direction listed in all some ten situations (see paras. [3.1] to [3.10]) of the Direction.

Some of the better known examples are listed below.

Intractable cases. Such cases often involve many hearings, over a number of years, numerous CAFCASS reports and continuing problems.

Significant foreign/ethnic/cultural element. There may be a risk of abduction, issues of religion, education, etc.

Significant health problems. A parent may have mental health difficulties, or serious physical handicaps, which may affect the ability to care.

Violence and/or sexual abuse. Physical and sexual abuse by carer upon child or violence between parents impacting upon the child. Significant problems with drugs or drink can also be a factor.

Complex family relationships. This heading may concern multiple applications by family members, such as grandparents.

The above categories were not exhaustive and the President added other examples. Cases requiring representation will contain one or more of the above factors. The court has had to and will continue to consider what it was and is in a practical sense that a guardian could and can bring to the case that could not equally have been achieved by the CAFCASS reporter. The judge has to exercise his discretion to the perceived seriousness of the case and the welfare needs of the child or children.

It is to be emphasised that in disputes relating to a child it is not normally appropriate to impose upon the child the burden of being a party to the proceedings. However, where the battle between the parents has become such that the interests and voice of the child are at risk of being ignored if the child is not represented, then the court should consider a rule 9.5 appointment.

Equally, if the court needs information that goes beyond that which can be obtained by a section 7 report, such as evidence from one or more experts, it may be better for such evidence to obtained by a rule 9.5 appointee than by one of the protagonists.

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Where a section 37(1) direction is given for an investigation by an appropriate local authority into a child's circumstances because the court considers that it may be appropriate for a care or supervision order to be made, non-specified family proceedings may become specified where the court has made or is considering whether to make an interim care order (see s.41(6)). In that event the court 'shall appoint a guardian ad litem' for the child/children for the duration of the investigation (s.41(1) of the Children Act 1989) 'unless it is satisfied that it is not necessary to do so in order to safeguard his interests' (see, for example, In Re J (A Minor) (Change of Name) [1993] 1 FLR 699).

10.2 The value of r 9.5 guardians in private law cases

It is the frequent experience that children and family reporters have a limited time available to each allocated case. Some limit themselves to about three hours to see the father, mother and children at their offices, make enquiries of the schools and then prepare their reports. A CAFCASS officer is normally limited to spending a maximum of 12 hours on each case. In the more difficult cases a guardian routinely puts in a greater investment of time, which is likely to lead to a better final outcome. There is still a stark contract between the time spent by guardians preparing reports in public law cases and difficult private cases.

There has been a shift in policy towards children being directly represented in more cases having regard to the Human Rights Act (see the Articles in Family Law Vol. 34, for May, June and July 2004 at pages 338, 427 and 504 respectively, and in particular the article headed 'Making sure the child is heard' by Mr Justice Munby).

It remains to be seen to what extent the amendments to sections 41 and 93 of the Children Act 1989, introduced by s 122 of the Adoption and Children Act 2002, if implemented, will lead to more frequent appointments of guardians in private law cases, given that the court would be required to appoint a guardian in a s.8 application unless it was satisfied that it was not necessary to do so.. In March 2006 the DCA published a report of research into the operation of rule 9.5 to assess whether such representation met children's needs. The DCA is currently considering whether the amendment can be implemented. However it is likely that a lack of resources will cause such implementation to be delayed.

10.3 Separate representation

The issue of separate representation of the child has been considered in a number of recent decisions of the Court of Appeal. In Re W *(Contact: Joining child as party)* [2003] 1 FLR 681, the Court of Appeal indicated that the normal course is to request a CAFCASS reporter to prepare a report and only to consider appointing a guardian to represent the child in a difficult case, where the report was inadequate or provided no way forward and separate representation was needed. This is the approach adopted by the former President in her Direction. In Re W it was emphasised that the lawyers should be fully acquainted with the *CAFCASS Practice Note (Officers of CAFCASS Legal Services and Special Casework Appointment in Family Proceedings)* [2001] 2 FLR 151, now superseded by the Practice Note 2006 (CAFCASS). It follows that lawyers will equally now need to be very familiar with the CAFCASS Practice Direction made in June 2006, referred to above.

In *Re W* the President deprecated the use of a solicitor and independent social worker with a child as young as seven. In the case of Re T *(Contact:Alienation: Permission to Appeal)* [2003] 1 FLR 531, Thorpe LJ made the point that children should be more frequently represented. Note also the case of *Re N (Contact: Minor seeking leave to defend and removal of guardian)* [2003] 1 FLR 652, Coleridge J and *Sahin v Germany; Sommerfield v Germany* [2003] 2 FLR 671.

One other factor to be carefully considered. Is this a case which warrants the very considerable extra expense that appointing a guardian will entail?

10.4 Procedure

Whether in the High Court or county court, the procedure is to join the child as a party and appoint a named person as the child or children's guardian. See the procedure set out in paragraphs [3] to [7] of the new Practice Note.

10.5 Who can be appointed to be a guardian and for how long?

Guardians are usually the CAFCASS officers, who have previously prepared reports in the proceedings, unless it is felt that an alternative officer should be appointed. If CAFCASS are unable to provide an officer, the National Youth Advisory Service (NYAS) or other similar bodies may be invited to act as Guardian. NYAS has achieved considerable success in some of the most difficult cases.

The court may specify how long the appointment should be, but it is usually until the appointment is terminated by the court. The appointment can be reviewed and a fresh guardian appointed, if the guardian becomes ill, unavailable or there is some other good reason. There may be a conflict between the guardian and the child. A child can apply for his next friend or his guardian to be dismissed. In such circumstances the guardian should be allowed an opportunity to be heard. If the guardian acts in a way that is manifestly contrary to the child's wishes or best interests, the court may have to remove the guardian. In reaching a responsible and considered decision, on which another mind might possibly take a different view, a guardian does not act manifestly contrary to the child's best interests, (see *Re A (Conjoined Twins: Medical Treatment) (No 2)* [2001] 1 FLR 267). There is usually no reason why a guardian should not properly represent children whose interests may conflict, (see *Re T and E (Proceedings: Conflicting Interests)* [1995] 1 FLR 581).

10.6 The role of CAFCASS legal in private law applications

It is now very rare for CAFCASS Legal to accept appointments in private law cases except in the High Court because of the lack of resources, despite the entreaties of circuit judges. Usually it advises the Court to appoint a local CAFCASS officer to instruct solicitors to act for the child or children. (See now the CAFCASS Practice Note of June 2006)

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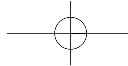

10.7 Application by child to be joined as a party

Occasionally a child may wish to be joined in proceedings and to be represented or to initiate proceedings such as an application for contact with siblings.

Such applications should be transferred to the High Court. In each case the Court has to determine whether the child may act without a guardian.

By Rule 9(2)(A), a child may act without a children's guardian with the permission of the court (see *Mabon v. Mabon* (2005) 3 WLR 460) or if a solicitor, who considers the child is capable of giving instructions in relation to the proceedings, accepts instructions to act.These are fairly rare events in the private law field.

The criterion for granting permission is set out in r 9.2A(6). Even where a child has retained a solicitor, the solicitor may still wish to obtain the permission of the court if he is unsure whether r 9.2A(1)(b) is satisfied.

The court rather than the solicitor always has the ultimate right to decide whether a child, who comes before it as a party without a next friend or a guardian ad litem, has the necessary ability, having regard to his understanding, to instruct his solicitor *(Re CT (A Minor) (Wardship: Representation)* [1993] 2 FLR 278).

10.8 Official Solicitor

The Official Solicitor will no longer represent children who are the subject of family

proceedings (other than in very exceptional circumstances and after liaison with CAFCASS) see Practice Note dated 2 April 2001,The Official Solicitor:Appointment in Family Proceedings.

The Official Solicitor will also act for a child, who is a parent and a respondent to a Children Act or adoption procedure application, unless the child is already represented by a CAFCASS officer. He will likewise act where a child wishes to make an application for a Children Act order naming another child.Also if a child is a witness in a case and requires an intervener, he may act – note Re H (Care Proceedings: Intervener) [2000] 1 FLR 775.

The Official Solicitor will act for a child who is a patient and requires a next friend or guardian, or as a friend of the court in the role of amicus curiae in an exceptional case.This is likely to be limited to the High Court.

Any order appointing the Official Solicitor must be expressed as being made subject to his consent. He tries to respond within 10 working days. If he agrees to act he requires a copy of the order appointing him, the court file and, if available, a bundle with a summary, statements of issue and a chronology.