

7. Children in private family proceedings

7.1 Introduction

In private family law cases, the court decides questions concerning the upbringing of a child. The most common issues involve deciding with which parent a child will reside and/or the terms of contact of the non-resident parent. The parties to the proceedings are usually the mother and the father. The child is rarely represented in these proceedings. The law relating to private family cases is set out concisely in the first 16 sections of the Act 1989 ('the Children Act').

7.2 The three principles

Three principles are set out in section 1 of the Act to guide courts in making their decisions.

1. At the heart of the Act is the principle that the child's welfare shall be the paramount consideration of the court when the court determines any question with respect to the upbringing of the child (s. 1(1)).
2. Delay in determining a question with respect to the upbringing of a child is likely to prejudice the welfare of the child (s. 1(2)).
3. The court shall not make an order unless it considers that doing so would be better for the child than making no order at all (s. 1 (5)).

The aim of the court is to bring a case to a swift conclusion in the best interests of the child, making the least intrusive order necessary.

7.3 The welfare check list exercise

Section 1(3) of the Act demands that when deciding whether to make a section 8 order (e.g. a residence or contact order) the court shall have regard to the welfare check list (s. 1 (3) (a) to (g)), that is:

- a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding),
- b) his physical, emotional and educational needs,
- c) the likely effect on him of any change in his circumstances,
- d) his age, sex, background and any characteristics which the court considers relevant,
- e) any harm which he has suffered or is at risk of suffering,
- f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs,
- g) the range of powers available to the court under this Act in the proceedings in question.

No particular factor in the welfare check list takes priority. Judges use the check list as a weighing and balancing exercise, finally giving reasons for the decision reached.

7.4 Section 8 orders

A section 8 order is one of the following orders:

- a residence order
- a contact order
- a prohibited steps order, or
- a specific issue order.

Applications for any of these orders are decided on the basis that the welfare of the child is the court's paramount consideration. Use the welfare check list exercise, the no order principle and remember delay is contrary to the interests of the child.

7.5 A residence order

A residence order is a section 8 order which settles the arrangements to be made as to the person with whom a child is to live. The basic principle is that the natural parents should be considered first as carers for a child. The usual dispute is whether a child should live with their mother or their father. When making a residence order the court often makes a contact order in favour of the non-resident parent. The majority of residence disputes conclude in this way so that the child has the certainty of knowing with which parent they will be living and how often they will be seeing their other parent.

7.5.1 A shared residence order

Section 11 (4) gives the court the power to make a residence order in favour of two or more persons who do not themselves all live together. The order may specify the periods during which the child is to live in the different households concerned, e.g. one week with mother and then one week with father. A shared residence order is less common than a residence order. However, in certain cases it will be in the best interests of a child to make a shared residence order. See *Re A (Shared Residence)* [2002] 1 FLR 177; *A v A* [2004] 1 FLR 1195.

7.5.2 A residence order may be limited or unlimited in time.

For example:

- 'The child shall live with his father until the final hearing on ...' (time limited), or
- 'The child shall live with his father' (unlimited).

In a hotly disputed application, a shared residence order limited in time may be in the child's best interests as a holding position until the final hearing, e.g. 'The child shall live with his mother Monday pm to Friday am. The child shall live with his father Friday pm to Monday am, until final hearing on ...'.

7.5.3 Applications for a residence order where the other party has not been given notice of the application

It is unfair and undesirable to make a residence order even for a limited period of time if one party has not been served or received notice of the application. Adjourn, abridge time for service and give a hearing date a few days later to allow both parties to have notice of the application and attend court. If there is a risk that the child is about to be removed from the country, a prohibited steps order forbidding the removal of the child from England and Wales with a penal notice attached to it should suffice.

7.5.4 Imposing conditions on a residence order

It is unusual for the court to interfere with the right of a parent who has a residence order to choose where and with whom they live. However, in exceptional circumstances, conditions may be imposed under section 11 (7) to protect the best interests of a child. See *Re H (Children) (Residence Order: Condition)* [2001] 2 FLR 1277; *Re S (A Child) (Residence Order: Condition) No. 2* [2004] FLR 651; *B v B (Residence: Imposition of Conditions)* [2004] 2 FLR 979 and paragraph 7.13.3 below on Internal Relocation.

7.5.5 Child abducted from another country

Beware the case in which a mother makes an application to the court for a residence order without notice to the father, having recently arrived from another country where she and the child have been habitually resident. The father has been left behind and may not even know where his child is. In these circumstances the judge should not assist the mother's potential abduction by making a residence order in her favour.

A prohibited steps order should be made preventing the mother from changing the child's place of residence from that specified in the order. The mother's application for residence must be transferred to a High Court judge immediately. Steps should be taken to notify the father of the whereabouts of his child and the next hearing date.

7.6 A contact order

A contact order is a section 8 order requiring the person with whom a child lives or is to live to allow the child to visit or stay with the person named in the order. The basic approach to contact between a child and their parent is that the court will not deny a non-resident parent contact unless there are cogent reasons for doing so. The presumption is that if the child lives with one parent, they should grow up knowing and seeing the other parent. Occasionally a court is compelled to come to the conclusion that in existing circumstances an order for direct contact (face to face contact) is not in the best interests of the child. If there is to be no direct contact it is usually desirable that there should be an order for indirect contact by means of

cards, letters and presents so that the child grows up knowing of the love and interest of the absent parent with whom in due course direct contact may be established.

7.6.1 Possible issues arising in contact cases

- Whether the child is to have visiting contact for part of a day and/or overnight, staying contact and/or holiday contact with the non-resident parent.
- The length and frequency of each of such periods of contact.
- Who is to collect the child at the beginning of contact from a specified place and at a specified time.
- Who is to return the child at the end of contact to a specified place at a specified time.

7.6.2 The most problematic contact cases

The most problematic contact cases are those in which the parent with whom the child lives opposes the other parent having any contact with the child. The court must decide whether the parent with whom the child resides is opposing for good reason or for no good reason. Examples of a parent opposing contact for potentially good reason are those allegations which, if true, could place the child at risk of physical or emotional harm during contact, e.g. an allegation of:

- sexual abuse,
- domestic violence,
- psychiatric illness,
- drug or alcohol abuse,

any of which may present the risk of physical or emotional harm to the child.

The court must decide whether these allegations are true at an early hearing. The burden of proof is on the party making the allegations. The standard of proof is on the balance of probabilities. However, in a case involving allegations of sexual abuse or domestic violence, the standard of proof is on the balance of probabilities but the more serious the allegation, the more cogent must be the evidence to prove it.

See Lord Nichol's Judgment at 96D and E of *H and R (HL)* [1996] 1 FLR 80. The leading authority on domestic violence is essential reading - *Re L; Re V; Re M; Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 and the report 'Contact and Domestic Violence - The Experts' Court Report' by Dr Claire Sturge and Dr Danya Glaser - see Appendix 8.

Domestic violence is not a bar to contact. It is one factor to be taken into account in the welfare check list exercise.

7.6.3 Ensuring that your contact order is effective

Sometimes a parent (often the mother) may need support in order to ensure contact takes place and the court order is not breached, e.g. counselling, work with a psychologist or a therapist. A contact centre may provide a safe environment in which contact can be started (see para. 7.6.6).

7.6.4 Methods of dealing with a breach of a contact order

- A change of residence for the child.
- A shared residence order.
- Placing a penal notice on a contact order. In the event of a further breach, committal proceedings will be issued resulting in a fine or a suspended prison sentence or a committal to prison for up to two years.

Committal orders in family cases are the orders of last resort. Every other possible action should be taken before resorting to a prison sentence.

7.6.5 Paternity of the child

If a mother claims in answer to a father's application for contact that he is not the father of the child, direct DNA tests in order to determine the truth. Uncertainty about paternity is likely to cause a child emotional damage. If a child does not know the identity of his father or mistakenly believes another man to be his father, ensure that work is done with the mother and the CAFCASS officer or a psychologist so that the child grows up knowing the truth about his paternity.

7.6.6 Child Contact Centres

Child Contact Centres are often used as a venue to re-start contact in cases where there has been a break in contact or there is a large amount of anxiety exhibited by the resident parent or the child himself surrounding contact. For example a Contact Centre may be used where one parent does not wish to meet the other parent and there are no relatives or friends available who are willing to permit their home to be used for the purposes of contact. In these cases Child Contact Centres provide a safe, friendly environment in which to facilitate contact and develop positive relationships between parent and child. Several families are usually together in one room exercising contact at the same time. The aim is to establish a positive relationship between parent and child and then, using the Centre as a collection point, move contact out of the Contact Centre and eventually away from the Centre altogether. No order for contact at a Contact Centre should be made without checking when a Contact Centre may accommodate the family. There are often waiting lists.

Most Child Contact Centres only offer supported contact. A few offer supervised contact. It is important to choose the right Contact Centre for each case. When supporting contact, the staff, who are usually volunteers, do not observe, monitor or evaluate the contact. No report

will be made upon contact and the staff will not become involved in the court process. The only record kept is an attendance record of the dates and times when the parties attended. Some Contact Centres offering supported contact will permit CAFCASS officers to observe contact within the Contact Centre.

If a child is at risk of harm during contact, for example where there is a history of conflict between the parents, substance abuse or a risk of violence, contact will need to be supervised by supervisors who are skilled and confident enough to intervene immediately and firmly to protect a child from a highly distressed parent or parents. Supervised contact involves individual supervision of the contact by an experienced worker who has seen the court papers and has the ability to assess, report upon and establish positive relationships between parent and child so that eventually contact can move on to unsupervised contact, away from the Contact Centre.

All Child Contact Centres must be told of any risks attached to a parent or child attending at their premises. A Contact Centre may refuse to deal with a case where there is a high risk of violence or where a parent has been convicted of an offence of physical or sexual abuse of a child. Each judge needs to be aware of the Contact Centres in their area and whether they only offer supported contact or supervised contact.

7.7 A prohibited steps order

A prohibited steps order is a section 8 order which prohibits a person from taking specified steps which could normally be taken by a parent in meeting their parental responsibility. Examples of possible prohibited steps orders are:

- Prohibiting the removal of a child from the jurisdiction of the court.
- An order preventing a parent from changing a child's school.
- An order preventing a parent from changing the surname of a child.
- An order prohibiting a parent from allowing the child to have contact with a named individual (e.g. a relative who is a sex offender).

BUT no court may make a prohibited steps order or a specific issue order with a view to achieving a result which could be achieved by making a residence or contact order (s. 9 (5) (a) of the Act).

7.8 A specific issue order

A specific issue order is a section 8 order giving directions for the purpose of deciding a specific question which has arisen or which may arise in connection with any aspect of parental responsibility for a child. Examples of possible specific issues are:

- Determining where a child should be educated.

- Determining issues of religion.
- Determining issues of medical treatment (transfusions, circumcision, sterilisation, abortion).
- Determining the surname by which a child shall be known where there is no residence order in force.

7.9 Applications for section 8 orders

Section 10 (1) of the Act gives the court power to make a section 8 order on application by a party or of its own motion. For example, a court may make a residence order of its own motion in favour of a relative when the children are living with that relative during a residence dispute between the parents. Such an order may be unlimited in time or time limited until the date of the final hearing or the next court hearing.

7.9.1 Who may apply for a section 8 order without leave of the court?

A parent or guardian or any person in whose favour a residence order is in force with respect to the relevant child may apply for any section 8 order without obtaining leave of the court (s. 10 (4) of the Act). A natural parent does not need leave of the court to make an application, whether they have parental responsibility or not (s. 2 (3) of the Act). Section 10 (5) of the Act specifies the people who are entitled to apply for a residence or contact order without leave of the court. See also section 10 (10). S77 of the Civil Partnership Act 2004 entitles a civil partner who has entered into a civil partnership agreement (whether or not subsisting) to make an application for a residence order in respect of a child who is a child of the family. Local Authority foster parents with whom a child has lived for over twelve months may apply for a residence order.

7.9.2 Applications for leave to make an application for a section 8 order (s.10 (9), of the Act)

Where the person applying for leave is not the child, the court shall have particular regard to:

- The nature of the proposed application.
- The applicant's connection with the child.
- Any risk there might be of that proposed application disrupting the child's life to such an extent that they would be harmed by it.

Note that section 1 (1) and (3) of the Act, do not apply to these applications for leave.

Grandparents are often the applicants for leave to make an application for a residence or contact order. They may have played a significant rôle in a child's life in which case leave ought to be granted. The fact that leave is granted does not create any presumption in favour of the substantive application.

7.9.3 Application for leave by the child (s. 10 (8) of the Act)

Where the person applying for leave is the child concerned, the court may only grant leave if it is satisfied that the child has sufficient understanding to make the proposed application. These applications should be transferred to the High Court for determination. In addition to section 10 (8) of the Act, the High Court will consider the child's best interests, the likelihood of success of the application and whether the child is being pressured by an adult to make the application.

7.9.4 Power of the court to prevent any specified application without leave of the court under section 91 (14) of the Act

Under section 91 (14) the court may, on disposing of any application under the Act, order that no application for an order under the Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court. This order is used to prevent a parent from making repeated applications for a residence or contact order (e.g. for three years) without leave of the court. It restricts the right of a parent to make application for a section 8 order without leave of the court. The court has to balance the right of access to the court of the parent against the needs and welfare of the child involved and will only interfere with the parent's right to make application without leave if the child's welfare requires it. The leading authority is *Re P (Section 91 (14) Guidelines) (Residence and Religious Heritage)* [1999] 2 FLR 573.

The welfare of the child is paramount. The power should be used sparingly and should be the exception and not the rule. A litigant in person should be given notice of the fact that the court is considering a section 91 (14) order against them.

7.10 Duration of section 8 orders

A section 8 order ceases to have effect when the child reaches 16 (s. 91 (10)) unless by order of the court it is to have effect beyond that age by virtue of section 9 (6) or section 12(5), in which case it will cease to have effect when the child reaches 18 years (s. 91 (10) and (11)). No court shall make any section 8 order with respect to a child who is 16 unless it is satisfied that the circumstances of the case are exceptional (s. 9 (7)).

The making of a care order in public law proceedings automatically discharges any section 8 order (s. 91 (2)). A residence order or a contact order ceases to have effect if the child and his parents live together for a continuous period of more than six months (s. 11 (5) and s. 11 (6)).

7.11 Parental responsibility

Section 3 (1) defines parental responsibility as 'all the rights, duties, powers, responsibilities and authority by law a parent of a child has in relation to the child and his property'. These powers include the right to choose a child's religion and education, the right to name a child, the power to consent (or not) to the child's medical treatment and the power to consent (or not) to the child's removal from the jurisdiction, temporarily or permanently.

7.11.1 Who has parental responsibility automatically?

- The mother.
- The father if he is married to the mother at the date of the child's birth (s. 2 (1)).
- The unmarried father who was registered on the birth certificate as the father of the child on or after 1 December 2003.

7.11.2 Methods of obtaining parental responsibility if a party does not have it automatically

- An unmarried father can obtain parental responsibility by entering into a parental responsibility agreement with the mother (s. 4 (1) (b)).
- An unmarried father can apply for a parental responsibility order under section 4 (1) (a).
- When the court makes a residence order in favour of an unmarried father, the court must also make a parental responsibility under section 4 (1) (a) (see s. 12 (1)).
- Where the court makes a residence order in favour of any person who is not the parent or guardian of the child, that person shall have parental responsibility for the child while the residence order remains in force (s. 12 (2)).
- A stepfather will acquire parental responsibility for a child by agreement between the step parent and the parents or by order of the court (s. 4 (A)).
- If a parent of a child has entered into a civil partnership agreement, the civil partner may obtain parental responsibility in respect of that child by agreement with the parents or by order of the court.
- A same sex partner of a parent who has not entered into a civil partnership agreement may obtain parental responsibility by means of a shared residence order see *Re G (Residence: Same Sex Partner)* [2005] 2 FLR 957.

7.11.3 Deciding an application for a parental responsibility order under section 4 (1) (a)

- The child's welfare is the paramount consideration of the court (s. 1 (1)).
- The court must consider whether making such an order is better for the child than making no order.
- In *Re H (Parental Responsibility)* [1998] 1 FLR 855, on a father's application for a parental responsibility order it was found that the court must take into account a number of factors:
 - the degree of commitment which the father has shown to the child,

- the degree of attachment which exists between the father and the child, and
- that his reasons for making the application are sound (e.g. he is not motivated by malice).

This is not an exhaustive list of factors.

The court must take into account all the relevant circumstances and decide whether the order is in the best interests of the child. Parental responsibility does no more than confirm the status of fatherhood which a father has automatically, if married to the mother. It does not give the father the right to interfere with the day to day management of the child. Hostility and lack of trust between the parents is not sufficient reason to refuse to grant parental responsibility.

7.12 Change of surname

A decision to change a child's surname from the surname in which the child is registered at birth is a matter of importance and requires strong reason if the parties were married. The surname often maintains an important link between the father and the child at a time when the father is no longer living with the child. A change of surname may damage the child's understanding of his roots or may suggest to the child that there is some reason why it is desirable that he should be called by some name other than his father's surname. For all these reasons a mother should not change a child's surname unilaterally at a time when her surname is changing on divorce or remarriage. Any dispute must be referred to the court for determination, whether or not there is a residence order in force and whoever has or has not parental responsibility for the child. The leading case is the House of Lords' decision in *Dawson v Wearmouth* [1999] 1 FLR 1167.

7.12.1 The application

If a change of surname is disputed:

- Where there is a residence order in force, mother ought to make an application under section 13 (1) of the Act.
- Where no residence order is in force, mother should make an application under section 8 for a specific issue order for change of name.
- Where father wishes to prevent a change of name he should apply for a prohibited steps order forbidding mother from changing the child's name.

7.12.2 Factors to be considered

On any application, the welfare of the child is paramount and the judge must take into account the welfare check list exercise and would be wise to do so on a section 13 (1) application. In *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930, Butler-Sloss LJ sets out the factors to be considered at 933F. This case is essential reading.

7.13 Removal from the jurisdiction

Where a residence order is in force with respect to a child, no person may remove that child from the United Kingdom without either the written consent of every person who has parental responsibility for the child or the leave of the court (section 13 (1) of the Act). Section 13 (2) of the Act permits a person who has a residence order in their favour to remove the child who is the subject of the residence order from the jurisdiction for a period of less than one month without the consent of every person who has parental responsibility and without leave of the court.

7.13.1 Applications for leave to remove a child from the jurisdiction temporarily for a holiday to a country that is not a signatory to the Hague Convention

In these cases the fear is that the opportunity afforded by temporary removal will be abused, that the child will not be returned to the United Kingdom and will never be recovered. Applications of this type should be transferred to the High Court or a section 9 (deputy High Court) judge. They require rigorous scrutiny and the orders can be complex.

7.13.2 Applications to remove a child from the jurisdiction permanently

The leading authority is *Payne v Payne* [2001] FLR 1052. The judgments of Thorpe LJ and the then President Butler-Sloss LJ provide the framework to deal with these applications. The starting point is:

- The welfare of the child is the paramount consideration of the court.
- Refusing the primary carer's reasonable proposals for the relocation of their family life is likely to impact detrimentally on the welfare of their dependent children. This means that an application to relocate is likely to be granted unless it is detrimental to the welfare of the child.

A court must scrutinise the plans to relocate carefully to determine whether they are reasonable, looking at issues such as accommodation, education, health care and jobs. Living conditions or dangers within the potential host country may prevent a child from developing to their maximum potential or place the child at risk. In cases where there is a conflict between the interests of the parent seeking to move and those of the child concerned, the application ought to be transferred to the High Court. In all cases the court needs to be satisfied that there is a genuine motivation for the move and that the application is not motivated by a selfish desire to exclude the other parent from the child's life. The effect upon the applicant and any new family of a refusal is important (e.g. stepfather losing an important job opportunity). The wishes of the child and the effect upon the child of the denial of contact with the other parent and with the extended family is also important.

The relationship between the child and the parent remaining in the United Kingdom must be assessed. Plans for future contact with that parent are very significant. Nevertheless, the fact

that contact will be less frequent and more difficult to exercise will not defeat an otherwise reasonable application. All these features need to be analysed and weighed in the course of conducting the welfare check list exercise.

If leave is to be granted, consideration should be given to the imposition of conditions to secure compliance with any contact order, such as:

- An undertaking to return the child if called upon to do so.
- The obtaining of a 'mirror order' in the host jurisdiction, in particular specifying the return of the child to this country.
- A financial bond to guarantee compliance or pay travel expenses for contact.

7.13.3 Internal relocation

The basic principle is that the court should not normally limit a parent's ability to move within the jurisdiction other than in exceptional circumstances e.g.

B v B (Residence: Condition Limiting Geographical Area) [2004] 2 FLR 979. Mother attempting to thwart contact by moving to Newcastle. Residence order made with a condition that mother lived in a defined part of Southern England.

Re S (A Child) (Residence Order: Condition No. 2) [2002] EWCA Civ 1795, Court of Appeal. Child's special characteristics Down's syndrome and heart problem combined with the risk of serious emotional harm resulted in highly exceptional circumstances preventing a move to Cornwall.

Re H (Children) (Residence Order) [2001] 2 FLR 1277. In highly exceptional circumstances where medical evidence indicated that the effect of a move on the children away from their mother would be devastating, the court imposed a prohibited steps order preventing the father, who was granted a residence order, from moving to live with the children in Northern Ireland.

7.14 The Private Law Programme and the Rôle of the CAFCASS officer (also known as the Children and Family Reporter)

CAFCASS stands for the Children and Family Court Advisory and Support Service. The Private Law Programme introduces a new framework for private law cases in three respects:

- Dispute resolution at a first hearing.
- Effective court control including monitoring outcomes of orders, agreements and referrals.
- Flexible facilitation (matching resources to families).

In all private law cases, an early first hearing dispute resolution appointment is listed before a

district judge between four and six weeks of an application being issued. The purpose of that hearing is 'in-court conciliation' using a duty CAFCASS officer where available to facilitate agreements, identify issues or make appropriate referrals for assistance, e.g. mediation, counselling, anger management, therapy or treatment by a doctor or the community alcohol or drugs team. In practice, if no CAFCASS officer is available, a district judge will identify agreed and disputed issues and do their best to facilitate agreements and make any appropriate referrals for assistance.

At the conclusion of the first hearing dispute resolution appointment, the district judge identifies in their order the agreed and disagreed issues, the aim of the order agreement or referral and timetables any disputed issues to final hearing before an allocated judge. When deciding what evidence is required for the final hearing, the district judge will consider amongst other things whether a CAFCASS officer's report is necessary. If so, the issues to which the report is to be directed must be specified in the judge's order. For example, a report is not necessary simply to determine the duration and frequency of contact. However, if one parent is opposing the other parent having any direct contact with a child at all, then a report from a Children and Family Reporter on such an important issue is helpful.

A judge must find out the length of time required by CAFCASS officers in their area to file such a report (e.g. anything from 14 - 20 weeks), specify in their order the date by which the report must be filed and the issues which the court wishes the CAFCASS officer to address in the report and provide for their attendance at court to give evidence at the final hearing.

In the course of compiling a report, the CAFCASS officer will interview the parents, their partners and any close relatives and gather information from the child's school or nursery. Most importantly, they will interview the child in the absence of his parents to avoid influence, providing the child is of sufficient age to permit such an interview. Whatever the age of the child, the CAFCASS officer will observe the child with each parent in order to assess the attachment of the child to the parent and vice versa, together with the parenting abilities of each parent and the ability of each parent to meet the child's needs.

The welfare of the child is the paramount consideration of the CAFCASS officer. In their report they will conduct an independent welfare check list exercise based on the information they have gathered. The work done by the CAFCASS officer makes it unnecessary for the child to attend court or see the judge. The risk attached to a judge agreeing to see a child is that the child is likely to be placed under undue pressure or be coached by one or other or even both of his parents. However occasionally it may be in the child's best interest for the judge to see and hear what a child needs and wants to tell the judge personally (see *Mabon v Mabon* [2005] EWCA Civ 634)..

At the final hearing it is normal practice to call the CAFCASS officer first in order to crystallise the issues and so that they may be released from court early to deal with other cases. If a judge disagrees with the recommendations of the CAFCASS officer, the judge must give clear reasons in the judgment for doing so or risk an appeal.

The private law programme envisages that the CAFCASS officer will facilitate all court orders, agreements and referrals to other agencies, for example, by actively assisting in carrying into effect a court order for contact. Moreover, the CAFCASS officer will also monitor the outcome of the court order and will notify the court of any breach. The matter will then be listed before the allocated trial judge again within 10 working days of any request by the CAFCASS officer or a party for the purpose of an urgent hearing to review and where necessary enforce private law orders. The private law programme therefore extends the role of the CAFCASS officer beyond reporter to facilitator and monitor. They are the eyes and ears of the court.

7.15 The power of a private law judge to order a local authority to undertake an investigation of a child's circumstances under section 37

Section 37 of the Act is the only way a private law judge may trigger public law proceedings (i.e. an application by a local authority for a care order or a supervision order). Where, in any family proceedings in which a question arises with respect to the welfare of a child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to the child, the court may direct the appropriate authority to undertake an investigation of the child's circumstances (s. 37 (1)).

Under section 31, a care or supervision order may only be made if it is likely that the child concerned is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child or likely to be given to the child if the order were not made not being what it would be reasonable to expect a parent to give to the child. When undertaking a section 37 investigation, the local authority must consider whether it should:

- Apply for a care or supervision order.
- Provide services or assistance for the child or their family.
- Or take any other action with respect to the child.

It is helpful to refer the local authority to these three points in the order directing the section 37 investigation. Before the end of eight weeks, the local authority must report upon the investigation (s. 37 (4)). In that report the local authority must give its reasons for applying or not applying for a care or supervision order and inform the court of any services or assistance which it has provided or intends to provide and of any other action it has taken or intends to take with respect to the child. The local authority has a number of resources available to it within a few weeks, e.g. Family Centres, Family Support Workers and psychologists, which are not available to a CAFCASS officer or the court within private law proceedings. However, a section 37 investigation should only be directed in the serious case in which a child is suffering or is likely to suffer significant harm.

Where a direction is made under section 37 the court must adjourn the private law proceedings, usually to a date after the eight week period when the report is to be supplied. It is useful to request the author of the section 37 report to attend court at the adjourned hearing.

Where a child is at immediate risk of harm the court has the power to make an interim care or supervision order to the local authority at the same time as directing a section 37 investigation (s. 38 (1)(b)). In practice, this power is rarely used. One effect of making an interim care or supervision order is that a guardian will be appointed to represent the interests of the child.

7.16 The local authority and section 7 reports

Normally a CAFCASS officer will be asked to supply a report upon the welfare of a child. However, occasionally it is more appropriate to ask a local authority to supply the section 7 welfare report, e.g.:

- Where the case involves an allegation of sexual abuse which has been or is being investigated by the Local Authority, or
- Where the Local Authority has recently worked or is still working with the child and their family.

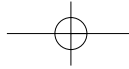
7.17 Family assistance orders (s. 16)

A family assistance order requires a CAFCASS officer or the local authority to make a social worker available to advise, assist and where appropriate befriend any person named in the order. The purpose of a family assistance order is to provide expert assistance and advice to a family for a short period of time. This order may be useful where there are problems surrounding contact or a child is proving difficult to manage. The people who may be named in the order are any parent or guardian, the child himself or any person with whom the child is living or in whose favour a contact order is in force.

As in the case of section 8 orders, the court may not make a family assistance order unless to do so accords with the principle that the welfare of the child is paramount (s. 1 (1)) and that it is better for the child than making no order at all (s. 1 (5)).

In addition, section 16 (3) provides that no court shall make a family assistance order unless it is satisfied that the circumstances of the case are exceptional and it has obtained the consent of every person to be named in the order other than the child. Family assistance orders continue for six months unless a shorter term is specified (s. 16 (5)). The Adoption and Children Bill proposes that family assistance orders will be extended from six months to twelve months and that the requirement for exceptional circumstances to be established will be deleted.

It is usually a CAFCASS officer who works with the persons named in the order. Often the CAFCASS officer has recommended the order in their report. No order can be made requiring a local authority to make a social worker available without the consent of the local authority. Local authorities may be reluctant and say that they do not have the resources to fund such an order. If, however, the local authority has provided the section 7 report on the welfare of the child, it may agree to service a family assistance order.



7.18 Special Guardianship Orders

See section 14A to G, and additional information provided by the Judicial Studies Board on the Adoption and Children Act 2002.

7.18 Human rights

Private family law orders always infringe the Article 8 right to respect for family life of the parties, the child and often members of the extended family. Every application involves the court balancing the rights of the participants to the application including the children who are the subject of it and arriving at a result which is in the interests of those children and proportionate to the legitimate aim being pursued. Having conducted the welfare check list exercise, it is a useful cross check to ensure that the order proposed is human rights compliant – that is that the order complies with both English and European law, that it is necessary for the protection of the rights and freedoms of the child or children and is proportionate. In this manner, interference with the parties' Article 8 rights can be justified.

At all times a judge will safeguard the parties' Article 6 right to a fair trial.

