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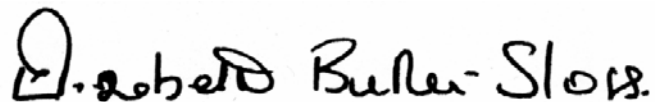
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## FOREWORD

With the implementation of unified administration family proceedings courts will enjoy a much closer relationship with the county courts. This, together with the move, where possible, towards housing family proceedings courts and county courts under the same roof, can only be of benefit to the family justice system. I am hoping that family cases will be listed flexibly between the local county court and family proceedings court to ensure the first available date for hearing and thereby to reduce delay. I hope to see the fullest possible use of the family proceedings courts in private family law cases as well as in public law cases.

This new training manual is of enormous importance, for, until now, despite a common framework for justices' training to be found in MNTI 2, there has been no nationwide coordination of justices' training in the family proceedings courts. The Magisterial and Family Sub-committee charged with the drafting are to be congratulated for the hard work and success in creating a clear and well-arranged bench book. It is an invaluable guide for reference as well as for study.

Family panel members are asked to try difficult and sensitive cases affecting the future lives of all members of the families who come before them. They have been chosen to do so because of their aptitude and personal suitability. I am well aware of, and should like to pay tribute to, the hard work and dedication of family magistrates and their invaluable contribution to the administration of family justice.

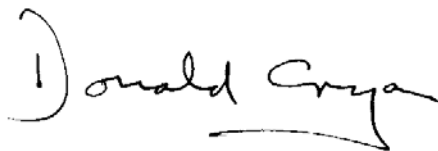


**Dame Elizabeth Butler-Sloss**  
*President of the Family Division*

## INTRODUCTION

This is the first time that there has been a national *Family Court Bench Book*. It comes at an apt moment. The unified administration under the Courts Act 2003 comes into effect on 1 April 2005. The Act charges the Lord Chancellor with the duty of providing training materials for the training of justices, including those sitting in specialist courts such as the family proceedings courts. The Lord Chancellor has asked the Judicial Studies Board (JSB) to discharge that task on his behalf. This bench book will make a good start.

Whilst the bench book will provide an invaluable tool to use in training alongside the syllabus in Appendix 8 of the *MNTI 2 Handbook*, its primary use is as a ready and easy reference source on the bench. The work of the family courts can be surprisingly complex and like any other specialist area prone to jargon. We have chosen to work with these facts of life rather than ignore them and to produce a work that will help the lay bench to navigate its way through these challenges. Perhaps the first point to bear in mind when using the bench book is that it has a comprehensive index. Next, it has a Glossary to help the user deal with unfamiliar terms. Finally, it is set out in the order in which cases present themselves to the court. The final stage will be the use of the reasons and welfare checklists at the end of each hearing.



*Donald Cryan, Vice-Chairman Family and Magisterial Subcommittee, April 2005*

## ACKNOWLEDGMENTS

In one sense it would be good to say that the Magisterial and Family Subcommittee that produced this book moved with exceptional speed to be at the start on time, but that would not be correct. This bench book had been under consideration for some time and the committee, under the chairmanship of Mr Justice Sumner, had been planning it even before its new role under the Courts Act became clear. Equally, it would not be right to give the impression that this is an entirely novel work. The small editorial team has drawn extensively on the work of others and has incorporated into this bench book much of an earlier work prepared for training in the South West Region. The editorial team have been greatly helped by the tireless work of the JSB staff and its endless patience in providing advice and technical backup. Special thanks are extended to:

Jane Hall, Legal Adviser JSB

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Audrey Damazer, Justices' Clerks Society

Elaine Laken, Justices' Clerks Society

Sue Allen, JP

Margaret Wilson, JP

Judge Donald Cryan, Vice-Chairman Family and Magisterial Subcommittee, JSB.

Thanks are also due to the MCCs and magistrates who contributed by responding to the Family Bench Book survey.

## SECTION 1 THE FAMILY PROCEEDINGS COURT

### THE SYSTEM OF FAMILY COURTS

1. The present system of family courts was introduced by the Children Act 1989 (the 1989 Act). Under this system, the following courts deal with family matters:
  - a. **The family proceedings court.** This is the name given to the magistrates' court when members of the family panel sit to hear this type of case.
  - b. **The county court.** There are a number of 'different' county courts as far as family proceedings are concerned. Some have no family jurisdiction at all. Those which do always have jurisdiction to deal with divorce, but fall into one of three categories:
    - i. County courts that only have a divorce jurisdiction.
    - ii. Family hearing centres. These county courts can, in addition to divorce cases, hear contested private law cases and adoption applications.
    - iii. Care centres. These county courts can hear all family matters including public law cases. The Principal Registry of the Family Division is the care centre for London.
  - c. **The High Court of Justice.** Normally the Family Division.
2. Work can move between the tiers as it is important that the case is dealt with at an appropriate level.

### JURISDICTION

3. The Children Act 1989 provides the basis for most applications dealing with children.
4. Beyond the 1989 Act, magistrates continue to have quite separate powers to make maintenance orders between spouses to protect them from one another, to protect

'associated persons' and to regulate occupation of the family home. Different statutes may need to be considered depending upon the nature of the case. The main provisions affecting law and procedure in the family proceedings court are the:

- a. Domestic Proceedings and Magistrates' Courts Act 1978
- b. Magistrates' Courts Act 1980
- c. Adoption and Children Act 2002
- d. Child Support Act 1991
- e. Children Act 1989
- f. Family Law Act 1996.

### **Public law and private law cases**

5. The family proceedings court plays a key role in what are termed:
  - a. *public law* cases (e.g. applications for care or supervision orders in respect of children who are at risk, usually brought by local authorities); and
  - b. *private law* cases (e.g. disputes between parents concerning the upbringing of children).
6. Other work dealt with includes:
  - a. **Applications by spouses for financial provision for themselves**, i.e. provision for parties who remain married. Maintenance arrangements for children are for the most part dealt with by the Child Support Agency (CSA).
  - b. **Non-molestation orders** to prevent domestic violence and involving, where appropriate, the use of powers to arrest.

- c. **Occupation orders** to keep a spouse out of the family home and also involving, where appropriate, the use of powers to arrest.
- d. **Declaration of parentage.**
- e. **Adoption**, i.e. orders giving parental rights and duties in respect of a child to adoptive parents.
- f. **Enforcement** concerning, for example:
  - i. 1989 Act cases; and
  - ii. Orders for financial provision for spouses. Also included under this heading is the enforcement of assessments made by the CSA and of maintenance orders from abroad, and vice versa (known as 'reciprocal enforcement').
- g. **Variation and enforcement of 'old' maintenance cases.**

## CONSTITUTION

- 7. Family proceedings courts must be made up of three magistrates from the family panel and include a man and a woman, unless this is impracticable, when a minimum of two is allowed. A family proceedings court may comprise a district judge as chairman and one or two lay justices who are members of the family panel. If this is not practicable the district judge may sit alone.

## FAMILY PANEL

- 8. Family panels are made up of magistrates elected by their local colleagues for this work on the basis of their aptitude and personal suitability (except in London where different arrangements exist). In addition to their special duties in the family proceedings court, members of the panel continue to serve in the ordinary magistrates' court. Different arrangements for the selection of magistrates to sit in the family proceedings court are likely to be put in place in 2006 after the Courts Act 2003 has been fully implemented.

**Chairmen and deputy chairmen**

9. The panel appoints its own chairman. It also elects enough deputy court chairmen to ensure that family proceedings are always chaired by someone trained for this role. Different provision for chairmen will also be in place from 2006.

## SECTION 2 GENERAL PRINCIPLES IN FAMILY CASES

### HUMAN RIGHTS ACT 1998

1. The main rights guaranteed by the European Convention on Human Rights that are likely to be raised in family courts are enshrined in the following Articles.
2. **Article 6** (right to a fair trial). Article 6 also deals with the determination of the civil rights and obligations. It sets out the entitlement of each individual to a fair hearing within a reasonable time by an independent and impartial tribunal established by law. Article 6 may therefore be relevant in family proceedings when dealing with applications made without notice to other parties, questions concerning the disclosure of information, applications for leave to apply and making decisions whether to proceed in the absence of one or more of the parties.
3. In children's or domestic violence cases, however, where the risks are sufficiently grave and urgent it may be entirely appropriate for the court to make orders without notice, but they should always be made for the shortest time possible. Provision should always be made for the application to be considered on notice within a short time.
4. **Article 8** (the right to respect for private and family life). Any interference with family life must be in accordance with the law, pursue a legitimate aim and be necessary and proportionate. Most applications involving children engage Article 8. Such a decision must be justified in terms of child protection and shown to be necessary and proportionate. Generally, it is safe to assume that the application of the Children Act 1989 in accordance with case law is Article 8 compatible.
5. **Article 5 (1)** deals with the right to liberty and security. Such rights are engaged when the court has to deal with committal for breach of an order (e.g. a non-molestation order) or a secure accommodation order. Both types of order are recognised as legitimate in appropriate circumstances.

**DIVERSITY AND FAIR TREATMENT**

6. When taking the Judicial Oath the newly appointed justice swears to 'do right to all manner of people after the laws and usages of this realm, without fear, favour, affection or ill-will'. With this in mind magistrates sitting in the family court will be aware of diversity and fair treatment issues and how they may affect the judicial process.
7. In particular, a magistrate specialising in family work needs to be able to demonstrate:
  - a. an understanding of their own personal values and assumptions about the family such as what it means to be a father or mother, how fathers and mothers should behave or what constitutes family life, and
  - b. an ability to set aside those that are not relevant to the judicial process, so that they can recognise and respect the diversity of those entering the court (all manner of people) and treat them fairly (without fear, favour, affection or ill-will).
8. The task of respecting the differences in lifestyle has to be understood from the starting point that for many of us the 'norm' is actually the European White model of the family. Statistics tell us that the 'norm' does not in fact exist.
9. Magistrates need to recognise that:
  - a. all families are unique with shared tendencies and idiosyncrasies;
  - b. the family is the cornerstone of most communities and a key source of personal identity;
  - c. differences in outlook amongst all families will exist in a diverse society;
  - d. no major religion condones abuse – abuse is nearly always a combination of parenting failures;

- e. if families suffer as a result of racism it can add to the problems they encounter as a family;
  - f. if someone has suffered racism at school, or from the police or social services, or at work, then what happens in the courtroom will most probably be viewed with mistrust;
  - g. same-sex couples can, as a matter of law, constitute an enduring family relationship;
  - h. objective mainstream research shows that children brought up by lesbian or gay parents do thrive as well as those brought up by heterosexual parents;
  - i. families that do not conform to the traditional model are an increasingly common social reality.
10. Magistrates should also be able to demonstrate an ability to:
- a. identify the questions they need to ask and the steps they need to take in order to make decisions in the child's best interests within a structured framework;
  - b. identify disadvantaged and vulnerable people involved in or directly affected by the court process and take steps to address this disadvantage and minimise its effect;
  - c. identify any other factors which will enable the court to demonstrate fairness such as:
    - i. the religious beliefs of parties to the proceedings and what oaths or other provisions might be relevant;
    - ii. any language considerations;
    - iii. whether or not any parties suffer from poverty or social exclusion;

- iv. whether any parties are from a minority ethnic group including Roma, travellers, asylum seekers or refugees;
  - v. whether or not any parties to the proceedings have a physical, learning or mental disability;
  - vi. whether or not any women or girls in the proceedings are suffering from stereotyping of their roles or behaviour, for example, regarding child care, housework or paid work;
  - vii. whether or not sexual orientation is a *relevant* feature of the case;
- d. recognise and challenge any discriminatory remarks and unfair assumptions.
11. Magistrates will want to ensure that they are effectively communicating with everyone involved in the proceedings. Equally, they need to be confident that all parties to the proceedings accurately understand the material before them, the meaning of questions asked and answers given.
12. Ensuring fairness and equality of opportunity may mean providing special or different treatment.

## **GENERAL PRINCIPLES IN SPECIFIC JURISDICTIONS**

### **Proceedings under the Children Act 1989**

#### *The welfare of the child*

13. When a court makes a decision about a child's upbringing or property the child's welfare must be the court's paramount consideration.
14. When deciding what is best for the child in:
- a. a contested application concerning a section 8 order, or
  - b. any application concerning a care or supervision order,

the court must have regard to the 'welfare checklist'.

15. The checklist, which is not exhaustive, includes the following:
  - a. the ascertainable wishes and feelings of the child concerned (considered in the light of the child's age and understanding);
  - b. the child's physical, emotional and educational needs;
  - c. the likely effect on the child of any change in circumstances;
  - d. the child's age, sex, background and any characteristics that the court considers relevant;
  - e. any harm the child has suffered, or is at risk of suffering;
  - f. how capable each of the child's parents (or other relevant person) is of meeting the child's needs;
  - g. the range of powers available to the court under the 1989 Act in the proceedings in question.
16. The welfare principle and welfare checklist do not, however, apply in child maintenance cases.

*No delay*

17. In cases concerning a child's upbringing, the court must have regard to the general principle that any delay in reaching a decision is likely to prejudice the welfare of the child.
18. This general principle has since been reinforced in public law proceedings by the Protocol for Judicial Case Management in Public Law Children Act Cases (June 2003) which sets a maximum of 40 weeks for the conclusion of care cases.
19. The Protocol stipulates that the *overriding objective* is to enable the court to deal with every care case:

- a. justly, expeditiously and fairly, and with the minimum of delay;
- b. in ways which ensure, so far as practicable, that
  - i. the parties are on an equal footing;
  - ii. the welfare of the children involved is safeguarded; and
  - iii. distress to all parties is minimised;
- c. so far as is practicable, in ways that are proportionate:
  - i. to the gravity and complexity of the issues; and
  - ii. to the nature and extent intervention proposed in the private and family life of the children and adults involved.

#### *No order principle*

20. A court should not make an order unless it considers that doing so would be better for the child than making no order at all.

#### *Limiting litigation*

21. The court can limit future applications by stipulating that the applicant must obtain the leave of the court before re-applying. This power should be used sparingly but it may be appropriate where applications are being made too frequently and they are shown to be damaging to the child(ren) concerned.

#### *Parental responsibility*

22. Parental responsibility is defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.

**Proceedings under the Adoption and Children Act 2002**

23. In coming to a decision relating to the adoption of a child the paramount consideration of the court must be the child's welfare throughout his life. Whenever a court is considering under the Adoption and Children Act 2002 whether to make an adoption order, whether to dispense with parental consent in relation to placement and adoption orders or the granting of leave to oppose the making of an adoption order the court must have regard to the 'welfare checklist' under this Act. (This is similar to but **not** identical to the checklist under the Children Act 1989.)
24. The checklist, which includes the following, is not exhaustive:
- a. the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
  - b. the child's particular needs,
  - c. the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
  - d. the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
  - e. any harm which the child has suffered or is at risk of suffering,
  - f. the relationship which the child has with relatives, and with any other person in relation to whom the court or adoption agency considers the relationship to be relevant, including
    - (i) the likelihood of any relationship continuing and the value to the child of its doing so,
    - (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

25. When an adoption agency is planning to place a child for adoption it must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.
26. The court must also, when coming to a decision relating to the adoption of a child, consider the whole range of powers available to it and must not make any order unless it considers that making the order would be better for the child than not doing so. The general principle that any delay in the decision-making process is likely to prejudice the child's welfare also applies.

**Other proceedings within the jurisdiction of the family proceedings court**

27. The principles to be applied in other types of case, which tend to be less frequently encountered, are set out in the relevant sections.

## **SECTION 3 ALLOCATION AND TRANSFER**

### **ALLOCATION OF PROCEEDINGS**

#### **Public law (cases involving a local authority)**

1. Almost all public law cases have to be started in the family proceedings court. If the county court or the High Court orders a local authority to consider in private law proceedings if public law proceedings are necessary then a 'section 37 report' is ordered. If the local authority concludes they are necessary then proceedings should be started in that court. Where public law proceedings are already pending in a court any subsequent public law proceedings should be commenced in the same court.
2. Where there is an existing order, applications to extend, vary or discharge the order must be made to the court whose order it is.

#### **Private law – children**

3. Private law proceedings for orders under the Children Act 1989 may be commenced in a family proceedings court, county court or the High Court. Jurisdiction is not limited to the area in which the applicant, respondent or child resides although such factors may be relevant when considering applications to transfer from one family proceedings court to another. The applicant can, therefore, apply to any court except where the proceedings may extend, vary or discharge an existing order when the application must be made to the court that made the order. Provision is made for transfer between the three levels of court – High Court, county court and family proceedings court.

#### **Adoption**

4. Adoption applications may be made to any family proceedings court, the county court (at an adoption centre) and the High Court.

**Domestic violence**

5. Many domestic violence cases are ideally suited to the family proceedings court, but if proceedings are pending in another court they should be transferred there if this is more appropriate. Also, the family proceedings court may transfer cases to the county court if:
  - a. there is a conflict of law with another jurisdiction;
  - b. there is a novel or difficult point of law;
  - c. there is a question of law of general public importance;
  - d. proceedings are exceptionally complex.

An indication of complexity could be the potential gravity of the type of conduct concerned and the need for greater powers of enforcement than the family proceedings court has.

*Note:* The county court has power to transfer and retransfer cases to the family proceedings court.

6. The family proceedings court must transfer cases where a child under 18 is or wishes to become a party or a party is subject to a mental disorder within the meaning of the Mental Health Acts. When considering the complexity of a case the court should have regard to the fact that its powers of enforcement are more limited than the county court and the case cannot be transferred simply for the purpose of enforcement.

**TRANSFER OF PROCEEDINGS**

7. The issue of transfer should be considered at the earliest opportunity such as upon receipt of the application or at the first directions hearing. Transfer should continue to be addressed at each subsequent hearing. If a case unexpectedly becomes complex as it progresses, immediate action should be taken to transfer it. Conversely, an initially complex case may become more manageable as it progresses in a county court and justify a transfer back to a family proceedings court.

**Transfers from one family proceedings court to another**

8. Although magistrates' courts tend to deal with local cases a 'lateral' transfer from one family proceedings court to another may be preferable. A nearby family proceedings court may have more room or it may be a more convenient venue for one or more of the parties. The Justices' Clerk for the receiving court must consent to the transfer before it can be made. A lateral transfer will be appropriate where the transferring court considers that the transfer is in the interests of the child:
- a. because it is likely to significantly accelerate the determination of the proceedings;
  - b. because there are proceedings pending in the receiving court and it would be appropriate for them to be heard together; or
  - c. for some other reason.
9. The factors to be taken into account when deciding whether there is 'some other reason' for a lateral transfer may include:
- a. where an earlier hearing date can be given;
  - b. where the child lives;
  - c. where the parties live;

- d. any financial implications of transferring a case from one court to another;
- e. the views of any children's guardian, social worker or children and family court reporter involved in the proceedings;
- f. any inconvenience to witnesses;
- g. any inconvenience to advocates or other professionals.

### **Transfer from family proceedings court to county court**

#### *Children – public law*

10. A family proceedings court may, upon application by a party or of its own motion, transfer public law proceedings to a county court where it considers it in the interests of the child to do so having regard to the following:
  - a. The general principle is that any delay is likely to prejudice the welfare of the child. Cases that will take longer than five consecutive days should be transferred. Cases of shorter duration for which a hearing on consecutive days cannot be arranged may be suitable for a lateral transfer or a transfer to the county court.
  - b. Whether the proceedings are exceptionally grave, important or complex, in particular because of:
    - i. Complicated, or conflicting evidence about the risks involved to the child's physical or moral well-being or about other matters relating to the welfare of the child, such as:
      - (1) non-accidental injury to a child for which the parents can give no proper explanation and where there is conflicting expert evidence as to the risk of returning the child to its parents;
      - (2) conflicting medical expert evidence;

- (3) cases relating to blood transfusions (e.g. local authority and parents in conflict);
- (4) cases where there are issues as to the legality of a foster placement;
- ii. The number of parties;
- iii. Conflict with the law or another jurisdiction (e.g. where the case has an international element such as involving issues relating to child abduction); or
- iv. Where there are criminal proceedings that are to be dealt with by the crown court;
- v. Some novel or difficult point of law;
- vi. Some question of general public interest (e.g. balancing the risk of returning a battered baby to its parents where they did not accept responsibility for the injuries);
- c. Whether it would be *appropriate for the proceedings to be heard together with other family proceedings pending in another court*,
- d. Whether *transfer is likely significantly to accelerate the determination of the proceedings* where:
  - i. no other method of doing so is appropriate, and
  - ii. delay would seriously prejudice the interests of the child.

#### *Children - private law*

11. A family proceedings court may transfer a private law case to a county court, where having regard to the delay principle, it is considered in the interests of the child that the proceedings can be dealt with more appropriately at the county court. However, a magistrates' court should not limit itself to the question of delay and preclude

itself from considering the interests of the child on an application for upward transfer.

12. Cases where transfer should be considered are:
  - a. any case involving permanent removal of the child from the jurisdiction;
  - b. any application made by the child for a residence, contact, specific issue or prohibited steps order or any private law application where the child is to be made a party to the proceedings and it is a case in which CAFCASS legal officers are likely to be involved;
  - c. any application by parents to have contact with their adopted child;
  - d. any case where the court will be required to balance the risk that the child would be damaged by not getting to know their father against the possible risk to the mother's health if contact takes place;
  - e. an application for leave to change a child's name without notice to the parents.

### **Transfer from county court to family proceedings court – children**

13. A care centre may transfer back to a family proceedings court any public law case where the relevant transfer criterion no longer applies.
14. A county court has power to transfer to magistrates any private law proceedings that have been commenced in a county court or to transfer back any private law proceedings that were commenced in the family proceedings court.

### **Refusal of transfer**

15. Where a family proceedings court refuses to transfer proceedings a party may apply to a care centre/county court for the proceedings to be transferred. The application is then heard afresh and the family proceedings court is notified of the outcome. If the application is granted the case is transferred to the higher court. If

the application is refused arrangements need to be made for the case to be re-listed for further directions to be made.

16. Where proceedings are commenced or transferred in contravention of these rules on allocation of proceedings, those proceedings are not invalidated.

## **SECTION 4 STARTING PROCEEDINGS**

### **APPLICATIONS**

1. Almost all applications must be in writing. They must identify who else is involved in the case, who needs to be a party to the proceedings and who needs notice that the case is going on.
2. The applicant must prepare the papers and bring or send them to the court. A court hearing must then be fixed giving the applicant enough time to get copies of the paperwork to everyone who needs to know about the case.
3. The applicant (or their solicitor) is responsible for notifying everyone of the application and the hearing.
4. Once the matter is before the court it may, of its own motion, often be able to make orders to protect the child and/or their parties. The legal adviser's advice should be sought.

### **THE RESPONSE (PRIVATE LAW CASES ONLY)**

5. Where there is an application for a residence, contact, special guardianship, specific issue or prohibited steps order, all respondents must prepare a written statement in answer to the application. Copies must be sent to the court and to all involved in the case. This document is called the 'response'.
6. In maintenance cases, both applicant and respondent must send in financial details in writing.

### **HEARINGS WITHOUT NOTICE**

7. A hearing without notice, also referred to as an ex parte hearing, is where the court hears only one side of the case when the other parties involved have not had notice of the hearing. In some emergency cases it is possible for courts to hear applications relating to prohibited steps or specific issues, or to make an

emergency protection order without the usual notice being given. Such applications are most often made at the start of a case. These orders may be made by the court or if a court is not sitting by a single magistrate. Because of the implications of the Human Rights Act 1998, hearings without notice occur only in exceptional cases and, if an order is made, it should be for the shortest period possible. With the exception of an emergency protection order, the order will invariably be followed by a hearing on notice to reconsider the application.

## **THE FIRST HEARING**

8. In both public and private law cases the first hearing may take place before a court or, where only procedural issues are to be decided, before a single magistrate or a legal adviser. It may be possible for the court to deal with the case at once. If this is not possible, a number of important questions must be decided. The first hearing can set the course of the case. The court's role as case manager starts here. Interim orders, until the matter can be finally resolved, may also have to be considered here. Such orders may have to be made or repeated at any stage throughout the proceedings. Reference should be made to *Section 5: Public law case management procedure* (see later) for a more detailed account of what happens at such hearings.

## **INTERIM HEARINGS**

### **Public law cases**

9. In public law proceedings it may be necessary to make interim care orders to safeguard the child or preserve the status quo while reports are being obtained, assessments made or statements of evidence prepared. An initial interim care order can last for up to eight weeks and subsequent orders for no more than four. There is no limit on the number of orders that can be made and a series of interim care orders may be required in a typical care case. Nonetheless their use should be monitored carefully to ensure that the case does not drift unacceptably. When an interim care order is made the court can also make the following order.

- a. Directions about the medical, psychiatric or other assessment of the child that can include directing the placement of the child and parent(s) in a specialised unit so that the parenting abilities of the mother and/or father can be assessed in a supervised setting.
- b. An exclusion requirement for a person to leave or not enter a house in which the child lives or not to enter a defined area in which the house is situated. The person who is to care for the child in the house must consent to the requirement being made. A power of arrest may also be attached.

### **Private law cases**

10. In any private law proceedings where a court has power to make a residence, contact, specific issue or prohibited steps order it may do so at any time during the course of the proceedings even though it is not in a position to dispose finally of those proceedings. Also the court may make orders to protect the children and parties from domestic violence. The order is usually made 'until the conclusion of the proceedings' and, although not strictly an interim order, it has the characteristics of such an order. It may sometimes be in the best interests of the child for a temporary residence order or contact order to be made pending the conclusion of the proceedings (e.g. to settle where the child should live while a CAFCASS report is being prepared or to test contact arrangements). Where a residence order is made parental responsibility vests automatically in the person the child resides with. The court should consider carefully whether that is appropriate in the interim and have in mind that the parental responsibility is coterminous with the residence order except in the case of a natural father who keeps it until further order.

## **SECTION 5 PUBLIC LAW CASE MANAGEMENT PROCEDURE**

### **INTRODUCTION**

1. In any case concerning a child's upbringing, the court must have regard to the general principle that any delay in reaching a decision is likely to prejudice the welfare of the child. Decisions of the European Court of Human Rights emphasise the need under Article 6 of the European Convention for 'exceptional diligence' in this context. The court is expected to facilitate the most effective means of ensuring that a case is fully prepared and dealt with at the earliest opportunity. Magistrates must, therefore, adopt a proactive approach to the issues in the case. Strong and effective case management is required throughout the proceedings in order to ensure that prompt and appropriate responses are given to any developments in the case.

### **PUBLIC LAW PROTOCOL**

2. This general emphasis on effective case management has recently been substantially re-enforced in public law proceedings by the Practice Direction, Principles and Protocol for Judicial Case Management in Public Law Children Act Cases 2003.
3. The Practice Direction (Care Cases: Judicial Continuity and Judicial Case Management 2003) states that:

‘The overriding objective is to enable the court to deal with every care case:

  - a. justly, expeditiously, fairly and with the minimum of delay;
  - b. in ways which ensure, so far as is practicable, that
    - i. the parties are on an equal footing;
    - ii. the welfare of the children involved is safeguarded; and

- iii. distress to all parties is minimised;
- c. so far as is practicable, in ways which are proportionate
  - i. to the gravity and complexity of the issues; and
  - ii. to the nature and extent of the intervention proposed in the private and family life of the children and adults involved.'
- 4. The court is required to give effect to this overriding objective and the parties are required to help the court to do so. The Practice Direction further recognises that:  
  
'One of the most effective means by which unnecessary delay can be avoided in care cases is by active case management by a specialist judiciary.'
- 5. The key principles identified as underlying judicial case management are:
  - a. judicial continuity;
  - b. active case management – each care case must be actively case managed with a view to furthering the overriding objective;
  - c. consistency by standardisation of steps – each care case is to be managed in a consistent way in accordance with standardised steps, procedures and forms set out in the Public Law Protocol;
  - d. the importance of the case management conference – in each care case there is a case management conference to enable the case to be actively managed.
- 6. Active case management can be demonstrated through various aspects of the proceedings, for example;
  - a. timetables and time targets,
  - b. directions,
  - c. conciliation/mediation,

- d. experts,
  - e. disclosure,
  - f. documentary evidence,
  - g. the case management conference,
  - h. the pre-hearing review,
  - i. the final hearing,
  - j. wasted costs
7. In care cases the Protocol emphasises the need for active case management at all stages. The approach of the court to case management is described in the Protocol where it states:
- ‘Active case management is to be achieved by giving directions to ensure that the determination of proceedings occurs quickly, efficiently and with the minimum of delay and risk to the child (and where appropriate other persons) by:
- a. Identifying the appropriate court to conduct the proceedings and transferring the proceedings as early as possible to that court.
  - b. Identifying all facts and matters that are in issue at the earliest stage and then at each case management step in the proceedings.
  - c. Deciding which issues need full investigation and hearing and which do not.
  - d. Considering whether the likely benefits of taking a particular social work or legal step justify the delay which will result and the cost of taking it.
  - e. Encouraging the parties to use an alternative dispute resolution procedure such as a family group conference and facilitating the use of such a procedure.

- f. Helping the parties to reach agreement in relation to the whole or part of a case, quickly, fairly and with the minimum of hostility.
  - g. Encouraging the parties to co-operate with each other in the conduct of the proceedings.
  - h. Identifying the timetable for all legal and social work steps.
  - i. Fixing the dates for all appointments and hearings.
  - j. Standardising, simplifying and regulating:
    - i. the use of case management documentation and forms.
    - ii. the court's orders and directions.
  - k. Controlling:
    - i. the use and costs of experts.
    - ii. the nature and extent of the documents which are to be disclosed to the parties and presented to the court.
    - iii. whether and if so in what manner the documents disclosed are to be presented to the court.
  - l. Monitoring the court's timetable and directions against target times for the completion of each Protocol step to prevent delay and non-compliance.'
8. Cases should be closely monitored to ensure that directions have been complied with. Prompt action should be taken whenever a time limit for compliance with a direction has not been met.

**TIMETABLES AND TIME TARGETS**

9. The Children Act 1989 imposes a duty on all courts dealing with applications concerning children to draw up a timetable in an effort to avoid delay likely to be prejudicial to the child.
10. In public law proceedings a detailed six step timetable with targets has been specified in the Protocol for Case Management in Public Law Children Act Cases. The Protocol is based on the belief that it is:  
  
‘... essential that unnecessary delay is eliminated and that better outcomes for children and families are thereby achieved’.
11. The Protocol sets a guideline of 40 weeks for the conclusion of care cases. However, it is recognised that while some cases may need that time, many more cases should take less. Only in exceptional or unforeseen circumstances should a case take longer than 40 weeks. On this basis the Protocol makes provision for the regulation of public law proceedings in accordance with the following six steps:
  - a. Step 1        The application (by day 3)
  - b. Step 2        The first hearing in the family proceedings court (by day 6)
  - c. Step 3        The allocation hearing and directions (by day 11)(county court only)
  - d. Step 4        The case management conference (between days 15 and 60)
  - e. Step 5        The pre-hearing review (by week 37)
  - f. Step 6        The final hearing (by week 40)
12. Timetabling should take place at the earliest opportunity so that the parties know what action needs to be taken up to the final hearing. Further hearings are to be avoided as far as possible.

13. Dates for interim hearings and each step in the Protocol should be fixed. Consideration should also be given to the attendance of witnesses, and experts. The parties may be directed to file a 'Statement of issues' – a summary identifying the main issues or concerns in the case. Once a timetable has been set it should be kept to and only departed from for good reason. The target times specified in the Protocol for the taking of each step should be adhered to wherever possible and treated as the maximum permissible time for the taking of that step. Target times should only be departed from at the direction of the court and for good reason in accordance with the overriding objective.

### **DIRECTIONS AT THE FIRST HEARING**

14. The Protocol gives a template that must be adopted for the case management of public law cases. It will be available to the bench at each hearing. It sets out what the bench should be considering at each stage of proceedings. At Appendix A/3 it has the Case Management Checklist that is to be followed at first hearings in family proceedings courts. It should be approached systematically. Directions to be considered include the following:
- a. the timetable for the proceedings – including interim hearings;
  - b. the appointment of a children's guardian or if one is not readily available a solicitor to act for the child from the list kept by the court for that purpose;
  - c. the joining of parties (e.g. an unmarried father or grandparent);
  - d. the service of documents and restricting service of further documents without permission;
  - e. the submission of evidence including experts' reports;
  - f. the transfer of the proceedings to another court;
  - g. consolidation with other proceedings;

- h. the variation of the time limits stipulated in the Rules for action to be taken;
- i. the attendance of the child;
- j. the fixing of a date for an advocates' meeting.

15. If appropriate directions are made time wasting and delay should be avoided.

### **EXPERTS IN PUBLIC AND PRIVATE LAW CASES**

16. In all cases under the Children Act 1989 it is for the court to give permission for the instruction of experts. Experts should only be instructed when relevant and necessary for the welfare of the child. Expert evidence should be proportionate to the issues in question and should relate to questions that are outside the skill and experience of the court. The code of guidance for the appointment and use of expert witnesses is set out in Appendix C of the Protocol.

### **DISCLOSURE**

17. Disclosure of relevant documents should be encouraged at the earliest opportunity. Where disclosure is in issue the court will have regard to whether the disclosure proposed is proportionate to the issues in question and the continuing duty of each party to give full and frank disclosure of information to each other and the court.

### **DOCUMENTARY EVIDENCE**

18. Bundles of evidence should be prepared paginated, indexed and accompanied by a chronology, and filed before the final hearing. In a contested case the parties should be directed to provide:

- a. skeleton arguments,
- b. a statement of agreed facts,
- c. a statement of facts in dispute/issues,

- d. a statement identifying the facts relied on to satisfy the threshold criteria (if applicable).

### **THE CASE MANAGEMENT CONFERENCE**

19. In a care case, the target time for the case management conference is between day 15 and 60. The date should have been fixed at the first hearing. Its objective is to consider case management directions and the timetable. At the case management conference the following matters are considered:

- a. the schedule of issues,
- b. the case management checklist, questionnaires and documents provided for in the Public Law Protocol,
- c. the timetable for the final hearing and pre-hearing review,
- d. time estimates for witnesses, final hearing, etc.,
- e. any necessary case management directions concerning disclosure, experts, bundles,
- f. monitoring compliance with previous case management directions.

### **THE PRE-HEARING REVIEW**

20. At a pre-hearing review those involved in the case are expected to ensure that:

- a. the issues in the case to be addressed at the final hearing are clearly identified;
- b. the evidence to address those issues is available or will be available in time for the final hearing;
- c. expert witnesses have been sent or will be sent all relevant material which has emerged since their reports were written;
- d. the witnesses required to give evidence at the hearing have been identified;

- e. the time required for each witness to give evidence has been estimated;
  - f. the witnesses have been timetabled;
  - g. the expert witnesses have been given specific dates and times for their evidence;
  - h. the documents required are in good order and bundled appropriately with a chronology;
  - i. the guardian's report will be available for the final hearing;
  - j. appropriate reading time and time for recording reasons has been given to the justices.
21. Appropriate and accurate time estimates will enable the court to make arrangements to stagger the attendance of the witnesses and to manage the final hearing effectively.
22. In a care case, the time target for the pre-hearing review is by no later than week 37. Its objective is to identify or narrow the issues and ensure an effective final hearing takes place.

### **THE FINAL HEARING**

23. At the final hearing the parties should be directed to attend court at least one hour before the scheduled time for the hearing. By making provision for a pre-hearing meeting in this way it is hoped that the issues in dispute may be further reduced or resolved. Furthermore, it establishes an expectation that the hearing itself will start on time.
24. The court is expected to adopt a proactive approach throughout the hearing. Time-wasting practices are to be prevented. Any statements filed should stand as evidence in chief, i.e. without the witness having to repeat the contents of the

statement. Examination in chief should, therefore, be confined to clarifying the statement or bringing it up to date.

25. Much of the evidence will be in written statements or reports. Magistrates must read these documents before the hearing starts. Once filed, a document may only be amended with the leave of the court.
26. The court can decide the order of the speeches etc. Generally the applicant will begin, followed by those with parental responsibility, anyone else who is a respondent (in care cases), the children's guardian and finally (if appropriate and very rarely) the child.
27. The legal adviser must note any oral evidence. Generally all matters raised in oral evidence must have been disclosed in written statements sent to everyone before the hearing.
28. The legal adviser, in consultation with the magistrates, must draw up a statement of the reasons for the court's decision and any relevant findings of fact. This document must be prepared before the decision is announced. The chairman must read out the findings of fact and reasons when giving the court's decision.

## **COSTS**

29. The court has power after hearing representations to make orders for costs against any party or their legal representative. Costs orders in family proceedings are, however, unusual.

## **SECTION 6 PUBLIC LAW ORDERS**

### **INTRODUCTION**

1. In any family proceedings the court has wide powers to make whatever order it regards as appropriate. For example, if in an application for a interim care order the court considers that a mother needs to be protected from domestic violence, it may grant a non-molestation order. The parties must always be given notice of the type of order that the court is considering and a bench should always take advice from its legal adviser before adopting such a course.

### **CARE PLANS**

2. These documents, in many ways lying at the heart of public law proceedings, are prepared by local authorities following government guidance.
3. Local Authority Circular, LAC(99)29 Care Plans and Care Proceedings under the Children Act 1989, offers a structure for care plans which is divided into five sections:
  - a. Overall aims
  - b. The child's needs
  - c. The views of others (e.g. parents)
  - d. Placement details and timetable
  - e. Details of the management and support to be provided.
4. The care plan does not form part of any order to be made by the court, but before the court makes a care or supervision order it must be satisfied that the care plan put forward is formulated in the best interests of the child. No care order can be made until the court has considered a care plan. The court is powerless to order a change in the care plan, but in the spirit of working together a local authority should

be prepared to modify a care plan if the court expresses serious reservations about it. The court can consider adjourning a case on the basis of interim orders in order to allow a local authority to consider its position.

### **TYPES OF CHILD PROTECTION ORDERS**

5. There are three types of order that can be considered by the court in cases where a child needs urgent protection:
  - a. a child assessment order (CAO)
  - b. an emergency protection order (EPO)
  - c. a recovery order (RO).

### **CHILD ASSESSMENT ORDER**

6. A child assessment order authorises a medical, psychiatric or other assessment of a child. It requires any person able to do so to produce the child to a person named in the order and to comply with any directions in the order relating to the arrangements for the assessment.
7. Only a local authority, the NSPCC or other 'authorised person' can apply.
8. The applicant has to do what is reasonably practicable to ensure that notice of the application is given to the child, their parents, carers and anyone with parental responsibility, or a contact order.
9. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
10. The child's welfare is the court's paramount consideration but the court does not have to apply the welfare checklist.
11. The court should not make an order unless to do so would be better for the child.
12. The court can make a child assessment order if it is satisfied that:

- a. the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm; *and*
  - b. an assessment is required to enable the applicant to determine this question; *and*
  - c. it is unlikely that such an assessment will be made (or be satisfactory) in the absence of an order.
13. If the court is satisfied that there are grounds for an emergency protection order and decides that it ought to make such an order it must not make a child assessment order and may make an emergency protection order instead.
  14. If necessary, the order can include a direction that the child lives away from home for a specified period while undergoing the assessment and contact may also be regulated during this time.
  15. Although the order authorises any person carrying out the assessment to do so in accordance with the terms of the order if the child is of sufficient understanding to make an informed decision they can refuse to submit to the assessment.
  16. The order lasts for a maximum of seven days from a date specified in the order and there can be no further application for a child assessment order within six months without the leave of the court.
  17. Persons specified in the Rules and anyone entitled to notice can apply for variation or discharge of the order.

### **EMERGENCY PROTECTION ORDER**

18. Where it appears that a child is at risk of harm an application may be made for an emergency protection order in order to ensure the child's short-term safety. The serious nature of this order must be emphasised. If immediate separation of parent and child is contemplated to secure the child's safety, imminent danger must be established.

19. While the Rules provide for one day's notice of the application it may, with leave, be made with less notice. For it to be made without any notice at all requires the leave of a Justices' Clerk or legal adviser. Applications to shorten notice should be carefully scrutinised. A without notice application may be considered by a single justice, who may grant or refuse the application. Either a court or single justice hearing a without notice application may direct that it will be heard on notice.
20. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
21. A full note of everything said at the hearing should be taken.
22. Anyone can apply for an order (including a local authority, an authorised person such as the NSPCC or a police officer). However, the grounds for making the order differ according to the *type* of applicant:

<b>Type of applicant</b>	<b>Grounds for making the order</b>
Any person	There is reasonable cause to believe that the child is likely to suffer significant harm if they are not removed or do not remain where they are.
A local authority	Enquiries are being made about the child and those enquiries are being frustrated by access being unreasonably refused and access is required urgently.
An authorised person	The applicant has reasonable cause to suspect that a child is suffering, or is likely to suffer, significant harm and the applicant is making enquiries and those enquiries are being frustrated by access being unreasonably refused and access is required urgently.

23. The child's welfare is the paramount consideration but the welfare checklist does not have to be taken into account. However consideration should always be given to the guidance issued in *X County Council v B* [2005] and *Re X* [2006] namely:
- a. An emergency protection order, summarily removing a child from his parents, is a 'draconian' and 'extremely harsh' measure, requiring 'exceptional justification' and 'extraordinarily compelling reasons'. Such an order should not be made unless the court is satisfied that it is both necessary and proportionate and that no other less radical form of order will achieve the essential end of promoting the welfare of the child. Separation is only to be contemplated if immediate separation is essential to secure the child's safety: 'imminent danger' must be 'actually established'.
  - b. Both the local authority which seeks and the court which makes an order assume a heavy burden of responsibility. It is important that both the local authority and the court approach every application with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the European Convention rights of both the child and the parents.
  - c. Any order must provide for the least interventionist solution consistent with the preservation of the child's immediate safety.
  - d. If the real purpose of the local authority's application is to enable it to have the child assessed then consideration should be given to whether that objective cannot equally effectively, and more proportionately, be achieved by an application for, or by the making of, a child assessment order.
  - e. No order should be made for any longer than is absolutely necessary to protect the child. Where the order is made on a without notice application very careful consideration should be given to the need to ensure that the initial order is made for the shortest possible period commensurate with the preservation of the child's immediate safety.

- f. The evidence in support of the application for an order must be full, detailed, precise and compelling. Unparticularised generalities will not suffice. The sources of hearsay evidence must be identified. Expressions of opinion must be supported by detailed evidence and properly articulated reasoning.
- g. Save in wholly exceptional cases, parents must be given adequate prior notice of the date, time and place of any application by a local authority. They must also be given proper notice of the evidence the local authority is relying upon.
- h. Where the application is made without notice the local authority must make out a compelling case for applying without first giving the parents notice. A without notice application will normally be appropriate only if the case is genuinely one of emergency or other great urgency – and even then it should normally be possible to give some kind of albeit informal notice to the parents – or if there are compelling reasons to believe that the child’s welfare will be compromised if the parents are alerted in advance to what is going on.
- i. The evidential burden on the local authority is even heavier if the application is made without notice. Those who seek relief without notice are under a duty to make the fullest and most candid and frank disclosure of all the relevant circumstances known to them. This duty is not confined to the material facts: it extends to all relevant matters, whether of fact or of law.
- j. The court can hear oral evidence. But it is important that those who are not present should nonetheless be able to know what oral evidence and other materials have been put before the court. The court must ‘keep a note of the substance of the oral evidence’ and must also record in writing not merely its reasons but also any findings of fact.
- k. The local authority, subject only to any direction given by the court, to allow a child who is subject to an order ‘reasonable contact’ with his parents.  
Arrangements for contact must be driven by the needs of the family, not stunted

by lack of resources. The court needs to be aware of this when considering any directions in relation to contact.

24. The court should not make an order unless to do so would be better for the child.
25. The order lasts for a specified period not exceeding eight days, which can be extended once for up to seven days. In view of the serious nature of the order it should be made for the shortest period possible.
26. The order authorises the applicant to remove the child to (or to keep them in) a safe place.
27. The order gives the applicant limited parental responsibility in order to safeguard or promote the child's welfare.

#### **Emergency protection order – exclusion requirement**

28. An exclusion requirement can be included in the order where:
  - a. there is reasonable cause to believe that if a particular person is excluded from the house where the child lives they will not be likely to suffer significant harm or the enquiries will cease to be frustrated; and
  - b. another person living in the house (whether a parent of the child or some other person) is able and willing to look after the child and consents to the making of the exclusion requirement.
29. An exclusion requirement is any one or more of the following:
  - a. a provision requiring the relevant person to leave a house in which they are living with the child;
  - b. a provision prohibiting the relevant person from entering a house in which the child lives; and

- c. a provision excluding the relevant person from a defined area around the house in which the child lives.
30. The exclusion requirement may be for a shorter period than the other provisions of the order. The court may also attach a power of arrest to the exclusion requirement.
31. The court also has power to order a named person to disclose where the child is or to allow the applicant to enter specified premises in order to search for the child. A warrant authorising the assistance of a police officer may be issued if entry is likely to be refused.
32. On making the order the court can give directions concerning contact, the medical or psychiatric examination or other assessment of the child and whether a doctor, nurse or health visitor should accompany the applicant.
33. An application to discharge the order may be heard when at least 72 hours have expired since the making of the order. An application to discharge is not, however, permitted where the order has been extended or the applicant had notice of and was present at the hearing when the original order was made.

### **RECOVERY ORDER**

34. A recovery order ensures that a child who is in care, under police protection or the subject of an emergency protection order and is missing is recovered.
35. A person with parental responsibility by virtue of an emergency protection order or a care order or, where the child is under police protection, a designated officer may apply for an order.
36. The child's welfare is the paramount consideration but the welfare checklist does not have to be taken into account.
37. The court should not make an order unless to do so would be better for the child.

38. The court may make an order where it has reason to believe that the child:
- a. has been unlawfully taken or kept away from the responsible person who has care of the child by virtue of a care order, emergency protection order or police protection;
  - b. has run away or is staying away from the responsible person; or
  - c. is missing.
39. A recovery order:
- a. operates as a direction to any person who is in a position to do so to produce the child on request to any authorised person;
  - b. authorises the removal of the child by any authorised person;
  - c. requires any person who has information as to the child's whereabouts to disclose that information, if asked to do so, to a constable or an officer of the court;
  - d. authorises a constable to enter any premises specified in the order and search for the child, using reasonable force if necessary .
40. A recovery order is open-ended. It remains in force until the child is recovered or the order is discharged.

### **POLICE PROTECTION**

41. In addition to the powers of the court considered above, the police also have powers to take urgent steps to protect a child for up to 72 hours. As soon as practicable after taking a child into police protection the police officer concerned shall:
- a. inform the relevant local authority;
  - b. inform the child (if they appear capable of understanding) of the action taken and what further action is intended;

- c. take such steps as are reasonably practicable to discover the wishes and feelings of the child;
- d. ensure that the case is enquired into by the 'designated officer';
- e. secure the child's accommodation in either local authority accommodation or a refuge if they are not already so accommodated. The local authority is under a duty to receive and provide accommodation for such children and 'certified' safe houses can now legally provide accommodation for children;
- f. inform the child's parents (and anyone with parental responsibility for the child) and any other person with whom the child was living immediately before being taken into police protection, of the action taken and any further action planned.

## **CARE AND SUPERVISION PROCEEDINGS**

### **INTERIM CARE ORDER**

- 42. An interim care order enables the court to safeguard the welfare of a child until such time as the court is able to decide whether or not it is in the best interests of the child to make a care order. An interim care order establishes a holding position, after weighing all the relevant risks, pending the final hearing.
- 43. A local authority, the NSPCC or other 'authorised person' may apply.
- 44. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child. A solicitor must be appointed for the child.
- 45. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.
- 46. The court should not make an order unless to do so would be better for the child.
- 47. The court can make an interim care order when:
  - a. adjourning an application for a care or supervision order; or

- b. when making a 'section 37' direction to investigate a child's circumstances.
48. The court may only make an interim order if it is satisfied that there are reasonable grounds for believing that:
- a. that the child concerned is suffering, or is likely to suffer, significant harm; and
  - b. that the harm, or likelihood of harm, is attributable to:
    - i. the care given to the child, or likely to be given to them if the order were not made, not being what it would be reasonable to expect a parent to give to them; or
    - ii. the child's being beyond parental control.
49. The order places the child in the care of the local authority and gives the local authority parental responsibility for them. The authority must accommodate and maintain the child.
50. While the interim care order is in place there is a presumption that the child will have reasonable contact with their parents, any guardian or anyone who had a residence or High Court order to care for the child immediately before the making of the care order. The court is under a duty to consider the arrangements for contact and to hear representations from the parties before making orders regulating or refusing contact.
51. When it makes an interim order the court has the power to make directions concerning the medical or psychiatric examination or other assessment of the child. If the child is of sufficient understanding to make an informed decision they can refuse to submit to the examination or assessment.

*Interim care order – exclusion requirement*

52. Where the court makes an interim care order, the court may include an exclusion requirement in the order if:

- a. there is reasonable cause to believe that, if a particular person is excluded from a house in which the child lives, the child will cease to suffer, or cease to be likely to suffer, significant harm; and
  - b. another person living in the house (whether a parent of the child or some other person) is able and willing to look after the child, and consents to the making of the exclusion requirement.
53. An exclusion requirement is any one or more of the following:
- a. a provision requiring the relevant person to leave a house in which they are living with the child;
  - b. a provision prohibiting the relevant person from entering a house in which the child lives; and
  - c. a provision excluding the relevant person from a defined area around the house in which the child lives.
54. The exclusion requirement may be for a shorter period than the other provisions of the order. The court may also attach a power of arrest to the exclusion requirement.
55. An interim care order can initially be made for up to eight weeks with further orders of up to four weeks (longer if the first order was for less than four weeks). There is no limit to the number of orders that can be made.
56. When determining the length of the order the court must consider whether any party who was or might have been opposed to the making of the order has been able to argue their case fully.

**CARE ORDER**

57. A care order places a child in the care of the local authority and requires the authority to accommodate and maintain the child. It also gives the local authority parental responsibility for the child.
58. A local authority, the NSPCC or other 'authorised person' may apply.
59. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.
60. The court should not make an order unless to do so would be better for the child.
61. A court may only make a care order if it is satisfied:
- a. that the child concerned is suffering, or is likely to suffer, significant harm; and
  - b. that the harm, or likelihood of harm, is attributable to:
    - i. the care given to the child, or likely to be given to them if the order were not made, not being what it would be reasonable to expect a parent to give to them; or
    - ii. the child's being beyond parental control.
62. Any local authority looking after a child is required to make arrangements for them to live with or near their family unless it is not reasonably practicable and consistent with the welfare of the child.
63. The local authority acquires parental responsibility for the child which it shares with the parents. However, it can determine how a parent or guardian exercises parental responsibility in order to safeguard the child's welfare.
64. There are some statutory limitations on the local authority's powers: for example, it may not change a child's religious upbringing; it cannot give/withhold consent to adoption; it cannot appoint a guardian. It can only change a child's surname or take

the child out of the UK with the court's permission or with the consent of all those with parental responsibility.

65. Before making a care order the court must consider the arrangements that the local authority has made, or proposes to make, for contact with the child and invite the parties to the proceedings to comment on them.
66. While the care order exists there is a presumption that the child will have reasonable contact with their parents, any guardian or anyone who had a residence or High Court order to care for the child immediately before the making of the care order. Decisions about contact, its frequency, duration and possible termination can only be made by the court.
67. A care order lasts until the child's 18th birthday unless it is brought to an end before that date.
68. A care order is discharged by:
  - a special guardianship order
  - b an adoption order
  - c a residence order
  - d a supervision order
  - e an application for the discharge of the order being granted.

On the making of a placement order a care order is suspended.

### **Contact with children in care**

69. There is a presumption that a child in care will be allowed reasonable contact with parents, any guardian or anyone who had a residence or High Court order to care for the child immediately before the care order was made. As a matter of urgency, however, the local authority may withhold contact for a period of up to seven days if it is satisfied that it is necessary to do so to safeguard or promote the child's

welfare. Where there are disputes as to contact with children in care an application must be made to the court.

70. A child is 'in care' if they have been placed in the care of the local authority by virtue of a care order (whether an interim or final order) made by a court.
71. The following have a right to apply for an order allowing contact:
- a. the child or the local authority;
  - b. the child's parent or guardian;
  - c. the person in whose favour a residence order existed immediately prior to the making of the care order;
  - d. any person who immediately before the making of the care order had care of the child by virtue of an order of the High Court under its inherent jurisdiction.
72. Anyone else can apply for contact with the leave of the court.
73. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
74. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.
75. The court should not make an order unless to do so would be better for the child.
76. Before making an interim or final care order the court must consider the arrangements that the local authority has made or proposes to make for contact with the child and invite the parties to comment on them.
77. When making a care order or dealing with a case involving a child in care the court can make an order concerning contact with a child in care even though no application for such an order has been made.

78. The court has a wide discretion as to whether or not it makes an order and, if so, on what terms.
79. The court can impose such conditions as it considers appropriate on the order.
80. The order lasts until the child reaches the age of 18 or the date specified in the order unless it is discharged before that date.
81. The child, local authority or person named in the order may apply for variation or discharge.
82. The contact order ceases to have effect once the child is no longer in care and is, therefore, discharged by the making of a residence order.
83. If an application for contact has been refused the applicant cannot make a further application for six months unless the leave of the court is obtained.

#### **INTERIM SUPERVISION ORDER**

84. An interim supervision order enables the court to safeguard the welfare of a child until such time as the court is able to decide whether or not it is in the best interests of the child to make a supervision order. An interim supervision order establishes a holding position, after weighing all the relevant risks, pending the final hearing.
85. A local authority, the NSPCC or other 'authorised person' may apply.
86. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
87. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.
88. The court should not make an order unless to do so would be better for the child.
89. The court can make an interim supervision order when:
  - a. adjourning an application for a care or supervision order; or

- b. making a 'section 37' direction to investigate a child's circumstances.
90. The court must make an interim supervision order when it makes a residence order in care proceedings unless the child's welfare will be sufficiently safeguarded without one.
91. The court may only make an interim supervision order if it is satisfied that there are reasonable grounds for believing that:
- a. the child concerned is suffering, or is likely to suffer, significant harm; and
  - b. the harm, or likelihood of harm, is attributable to:
    - i. the care given to the child, or likely to be given to them if the order were not made, not being what it would be reasonable to expect a parent to give to them; or
    - ii. the child's being beyond parental control.
92. When it makes an interim supervision order the court has the power to make directions concerning the medical or psychiatric examination or other assessment of the child. If the child is of sufficient understanding to make an informed decision they can refuse to submit to the examination or assessment.
93. An interim supervision order can initially be made for up to eight weeks with further orders of up to four weeks (longer if the first order was for less than four weeks). There is no limit to the number of orders that can be made.
94. When determining the length of the order the court must consider whether any party who was or might have been opposed to the making of the order has been able to argue their case fully.

### **SUPERVISION ORDER**

95. A supervision order places the child under the supervision of a designated local authority or officer such as a social worker or probation officer.

96. A local authority, the NSPCC or other 'authorised person' may apply.
97. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
98. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.
99. The court should not make an order unless to do so would be better for the child.
100. A court may only make a supervision order if it is satisfied that:
- a. the child concerned is suffering, or is likely to suffer, significant harm; and
  - b. the harm, or likelihood of harm, is attributable to:
    - i. the care given to the child, or likely to be given to them if the order were not made, not being what it would be reasonable to expect a parent to give them; or
    - ii. the child's being beyond parental control.
101. The supervisor is under a duty:
- a. to advise, assist and befriend the supervised child;
  - b. to take such steps as are reasonably necessary to give effect to the order; and
  - c. where:
    - i. the order is not wholly complied with; or
    - ii. the supervisor considers that the order may no longer be necessary,
  - d. to consider whether or not to apply to the court for its variation or discharge.
102. The court can include directions in the supervision order requiring the child and 'the responsible person' to act in a particular way.

103. A court shall not include in the order a requirement concerning the examination or treatment of a child unless it is satisfied that where the child has sufficient understanding to make an informed decision they consent to its inclusion and satisfactory arrangements have been made for the examination or treatment.

104. The order initially lasts for up to one year and it may be extended or further extended. The maximum length of the order is three years.

105. The order cannot continue after the child's 18th birthday.

106. The order can be discharged by:

- a. a care order;
- b. an application for discharge made by the child, any person with parental responsibility or the supervisor being granted.

### **EDUCATION SUPERVISION ORDER**

107. An education supervision order places a child under the supervision of a designated local education authority.

108. The local education authority must consult the appropriate local authority before making an application.

109. The child's welfare is the court's paramount consideration and the court has to apply the welfare checklist.

110. The court should not make an order unless it thinks that to do so would be better for the child.

111. The court must be satisfied that the child is of compulsory school age and is not being properly educated.

112. An education supervision order cannot be made in respect of a child in local authority care, although it can co-exist with a supervision order.

113. The supervisor is under a duty to advise, assist and befriend, and to take such steps as are reasonably necessary to give effect to the order.
114. The child, and the parent(s) (if asked), may be required to keep the supervisor informed of any change of address and to allow the supervisor to visit the child wherever they are living.
115. If directions are not complied with the supervisor must consider what further steps to take in the exercise of the powers under the Act.
116. If the child persistently fails to comply with any direction given under the order the local education authority must notify the local authority who must investigate the circumstances of the child.
117. A parent who persistently fails to comply with a direction given under an education supervision order is guilty of an offence.
118. The order lasts for one year but it may be extended for up to three years and there can be more than one extension.
119. The order automatically ceases on the making of a care order or when the child reaches school-leaving age.
120. The child, parent or the local educational authority can apply for the order to be discharged.

### **SECURE ACCOMMODATION ORDER**

121. A secure accommodation order restricts the liberty of a child being looked after by a local authority by placing or keeping the child in secure accommodation.
122. The local authority looking after the child or the health authority, National Health Service trust or local education authority providing the child with accommodation may apply for such an order.

123. The child and all those with parental responsibility should be notified of the application.
124. A children's guardian should be appointed unless it is not necessary to do so to safeguard the interests of the child.
125. An order may be made where it appears that the child:
- a. has a history of absconding and is likely to abscond from any other type of accommodation and, if they abscond, are likely to suffer significant harm; or
  - b. is likely to self-injure or injure others if kept in any other type of accommodation.
126. Where the court finds the criteria satisfied it is required to make an order. The welfare principle and the welfare checklist do not apply.
127. The order should be for no longer than is necessary. The court must make findings of fact and give reasons for the length of the order made.
128. A child may be kept in secure accommodation for a maximum of 72 hours without a court order but if longer is required an application to the court must be made.
129. The court may make an order for up to three months on a first application and up to six months on any further application.
130. An order cannot be made unless the child is legally represented or has been told about the right to apply for legal representation and has refused or failed to apply.
131. A child under 13 cannot be placed in secure accommodation without the approval of the Secretary of State.

## SECTION 7 PUBLIC LAW – A STRUCTURED APPROACH

*The following points need to be taken into account at the hearing.*

### THE THRESHOLD CRITERIA

1. All applications for care or supervision orders have to be considered in two stages. The applicant must first establish on a balance of probabilities that the threshold criteria have been met. Without that no care or supervision order can be made. The court will only be able to make a care or supervision order if it is satisfied that, at the time the local authority took action to protect the child (either by direct intervention or by making its application for the care order):
  - a. the child was suffering/likely to suffer significant harm; and
  - b. the harm/likely harm was attributable to:
    - i. either the care (or likely care if no order were made) not being what it would be reasonable to expect of a parent; or
    - ii. the child being beyond parental control.

These are known as the ‘threshold criteria’.

2. The final hearing of an application is a two-stage process:
  - a. Are the threshold criteria satisfied? During this first stage the court is concerned with making findings of fact and assessing whether the criteria are satisfied. The child’s welfare at this stage is not the court’s paramount consideration.
  - b. What order, if any, should be made? If the threshold criteria are satisfied how should the case be disposed of? Should the court make a care order, some other order or no order? This stage involves the exercise of discretion and the child’s welfare is now the court’s paramount consideration and the welfare checklist must now be addressed.

**ISSUES BEFORE THE COURT**

3. The court will usually be asked by the local authority to find the threshold criteria satisfied and then make a care order within the context of a single hearing. Nonetheless the court must still adopt the two-stage process described above even though its facts and reasons will be contained in one document.
4. In some cases, however, the parents concede that the threshold criteria are satisfied on the basis of facts agreed by all parties and filed at or before the hearing. Nevertheless, the court must satisfy itself that the evidence before it proves the facts that establish the threshold criteria and state the findings in their reasons. In cases where concessions are made they can be taken as having evidential value and a contested hearing will not be necessary.
5. In cases where concessions are made they should be recorded in writing and kept on the court file.
6. Conversely, the court may be invited only to decide whether the threshold criteria are met and in doing so the court will only deal with the first stage of the process. It is for the court to decide if such an approach is appropriate. The most common basis for such applications is the wish of a party to have the facts established in order to form the basis of an assessment of the parents or the child. Alternatively, a parent may wish to have the local authority's case tested without waiting for the sometimes protracted assessments to be concluded.
7. If the court finds the threshold established at such a 'split hearing', it will almost invariably adjourn the care application to a later date so that assessments can be made, reports obtained, a care plan drawn up and further evidence filed. Whilst the court at the case management conference will have tried to anticipate the need for further reports, etc. so as to avoid delay, it may be necessary to give further directions at the end of the 'threshold hearing'. It is essential that the same bench deals with the final hearing

**BEFORE AND DURING THE HEARING****Read the evidence prior to the hearing**

8. Before the hearing the magistrates will receive, and should read, an indexed bundle prepared by the local authority which contains copies of some or all of the following:
  - a. the application for the care order;
  - b. the case synopsis prepared by the local authority;
  - c. a chronology of significant events;
  - d. a schedule of facts alleged by the local authority that, if proved, are likely to satisfy the ‘threshold criteria’;
  - e. a statement from every respondent stating their position in relation to the local authority’s allegations;
  - f. interim orders made and directions given during the course of the proceedings;
  - g. statements of the local authority’s witnesses;
  - h. social worker’s reports and assessments;
  - i. the local authority’s care plan for the child – namely its proposals for the child’s future if a care order is made, such as adoption;
  - j. statements of the respondents themselves (usually the parents) and their witnesses;
  - k. medical and other reports;
  - l. the report of the children’s guardian.

**Establish the issues before the court**

9. If the issues the court is being asked to decide are not clear from the paperwork supplied, the court must first establish what issues it is in fact being asked to decide and whether the threshold criteria are conceded. Is the court to undertake a 'split hearing'? (Split hearings can have serious disadvantages and the advice of the legal adviser should be sought.)

**Hear the oral evidence**

10. First, the applicant opens the case.
11. The parties give their evidence in the following order unless the court directs otherwise:
  - a. the applicant (usually the local authority);
  - b. respondents with parental responsibility (usually the parents);
  - c. other respondents (e.g. grandparents);
  - d. the children's guardian;
  - e. the child, if appropriate (this is very rare).
12. The written statement of a witness forms the basis of their examination in chief though the supplemental questions may be asked by their advocate. The witness is cross-examined by the other parties and, if necessary, re-examined by their advocate.
13. Closing speeches are made in the following order unless the court directs otherwise:
  - a. the respondents,
  - b. the applicant,

- c. the children's guardian.
14. Not every witness who has made a written statement will give oral evidence as their evidence may be unchallenged.
  15. Evidence that has not been supplied in advance of the hearing in the form of a written statement or document may only be given with the leave of the court. Such leave is generally given if the evidence appears relevant.
  16. Hearsay evidence is admissible but, as it cannot be challenged by cross-examination, the court must carefully consider what weight to attach to it.

**Make findings of fact**

17. What findings need to be made?
  - a. Findings need to be made which are relevant both to the threshold criteria (the first stage) and the final disposal of the case (the second stage). Carefully peruse the schedule of alleged facts that the local authority asks the court to find proved and remember that the court may need to make orders under the Children Act 1989 (e.g. residence or contact order) even if the threshold criteria are not met and it cannot make a care order or supervision order.
18. How should the findings be made?
  - a. Evidence which has been read and heard must first be carefully weighed and evaluated.
  - b. Set out the relevant facts in chronological order or under convenient headings. A structured decision-making form is available and included in *Section 14: Reasons and welfare checklists*, see later.
  - c. It should be made clear what facts are not in dispute and what facts are disputed.

- d. Findings on disputed issues should be made and an explanation given as to why particular evidence has been accepted or rejected.
19. Which party must establish the threshold criteria?
- a. The burden of proof rests with the local authority.
20. What is the standard of proof?
- a. The standard of proof is the normal civil standard on the balance of probabilities. The court should have in mind, to whatever extent is appropriate in a particular case, that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence before the court concludes that it occurred on a balance of probability.
21. What is significant harm?
- a. The word 'significant' has its ordinary dictionary meaning. 'Harm' is very widely defined. It covers all forms of physical, sexual, emotional and other non-physical abuse as well as impairment of health or significant impairment of any aspect of child development. It can include impairment suffered from seeing or hearing the ill-treatment of another.
22. What is the likelihood of harm?
- a. It is a real possibility of harm and must be based on actual facts rather than suspicions, although it is not necessary to prove actual harm has occurred.

**Decide whether the threshold criteria are satisfied**

23. On the basis of the facts found by the court, are the threshold criteria satisfied? Reasons must be given to support the decision. If the threshold criteria are not satisfied the application for the care order will fail but the court may be asked to make other Children Act orders.

**Decide what order, if any, to make**

24. If the threshold criteria are satisfied the court should move to the second stage – the disposal of the case. The court must consider at this stage the paramount welfare of the child. It may make a care order or a supervision order, but must consider and record the range of powers available to the court and not just the orders that the local authority ask it to make. In its exercise of this discretion the court must:
- a. remember that the child’s welfare is its paramount consideration;
  - b. have regard, in particular, to the welfare checklist;
  - c. have regard to the general principle that delay is likely to prejudice the child’s welfare;
  - d. not make any order unless it is better for the child than making no order at all;
  - e. consider the implications of the Human Rights Act 1998. (A local authority has a duty to support and eventually to reunite a family unless the risks are so high that the child’s welfare requires alternative care.)
25. Before making a final decision on the care application the court must:
- a. Have all the information it needs to make a final decision. In rare cases where it does not, it may have to adjourn the case and, if it does, it can make an interim order if appropriate. Reasons must be given for the adjournment if it is opposed by any party.
  - b. Approve the local authority care plan. It should be carefully scrutinise the care plan. In rare cases where the court does not think the plan is in the best interests of the child it should ask the local authority to reconsider it and, if it does the court may make an interim order if appropriate. Reasons must be given for the court’s decision.

26. In deciding how to dispose of the case finally the court should adopt the following approach:
- a. Apply the findings of fact to every section of the welfare checklist.. The list provides a very useful guide to the court in deciding what factors are relevant and what order, if any, will most promote the child's welfare: for example, What are the wishes of the child? What harm have they suffered or are likely to suffer? What are their needs and who might best meet them? In answering some of these questions the court is looking to the future and must base its assessments as to the risk of future harm, etc. on actual facts rather than suspicions. Facts short of the occurrence of past harm can nevertheless, in an appropriate case, demonstrate that future harm is likely.
  - b. When considering the range of powers available to the court the court should first consider the likely effect on the child of making 'no order' and decide whether it is better for the child if some order is made: for example, no order may mean that the child is returned to a household where they have been or are likely to be abused. The court should then go on to consider the effect on the child of not just the care order but all other available orders that might be relevant to the particular circumstances of the case.
  - c. Take into account any other factors identified by the court that it considers are relevant to the final disposal of the case.
  - d. Balance all the relevant factors such as those which point towards or away from a particular disposal, apply the paramountcy test, i.e. what best promotes the child's welfare, and decide what order, or orders, if any should be made. Reasons which justify the court's decision will have to be given.
  - e. Ensure that the court's decision is compatible with the Human Rights Act 1998. All Children Act orders, to differing degrees, engage Article 8 and the making of a care order is an obvious interference with the exercise of the rights of the

parents (or other carers) and child to respect for their family life. The court's decision must therefore:

- i. Be in accordance with the law. Any Children Act order will meet this requirement.
- ii. Pursue a legitimate aim, i.e. it must be necessary. The respective rights of parents (or other carers) and the child must be balanced and a care order may be necessary to protect a child's health and their right to a stable and secure future.
- iii. Be the minimum interference necessary to secure the legitimate aim and thus be proportionate and fair.

Finally

27. Consider the arrangements which the local authority have made or propose to make for affording the parents (and other specified persons) contact with the child and give the parties the opportunity to comment on those arrangements.
28. Arrange for the legal adviser, in consultation with the court, to record the findings of fact and reasons. This must be done before the court makes or refuses to make an order.
29. In giving reasons for its decision and any order made the court must set out the factors which it took into account and how they were balanced.
30. If the court did not follow the recommendation of the children's guardian or other independent expert it must explain why it did not follow their recommendation.
31. The court may not have time to prepare its findings of fact and reasons immediately after the end of the actual hearing and may have to come back later that day or another day to announce its decision, findings of fact and reasons. It must however do so as soon as reasonably practicable and in the meantime it can

make an interim order if necessary (but reasons will have to be given for the interim order).

*Announce the decision in open court and read out the facts found and the reasons given for the decision.*

## **SECTION 8 PRIVATE LAW CASE MANAGEMENT PROCEDURE**

### **INTRODUCTION**

1. The President of the Family Division has set out in her Private Law Programme an approach to dealing with private law children's cases that echoes the Public Law Protocol by encouraging judicial continuity and strong case management, early resolution and the encouragement of mediation. Such case management involves many of the features of the Public Law Protocol, but adapted to private law cases. Where an application is made in private law proceedings the welfare of the child (the court's paramount consideration) will be safeguarded by the application of the overriding objective of the family justice system in the same three respects. The Programme sets out the following approach, but it is recognised that it may have to be adapted to local resources and circumstances.

### **THE FIRST HEARING DISPUTE RESOLUTION APPOINTMENT**

2. This should be listed within a target window from the issue of the application of four to six working weeks.
3. It should be attended by the parents and in court centres where the local scheme provides for it and where resources exist may be attended by any child age nine or over.
4. In court centres where resources exist to provide 'in-court conciliation':
  - a. the first hearing dispute resolution appointment shall be listed so that a duty CAFCASS practitioner is available to the parties and to the court to facilitate agreements, the identification of issues and any appropriate referrals for assistance;
  - b. where the local scheme provides for it, the detailed content of the conciliation discussions may remain confidential;

- c. the court may adjourn a first hearing dispute resolution appointment for further in-court conciliation or a report upon the availability or success of any proposal.

*The court should encourage families to use parenting plans and ensure that parenting plan materials have been made available to the parties prior to the hearing.*

- 5. In court centres where a duty CAFCASS practitioner is not available:
  - a. the court will identify the issues between the parties and use its best endeavours to facilitate agreements and referrals for assistance;
  - b. in appropriate cases where advice is necessary, the court may adjourn the first hearing dispute resolution appointment for a CAFCASS practitioner to provide oral or short written advice to the parties and the court limited to the facilitation of matters that are agreed and referrals for further assistance.
- 6. In all cases at the conclusion of the first hearing dispute resolution appointment and generally at the end of any subsequent hearing that may be required the court shall identify on the face of the order:
  - a. the issues that are determined, agreed or disagreed;
  - b. the aim of the order, agreement, referral or hearing that is set out in the order;
  - c. any other basis for the order or directions that are made or the agreement that is recorded;
  - d. in respect of issues that are not agreed and that need to be determined so as to safeguard the welfare of the child:
    - i. the level of court (and where appropriate the allocated judge(s)) before whom all future non-conciliation hearings and applications are to be heard;
    - ii. the timetable and the sequence of the steps that are required to lead to an early hearing;

- iii. the filing and service of evidence limited to such of the issues as the court may identify;
- iv. whether a CAFCASS practitioner's or other expert report is necessary and, if so, the issues to which the report is to be directed;
- v. in respect of all orders, agreements and referrals directions for:
  - (1) the facilitation of the same (in particular by a CAFCASS practitioner);
  - (2) the monitoring of the outcome, including by urgent reserved re-listing before the same court within ten working days of a request by CAFCASS;
  - (3) enforcement.

#### **OTHER CONSIDERATIONS AT THE FIRST HEARING**

- 7. Notice – Has everyone who should know about the case had notice? Should the court go ahead even if some people have not been served with notice or have not responded?
- 8. Parties – Is there anyone else who ought to be involved in the proceedings? Is there anyone who wants to apply to be a party?
- 9. Statements – How soon can the parties disclose their case to each other in written statements?
- 10. Interim orders – Are any interim orders necessary?

#### **CONCILIATION/MEDIATION**

- 11. Courts should identify cases which are appropriate for assistance from a children and family reporter/mediator and list them when conciliation or mediation is available at court. Consideration should be given to transfer if mediation is available in another court accessible to the parties within a reasonable time.

## WELFARE REPORTS

12. **CAFCASS:** Where conciliation or mediation is inappropriate or unsuccessful and an assisted settlement is not possible the court may request the preparation of a welfare report. A request for a welfare report should only be made when absolutely necessary, but the court should always consider whether the wishes and feelings of the child can be adequately presented to it without a report. The court should always identify the issues that the CAFCASS officer should address in the report. In appropriate cases, reports focusing on limited issues (e.g. the wishes of the child) should be ordered.
  
13. **Local authorities:** Where a local authority has had an involvement with the child or family they can be requested to prepare a report in place of CAFCASS. These are essentially the same 'section 7' type reports that CAFCASS prepare. Where additionally the court has concerns about issues of significant harm and whether considerations should be given to the instigation of public law proceedings the court may order the relevant local authority to prepare a report within a period of eight week or such other time as it directs. This would be a 'section 37 report'. When such reports are requested the court also has the power to make a interim care order and appoint a children's guardian. (See Appendix G of the Public Law Protocol for the practical steps to be taken on ordering a section 37 report.) (See also *Section 9: Children Act private law orders*, later.)

## THE PRE-HEARING REVIEW

14. A pre-hearing review will not usually be necessary in a private law case in the family proceedings court, but where the issues are complex or the case is listed for a day or more it is often appropriate to hold one. The case issues should be addressed at a pre-hearing review in a public law case.

## THE FINAL HEARING

15. Final hearings should be approached in the same way as public law hearings.

## **WASTED COSTS**

16. Although such orders are possible they are very rare in private law cases. The courts recognise that there is a very wide latitude necessary where families are subject to complex and difficult emotions. Adverse orders for cost can exacerbate an already tense situation. However, consideration should be given to cost orders where the conduct of a party has been tactical, wholly unreasonable or an abuse of process.

## **SECTION 9 CHILDREN ACT PRIVATE LAW ORDERS**

### **INTRODUCTION**

1. In any family proceedings the court has wide powers to make whatever order it regards as appropriate. For example, if in an application for contact with a child the court considers that a mother needs to be protected from domestic violence, it may grant a non-molestation order. The parties must always be given notice of the type of order that the court is considering and a bench should always take advice from its legal adviser before adopting such a course.

### **SECTION 8 ORDERS AND SPECIAL GUARDIANSHIP ORDERS**

2. There are four main orders that are made in private law matters. Unavoidably they are known in the jargon as 'section 8 orders': They are for:
  - a. contact
  - b. residence
  - c. specific issue
  - d. prohibited steps.

The court also has powers to make special guardianship orders, which provide legally secure placements for children who cannot live with their birth parents but for whom adoption is not appropriate.

3. In any family proceedings the court can:
  - a. on application make a section 8 order or a special guardianship order;
  - b. grant leave to apply for such an order;
  - c. make a section 8 order or a special guardianship order on its own motion.

**THE SECTION 37 REPORT**

4. The section 37 report provides the 'cross-over' or bridge between private and public law. If, within private law proceedings, the court becomes concerned about the welfare of the child it can involve the 'state' in the form of the local authority and set in train enquiries which have to be reported back to the court. The practical aspects of making the order are set out in Appendix G to the Public Law Protocol.
5. Where, in any family proceedings in which a question arises concerning the welfare of a child, it appears that it may be appropriate for a care or supervision order to be made the court may, of its own volition, direct a local authority to undertake an investigation into the child's circumstances.
6. During the 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 concerning the child.
7. Where the local authority decides not to apply for a care or supervision order it should inform the court of the reasons for its decision, any support it has provided for the child and its family and any other action to be taken concerning the child.
8. The information should be given to the court within eight weeks of the date of the direction unless the court states otherwise.
9. The authority named in the direction should be the authority in whose area the child lives or the authority where the circumstances causing concern arose.
10. Where the authority decides not to apply for a care or supervision order it is required to consider whether it is appropriate to review the case at a later date and if it is appropriate to set a date for it.

**PARENTAL RESPONSIBILITY ORDER**

11. The term 'parental responsibility' refers to all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the

child and their property, or which a guardian of a child's estate has in relation to their property.

12. Married parents each have parental responsibility for their child. Where the parents are not married to each other at the time of the birth only the child's mother has parental responsibility – the father will not have parental responsibility unless he acquires it in one of four ways specified in statute.
13. An unmarried father can acquire parental responsibility by:
  - a. obtaining a parental responsibility order;
  - b. making a formal parental responsibility agreement with the mother;
  - c. an order of the court on the making of a residence order;
  - d. becoming registered as the child's father.
14. A step-parent is an individual who is married to the parent of the child who is the subject of the application. For the purpose of this legislation a step-parent may also be an individual who is in a relationship with someone of the same sex who is the parent of the child and is the civil partner of that person. A step-parent can acquire parental responsibility by:
  - a. obtaining a parental responsibility order;
  - b. making a formal parental responsibility agreement with any parent of the child who has parental responsibility for the child.
15. Anyone else can acquire parental responsibility by:
  - a. being granted a residence order;
  - b. being made a guardian or a special guardian;
  - c. having an emergency protection order in their favour (although this is limited to taking reasonable steps to safeguard and promote the child's welfare);

- d. having a child 'placed' with them for adoption by order of the court or an adoption agency;
  - e. having an adoption order made in their favour.
16. A local authority acquires parental responsibility on the making of a care order or a placement order.
  17. When the court is dealing with an application for a parental responsibility order the child's welfare is the court's paramount consideration.
  18. The court should not make an order unless it thinks that to do so would be better for the child.
  19. The court must take into account all the relevant circumstances, particularly the degree of commitment that the father has shown to the child, the degree of attachment between him and the child, and his reasons for applying for an order. Where the father has shown commitment and there is a degree of attachment between the father and the child and his reasons for applying for an order are not improper or wrong it will generally be in the child's best interests that an order is made. Different considerations may apply in relation to step-parent applications. Consideration must be given to the effect the making of an order will have on the child's relationship with the other parent, if there is one, who is not married to the step-parent.
  20. Where the court makes a residence order in favour of an unmarried father it must also make a parental responsibility order if he would not otherwise have parental responsibility for the child. The father's parental responsibility will continue even if the residence order is brought to an end.
  21. If a natural father has acquired parental responsibility as the result of a formal agreement or court order it can only be brought to an end by a successful application to the court by a person with parental responsibility or, with the leave of the court, on the application of the child.

**RESIDENCE ORDER**

22. A residence order determines the person(s) with whom a child is to live. Where a residence order is made in favour of two or more persons who do not live together, the order may specify the periods during which the child is to live in the different households concerned.
23. There are two categories of applicant – those who can apply as of right and those who require the leave of the court. Those who can apply as of right are:
- a. a parent, guardian or special guardian;
  - b. a step-parent;
  - c. anyone with whom the child has lived for a period of at least three years;
  - d. a local authority foster parent with whom the child has lived for at least a year immediately preceding the application;
  - e. any other person who has the consent of everyone in whose favour a residence order is in force or who has care and control of the child under a court order or has parental responsibility for the child or (where the child is in care) the consent of the local authority.
24. No-one may apply for a residence order without the leave of the court if the child is subject to a special guardianship order.
25. With the leave of the court anyone else, including the child, can apply.
26. The court is able to make a residence order of its own volition in any family proceedings without an application being made, but the parties should always be given notice that the court is minded to do so. The legal adviser should always be asked to advise before such a step is taken.
27. The child's welfare is the court's paramount consideration and the court must take the welfare checklist into account if the application is opposed.

28. The court should not make an order unless to do so would be better for the child.
29. A residence order can be applied for either separately or in any family proceedings.
30. The local authority cannot apply for a residence order. An order can be made if the child is in local authority care but it has the effect of discharging the care order.
31. A residence order will last until the child is 16 unless the court directs on the request of the applicant (other than a parent or guardian of the child) that the order continues in force until the child's 18th birthday. Where such a direction is made no application to vary or discharge the residence order can be made without the leave of the court. A court can also direct, if satisfied that there are exceptional circumstances, that the order lasts until the child's 18th birthday.
32. If a residence order is made in favour of an unmarried father, the court must also make a parental responsibility order.
33. A residence order automatically gives anyone in whose favour it is made (other than a parent) parental responsibility for the child.
34. When a residence order is in force no person may either change the child's surname or remove them from the United Kingdom without the written consent of every person who has parental responsibility for the child or the leave of the court. However, a person who has a residence order can take the child out of the United Kingdom for up to one month without getting anyone's consent.
35. The order can contain conditions and directions as to how it is to be carried out and can be limited to a specified period.
36. A residence order ceases to have effect:
  - a. if the parents, both having parental responsibility, live together for a continuous period exceeding six months;

- b. when the child reaches the age of 16 (18 in certain specified circumstances or exceptional circumstances if the court directs);
  - c. if a care order is made;
  - d. on the making of a placement order;
  - e. if an adoption order is made;
  - f. if the order is discharged.
37. Any person entitled to apply for a residence order can apply for its variation or discharge. Anyone else is entitled to do so if the order was made on their application. Leave is required to vary or discharge a residence order in respect of which a direction has been made on request of the applicant that the order is to last until the child's 18th birthday.

### **CONTACT ORDER**

38. A contact order requires the person with whom the child is living to allow the child to visit, stay or to otherwise have contact with someone. Contact is not restricted to direct, physical contact but can include indirect contact such as telephone calls or letters.
39. There are two categories of applicant – those who can apply as of right and those who require the leave of the court. Those who can apply as of right are:
- a. a parent, guardian or special guardian;
  - b. anyone who has a residence order in relation to the child;
  - c. a step-parent;
  - d. anyone with whom the child has lived for a period of at least three years;
  - e. any other person who has the consent of everyone in whose favour a residence order is in force or who has care and control of the child under a court order or

has parental responsibility for the child or (where the child is in care) the consent of the local authority.

40. With the leave of the court anyone else, including the child, can apply for a contact order. In the case of local authority foster-parents then unless they are relatives of the child, or the child has been living with them for one year preceding the application, they must have the consent of the local authority to apply for the court's leave.
41. The court is able to make a contact order of its own volition in any family proceedings without an application being made, but the parties should always be given notice that the court is minded to do so. The legal adviser should always be asked to advise before such a step is taken.
42. The child's welfare is the court's paramount consideration and the court must take the welfare checklist into account if the application is opposed.
43. The court should not make an order unless to do so would be better for the child.
44. A contact order can be applied for either separately or in any family proceedings.
45. The local authority cannot apply for a contact order nor can a contact order under section 8 be made if the child is in local authority care or subject to a placement order.
46. A court cannot make a contact order that is to have effect beyond the child's 16th birthday unless it is satisfied that the circumstances of the case are exceptional.
47. The order can contain conditions and directions as to how it is to be carried out and can be limited to a specified period.
48. Where issues of domestic violence are raised and the court considers that they are relevant to the issue of contact the court must consider whether to have a fact-finding hearing. Reference must be made to the guidelines for good practice on

parental contact in cases where there is domestic violence (seek the advice of the legal adviser).

49. A contact order ceases to have effect:
- a. if the parents, both having parental responsibility, live together for a continuous period exceeding six months;
  - b. when the child reaches the age of 16 (18 in exceptional circumstances);
  - c. if a care order is made;
  - d. if a placement order is made;
  - e. if an adoption order is made;
  - f. if the order is discharged.
50. Any person entitled to apply for a contact order can apply for its variation or discharge. Anyone else shall be entitled to do so if the order was made on their application or they are named in the contact order.

### **PROHIBITED STEPS ORDER**

A prohibited steps order restrains in some way the action of another person in relation to the child. However, the only steps that can be prohibited are those that could be taken by parents in meeting their parental responsibility such as preventing a child being taken out of the country. Any person entitled to apply for a prohibited steps order can apply for its variation or discharge. Anyone else shall be entitled to do so if the order was made on their application or they are named in the contact order.

51. There are two categories of applicant – those who can apply as of right and those who require the leave of the court. Those who can apply as of right are:
- a. a parent, guardian or special guardian;
  - b. any step-parent with parental responsibility;

- c. anyone who has a residence order in relation to the child.
52. With the leave of the court anyone else, including the child, can apply for a prohibited steps order. In the case of local authority foster-parents then unless they are relatives of the child, or the child has been living with them for one year preceding the application, they must have the consent of the local authority to apply for the court's leave.
53. The court is able to make a prohibited steps order of its own volition in any family proceedings without an application being made, but the parties should always be given notice that the court is minded to do so. The legal adviser should always be asked to advise before such a step is taken.
54. The child's welfare is the court's paramount consideration and the court must take the welfare checklist into account if the application is opposed.
55. The court should not make an order unless to do so would be better for the child.
56. A prohibited steps order can be applied for either separately or in any family proceedings.
57. A court cannot make an order that is to have effect beyond the child's 16th birthday unless it is satisfied that the circumstances of the case are exceptional.
58. A prohibited steps order cannot be made in relation to a child in local authority care or subject to a placement order.
59. The court cannot make a prohibited steps order with a view to obtaining a result that could be achieved by a residence or contact order, or in any way that is denied to the High Court.
60. The order can contain conditions and directions as to how it is to be carried out and can be limited to a specified period.

61. Any person entitled to apply for a prohibited steps order can apply for its variation or discharge. Anyone else shall be entitled to do so if the order was made on their application or they are named in the contact order.
62. An order ceases to have effect:
- a. when the child reaches 16 (18 in exceptional circumstances);
  - b. if a care order is made;
  - c. if a placement order is made;
  - d. if an adoption order is made;
  - e. if it is discharged.

### **SPECIFIC ISSUE ORDER**

63. A specific issue order is an order of the court giving directions as to how a particular aspect of parental responsibility should be exercised such as a question concerning a child's schooling.
64. There are two categories of applicant – those who can apply as of right and those who require the leave of the court. Those who can apply as of right are:
- a. a parent, guardian or special guardian;
  - b. any step-parent with parental responsibility;
  - c. anyone who has a residence order in relation to the child.
65. With the leave of the court anyone else, including the child, can apply for a specific issue order. In the case of local authority foster-parents then unless they are relatives of the child, or the child has been living with them for one year preceding the application, they must have the consent of the local authority to apply for the court's leave.

66. The court is able to make a specific issue order of its own volition in any family proceedings without an application being made, but the parties should always be given notice that the court is minded to do so. The legal adviser should always be asked to advise before such a step is taken.
67. The child's welfare is the court's paramount consideration and the court must take the welfare checklist into account if the application is opposed.
68. The court should not make an order unless to do so would be better for the child.
69. A specific issue order can be applied for either separately or in any family proceedings.
70. A court cannot make an order that is to have effect beyond the child's 16th birthday unless it is satisfied that the circumstances of the case are exceptional.
71. A specific issue order cannot be made in relation to a child in local authority care.
72. The court cannot make a specific issue order with a view to obtaining a result that could be achieved by a residence or contact order, or in any way that is denied to the High Court.
73. The order can contain conditions and directions as to how it is to be carried out and can be limited to a specified period.
74. An order ceases to have effect when:
  - a. the child reaches 16 (18 in exceptional circumstances);
  - b. a care order is made;
  - c. a placement order is made;
  - d. an adoption order is made;
  - e. it is discharged.

75. Any person entitled to apply for a specific issue order can apply for its variation or discharge. Anyone else shall be entitled to do so if the order was made on their application.

### **SPECIAL GUARDIANSHIP ORDER**

76. A special guardianship order is an order of the court appointing one or more individuals to act as the child's special guardian. A special guardian has parental responsibility for the child and (subject to any other order in force with respect to the child) is entitled to exercise that parental responsibility to the exclusion of any other person with parental responsibility. The consent of a special guardian is required for the making of an adoption order.

77. The court may make a special guardianship order on the application of an individual or on the joint application of more than one person. There are two categories of applicant: those who can apply as of right or those who require the leave of the court. Those who can apply as of right are:

- a. any guardian of the child;
- b. any individual in whose favour a residence order is in force with respect to the child;
- c. anyone with whom the child has lived for a period of three years;
- d. any other person who has the consent of everyone in whose favour a residence order was in force or, where the child is in the care of the local authority, has the consent of that authority, or in any other case has the consent of all those who have parental responsibility for the child;
- e. a local authority foster parent with whom the child has lived for a period of at least a year immediately preceding the application.

78. With the leave of the court anyone else can apply for a special guardianship order provided that they are over 18 and that they are not the parent of the child. Local authority foster parents with whom the child has lived for less than a year may not

apply for leave unless they have the consent of the local authority or are relatives of the child.

79. Anyone wishing to apply for a special guardianship order must give three months notice to the local authority in whose area they reside or if the child is being looked after, to the local authority that is looking after the child, of their intention to apply for an order.
80. The court may not make a special guardianship order unless it has received a report from the local authority dealing with a number of matters including the suitability of the applicant to be a special guardian.
81. On the making of a special guardianship order the court must consider whether a contact order should also be made and whether to vary or discharge any section 8 orders which are in force
82. The court may also make a special guardianship order of its own volition in any family proceedings without an application being made, but the parties should always be given notice that the court is minded to do so. The legal adviser should always be asked to advise before such a step is taken, as the court is still required to consider a report from the local authority (see paragraph 80 above).
83. The child's welfare is the court's paramount consideration and the court must take the welfare checklist into account if the order is opposed.
84. The court should not make an order unless to do so would be better for the child
85. A special guardian may remove the child from the United Kingdom without a court order for a period up to three months. A special guardian can, with the written consent of every person who has parental responsibility for the child or the leave of the court, take the child out of the United Kingdom for a period of more than three months. A special guardian can also, with the consent of every person who has parental responsibility, change the surname of the child unless the child is subject to a placement order.

86. A special guardianship order will cease to have effect:
- a. when the child reaches 18,
  - b. if a care order is made,
  - c. if an adoption order is made,
  - d. if the order is discharged.
87. A special guardianship order can be varied or discharged on the application of:
- a. the special guardian,
  - b. any parent or guardian of the child (with leave),
  - c. any individual who has or had parental responsibility for the child immediately before the making of the order (with leave),
  - d. the child (with leave),
  - e. the local authority designated in a care order with respect to the child.

### **FAMILY ASSISTANCE ORDER**

88. A family assistance order is addressed to a local authority or to CAFCASS and requires it to appoint a social worker or CAFCASS officer to advise, assist and befriend a person named in the order. The order provides help to a family in the aftermath of family break-up where there are difficulties concerning the children.
89. Unless the child lives within their area, it is always necessary to have consent of a local authority before making such an order. Even where formal consent is not necessary it is always sensible to enquire whether CAFCASS or the relevant local authority would support such an order being made and whether it would have the resources to implement it.
90. It is not possible to apply for a family assistance order. Only the court of its own volition can make the order.
91. The child's welfare is the court's paramount consideration but the welfare checklist does not apply.

92. The court should not make an order unless it thinks that to do so would be better for the child.
93. The court may only make a family assistance order if:
- a. it has the power to make a residence, contact, prohibited steps, special guardianship order or specific issue order (whether or not an order is actually to be made); and
  - b. the circumstances of the case are exceptional; and
  - c. it has obtained the consent of every person named in the order other than the child.
94. The persons who can be named in the order are:
- a. any parent, guardian or special guardian of the child;
  - b. any person with whom the child is living or in whose favour a contact order is in force with respect to the child;
  - c. the child.
95. Any person named in the order can be required to take such steps as may be specified to keep the officer informed of the address of any person named and to allow the officer to visit such person(s).
96. Unless a shorter period is specified the order lasts a maximum of six months, although a new order can be made at the end of this period.
97. The officer can refer back to the court issues relating to the discharge or variation of residence, contact, prohibited steps and specific issue orders current during the period of a family assistance order.

## **SECTION 10 PRIVATE LAW – A STRUCTURED APPROACH**

### **PRIOR TO THE HEARING**

#### **Read the evidence prior to the hearing**

1. Prior to the hearing magistrates must read a bundle containing copies of some or all of the following:
  - a. the application for the order;
  - b. statements of the applicant and their witnesses;
  - c. statement of the respondent(s) and their witnesses;
  - d. orders made and directions given during the course of the proceedings;
  - e. welfare report(s) prepared by CAFCASS;
  - f. medical and other reports.

### **AT THE HEARING**

#### **Establish the issues before the court**

2. At the hearing itself the court must first establish what issues it is being asked to decide. If issues are not clear from the paperwork supplied, for example, in an application for contact it may be unclear whether the person with whom the child lives is opposing contact in principle or merely the type or frequency of contact, these need clarification.
3. In most cases the court will be asked to adjudicate on the application and decide what order, if any, it should make.
4. In some cases however the court may simply be invited to make certain findings of fact and then adjourn the case to a later date so that, for instance, a welfare report can be obtained from CAFCASS and further evidence filed by the parties. This is

called a 'split hearing' and occurs in cases where an important factual issue has to be determined before the application itself can be finalised. For example, in a contact application made by the father the mother may allege serious domestic violence on his part and the court may be asked to make a finding in relation to it before the contact application itself is heard and determined. The court must consider the domestic violence guidelines (seek the advice of the legal adviser and refer to the domestic violence checklist in section 14). The same court must sit for both the fact finding and final disposal.

### **Follow a two-stage approach at the hearing**

5. At the final hearing of any application for an order in a private law case the court must generally adopt the following two-stage approach:
  - a. First determine the facts of the case. This involves making findings on outstanding, disputed, factual issues.
  - b. Then decide what order, if any, to make. The child's welfare is now the court's paramount consideration. The court must now address the welfare checklist.

### **Hear the oral evidence**

6. The applicant opens their case
7. The parties give their evidence in the following order unless the court directs otherwise:
  - a. the CAFCASS officer (children and family court reporter) if present at the direction of the court;
  - b. the applicant;
  - c. any respondent with parental responsibility for the child;
  - d. any other respondent;

- e. the child if appropriate (this would be most rare).
8. The written statement of a witness forms the basis of their examination in chief though supplemental questions may be asked by their advocate. The witness is cross-examined by the other party(ies) and if necessary re-examined by their advocate.
  9. Closing speeches are made in the following order unless the court directs otherwise:
    - a. the respondent(s),
    - b. the applicant.
  10. Not every witness who has made a written statement will give oral evidence as their evidence may be unchallenged
  11. Evidence which has not been supplied in advance of the hearing in the form of a written statement or document may only be given with the leave of the court, but if it is potentially relevant, leave is usually given.
  12. Hearsay evidence is admissible but, as it cannot be challenged by cross-examination, the court must carefully consider what weight to attach to it.

**Make findings of fact**

13. What findings need to be made?
  - a. Any factual issue which is disputed and which is relevant to the determination of the application before the court must be the subject of a finding. The findings required may be few or many depending on the type of application before the court. In some cases the facts may be agreed. The court should not make more findings than are necessary to determine the issues before it.
14. How should the findings be made?

- a. The following procedure should be adopted:
  - i. Evidence which has been read and heard must first be carefully weighted and evaluated.
  - ii. Set out the relevant facts in chronological order or under convenient headings. A pro-forma is available and is included in *Section 14: Reasons and welfare checklists* (see later).
  - iii. Make it clear what facts are not in dispute and what are disputed.
  - iv. Make findings on disputed issues and say why particular evidence has been accepted or rejected.

15. On which party is the burden of proof?

- a. The burden of proving a fact rests with the party who alleges it to be a fact.

16. What is the standard of proof?

- a. The standard of proof is the normal civil standard on the balance of probability. The court should have in mind, to whatever extent is appropriate in a particular case, that the more serious the allegation, the less likely it is that it occurred and the stronger should be the evidence before the court concludes that it occurred on a balance of probability.

### **Decide whether a section 37 direction should be made**

17. In rare cases the court, having read and heard the evidence, may have such concerns about the child's welfare that it believes that it may be appropriate for a care order or supervision order to be made. In such a case it can adjourn the application and order the local authority to investigate the child's circumstances ('a section 37 report'). If it makes such a direction the court has the power to make an interim care order or an interim supervision order but should never do so without first discussing the matter fully with the legal adviser. The court should consider

whether to appoint a children's guardian. The practical aspects of making a section 37 order in private law cases are set out in Appendix G to the Public Law Protocol. See *Section 9: Children Act private law orders*, earlier, for further information.

### **Decide what order if any to make**

18. What powers are available?

- a. The court must consider at this stage the paramount welfare of the child. It must:
  - i. remember that the child's welfare is its paramount consideration;
  - ii. have regard, in particular, to the welfare checklist;
  - iii. have regard to the general principle that delay is likely to prejudice the child's welfare;
  - iv. not make any order unless it is better for the child than making no order at all;
  - v. consider the implications of the Human Rights Act 1998;
  - vi. remember that no residence, contact, specific issue or prohibited steps order, other than for the variation or discharge of an existing order, can be made with respect to a child who has reached the age of 16 unless there are exceptional circumstances.

19. In deciding what order, if any, to make the court should adopt the following approach:

- a. Apply the findings of fact to every section of the welfare checklist. The list provides a very useful guide to the court in deciding what factors are relevant and what order, if any, will most promote the child's welfare, for example, what are the wishes of the child, what harm have they suffered or are likely to suffer, what are their needs and who might best meet them? In answering some of

these questions the court is looking to the future and must base its assessments (e.g. of risk of future harm) on actual facts rather than suspicions. However, reasonable inferences as to likelihood may be drawn from findings of fact actually made.

20. In relation to the last section of the welfare checklist, i.e. the range of powers available to the court:
  - a. First consider, in the light of the facts found, the likely effect on the child of 'no order' and decide whether it is better for them if the court makes some order, for example, no order may lead to the continuation of muddled arrangements regarding contact or the person with whom the child lives not having parental responsibility for them.
  - b. Then consider, again in the light of the facts found, the effect on the child of not just the order sought but all other available orders which might be relevant to the particular circumstances of the case, for example, a family assistance order to provide short term assistance to the child's family.
21. Take into account any other factors which have been identified by the court and which it considers are relevant to its decision.
22. Balance all relevant factors, i.e. those which point towards or away from the order sought or other relevant orders, apply the paramountcy test, i.e. what best promotes the child's welfare, and decide what order or orders if any should be made. Reasons which justify the court's decision will have to be given.
23. Ensure that its decision is compatible with the Human Rights Act 1998. All Children Act orders engage Article 8 and, to differing degrees, interfere with the exercise of the rights of parents (or other carers) and child to respect for their family life. The court's decision must thus:
  - a. Be in accordance with law. Any Children Act order will meet this requirement.

- b. Pursue a legitimate aim, i.e. it must be necessary. The respective rights of parents (or other carers) and the child must be balanced and an order may be necessary to protect the child's health and their right to a stable and secure future.
- c. Apply the minimum interference necessary to secure the legitimate aim and thus be proportionate and fair.

**Decide whether any direction condition or limitation should be attached to the order**

24. In an appropriate case the court can:

- a. add to the order directions about how it is to be carried into effect;
- b. attach conditions which must be complied with by any person in whose favour the order is made, any parent, anyone who has parental responsibility but is not a parent and anyone with whom the child is living;
- c. make the order for a specified period only;
- d. prevent anyone (usually the applicant), from bringing any future applications of any specified kind in respect of the same child for a prescribed period without the leave of the court. This power, which is intended to stop inappropriate applications being brought (e.g. repeat applications for contact to which a child is adamantly opposed), should be used sparingly and the legal adviser's advice sought.

**At the conclusion of the hearing**

*Arrange for the legal adviser, in consultation with the court, to record the findings of fact and reasons. This must be done before the court makes or refuses to make an order.*

25. In giving reasons for its decision and any order made the court must set out the factors which it took into account and how they are balanced.

26. If the court did not follow the recommendation of the CAFCASS officer or other independent expert it must justify its decision in its reasons.
27. The court may not have time to prepare its findings of fact and reasons immediately after the end of the actual hearing and may have to come back later that day or another day to announce its decision, findings of fact and reasons. It must however do so as soon as reasonably practicable and in the meantime it can make an interim order if necessary. Reasons for any interim orders will have to be given.

*Read out the facts found and the reasons given for the decision and announce the decision made.*

*Consider any application for costs*

28. Cost orders can be made in family proceedings but are rare. They are most likely to be made in cases involving the Child Support Agency though are not limited to such cases. Consideration should also be given to cost orders if they are sought in circumstances where the conduct of a party has clearly been tactical, wholly unreasonable or an abuse of process.

**SECTION 11 FAMILY LAW ACT – DOMESTIC VIOLENCE ORDERS****JURISDICTION**

1. Magistrates sitting in the family proceedings court share this jurisdiction with the High Court and county court.
2. The court has the power to make two types of order: a non-molestation order and/or an occupation order. A non-molestation order can be made on the court's own motion in family proceedings where the respondent is a party if the court considers such an order should be made for the benefit of any party to the proceedings or any relevant child, but the parties should always be given notice that the court is minded to do so. From 1<sup>st</sup> July 2007, the court cannot attach a power of arrest to a non-molestation order although it may be attached to an occupation order; the venue for proceedings for breach of the non-molestation order will depend on the date of the order – persons arrested on a power of arrest for orders made before 1<sup>st</sup> July 2007 will be taken before the “relevant judicial authority” (meaning a Family Proceedings Court where the order was made at that level) within 24 hours of arrest; persons who have breached a non-molestation order made after 1<sup>st</sup> July 2007 will be liable to arrest and charge to appear before an adult criminal court. The legal adviser should always be asked to advise before such a step is taken.
3. Where an emergency protection order has been made which includes an exclusion requirement the court also has power to make a non-molestation order.

**NON-MOLESTATION ORDER**

4. A non-molestation order prohibits a person from molesting an associated person and/or a relevant child. ‘Molestation’ is not specifically defined but it has been held that the word implies some quite deliberate conduct aimed at a high degree of harassment of the other party so as to justify the intervention of the court.

5. A person who is 'associated' with the respondent can apply but the court can make an order of its own volition in any family proceedings if the court considers that the order should be made for the benefit of any other person or any relevant child.
6. A person is associated with another person if they:
  - a. are or have been married (or are civil partners);
  - b. live or have lived in the same household other than by reason of one of them being the other's employee, tenant, lodger or boarder;
  - c. are relatives;
  - d. have agreed to marry one another;
  - e. are parents of, or have or have had parental responsibility for, the child;
  - f. are parties to the same family proceedings;
  - g. have or have had an intimate personal relationship which is or was of significant duration.
7. Associated persons are the parties to the proceedings and are generally entitled to notice of the proceedings but the court may, in any case where it considers that it is just and convenient to do so, make an order even though the respondent has not been given notice, i.e. an 'ex parte order'.
8. In deciding whether to make an ex parte order the court is required to have regard to all the circumstances including any risk of significant harm to the applicant or a child, whether the applicant is likely to be deterred or prevented from pursuing the application if the order is not made and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service of the application.
9. In deciding whether to make an order and, if so, in what manner, the court is required to have regard to all the circumstances including the need to secure the health, safety and well-being of the applicant and any relevant child.

10. The order may be expressed so as to refer to molestation in general, to particular acts of molestation or both.
11. In a case where the court has power to make an order the court may accept an undertaking from any party to the proceedings except in any case where the respondent has used or threatened violence against the applicant or a relevant child and for the protection of the applicant or child it is necessary to make a non-molestation order so that the breach may be punishable in the criminal courts. Where an undertaking is given to the court it is enforceable as if it were an order of the court. It is not a criminal offence and must be dealt with by the “relevant judicial authority”.
12. Although the order may be for a specified period or until further order it has been held that orders should be for a specified period of time unless there are exceptional or unusual circumstances.
13. Either party to the proceedings may apply for variation or revocation.
14. In some circumstances the court may, of its own volition, vary or discharge the order.

### **OCCUPATION ORDER**

15. An occupation order regulates the occupation of a dwelling-house and may extend to a defined area in which the dwelling-house is included.
16. A family proceedings court is not competent to entertain any application, or make any order, involving any disputed question as to a party’s entitlement to occupy any property unless it is unnecessary to determine that question in order to deal with the application or make the order.

17. There are various categories of occupation orders. The appropriate category in a particular case is determined by reference to whether either party is entitled to occupy the property. In practice, most applications are by an applicant who is entitled to occupy a home with the respondent who is an 'associated' person.
18. The parties to the proceedings are generally entitled to notice but the court may, in any case where it considers that it is just and convenient to do so, make an order even though the respondent has not been given notice.
19. In deciding whether to make an order without notice the court is required to have regard to all the circumstances including any risk of significant harm to the applicant or a child, whether the applicant is likely to be deterred or prevented from pursuing the application if the order is not made and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service of the application. In practice the court should be slow to deprive a party of a roof over their head on a without-notice basis and should be satisfied that it is necessary in order to carry out its duty. The court should have in mind that it has only heard one side and should be on its guard against 'tactical' applications.
20. The category of occupation order determines the nature and extent of its scope. Where the court makes an order it may, depending on the relevant category:
  - a. enforce the applicant's entitlement to remain in occupation as against the other person;
  - b. require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;
  - c. regulate the occupation of the dwelling-house by either or both parties;
  - d. if the respondent is entitled to occupy the dwelling-house the order may prohibit, suspend or restrict the exercise of that right;
  - e. if the respondent has matrimonial home rights in relation to the dwelling-house and the applicant is the other spouse, restrict or terminate those rights;

- f. require the respondent to leave the dwelling-house or part of the dwelling-house;
- g. exclude the respondent from a defined area in which the dwelling-house is included.

21. Additional provisions relating to the repair and maintenance of the dwelling-house or the payment of rent, mortgage or other outgoings can be included in the order. However, as a result of a gap in the legislative scheme, such orders cannot be effectively enforced and the financially vulnerable party would do better to seek other forms of financial relief if available.

22. In a case where the court has power to make an order the court may accept an undertaking from any party to the proceedings. However, a power of arrest cannot be attached to an undertaking and therefore the court should not accept an undertaking in cases where a power of arrest should be attached to the order. Where an undertaking is given to the court it is enforceable as if it were an order of the court.

23. Where the court makes an order and it appears that the respondent has used or threatened violence against the applicant or a relevant child then the court is required to attach a power of arrest to the order unless it is satisfied in all the circumstances of the case that there will be adequate protection without such a power. Where the order is made without notice the court may attach a power of arrest if the respondent has used or threatened violence and there is a risk of significant harm if a power of arrest is not attached.

24. An order may be made for a specified period, until the occurrence of a specified event or until further order.

25. Either party to the proceedings may apply for variation or revocation.

**SECTION 12 ENFORCEMENT POWERS**

*(This section also applies to failure to comply with an exclusion requirement)*

**POWER OF ARREST**

1. On the making of an occupation order the court can attach a power of arrest in the circumstances outlined in *Section 11: Family Law Act –Domestic violence orders*, paragraph 23. The court can attach a power of arrest to an exclusion requirement included in an emergency protection order or an interim care order. For details see *Section 6*, paragraphs 28–30 and 52-54.
2. A power of arrest is a sanction designed to encourage compliance with an occupation order and protection for the applicant and/or any relevant child. It is a direction contained within one of those orders which enables constables to arrest without warrant a person whom they have reasonable cause for suspecting to be in breach of any provision of the order to which the power of arrest has been attached.
3. If the court has not attached a power of arrest to the order the applicant can apply for the issue of a warrant for the arrest of the respondent. The applicant must give evidence on oath about the alleged breach of the order. A warrant can only be issued if the court has reasonable grounds for believing that the respondent has failed to comply with the order.
4. If the respondent is arrested they must be brought before the relevant court within 24 hours. There are special provisions for Sundays and some Bank Holidays. Failure to produce the arrested person before a court within the time limits means that the court cannot deal with them on that arrest and they must be released. However, fresh process can be initiated and a warrant sought in respect of the same breach. *(Note: Any family proceedings court may deal with the arrest provided the original order was made at that level.)*

5. When a respondent is brought before the court following arrest under a power of arrest or a warrant of arrest, the court may either proceed to deal with the respondent immediately or, if appropriate, adjourn the proceedings and remand them on bail or in custody to appear before the court on a later date. If the court is considering a remand in custody the respondent must be given the opportunity to be legally represented.
6. The court is required to deal with the respondent within 14 days of their arrest. The attendance at court of the arresting officer is not necessary and a written statement from the arresting officer as to the circumstances of the arrest should normally be sufficient.
7. Any remand may be in custody or on bail. Bail may be unconditional or subject to whatever conditions the court considers to be appropriate to ensure that they do not interfere with witnesses or otherwise obstruct the course of justice.
8. In appropriate circumstances a remand may be requested in order to enable a medical examination and report to be made on the respondent's mental or physical condition.

### **PROVING THE BREACH**

9. The court must be satisfied that the respondent was aware of the terms of the order. In certain limited circumstances the court may proceed to deal with a breach even if there has not been formal service, provided it is satisfied that the respondent was aware of the order and knew what they were doing was a breach. The legal adviser's guidance should always be sought before doing so.
10. Evidence of the arrest may usually be in written form, as may evidence of the breach, but if the respondent is challenging the breach they are entitled to have all

relevant witnesses attend for cross-examination. That can frequently lead to an adjournment.

11. The standard of proof is the criminal standard and *not* the civil standard. The burden of proof is on the applicant.

### **ENFORCEMENT POWERS OPEN TO THE COURT**

*Breach of a non-molestation order made on or after 1<sup>st</sup> July 2007 is a criminal offence triable either-way and punishable in the magistrates court to a sentence of imprisonment of up to 6 months and/or a fine not exceeding the statutory maximum. In the Crown Court the maximum penalty is 5 years. The Court will be assisted by the Sentencing Guideline Council publication of December 2006 “Breach of a Protective Order – Definitive Guideline”.*

*Note that the powers in this section also apply to a non-molestation order in the event that any breach is not being prosecuted as a criminal offence.*

12. Where the court is satisfied that the respondent has breached a non-molestation order made on or before the 30<sup>th</sup> June 2007 or an occupation order the court may either:

- a. order the respondent to pay a fine not exceeding £5,000; or
- b. commit them to custody for a period not exceeding two months.

13. The court has power to suspend any committal to prison on whatever terms and conditions the court considers appropriate. If considering a committal to prison or a suspended committal the respondent must be offered the opportunity to be legally represented. In enforcement proceedings the focus of the court is more on ensuring future compliance with the court’s orders than punishment. Protection of the

vulnerable is the court's aim but, particularly on a first breach, immediate imprisonment should be avoided if possible.

14. If the court is satisfied that the respondent is suffering from mental illness or severe mental impairment and the justices are satisfied that they have breached an occupation order, non-molestation order or an exclusion requirement there may be power to make a hospital order or guardianship order under the Mental Health Act 1983. If considering one of these orders seek the advice of a legal adviser.
15. As an alternative to proceeding to enforce the order it may be appropriate for the court to consider the variation or discharge of an occupation or non-molestation order.
16. Such an application may be made by the respondent or the person on whose application the order was originally made.
17. The court has power to vary or discharge a non-molestation order of its own motion without application, provided that the order was made by the court, in the same manner of its own motion without application.
18. The power to vary or discharge the order includes power to vary or discharge any power of arrest attached to the occupation order.

## SECTION 13 FINANCIAL PROVISION

### INTRODUCTION

1. The Child Support Act 1991 stipulates that a family proceedings court may not exercise its powers in relation to financial provision in any case where the Child Support Agency has jurisdiction to make a maintenance assessment. As a result, applications for maintenance now tend to be made to the Agency and not to the courts. Although applications to the courts for maintenance for a married partner and/or children are uncommon the court may still be required to vary or enforce existing magistrates' courts orders or orders made by the county court or High Courts which have been registered in the magistrates' court.
2. The court may vary, suspend or revoke an order for periodical payments if that order was made by a magistrates' court but may only reduce or increase a registered order made by the county court or the High Court.
3. On an application for variation or revocation, the court shall, as far as it appears just to do so, give effect to any agreement that has been reached between the parties. The court must take account of all the circumstances of the case, first consideration being given to the welfare, while a minor, of any child of the family who is under 18 including any change in any of the matters to which the court was required to have regard when making the original order.
4. The matters the court may have regard to are as follows:

<b>Type of order</b>	<b>Matters to have regard to</b>
Maintenance for the other party to the marriage	<ul style="list-style-type: none"> <li>▪ The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. This will include in the case of earning capacity any increase in that capacity that it would, in the opinion of the court, be reasonable to expect a party to the marriage to take steps to acquire.</li> <li>▪ The financial needs, obligations and responsibilities that each of the parties to the marriage has or is likely to have in the foreseeable future.</li> </ul>

Type of order	Matters to have regard to
	<ul style="list-style-type: none"> <li>▪ The standard of living enjoyed by the parties to the marriage before the conduct which formed the basis for the original application occurred. The conduct can be a failure to provide reasonable maintenance for the applicant or any child, unreasonable behaviour and desertion.</li> <li>▪ The age of each party to the marriage and the duration of the marriage.</li> <li>▪ Any physical or mental disability of either of the parties to the marriage.</li> <li>▪ The contributions which each of the parties has made or is likely to make in the foreseeable future to the welfare of the family, including any contribution made by looking after the home or caring for the family.</li> <li>▪ The conduct of each of the parties, if that conduct is such that it would, in the opinion of the court, be inequitable to disregard it.</li> </ul>
Maintenance for a child of the family	<ul style="list-style-type: none"> <li>▪ The financial needs of the child.</li> <li>▪ The income, earning capacity (if any), property and other financial resources of the child.</li> <li>▪ Any physical or mental disability of the child.</li> <li>▪ The standard of living enjoyed by the family before the conduct which formed the basis for the original order occurred.</li> <li>▪ The manner in which the child was being and in which the parties to the marriage expected them to be educated or trained.</li> <li>▪ The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future. This will include in the case of earning capacity any increase in that capacity that it would, in the opinion of the court, be reasonable to expect a party to the marriage to take steps to acquire.</li> </ul>

Type of order	Matters to have regard to
	<ul style="list-style-type: none"> <li>▪ The financial needs , obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future.</li> </ul>
Order against a step-parent who has treated a child as a child of the family in favour of such a child	<ul style="list-style-type: none"> <li>▪ Whether the step-parent had assumed any responsibility for the child's maintenance and, if so, to what extent, and the basis on which that responsibility had been assumed and the length of time it had been maintained.</li> <li>▪ In the case of a step-father, whether in assuming and discharging that responsibility the respondent did so knowing that the child was not his own.</li> <li>▪ The liability of any other person to maintain the child.</li> </ul>

### ENFORCEMENT OF MAINTENANCE ORDERS

5. The court can enforce any order for maintenance made in a magistrates' court or any county court or High Court maintenance order which is registered in the magistrates' court for enforcement purposes.
6. After holding a means enquiry in the presence of the defaulter the court may, as a result, make the following orders:

Type of order	Matters to have regard to
Remission	The court may remit arrears but unless it appears unnecessary or impractical to do so, must notify the person in whose favour the order was made in writing and allow that person a reasonable opportunity to make representations. Arrears which are over 12 months old should generally be remitted.
Adjournment on terms	The court may order that the arrears be paid by instalments or within a specified period.
Distress warrant	The court may issue a warrant for distress on the defaulter's property forthwith or postpone the issue of the warrant until such time and on such conditions, if any, it sees fit.

Type of order	Matters to have regard to
Attachment of earnings order	<p>Where the defaulter is employed (but not self-employed) the court may order attachment of earnings whereby the employer is required to deduct a specified amount from the defaulter's wages or salary and send it to the court. The court should make an attachment of earnings order in preference to ordering a committal to prison whether immediate or suspended. When making an order the court must specify the normal deduction rate and a protected earnings rate.</p>
Imprisonment	<p>The defaulter may be imprisoned for a period of not less than five days and not more than six weeks. The court cannot issue a warrant for imprisonment unless:</p> <ul style="list-style-type: none"> <li>▪ the defaulter is present.</li> <li>▪ an attachment of earnings order would not be appropriate;</li> <li>▪ there has been enquiry into the reason for the default in the presence of the defaulter and the court is satisfied that the default is due to the defaulter's wilful refusal or culpable neglect.</li> </ul> <p>The court can postpone the issue of the warrant on such terms and conditions as it thinks fit (referred to as a suspended committal order) but, if postponed, it may not be issued without further notice being given to the defaulter and, if requested by them, a further review by the court.</p>

## CHILD SUPPORT APPLICATIONS

### Declaration of parentage

7. A declaration of parentage is an order declaring that a named person is or is not the parent of another person.
8. The following persons may apply for a declaration of parentage as of right:
  - a. parent of a child named in the application;
  - b. a child of a parent named in the application;

- c. the Child Support Agency.
9. Anyone else with a sufficient personal interest in the determination of the application may apply for a declaration.
  10. Where an application is made for a maintenance assessment, the Child Support Agency can assume parentage in the following cases:
    - a. where the alleged parent is or was married to the child's mother and the child has not been adopted;
    - b. where the alleged parent is registered on the birth certificate as the father and the child has not been adopted;
    - c. where the alleged parent refuses to take a scientific test to determine the child's parentage or, after submitting to such a test, there is no reasonable doubt that the alleged parent is the parent of the child;
    - d. where the Agency is satisfied that the alleged parent is a parent by virtue of the Human Fertilisation and Embryology Act 1990;
    - e. a decision has been made in other court proceedings mentioned in the Child Support Act 1991 that the alleged parent is a parent of the child, the decision is still in force and the child has not subsequently been adopted.
  11. In any other case where parentage is in dispute the Child Support Agency must apply for a declaration of parentage.
  12. The court can direct, on application of one or both of the parties, that blood tests be carried out by a body accredited by the Lord Chancellor. The court can order that a blood sample be taken from a minor if the person who has care and control does not consent where it is in the best interests of the minor to do so. Before making such a direction the court needs to know how and by whom payment is to be made.

13. A children's guardian can be appointed at any stage in the proceedings if such an appointment is necessary to safeguard the interests of the child.
14. The court can:
- a. make a declaration; or
  - b. refuse to hear the application if it is not in the child's best interests to do so or the applicant has insufficient personal interest in the application.
15. The unsuccessful party can be ordered to pay the successful party's costs including the fee paid for any blood tests obtained.

### **Enforcement of child support maintenance**

16. Maintenance is payable to the Child Support Agency in the form of a maintenance assessment. If the maintenance is not paid in accordance with the maintenance assessment the Agency can take the following action to enforce it:

<b>Action</b>	<b>Matters to have regard to</b>
Deductions from earnings order	<p>The Child Support Agency may make an order for payments and arrears to be collected by deduction from the payer's earnings without reference to the court.</p> <p>There is a right to appeal to a magistrates' court within 28 days of a deductions from earnings order being made. When hearing the appeal the court cannot question or review the amount of the maintenance assessment. The only two grounds of appeal are:</p> <ol style="list-style-type: none"> <li>a) the order is defective in that the employer is unable to comply with the order;</li> <li>b) the payments are not earnings. Earnings are wages, salary, sick pay and occupational pension but not disability pensions or allowances or pensions payable under Social Security enactments.</li> </ol>
Liability order	<p>A deduction from earnings order is not possible where the payer is self-employed or unemployed. In these circumstances the Child Support Agency can apply to the magistrates' court for the area in which the payer lives for a liability order. The Agency has to show that:</p>

Action	Matters to have regard to
	<p>a) an assessment has been made;</p> <p>b) the payer has been notified of the assessment at their last known address;</p> <p>c) the payer has been given at least seven days' notice of the Agency's intention to apply for an order.</p> <p>Where the criteria is satisfied and the court is satisfied that payments due have not been paid it is obliged to make the order.</p> <p>The order enables the Agency either to levy distress against the payer's goods or to take enforcement action in the county court.</p>
Means enquiry Proceedings	<p>If all the other methods have been tried and failed or considered to be inappropriate, the Agency can lay a complaint for a summons to bring the defaulter before the magistrates' court for a means enquiry. If the defaulter fails to attend a warrant can be issued.</p> <p>When hearing the application the court has no power to remit any arrears. If, after a means enquiry, the court finds that the defaulter has wilfully refused or culpably neglected to pay it may either commit them to prison or disqualify them from driving. The court should invite representations from the Agency and the defaulter as to whether committal to prison or disqualification is more appropriate. Before imposing disqualification or imprisonment the court is obliged, therefore, to consider:</p> <p>a) whether the defaulter needs a driving licence to earn a living;</p> <p>b) the defaulter's means;</p> <p>c) whether there has been wilful refusal or culpable neglect.</p> <p><i>Disqualification from driving</i></p> <p>The disqualification may be for up to two years and may be ordered to take effect immediately or it may be suspended on terms regulating the payment of the maintenance assessment arrears together with the Agency's costs in bringing the application.</p> <p>The court must specify the sum in respect of which disqualification is ordered including any court costs.</p> <p>On the application of the defaulter or the Agency the court:</p>

Action	Matters to have regard to
	<ul style="list-style-type: none"> <li>▪ <i>may</i> revoke or reduce the disqualification if there has been part-payment of the amount due;</li> <li>▪ <i>must</i> revoke a disqualification if the amount due has been paid in full.</li> </ul> <p>If the amount due has not been paid when the disqualification expires a further complaint for a means enquiry may be made and if the defaulter is found to have wilfully refused or culpably neglected to pay again, the court may impose either a further disqualification or a term of imprisonment.</p>
Imprisonment	<p>Imprisonment may be for up to six weeks and may be ordered to take effect immediately or suspended on terms. The court must specify the sum in respect of which imprisonment is ordered including any court costs.</p> <p>Where imprisonment is suspended on terms and the defaulter fails to comply with those terms a further application can be made for the warrant of commitment to be issued and, if the warrant is issued, credit has to be given for any payments made since the commitment was suspended.</p> <p>Even if the defaulter is sent to prison the arrears remain unremitted and payable, although the Agency cannot take any further action to enforce them.</p>

## SECTION 14 REASONS AND WELFARE CHECKLISTS

### INTRODUCTION

1. The justices are required by the rules to give reasons for their decisions and must state clearly their findings of fact. The purpose behind the giving of reasons is to explain the court's decision and to demonstrate how it arrived at its conclusion.
2. Your reasons will be read by the parties and their representatives and also by the child when they become old enough to understand them. In reaching a decision a structured approach is required and by following a structure justices can ensure that all issues raised have been addressed and that the correct threshold in public law proceedings has been applied.
3. It is also vital that any other court looking at the reasons will be able to see why the court has reached its decision. This can be at a later hearing, upon transfer or on appeal. The appellate court must be satisfied that the justices have applied the law correctly and have taken into account what they should have, and have not taken into account inappropriate matters.
4. This section is intended to assist in the process of structuring reasons in the main areas of family work. If justices find themselves dealing with one of the less common areas of work they should apply the same principles they have found here, but they should consult their legal adviser for specific advice.
5. Some panels use pro-formas<sup>1</sup> that can be helpful, but each case is different and is unlikely to 'fit' exactly into the pro-forma. Therefore this section sets out some 'checklists' that can form an agenda and act as an *aide-memoire* when you are drafting the reasons with your legal adviser. Attached to some of the checklists are examples of pronouncements that can be included in your reasons.

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<sup>1</sup> See, for example, the Structured Decision Making Form in this section.

6. Remember that each case usually involves a balancing of risk and it is important that your reasons set out this balancing exercise.

**What does the High Court consider?**

7. A judge hearing an appeal will be examining your reasons to see whether your decision can be said to have been made:

‘under a mistake of law, or in disregard of principle or under a misapprehension of fact, or to have involved taking into account irrelevant matters or omitting from account matters which ought to have been considered, or to have been plainly wrong, ie. outside the generous ambit within which a reasonable disagreement is possible....’

**CHECKLISTS**

*The following pages give the reasons and welfare checklists in detail.*

**EMERGENCY PROTECTION ORDER**

All the following points need to be considered:

- Whose application, for what and in respect of whom, to include reference to parents/persons with parental responsibility for the child.
- Opposed/unopposed.
- If *ex parte*, explain why the Justices' Clerk granted leave and why the court is dealing with the application on an *ex parte* basis.
- Consider the guidance issued in *X County Council v B* [2005] and *Re X* [2006]
- Documents read/evidence heard.
- Brief summary of background to include how the child came to the attention of Social Services.
- In contested cases on notice, summarise each party's case.
- Make findings of fact on relevant issues that should be succinct but sufficiently clear to inform any party not present as to the reasons why an emergency order was necessary.
- Refer to criteria in the 1989 Act (i.e. that court is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if (i) they are not removed to accommodation provided by or on behalf of the applicant; or (ii) they do not remain in the place in which they are then being accommodated).
- No order principle – justify the need for an order or for refusing to make the order.
- State the order and duration and the reasons for making the order for the period specified (that should be the minimum necessary).

- If an exclusion requirement is to be inserted into the order explain the findings for that requirement by reference to the conditions in the Act. The conditions are (a) that there is reasonable cause to believe that, if the relevant person is excluded from a house in which the child lives then (i) the child will not be likely to suffer significant harm even though the child is not removed to accommodation provided by or on behalf of the applicant or does not remain in the place in which they are then being accommodated, or (ii) in the case of an order made on grounds of enquiries being frustrated, the enquiries will cease to be frustrated, and (b) that another person living in the house (parent of the child or some other person) is able and willing to give to the child the care which it would be reasonable to expect a parent to give to them and consents to the inclusion of the exclusion requirement.
- It may be necessary to refer to the arrangements for contact (especially in the case of a very young baby) and to make directions relating to contact or to medical/psychiatric examination.
- Such a draconian decision requires a clear statement of why it is found to be justified on the evidence before the court. Address Human Rights Act issues.

**INTERIM CARE/SUPERVISION ORDERS**

All the following points need to be considered:

- Whose application, for what, in respect of whom and including reference to child's parents/persons with parental responsibility.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of the case to include how the child came to the attention of Social Services. If the parties have prepared a statement of agreed facts insert them here.
- If contested case, include any facts agreed and disputed facts and summarise each party's case including any case law cited.
- Make limited findings of fact (whether this is a contested hearing or not) and include limited findings on any case law cited.
- Refer to threshold criteria – reasonable grounds to believe.
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether and what order to make.
- No order principle – justify the need for any order to be made and address Human Rights Act issues.
- State order made and duration.
- If an exclusion requirement is to be inserted into an interim care order make findings in respect of that requirement by reference to conditions in the Act. The conditions are that (a) there is reasonable cause to believe that if the relevant person is excluded from a house in which the child lives, the child will cease to suffer or cease to be likely to suffer significant harm and (b) that another person living in the house

(whether a parent of the child or some other person) is able and willing to give to the child the care which it would be reasonable to expect a parent to give them and that person consents to the inclusion of an exclusion requirement.

- Signposting for timetabling – current arrangements/future arrangements. Make any necessary directions including directions relating to medical/ psychiatric assessments.

*Note: If the order made goes against the recommendation of the CAFCASS officer, specific reference must be made in the reasons as to why the bench find that such an order is appropriate, making reference to relevant factors in the welfare checklist.*

**CARE/SUPERVISION ORDERS – FINAL ORDERS**

All the following points need to be considered:

- Whose application, for what and in respect of whom.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief history of court proceedings to date, i.e. explain when and what previous orders have been made in these proceedings.
- Either adopt previous reasons for background, for example, ‘The background to these proceedings is set out fully in the Justices’ Reasons dated xxxx’ or insert the statement of agreed facts prepared by the parties.
- Update situation and include reference to the care plan.
- In a contested case, include any facts agreed and summarise each party’s case including any case law cited.
- Make findings of fact on relevant issues including findings on any case law cited. If this is an agreed order it may be possible to adopt the findings of a previous bench.
- Refer to the threshold criteria – the court is satisfied that.
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether and what order to make.
- No order principle – justify the need for any order to be made and address Human Rights Act issues.
- State order made.

- Refer to contact arrangements (this may be necessary either because an order as to contact with a child in care has been applied for or to demonstrate that the bench are aware of power to make orders under the Act but that there is no need for such an order in this case, for example, 'We understand that the local authority propose to allow X and Y reasonable contact with their children as follows...').

*Note: If the order made goes against the recommendation of the CAFCASS officer, specific reference must be made in the reasons as to why the bench find that such an order is appropriate, making reference to relevant factors in the welfare checklist.*

**REQUEST FOR LEAVE FOR EXPERTS****Expert appointment application**

*(Any party proposing to instruct an expert should file this information in advance of Case Management Conference and on any occasion when seeking to appoint an expert.)*

- What is the expert's area of expertise?
- Should this work have been undertaken by the local authority? If yes, why has it not been?
- Has the expert proposed already been contacted? If not, why not? (The court will consider adjourning the application if no contact has been made and the expert is unavailable.)
- Has the expert confirmed that the work is appropriate, within their area of expertise, and that they are available to undertake and complete the work within the timescale identified for the child's welfare?
- What is the relevance of the expert evidence? Why is it that the evidence proposed could not be given by a social worker or the child's guardian?
- What specific questions will the expert be asked to address? (Attach draft letter of instruction.)
- Is the expert's evidence needed to address the allegation of significant harm or deal with the appropriate order:
  - significant harm
  - appropriate order.
- What is the likely cost of the report? (Both the hourly and global rate should be indicated.)
- What is the proposal for the apportionment of the costs?

- Local authority 100%
- Moiety basis (50% local authority; 50% public funding)
- equally between parties.
- The reason for this apportionment
- What is the timescale for preparation of the report?
- Can the expert attend court on the proposed hearing date(s)?
- Is this a joined instruction? If not, why not?
- Who will be responsible for sending the letter of instruction and by what date?  
(Confirm that the expert is aware of their duty/contents of the Protocol.)
- What directions are sought re: disclosing papers/child/timetable/dates for court, etc.?

## CONTACT ORDERS

All the following points need to be considered:

- Whose application, for what and in respect of whom to include reference to the child's parents/persons with parental responsibility.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of background including what prompted the application to be made. If this hearing is the final hearing after interim order or one of series of interim hearings, adopt previous reasons for background and give brief updating information.
- If the application is agreed include any agreed statement of facts prepared by the parties.
- If contested, include any facts agreed and then summarise each party's case including any case law cited.
- Make findings of fact on relevant issues including findings on any case law cited. If a contested hearing, it is desirable that magistrates in their reasons expressly refer to presumption in favour of contact between a natural parent and child with reference to *Re H (Minors)(Access)(1992)* or any of the several other relevant decisions (seek the advice of the legal adviser).
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether and what order to make.
- No order principle – justify the need for any order. If a contact order is to be made at an interim hearing, at an early stage in proceedings, before the CAFCASS officer's report is completed, have regard to the decision in *Re D (Contact: Interim*

Order)(1995) and explain why the bench feels able to make an order without hearing full oral evidence or having the advice of the CAFCASS officer. Address Human Rights Act issues.

- State order made.

*Note: If the order is made or refused against the recommendation of the children and family court reporter, specific reference must be made in the reasons as to why the bench find that such an order is appropriate, making reference to relevant factors in the welfare checklist.*

**PROHIBITED STEPS/SPECIFIC ISSUE ORDERS**

All the following points need to be considered:

- Whose application, for what and in respect of whom to include reference to the child's parents/persons with parental responsibility.
- Opposed/unopposed.
- If *ex parte* explain why the Justices' Clerk granted leave.
- Documents read/evidence heard.
- Brief summary of background including what prompted the application to be made. If the application is agreed, include any agreed statement of facts prepared by the parties.
- If contested, include any facts agreed and summarise each party's case including reference to any case law cited.
- Make findings of fact on relevant issues including findings on any case law cited.
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether and what order to make.
- No order principle – justify the need for an order making explicit reference to the restriction imposed in the Act (i.e. no court shall make a specific issue order or prohibited steps order with a view to achieving a result that could be achieved by making a residence or contact order). Address HRA issues.
- State order/refuse order.

*Note: If an order is made or refused against the recommendation of the CAFCASS officer, specific reference must be made in the reasons as to why the bench find that*

*such an order/refusal is appropriate making reference to relevant factors in the welfare checklist.*

**PARENTAL RESPONSIBILITY ORDERS**

All the following points need to be considered:

- Whose application, for what and in respect of whom to include reference to the child's mother.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of background to the application. If application is agreed include any agreed statement of facts prepared by the parties.
- If contested, include any agreed facts and summarise each party's case including reference to any case law cited.
- Make findings of fact on relevant issues to include specific reference to the three conditions set out in *Re H* (1993) (commitment, attachment, applicant's reason for applying) and any other case law cited. Address Human Rights Act issues.
- State order/refuse order.

*Note: If order is made or refused against the recommendation of the CAFCASS officer, specific reference must be made in the reasons as to why the bench find that such an order/refusal is appropriate.*

## RESIDENCE ORDERS

All the following points need to be considered:

- Whose application, for what in respect of whom and including reference to child's parents/persons with parental responsibility.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of background including what prompted the application to be made. If the application is agreed, include any agreed statement of facts prepared by the parties.
- If contested, include any facts agreed and summarise each party's case including any case law cited.
- Make findings of fact on relevant issues including in relation to any case law cited.
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist taken into account in deciding whether and what order to make.
- If the order to be made is an interim order there is a need to make it clear as to why the bench finds it necessary to make an order at such an early stage in proceedings without the benefit of advice from the CAFCASS officer or full written/oral evidence.
- No order principle – justify the need for an order if considering making one. This is particularly important where the order to be made is simply confirming the status quo. Address Human Rights Act issues.
- State order made or refuse application.
- If residence order made in favour of father who does not already have parental responsibility, remember to make a parental responsibility order.

*Note: If the order is made or refused against the recommendation of the CAFCASS officer, specific reference must be made in the reasons as to why the bench find that such an order/refusal is appropriate, making reference to relevant factors in the welfare checklist.*

**SECURE ACCOMMODATION ORDERS**

All the following points need to be considered:

- Whose application, for what and in respect of whom, to include reference to the parents/persons with parental responsibility for the child.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of background including what prompted an application to be made. In an agreed case insert any statement of agreed facts prepared by the parties.
- In a contested case, include any facts agreed and summarise each party's case including any case law cited.
- Make findings of fact on relevant issues including findings on any case law cited.
- Refer to criteria in the Act, i.e. that it appears that the child has a history of absconding and is likely to abscond from any other accommodation and if they abscond is likely to suffer significant harm or that if they are kept in any other description of accommodation are likely to self-injure or injure other persons.
- *No order principle, paramountcy principle and welfare checklist do not apply so do not refer to them.*
- Make order or refuse order.
- Explain the reasons for length of order chosen.
- If interim order, explain what further enquiries are necessary before final length of order can be assessed.
- The court has determined that the order is compliant with the principles of the Human Rights Act 1998 because:

- i. The court has the power to make such an order as is prescribed in the Children Act 1989 and the regulations thereunder.
- ii. The order pursues the legitimate aim of protecting the health or morals of [insert name(s)] or protecting the rights of others, namely [insert name(s)].
- iii. The order is proportionate in that it is the minimum intervention necessary to ensure that \_\_\_\_\_
- iv. The parties and the child/ren have rights to an independent and impartial tribunal, disclosure, an adversarial hearing, reasons and decisions made within a reasonable time. The court has concluded that \_\_\_\_\_

**WELFARE CHECKLIST- CHILDREN ACT 1989**

All the following points on the welfare checklist need to be considered:

- the ascertainable wishes and feelings of the child concerned (considered in the light of their age and understanding);
- their physical, emotional and educational needs;
- the likely effect on them of any change in their circumstances;
- their age, sex, background and any characteristics of which the court considers relevant;
- any harm which they have suffered or are at risk of suffering;
- how capable each of their parents and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs;
- the range of powers available.

**SPECIAL GUARDIANSHIP ORDERS**

All the following points need to be considered and referred to:

Whose application it is and include reference to child's parent/guardian or those with parental responsibility.

- Opposed/unopposed.
- Documents read which must include a report from the local authority/evidence heard.
- Brief summary of the case to include what prompted the application to be made. If the application is agreed, include any agreed statement of facts prepared by the parties.
- If a contested case, include any facts agreed and any disputed facts and summarise each party's case including any case law cited.
- Make necessary findings of fact and include findings on any case law cited.
- Make clear the welfare of the child has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether and what order to make.
- Contact.

If a special guardianship order is appropriate, before making the order the court must consider whether to make a contact order and the discharge of any section 8 orders in force.

- CAFCASS recommendations.

If the court goes against the recommendation a clear explanation must be given.

- No order principle – justify the need for the order to be made and address Human Rights Act issues (see *Section 2: General Principles in Family Cases* earlier).
- Give the decision.

**PLACEMENT ORDERS**

All the following points need to be considered and referred to:

- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of the case to include why the local authority is making the application. If parties have prepared a statement of agreed facts insert them here.
- If a contested case, include any facts agreed and any disputed facts and summarise each party's case including any case law cited.
- Make findings of fact and include findings on any case law cited.
- Which of the following applies:
  - a. the child is subject of a care order; or
  - b. the court is satisfied that the threshold conditions for the making of a care order are met; or
  - c. the child has no parent or guardian; or
  - d. where the child has a parent or guardian that
- Consent – is the court satisfied that the:
  - a. parent/guardian consented and has not withdrawn that consent? or
  - b. parent/guardian's consent should be dispensed with?
- Make clear the welfare of the child throughout his or her lifetime has been the paramount consideration and the relevant aspects of the welfare checklist have been taken into account in deciding whether to make the order.

- Children’s guardian’s recommendations – if the court goes against the recommendation a clear explanation must be given.
- No order principle – justify the need for the order to be made and address Human Rights Act issues (see *Section 2: General Principles in Family Cases* earlier).
- Contact – is any order necessary?
- Give the decision.

**ADOPTION ORDERS**

All the following points need to be considered and referred to:

- Whose application this is including reference to the child's parents/guardians.
- Opposed/unopposed.
- Documents read/evidence heard.
- Brief summary of the case to include how the child comes to be living with the applicants. If the application is agreed, include any agreed statement of facts prepared by the parties.
- If a contested case, include any facts agreed and any disputed facts and summarise each party's case including any case law cited.
- Make necessary findings of fact and include findings on any case law cited.
- Dependent on the basis of the application (e.g. foster parent or placement by an agency) is the required period of residence satisfied (see section 15 paragraph 3 of this bench book)?

Under which of the three possible regimes was the issue of parental consent considered:

- a. Placement by an adoption agency (i.e. where the child has been placed by an adoption agency with prospective applicant adopters) and the court is satisfied:
  - i. that the child was placed with the consent of each parent/guardian and the consent of the mother was given when the child was at least six weeks old; or
  - ii. that the child was placed under a placement order: and
  - iii. no parent/guardian opposes the making of the adoption order (if a parent or guardian has been given leave to oppose the making of

the order then the court must proceed under condition c. below and consider dispensing with the consent of the parents); or

- b. The child is free for adoption by virtue of a court order; or
  - c. In all other cases where the residence conditions are satisfied consider if:
    - i. the parent/guardian consents to the application;
    - ii. the parent/guardian gave advance consent that has not been withdrawn, and does not oppose the application; or
    - iii. the parent/guardian's consent should be dispensed with.
- Where the court has to consider dispensing with the parent's/guardian's consent the court may do so only if satisfied that:
    - i. the parent/guardian cannot be found or is incapable of giving consent; or
    - ii. the welfare of the child requires the consent to be dispensed with.
  - Make clear the welfare of the child throughout his or her lifetime has been the paramount consideration and the welfare checklist has been taken into account in deciding the orders available and which, if any, is the most appropriate.
  - What, if any, recommendation is made by CAF/CASS? If the court goes against this recommendation a clear explanation must be given.
  - No order principle – justify the need for the order to be made and address Human Rights Act issues (see *Section 2: General Principles in Family Cases* earlier).
  - Contact under the Adoption and Children Act 2002 – is any order necessary? The court must consider whether there should be arrangements for allowing any person contact with the child, and must consider any proposed or existing arrangements and obtain any views of the parties to the proceedings.
  - Give the decision.

**WELFARE CHECKLIST-  
ADOPTION AND CHILDREN ACT 2002**

All the following points on the welfare checklist need to be considered:

- the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding);
- the child's particular needs;
- the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person;
- the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant;
- any harm (within the meaning of the Children Act 1989) which the child has suffered or is at risk of suffering;
- the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including:
  - a. the likelihood of any relationship continuing and the value to the child of doing so;
  - b. the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise met the child's needs;
  - c. the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

**OCCUPATION ORDERS AND NON-MOLESTATION ORDERS**

(See *Section 11: Family Law Act – domestic violence orders* for more detailed information)

All the following points need to be considered:

- Whose application, for what and in respect of whom.
- Who are the parties and why are they connected parties.
- Whether respondent is present in court today and if they are not present or represented ought the court proceed in their absence.
- Is the court satisfied that the applicant/applicant's solicitors effected personal service of the application form, statement of the applicant and notice of hearing on the respondent, pursuant to Rule 3A(5), Family Proceedings Courts (Matrimonial Proceedings) Rules 1991, on (date).
- Is the application opposed/unopposed.
- Has the applicant, if applying for an application order, sent a copy of the application to the mortgagee/landlord with a notice in Form FL416 informing them of their right to make representations, by first class post pursuant to Rule 3A(10), Family Proceedings Courts (Matrimonial Proceedings) Rules 1991.
- Consider whether it is appropriate to transfer the application for a non-molestation order and occupation order. *Note:* If the respondent is under 18 years of age, the court must transfer the proceedings to the county court.
- Documents read/evidence heard, and any agreed statement of facts prepared by the parties, including reference to any case law cited.
- Make findings of fact on relevant issues. Having regard to the above findings state whether the respondent poses a serious threat to the applicant and child/ren.

- State, if dealing with an application for a non-molestation order, whether order to secure their health and safety. State terms of the order.
- Consider the necessary duration of the order, which should be the shortest necessary to achieve its aims.
- *Ex parte* orders: Do all the circumstances including any risk of significant harm to the applicant or a relevant child if the order is not made immediately justify the making of the order without notice. The court should also consider whether or not it is likely that the applicant will be deterred or prevented from pursuing the application if an order is not made immediately. The court should consider making an *ex parte* order where there is reason to believe that the respondent is aware of proceedings but is deliberately evading service.
- If an *ex parte* order is granted the court will decide how long is appropriate for the order to remain in place before the court reconsiders it on an on-notice basis.
- Power of arrest: having made a non-molestation order do you find that the respondent has used and/or threatened violence against the applicant/and relevant child/ren? If 'Yes' you must attach a power of arrest unless you are satisfied that the person protected by the order is adequately protected without the power of arrest. If you are dealing with an *ex parte* order the power is discretionary.
- Human rights: The rights of those concerned under Article 8 of the Human Rights Convention will be affected by the order(s) but you must consider whether for the necessary protection of the applicant and relevant child(ren) the order(s) are proportionate in all the circumstances.

**THE ASSESSMENT OF MAINTENANCE**

1. Ascertain the net income of each family unit. A man cannot be made to pay maintenance out of his second spouse's or partner's income but her income is relevant in seeing what he can afford to pay in so far as her income relieves him of a proportion of the expenses of the household which he would otherwise be shouldering alone.
2. Assess the essential expenditure of each family unit excluding food, clothing and any luxury (i.e. non-essential) items that the court deems unnecessary.
3. Subtract the expenditure from the income.
4. Compare the remaining figures to decide how much the payer shall be ordered to pay to the other family unit.
5. Decide on a proposed figure for maintenance. As a guideline, you can always have regard to an offer that is made, any maintenance currently being provided voluntarily, any existing order which is sought to be varied and DSS benefit rates for children
6. Have regard to any tax relief.
7. What is the net effect – i.e. the impact of making this particular order on the respective households? Would an order in these terms be a fair distribution of income? The court should alter this proposed order up or down if necessary so as to produce a result which is as just as possible to both households in the light of all the circumstances and the statutory criteria.
8. It is important not to make an order that will reduce the payer to below subsistence level. This is usually regarded as the amount a person would receive from the State if on income support. Therefore, it is usual to make a nominal order for maintenance if the payer is in receipt of state benefits.

In considering the net effect of the order, it is important to have regard to the DSS rates, particularly if the payer is on a low income. The court should look at the figure the payer would receive if on income support and add on any other financial benefits to the payer if they are not working (e.g. rent paid, no longer any travelling expenses to work).

**STRUCTURED DECISION-MAKING PROFORMA**

Family Proceedings Court

REASONS IN FAMILY PROCEEDINGS

DATE	
APPLICANT	
RESPONDENT	
OTHER PARTIES	

NATURE OF PROCEEDINGS

SECTION 8 ORDERS	
FINANCIAL ORDERS	
CARE PROCEEDINGS ORDERS	
OTHER PROCEEDINGS	

JUSTICES	(1)
	(2)
	(3)
LEGAL ADVISER	
SITTING AT	

Parties	Represented by
Guardian/Children and Family Court Reporter	
Duration of Proceedings	











THE WELFARE CHECKLIST

(a) The ascertainable wishes and feelings of the child concerned (considered in the light of their age and understanding).


(b) Their physical, emotional and educational needs.


(c) Likely effect on them of any change of their circumstances.


(d) Their age, sex, background and any characteristics that the court considers relevant.


(e) Any harm which they have suffered or are at risk of suffering.

(f) How capable each of their parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting their needs.

(g) The range of powers available to the court.

THE REQUIREMENTS OF THE PARTICULAR SECTION UNDER CONSIDERATION

## 6. HUMAN RIGHTS

In making the order(s) in this case the court has considered the rights of the parties and the child(ren). In doing so the following rights are engaged:
The court has determined that the order is compliant with the principles of the Human Rights Act 1998 because:
<ul style="list-style-type: none"> <li>• The court has the power to make such an order as is prescribed in</li> </ul>
<ul style="list-style-type: none"> <li>• The order pursues the legitimate aim of protecting the health or morals of [insert name(s)] or protecting the rights of others, namely</li> </ul>
<ul style="list-style-type: none"> <li>• The order is proportionate in that it is the minimum intervention necessary to ensure that</li> </ul>
<ul style="list-style-type: none"> <li>• The parties and the child/ren have rights to an independent and impartial tribunal, disclosure, an adversarial hearing, reasons and decisions made within a reasonable time. The court has concluded that</li> </ul>
<b>Secure accommodation orders only:</b>
<ul style="list-style-type: none"> <li>• The court has considered the right to liberty and security of the child under Article 5 European Convention of Human Rights. The court is satisfied that the making of this order comes within the exception to the right to liberty under Article 5 (i)(d)</li> </ul>

7. ORDER(S)

SECTION 8
FINANCIAL
OTHERS (eg care)

8. REASONS FOR [NO] ORDER(S)

[Explain why it is better for an order to be made or not made. State the recommendation of the children’s guardian and if it is not being followed explain why.]

Signed .....

**SECTION 15 ADOPTION****ADOPTION PROCEEDINGS**

1. The adoption of children is governed by the Adoption and Children Act 2002. Whenever a court is coming to a decision about the adoption of a child the paramount consideration of the court must be the child's welfare throughout his life. The court must always consider the whole range of powers and must not make any order under the Adoption and Children Act 2002 unless it considers that making the order would be better for the child than not doing so. The delay principle also applies and the court is required to consider that in general any delay in coming to a decision is likely to prejudice the child's welfare.
  
2. The Adoption and Children Act 2002 provides a checklist which is very similar to the one used in the Children Act 1989. The factors that the court will consider, amongst others, are:
  - a. the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
  - b. the child's particular needs,
  - c. the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
  - d. the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
  - e. any harm (within the meaning to the Children Act 1989) which the child has suffered or is at risk of suffering,
  - f. the relationship which the child has with relatives, and with any person in relation to whom the court or agency considers the question to be relevant, including-

- i. the likelihood of any such relationship continuing and the value to the child of its doing so,
- ii. the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
- iii. the wishes and feelings of any of the child's relatives, or any such person, regarding the child.

### **ADOPTION AND PLACEMENT**

3. No child can be adopted unless they have resided with the applicants for specified periods preceding the making of the application:
  - a. ten weeks where an adoption agency is authorised to place the child for adoption,
  - b. six months where the applicant is a step-parent,
  - c. one year if the applicants are local authority foster parents,
  - d. three years in any other case (whether continuous or not) during the period of five years preceding the application.
4. An adoption agency can only be authorised to place a child for adoption where either:
  - a. the parents consent or
  - b. the court has made a placement order.

**PLACEMENT ORDERS**

5. This is an order of the court authorising a local authority to place a child for adoption with any prospective adopters chosen by the authority. On the making of a placement order parental responsibility for the child is given to the adoption agency and the prospective adopters. The parents' parental responsibility is not extinguished but is shared with the prospective adopters and the agency. It is for the agency to decide on any necessary restrictions of the exercise of parental responsibility.
6. Applications to make or revoke placement orders are specified proceedings and therefore the child will be a party and a children's guardian will be appointed by the court. The guardian will appoint a solicitor to represent the child.
7. Once a placement order is made only a local authority may remove the child and it continues in force until it is revoked, the child marries or becomes a civil partner, attains 18 years or the adoption order is made in respect of the child. Other consequences of a placement order are:
  - a. any care order which the child is subject to is suspended;
  - b. any other order under section 8 Children Act 1989 and any supervision order ceases to have effect;
  - c. no prohibited steps, specific issue or child assessment order can be made;
  - d. no application for a residence order under section 8 Children Act 1989 can be made unless the applicant has obtained the leave of the court and an application for an adoption order has been made;
  - e. no application for a contact order under section 8 Children Act 1989 can be made unless the application is to be heard together with an application for the adoption of the child (note: the court can make an order for contact under section 26 Adoption and Children Act 2002, see below);

- f. the child may not be given a new surname or removed from the UK for more than a month unless each parent consents or the court grants leave.

### **CONDITIONS FOR MAKING A PLACEMENT ORDER**

- 8. The court may not make a placement order in respect of a child unless:
  - a. the child is subject to a care order; or
  - b. the court is satisfied that the threshold conditions for the making of a care order are met; or
  - c. the child has no parent or guardian; or
  - d. or where the child has a parent or guardian that:
    - i. they have consented to the child being placed for adoption or
    - ii. the parent's or guardian's consent should be dispensed with.
- 9. The welfare of the child is the paramount consideration and the welfare checklist, no order and no delay principles apply.

### **REPORTS**

- 10. The court will appoint a guardian for the child who is required to advise the court on matters relating to the welfare of the child. The court will also consider any report filed by the local authority giving its reasons for placing the child for adoption and addressing other matters as stipulated by the regulations.

### **CONTACT WHILST SUBJECT TO A PLACEMENT ORDER**

- 11. Before making a placement order the court must:

- a. consider the arrangements that the adoption agency has made or proposes to make for allowing any person contact with the child, and
  - b. invite the parties to the proceedings to comment on those arrangements.
12. The court may make an order under section 26 Adoption and Children Act 2002 requiring the person with whom the child lives or is to live to allow the child to have contact with the person named in the order. The court may of its own initiative make an order under this section or the following can apply for an order:
- a. the child or adoption agency;
  - b. any parent, guardian or relative;
  - c. any person in whose favour there was a contact or residence order in force under the Children Act 1989 which ceased to have effect as a result of the placement order being made;
  - d. any person who had care of the child as a result of the exercise of the inherent jurisdiction of the High Court; or
  - e. any person who has obtained the court's leave to make the application.
13. The court may make any conditions for contact that it sees fit on the making of a contact order under this section.
14. The welfare of the child is the court's paramount consideration and the welfare checklist, the no order and delay principles apply.
15. A contact order under the ADOPTION AND CHILDREN ACT 2002 may be varied or revoked by the court or on an application by the child, the adoption agency or the person named in the order.
16. A contact order under this section only has effect whilst the adoption agency is authorised to place the child for adoption.

**ADOPTION**

17. An adoption order can be made in respect of a child who has not attained the age of 18 years on the date of the application and is under 19 years on the date of the making of the adoption order.
18. Applicants for an adoption order must satisfy conditions relating to domicile and residence. An application may be made by:
  - a. A couple or one person who is not married or a civil partner. A couple may be married, civil partners or living in an enduring relationship. A couple may be two people of different sexes or of the same sex.
  - b. Where an application is made by a couple or a single person they must be 21 years old (there are some exceptions, check with your legal adviser).
  - c. A person who is the partner (either married, civil partner or living in an enduring relationship) of the natural parent of the child to be adopted may apply.
  - d. An individual who is married or a civil partner may in certain circumstances apply on his or her own to adopt a child.

**CONDITIONS FOR MAKING AN ADOPTION ORDER**

19. The court may only make an adoption order if the child has resided with the applicants for the prescribed periods as set out in paragraph 3 above and

**EITHER**

- i. the parent or guardian consents to the making of the adoption order or
- ii. the parent or guardian has given advance consent to the child being adopted by any prospective adopters and does not oppose the making of the order or
- iii. the parent's or guardian's consent should be dispensed with.

Note: Where a parent has given advance consent to the making of the adoption order they can only oppose the making of the order with the leave of the court.

**OR**

- i. the child has been placed for adoption with the consent of the parent or guardian or
- ii. the child was placed for adoption under a placement order and
- iii. no parent or guardian opposes the making of the order.

Note: Where a child is subject to a placement order or has been placed with the consent of the parents the application for the adoption order can only be opposed with the court's leave.

**OR**

the child is subject to a freeing order.

20. The welfare of the child is the court's paramount consideration and the welfare checklist, the no order and no delay principles apply.
21. The making of an adoption order operates to extinguish the parental responsibility that any person other than the adopters had before the making of the order. Where the applicant is the partner of the parent of the adopted child the parental responsibility of that parent is not extinguished.
22. Where the applicants wish their identity to be confidential they may apply for a serial number to be assigned to them. This number will be used instead of their names.

## **REPORTS**

23. The local authority is required to submit a report to the court on the suitability of the applicants to adopt the child and regulations stipulate the matters the local authority must address in the report. Where the parents have consented to the placing of the child for adoption a reporting officer (CAFCASS) will be appointed who will witness the signature on the consent form and make a report in writing to the court. Where an adoption order is opposed, the arrangements for contact are opposed, or for any other reason the child is made a party, then a children's guardian will be appointed and will file a report with the court. In all other cases a CAFCASS officer will be appointed to report on the welfare of the child.

## **LEAVE TO OPPOSE AN APPLICATION**

24. When considering an application by the parents for leave to oppose the adoption application the court must be satisfied that there has been a change of circumstances since the making of the placement order or the giving of consent by the parents to the placement of the child.
25. The welfare of the child is the court's paramount consideration and the no order and no delay principles apply.

**CONSENT**

26. The consent provisions apply generally to consent to placement and consent to adoption.

'Consent' to the placement of a child for adoption or the making of an adoption order means:

*'consent given unconditionally and with the full understanding of what is involved, but a person may consent to adoption without knowing the identity of the persons in whose favour the order will be made'.*

27. The persons who have the right to consent are the parent 'having parental responsibility' or the guardian of the child (which includes a special guardian).

Those 'parents' who qualify are:

- a. the birth mother;
- b. the birth father where he is married to the child's mother at the time of the child's birth or if he subsequently marries the mother;
- c. an unmarried father if:
  - i. he becomes registered as the child's father, or
  - ii. he makes a parental responsibility agreement with the child's mother, or
  - iii. he is granted a parental responsibility order by the court;
- d. the child's adoptive parent, where the child has been the subject of a previous adoption.

28. Where the application is based on the consent of the parents a prescribed form signed by the parents or guardian and witnessed by a Cafcass officer must be filed with the court.

### **DISPENSING WITH CONSENT**

29. There are now only **two** grounds for dispensing with a parent's consent.

These are where the court is satisfied that:

- a. the parent or guardian of a child cannot be found or is incapable of giving consent; or
- b. the welfare of the child requires the consent to be dispensed with.

## **SECTION 16 THE USE OF EXPERT WITNESSES**

### **INTRODUCTION**

1. There is a multiplicity of potential experts in the Children Act sphere.
2. The vast majority will be working in an NHS trust or Child and Adolescent Mental Health Service (CAMHS)
3. Selecting the correct one will facilitate and help everyone in the case.
4. The wrong one can create problems (e.g. the danger of not being child centred).
5. It is vital to select the appropriate expert for the identified problem. The table below will assist.
6. Consider whether the expert will resolve the issues or confuse.
7. It is important to clearly identify the issues to be addressed.
8. Guardians and CAFCASS Legal are the best at knowing and identifying good independent experts
9. Consider and be cautious about the following:
  - a. Some busy professionals are reluctant to get involved in time-consuming court work.
  - b. For medical experts this is 'Category 2 ' work.
  - c. Those who are good at clear thinking and producing non-jargon reports are in short supply; delay may be inevitable.
  - d. Unfortunately the able/most effective experts are often in short supply – there will be a need to balance delay against the benefits of successful final resolution.

- e. Beware those experts who:
- i. are quickly available;
  - ii. have taken early retirement to concentrate on court work;
  - iii. are private company experts;
  - iv. have lost touch with peers and modern developments.

### SELECTING THE APPROPRIATE EXPERT

Child and family	'Expert'
<ul style="list-style-type: none"> <li>• Physical effects of abuse (physical, sexual, neglect)</li> </ul>	Paediatrician specialist, e.g. neurologist, or generalist, e.g. Community Paediatrician.
<ul style="list-style-type: none"> <li>• Developmental delay or learning disability</li> </ul>	Paediatrician; Community Paediatrician Psychologist; Clinical or Educational.
<ul style="list-style-type: none"> <li>• Mental illness (child) e.g. depression, post traumatic stress disorder</li> </ul>	Child Psychiatrist
<ul style="list-style-type: none"> <li>• Emotional and/or behavioural problems (child)</li> </ul>	Clinical Psychologist
<ul style="list-style-type: none"> <li>• Concerns about attachment/bonding between child and parent</li> </ul>	Clinical Psychologist; Social Worker
<ul style="list-style-type: none"> <li>• Criminal behaviour in the child</li> </ul>	Forensic Psychiatrist/Psychologist; Youth Offending Team
<ul style="list-style-type: none"> <li>• Parental mental illness</li> </ul>	General Adult Psychiatrist
<ul style="list-style-type: none"> <li>• Parental drug and alcohol problem</li> </ul>	Specialist Addiction Psychiatrist
<ul style="list-style-type: none"> <li>• Parental learning disability</li> </ul>	Learning Disability Psychiatrist, Psychologist

• Concerns about parenting	Social Worker
• Issues relating to contact, and permanence planning	Social Worker; Research Social Worker
• Significant harm	All

## PSYCHIATRISTS

### Child and adolescent psychiatrists

10. Child psychiatrists have a wide range of training and expertise, and knowledge of family functioning and needs. The required seniority is Consultant or Specialist Registrar. They will have identified that they are particularly expert in:
- a. advising on the diagnosis, management and outlook for children with mental health problems;
  - b. looking for causes of problems in inadequate parenting, early experience, and comparing that with possible biological or genetic causes of identified problems;
  - c. advice on the likely effects of certain styles of upbringing on child development;
  - d. offering advice on the mental impact of physical illnesses or brain disorders such as epilepsy and head injury;
  - e. advising on the likely effect of parental mental illness on children, including substance misuse;
  - f. advice on contact and its benefits;
  - g. advice on parent/child relationships, attachment and bonding.

11. It is *not* appropriate to ask child psychiatrists to make detailed comment on children's intelligence, educational attainments or complex assessments of developmental issues. These are the provinces of psychologists.

### **General adult psychiatrists**

12. Adult psychiatrists work with patients from 18 years to 65 years. They have very limited child knowledge.
13. Psychiatrists frequently work with other professionals, particularly members of the Community Mental Health Team (CMHT), for example, the community psychiatric nurse (CPN) and social workers.
14. The adult psychiatrist can give advice to the court on those adult individuals with mental illness and personality disorder.
15. They will advise on what can reasonably be expected from local psychiatric services and a realistic appraisal of how any particular individual might or might not respond to psychiatric treatment.
16. In relation to proceedings involving children and families, an adult psychiatrist can advise how a parent or guardian may be affected by a mental disorder such that it affects the ability of parents to look after a child.
17. The adult psychiatrist would not usually make a direct assessment of the adult's actual ability to parent, that being the province of the child psychiatrist.
18. The adult psychiatrist can advise what services from Health or Social Services might assist a parent with a mental disorder to act more effectively in the care of the child.
19. An adult psychiatrist would not make a detailed assessment of intellectual function, that usually being the province of the clinical psychologist.

**Psychiatrists in learning disability**

20. These experts can give evidence on:

- a. The presence of particular disorders in adults and advise on how these disorders effect parenting ability.
- b. Psychiatric problems and effects on relationships between the parents, personality functioning, substance misuse and full mental illness.
- c. The potential management of cases and the possibility for therapy and a secure return of children to parental care, as well as advising on future supervision.
- d. Learning disability consultants with particular interest in forensic psychiatry would advise on interpersonal aggression.
- e. It is less common or appropriate to instruct learning disability consultants to see children for developmental assessment. Clinical psychologists in learning disability or community paediatricians would be more appropriate.

**Addiction psychiatrists**

21. Addiction psychiatrists are trained as general adult psychiatrists with an additional focus on training in alcohol and drug related problems. Their expertise often includes knowledge of substance use in older adolescents.

22. Addiction psychiatrists are able to offer expertise in:

- a. substance use, problematic use and dependent/addicted use alone;
- b. substance use, problematic use and dependent/addicted use alone or in combination with psychiatric illness;
- c. the effects or likely effects on emotional and physical health of the adult substance user;

- d. the interplay of substance use, personality and mental illness;
  - e. the likely or potential effects of particular patterns of substance use upon personal relationships including partners and children;
  - f. the diagnosis and treatment of co-existing mental illness and its interface with substance use;
  - g. the treatments available for substance-related problems and their applicability to individual cases;
  - h. the prognosis with or without treatment.
23. Addiction psychiatrists do not have expertise in family assessments or in the assessment of parenting skills. They may be able to make a collaborative assessment with another expert, for example, a child psychiatrist or psychologist, in order to more successfully address issues of family functioning in the context of substance use.

### **Forensic psychiatrists**

24. Forensic psychiatrists are trained specifically in forensic psychiatry. The training is a separate programme. They have expertise in serious mental illness, involvement with the criminal justice system and risk assessment. Forensic psychiatrists are able to give advice to the court on:
- a. mental illness;
  - b. personality difficulties;
  - c. the interplay of personality in mental illness;
  - d. the interplay between mental state and risk to others;
  - e. the diagnosis and treatment of mental illness and its interface with risk;
  - f. prognosis with or without treatment.

25. Forensic psychiatrists do not have expertise in family assessments or in the assessment of parental skills. It is possible that a collaborative assessment with a child psychiatrist could be undertaken in some exceptional cases.

## **PSYCHOLOGISTS**

### **Clinical psychologists (including child psychologists)**

26. These experts are non-medical. They have particular expertise in human development, behaviour and assessment, including psychometric assessment. They can offer opinion on recommended courses of treatment and likely outcomes.
27. Clinical psychologists can give evidence on:
- a. cognitive assessment of the child (overall abilities, memory function, specific learning problems);
  - b. advice on the causes and the effects of developmental delay;
  - c. assessment and advice on emotional and behavioural problems;
  - d. advice on parent/child relationships, attachment and bonding;
  - e. advice on care plans, including fostering and adoption arrangements (however, fostering and adoption are difficult topics for most professional experts, except some specialist clinical psychologists, social workers and academics specifically trained in the field);
  - f. advice on conduct problems including young offenders;
  - g. advice on the neuro-psychological impacts of injury, including head injury;
  - h. assessment of the child's overall needs.

**Child psychologists in learning disability**

28. As working arrangements differ across areas, some clinical psychologists in learning disability will accept referrals of:
- a. adults only, or
  - b. adults and children, and/or
  - c. forensic learning disabilities.
29. This should be made clear in the individual's CV.
30. These experts are available to comment on:
- a. the degree of learning disability;
  - b. behaviour problems and parenting problems associated with learning disability;
  - c. overcoming problems such as poor literacy skills;
  - d. difficulties with memory function;
  - e. neuro-psychological problems and autism;
  - f. giving advice on the person's ability to understand and adapt their behaviour from the emotional point of view;
  - g. assessing risks (e.g. aggression, sex offending and fire setting);
  - h. assessing evidence of post traumatic stress disorder;
  - i. advising on the effects of bereavement and loss;
  - j. advising on attachment with respect to learning disability;
  - k. the effects of drug and alcohol within the speciality;

- l. treatment needs and prognosis;
  - m. fitness to plead.
31. Both child psychiatrists and child psychologists have the expertise to:
- a. establish possibilities for therapeutic change and rehabilitation;
  - b. assess the developmental impact on the child's mental health or mental illness of a parent, including substance misuse and experience of abuse;
  - c. assess the emotional effects on the child following divorce and contact disputes;
  - d. assess Gillick competency;
  - e. assess the child's understanding of right and wrong in the case of criminal behaviour.

### **Educational psychologists**

32. Education psychologists will comment on educational issues, the psychology of teaching and learning, and advise on situations where children are failing to learn effectively or where behaviour difficulties impede progress. They are not part of the Health Service but the Local Authority Education Service.
33. Reports in care proceedings from education psychologists will focus on:
- a. a child's progress in school;
  - b. a child's educational needs, if changes in school placement are required;
  - c. concern about behaviour in the school setting;
  - d. fears and anxieties or emotional disturbance that compromise educational progress.

**Forensic clinical psychiatrist/forensic psychologist**

34. Will comment on, or undertake:
- a. a risk assessment of a range of offending behaviours (including fire setting, sex offending and aggression and violence);
  - b. psychometric assessment where relevant;
  - c. treatment recommendations;
  - d. prognosis.
35. Clients with a forensic history and learning disability are usually referred to the Learning Disability Service.

**OTHER DISCIPLINES****Clinical neuropsychology**

36. Neuropsychology is a study of the way the brain works and how damage (e.g. from a road traffic accident) can interrupt normal functioning in specific ways. Complex assessment may require someone with particular expertise in this area.
37. Most child psychologists will undertake some neuropsychological assessments. However, in complex cases, specific expertise in this area can be sought. This will be indicated in the expert's CV.

**Counselling psychology**

38. Counselling psychology is a relatively new profession. Increasing numbers of counselling psychologists are employed in the NHS or undertake private practice. Counselling psychologists are skilled in offering a range of psychological therapies and are able to offer insight into options and evaluations in this area. Many also have areas of special interest or expertise (e.g. learning disabilities, the effects of childhood sexual abuse, post traumatic stress disorder, relationship breakdown,

eating disorders). There are areas of overlap with clinical psychology and counselling psychologists are often employed within departments of clinical psychology.

### **Paediatricians**

39. Paediatricians include a broad range of sub-specialities reflecting the range of children's health care including acute (hospital based) and community paediatricians.
40. Acute paediatricians have expertise in: problems before, during and after birth (perinatal and neonatal medicine); acute illness; specialist areas including cardiology, neurology, etc.
41. Community paediatricians have expertise in developmental delay and disorders, disability, emotional and psychological problems. Many also have a particular expertise in sexual harm.
42. Paediatricians consider the effects on children's health by assessing and measuring growth, physical development and general developmental progress – and like psychologists, against standardised references where available and by considering the emotional consequences of harm.
43. Paediatricians will provide information, assessment, diagnosis and recommendations based upon:
  - a. the child's and family's past history including antenatal and perinatal history, childhood illnesses, hospital admissions and any other health-related information;
  - b. using information from all available health courses (hospital, community, general practice and other);

- c. considering the effects of all forms of abuse – physical, neglect, sexual, emotional – on short- and long-term problems, as this relates to a child's growth and physical development, and general social and emotional development.

### **Play therapists**

- 44. One of the 'Professions Allied to Medicine (PAMs)' these help children through the use of play deal with the emotionally upset aspects of physical illness. Other PAMs are:
  - a. speech therapists
  - b. physiotherapists
  - c. dieticians.
- 45. They all work primarily with children who have physical/developmental problems.

### **Clinical nurse specialist**

- 46. These are senior nurses who have developed expert knowledge in the area of specific childhood illness (e.g. Asthma/Diabetes). Their experiences give them very considerable knowledge about the psycho-family–social aspects of such diseases.

### **Counsellors**

- 47. A generic term covering an enormous range of expertise, training and experience. Care must be taken in assessing their ability to make expert assessments. They mostly function in the private and voluntary sector.

## **SOCIAL WORK**

### **Social worker**

48. The social worker will make the application in care proceedings on behalf of the local authority.
49. Social workers would be expected to provide details of the child's situation, a chronology of life events, an analysis of risk, an outline of assessments needed and proposals for the care of the child in the immediate, interim and long-term future.
50. The social worker would expect to comment on the significance of life events for the child, their wishes and feelings and the weight to be given to them, the nature and importance of family relationships, the pattern of attachment, the importance of sibling relationships and the potential for care within the birth family. Their analysis should include reference to the context in which the child and their family live and the pattern of parenting. They would have an opinion on the likelihood of change.
51. Social workers would provide details of the options for the care of the child when placement within the birth family is not supported.
52. Local authorities now assess children in accordance with the 'Framework for the Assessment of Children in Need and their Families'.
53. The Framework defines three inter-related domains, each of which has a number of critical dimensions:
  - a. **Social work research experts**
    - i. Social work academics provide expert evidence in child and family matters based upon their research expertise. This may include evidence where there are different children between parties in respect of contact between children and their birth relatives, the placement of siblings and choices of permanent placements for children with their relatives, foster-carers or with

adopters. The evidence of these experts is based upon their own research or that which they have supervised, a synthesis of the research of others or a combination of the two. Much of this research will be published and in the public domain but experts may also have access through the research community to contemporary studies that may not yet be available in published form. Research experts rarely need to meet the child or other parties.

**b. Independent social worker**

- i. A qualified social worker who is independent from the parties in the case.

**c. Social worker, psychologist or psychiatrist have the expertise to consider:**

- i. parent child relationships, attachment and bonding;
- ii. joint instructions, clear questions and discussion with the experts should result in instructing the most appropriate (single) expert for the particular case.

**d. Social work roles**

Within the local authority social workers could be part of:

- i. a Court Work Service Team – working jointly with social workers from other services when a child is the subject of public law proceedings;
- ii. an Assessment Service Team – completing initial work with families and children;
- iii. a Family Intervention Service Team – working mainly with the families of children whose names are on the Child Protection Register, or who have been the subject of a Family Support Conference;

- iv. a Looked After Children Service Team – working with children who are looked after or accommodated by the local authority under voluntary or statutory arrangements;
  - v. an Adoption Service Team – working for the Adoption and Family Finding Service in recruiting adoptive families and finding adoptive families with children;
  - vi. a Family Placement Service Team – working to recruit and support foster-carers for children who need short-term, intermediate or permanent care;
  - vii. a Children with Disability Service – working with children and their families where the child is registered disabled;
  - viii. a Community Support team – working primarily with looked after children on pathway plans to independence;
  - ix. social workers in other disciplines working with adults with mental health, addiction, or learning disability issues.
- e. Other local authority workers:**
- i. Family support worker – working to a qualified social worker to implement agreed care plans. These workers are likely to have related qualifications.
  - ii. Contact supervisors – will concentrate on supervising contact arrangements within public law proceedings. Will write reports for the social worker. Unqualified but will have relevant in-house training.
  - iii. Social work assistant – to support the social worker in a range of tasks. Unqualified but will have relevant in-house training.
  - iv. Family centre workers – may be qualified social workers; will have expertise in individual work with children and parenting assessments.

- f. **A social work research expert** will often be employed by a university as an academic (lecturer, senior lecturer, reader or professor) or a researcher (research associate, senior research associate or fellow). They may be qualified with a professional diploma as well as a higher degree but a CV should be obtained.

## SECTION 17 GLOSSARY OF TERMS AND INDEX OF SECTIONS

### GLOSSARY OF TERMS

This *Glossary* is intended to provide relatively simple explanations of the most important terms and phrases used in the bench book. There are basically three kinds of entry.

First, phrases given a specific meaning within the Children Act 1989 (such as 'accommodation') and the Adoption and Children Act 2002 have been included. These are intended to be generally useful to aid familiarisation with the new terminology.

Where appropriate they have been cross-references to the Children Act 1989 itself (e.g. [s20]); where quoted directly from the Act quotation marks are used. Secondly, some legal terms that may be unfamiliar to non-lawyers (such as 'affidavit') are included, in order to make the legal terminology more comprehensible. Finally, terms which have specific meanings in child care work (such as 'assessment') are included, to clarify what these mean in the context in which they are used.

***Accommodation:*** refers to a service that the local authority provides to the parents of children in need and their children. The child is not in care when they are being provided with accommodation; nevertheless the local authority has a number of duties towards children for whom it is providing accommodation, including the duty to discover the child's wishes regarding the provision of accommodation and to give them proper consideration. [s20]

***Adoption:*** the total transfer of parental responsibility from the child's natural parents to the adopter/s.

***Adoption agency:*** a local authority or a registered adoption society that makes arrangements for the adoption of children.

***Advocates' meeting:*** meeting of lawyers required by the Public Law Protocol to be held prior to a case management conference. Purpose of meeting is to identify and narrow the issues in the case and prepare for the next meeting.

**Affidavit:** a statement in writing and on oath sworn before a person who has the authority to administer it (e.g. a solicitor).

**Appeal:** an appeal in care proceedings will now be heard by the High Court or, where applicable, the Court of Appeal. All parties to the proceedings will have equal rights of appeal. On hearing an appeal, the High Court can make such orders as may be necessary to give effect to its decision.

**Area Child Protection Committee (ACPC):** based upon the boundaries of the local authority, it provides a forum for developing, monitoring and reviewing the local child protection policies, and promoting effective and harmonious co-operation between the various agencies involved. Although there is some variation from area to area, each committee is made up of representatives of the key agencies, who have authority to speak and act on their agency's behalf. ACPCs issue guidelines about procedures, tackle significant issues that arise, offer advice about the conduct of cases in general, make policy and review progress on prevention, and oversee inter-agency training.

**Assessment:** a complex and skilled process of gathering together and evaluating information about a child, their family, and their circumstances. Its purpose is to determine children's needs, in order to plan for their immediate and long-term care, and decide what services and resources must be provided. Child care assessments are usually co-ordinated by social services, but depend upon teamwork with other agencies (such as educational and health). Detailed information about conducting assessments in child protection cases is provided in the Framework Assessment of Children and Their Families 2000.

**Authorised person:** in relation to care and supervision proceedings, this is a person other than the local authority, authorised by the Secretary of State to bring proceedings under s31 of the Act. This term covers the NSPCC and its officers. Elsewhere in the Act there is a reference to persons who are authorised to carry out specified functions (e.g. to enter and inspect independent schools).

**Care order:** an order made by the court under s31(1)(a) of the Act placing the child in the care of the designated local authority. A care order includes an interim care order except where express provision to the contrary is made. [s31(11)]

**Case conference:** in a child care context, a formal meeting attended by representatives from all the agencies concerned with the child's welfare (increasingly this includes the child's parents, and the Act promotes this practice). Its purpose is to gather together and evaluate all the relevant information about a child, and plan any immediate action which may be necessary to protect the child (e.g. seeking a court order). Where the meeting decides that the child and family need support, a key worker will be appointed to co-ordinate an inter-agency plan for work with the child and the family, and the child's name (plus those of any other children living in the same household) may be entered on the Child Protection Register.

**Case management conference:** A directions appointment in public law proceedings that enables the court to actively manage the case. To be held not later than 60 days after the date of application and to provide the court with an opportunity to timetable the proceedings so that the final hearing is completed within the maximum of 40 weeks.

**Child:** a person under the age of 18. There is an important exception to this in the case of an application for financial relief by a 'child' who has reached 18 and is, or will be, receiving education or training. [Sch 1, paras 2,6 and 16]

**Child assessment order:** an order under s43 of the Act. The order requires any person who can do so to produce the child for an assessment and to comply with the terms of the order.

**Child Protection Register:** a central record of all children in a given area for whom support is being provided via inter-agency planning. Generally, these are children considered to be at risk of abuse or neglect. The register is usually maintained and run by social service departments under the responsibility of a custodian (an experienced social worker able to provide advice to any professional making enquiries about the child). Registration for each child is reviewed every six months.

**Childminder:** a person who looks after, for reward, one or more children under the age of eight for more than two hours in any one day. [s71]

**CAFCASS:** The Children and Family Court Advisory and Support Service, a national body responsible for the provision of the children's guardians and children and family court reporters in family proceedings.

**Children and family court reporter (CPFR)** an officer appointed to provide a report for the court about the child and the child's family situation and background.

**Children's guardian (CG):** a person appointed by the court to investigate a child's circumstances and to report to the court. The CG does not represent the child but seeks to present a non-partisan view of the child's welfare. In most cases a CAFCASS reporter will be appointed. In exceptional cases a representative of CAFCASS legal will act (but such cases will usually have been transferred to the county court or High Court).

**Children in need:** a child is 'in need' if:

- a. 'he is unlikely to achieve or maintain, or have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority;
- b. his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- c. he is disabled.' [s17(10)]

**Children living away from home:** children who are not being looked after by the local authority but are nevertheless living away from home (e.g. children in independent schools). The local authority has a number of duties towards such children, for example, to take reasonably practicable steps to ensure that their welfare is being adequately safeguarded and promoted.

**Civil partner:** Under the Civil Partnership Act 2004 two people of the same sex who are in a relationship can register as civil partners.

**Complaints procedure:** the procedure that the local authority must set up to hear representations regarding the provision of services under Part III of the Act from a number of persons, including the child, the parents and 'such other person as the authority consider has a sufficient interest in the child's welfare to warrant his representations being considered by them'. [s26(3)] This procedure must contain an independent element.

**Concurrent jurisdiction:** by virtue of s92(7) the High Court, a county court and a magistrates' court (family proceedings court) will have jurisdiction to hear all proceedings under the Children Act, with some clearly limited exceptions. It is also possible for all proceedings involving the same child and family, irrespective of where they started, to be heard in the same court.

**Contact:** between a child and another person includes visits, stays, outings and communication by letter or telephone. Under s34 of the Act the local authority is under a duty to allow a child in care reasonable contact with a number of persons, including the child's parents.

**Contact order:** an 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, or for that person and the child otherwise to have contact with each other'. [s8]

**Day care:** a person provides day care if they look after one or more children under the age of eight on non-domestic premises for more than two hours in any day. [s71] In relation to the local authority provision of day care, it refers to any form of supervised activity provided for children during the day. [s18(4)]

**Development:** 'physical, intellectual, emotional, social or behavioural development'. [s31(9)]

**Disabled:** a child is disabled if ‘he is blind, deaf, or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed’. [s17(11)]

**Disclosure interview:** a term sometimes used to indicate an interview with a child, conducted as part of the assessment for suspected sexual abuse. It is misleading (since it implies in some people’s view, undue pressure on the child to ‘disclose’) and therefore the preferred term is ‘investigative interview’.

**Duty to investigate:** the local authority is under a duty to investigate in a number of situations. The general investigative duty arises where the local authority has ‘reasonable cause to suspect that a child who lives, or is found, in [its] area is suffering, or is likely to suffer, significant harm’; it must make such enquiries as it considers necessary to enable it to decide whether it should take any action to safeguard or promote the child’s welfare.

**Educational psychologist:** a psychology graduate who has had teaching experience and additional vocational training. Educational psychologists perform a range of functions, including assessing children’s educational, psychological, and emotional needs, offering therapy, and contributing psychological expertise to the process of assessment.

**Education supervision order:** an order under s36(1) which puts the child under the supervision of a designated local education authority.

**Education welfare office (EWO):** provides social work support to children in the context of their schooling. While EWOs’ main focus used to be the enforcement of school attendance, today they perform a wider range of services, including seeking to ensure that children received adequate and appropriate education and that any special needs are met, and more general liaison between local authority education and social services departments. Their approach is primarily supportive and directed towards children’s educational entitlements.

**Emergency protection order:** an order under s44 which the court can make if it is satisfied that a child is likely to suffer significant harm, or where enquiries are being made with respect to the child and they are being frustrated by the unreasonable refusal of access to the child. The effect of the order is to operate as a direction to any person in a position to do so to comply with any request to produce the child, and it authorises the removal of the child or the prevention of the child's removal. The order gives the applicant parental responsibility for the child. [s44]

**Evidence:** s96 of the Act allows a child who does not in the opinion of the court understand the nature of an oath to give evidence if the court considers that the child understands that it is their duty to speak the truth and that they have sufficient understanding to justify the evidence being heard. Sections 7 and 41 permit the inclusion of what would be hearsay evidence (i.e. evidence of a fact not directly seen or heard by the witness) in reports written by social workers, court welfare officers and guardians.

**Family assessment order:** an order under s16 of the Act requiring either a probation officer or a social worker to 'advise, assist and befriend' a named person for a period of six months or less. The named person can be the child's parents, guardian, those with whom the child lived or who had contact with the child, and the child.

**Family centre:** a centre which the child and parents, and any other person looking after the child, can attend for occupational and recreational activities, advice, guidance or counselling, and accommodation while receiving such advice, guidance or counselling. [Sch 2, para 9]

**Family Panel:** the panel from which the magistrates who sit in the family proceedings court are selected. These magistrates will have undergone specialist training on the Act.

**Family proceedings:** these are defined in s8(3) as any proceedings under the inherent jurisdiction of the High Court in relation to children; and under Parts I, II and IV of the Act, the Matrimonial Causes Act 1973, the Domestic Violence and Matrimonial Proceedings Act 1976, the Adoption and Children Act 2002, the Domestic Proceedings

and Magistrates' Courts Act 1978, s1 and s9 of the Matrimonial Homes Act 1983, Part IV of the Family Law Act 1996 and Part III of the Matrimonial and Family Proceedings Act 1984. *Note:* proceedings under Part V of the Children Act 1989, i.e. orders for the protection of children, are not family proceedings.

***Family proceedings court:*** the court at the level of the magistrates' court to hear proceedings under the Children Act 1989. The magistrates will be selected from a panel, known as the Family Panel, and will be specially trained.

***Fieldworker (field social worker):*** conducts a range of social work functions in the community and in other settings (e.g. hospitals). Most fieldworkers carry their own case-load and, following career progression, undertake supervision of others and /or specialise either with a particular group (e.g. older people) or in a particular function (e.g. running the home-help service). In many (but by no means all) local authorities specialist social workers have been appointed to co-ordinate child protection work and offer particular expertise (e.g. in conducting joint investigative interviews with police officers).

***Foster-carer:*** a foster-carer provides substitute family care for children. A child looked after by the local authority can be placed with local authority foster-carers under s23(2)(a). Under the Act, Part IX regulates the private foster-care of children for more than 27 days. Foster-carers are subject to the limit of three children unless they are siblings or the local authority grants them an exemption. Short-term care of children under eight may be subject to the childminding provisions in Part X of the Children Act.

***Guardian:*** where a child has no parent with parental responsibility a person may be appointed to act as the guardian of the child. The person appointed will have parental responsibility for the child and the order will last until the child's 18th birthday. An appointment can be made either by order of the court in any family proceedings or by written instrument. This is not to be confused with a children's guardian who is appointed by the court to protect a child during court proceedings (see below) or with a special guardian (see below).

**Guidance:** local authorities are required to act in accordance with the Guidance issued by the Secretary of State. However, Guidance does not have the full force of law but is intended as a series of statements of good practice and may be quoted or used in court proceedings.

**Harm:** defined as 'ill-treatment or the impairment of physical or mental health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another'. Ill-treatment includes sexual abuse and forms of ill-treatment that are not physical, and development covers physical, intellectual, emotional or social behavioural development. [s31(9) Children Act 1989]

**Health:** physical or mental health.

**Ill-treatment:** included sexual abuse and forms of ill-treatment that are not physical.

**In care:** refers to a child in the care of the local authority by virtue of an order under s31(1)(a) or an interim order under s38 of the Act.

**Independent visitor:** the local authority in certain sets of circumstances appoints such a visitor for a child it is looking after. The visitor appointed has the duty of 'visiting, advising and befriending the child'. [Sch 2, para 17]

**Inherent jurisdiction:** the powers of the High Court to make orders to protect a child that are not based on statute and are outside the established wardship jurisdiction.

**Injunction:** an order made by the court prohibiting an act or requiring its cessation. Under the Domestic Violence and Matrimonial Proceedings Act 1976 the county court has the power to make injunctions. Injunctions can be either interlocutory (i.e. temporary, pending the outcome of the full hearing) or perpetual.

**Inter-agency plan:** a plan devised jointly by the agencies concerned in a child's welfare that co-ordinates the services they provide. Its aim is to ensure that the support offered meets all the child's needs, so far as this is practicable, and that duplication and rivalry are avoided. The plan should specify goals to be achieved, resources and services to be provided, the allocation of responsibilities, and arrangements for monitoring and review.

**Interim care order:** an order made by the court under s38 placing the child in the care of the designated local authority. There are complex provisions as to its duration, with a special initial period of eight weeks. There is no limit to the number of interim care orders that can be made.

**Interim supervision order:** an order made by the court under s38 placing the child in the care of the designated local authority.

**Investigative interview:** the preferred term for an interview conducted with a child as part of an assessment following concerns that the child may have been abused (most notably, in cases of suspected sexual abuse). In many areas these interviews are conducted jointly by specially trained social workers and police officers, in order to reduce the number of times children are expected to tell their story and for information to be gathered in ways that make it acceptable as evidence, if the need arises.

**Judicial review:** an order from the divisional court quashing a disputed decision. The divisional court cannot substitute its own decision but can merely send the matter back to the offending authority for reconsideration.

**Key worker:** a social worker allocated specific responsibility for a particular child. In residential settings, this will be the person who will maintain an overall interest in the child's welfare, and will often undertake specific work with the child on a day-to-day basis. In a fieldwork child care setting, the key worker is appointed at a case conference, and is responsible for co-ordinating the work done with and for the child by the different agencies (e.g. health, education, housing).

**Legal aid:** available in proceedings under the Act. There is neither a merits nor a means test in relation to proceedings under s25 relating to secure accommodation.

**Looked after:** a child is looked after when they are in local accommodation provided by the local authority. [s22(1)]

**Monitoring:** where plans for a child, and the child's safety and well being, are systematically appraised on a routine basis. Its function is to oversee the child's

continued welfare and enable an necessary action or change to be instigated speedily, and at a managerial level, to ensure that proper professional standards are being maintained.

**Official Solicitor:** an officer of the Supreme Court who acts on behalf of children in certain cases. When representing a child the Official Solicitor acts both as a solicitor as well as a guardian.

**Paramountcy principle:** the principle that the welfare of the child is the paramount consideration in proceedings concerning children.

**Parent:** the mother or father of a child. Depending on the legislation under which an application is made, this can include a father without parental responsibility. In any application always check with your legal adviser whether the definition includes fathers without parental responsibility.

**Parental responsibility:** defined as ‘all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property’. [s3(1)] Parental responsibility can be exercised by persons who are not the child’s biological parents and can be shared among a number of persons. It can be acquired by agreement or court order, or registration of the natural father’s name on the birth certificate.

**Parties:** parties to proceedings are entitled to attend the hearing, present their case and examine witnesses. The Act envisages that children will automatically be parties in care proceedings. Anyone with parental responsibility for the child will also be a party to such proceedings, as will the local authority. Others may be able to acquire party status. A person with party status will be eligible for legal aid in order to be legally represented at the hearing. If you have party status you are also able to appeal against the decision. Others who are not parties may be entitled to make representations. For further information on this, refer to the Rules of Court.

**Permanency planning:** deciding on the long-term future of children who have been moved from their families. Its purpose is to ensure them a permanent, stable and secure

upbringing, either within their original family or by providing high-quality alternative parenting (e.g. living permanently with grandparents or other relatives, or being adopted). Its aim is to avoid long periods of insecurity or repeated disruptions in children's lives. Hence it should be completed speedily, preferably within six months of a child first moving away from home.

**Placement orders:** an order of the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

**Police protection:** s46 allows the police to detain a child or prevent their removal for up to 72 hours if they believe that the child would otherwise suffer significant harm. There are clear duties on the police to consult the child, if this is practicable, and to notify various persons (e.g. the child's parents and the local authority) of their action.

**Preliminary hearing:** a hearing to clarify matters in dispute, to agree evidence, and to give directions as to the timetable of the case and the disclosure of evidence.

**Principal Registry Family Division:** serves as the care centre for London.

**Probation officer:** a welfare professional employed as an officer of the court and financed jointly by the local authority and the Home Office. In addition to taking on a caseload, most probation officers undertake some specialist work, such as conducting group work with offenders or helping to run a phone-in service. An important role is the provision of welfare reports of various kinds.

**Prohibited steps order:** an order that 'no step which could be taken by a parent in meeting his parental responsibility for a child, and which is a kind specified in the order, shall be taken by any person without the consent of the court'. [s8(1)]

**Recovery order:** an order which the court can make when there is reason to believe that a child who is in care, the subject of an emergency protection order or in police protection has been unlawfully taken or kept away from the responsible person, or has run away or is staying away from the responsible person, or is missing. The effect of the recovery order is to require any person who is in a position to do so to produce the child

on request, to authorise the removal of the child by any authorised person, and to require any person who has information as to child's whereabouts to disclose that information, if asked to do so, to a constable or officer of the court. [s50]

**Refuge:** s51 enables 'safe houses' legally to provide care for children who have run away from home or local authority care. However, a recovery order can be obtained in relation to a child who has run away to a refuge.

**Regulations:** refer to the supplementary powers and duties issued by the Secretary of State under the authority of the Act, These cover a wide range of issues, from secure accommodation to the procedure for considering representations (including complaints), and have the full force of law.

**Rehabilitation:** in a child care context, the process of working with children and parents, and providing resources and support to enable children to return home to be brought up in their families, for the children's needs to be met, and to help overcome the problems that led to their needing to live away.

**Representations:** see *Complaints procedure*.

**Residence order:** an order 'settling the arrangements to be made as to the person with whom a child is to live'. [s8(1)]

**Residential social worker:** provides day-to-day care, support and therapy for children living in residential settings, such as children's homes. Until recently most residential social workers were unqualified. As the importance and demands of their work have become increasingly recognised, more training opportunities are being provided.

**Respite care:** a service giving family members or other carers short breaks from their caring responsibilities. It is intended to support the care of people (e.g. those with disabilities or infirmities) in the community who might otherwise need to be placed in full-time residential care.

**Responsible person:** in relation to a supervised child, 'any person who has parental responsibility for the child, and any other person with whom the child is living'. With their

consent the responsible person can be required to comply with certain obligations. [Sch 3, paras 1 and 3]

**Review:** under s26 local authorities are under a duty to conduct regular reviews in order to monitor the progress of children they are looking after. When holding reviews local authorities must comply with their duties as given in s22. Reviews are opportunities to consider progress and any problems and changes in circumstances, and to resolve difficulties, set new goals and plan for the future. They are usually attended by all those with significant responsibilities for the child. The child and their parents should also attend, and be given help and support to participate in the decision making and to make sure their views and wishes are known.

**Rules:** Rules of Court produced by the Lord Chancellor's Department and the Home Office. These lay down the procedural rules which govern the operation of the courts under the Children Act 1989.

**Section 8 orders:** the four orders contained in the Act which, to varying degrees, regulate the exercise of parental responsibility (residence, contact, specific issue and prohibited steps orders).

**Secure accommodation:** s25 provides for the circumstances in which a child who is being looked after by the local authority can be placed in secure accommodation. Such accommodation is provided for the purpose of restricting the liberty of the child.

**Significant harm:** s31(10) states: 'Where the question of whether harm suffered by the child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child'.

**Social worker:** a generic term applying to a wide range of staff who undertake different kinds of social welfare responsibilities. These include advising and supporting individuals and families during periods of trouble, both within the community and in residential settings; accessing resources, benefits and services; conducting assessments and investigations and monitoring standards of care. Social workers may

be employed by local authorities, courts or voluntary organisations (see *Residential social worker, Fieldworker, Education welfare officer and Probation officer*).

**Special Guardian:** is an individual in whose favour a special guardianship order has been made. They have parental responsibility for the child, which they can exercise to the exclusion of all other individuals who have parental responsibility.

**Specific issue order:** an order 'giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child'. [s8(1) Children Act 1989]

**Step-parent:** for the purposes of the Adoption and Children Act 2002 this is someone who is a partner of, whether or not they are married to them, the mother or father (with parental responsibility) of the child who is the subject of the application. For the purposes of the Children Act 1989 a step-parent is a person who is married to or the civil partner of a parent with parental responsibility for the child who is subject to the application.

**Supervision order:** an order under s31(1)(b) and including, except where express contrary provision is made, an interim supervision order under s38. [s31]

**Supervisor:** the person under whose supervision the child is placed by virtue of an order under s31 and s38. The powers and duties of the supervisor are contained in s35 and Sch 3.

**Timetables:** under the Act the court, pursuant to the principle of avoiding delay because it is harmful for the child, has the power to draw up a timetable and give directions for the conduct of the case in any proceedings in which the making of a section 8 order arises, and in applications for care and supervision orders. [ss11 and 32]

**Ward of court:** a child who, as the subject of wardship proceedings, is under the protection of the High Court. No important decision can be taken regarding the child while they are a ward of court without the consent of the wardship court.

**Wardship:** the legal process whereby control is exercised over the child in order to protect the child and safeguard their welfare.

**Welfare report:** s7 of the Act gives the court the power to request a report on any question in respect of a child under the Act. The report can be presented by either a CAFCASS officer or an officer of the local authority. Section 7(4) provides that regardless of any rule of law to the contrary, the court may take account of any statement contained in the report and any evidence given in respect of matters referred to in the report as long as the court considers them relevant.

**Written agreement:** the agreement arrived at between the local authority and the parents of children for whom it is providing services. These agreements are part of the partnership model that is seen as good practice under the Act.

## INDEX OF SECTIONS

**Section 4** parental responsibility.

**Section 7** a direction that a report is prepared: in private law proceedings either by a children and family court reporter or a local authority.

**Section 8** private law orders = contact, residence, prohibited steps and specific issues orders.

**Section 16** family assistance orders.

**Section 25** secure accommodation orders.

**Section 31** care and supervision.

**Section 34** contact with a child in care.

**Section 37** power of court in private law proceedings to direct that the local authority undertake an investigation into the child's circumstances with a view to commencing public law proceedings.

**Section 38(1)** interim care/supervision orders.

**Section 38(6)** directions in relation to a medical, psychiatric or other examination of the child.

**Section 50** recovery of an abducted child.

**Section 91(14)** power to restrict the making of any further applications without the leave of the court.

**ADDENDUM: NEW & UPDATED TERMS FEBRUARY 2006**

**Adoption agency:** a local authority or a registered adoption society that makes arrangements for the adoption of children.

**Civil partner:** Under the Civil Partnership Act 2004 two people of the same sex who are in a relationship can register as civil partners.

**Family proceedings:** these are defined in s8(3) of the Children Act 1989 as any proceedings under the inherent jurisdiction of the High Court in relation to children; and under Parts I, II and IV of the Act, the Matrimonial Causes Act 1973, the Domestic Violence and Matrimonial Proceedings Act 1976, the Adoption and Children Act 2002, the Domestic Proceedings and Magistrates' Courts Act 1978, s1 and s9 of the Matrimonial Homes Act 1983, Part IV of the Family Law Act 1996 and Part III of the Matrimonial and Family Proceedings Act 1984. *Note:* proceedings under Part V of the Children Act 1989, i.e. orders for the protection of children, are not family proceedings.

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**Harm:** defined as 'ill-treatment or the impairment of physical or mental health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another'. Ill-treatment includes sexual abuse and forms of ill-treatment that are not physical, and development covers physical, intellectual, emotional or social behavioural development. [s31(9) Children Act 1989]

**Parent:** the mother or father of a child. Depending on the legislation under which an application is made, this can include a father without parental responsibility. In any

application always check with your legal adviser whether the definition includes fathers without parental responsibility.

**Placement orders:** an order of the court authorising a local authority to place a child for adoption with any prospective adopters who may be chosen by the local authority.

**Special Guardian:** is an individual in whose favour a special guardianship order has been made. They have parental responsibility for the child, which they can exercise to the exclusion of all other individuals who have parental responsibility.

**Step-parent:** for the purposes of the Adoption and Children Act 2002 this is someone who is a partner of, whether or not they are married to them, the mother or father (with parental responsibility) of the child who is the subject of the application. For the purposes of the Children Act 1989 a step-parent is a person who is married to or the civil partner of a parent with parental responsibility for the child who is subject to the application.

**SECTION 18          HUMAN RIGHTS – A STRUCTURED APPROACH****How does the European Convention on Human Rights affect the work of the court?**

The Convention was drawn up after the Second World War in the light of the atrocities that had been perpetrated during that conflict. It provides a set of basic human rights that all people can expect.

The court as a public authority has a duty to act compatibly with the Convention. The practices, procedures and decisions of the court should be carried out in such a way so as not to breach an individual's human rights. This applies to all those affected (e.g. parties, children, witnesses).

Article 6 is the right to a fair trial and should always be at the forefront of your mind – a full list of the articles is provided at the end of this checklist.

The Convention can be a complex area of law. You should always seek the advice of your legal adviser if a Convention point is raised.

A party wishing to raise a Convention point should be required to provide a written outline of their argument including supporting case law. This enables the parties, magistrates and legal adviser to consider the point fully.

**Is the Convention engaged?**

When you are dealing with any matter in court you should, in addition to considering the domestic law, also consider whether a human rights issue exists.

One of the parties/the court/the legal adviser may raise a human rights point. Seek representations from all parties and advice from your legal adviser before deciding whether a Convention right is in fact in issue.

If you proceed, will the individual's Convention right be interfered with?

If *no* decide the point without reference to the Convention announcing your reasons.

If *yes* continue to follow this structured approach.

### **Which right is engaged?**

It is important to identify which right is engaged at the outset. There are three types of rights:

- absolute,
- limited,
- qualified.

Each type of right requires a slightly different approach.

### **Which type of right is it?**

The Articles that are most likely to be raised in court are:

- |            |  |
|------------|--|
| Article 5  | Right to liberty and security (limited)                  |
| Article 6  | Right to a fair trial (part absolute, part limited)      |
| Article 8  | Right to respect for private and family life (qualified) |
| Article 10 | Right to freedom of expression (qualified)               |
| Article 11 | Right to freedom of assembly (qualified)                 |
| Article 14 | Prohibition of discrimination (qualified)                |

**Has the right been breached?**

The fact that a right is interfered with does not necessarily mean that it has been breached. For example a prison sentence imposed by the magistrates' court will clearly interfere with an individual's right to liberty; the next stage will enable you to decide whether the right is actually breached or whether the Convention allows that interference.

Follow the structure for the type of right that is engaged

**Absolute right**

Has there been an interference with the individual's Convention right?

If the answer is *yes*, then there has been a breach of the right. The absolute rights include the prohibition on slavery and torture and inhuman and degrading treatment – there are no circumstances when such behaviour would be acceptable under the Convention.

*Note:* The threshold as to what amounts to, for example, torture or inhuman or degrading treatment, is a high one – the treatment would need to be sufficiently serious to cross the threshold and therefore be a breach.

**Limited right**

Does the interference fall within one of the lawful exceptions within the article?

Limited rights are those Convention rights that can only be interfered with if the method of interference is set out in the Article itself – for example, Article 5: the right to liberty, which provides that everyone has a right to liberty, but then goes on to give a list of situations where an individual's right can lawfully be interfered with. These include:

- custodial sentences imposed by a court;
- detention to bring someone before the court for an offence or on a warrant; and

- remands in custody and bail conditions where the court reasonably believes it necessary to prevent offences or a failure to attend.

Each limited article contains an exhaustive list of the exceptions to the right – if the exception is not in the list then there is a breach.

### **Qualified right**

You need to ask three questions:

*Is the interference prescribed by clear and accessible UK law?*

For example, the imposition of bail conditions might interfere with an individual's right to respect for private and family life – however the Bail Act allows such conditions to be imposed and therefore the answer is yes.

*Does it pursue one of the legitimate aims set out in the article?*

A qualified right can only be interfered with in order to achieve one of the aims in the article. For example Article 8 can be interfered with if the interference is in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health and morals or for the protection of the rights and freedoms of others.

For example, bail conditions that interfere with an individual's right to respect for family life can therefore be imposed if they are to prevent offences or protect a witness.

*Is it no more than is necessary to secure that legitimate aim?*

The interference must be necessary and proportional – the court should not use a sledgehammer to crack a nut.

For example, very strict bail conditions might be proportionate, but this will depend on the details of the particular case – a blanket decision to impose a curfew condition on all defendants would not be proportionate.

If the answer is *no* to any of these three questions, then there is a breach.

**What is the source of the breach?**

Primary legislation? i.e. Acts of Parliament

or

Secondary legislation? i.e. some rules and byelaws

or

Practice or precedent? i.e. case law or the way we have always done things.

**What does the Human Rights Act allow the court to do?**

Primary legislation:

- Can you find a possible interpretation that will give effect to the Convention right?
- If yes, then the law must be applied in this way.
- If *no*, then apply national law as it is.

Secondary legislation:

- Can you find a possible interpretation that will give effect to the Convention right?
- If yes, then the law must be applied in this way.
- If *no*, disregard national law so as to give effect to the Convention right.

Practice or precedent

- Can you find a possible interpretation that will give effect to the Convention right?
- If yes, then the law must be applied in this way.
- If *no*, disregard national law so as to give effect to the Convention right.

**List of Convention Articles**

- Article 2      Right to Life (limited)
- Article 3      Prohibition of Torture (absolute)
- Article 4      Prohibition of Slavery (absolute) and Forced Labour (limited)
- Article 5      Right to Liberty and Security (limited)
- Article 6      Right to a Fair Trial (absolute and limited)
- Article 7      No Punishment without Lawful Authority (absolute)
- Article 8      Right to respect for Private and Family Life (qualified)
- Article 9      Freedom of Thought and Conscience and Religion (qualified)
- Article 10     Freedom of Expression (qualified)
- Article 11     Freedom of Assembly and Association (qualified)
- Article 12     Right to Marry (limited)
- Article 13     Right to an Effective Remedy (not incorporated in HRA)
- Article 14     Prohibition of Discrimination
- Article 15     Derogation in times of Emergency
- Article 16     Restrictions on the Political Activity of Aliens
- Article 17     Prohibition of Abuse of Rights
- Article 18     Limitation on use of restriction of rights
- 1st Protocol – Article 1      Protection of Property (fair balance test)
- 1st Protocol – Article 2      Right to Education (UK reservation)

1st Protocol – Article 3      Free Elections

6th Protocol – Article 1      Abolition of the Death Penalty

6th Protocol – Article 2      Death Penalty in Time of War

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