

FAMILY JUSTICE COUNCIL

RESPONSE TO THE HMCS CONSULTATION

on

THE ALLOCATION AND TRANSFER OF PROCEEDINGS ORDER 2008

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PRACTICE DIRECTION - ALLOCATION AND TRANSFER OF PROCEEDINGS

1. GENERAL OVERVIEW

The Family Justice Council is in agreement with and fully supports the overall objectives of both the Allocation Order and the Practice Direction, i.e.

- cases are dealt with in the most appropriate level of court
- the utilisation of all judicial resources available to the family justice system.

In particular the Council is in agreement with the stricter criteria for:

1.1 the hearing of cases in the High Court, either on initial application or by transfer

1.2 transfer of cases between the FPC and County Courts.

Whilst recognising that the consultation is on the drafting of the order and not on the policy, the Council makes the following comments.

The implementation will need to be carefully managed, particularly with regard to the expected increased workload in the FPCs and the increased resource implications for Cafcass in providing court-based services in numerous additional FPCs. The document setting out the rationale for the consultation (Consultation Paper) says in paragraph 4,

“Many FPCs have the capacity to hear more cases. Magistrates would benefit from undertaking more cases that would enable them to enhance their expertise in the family jurisdiction.”

Whilst in agreement with this statement, the lack of work in recent years may initially cause listing issues due to the limitation of availability of Family Legal Advisers and also fully experienced Magistrates. Whilst this is catered for in paragraph 4.1 of the Practice Direction, the situation will need to be monitored to ensure that adequate resources are provided to the FPCs by all agencies within the family justice system, and in particular by Cafcass, to ensure that the objectives of the Allocation Order and Practice Direction do result in a significant increased workload in the FPCs. Cafcass, in order to provide the necessary additional resources to the FPCs, will itself need to be provided with additional resources by central Government to take on this new burden.

1.1 Projected Workload

Paragraph 26 of the Consultation Paper projects an annual increase of 20,000 cases in the FPCs. It is assumed this is based on the figures contained in Annex D of the consultation papers which shows that if in the period October 2006 to September 2007 the County Courts had transferred 25% of private law cases to the FPCs this would have resulted in an additional 22,000 cases nationally being heard in the FPCs.

In his recent address to the Presidents Conference on the Private Law Programme on 13 May 2008, the President reported that 60 % of applications are settled at the first hearing. If allocation decisions are made at the first appointment, rather than on the papers following issue of proceedings (an approach already adopted by some courts), the cases that settle at the time of first appointment will not be available for transfer to FPC level. This will reduce the number of cases transferred. However, the nature of the issues at stake in some of the remaining 40% of cases will mean that they will not be suitable for transfer. Thus it seems that it is only realistic to expect that as many as 25% of cases will be transferable from county Court to FPC level if judicial sifting and allocation takes place prior to the first appointment. A further argument in support of early sifting is that it will help support continuity of judicial case management.

1.2 Suggested Alternative Approach

It does not appear to be a good use of both HMCS resources and County Court judges' time for this level of court to deal with those applications that appear able to be settled at the first hearing. These could and should be heard in the FPC, provided Cafcass conciliation facilities are available prior to and at the first hearing at FPC level.

The current Children (Allocation of Proceedings) Order 1991 allows applicants to choose, subject to some exceptions, where to commence private law proceedings, though it is recognised that only a small proportion of private law applications are currently made to FPCs. It would overwhelm the FPCs if all private law applications were required to be made to the FPC. However it would be very beneficial to identify and divert, by means other than a first appointment (such as by using a gate keeping judge or FPC legal adviser along the lines followed in Plymouth county Court and Birmingham Combined Court) to FPCs, those cases likely to settle at the first hearing to the FPC.

Since Cafcass are generally involved brokering these agreements, often working alongside a District Judge and with the support of committed legal practitioners,

the following options are suggested, dependent on the availability of Cafcass services.

1.2.1 Combined or Co-located FPCs and County Courts with CAFCASS In-Court conciliation scheme

Where through their In-court scheme Cafcass appears, potentially, able to broker an agreement then the first hearing is to be listed in the FPC. This option reflects only limited change to the current practice in such courts.

1.2.2 CAFCASS Early Dispute Resolution Scheme

Where through their EDR scheme Cafcass may be able to broker an agreement and notify the court of the agreement in advance of the first hearing then the First Appointment should be in the FPC, provided that Cafcass is resourced to be able to attend a substantially greater number of courts.

1.2.3. Application for Changes to Contact Orders

Where an application is made for a change to a current contact order is made, eg. for Summer, Christmas or Easter holiday arrangements, then the application could be heard in the FPC, unless judicial continuity was essential.

Note: If, following the review of the “CAFCASS Model” by the Working Group under Hogg J which has been initiated by the President, the Model is rolled out to additional courts then more applications should be diverted to the FPC under option 1.2.2 above.

2. ALLOCATION ORDER - SPECIFIC COMMENTS

With regard to the Allocation Order the following observations and comments are made:

2.1 Judicial Continuity

There is no provision in the order similar to the provision in paragraph 3C of The Children (Allocation of Proceedings) (Amendment No.2) Order 2005. This apparent omission is of concern. It would make sense to provide that, for example, an application for leave to apply to revoke a placement order should be made to the court that made the placement order. If this does not happen, the

new court would be required to read all the evidence in what may have been a complex case, which would place a heavy drain on judicial resources.¹ In the light of the provisions on transfer, which place restrictions on transfer (paragraph 15 of the new order), there is some concern that cases will not be transferred to the original court and judicial continuity will be lost. Paragraph 5(3) of the new order provides for proceedings to be started in the court where other proceedings are pending, however, there is no mention of proceedings which have been completed. In the event that new proceedings are commenced, judicial continuity may also be of assistance.

The balance between getting a case dealt with with the minimum of delay, and judicial continuity is a difficult one, but the Council is concerned that full consideration should be given to judicial continuity.

2.2 Article 5 (1) (e) - Adoption Orders

It is proposed that adoption applications should be commenced in the FPC unless the local authority is a party. In fact a local authority is a respondent in almost 100% of cases. Where it has placed a child for adoption whether under a placement order or following consent under s19 ACA 2002, it will have parental responsibility. In any “non agency” case (i.e. where the child was not placed for adoption by an adoption agency), the applicants must give notice to the local authority where they have their home, and that local authority is then a respondent. The only cases where no local authority is a party would therefore be those where the child was placed for adoption by a voluntary adoption agency following consent under s19. Such cases are now extremely rare, if they occur at all. Article 5.1. (e) therefore will have very little effect on the current situation and would have very little impact if the aim is to increase the numbers of adoption cases commenced in the FPCs

2.3 Article 11 (a) - List of named County courts

What will be the rules to determine the list of county courts?

2.4 Article 14 and 14 (b)

For consistency, it is suggested that this is rephrased to read the same as Article 17 and 17 (a) (ii), ie.

2.4.1 Article 14 - add “(the receiving court)” after “another magistrates court”

2.4.2 Article 14 (b) replace “other magistrates” with “receiving”.

¹ As demonstrated in the recent case of re F [2008] EWCA Civ 439, speed may well be essential in these cases, and judicial continuity particularly important.

2.5 Article 15. (1) (g)

Whilst it is accepted that the FPC does not have the power to appoint a Guardian under Rule 9.5, it is to be hoped that when the appointment has been made, the County Court will give consideration to transferring the case to the FPC under the proposed transfer rule. It is suggested that this provision should be specifically added to the Order.

2.6 Article 15.1 (h)

When the new Family Procedure Rules are implemented they will allow the Official Solicitor to act in the FPC. This reflects the Family Procedure (Adoption) Rules 2005 which allow the Official Solicitor to act in the FPC in adoption cases. The Allocation order provides a mechanism for this practice to be implemented before the new rules and it is suggested that Article 15(h) is deleted; allowing all such cases to continue to be heard in the FPC.

2.8 Article 16 (2)

This article says that the County Court must transfer cases to the FPC. However, the wording in the Practice Direction (paragraph 9) is less strong. Consideration should be given to strengthening the obligation.

3. PRACTICE DIRECTION

3.1 Paragraph 9

The reference to Article 15 (2) appears to be incorrect and the reference should be to Article 16 (2)

4. OTHER ISSUES/COMMENTS

4.1 Evaluation of Implementation

It is noted from paragraph 26 of the Consultation Paper that it is intended to evaluate the impact of the implementation of the Allocation Order and Practice Direction after a period of six months. It is also suggested that in the medium term SUPS Familyman will provide for electronic transfer between courts and therefore provide more effective means of collecting data, particularly for FPCs. However it is understood that SUPS will not be available until the end of 2009 and it is therefore essential that adequate manual data recording and collection is put in place to support the evaluation. This will impose an additional workload

on existing staff at the same time they are dealing with new processes to support the implementation of the new Allocation Order and Practice Direction. Due to this additional work, HMCS family court staff in both the county courts and the FPCs should be involved in the planning and implementation of the evaluation. It would therefore be helpful to both the Judiciary and Court User groups at the time of the implementation to publish a schema setting out the data to be collected and the reporting timescales so that implementation can be monitored at a local level. The Council would recommend that the monitoring should be more than six months after the implementation; six months will probably be rather early to see the overall effect. The Council would also recommend that in the longer term consideration should be given to making collection of data on all types of transfers routine.