

# Family Justice Council Response to the DCA Consultation Paper on Separate Representation of Children

## Introduction

1. The consultation paper acknowledges that –
  - Parental separation affects many children and their families.
  - When separation is handled badly children in this situation suffer poorer outcomes and reduced life chances.
  - The wishes and feelings of the child may be overlooked by parents locked in their own conflict.
  - Children do not automatically have party status and the representation that accompanies it.
  - There is a need for new Rules to be established to ensure that children who need separate representation are provided with it in a timely and appropriate way.
  
2. The paper relies heavily upon the findings of the Cardiff University researchers who reported in March 2006. Their principal findings were –
  - That giving the child party status and separate representation was most beneficial in intractable cases because it enabled the parents to re-focus attention on the child.
  - However, there was a risk that bringing a child into the proceedings could be stressful and put too much responsibility on the child, particularly if the child believes that the judge will make a decision based entirely on his view.
  - Children should be provided with greater support and information throughout the proceedings.
  - There is a need for greater judicial continuity.

The paper goes on to make eight specific proposals in the form of 23 questions between the proposals. The Council submits its reply to the questions in the document at Appendix A.

3. The Council has serious concerns as to the manner in which the consultation paper presents the findings of this research through selective quotation. The Council is aware that adverse comment has been made by the researchers, other academics and the judiciary on this matter. Such an approach to research can only undermine the confidence of family justice stakeholders in the DCA in taking forward its programme of reform. The Council deprecates this tendentious approach to research and would urge the Department not to repeat it. The researchers were themselves clear about the limitations of the study. In outlining their findings and their conclusions, they drew on two other major elements of the research - file reading in 121 closed cases where r.9.5 had been used and a national survey of solicitors with 420 responses.
4. The use of r 9.5 was generally driven by judges and CAFCASS, not by solicitors or parents. In a third of cases a key reason for the use of 9.5 appeared to be questioning of the CAFCASS officer's reports by the parents; most cases where r.9.5 was used were intractable disputes:

*'protracted disputes between the parties often involving a number of separate applications and defined by the judge as "intractable" led to the use of r 9.5 in the majority of cases.'*

*'The majority of cases sampled appeared to show that r 9.5 was applied as a measure of "last resort" when an exasperated judge concluded that the case was intractable and feared that damage to the welfare of the child was worsening.'*

5. As the summary of the research makes clear:

*'Most of the children liked the idea of someone appointed by the court to help them have their say in the proceedings.'*

*Most of them believed that if their parents could not resolve their differences in any other way, a neutral judicial authority of some sort was needed.*

*'Where the children had established effective, supportive relationships with their guardian and/or solicitors, they reported feeling having been made more confident both in terms of being able to get their views over to the court and*

*also by the experience of being treated with respect.'*

*'The majority of parents, like their children, favoured the idea of separate representation and thought that it had had a beneficial effect on their children.'*

6. Negative as well as positive views of r.9.5 were expressed by some parents and a minority (20 per cent) of the solicitors who replied to the postal questionnaire. These acknowledge that r.9.5 is not appropriate for every case and that *some children* may prefer not to be involved.
7. The researchers concluded that earlier use of r.9.5 would be advantageous in some cases and that there is a need for professional development and practice guidance so that in appropriate cases children can have the representation that is necessary. Nowhere in the research is it suggested that too many cases are made subject of r.9.5.

### **General Comments**

8. Representation of litigants performs two distinct functions within the adversarial system. –
  - a) It facilitates the operation of the system because the court deals with lawyers not lay people; and
  - b) It allows individuals represented to participate in the process by ensuring that they have professional support to understand the process and pursue their claims.
9. The ECHR applies to both adults and children. Article 6 guarantees a right to a fair trial. Parties such as children need greater assistance in the protection of that right. In public law proceedings children are guaranteed representation in order to protect their rights. In private law proceedings they do not have an automatic right to representation.
10. The Council believes that all children involved in court proceedings, whether public law or private law, should be provided with age appropriate information and should be given the opportunity to say whether or not they would wish to

engage with the proceedings in some way. In the event that they do wish to become engaged they should have the benefit of legal representation and the assistance of a Children's Guardian. Discussions should then take place as to how their engagement should be accomplished.

11. The Council does not understand the reference to 'legal need' in the consultation paper. Under the ECHR and UNCRC children are entitled to be heard. The Council accepts entirely that the establishing of wishes and feelings needs to be undertaken away from the court arena in order to limit the pressure on the child. However, the child is entitled to establish that his/her wishes and feelings have been properly understood by the court, to meet with the judge if he/she so wishes, and to have the judge explain his/her decision to them personally. Equally, a child who does not wish so to engage needs to be reassured that it is perfectly acceptable to say so. The Council does not accept that Rule 9.5 should be applied only in intractable contact disputes nor that the proposed restriction on separate representation will deliver savings in the long term. In the Council's view, the restriction of separate representation is likely to be counter-productive because its judicious use can prevent cases from becoming intractable and can break the deadlock in cases where the parents have not been able to co-operate.

12. The Council wishes to highlight some responses of the joint CAFCASS and FJC Young Persons Group, which met at the National Youth Advocacy Service in Birkenhead on 11<sup>th</sup> November to discuss the consultation paper, specifically -

- It is important that a young person understands what is going on and what a private law case is and what it covers.
- It is important that young people have a choice to get involved.
- A young person may find it difficult to talk about things that might upset their parents.
- It is important that a young person is in court to make sure that everybody gets everything right – particularly in terms of what a young person has said.

- A young person needs to spend time with whoever will represent them – there is a need to ensure that as much time as possible is spent with the young person face-to-face.
- It is important that the young person deals with only one person.
- It is important that a young person should be able to show that he/she is in control of his/her life.
- Those who represent children, and those who make decisions about them, should be trained in working with young people if they choose to work in the family court.
- Court decisions need to be fed back to children and young people quickly. Everything that happens in the court should be well documented for the young person to look at when they are older.

A feedback document is attached at Appendix B.

**Responses to Questions**

**Proposal 1**

- Q1. No. The concept of 'legal need' is inadequate to determine in which cases children should have party status and be represented in Children Act proceedings. For the following reasons:
- a) Unless, and until, a child is represented it is unlikely that they will have an opportunity to hear a full explanation of the issues being litigated or assisted to formulate their own view regarding these. For children, the identification of 'legal need' follows from representation.
  - b) Most Children Act cases are determined through application of the welfare principle to the facts, not because of technical legal points. It is the lawyer's ability to use the litigation process to ensure that all the facts are presented to the court which forms the most important part of representation.
  - c) As in public law cases the course of the litigation can change as a case proceeds because options for the child's future care open or close. If the child is not represented throughout this process he or she may lose the opportunity to secure an option which would be in his or her best interests but is not being promoted by any of the other parties.

The paper, in effect, proposes a system where children's access to legal representation will be limited by the courts. Courts will need far more guidance than is provided by the vague concept of 'legal need'. A filtering, or triage, mechanism which can be applied objectively to the circumstances of the case would provide a much clearer basis for determining when representation is required. It is also more likely to be operated consistently in different courts, and levels of court, and understood by the different agencies and professionals working in the family justice system.

Q2. No.

Q3&4. The current level of inconsistency reflects judicial expectations, CAFCASS resources, knowledge and experience of CAFCASS staff,

and knowledge and experience of lawyers. Despite the suggestions that r.9.5 is not always appropriate in cases where it has been used, the variations cannot just be taken as indicating over use of the provision. Rather they indicate that this provision, which is recognised in valuable in unblocking some cases, is underutilised in some areas. The continuation of differential access to the operation of r.9.5 is unjustified. However, vague criteria for use of r.9.5 are likely to perpetuate inconsistency in use of r. 9.5 representation. Much clearer criteria and funding to ensure that CAFCASS can provide a service without delay in all cases where the criteria are met will reduce the variations. Attention also needs to be given to the process through which the use of r. 9.5 will be decided.

### **Proposal 2**

Q5&6. Yes. CAFCASS should be the first choice but not the only choice. In the Council's view, NYAS provide a good service. Children need continuity of support and representation. There are not enough professionals qualified to support children through the courts at present. CAFCASS does not have the resources to meet the current need and it would only add to delay to seek to use only CAFCASS officers. CAFCASS and NYAS have an agreed protocol which the Council welcomes and is attached at Appendix 3. The Council notes that NYAS has challenged the costings that the Department has attributed to its services and does not consider the evidence presented in the consultation paper on this issue at all reliable or persuasive.

Q7. Yes, please see the protocol at Appendix 3.

### **Small firms**

Q8. N/A

Q9. N/A

### **Proposal 3**

Q10. Yes

#### **Proposal 4**

Q11. Yes

#### **Proposal 5**

Q12. Direct instruction of a solicitor by a competent child could be considered in cases of child abduction and also in relation to domestic violence injunction proceedings. The Council would refer to paragraphs 34-36 of its report to the President on consent orders for contact in cases with a history of domestic violence:

*“34. The wishes and feelings of children need to be given appropriate weight. A child who has lived in a violent household may not want to have contact with a violent parent, for sound reasons. How is that child’s voice to be heard, particularly if there is no CAFCASS report, if the parents present the court with an agreement for approval?”*

*35. In cases involving cross allegations of domestic violence, or highly conflicting accounts, such as the cases reviewed by Lord Justice Wall, it is difficult for a judge to perform his or her duty to assess risk in the absence of any appropriate admissions or findings of fact. In such highly conflicted cases, the court should consider referring the matter to CAFCASS and making an order under Rule 9.5 of the Family Proceedings Rules 1991 that the child should be separately represented. It is essential that children’s voices are heard in cases where it seems likely that neither parent is capable of properly protecting their interests.*

*36. The impact of the domestic violence upon the child must be determined, as must the impact of the proposed order. It will be necessary to know what might be said to the child during contact. This might require someone with appropriate training, perhaps a CAFCASS officer, to talk separately to the child or, again, it might require separate representation of the child. There should in any event be provision for the child’s views to be reported back to the court, without putting the child into a difficult position. This is obviously more important the older the child involved. Children sometimes do not disclose abuse to their non abusing parent. Children’s support workers can give children space and the opportunity to talk to someone.”*

Q13. Solicitors should consider the use of Rule 9.2A in appropriate cases and to raise the issue with competent children. An amendment to the



Family Law Protocol to encourage greater consideration of Rule 9.2A may be appropriate.

**Proposal 6**

Q14. Yes.

Q15. Yes.

Q16. Yes. It is conceivable that where a hearing is simply listed for directions or timetabling of evidence, the Guardian may not need to attend. This situation is already dealt with by courts on a regular basis: solicitors and Guardians frequently discuss such matters and the court is requested to dispense with the attendance of the Guardian. The courts readily accede to such request, subject to the solicitor being fully instructed by the Guardian prior to the hearing. The only way an arrangement entailing the absence of the guardian could work is where there was an absolute bar imposed upon the court considering or making any substantive orders. It is difficult to conceive of a situation where this would be appropriate.

In practice it is quite rare that hearings listed for the stated purpose of directions/ timetabling do not raise questions/discussions/negotiations around substantive issues such as contact and residence. It would be difficult, if not impossible, to predict when a case will be limited to straight-forward directions. The consequence of dispensing automatically with the Guardian's attendance would be that an adjournment would be necessary and further costs incurred.

The Courts usually appoint Guardians in complex private law cases when an impasse has been reached and the court simply does not have the appropriate mechanism to progress the case. The intervention of the Guardian is, therefore, essential and sometimes urgent. By their very nature, such cases involve a high degree of parental hostility. The way in which court hearings are used by parents and their legal representatives needs to be examined:

- Sometimes the contact arrangements are such that the only time parents meet each other is at court.
- Sometimes the relevant child is brought to court by one or the other parent.
- The parents sometimes receive expert and Guardian's reports too late so detailed instructions can only be taken at court. Frequently the parents fail to provide any instructions until they arrive at court. The result is that relevant issues in the case are only capable of being ascertained at court.
- Cases are organic. Issues of non-compliance or allegations relating to abuse and other welfare concerns relating to the child are raised at frequently raised at court as, often, they have only recently arisen.

In all these situations it is difficult to see how the solicitor could provide effective representation in the absence of discussions with the Guardian and the instructions obtained as a result. Short briefings and letters would not be sufficient to meet the challenges presented at such hearings, of which there has been no prior notice. It is a matter for the professional judgment of solicitors and Guardians as to whether the attendance of the Guardian is necessary. Where the professional team representing a child agrees that the attendance of a Guardian is not necessary then they are at liberty to request that the court to give leave for the Guardian not to attend.

### **Proposal 7**

- Q17. CAF/CASS provide a range of age appropriate leaflets, including the Power Pack, which are also available on line. The NCH website [itsnotyourfault.org](http://itsnotyourfault.org) is also a useful resource for older children.
- Q18. In the Council's view good quality and accessible information is provided to children involved in public law proceedings. This is largely because in public law proceedings, the Guardian is responsible for providing information to children. Good quality materials are also available to children involved in private law proceedings but the

Council has concerns that this information does not, in many cases, reach the children who need it. This is because, in private law cases, information is largely filtered through the parents and it very much depends on the ability or willingness of parents to ensure that information reaches the child. For this reason, the Council believes that there is a real need to provide more information materials to help parents to explain the court process to their children.

Q19. The Council would like to see a stakeholder group, along the same lines as that which produced the Power Pack in public law proceedings, to review the materials available to children in private law cases and to provide materials to help parents explain the court process, and contact issues, to their children. The Council would urge that the stakeholder group should involve a panel of children and young people in developing any materials for children.

Q20. The Council believes that there may be more scope to raise divorce, separation and contact issues in the context of the PHSE curriculum in schools. The Council would also propose the provision of a confidential advice and counselling service dealing with issues arising for children and young people as a result of family breakdown. It may be possible to graft a service of this nature onto an existing telephone helpline service for children.

### **Proposal 8**

Q21. No, not as a matter of course. There are, however, a range of views about this issue on the Council. The majority view recognises the importance of re-assuring children that their views have been heard and taken into account but feels that it is more appropriate for CAFCASS or NYAS professionals, or the solicitor representing the child, rather than judges, to speak to the child. In the view of the majority the person best suited to explain the court process to the child is the one who has developed a relationship, and established trust, with the child.

Taking the needs of the child as a starting point, the majority view on the Council would caution against a 'one size fits all' approach and

suggests that in some cases it may be appropriate for the judge to speak to the child, in other cases it will not be – it all depends on the age and needs of the child and the circumstances of the case.

A child needs to know what, how and why, decisions have been made, and that their views have been taken seriously (although recognising that this does not mean the child will necessarily get what they want). This information needs to be provided in a manner and style appropriate for the emotional and cognitive development of the child, by an individual with experience and skill in talking to children. This process may take several meetings. The judge will have a part to play in this process, but it is unlikely that the judge will be in a position to match fully the needs of the child at this crucial time.

The minority view is that the judge should speak to children when:

- i. The child requests this;
- ii. The child's guardian, solicitor or Court appointed specialist suggests this;
- iii. When the judge identifies a need to see and speak to the child.

A minority on the Council would like to see a culture change where it becomes more usual for judges to speak directly to children in private but recognises that this will take time and significant changes in judicial training to bring about.

Q22. In the view of the minority, when speaking to a child, the judge should explain that s/he cannot keep secrets, but will paraphrase to the parties in court what the children say. Other considerations include:

- i. While the child's views cannot be used as evidence in making a judgment, the child's views might be very relevant to the orders a judge makes e.g. about residence or contact.
- ii. It is a basic human right that the person, in this case the child, around whom the case revolves, has the right to make their views known.

- iii. The child's ability to express their views in the way in which they wish to do so has important psychological and emotional implications. A child who feels he or she has been listened to, and who was allowed to make his or her views directly known to the judge, is more likely to accept the judgments and orders made. They are likely to feel more respected by the Court process because the Court wanted to hear what they had to say. Conversely, a child who has strong views they wish to convey directly to the Court, if denied this, will harbour feelings of anger, of their views being dismissed and is more likely to resent the outcome of the hearing. Allowing the child to be heard, when they wish to contribute, is in their emotional best interests.
- iv. When a child has very strong views, it is difficult to convey the emotional intensity of these on paper, or in evidence, their real nature is more likely to be conveyed in a face to face meeting.
- v. Judges are likely to find their task in making decisions facilitated by having met the child and being able to hold them in mind.

Q23. To make courtrooms more child-friendly would require, in most cases, and particularly in the High and County Courts, a complete rethink and redesign. They would need to be more in the style of some magistrates' courts and Sheriff's courts - in the round with all participants at the same level. There would need to be a balance between creating a child friendly atmosphere (e.g. wall decorations, furniture suitable for children, drawing facilities and toys) and the need for gravitas and conveying to the child the serious nature of the proceedings.

It would be desirable to have a child-friendly room in each Care Centre and, ideally, a separate entrance away from other types of court by which the children could reach the room. When appropriate, the judge could see the child in this room. The room could also be the waiting area for the child if required to give evidence in court. Where it is not possible to have a dedicated child friendly room in the court building then consideration should be given to finding a suitable room

in appropriate premises away from the court building e.g. local CAFCASS offices.

Even in their present form, the courts could make some adjustments to procedures and format to accommodate children better. The Inner London Family Proceedings Court, at Wells Street, is an example of how much can be done to make existing environments more child friendly. A familiar person, rather than an usher, could take them to the witness box or other place in the court e.g. a chair near the judge, perhaps with a parent or other supportive representative. The Council would suggest a different way of taking the oath or affirming for children, in the rare cases where it is necessary for children to give oral evidence, perhaps the judge telling the child he or she expects the child to tell the court only things that are true. The advocates could, through a pre-meeting and plan, adjust their behaviour and the order and type of questions to the needs of the child.

Much could be learnt from other jurisdictions where children are more frequently present in court.

December 2006

**Feedback from CAFCASS/FJC Panel Meeting on the DCA “Separate Representation of Children” Consultation Paper – 11.11.2006**

The above panel met on 11<sup>th</sup> November 2006 at NYAS (National Youth Advocacy Service) Head Office in Birkenhead. Five young people were brought together to discuss the above consultation paper and the proposals within it.

**About the Group:**

The group was set up in September 2005. NYAS were commissioned by CAFCASS and the FJC to facilitate a young persons’ group. The objective of the group is to allow young people to be consulted on a range of issues involving CAFCASS and the FJC. The vision was to ensure that practice and policy within both organisations was child centred and reflected the feedback of this panel of young people as far as was possible.

Thirteen young people have been recruited to the group, their ages ranging from 11 to 21 years. The group consists of young people who have experienced parental separation, private or public law proceedings and contact with Social Services. Some of the young people have worked with NYAS prior to the group forming; including some where NYAS have represented them as a guardian in proceedings and in other pieces of NYAS consultation work. Most of the group are from Merseyside area and the remainder from North Wales.

The group meets every two months and topics are selected respectively by CAFCASS and FJC. To date the young people have been consulted in regard to the “CAFCASS Principles of Good Practice” and “CAFCASS Quality Standards”. This group has also been working with the DCA policy team for over nine months and recently responded to the consultation paper – “Confidence and Confidentiality : Improving Transparency and Privacy in Family Courts.”

### **About the Day:**

The panel consisted of five young people. Their age range was 11 – 21 years, three female and two male. Two had experienced public law and two other young people had experienced private law. The panel met to discuss the proposals set out in the consultation paper. The group discussions were lead by Kate Perry and Dan Copley (NYAS) with support from Christine Smart (CAFCASS), Erika Maass (DCA) and District Judge Nicholas Crichton (FJC).

The panel explored the consultation questions which had been written in a child centred format via a group discussion. Following this, the panel viewed the websites refereed to in the consultation paper which provide information to young people e.g. CAFCASS, NCH and the Parenting Plans published by the DfES (accessed via DCA).

All of the feedback and comments received from the young people in the discussion follows:

### **Group Discussion on Child Centred Consultation Questions**

#### **1. What do you think are the advantages and disadvantages of young people getting involved with Private Law cases?**

- It is important that a young person understands what is going on and what a private law case is and what it covers
- It is important that young people have a choice to get involved
- If a young person changes their mind they should feel that this is O.K
- A disadvantage may be that the young person finds out something that they might not know and might not want to know
- Need to consider the feelings of the young person
- A disadvantage may be that it would be a very tense atmosphere and a young person may find it difficult to talk about things that might upset their parents



- Young people being able to talk to the judge alone may help this
- Could the judge have a confidential “chat” with young people? It would need to be clear that child protection concerns would need to be reported back by the judge.
- Young people wouldn’t like it if the judge talked to parents secretly so parents may be angry if a young person had a secret chat with the judge?
- It is still important that the young person is in court to make sure everybody gets everything right – particularly in terms of what the young person has said
- 

**2. Do you think CAFCASS should be the preferred choice of the court to represent all young people?**

- acknowledges how it would always be CAFCASS in the all courts
- it is sometimes not fair to the young person if there is a change in worker i.e. CAFCASS – NYAS/Independent Advocate – this can affect trust
- adults should not be allowed to change a young person’s worker – sometimes this is done because the adults/family are unhappy with CAFCASS – should always talk to the young person about this
- A young person needs to spend a long time with whoever will represent them – need to ensure that as much time as possible is spent with the young person face to face
- If a young person is already working with an advocate this should be flexible. Could the advocate support the young person with the court case as the young person sometimes has an established relationship with an advocate?
- It is important that the young person deals with only one person
- Couldn’t the young person write the report or part of it?
- Couldn’t a young person decide who they would like to write a report on them?
- The court should get reports from all sides of a young person’s situation not just their representative in the court
- Concerns were expressed by young people for those young people who were not able to talk about what they wanted (i.e. too young)

### **3. Do you think competent young people should be able to instruct a solicitor on their own?**

- it was agreed by the group that competent meant knowing your own mind and being able to express yourself
- this would be good as it would show that a young person is in control of their life
- the solicitor would be able to get first hand information from the young person instead of it coming from different people and places
- A disadvantage may be that the solicitor may not talk to the young person seriously
- All solicitors should be provided with training (Total Respect!) to help them talk and work with young people. It was acknowledged that these solicitors would be on the Children's Panel –
- Talking to a solicitor may be hard. You would need to get to know them so you know they can be trusted when you are telling them something personal. Need to be sure they aren't going to tell anyone without you knowing.
- The above question should be treated on a case by case basis and young people should have this choice and also be allowed to change their mind at any point. Should always be flexible.
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### **4. Who do you think should attend hearings involving young people? i.e their solicitor? their guardian?**

- There should be a choice and flexibility. Should be decided on a case-by-case basis.
- The CAFCASS Officer is who the young person will be relying on through most of the court proceedings – “the CAFCASS Officer should be there representing the young person all the time.”
- CAFCASS should be there all the time to check that the reports are correct. “It's CAFCASS's job to be there all the time.”
- The Judge can pass information to the CAFCASS Officer, who then passes information to the young person.

- CAFCASS need to be there to help the young person understand the Judge's decision. "At the end of the hearing, the Judge should explain to everyone why they made that decision."
- Any decisions made need to be fed back to the young person quickly.
- The child/young person should be able to contact the CAFCASS Officer if they aren't satisfied with what they have heard.

**5. Do you know of any information that is available for young people who are involved with the family courts?**

For this question, the young people looked at the websites and information sources that are referred to in the consultation paper – CAFCASS, NCH and the Parenting Plans published by DfES (accessed through the Department for Constitutional Affairs website).

CAFCASS - [www.cafcass.gov.uk](http://www.cafcass.gov.uk)

- Too much writing – particularly for younger children.
- Good that the pictures show ethnic diversity, but the artwork used is patronising – no one is smiling and pictures of real children would work better.
- The website is okay if you have an adult guiding you through it, but young people should be able to access the information on their own.
- The 'Viewpoint' option gives people the chance to feedback, but more guidance is needed to explain it – it doesn't tell you to click there to leave feedback.
- A message board or chat room for young people in the same situation would be good.

NCH - [www.nch.org.uk](http://www.nch.org.uk)

- Home page has a lack of colour.
- The pictures don't look right; they don't pull you in.
- The writing looks dull.
- Difficult to find the information you want (looking for information on family court proceedings).

- (Found the 'It's Not Your Fault' page) Took a while to find, but has good pictures.
- The text is hard to read – the colours/backgrounds make it difficult.

The DfES's Parenting Plans and leaflets – viewed by going to:

[www.dca.gov.uk/family/divleaf.htm](http://www.dca.gov.uk/family/divleaf.htm)

- "That's nice."
- Done in readable chunks.
- Colours are okay.
- Should be able to access interactive leaflets on the web – these have to be printed out before you can fill them in.
- Good exercises.
- Would like to know how old the children/young people are that are in the case studies.

## **6. What do you think young people should be able to discuss with judges?**

### **What do you think young people need to know from a judge?**

- Young person needs to be regularly given the opportunity to change their mind by the Judge.
- Judges should explain the process of the court proceedings fully to the child/young person – "they should take everyone's feelings into consideration."
- Judge should explain what happens when a decision is made.
- Decisions should be fully explained by the Judge. Acknowledged that this could depend on the decision – if the young person disagreed they'd want to know why the decision was reached, but if they agreed, they might not.
- Could be training for judges to help them work with children/young people.
- If a judge isn't willing to talk to children/young people they shouldn't be in the family courts. All the judges need to be at that level.
- If the child/young person wants it, a CAFCASS Officer could go with them to talk to the Judge.
- Everything that happens in the court proceedings should be well-documented so that the young person can look back at the events when they're older.

- A letter from the Judge explaining their decisions should also be available to the young person to look at when they're ready (not judged by age, but by understanding).

### **7. How can the courts be friendlier to young people?**

- All the tapes and video machines in the court rooms made it look as if someone was listening in, and this wasn't welcoming.
- "It (the court room) was scary."
- Disagreement about how the court room should be laid out. Some young people felt that the Judge shouldn't be sat higher than everyone else, but others felt they should so that everyone can see.
- General agreement that if the room was laid out in a horse-shoe formation it would be better for everyone.
- Needs to be more colour in the court rooms, more child-friendly.
- The seats should be more comfortable, could all be cushioned.
- More toys and TV's for children/young people whilst they're waiting.

**Kate Perry – Children's Service Manager**

**Dan Copley- NYAS Participation Officer**

**13.11.06**

**National Youth Advocacy Service.**

**PROTOCOL BETWEEN THE NATIONAL YOUTH ADVOCACY SERVICE AND  
THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE**

This protocol aims to clarify the roles of both agencies representing children in private law proceedings in order to meet, in the best possible way, the needs of all children and families.

Shared Commitments

- Compliance with article 12 of the United Nations Convention on the Rights of the Child
- Improved Services for Children in family proceedings
- A co-ordinated response to changing practice and regional needs

National Youth Advocacy Service

1. NYAS is a UK charity offering socio-legal information, advice and legal representation to children and young people up to the age of 25. NYAS has developed a strong identity as a leading Children's Rights organisation with provision of advocacy services. NYAS has advocates across England and Wales, supported by a Legal Team and a free phone helpline and advice service for children and young people. NYAS also provides separate representation for children and young people where the court considers that such representation is necessary under Rule 9.5 of the Family Proceedings Rules and in line with the Practice Direction of The President of the Family Division of April 2004.<sup>1</sup>
2. NYAS is committed to Article 12 of the UN Convention of the Rights of the Child. The object of NYAS representing young people is, wherever possible, to protect the young person from the damaging effects of being caught up in legal proceedings. It is a common misconception that children as parties to the proceedings would always give instructions, although they may do so with leave of the court or if they if they are competent to instruct a solicitor directly. A child who is capable of forming his or her own views has the right to

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<sup>1</sup> [2004] 1 FLR 1188

express those views in the proceedings with the views being given due weight in accordance with the age and maturity of the child. The child's true wishes and feelings should be put before the court as part of an holistic approach in terms of assessing the whole background and dynamics of the situation. The child should have the opportunity to have their situation represented separately from that of any of the adults.

3. The suitability of NYAS to act as guardian in appropriate cases was approved by Dame Elizabeth Butler-Sloss in the case of Re: A<sup>2</sup> (Separate Representation). There are a number of accepted situations in which separate representation of children in private law proceedings is either appropriate or acceptable and NYAS has also been involved in the recent cases A & A (Shared Residence)<sup>3</sup> and Re S (Unco-operative Mother)<sup>4</sup>.
4. It is the policy of NYAS to appoint a caseworker who is an independent social worker and usually a children's guardian in the public law sense. The lawyer and caseworker work in tandem to provide representation for children and young people.

#### Children and Family Court Advisory and Support Service (CAFCASS)

5. CAFCASS is a Non-Departmental Public Body. The service was established to combine the functions previously carried out by the Family Court Welfare Service provided by the Probation Service, the Children's Branch of the Official Solicitor's Department and the GALRO Service provided by local authorities. Its function is to safeguard the interests of children who are the subject of family proceedings. Social workers employed by CAFCASS are appointed as Family Court Advisers (FCAs) and carry out a number of roles according to the nature of the proceedings in which the child is involved.

#### CAFCASS duties are to :

- Safeguard and promote the welfare of the child

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<sup>2</sup> [2001] 1 FLR 715

<sup>3</sup> [2004] EWHC 142 Fam

<sup>4</sup> [2004] EWCA Civ 597

- Give advice to the court about any application made to it in such proceedings
- Make provision for children to be represented in such proceedings
- Provide information, advice and support for children and their families <sup>5</sup>

#### Safeguarding and Promoting the Interests of Children

6. CAFCASS' responsibility is to safeguard and promote the interests of individual children who are the subject of family proceedings by providing independent social work advice to the court. In addition to its general duties it meets these responsibilities in some private law Children Act cases where an officer of CAFCASS accepts appointment as guardian under r9.5 of the Family Proceedings Rules 1991. In these cases the child will always have the benefit of legal representation and the FCA acting as guardian will instruct the solicitor.
7. Certain specialist High Court appointments for children are handled by the CAFCASS High Court Team based at National Office in London. They are responsible for medical treatment cases and cases with particularly complex features.

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<sup>5</sup> Criminal Justice and Court Services Act 2000, Section 12



### Children made a party in private law proceedings

8. Rule 9.5 of the Family Proceedings Rules 1991 states:
- (1) "...if in any family proceedings it appears to the court that it is in the best interests of any child to be made a party to the proceedings, the court may appoint –
- (a) an officer of the service
  - (b) (if he consents) the Official Solicitor<sup>6</sup>; or
  - (c) (if he consents) some other proper person,
- to be the guardian ad litem of the child with authority to take part in the proceedings on the child's behalf."
9. The President's Practice Direction makes it clear that the child should only be made a party in a minority of cases featuring issues of significant difficulty. Such decisions are only made by a Circuit Judge, High Court Judge or District Judge in the Principal Registry of the Family Division (unless there are exceptional circumstances when a District Judge can make an order).
10. CAFCASS should be approached first to provide a guardian. The provision of a guardian when requested by the court is a significant and core task for CAFCASS and CAFCASS has a duty to appoint a guardian and cannot refuse appointment. Guidance has been issued to clarify that where a judge has decided that an appointment under Rule 9.5 is necessary that Service Managers must prioritise the allocation of the case.

### National Youth Advocacy Service and CAFCASS working together

11. The National Youth Advocacy Service often provided a guardian in private law proceedings before the inception of CAFCASS when there was limited

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<sup>6</sup> For the Official Solicitor's functions in family cases see Practice Note dated 2 April 2001 [2001] 2 FLR 155. He acts as guardian ad litem of minors who are not subject of the proceedings such as respondent minor parents and child applicants.

provision for guardians to be appointed. NYAS has continued to provide such a service particularly where judges have previous experience of their effective work in this area. This is part of NYAS' broader commitment to provide information and advice to children and young people.

12. Since 2001 when CAFCASS was created to provide a service in both public and private law proceedings there has been a considerable growth in rule 9.5 appointments undertaken by CAFCASS. As clarified in the President's Direction it is recognised that in many cases the child will benefit from representation by a guardian who has already met them in their capacity as children and family reporter in the case.

When NYAS may be appointed guardian:

13. The Practice Direction of April 2004 states;

“5. When a child is made a party and a guardian is to be appointed:

5.1 Consideration should first be given to appointing an officer of CAFCASS as guardian.....

5.2 If CAFCASS is unable to provide a guardian without delay, or if for some other reason the appointment of a CAFCASS officer is not appropriate, FPR rule 9.5(1) makes further provision for the appointment of a guardian”

14. CAFCASS should be approached first and will usually provide a guardian. However, NYAS may, for example, be asked by the court to provide a guardian in any matter (likely to be long standing) where, despite the best efforts of CAFCASS staff, one or more members of the family can no longer work with the organisation.

#### General principles

15. Both agencies are committed to effective communication in the best interests of the child in accordance with the law. The normal points of contact should be the CAFCASS service manager and the nominated NYAS lawyer. If any case moves between the two agencies, it is particularly important to pass on information which may assist the work with the child and family, e.g. aspects of risk management, conflict of interest issues and any particular needs of the child. If NYAS is invited to provide r9.5 representation where CAFCASS has not been approached, NYAS will discuss the matter with CAFCASS and will be responsible for notifying the court in the first instance.

16. CAFCASS and NYAS will work together to advise the court whenever there appears to be good reason for a guardian not to be appointed e.g. when there is an alternative preferable route such as a section 37 report from the local authority.

This Protocol will be reviewed in twelve months' time.

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