

## APPENDIX 12

# CAFCASS: Guidance – Representation of Children in Private Law Proceedings

[April 2004]

### **PURSUANT TO RULE 9.5 FAMILY PROCEEDINGS RULES 1991**

#### **What is the background to this guidance?**

1. Children are not normally represented in private law proceedings in the sense of being made parties to such proceedings with a lawyer to advocate on their behalf. This is in direct contrast to the position in ‘specified proceedings’ (defined by section 41(6) Children Act 1989 but basically meaning public law proceedings).
2. Ever since the Children Act 1989 came into force it has, however, been possible to make children party to private law proceedings in accordance with the rules set out in Part IX of the Family Proceedings Rules 1991. Of these, rule 9.5 is the most important. The use of rule 9.5 has varied throughout England and Wales with some courts never making such appointments and their use being quite common in Yorkshire/Humberside and the North West.
3. During 2003, the President of the Family Division took the initiative and consulted with judges, lawyers and organisations such as CAFCASS about the circumstances in which it might be in the interests of a child to be made a party to private law proceedings. The result is her Practice Direction addressing precisely this issue.
4. At the same time, we have taken the opportunity to issue a fresh CAFCASS Practice Note. Its main purpose is to clarify when such cases, if they are referred to CAFCASS, should be referred to the local office and when they should be referred to CAFCASS Legal.
5. Overall, the emerging general consensus within the family justice system is that whilst making children parties to private law proceedings should remain the exception and not the rule, nevertheless it will happen rather more often, at least in those parts of England and Wales that have been very restrictive in their use of this provision. Further steps are now a matter for the Government. In the meantime, the President’s Practice Direction

should be seen as an important step in the recognition of the rights of children in proceedings that affect them. The CAFCASS Practice Note recognises that such cases should be regarded as a normal part of the work of a CAFCASS officer and are usually entirely suitable to be worked by local officers.

**What are the key documents concerning the representation of children in private law proceedings?**

6. There are three key documents: rule 9.5 Family Proceedings Rules 1991, the President’s Practice Direction, and the CAFCASS Practice Note. This guidance and the accompanying flowchart are intended to help CAFCASS officers with these key documents, copies of all of which accompany it.<sup>1</sup>

**In what ways may the issue of a rule 9.5 appointment arise?**

7. It may arise on the initiative of one of the adult parties or, more likely, on the initiative of the court or the CAFCASS officer. In particular:
  - the court may at any time ask a CAFCASS officer to advise or report about this issue (and it should consider asking for the advice of any CAFCASS officer already involved before making an order under rule 9.5); and
  - CFRs have a general duty to advise the court if they consider the joining of a person as party to the proceedings would be likely to safeguard the interests of the child; and a particular duty to consider whether it is in the best interests of the child to be made a party to the proceedings and, if so, to notify the court of that opinion together with the reasons for it (rule 4.11B(4)–(6) Family Proceedings Rules 1991).

**What if the case is proceeding in the family proceedings court (magistrates’ court)?**

8. If the case is proceeding in the family proceedings court, rule 9.5 cannot be used. If a CAFCASS officer thinks there is a real possibility the child should be made party to private law proceedings that are currently in the family proceedings court, the case should be transferred to the county court (or High Court) for this to be considered.

**When should children be made a party under rule 9.5?**

9. The starting point is rule 9.5 itself, which indicates that the court may appoint someone to be the child’s guardian<sup>2</sup> ‘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’. In short, it is a ‘best interests’ test.
10. In considering their advice to the court, CFRs need to consider the advantages and disadvantages that party status would bring to the child, as well as what the alternative ways are of dealing with the matter (see paragraph 16 below).

11. In doing so, CFRs should pay careful regard to the President's Practice Direction which sets out the circumstances in which it may be justified to join the child as a party.
12. Reported case law and past experience have identified other questions which it may be helpful for CFRs to consider:
  - are there active investigations to be conducted on the child's behalf, or steps to be taken in proceedings such that it would be appropriate to join the child as a party?
  - contact cases: is the principle of contact established? is there an enforcement issue? is the case ready for determination by the court?
  - parentage cases with welfare issues: are there any steps to be taken before DNA testing? is the child old enough to refuse to be tested? can other agencies help with telling the child about parentage?

**What should CAFCASS officers do if they are unsure whether or not it is in a child's best interests to be made party to private law proceedings?**

13. First, CAFCASS officers should discuss the particular case with a colleague and their line manager. They are also very welcome to telephone and discuss the matter with a colleague from CAFCASS Legal.
14. If in doubt, and if this has not already been done, the matter should be raised with the court as soon as possible. If the CAFCASS officer thinks further information is needed before a recommendation can be made, this should also be explained.
15. In most situations, the CAFCASS officer should ultimately be able to make a recommendation to the court one way or the other. If an officer really feels unable to do so, then she should explain what she thinks are the competing factors and the weight she attaches to them. It will then be – as it always is – for the court to make the decision.

**What alternatives should be considered before a rule 9.5 appointment is made?**

16. Alternatives to a rule 9.5 appointment that should be considered by CAFCASS officers and courts are:
  - whether a report under section 7 Children Act 1989 would in fact be sufficient, particularly if the CFR spends more time in her enquiries (including meetings with the child) and/or if the court exercises its powers under rule 4.11(2)(a) Family Proceedings Rules 1991 to direct the CAFCASS officer to carry out specified investigations;
  - whether the investigation and report should be carried out by local authority social services rather than an officer of CAFCASS. This might be done either under section 7 or section 37 Children Act 1989. This may be appropriate if the local authority has already had involvement with the family, and will usually be appropriate if there are immediate issues of child protection (the primary responsibility for

child protection lies with local authority social services, and neither CAFCASS nor its officers have any special powers to institute child protection procedures);

- whether the child is of sufficient age and understanding to give instructions direct to a solicitor without the need for a guardian ad litem, pursuant to rule 9.2A Family Proceedings Rules 1991.

17. Other measures that may be considered as alternatives to joining the child as a party pursuant to rule 9.5 include:

- alternative dispute resolution;
- arrangements for contact such as referral to a supervised contact centre;
- the use of a family assistance order pursuant to section 16 Children Act 1989;
- jointly instructed expert assessment.

**In how many cases should rule 9.5 appointments be made?**

18. It is expected that there will be an increase in the total number of rule 9.5 appointments without necessarily meaning an increase in all courts. This would be in keeping with ministerial comments made in the House of Commons.

19. CAFCASS officers are particularly reminded of the wording of the President’s Practice Direction that ‘making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur only in a minority of cases . . . It must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings. When deciding whether to direct that a child be made a party, the court will take into account the risk of delay or other factors which might be adverse to the welfare of the child . . .’.

20. In the light of these observations of the President, in any case in which the CAFCASS case officer or service manager thinks that the court should not have made the direction under Rule 9.5, what should they do? While mindful that it is the court’s decision, it is open to the officer of CAFCASS to seek to renegotiate with the court. Lawyers and Managers at CAFCASS Legal will be pleased to offer advice, but in order to avoid delay, any referral should be made with the utmost promptness.

**Who can be appointed as guardian?**

21. Rule 9.5 identified three alternatives between which the court must choose when appointing a guardian:

- an officer of CAFCASS;
- (if he consents) the Official Solicitor; or
- (if he consents) some other proper person.

22. The Practice Direction makes it clear that where it is necessary to join the child as a party, the court should normally look first to CAFCASS to provide a guardian. There are several reasons for this:
  - CAFCASS is the organisation created and funded by the Government to fulfil such a role in family proceedings (see generally CAFCASS's functions pursuant to section 12 Criminal Justice and Court Services Act 2000);
  - appointing 'some other person' (see further below) is likely to create a double burden on the Legal Services Commission, with it having to pay for both the welfare work and legal representation for the child;
  - rule 9.5 itself suggests this by giving CAFCASS no discretion as to whether or not to accept such an appointment;
  - rule 9.5(6) makes specific provision about the powers and duties of a guardian who is an officer of CAFCASS. See paragraph 34.
23. It will be appropriate to consider approaching the Official Solicitor if a case falls within the terms of his Practice Note (Official Solicitor: appointment in family proceedings)<sup>3</sup>, notably if the child is involved in certain proceedings such as proceedings under Part IV of the Family Law Act 1996 (non molestation and ouster injunctions) or under Part III of the Family Law Act 1986 (declarations of parentage in the absence of welfare issues).
24. If the child is involved in family proceedings in which he is not the subject (e.g. a minor parent or applicant in family proceedings) it is open to CAFCASS to provide a guardian who may after all already be representing that child in other proceedings in which the child is the subject. But it may also be more appropriate for the Official Solicitor to act. If there is any question of whether the case is one in which the Official Solicitor should be invited to act on behalf of a child, please contact CAFCASS Legal.
25. The rules also refer to 'some other proper person' which allow the court to appoint a relative or other adult, including a relevant professional, as the child's guardian. However, for reasons set out above, other agencies such as the National Youth Advocacy Service should only be considered if CAFCASS is not able to assist within a reasonable time<sup>4</sup> or if there is some other particular reason for doing so.

**If the court directs that an officer of the Service is to be appointed as guardian ad litem under rule 9.5, should that officer come from CAFCASS Legal or from the local CAFCASS office?**

26. This is the main issue that is dealt with by the CAFCASS Practice Note. The starting point is that county court cases should normally be referred to the local CAFCASS office, and High Court cases to CAFCASS Legal.
27. The CAFCASS Practice Note also sets out specific categories of case that should be referred to CAFCASS Legal. The details of these categories are not repeated here – CAFCASS officers should refer to the CAFCASS Practice Note itself. Note: If CAFCASS Legal take on a particular case

they will always notify the local/regional CAFCASS office for effective liaison

28. The majority of rule 9.5 cases will be cases proceeding in the county court and without any of the special features that might warrant the matter being referred to CAFCASS Legal. However, if a case has been referred to a local CAFCASS office but there is any doubt in the mind of the service manager or case officer involved, please telephone CAFCASS Legal to discuss the matter. Similarly, there will from time to time be High Court cases referred to CAFCASS Legal that may be better dealt with by or in conjunction with a local CAFCASS officer. In those circumstances it is for CAFCASS Legal to telephone the local service manager to discuss the matter. Either way, it is important that this is done promptly to ensure CAFCASS responds to the court within the 5 day timetable set by the CAFCASS Practice Note.
29. Local arrangements should ensure swift and effective liaison between judges making rule 9.5 appointments and all CAFCASS offices to ensure that CAFCASS responds to such appointments within 5 days, the timetable set by the CAFCASS Practice Note.<sup>5</sup> Experience in the North-West has been that it is helpful if judges discuss the suitability of a rule 9.5 appointment in particular cases with the local service manager. This helps to eliminate unsuitable cases and helps increase mutual understanding about appropriate cases. It has proved useful to ask ‘What would such an appointment add for the child?’

**To whom should the case be allocated and how should the case be managed?**

30. Service managers need to give careful consideration as to whether it is appropriate for the original CFR to continue in the new role of guardian or whether another worker should be allocated to the case. Whilst it will normally be appropriate for the original officer to continue in the new role, which provides continuity for everyone involved including the child, it may be necessary to allocate a different officer, for example if the relationship with one or more of the adult parties has broken down, if for some other reason the case needs a fresh approach, or if the current case officer is not yet ready to undertake such a role.
31. As soon as CAFCASS has decided which of its officers is to be allocated to the matter, the court should be notified of their name. If there is going to be any delay in the appointment of the officer or in their being able to start their work, the court should be informed.
32. There must always be a clear case plan, and active case management. Timetabling should ensure the matter is referred back to court if the guardian role becomes ineffective due, for instance, to lack of parental co-operation in an intractable contact case.
33. Appropriate support should be provided for all practitioners taking on the role of guardian ad litem, including training and mentoring, particularly for the less experienced. CAFCASS Legal is always willing to offer support

and guidance. Workshops for the regions are being planned in conjunction with the Professional Development and Quality Assurance section of CAF/CASS.

**What does one have to do in the role of guardian?**

34. Whatever the technical differences may be, the role of a guardian ad litem pursuant to rule 9.5 is very similar to that of a children's guardian in specified proceedings. Indeed rule 9.5(6) – a provision that was added at the time CAF/CASS was created – expressly stipulates that rules 4.11 and 4.11A Family Proceedings Rules 1991, which set out the powers and duties of a children's guardian in specified proceedings, shall apply to a CAF/CASS guardian ad litem appointed under rule 9.5.
35. Note, in particular, that this will normally mean the CAF/CASS officer must appoint a solicitor to represent the child. Practitioners should normally instruct solicitors who are members of the Law Society Children Panel who regularly appear in the court in which the proceedings are being conducted and have experience of private law matters.
36. One key difference between the role of a children's guardian in specified proceedings and that of a guardian ad litem under rule 9.5 is that Section 42 Children Act 1989 (Right of Officer of the Service to have access to Local Authority Records) does not apply to the latter. If difficulties are encountered in this respect, advice should be sought promptly from the child's solicitor or if this is not practicable from CAF/CASS Legal.

**What help can I get from CAF/CASS Legal?**

37. CAF/CASS Legal is always willing to offer advice to CAF/CASS officers about any case in which they are involved and is glad to do so in rule 9.5 cases. This may be particularly important before any rule 9.5 direction has been made by the court. If and when a local solicitor has been instructed to represent the child, CAF/CASS officers should normally expect to turn first to that solicitor for any help they need, but the possibility of discussing the matter with CAF/CASS Legal still remains.
38. CAF/CASS Legal may provide support or be involved in a number of other ways including:
  - giving legal advice in specialist situations (for instance, in relation to press injunctions);
  - giving practical advice (for instance, offering help with identifying specialist experts);
  - tandem working between a local CAF/CASS officer and a lawyer from CAF/CASS Legal;
  - CAF/CASS Legal asking for help from a local practitioner (for instance, for local knowledge or because the local officer possesses particular language skills).

**How do I contact CAFCASS Legal?**

39. CAFCASS Legal can be contacted on 020-7904 0867 (general line) or 020-7904 0868 (fax) or by email to [legal@cafcass.gov.uk](mailto:legal@cafcass.gov.uk). CAFCASS Legal has a duty lawyer and manager available each working day
40. The direct line numbers of the lawyers and managers are:
- William Simmonds – 020-7904 0878
  - Julie Hine – 020-7904 0879
  - Helen Burnell – 020-7904 0832
  - David Mott – 020-7904 0847
  - Suzi Rumens – 020-7904 0840
  - Terry McGinty – 020-7904 0833

**When will this guidance be reviewed?**

41. This guidance will be reviewed in April 2005, or sooner in the event that the representation of children in private law proceedings is the subject of secondary legislation issued pursuant to section 122 Adoption and Children Act 2002.

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7 April 2004

*Notes*

- 1 All of these documents will be placed on the CAFCASS intranet, in the Legal section and under the heading ‘Rule 9.5 cases’.
- 2 Whilst the rules still use the phrase guardian ad litem the President has decided the time has come simply to use the word ‘guardian’ and this is what she has done in her Practice Direction.
- 3 A copy of this is also being placed in the same part of the CAFCASS intranet.
- 4 A new policy on the Prioritisation of Allocation will be prepared to take account of this (as well as other issues caused by having converged teams).
- 5 Note that it is important to regard this as an upper time limit. There will be cases where a much more urgent decision has to be taken and confirmed to the court.

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