

PART 3

Children: private law

Solicitors should keep under review at all times the availability of public funding and the need to provide clients with costs information at the outset and on a regular basis.

3.1 SCOPE

3.1.1 This section applies to all private law cases involving children, with the exception of cases relating to adoption, whether these cases are brought under the Children Act 1989 or otherwise. Some of the matters contained within this Protocol are to be found within the Family Proceedings Rules 1991, SI 1991/1247 and the Family Proceedings Courts (Children Act 1989) Rules 1991, SI 1991/1395 (FPR 1991 and FPCR 1991) and their inclusion within the Protocol is for reinforcement in view of their importance.

3.1.2 In public law children cases solicitors are referred to the Law Society's *Good Practice in Child Care Cases* (2004) for guidance on appropriate methods of practice.

3.2 PARENTAL RESPONSIBILITY

3.2.1 Many biological fathers believe that they have parental responsibility when they do not. Solicitors must ensure clients are aware that a biological father only has parental responsibility if:

- he was married to the mother at the time of conception or subsequently;

- he acquired it by making a formal agreement with the mother;
- in relation to a child who was registered or re-registered after 30 November 2003, he was named as the father on the child's birth certificate;
- he has been granted it by court order under the Children Act 1989, s.4 or as a consequence of being granted a residence order.

3.2.2 When instructed in any case involving a child and in which the parents are unmarried, solicitors should enquire whether the child's father has parental responsibility. When acting for a father who is not married to the mother of his child or children, solicitors who are told that the father does not have parental responsibility should advise their client about the importance of parental responsibility and consider whether or not the mother should be asked to enter into a parental responsibility agreement, or if she does not agree, whether to apply for a s.4 order.

3.3 PROTECTIVE MEASURES AND CONFIDENTIALITY

3.3.1 In cases concerning allegations of domestic abuse and child abuse, whether physical, sexual or emotional, solicitors should, wherever possible, encourage clients to inform the appropriate authority. Solicitors should consider this paragraph in conjunction with **para. 3.3.5** below.

3.3.2 Solicitors should be aware of local support agencies (for example counselling agencies) and be able to signpost clients to any agencies which may be of assistance to them or their children.

3.3.3 The courts now give greater consideration to the impact on children witnessing (whether by seeing or hearing) domestic abuse against a parent (see *Re L, V, M and H* [2000] 2 FLR 334; the ruling in *Re D (Contact: Reasons for Refusal)* [1997] 2 FLR 48 also refers to the fact that there can be good reasons for implacable hostility). Clients should not be pressed into agreeing contact in circumstances where they genuinely believe it is not in the interests of the children to see the absent parent or where the absent parent is using the proceedings to continue their harassment.

The effect on children of seeing someone being subjected to domestic abuse or of children being directly abused either physically, sexually or emotionally by the perpetrator during contact, or of being alone with the perpetrator of violence should not be underestimated (see the *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence*, prepared by the Advisory Board on Family Law Children Act Sub-Committee (CASC) in March 2000: the ‘Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence’ contained in Section 5 of the report are reproduced at **Appendix 6**). Solicitors might find it helpful also to be aware of the Advisory Board on Family Law CASC report to the Lord Chancellor on facilitation of arrangements for contact and enforcement of court orders, *Making Contact Work* (February 2002) and the Government’s response (March 2004). Advice should be realistic but sufficiently robust to support clients should their individual circumstances raise questions about the appropriateness of contact.

- 3.3.4** Solicitors should be aware of the changes to the definition of ‘harm’ to children contained within the Adoption and Children Act 2002, s.120. This amends the Children Act 1989 definition of harm to include ‘impairment suffered from seeing or hearing the ill-treatment of another’. Solicitors will be aware that revised application forms (‘Gateway Forms’), including Form C1A dealing with allegations of domestic violence at the time of issue of section 8 Children Act applications, were introduced on 31 January 2005. Solicitors should routinely screen for domestic abuse, in addition to using the forms, whether or not clients raise it as an issue.
- 3.3.5** Solicitors should be aware of, and in appropriate circumstances, must make clients aware of, the effect of *The Guide to the Professional Conduct of Solicitors 1999*, Principle 16.02 (note 4), which states the exceptional circumstances in which solicitors should consider revealing confidential information to an appropriate authority:

‘There may be exceptional circumstances involving children where a solicitor should consider revealing confidential information to an appropriate authority. This may be where the child is the client and the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such infor-

mation. Similarly, there may be situations where an adult discloses abuse either by himself or herself or by another adult against a child but refuses to allow any disclosure. The solicitor must consider whether the threat to the child's life or health, both mental and physical is sufficiently serious to justify a breach of the duty of confidentiality.'

Solicitors are reminded that they are obliged to disclose the whereabouts of a child who is the subject of a seek and locate order or a child who is a ward of court or otherwise if so directed by the court, regardless of the rules of client confidentiality. If solicitors feel concerned that such disclosure puts a client and/or their child or children at risk they must seek directions from the court as a matter of urgency.

- 3.3.6** However, solicitors should always bear in mind that they owe a duty of confidentiality to their clients and may have to justify any breach of that duty to their professional body. It is always advisable to seek advice from the Law Society's Professional Ethics department (tel. 0870 606 2577 and see **Appendix 17** for contact details), other members of the profession, partners in the firm and professional insurers.
- 3.3.7** In cases where an applicant does not know the address of the respondent and the respondent has care of the relevant child or children, solicitors should consider seeking a direction from the court for disclosure of the respondent's address to the court by the appropriate government agency. This is more economical than obtaining a 'seek and locate' order.

3.4 ABDUCTION

- 3.4.1** Solicitors must be aware of the practical and legal emergency steps that need to be taken if a child is abducted or threatened with abduction. Solicitors should consider discussing all cases of child abduction (within England and Wales) with the DCA's Child Abduction Unit (see **Appendix 17** for contact details). Proceedings should be heard by a full-time High Court judge wherever possible. Solicitors should remember that the law and procedures in Scotland and Northern Ireland are different and will be relevant in cross-border cases. Practical guidance can be obtained from Reunite (see **Appendix 17** for contact details).

- 3.4.2** Solicitors must recognise that international child abduction law is a rapidly developing highly specialist area of law and that specialist advice is essential for clients. Before agreeing to represent a client in such a case (including a child who is the subject of abduction proceedings) solicitors should consider whether they have the necessary specialist knowledge and expertise, and where appropriate the client should be referred to an appropriate specialist firm. (Assistance can be provided by the DCA or Reunite, who both maintain directories of solicitors who are specialists in this area of law. The consequences of bad or tardy advice can be devastating for the client, and may result in a substantial damages claim for negligence. At the time of writing, the Law Society, Resolution and Reunite with the support of the DCA, the LSC and others are jointly producing a child abduction directory and leaflet to assist in informing referrals in this field.)
- 3.4.3** Solicitors should always bear in mind the court's powers pursuant to Family Law Act 1986, s.33 (to order disclosure of the whereabouts of a child) and s.34 (to order the return of a child) and the inherent jurisdiction of the High Court to assist in locating and recovering an abducted child within England and Wales. Solicitors should appreciate that an order under s.33 may be directed to persons who are not parties to any proceedings within which the order is made and that s.34 of the Act gives a court the power to order recovery of a child by physically taking charge of them using such force as is necessary and delivering the child to the appropriate person.
- 3.4.4** Police may institute a port alert for up to four weeks if there is a real risk that a child is about to be removed from England and Wales unlawfully. No order is required. Reference should be made to *Practice Direction (Children: Removal from the Jurisdiction)* [1986] 2 FLR 89.
- 3.4.5** Solicitors acting for clients alleging domestic abuse in cases where the abduction of a child has occurred or is threatened must ensure that courts have full up-to-date information about the present circumstances of the case and the risks involved to children from the absent (violent) parent.

- 3.4.6** Solicitors should be aware of the difference between domestic abduction cases (i.e. within the UK) and international abduction cases and the different statutory remedies (i.e. Children Act 1989 and Family Law Act 1986 for domestic cases, and Child Abduction and Custody Act 1985, Supreme Court Act 1981 and a number of international conventions for international abduction cases).
- 3.4.7** Solicitors must be aware of the provisions of:
- (a) the Hague Convention of the Civil Aspects of International Child Abduction 1980 ('the Hague Convention');
 - (b) the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980 ('the European Convention');
 - (c) EU Council Regulation (EC) 2201/2003 ('the revised Brussels II') and
 - (d) the law in general and worldwide relating to non-Convention removals.

Solicitors should be aware of the additional provisions where Hague Convention cases are subject to EU law.

- 3.4.8** Solicitors should be aware that separate legal systems exist in Scotland and Northern Ireland and that the jurisdiction of the courts of England and Wales does not extend to these territories. Specific statutory remedies are available to deal with the cross-border movement of children.
- 3.4.9** Solicitors should also be aware of the special rules relating to public funding in child abduction cases. They should in particular be aware that public funding may not be available in the foreign state and the client may be required to fund the costs of the Hague Convention proceedings abroad. They should also be aware that if a child is wrongfully retained in this jurisdiction, or abducted from a Hague Convention country into England or Wales, the left behind parent is entitled to non-means, non-merits tested public funding if the case is brought to the attention of the DCA, but that the converse is not true for the defendant.

- 3.4.10** If a client discloses to a solicitor any threat to abduct a child, the solicitor should discuss the issue with the Law Society's Professional Ethics department. Solicitors should consider the possibility that a criminal offence has been or will be committed and advise the client accordingly. Solicitors may also wish to refer to Reunite's child abduction prevention guides.
- 3.4.11** Solicitors should be aware that international child abduction cases should be issued in or immediately transferred to the High Court to be considered by a full-time High Court judge.
- 3.4.12** In the event that a child is abducted (or is suspected to have been abducted) from this jurisdiction to another country, or wrongfully retained in a country that is a party to the Hague Convention (the current list of signatories can be found at www.offsol.demon.co.uk), solicitors should immediately contact the DCA's Child Abduction Unit which will fax or email across appropriate forms. Solicitors should submit the completed child abduction questionnaire together with photographs of the abducting parent and children. The client's Hague Convention application will then be forwarded by the DCA to the appropriate foreign central authority with a view to Hague Convention proceedings being instituted in that country for the child(ren)'s summary return to this jurisdiction. Practitioners may find it useful to read the case of *Re H (Abduction: Habitual Residence Consent)* (2000) 2 FLR 294, which gives a useful exposition of the Child Abduction and Custody Act 1985, the Hague Convention of 1980 and the issue of habitual residence and consent.
- 3.4.13** Solicitors must be able to identify when a wrongful removal or retention has occurred. Solicitors must be aware that the removal or retention has to be in breach of the left behind parent's 'rights of custody' and how this is defined by English law. In particular, solicitors should be aware that in the case of an unmarried father, unless:
- (a) he has parental responsibility (by entering into a parental responsibility agreement with the child's mother which is then properly registered, by court order or by being registered as the child's father on the child's birth certificate when the registration occurred after 1 December 2003);

- (b) he has a pending application for parental responsibility, residence and or prohibited steps order and the application has been served upon the abducting parent prior to the removal; or
- (c) he can assert that he was the de facto sole carer of the child prior to removal (inchoate rights);

the removal is unlikely to be deemed wrongful pursuant to the Hague Convention.

3.4.14 When advising as to mediation (which is sometimes appropriate in international cases) solicitors must be aware of the need for specialist mediators with appropriate experience and endorsement for mediation in these complex cases. Reunite has such a scheme (see www.reunite.org).

3.4.15 Solicitors should be familiar with the UK–Pakistan Judicial Protocol on Child Contact and Abduction, appended with the *Guidance to Judges on the Implementation of the UK–Pakistan Judicial Protocol on Child Contact and Abduction* at **Appendix 7**. Solicitors are also referred to **Appendix 8**, guidance on *Liaison Between Courts in England and Wales and British Embassies and High Commissions Abroad*.

3.5 CHILD CONTACT CENTRES

3.5.1 Child contact centres are a valuable (although limited) resource and solicitors should be aware of their local centres and the facilities and services which they provide. Child contact centres have agreed to adhere to a set of National Standards. The *Protocol for Referrals* has been developed by the National Association of Child Contact Centres (NACCC) and endorsed by leading members of the judiciary (see **Appendix 9**).

3.5.2 The majority of child contact centres provide supported contact whereby contact can take place in the centre or children can be handed from one parent to the other. Consideration should also be given to the appropriateness of arranging a handover using third parties and keeping parents apart with no face-to-face contact with each other. Solicitors should explain

to clients the difference between supported and supervised contact before the first contact visit at a centre occurs.

- 3.5.3** Where violence is an issue, careful thought should be given to the use of child contact centres. In cases of domestic violence (especially where there have been criminal proceedings or injunctive relief), supervised contact will generally be necessary, at least initially. There are a small number of child contact centres which undertake high vigilance supervision and the NACCC have details of their member centres which provide this service (see **Appendix 17** for contact details). It is often useful for clients to visit the child contact centre before the first contact period takes place.
- 3.5.4** Child contact centres are not equipped to deal with abusers who pose a serious threat to their families and it is vital that the centre coordinator is given the full background (orally, if necessary) in order to decide whether the centre can accommodate the family. Referral forms must be completed as fully and accurately as possible. It is important that child contact centres have full information about details of violent or abusive behaviour.
- 3.5.5** Solicitors must make it clear on referral forms if other family members can be present during the contact visit. Solicitors for the resident parent should discuss with them the need to prepare the child for the visit.
- 3.5.6** Solicitors have a duty of confidentiality to their clients and cannot reveal details about their client without the client's consent. If clients refuse to give consent to reveal information required on the referral form, a referral should not be made.
- 3.5.7** No child contact centre can guarantee that a child will not be removed from it. It is vital that centres are warned if there is a fear of this or if there have been threats of abduction. If so, solicitors should discuss with the resident parent giving the centre recent photographs of the children and of the contact parent, if possible. If there is a possibility of abduction abroad, solicitors for parents with residence should be asked to retain the passports of parents having contact and/or those of the children to ensure safe contact can take place.

- 3.5.8** If it is not possible to access an appropriate contact service, the issue of face-to-face contact should be carefully reviewed. Other forms of contact might be suggested, such as letters, telephone calls and the use of audio or video tapes. In serious cases, consideration should be given to whether it is appropriate to seek an order for no contact.
- 3.5.9** Solicitors should advise their clients that they should inform contact centres when they no longer need to use them. Clients should be made aware that child contact centres are regarded by the court as a temporary solution to difficulties in contact and not a permanent arrangement.
- 3.5.10** Solicitors should make clients aware that, in general, volunteers and staff at child contact centres do not provide reports or statements for any type of court proceedings unless a child is believed to be at risk of harm. However, a few supervised child contact centres are an exception to this general rule.

3.6 MEDIATION

- 3.6.1** Solicitors should recognise that alternative methods of dispute resolution, such as mediation, can be particularly helpful in dealing with disputes over contact and residence, especially where there are no welfare issues and the matter in dispute is the length or frequency of contact. However, solicitors must bear in mind that this may be neither a safe nor suitable option in domestic abuse cases.
- 3.6.2** It is recognised that the availability of mediation and ADR varies across the country. Mediators offering both publicly funded and privately funded family mediation are available across England and Wales. Mediators are able to offer mediation for disputes over issues regarding children (including contact and residence). Only those mediators with a franchise can offer mediation which will be funded by the LSC. Solicitors acting for publicly funded clients must ensure that they have the correct level of public funding in place for their clients at all stages of the mediation and legal process.

- 3.6.3** Where out of court (independent) mediation is readily available, solicitors should consider referring clients to such mediation before issuing an application at the court. Where only court-based mediation or conciliation schemes managed by CAF/CASS are available once proceedings have been issued, it may be necessary to issue proceedings early on.
- 3.6.4** Mediation has a role to play where marital tensions exist, but only in cases where the partners or family members have equal strength. Solicitors must remember that some family structures and community dynamics are built on unequal power relations between the parties and that some inequalities may be legitimised by culture and religion. Therefore, in certain cases, solicitors and mediators should be aware that mediation may not be appropriate.

3.7 THE PRIVATE LAW PROGRAMME

- 3.7.1** Solicitors should be aware of a number of new initiatives and pilot projects in the area of private children law proceedings, including the Private Law Programme, and the implementation of those initiatives in their local area.
- 3.7.2** Solicitors should understand how the Private Law Programme and other schemes affect the role of CAF/CASS and be aware of any local initiatives within the scheme, including in-court conciliation schemes, family resolution pilots or other resources offered locally. They must bear in mind the solicitor's role in early dispute resolution and in case management. Solicitors will find details of many pilot schemes and initiatives on the DCA or HM Courts Service websites.
- 3.7.3** Solicitors should also be mindful of their role in early dispute resolution and case management.

3.8 BEFORE ISSUE OF PROCEEDINGS

- 3.8.1** Court proceedings should normally only be commenced if all reasonable avenues have been considered and found to be inappropriate or unworkable or if this is the only way to offer

the parties the opportunity of a mediated settlement (see **para. 3.7.1** above.)

- 3.8.2** Solicitors should be aware of the content of *Practice Direction (Representation of Children in Family Proceedings)* [2004] 1 FLR 1188 (see **Appendix 10**), *Practice Note (CAFCASS: Representation of Children in Family Proceedings)* [2004] 1 FLR 1190 (see **Appendix 11**) and the CAFCASS guidance *Representation of Children in Private Law Proceedings* (see **Appendix 12**) or any revision of the same. They should also note the content of the Family Division President's interim guidance of 25 February 2005, *The Appointment of Guardians in Accordance with Rule 9.5 and the President's Practice Direction of 5 April 2004* (see **Appendix 13**). They must consider whether a child needs to be legally represented in any proceedings which relate to them. Solicitors should be aware that CAFCASS is developing its own policy and guidance documentation on contact principles and practice and on domestic abuse. CAFCASS documentation is currently being reviewed and may be amended shortly. Solicitors should use the latest version to be found on the CAFCASS website.
- 3.8.3** Solicitors should advise their clients on the most appropriate forum in which to commence proceedings (High Court, county court, or family proceedings court) bearing in mind restrictions for publicly funded clients.
- 3.8.4** Solicitors should be aware of any facilities in their local family proceedings and county courts including:
- (a) provision of separate waiting areas and other facilities for parties;
 - (b) facilities for children including playrooms etc;
 - (c) availability of in-court CAFCASS conciliation facilities;
 - (d) facilities for vulnerable parties and witnesses both in court and whilst waiting to be called;
 - (e) waiting times for first hearings and subsequent ones through to final hearings.
- 3.8.5** The Lord Chancellor's Department published a series of leaflets for children and parents affected by relationship breakdown, to help children of different ages understand and cope

with the changes that are occurring and to assist parents in discussing matters with them. The leaflets are available from FREEPOST, PO Box 2001, Burgess Hill, West Sussex, RH15 8BR or from parentsandchildren@acceleratedmail.co.uk. Solicitors may also wish to direct clients to the CAFCASS website and refer them to the age appropriate leaflets which CAFCASS produces for children, which explain the role of CAFCASS officers within proceedings. Age appropriate information is also available from the Children's Rights Director website (www.rights4me.org.uk) and ChildLine (www.childline.org.uk) among other organisations.

3.9 ISSUE OF PROCEEDINGS AND THEREAFTER

- 3.9.1** Forms C1 (and C1A if appropriate) or other documents should be simply worded using factual, rather than emotive language, setting out clearly the order sought. Solicitors may find it helpful to append a parenting plan indicating the proposed arrangements for the children.
- 3.9.2** Form C1A includes an opportunity briefly to identify issues of domestic abuse which may be relevant to the application. Solicitors should assist their clients to complete the form as accurately and unemotionally as possible and should remember that the application form should not be used as a statement of evidence.
- 3.9.3** No evidence should be filed until ordered by the court as stated in FPCR 1991, although it is sensible to prepare a short statement in readiness for an ex parte interim hearing if relevant.
- 3.9.4** Solicitors should avoid drafting statements using emotive and/or inflammatory language and/or expressing subjective opinions. They should ensure that statements drafted reflect as closely as possible the client's instructions and language, particularly when there are language difficulties. Where English is not the client's first language, solicitors should always consider whether an interpreter should be present throughout an interview. Solicitors must consider whether they can act for a client when they do not speak the language of the client and no interpreter is available.

- 3.9.5** Solicitors should at all times be mindful of the impact of domestic abuse upon children. The Adoption and Children Act 2002, s.120 amends the Children Act 1989 definition of harm to include ‘impairment suffered from seeing or hearing the ill-treatment of another’. Solicitors should advise their clients that children who have heard or witnessed domestic abuse are taken to fall within the amended definition of children who have suffered harm. Therefore solicitors should consider whether it is appropriate to seek a finding of fact hearing, in accordance with the principles formulated in the conjoined cases of *Re L, V, M and H (Contact: Domestic Violence)* [2000] 2 FLR 334. Solicitors should, however, be mindful that it may not be possible to establish domestic abuse allegations to the required standard and should consider carefully the cogency of the evidence before advising the client to seek a finding of fact hearing. The new forms to be filed with Form C1 in the event of an allegation of domestic violence have not changed the criteria for a finding of fact hearing but have highlighted the need to consider whether it is appropriate to hold one.
- 3.9.6** Where alleged perpetrators of domestic abuse have criminal records or there are concurrent criminal proceedings, solicitors should introduce findings from these proceedings into the family proceedings where relevant.
- 3.9.7** Solicitors should be aware of the potential effects of the Domestic Violence, Crime and Victims Act 2004 in children cases.
- 3.9.8** Solicitors are referred generally to *Practice Direction (Family Proceedings: Case Management)* [1995] 1 FLR 456.
- 3.9.9** Clients must be advised that a court will have regard, *inter alia*, to the ascertainable wishes and feelings of the child concerned, considered in light of that child’s age and understanding.
- 3.9.10** Solicitors must advise their clients about the need for confidentiality in proceedings relating to children and the fact that documents produced for proceedings relating to children, particularly the report of the Children and Family Reporter (CAFCASS officer), may not be disclosed to those who are not parties to the proceedings without permission of the court

(FPR 1991, rule 4.23 and FPCR 1991, rule 23). Solicitors must be aware of the impact that the Children Act 2004, s.62 and revisions to FPR 1991 have on disclosure.

- 3.9.11** Solicitors should advise clients on the need (if any) for witnesses. Solicitors should consider carefully the need to adduce evidence from non-parties, and should guard against a proliferation of witnesses who may add nothing to the case and may be pursuing an agenda unrelated to the welfare of the child. Solicitors are referred generally to *Practice Direction (Family Proceedings: Case Management)* [1995] 1 FLR 456, para. 3.7.3).
- 3.9.12** Solicitors should advise clients that it will not assist them to produce statements or letters written by their children, nor to bring their children to speak with solicitors acting for one or other parent, and solicitors should firmly discourage such conduct. Solicitors should not see the children who are the subject of any case in which they are advising unless they are acting for the child.
- 3.9.13** Solicitors should encourage clients to remember that in most cases they will be continuing to co-parent with the other party and it is better to acknowledge the other party's strengths as a parent rather than to condemn his or her weaknesses in an inflammatory negative statement. Where the other party is a perpetrator of domestic abuse, however, this clearly impacts on their parenting capacity and makes them an increased risk to the child and resident parent, and this should clearly be communicated to the court, with supporting evidence where available.
- 3.9.14** The court will wish to have as balanced a view as possible. If clients insist on the inclusion of subjective opinions in their statements, for example, as to the other party's adviser, solicitors should consider whether guidance should be sought from the Law Society's Professional Ethics department and in any event whether they should continue to act.

3.10 WELFARE REPORTS

- 3.10.1** Clients should be advised of the role of the Children and Family Reporter (CAFCASS officer) or local authority social worker in the decision-making and information-gathering process when they are asked to assist by the court. They should be made aware of the importance of the officer's report and should be encouraged to cooperate with the reporter and advised that failure to do so could prejudice their case. Clients should be advised that the work of the CAFCASS officer includes ensuring that the wishes and feelings of the children are conveyed to the court.
- 3.10.2** Following the implementation of the Private Law Programme, the role of CAFCASS officers may change, depending on the needs of each case. Solicitors must explain that the role of the CAFCASS officer will not be limited to the completion of a welfare report but will also include facilitation and provision of support to family members in appropriate cases where such services encourage contact.
- 3.10.3** Solicitors should be aware of, and where appropriate advise clients on, the right of a child to apply to be joined as a party to the proceedings in the event that the Children and Family Reporter (CAFCASS officer) is unable or declines to represent the wishes of the child in a way that the child or client deems appropriate. Solicitors are referred to *Practice Direction (Representation of Children in Family Proceedings)* [2004] 1 FLR 1188 at **Appendix 10**.
- 3.10.4** Where English is not the client's first language, solicitors are referred to the advice on interpreters given in **paras. 1.1.10–1.1.11** and **para. 3.9.4** above.

3.11 EXPERTS

- 3.11.1** Parties must seek permission from the court before an expert is appointed (see *Re A (Family Proceedings: Expert Witnesses)* [2001] 1 FLR 723). Without the permission of the court, no document held by the court other than an order may be disclosed other than to a party, their legal representatives, the

legal representative or guardian of the child, the LSC, a Child and Family Reporter or an expert whose instruction has been authorised by the court (FPR 1991, rule 4.23) subject to the detail of the implementation of Children Act 2004, s.62.

- 3.11.2** Recent and relevant experience on the part of the expert is essential. A curriculum vitae should be sought from the proposed expert.
- 3.11.3** Experts should only be instructed and indeed their evidence will only be admitted where necessary, that is in cases where other available evidence does not deal with the relevant issue and where the welfare of the child dictates that such further evidence ought to be obtained.
- 3.11.4** Solicitors should advise clients that they should not take children to appointed experts, nor obtain experts' reports, without prior permission from the court.
- 3.11.5** Parties should be encouraged to use a single expert jointly instructed if this is appropriate in the circumstances of the case. The costs of such an expert should be apportioned between the parties. When clients are publicly funded, solicitors must report to the LSC if clients will not agree to the use of a single expert where that would be appropriate to the case. The joint instruction of experts should be encouraged in appropriate cases. The letter of instruction will fall to one of the parties to prepare and its contents should be agreed (if possible) by the other parties. The letter of instruction, whether agreed or not, is disclosable.
- 3.11.6** Where the identity of an expert is agreed, the parties should agree a joint letter of instruction. Solicitors should be aware that the Civil Procedure Rules (CPR) 1998, SI 1998/3132, Part 35 does not apply to any family proceedings other than ancillary relief but they should request an expert to comply with CPR 1998, Part 35 and Practice Direction 35 as if they were applicable. Solicitors should ensure that the expert is familiar with CPR 1998, Part 35 and Practice Direction 35, if necessary by providing him/her with a copy. Guidance on instructions can be found in the Children Act Advisory Committee's *Handbook of Best Practice in Children Act Cases* (Lord

Chancellor's Department, 1997). Judicial guidance in respect of the instruction of experts is to be found in *Re CS (Expert Witnesses)* [1996] 2 FLR 115 and more recently in the case of *Re CB and JB (Minors) (Care Proceedings: Guidelines)* [1998] 2 FLR 211 (see also *Practice Note (Re: R (A Minor) (Expert Evidence)* [1991] 1 FLR 291, Children Act Advisory Committee Annual Report 1994/95, guidance issued by the President's Ancillary Relief Advisory Group (PARAG) at **Appendix 14**, *Guide to Good Practice in Child Care Cases* (Law Society, 2004)).

3.11.7 Solicitors need to be aware of the provisions of *The Guide to the Professional Conduct of Solicitors 1999*, Principle 16.02 (note 5) and their duty to disclose experts' reports in proceedings under the Children Act 1989. The full text of note 5 is reproduced below.

'5. In proceedings under the Children Act 1989 solicitors are under a duty to reveal experts' reports commissioned for the purposes of proceedings, as these reports are not privileged. The position in relation to voluntary disclosure of other documents or solicitor/client communications is uncertain. Clearly advocates are under a duty not to mislead the court (see 21.01 at p.374). Therefore, if an advocate has certain knowledge which he or she realises is adverse to the client's case, the solicitor may be extremely limited in what can be stated in the client's favour. In this situation, the solicitor should seek the client's agreement for full voluntary disclosure for three reasons:

- (i) the matters the client wants to hide will probably emerge anyway;
- (ii) the solicitor will be able to do a better job for the client if all the relevant information is presented to the court;
- (iii) if the information is not voluntarily disclosed the solicitor may be severely criticised by the court.

If the client refuses to give the solicitor authority to disclose the relevant information, the solicitor is entitled to refuse to continue to act for the client if to do so will place the solicitor in breach of his or her obligations to the court.'

Clients should be advised of the above.

3.11.8 Whether or not an expert is instructed jointly, that expert must be prepared to answer reasonable questions raised by any party.

3.12 MANAGEMENT OF COURT PROCEEDINGS

- 3.12.1** It is recognised that there are a variety of court practices throughout the jurisdiction in managing private law children cases and that any guidelines on the management of cases will be affected by this, although the introduction of the Private Law Programme may, in the future, mean variations are reduced. The following section offers a broad overview. (Solicitors will be aware that public law cases are now managed in accordance with the Protocol for Judicial Case Management in Public Law Children Act Cases.)
- 3.12.2** Solicitors should be aware of a number of new initiatives and pilot projects in the area of private children law proceedings and the implementation of them in their area. Solicitors should understand how any such scheme affects the role of CAFCASS and be aware of any local initiatives including in-court conciliation schemes, family resolution pilots or other resources offered locally. They must bear in mind the solicitor's role in early dispute resolution and in case management. Solicitors will find details of many pilot schemes and initiatives on the DCA or HM Courts Service websites. The Private Law Programme may be found at www.hmcourts-service.gov.uk/infoabout/divorce/links.htm under Private Law Programme.
- 3.12.3** If not automatically provided, solicitors should consider seeking a directions hearing and/or a dispute resolution/case management hearing in order to identify and minimise the areas of dispute. Following adoption of the Private Law Programme this should be standard in all courts.
- 3.12.4** Solicitors should inform the court listing section as soon as it becomes clear that a case's time estimate has changed and provide a revised time estimate. It is desirable for both parties' solicitors to agree any such change but even if agreement cannot be reached the court should still be notified.
- 3.12.5** Solicitors must produce court bundles in accordance with *Practice Direction (Family Proceedings: Court Bundles)* [2000] 1 FLR 536 reproduced at **Appendix 1**.

- 3.12.6 Solicitors should attempt to agree in advance with other parties any evidence which is undisputed and inform the court of agreed facts in accordance with the Practice Direction cited above.
- 3.12.7 Solicitors must, where necessary, obtain an appropriate direction of the court to ensure the attendance of the CAFCASS officer, as provided in FPR 1991.
- 3.12.8 Solicitors must be aware and make their clients aware that they will need to exercise restraint when questioning a Children and Family Reporter, although cross-examination of CAFCASS officers is now provided for in FPR 1991.

3.13 AFTER THE CONCLUSION OF PROCEEDINGS

- 3.13.1 Solicitors must write to clients confirming the outcome of proceedings and returning, where available, any original documents which clients have provided.
- 3.13.2 Solicitors must remind clients of the confidential nature of the proceedings and any relevant documents.
- 3.13.3 Solicitors should advise clients of the mechanism for review of decisions and, unless clearly inappropriate, remind them of the possibility of mediation as a means of resolving future disputes.
- 3.13.4 Where solicitors have given an undertaking in relation, for example, to safekeeping of documents, they should remember to seek to have the undertaking discharged at the conclusion of proceedings.
- 3.13.5 Solicitors should consider with their clients (and perhaps with the CAFCASS officer) how the child is to be told the results of proceedings, particularly when the child has expressed views which have not been accepted by the court.

3.14 CHILD SUPPORT ISSUES

- 3.14.1** Solicitors must recognise that the Child Support Agency (CSA) is now a factor in the settlement of most family law cases where there are children.
- 3.14.2** Since the implementation of the Child Support, Pensions and Social Securities Act 2000 on 3 March 2003, it is no longer possible to exclude the operation of the CSA for more than a limited period. It is still possible for parents to agree the level of child support that they will pay informally between them, but if that agreement is not recorded in a court order within divorce proceedings, it is not possible to stop either party making an application to the CSA at any time to assess the level of child support to be paid and such assessment will override any informal agreement.
- 3.14.3** Even if the agreement reached between the parties is incorporated into a court order (for example, as part of an overall settlement), either party may after the period of 12 months give two months' notice to the other of their intention to apply to the CSA. After that period of notice has expired, they may ask the CSA to calculate the level of child support to be paid by the non-resident parent. In practice, this means it is no longer possible to exclude the operation of the Child Support Agency Regulations for more than a limited period of time. Solicitors must therefore understand that the level of child support is no longer one of the variables which can be used to craft a solution to the parties' needs.
- 3.14.4** Where child support was recorded in a court order prior to 3 March 2003, the old rules under the Child Support Acts 1991 and 1995 still apply, and any variation of child maintenance still needs to be referred back to the court.
- 3.14.5** Solicitors need to be conversant with the rules defining the jurisdiction of the CSA and be aware of the situations where parents cannot use the CSA even if they wish to do so. Examples are where there is a pre-existing court order made prior to 3 March 2003, where there is a foreign element, where the children are older or have completed secondary education, or where there has been no separation from the non-resident parent.

- 3.14.6** Solicitors should be aware that the CSA always needs the authority of the parent with care to initiate a calculation on his or her behalf. Accordingly, parents with care in receipt of Income Support or Income Related Job Seeker's Allowance have the right to refuse their authority to the CSA to proceed, and solicitors should advise upon the steps that should be taken where the parent with care wishes to withhold such authority and the penalties that can result if such authority is withheld without good reason.
- 3.14.7** Solicitors need to be able to identify whether a case is being dealt with under the old regulations (Child Support Acts 1991 and 1995) or whether it is being dealt with under the new Child Support, Pensions and Social Security Act 2000. At the time of the preparation of this Protocol, the transition regulations to bring the old child support assessments under the new formula have still not been put into place.
- 3.14.8** Solicitors need to be aware of both the old and the new formulae and should be able to provide their clients with an approximation of the amount of the assessment/calculation under each of the formulae. The CSA website can be found at www.csa.gov.uk and this includes an overview of the workings of the formula including a maintenance calculation.
- 3.14.9** Solicitors need to be able to identify the variables that could be manipulated by either parent so as to influence the level of assessment, and should advise clients where they are at risk. Possibilities for manipulation under the new scheme include those who can:
- (a) control the level of the income that will be taken into account under the scheme;
 - (b) radically increase their pension contributions;
 - (c) influence the number of children in the new household that will be taken into account;
 - (d) arrange for competing claims from previous family members so as to reduce the levels received;
 - (e) press for increased overnight stays so as to reduce the assessment;
 - (f) qualify under the categories of variation.

- 3.14.10** Solicitors also need to be aware of the timescales within which funds are likely to be received, and again advise clients where they are at risk that funds will not flow for child support and consider strategies that might assist. Delays might arise because of:
- (a) complex circumstances likely to delay the completion of the calculation;
 - (b) likely enforcement problems;
 - (c) the CSA losing jurisdiction (for example, the non-resident parent moving abroad).
- 3.14.11** Notwithstanding administrative difficulties, solicitors should recognise that there can be advantages for some clients in the CSA. The system operates without charge both as to calculation and enforcement and therefore it can save significant costs for the parent with care, both over the initial assessment and when it comes to variation.
- 3.14.12** The major disadvantage to the CSA system is that the quite basic formula applies in all cases irrespective of the circumstances. It can therefore in certain circumstances result in maintenance orders that might be seen as unreasonable. Overall, the levels of maintenance under the new formula are expected to be less than under the old formula. Solicitors should advise their clients accordingly.
- 3.14.13** Solicitors must be aware of the limitations of the CSA and the circumstances in which it will be unable to assist parents with care.
- 3.14.14** Solicitors should be aware of methods of appeal from a decision of the CSA or in the event that a client considers the CSA's service to be unacceptable. These include internal methods of complaint and appeals to the Independent Case Examiner.

3.15 CHILD INTERVENERS IN ANCILLARY RELIEF

- 3.15.1** A child may intervene in proceedings to his parents' divorce if the child has, or appears to have, an interest in the matrimonial assets. In such cases the child should be represented by a guardian ad litem (FPR 1991, rule 9.2). There will seldom be a

suitable family member and an application should be made for the appointment of the Official Solicitor, subject to his consent, to represent the minor or minors in the proceedings. Rule 9.2A does not apply to proceedings under the Matrimonial Proceedings Act 1973.