



**Response to Volume 1 Draft Guidance on Children Act
1989: Court Orders**

by

British Association for Adoption & Fostering (BAAF)

and

Family Rights Group

September 2007

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About us

This is a joint response submitted by the British Association for Adoption and Fostering (BAAF) and Family Rights Group (FRG)¹. It has been informed by contributions from members of BAAF's Legal Group Advisory Committee, whose members include lawyers from local authorities and private practice, and BAAF's Social Work Practice Advisory Committee, and there has also been an opportunity for discussion with members of the Children sub-committee of the Law Society's Family Law Committee. The main part of this response concentrates on key issues that we consider must be addressed in the context of helping local authorities to meet the requirements of the law and the revised practice of the courts as set out in the new Public Law Outline and the review that preceded it. In addition we attach as an annex some comments on certain inaccuracies, and suggestions for improving clarity in individual paragraphs or sections, if these are to remain within the guidance.

Introduction

We welcome the determination to improve the conduct of care proceedings, to reduce unnecessary and inappropriate delay for children, and to provide clearer and more easily accessible information for parents before and during proceedings. We also welcome the attempts to co-ordinate the necessary contribution to the changes by all the relevant departments and agencies, and to consult with practitioners. We do however have serious concerns about the timeframe for implementation of the changes. We understand that the present timetable is an extremely tight one, with publication of the final version of the Guidance due in November. We would suggest that it may be necessary to delay the publication and coming into force of the final version of the guidance to allow for necessary revisions; as will be apparent from our comments, we believe these are likely to be substantial. It would be a great shame if the good intentions of the Care Proceedings Review were frustrated because there was insufficient time first to amend the draft in the light of responses from practitioners, and then to allow for dissemination of the revised version and appropriate training.

General Comments

Because of the context in which the original Guidance to the Children Act 1989 was produced, much of it, particularly Volume 1, contained a great deal of explanation of the new provisions, as well as guidance. There is an argument for adopting an entirely new approach for the revised guidance, and focussing on what is strictly **guidance**, with, where necessary, appropriate references to the legislation and other sources of explanation. This would make the document a more manageable one for social work practitioners and their managers to use. Alternatively, if both guidance and explanation are to remain in the same document, we would suggest that it would be helpful to

¹ BAAF is the leading charity and membership organisation in fostering and adoption in the UK.

Family Rights Group advises and supports families who are involved with social care agencies about the care and protection of their children.

highlight particular areas of practice guidance in boxes within the text (for example the matters on which legal advice will have to be sought before a decision is made to institute proceedings, or the documents that will be needed). A flow chart of the steps necessary before proceedings might also be useful, particularly for non-legally trained readers. Many local authorities have devised various pro forma documents, or leaflets containing information for children and/or parents, and it would be helpful where appropriate to draw attention to any useful resources such as these.

Arrangement of the guidance

The guidance as drafted follows the relevant parts of the Children Act. From a practice point of view, it would be more logical for chapters three and four to be in reverse order. Child protection investigations, which are dealt with in chapter 4 in the context of emergency protection and child assessment orders (but barely mentioned in chapter 3), will need to precede the institution of care proceedings, otherwise much of the pre-proceedings partnership work between the local authority and the family, as outlined in the Review, may be overlooked.

Dovetailing with the Public Law Outline

Although the draft PLO is in an initial draft form at present, it does refer to a number of matters which are not addressed in the Volume 1 Guidance. These are outlined below.

The care proceedings review represents a welcome opportunity to ensure consistency of approach and mutual understanding between courts and local authority social work staff. However, the existing (2003) protocol and the new PLO Practice Direction are not in a format that is likely to be easily accessible to social workers; hence it would be helpful if the Volume 1 guidance set out more clearly what is expected of the local authority children's services department at the various stages of the proceedings, particularly the pre-proceedings stage. For example, the 'Documents Summary' in the draft PLO refers to an 'outline care plan' but the list of documents in paragraph 3.18 refers only to the 'care plan'.

Once the new Public Law Outline has been finalised, we would suggest that reference be made to it within the Volume 1 Guidance, with appropriate web links so that the document itself can be accessed by readers of the guidance.

Pre-proceedings requirements

Paragraphs 3.1 – 3.17 of the guidance deal with a number of matters that must be addressed by local authorities before care proceedings are started, but a number of important issues are not covered, (some of which are mentioned below) and greater clarity is needed about the role of the core assessment for children in need and child protection investigations under s 47 of the Act. **We would respectfully suggest that this part of the Guidance be rewritten.**

We welcome the intention to ensure that parents (and the child if old enough) should be given an easy-to-understand explanation/document of the local authority's reasons for considering that care proceedings are justified (paragraph 3.16) but **the guidance needs to underline:**

1. the importance of ensuring that such communication takes place **throughout** the investigations and assessment;
2. that parents should be informed (orally and in writing) immediately of:
 - a. the conclusions of any investigations and assessment,
 - b. the proposals the local authority is making to provide support to the child and family, and
 - c. its expectations of the parents to address identified concerns, with a clear statement of the likely consequences if these expectations are not met.

If such a document is only provided at the point where the local authority has already 'decided that it intends to apply' for a section 31 order, there is little opportunity for the parents to attempt to address the alleged deficiencies in their care of the child.

Further consideration is also needed of the point at which a notice from the local authority will be the trigger for Level 2 help from the Legal Service Commission. If a trigger point linked to any section 47 investigation or Child Protection Conference is considered too wide, then the **active consideration of instituting care proceedings** would justify issue of this notice and consequently access to legal advice for the parents.

3. the importance of facilitating communication in those cases where additional help is required, for example the use of interpreters when English is not the first language, and/or referral to appropriate specialist support services when family members are known to have cognitive difficulties.

Further, this part of the guidance needs to address, and cross refer to:

- Good practice as set out in 'Working Together', including a reference to the Protocol for Advice and Advocacy in child protection cases (See copy attached).
- The value and use of family group conferences in appropriate cases (this could include a reference to the FGC Network guide entitled: *Using Family Group Conferences for children who are, or may become, subject to court proceedings: A guide for Courts, Lawyers, CAFCASS officers and Child Care Practitioners* (Family Rights Group, Sept 2007 – working draft attached).

We note that the 'frequently asked questions' provided for the 'initiative courts' mention that there 'will be more consistent use of advice and support initiatives such as FGCs' - yet these are barely mentioned in the draft guidance. This omission needs to be redressed.

- Consideration of, and guidance on, how to approach the dilemmas inherent in proposing section 20 accommodation as an alternative to care proceedings
- Consideration of the implications of encouraging an arrangement for a relative to care for the child, the various legal forms this might take, and the support that the local authority can or should provide (including assistance with legal costs for a relative ineligible for CLS funding). The issue of kinship, or ‘family and friends’, care is an area where a great deal more guidance is needed; much of it does appropriately belong in other volumes of the Children Act guidance, but it would be useful to remind practitioners of their key responsibilities, and to cross refer, pending revision of the other volumes, to existing and still relevant guidance contained, for example, in Volumes 2 and 3.
- The importance of good communication with the parents and wider family – not just in keeping them informed (taking into account issues of confidentiality in the case of sharing information with relatives) but also listening to what they have to say.
- Acknowledgment that some care proceedings are commenced in respect of children already looked after under section 20 of the Act, and the particular considerations that may apply in such cases.
- Recognition of the fact that while emergency protection orders should be used sparingly, there will be some cases which, while inappropriate for an EPO, will nevertheless require the local authority to start proceedings without being able to complete the core assessment.

Care plans and care planning

We appreciate that this volume of guidance is entitled ‘care orders’ and presume that it is for this reason that issues of care **planning** are not addressed. However, since the care plan is an essential requirement for the proceedings, it is necessary to set out here what is required. Guidance along the lines of circular LAC (99)29 - at the very least – is required. Social workers need to be reminded of the importance of contingency and twin-track plans, and an acknowledgment of the role of concurrent planning schemes would be helpful.

At the conference on 11 July where the consultation on the draft PLO and the draft guidance was discussed² there was reference to the Integrated Children’s System [ICS] and the hope that its use would make it easier for children’s social workers to use the care plan from the ICS for the care proceedings. While we would warmly welcome moves to help avoid duplication of work for social workers, we believe that urgent work needs to be undertaken to ensure that the ICS system is capable of producing a version of the care plan in a format that will satisfy the court’s needs.

Cases where adoption is – or may be – the plan

² Ministry of Justice and Department for Children, Schools and Families - Care Proceedings ; A New Approach

Specific guidance is needed for those cases where adoption has been identified as the plan, or as one prong of a twin track plan. The Family Justice Council has already drawn attention to the need for the court directions and the local authority's processes to consider how compliance with the Adoption Agencies Regulations 2005 and other requirements of the Adoption and Children Act 2002 can be ensured within an appropriate timetable. This is an area where there is a pressing need for improved mutual understanding. In practice, many courts and legal practitioners outside the local authority have little awareness of the obligations on local authorities in their capacity as adoption agencies, and some adoption workers and adoption panel members have insufficient awareness of the pressure involved in complying with court timetables for the filing of documents and the submission of evidence. We note that the Judicial Review Team's Thematic Review (December 2005) identified the need for guidance as to how the statutory information-sharing procedures and the adoption and placement order processes fit with the existing protocol steps and target times, and a 'particular need for guidance to be given about the necessary relationship between the provisions of the Protocol and the [then] recently published Adoption Rules and their associated practice directions.' None of this has been forthcoming except in an ad hoc way, and it is essential that both the statutory guidance to local authorities and any guidance or practice directions to the court give a clear and consistent message about what is required.

Liaison with CAFCASS

The draft guidance includes some explanation of the role of the CAFCASS children's guardian, but it would be helpful to include guidance on the importance of the local authority's co-operation with the guardian, and the guardian's right to access relevant documentation.

Other Issues

Our comments have focussed on chapter three of the draft guidance in particular since it is clearly crucial to the work also being consulted upon on the Public Law Outline. Although, as we have stated above, we consider that it might now be appropriate to concentrate on guidance rather than explanation, there is perhaps a need to offer somewhat more information about the role of special guardianship, given that it is still a comparatively new concept. While it is a private law order, the guidance needs to acknowledge its apparently growing use as an outcome in public law proceedings.

Annex to Response from BAAF and FRG - Points for correction or clarification

Paragraph 1.10

Reference to section 8 proceedings needs to be expanded to include special guardianship proceedings.

Paragraph 1.11

While the term “no order principle” has been adopted as a sort of shorthand, there is also case law to the effect that this is a rather misleading term.

Paragraph 1.16(a)

No need now to refer to appeals lying to the Crown Court.

Paragraph 1.17

The second sentence could safely be omitted. In the third sentence, directions appointments will always now be held.

Paragraph 1.19

Presumably this guidance is not actually intended for Wales and therefore for CAFCASS Cymru?

Paragraph 1.20

A court report under section 7 can also be ordered from the local authority. It would be helpful to include some guidance as to the circumstances in which it may or may not be appropriate for a report to be requested from the local authority rather than from CAFCASS.

Paragraph 1.21

CAFCASS is not the only organisation that may represent a child under rule 9.5. NYAS may also be used.

Paragraph 1.23

Third sentence – after “residence order” add “or a special guardianship order.”

Paragraph 2.1

At end add “and also in adoption proceedings.”

Paragraph 2.3

Second sentence – “unless she has subsequently lost it (through adoption” add “or a parental order under the HFE Act 1990).”

Paragraph 2.4

Third sentence – after “only the mother” add “automatically”.

Paragraph 2.4(c)

It would be as well to make it clear that joint registration prior to the amendment of section 4 Children Act 1989 did not confer parental responsibility on the father.

Guardianship: paragraphs 2.14 – 2.19

This is rather confusingly and unhelpfully put. There are a number of points:

- (a) There is only intermittent reference to special guardianship.
- (b) Although paragraph 2.18 refers to the situation where an appointor had a residence order immediately prior to his death, this is not made clear in paragraph 2.14.
- (c) In paragraph 2.17, in the last sentence, substitute “the appointment of” for “appointing” since the sentence as it exists slightly implies that the local authority may itself appoint a guardian.
- (d) In paragraph 2.19, the last sentence should make it clear that the appointment only takes effect once the appointor has died.

Residence Orders: paragraphs 2.25 – 2.30

It would be helpful either here or in paragraph 2.24 to include specific reference to the amendment made by the Adoption and Children Act 2002 by which the court can direct that a residence order in favour of a non-parent can continue until the child is 18 for which exceptional circumstances are no longer required.

Paragraph 2.31

At end, add “or if the child is authorised to be placed for adoption” or a specific cross reference to paragraph 2.39.

Paragraph 2.32

With reference to contact in respect of a child who is subject to a care order, it would be helpful to cross refer to section 34.

Paragraph 2.40

It is interesting to note that the final sentence of this paragraph is not reproduced in the section on special guardianship orders but presumably the same logic applies.

Paragraph 2.41

In the bullet points, add “foster carers of 12 months standing (section 10(5)).”

Paragraph 2.46

Final sentence – the child’s welfare will not be the court’s paramount consideration in an application for leave – see for example, *Re A and W* [1992] 2 FLR 154.

Paragraph 2.48

Second sentence – add “or contact order under section 8.”

Special guardianship

There are a number of omissions here, including the requirement for reports, the circumstances in which the child will or may be a party to proceedings and a CAFCASS officer appointed. In paragraph 2.55 the reference should be to the local authority looking after a child rather than “with care of”. In paragraph 2.56 at end add “unless discharged”.

Paragraph 2.69

The reference to the making of a residence order discharging a care order needs to extend also to the making of a special guardianship order.

Paragraph 3.1

We welcome the reference to the assessment framework but it would be helpful to explain the relationship between an assessment under this framework and an assessment under the common assessment framework.

Paragraph 3.4

It would be helpful to include a reminder that in many cases there may already exist a core assessment in respect of another child of the same family so that much of the material will already be available even though it will need to be updated.

Paragraph 3.9

This implies that it is the duty only of CAFCASS to ascertain the wishes and feelings of the child but of course it is also necessary for the local authority to do so.

Paragraph 3.10

It would be helpful to point out that these provisions apply where an interim care order is in force also and helpful to refer not only to section 34 but to schedule 2, paragraph 15.

Paragraph 3.13

It may no longer be the case that a residence order is the most common alternative to a care or supervision order – perhaps special guardianship orders have taken their place?³ The rest of the paragraph is also rather confusingly worded.

Paragraph 3.18(b)

Where adoption has been identified as the permanence option for the child and a decision made to that effect following a referral to the adoption panel, an application for a placement order **must** be made. It is rather confusing to talk about 'giving consideration to' an application.

Paragraph 3.18(e)

With the reference to section 37 it would be helpful to cross refer to the appropriate paragraph elsewhere in the guidance.

Paragraph 3.27

Mention should be made of the anticipated amendment of the Family Proceedings Rules.

Paragraph 3.29

³ 740 special guardianship orders made in year ending 31.3.07 with respect to looked after children, although it is not clear how many of these were made within care proceedings.

Further guidance is needed on section 37(1) orders.

Paragraph 3.30

Omit the last sentence.

Paragraph 3.32

Replace “also” by “instead”.

Paragraph 3.33

It would be helpful at this point to include some cross reference to the timetabling under the new Public Law Outline.

Paragraph 3.35

It would be helpful to include a cross reference to the appropriate section of the guidance here.

Paragraph 3.40

The last sentence refers to LAC 97/15. It is often difficult for practitioners to obtain copies of old circulars and it would be more helpful to reproduce the relevant paragraphs here.

Paragraph 3.41

It would be helpful to include guidance on communication with the CAFCASS guardian and the importance of keeping in touch with the legal advisor, for instance, if there is sufficient change in the care plan that a return to court may be necessary.

Paragraph 3.45

Last sentence should read “the local authority has power to allow the child to be taken abroad for a period of less than one month”.

Contact with children in care

The duty to **promote** contact in paragraph 15 in schedule 2 is not mentioned until paragraph 3.62. It would be helpful to include that in the very first paragraph. More could be said here on the need to promote contact with siblings and relatives especially in the light of the findings of the recent Your Shout Survey (NSPCC 2007) which highlighted the fact that a significant minority of children in care (37%) feel that they do not see enough of their siblings and that 49% felt they did not see enough of other significant family members.

Paragraph 3.69

A supervision order is also discharged by the making of a placement order under the Adoption and Children Act 2002.

Paragraph 3.73

Obviously some words are omitted here. It might be helpful to include a reminder that there is always a High Court judge on duty to assist in an emergency.

Paragraph 4.17

Second sentence – whether a refusal to comply with an assessment order would justify an EPO application will depend on the circumstances. It may be that an application for a care order would be more appropriate.

Paragraph 4.21(a)

The court must be satisfied that there is *reasonable cause to believe* that the child is likely to suffer significant harm.

Paragraph 4.24

This paragraph suggests that legal advice should not normally be obtained whereas, quite properly, paragraph 4.20 says that they should obtain and consider legal advice before making an application.

Paragraph 4.36(c)

The parents should be given information whether or not they request it – see *Re X*.

Paragraph 4.54(a) and (b)

The words in brackets in paragraph (a) should come after the first sentence in paragraph (b).

Paragraph 4.68

We note that there is no mention of 'ContactPoint' or the Common Assessment Framework.

27/09/2007