

THE FUTURE OF SEPARATE REPRESENTATION

Charan Martin, Barrister for NYAS

The National Youth Advocacy Service

The National Youth Advocacy Service (NYAS) was established on 1 January 1998 as a merger of two charities, Independent Representation for Children in Need (IRCHIN), which started in 1983, and the Advice, Advocacy and Representation Service for Children (ASC), set up in 1992. NYAS, therefore, draws upon over 20 years of combined pioneering experience: of legal representation and advice in private law matters by IRCHIN, and of public law experience, providing advocacy and support to young people in care, by ASC.

NYAS is a unique 'not for profit' children's charity which offers socio-legal advice, information, signposting and advocacy services to children and young people throughout England and Wales. The Charity works to provide a safety net for children and young people and actively supports the UN Convention on the Rights of the Child, in serving children and young people up to the age of 25.

NYAS is committed to Article 12 of the United Nations Convention on the Rights of the Child which states that,

'Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

'For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

NYAS has a legal department, which has a Specialist Family Legal Help Contract with the Legal Services Commission. NYAS Legal has developed a specialist service providing separate representation for children and young people under Rule 9.5 of the Family Proceedings Rules 1991, when invited by the Courts to do so. This uses the tandem model approach of legal representation combined with an experienced social work practitioner who has represented children as a guardian in public law cases. NYAS works to protect a child or young person from the damaging effects of being caught up in complicated and protracted legal proceedings. NYAS Legal works closely with its national network of caseworkers, who are trained and experienced in working in this way.

NYAS applies this holistic, socio-legal approach throughout the organisation to get the best outcomes for children. It provides multi-disciplinary training on advocacy, children's rights and issues of current interest for professionals and agencies working with children and their families within both public and private law family proceedings. NYAS is concerned that children and young people should

be properly and adequately represented within private law proceedings when they need to be.

Rule 9.5 and the President's Practice Direction

Rule 9.5 of the Family Proceedings Rules states that:

'... if in any family proceedings it appears to the Court that it is in the best interest of any child to be made a party to the proceedings, the Court may appoint

- (a) An officer of the service [or a Welsh Family Proceedings Officer];*
- (b) (If he consents) the Official Solicitor; 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.'*

Under (c), the Court may appoint NYAS to act as the guardian for the child. The suitability of NYAS to act as guardian in appropriate cases was approved by Dame Butler-Sloss in the case of *Re A (Separate Representation)* [2001] 1 Family Law Reports 715.

There are a number of widely accepted situations in which separate representation of children in private law proceedings is either appropriate or acceptable. The President's Practice Direction of 5 April 2004,¹ concerning separate representation, provides clear and unambiguous guidance to the Courts. It states as follows,

'1. The proper conduct and disposal of proceedings concerning a child which are not specified proceedings within the meaning of section 41 of the Children Act 1989 may require the child to be made a party. Rule 9.5 of the Family Proceedings Rules 1991 (FPR) provides for the appointment of a guardian ad litem ('a guardian') for a child party unless the child is of sufficient understanding and can participate in the proceedings without a guardian, as permitted by FPR 9.2A.

'2. 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 in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Children and Family Court Advisory and Support Service ("CAFCASS") to carry out further work or by making a referral to social services or possibly, by obtaining expert evidence.

'3. The decision to make a child a party will always be exclusively that of the Judge, made in the light of the facts and circumstances of the particular case. The following are offered solely by way of guidance, as circumstances that may justify the making of an order.

'3.1 Where a CAFCASS officer has notified the Court that in his opinion the child should be made a party (see rule 4.11B (6)).

'3.2 Where the child has a standpoint or interests which are inconsistent with

or incapable of being represented by any of the adult parties.

'3.3 Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute.

'3.4 Where the views or wishes of the child cannot be adequately met by a report to the Court.

'3.5 Where an older child is opposing a proposed course of action.

'3.6 Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child.

'3.7 Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.

'3.8 Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer.

'3.9 Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position.

'3.10 Where there is a contested issue about blood testing.

'4. 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 facts adverse to the welfare of the child. The Court's primary consideration will be the best interests of the child.

'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. Before appointing an officer, the Court will cause preliminary enquires to be made of CAFCASS. For the procedure, reference should be made to the practice note issued by CAFCASS, contemporaneously with this direction.

'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.

'6. In cases proceeding in a County Court, the Court may, at the same time as deciding whether to join a child as a party, consider whether the nature of the case or the complexity or importance of the issues require transfer of the case to the High Court.'

NYAS believes that this guidance provides a robust framework for a child's eligibility for separate representation and takes proper account of the full range of critical factors in a child's life that would indicate the need to provide separate representation. The Practice Direction is clear that the issue of whether a child is to be represented by a guardian is a matter for the Court and is subject to unfettered

judicial discretion. Once the Court has made the decision that a child should be represented by a guardian, CAFCASS must be approached first. If CAFCASS is unable to provide a guardian without delay (or cannot act as guardian for the child for some reason) then the Court may invite NYAS or some other proper person to act for the child.

If the Court does not refer the matter to CAFCASS before inviting NYAS to act as guardian, NYAS will advise CAFCASS of this, in accordance with the Protocol between CAFCASS and NYAS of December 2005,² which repeats and supports the premise of the President's Practice Direction. The Protocol reflects NYAS' commitment to working in partnership with CAFCASS and acknowledges that NYAS has a role in Rule 9.5 appointments.

A Snapshot Research

In January and February 2004, prior to the issue of the President's Practice Direction, NYAS undertook a research snapshot of 52 NYAS cases, which were examined to identify the circumstances of the 95 children involved, the reasons for the referral to NYAS and the outcomes of NYAS' involvement. We found that in 100 per cent of the cases referred to NYAS, two or more of the examples set out in the President's Practice Direction were given as the reasons for directing that a child be separately represented.

- Almost all (98 per cent) of NYAS' cases involved an intractable dispute over contact.
- 59 per cent of the children were extremely reluctant to express their opinions because these were not consistent with their parents' views.
- In 67 per cent of cases, it was necessary to ensure separate reporting of a sibling's views or needs. In a small number of those cases, the welfare of siblings had been found to be in conflict, particularly where children had been divided between parents and contact had ceased with the non-resident parent. Very often in cases where that had happened, contact between siblings had also ceased. Many of the children then found themselves in reconstituted families with additional and newly established separate family relationships associated with their parents' new relationships.
- In 44 per cent of cases there were questions about the mental health, physical health or learning disabilities impacting upon the ability of a parent to care adequately for their child.
- 27 per cent of the cases involved serious allegations of physical or sexual abuse, including domestic violence.
- In a number of the cases where no action had been taken following a Section 7 Report, the Judge still had serious concerns about the child's welfare and their wishes and feelings, and appointed NYAS to represent the child.
- Although there was no record of contested issues about blood testing, 8 per cent of the cases resulted in recommendations to present the child with the true facts about their paternity.

The Future

The Department for Constitutional Affairs' Consultation Paper, *Separate Representation of Children*, contains proposals to limit the use of Rule 9.5 in private law proceedings by changing the Court Rules. Relying on the research into the operation of Rule 9.5 undertaken by G. Douglas, M. Murch and L. Scanlan at Cardiff University,³ the Consultation Paper argues that an indiscriminate reduction in Rule 9.5 appointments is justified on the basis that separate representation is not good for all children. The Consultation Paper does not set out or give due weight to the significant finding that, in the Cardiff research, out of the 15 children interviewed on the subject of separate representation, only one made a remark that could be interpreted as negative about the experience. This is not sufficient to support the proposed restriction on the use of Rule 9.5 appointments through a change in the Court Rules.

The Paper proposes that 'legal need' should be the sole criterion for granting a child party status. This lacks the clarity of the *President's Practice Direction* of April 2004 and takes no account of the welfare of the child. Whilst the Consultation Paper provides no definition of 'legal need', its scope is arguably intended to be significantly narrower than that currently set out in the *President's Practice Direction*, which gives coherent and structured guidance on the circumstances in which separate representation is appropriate.

The proposed use of the criterion of 'legal need' seeks severely to restrict, if not deny, the opportunity for children embroiled in protracted and acrimonious proceedings to have access to legal representation. NYAS is gravely concerned that the aim in seeking to reduce the provision of separate representation in this way is an exercise in cutting costs. There appears to be little or no recognition of the risk this poses to some children, whose interests will be lost in the fog of parental allegations.

The NYAS snapshot research supports the view taken by Mr Justice Munby in *Re D (Intractable Contact Publicity)* [2004] EWHC727 (para 51) when he commented that,

'intractable contact disputes are one of the "prime categories" for separate representation of the children ... In this situation the Court can with great advantage make use of organisations such as the National Youth Advocacy Service.'

NYAS acknowledges the importance of early intervention and alternatives for children and families to prevent them being caught up in adversarial legal proceedings, and welcomes some of the plans for change. However, many of these plans are still evolving and CAFCASS does not have the capacity to absorb all such cases. It must be acknowledged that there are gaps in CAFCASS' ability to respond appropriately in private law matters. The 2006 *Report* by Her Majesty's Inspectorate of Court Administration (HMICA) draws attention to CAFCASS' deficits in private law practice and this must raise concern at the Consultation

Paper's second proposal – that CAFCASS should '*always be the preferred choice of the Court over independent practitioners*'.

The hypothesis that early interventions will reduce the need for 9.5 appointments is not supported by any research. The early interventions proposed will, if properly resourced, do much to resolve cases without complexity or protraction, but will do little to help the vulnerable children caught up in the most difficult, intractable cases. Further, given the recent concerns and criticisms of CAFCASS' practice in private law proceedings, it is simply unrealistic to expect CAFCASS to be the sole provider of yet more services, without first requiring it to improve the current service provided to children in those proceedings. We note that HMICA inspectors have expressed grave reservations about the ability of CAFCASS officers to promote the welfare of children when their emphasis is on agreement-seeking between parents caught up in acrimonious disputes. This emphasis often reflects insufficient focus on the interests of the child.

Proposals in the Consultation Paper also seek to fetter the broad discretion of the Court to direct a 9.5 appointment after having given due consideration to all the circumstances and needs of children caught up in hostile and intractable contact disputes. The Consultation Paper lacks coherence when it seems to suggest that, following a decision by the Court to give party status, CAFCASS should be the preferred agency to act for the child, and that '*this will enable CAFCASS to take the lead on deciding when to recommend that party status is required*'. As Lady Justice Arden commented in *Re H (A Child)* [2006] EWCA Civ 896, (para 22), '*as a matter of established law, decisions as to the exercise of discretion are to be left to the Judge*'.

NYAS entered into a voluntary Protocol with CAFCASS in the spirit of working together. The Protocol aimed to clarify the roles of both agencies and acknowledged the role of NYAS in providing separate representation. The Consultation Paper wrongly implies a limitation to NYAS appointments, suggesting that NYAS may only be appointed where there is a breakdown in the relationship between CAFCASS and the family. The appointment of a NYAS guardian is not limited to this example.

There is a lack of transparency in the information set out in the Consultation Paper on the issue of the costs. The unit figures given for CAFCASS do not make it clear that the costs of legal representation for a 9.5 guardian are not included and, correspondingly, the information given about NYAS costs omits to state that the costs of legal representation are included.

The Consultation Paper does not set out accurately the number of 9.5 orders made in respect of NYAS' involvement. This suggested number reflects not the number of orders of the Court, but the number of public funding certificates granted to NYAS. One order may encompass a family of three or four children and this does not equate to greater costs in representing a family than in representing a single child. Use of these statistics inflates the number of actual 9.5 orders and in doing so produces and suggests an unacceptably higher level of 9.5 activity. If the

same is true of the CAF/CASS statistics, the total number of Rule 9.5 orders made by the Court will be significantly fewer than is suggested in the Consultation Paper.

Conclusions

NYAS has developed considerable expertise in the representation of children. It remains committed to cost-effective approaches that establish a holistic understanding of the needs of children and provide the strongest possible partnership, empowering children within private law proceedings. We are surprised and dismayed at the statement in the Consultation Paper that *'the overall impact of the proposals on competition is minimal'*. The proposals would have a significant impact both upon children and upon NYAS' ability to represent them separately using the seamless tandem model approach.

The National Youth Advocacy Service has established an impressive track record in bringing cases to an effective conclusion, ensuring that the child is kept at the centre of judicial decision-making. It has achieved some outstanding outcomes, recognised in case law as effective. Lord Justice Wall commented in *Re H (A Child) [2006] EWCA Civ 896* (para 10) that,

'In my experience NYAS does not take cases willy-nilly. It only takes those cases in which it thinks it can make a proper contribution.'

And in *Re A v A (Shared Residence) [2004] EWHC 142 (Fam)* (para 132),

'There is no doubt that the excellent service provided by NYAS in this case was crucial to its successful determination.'

Many young people and their families have experienced unsatisfactory interventions by CAF/CASS and it is vital that they, and the judiciary, continue to have a choice of an alternative and creditable agency.

The Consultation Paper's proposals on separate representation clearly have the purpose of reducing the number of 9.5 appointments, by changing the Court Rules in relation to separate representation, in order to reduce costs. This will not serve the needs of a significant proportion of children involved in complicated and protracted legal disputes. Indeed, it will only add further to the burdens upon the family justice system and, more specifically, upon CAF/CASS. There is a risk that this will further reduce the confidence of Court users and will result in a silent collapse of the system. The casualties will, of course, be the children whom the Courts are required to make decisions about and whom CAF/CASS was set up to protect and serve. These children will not be able to speak up about their unequal access to justice.

It is important to note that the research snapshot of NYAS legal files took place prior to the issue of the Practice Direction. NYAS does not consider that the Practice Direction *per se* was responsible for the increase in 9.5 appointments, as is suggested by the Consultation Paper. These exceptionally difficult and complex private law cases have always existed and were increasing in number. The President's Practice Direction of 5 April 2004 simply reflected the reality of good

judicial practice and assisted the judiciary in its growing awareness of these cases.

Rather than reducing the number of 9.5 appointments by changing the Court Rules, and in doing so depriving children of legal representation and access to justice in the processes that shape their future, the DCA and the DfES need urgently to acknowledge the need for funding and to establish a joined-up approach. It would be a tremendous loss to the vulnerable children who need to be separately represented if the drafting of new Court Rules severely limits their access to legal representation. Sadly, these proposals do nothing to improve or promote the legal rights of children who deserve nothing less than the best protection and support we can provide.

References

- 1 The President's Practice Direction of 5 April 2004 (*2004 1FLR 1188*)
- 2 Protocol between CAF/CASS and NYAS of December 2005, *Family Law*, 243, 2006
- 3 Douglas G., Murch M. and Scanlan L. *The Operation of Rule 9.5 of the Family Proceedings Rules 1991. Final Report for the Department of Constitutional Affairs DCA*, 2006