

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

## **VERSION VI**

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

### **Shared Commitments**

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

### **National Youth Advocacy Service**

1. NYAS is a UK charity offering socio-legal information, advice and legal representation to children and young people up to the age of 25. NYAS has developed a strong identity as a leading Children's Rights organisation with provision of advocacy services. NYAS has advocates across England and Wales, supported by a Legal Team and a free phone helpline and advice service for children and young people. NYAS also provides separate representation for children and young people where the court considers that such representation is necessary under Rule 9.5 of the Family Proceedings Rules and in line with the Practice Direction of The President of the Family Division of April 2004.<sup>1</sup>
2. NYAS is committed to Article 12 of the UN Convention of the Rights of the Child. The object of NYAS representing young people, is wherever possible to protect the young person from the damaging effects of being caught up in legal proceedings. It is a common misconception that children as parties to the proceedings would always give instructions, although they may do so with leave of the court or if they if they are competent to instruct a solicitor directly. A child who is capable of forming his or her own views has the right to express those views in the proceedings with the views being given due weight in accordance with the age and maturity of the child. The child's true wishes and feelings should be put before the court as part of an holistic approach in terms of assessing the whole background and dynamics of the situation. The child should have the opportunity to have their situation represented separately from that of any of the adults.
3. The suitability of NYAS to act as guardian in appropriate cases was approved by Dame Elizabeth Butler-Sloss in the case of Re: A<sup>2</sup> (Separate Representation). There are a number of accepted situations in which separate representation of children in private law proceedings is either

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

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

appropriate or acceptable and NYAS has also been involved in the recent cases A & A (Shared Residence)<sup>3</sup> and Re S (Uncooperative Mother)<sup>4</sup>

4. It is the policy of NYAS to appoint a caseworker who is an independent social worker and usually a children's guardian in the public law sense. The lawyer and caseworker work in tandem to provide representation for children and young people.

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

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

CAFCASS duties are to :

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

### **Safeguarding and Promoting the Interests of Children**

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

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

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

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

### **Children made a party in private law proceedings**

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

### **National Youth Advocacy Service and CAFCASS working together**

11. The National Youth Advocacy Service often provided a guardian in private law proceedings before the inception of CAFCASS when there was limited provision for guardians to be appointed. NYAS has continued to provide such a service particularly where judges have previous experience of their effective work in this area. This is part of NYAS' broader commitment to provide information and advice to children and young people.
12. Since 2001 when CAFCASS was created to provide a service in both public and private law proceedings there has been a considerable growth in rule 9.5 appointments undertaken by CAFCASS. As clarified in the President's Direction it is recognised that in many cases the child will benefit from representation by a guardian who has already met them in their capacity as children and family reporter in the case.

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

## **When NYAS may be appointed guardian:**

13. The Practice Direction of April 2004 states;

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

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

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

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

## **General principles**

15. Both agencies are committed to effective communication in the best interests of the child in accordance with the law. The normal points of contact should be the CAFCASS service manager and the nominated NYAS lawyer. If any case moves between the two agencies it is particularly important to pass on information which may assist the work with the child and family, e.g. aspects of risk management, conflict of interest issues and any particular needs of the child. If NYAS is invited to provide r9.5 representation where CAFCASS has not been approached, NYAS will discuss the matter with CAFCASS and will be responsible for notifying the court in the first instance.
16. CAFCASS and NYAS will work together to advise the court whenever there appears to be good reason for a guardian not to be appointed e.g. when there is an alternative preferable route such as a section 37 report from the local authority.

This Protocol will be reviewed in twelve months' time.

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