Norfolk Local Practice Direction for Private Law Children Act proceedings and FLA 1996 injunctions

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Introduction

1. This local Practice Direction (PD) has been prepared in accordance with paragraph 7 of PD 12B of the Family Procedure Rules 2010 (FPR) and is intended to provide guidance as to the management of private law Children Act 1989 proceedings and related Family Law Act 1996 applications with the aim of concluding such proceedings justly and fairly at the earliest possible date. It does not deprive a court of its ability to use its full case management powers under the Family Procedure Rules 2010 (FPR) but is aimed at distilling good practice in the general approach to directions which are suited to the circumstances prevailing within the Norfolk Family Courts at the time of its production.
2. Practitioners and parties are also reminded of Norfolk Family Justice Board's Respect Charter which aims for all people involved in the court process to be treated with respect. This is perhaps especially important when there is disagreement about the right outcome for children.
3. The Practice Direction is likely to be subject to modification in accordance with learned experience of what practices will best support timely case management of private law cases through to final hearing and in accordance with the introduction of any new court processes, such as the Pathfinder procedure and/or an online portal for private law proceedings.
4. The Family Court Judges of Norfolk are indebted to all practitioners and professionals working in this challenging field of work for their help and support in the production and implementation of this local PD. HHJ North expresses his personal thanks to the Private Law Committee (District Judge Raggett, Keith Hurrell JP, Katie Gunn JP, Fiona Baruah, Joanna Longe, Kate Lonergan, Laura Clay-Harris, David Roper, Julia Baker, Tamsin Roques, Sarah Whitworth, Paul Butterworth and Hilary O'Keefe) for their invaluable input into the production of this PD.
5. The PD has underlined sub-headings for the purposes of clarity, and hyperlinks within the index to subject headings, and which may be further amended as it is updated. Matters of particular importance are typed in bold.

Before Issue of proceedings-Mediation Information and Assessment Meeting (MIAM) / Non court dispute resolution

6. Applicants are required to attend a MIAM with an accredited mediator for all applications listed in part 3 of the FPR including applications for a child

arrangements order, parental responsibility order, special guardianship order and an order varying or discharging such an order.

7. FPR Rule 3.8(1) sets out the circumstances in which the MIAM requirement does not apply. These exceptions do not mean that mediation or other non-court dispute resolution cannot be attempted.
8. **Non-Court Dispute Resolution (NCDR) encompasses a variety of methods designed to assist parties in resolving disputes outside of the courtroom. The Family Procedure Rules emphasise the importance of considering NCDR at every stage of the process to achieve just and efficient outcomes while minimizing conflict. Mediation, collaborative law, and arbitration are examples of NCDR approaches that can be tailored to the specific needs of the parties involved. Practitioners and parties are reminded of their obligation to actively engage with NCDR options, as this aligns with the overriding objective of promoting the welfare of the child and reducing unnecessary litigation.**
9. If an exemption to a MIAM applies, the evidence of the exemption should be requested by the court at the gatekeeping stage (if not already supplied to the court).
10. It is for the court to decide whether the exemption is validly claimed. If not, the court can direct the applicant to attend a MIAM and adjourn proceedings for this to take place, if necessary.
11. All parties (not just the applicants) are obliged to consider all types of NCDR during court proceedings. The mediator providing the MIAM will provide information about all types of NCDR available and suitable for the type of proceedings and dispute.
12. All parties must file a FM5 form setting out their position on NCDR and what types of NCDR have been attempted before the first hearing. This form should be served on the court and the other parties at least 7 days before the hearing. The court will make enquiry as to compliance with this provision which, if not adhered to, may result in adjournment of proceedings while this is addressed.
13. The court can require parties to complete a further FM5 before further hearings. If so, the form should be served on the court and the other parties at least 7 days before the hearing. The form should not be used as an opportunity to make allegations regarding wider behaviour.
14. Issues of domestic abuse are not an automatic bar to attending a MIAM or attempting NCDR. The MIAM should be utilised as an opportunity to explore suitability and safeguarding measures with the mediator, rather than immediately discounting NCDR as an option. Domestic abuse screening is undertaken in all MIAMs.

15. The court can adjourn the matter to allow for NCDR to take place at any time during proceedings and parties should expect strong encouragement from the court to participate in NCDR.
16. The court can consider parties refusal to consider/explore NCDR options when considering the issue of costs. Consideration should be given to the NCDR discussions as a whole, e.g. to ensure that neither "lip service" is being paid to this provision, nor that a party is seeking to delay proceedings by a late request for NCDR on the doorstep of a court hearing.

Allocation of Cases

17. The allocation of private law cases should be in accordance with the Schedule to the Allocation and Gatekeeping Guidance – Private Law issued on 22 April 2014. The court will consider reallocating a case to a different tier of judiciary at each hearing depending on the complexity of issues and with particular regard to the earliest possible disposal of the proceedings. When considering reallocation, the benefit to the children and the parties of the earliest possible adjudication will ordinarily be a factor of greater weight than achieving judicial continuity.
18. In the event of proceedings being re-allocated to a different tier, the court should make appropriate directions, such as for drug-testing, obtaining medical reports and provision of statements, as will facilitate progression of the case while a further hearing is awaited.
19. When considering allocation, a case does not need to be allocated to a judge who dealt with previous proceedings unless that judge specifically reserved any further proceedings to him/herself.

Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings

(a) Matters to be considered prior to the direction of a fact finding

20. In all cases where a party has made allegations of domestic abuse (as per the definitions at FPR PD 12J [2A] and [3]), it is incumbent upon the court to determine whether there is a need to determine those allegations in order for the court to reach a decision regarding the welfare of the subject child. While the input of the parties, CAFCASS and advocates is of assistance, the ultimate decision as to whether a fact finding hearing is necessary rests with the court. Relevant consideration will be given to the likely delay that a fact finding hearing will cause

to the conclusion of the proceedings and the potential negative impact upon the parent/child relationships. Other than in a very clear case (such as where the court accepts both parties' view that a fact finding is required on disputed allegations), a decision on whether to hold a fact finding will usually be best taken after the court has had the opportunity of considering witness statements and any schedule of allegations.

21. Before deciding whether a fact finding hearing is required, the court will expect the parties' and CAFCASS's assistance with the following matters:

(i) What exactly is alleged in terms of domestic abuse and by whom? To what extent are those allegations likely to be relevant to the making of a child arrangements order bearing in mind the purpose of a fact finding is to allow assessment of the future risk to the child and the impact of any abuse on the child?

(ii) Are there any admissions or have the allegations been determined to a sufficient extent in other proceedings? Are there any proposals which may satisfy the court that the adult child relationship may continue safely for the child and for the alleged victim of domestic abuse?

(iii) What are the real issues in the case. For example, does a party contend that the alleged domestic abuse is a bar to all contact, or do they seek to add conditions for or in relation to contact arrangements?

(iv) Is a fact finding proportionate?

(v) What are the questions relating to the child's welfare which will be assisted by the determination of the allegations?

(vi) Allegations of a pattern of behaviour, such as controlling and coercive behaviour, need only be determined to the extent that it is relevant and necessary to do so as part of the evaluation of issues relating to the child's future welfare. Even then, the court is only required to assess the overarching issue, rather than every single subsidiary factual allegation that may also be raised.

(vii) If the allegations (at their highest) can be mitigated by supervision of contact or some other measures which are available, why is it contended that a fact finding hearing is needed? This will include consideration of whether supervision of contact can be continued in the longer-term and beyond the conclusion of the proceedings.

(b) In the event of a fact finding hearing being directed

22. It is noted that while the judgment in Re H-N [2021] EWCA Civ 448 (paras 41-49) cautioned against allowing a Scott Schedule to distort the fact finding process (by becoming the sole focus of a hearing), the Court of Appeal did not rule out the use of a schedule as a structure to assist in analysing specific allegations. Specific allegations, such as of incidents of physical abuse may as such be set out within

a schedule but allegations requiring the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement.

23. Whether within a schedule or within a statement of evidence, a party making an allegation must explain why a finding on that allegation is relevant to the welfare decision to be made by the court. **If a schedule is directed, then an extra column is to be included for the party making the allegation to add in their explanation of its relevance.**
24. The court will expect the parties' assistance in ensuring that specific allegations are relevant and proportionate for determination. To that end, third party disclosure will only be directed where necessary and will require justification in terms of why it may be said to support or undermine an allegation. Orders will be targeted and precise so, for example, a GP summary should usually be sufficient rather than disclosure of a party's full GP records.
25. The court will only allow evidence from witnesses of fact where it goes to an issue to be determined and if satisfied that it is likely to add real value to the enquiry.
26. No case will be timetabled to a fact finding hearing without a properly completed witness template with time estimates agreed or fixed by the court. The parties are to have a realistic expectation of the time available to present their case to the court.
27. The court will consider **participation directions**. Consideration of FPR r.3A and PD 3AA are mandatory and the obligation to consider vulnerability is the court's, regardless of whether a party is represented or if participation directions are sought.
28. The Court will consider whether a short pretrial review (PTR) is required to be listed before the fact finding hearing (with the expectation one will be required for any fact finding hearing listed for 2 days or more) to ensure all the directions have been complied with and that the hearing will be effective. Such hearings will be listed for 30 minutes by CVP before the trial judge unless an alternative listing is ordered.

(b) Revisiting a decision

29. While the court will consider at all stages of the proceedings whether domestic abuse is raised as an issue pursuant to FPR PD 12 (5), its decision not to hold a fact finding hearing will only be revisited if there has been some change in circumstances to undermine that decision. In the event of 'new' evidence relating to past events being presented, the court will require a good reason as to why this was not advanced previously.

Qualified Legal Representatives

30. The Domestic Abuse Act 2021 prohibits perpetrators or alleged perpetrators of domestic abuse and their victims or alleged victims from cross-examining each other in person. The court has the power to appoint qualified legal representatives (QLRs) to carry out cross-examination. While there are automatic prohibitions on cross-examination, the court can exercise its discretion to direct that a party be prohibited from carrying out in person cross-examination where it appears to the court that allowing cross-examination in person would be likely to affect the quality of the witness' evidence or is likely to cause either the party or the witness significant distress and it would not be contrary to the interests of justice to give such a direction. This is a wide discretion and might apply, for example, in situations where domestic abuse is alleged but the allegations do not trigger any of the automatic prohibitions, where litigants in person have to cross-examine expert witnesses, or for reasons other than domestic abuse. The court must state its reasons for giving a direction, refusing an application for a direction, revoking a direction given or refusing an application to revoke a direction.
31. **The role of the QLR is substantially different from that of a lawyer instructed by a party and essentially is to ensure that the fairness of the proceedings is maintained, by carrying out the cross-examination which the prohibited party is prohibited from performing. Although they will advance the interests of the prohibited party during the cross-examination, the QLR must not attempt to present the prohibited party's entire case and should not take instructions from the prohibited party in the manner that a party's own lawyer ordinarily would.** 31.However, the QLR is expected, in most cases, to meet with the prohibited party to elicit relevant information that will form the basis of the cross-examination and inform the drafting of the position statement. There may also be instances in family proceedings where the court may need to appoint more than one QLR in the case, for example, one to cross-examine in place of the perpetrator and the other to cross-examine in place of the victim.
32. To effectively protect the prohibited party's Article 6 and 8 ECHR rights, the QLR must put the essence of the prohibited party's case to the witness on those parts of the witness' case that may have a significant impact on the outcome of the proceedings. The prohibited party may suggest questions to the QLR that he or she wishes to be put to the witness. Although the QLR may take such suggestions into consideration, ultimately questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are on those parts of the witness' case which may have a significant impact on the outcome of the proceedings.
33. The court will direct that the QLR has access to the full court bundle, or such parts of the bundle as directed by the court and by when access is to be given. Where

there is no court bundle, the court will prepare and provide the qualified legal representative with a court bundle. The QLR must ensure that he or she is fully familiar with the contents of the court bundle and evidence so as to be able to cross-examine the witness or witnesses effectively, and to put the prohibited party's case to the witness or witnesses.

34. The court will issue an order identifying the witness or witnesses to be cross-examined by the QLR. **The court will make clear to the prohibited party that the QLR is not their lawyer and that they are appointed by the court only to cross-examine a certain witness or certain witnesses.**
35. The court will identify those cases where a QLR may need to be appointed at the earliest possible stage but will always review appointment at PTR or at a DRA. The court will endeavour to identify and name the appointed QLR and directions will be made for court papers to be provided to the QLR by the court if both parties are unrepresented or, if the other party is legally represented, the legal representative shall provide the papers to the QLR.
36. If, in respect of final hearings, matters were to settle without the need for the QLR to assist in providing cross-examination, or it is agreed that the matter would proceed by way of submissions only, any appointed QLR will be notified as soon as possible by the court.
37. The court will keep a database of QLRs but, as unfortunately there can be no guarantee that a QLR will be available for a hearing, the following step must be taken whenever a QLR is deemed to be needed. **A direction must be made for questions to be sent by the prohibited party to the court not less than 7 days prior to the hearing so that these can be considered by the court and put (if appropriate) to the other party or witnesses by the judge or by the legal adviser or Family Justices at the hearing if a QLR is not in attendance.** In the event of a QLR having been appointed for each party but only one QLR attends the hearing, the hearing will still proceed on the basis of written questions being put by the court on behalf of the party who is without the assistance of the QLR.
38. The court should try to list a hearing no earlier than 4 weeks after filing of final evidence to enable a publicly funded party to obtain amendment to the legal aid certificate to provide for representation at the final or fact finding hearing. The court should direct a publicly funded party's solicitors to notify the court not less than 4 weeks prior to hearing if legal aid has been withdrawn so that the court may seek to appoint a QLR for the unrepresented party if the case is one in which the prohibition on cross examination applies.

Position Statements

39. Legal representatives are asked to bear in mind that arrangements agreed between the parties generally work best for children (subject to the court's approval

and consideration of any safeguarding concerns). The contents of a position statement should not inadvertently derail the prospects of a resolution so care should be taken to avoid entrenching positions. Succinct position statements of no more than 4 pages of A4 paper, preferably typed in a font no smaller than 12pt and at no less than 1.5 in line spacing, should be sufficient to set out the position taken by a party relevant to the hearing in hand. Any legal argument, if it must be committed to paper, for the court's consideration should be set out in a separate skeleton argument.

40. Legal representatives must lodge position statements with the court (and send them to the other party or legal representative) by no later than 24 hours prior to a hearing listed before the Circuit or District Bench but are required to do so at least 3 days prior to a hearing before the Family Justices. A litigant in person (LIP) is encouraged to send his/her position statement to the court within the same timescale to ensure that there is adequate time to consider its content, but the court may be more willing to extend the period to a LIP. The parties should not expect that the court will have the time available to consider a position statement which has been lodged outside of these timescales.

Reports

41. The timescale for preparation of a section 7 report either by CAFCASS or the local authority is 12 weeks from hearing. An addendum report is to be prepared within 8 weeks of order. **Addenda are not be routinely required and should only be directed when there has been a significant change in circumstances since the filing of the section 7 report as otherwise any update can be expected to be given at court in oral evidence by the author of the report.** The Family Court Adviser/Social Worker is expected to have made updating enquiries prior to the final hearing regardless of whether an addendum has been directed. Such enquiries may be conducted by way of telephone at the discretion of the report author unless directed otherwise by the court.
42. If the court though considers that it is necessary to have an update as to a child's wishes and feelings prior to a final hearing, then an addendum must be directed from CAFCASS or the local authority social worker who has prepared the report.
43. In a case where the safeguarding letter has not advised the preparation of a section 7 report, the Family Bench (who invariably have the benefit of a Family Court Adviser at court) will invite CAFCASS management to set out its views on whether such a report is needed prior to making such a direction. In a case before the District or Circuit Bench (where a Family Court Adviser is not generally in court)

and where the safeguarding letter did not advise a section 7 report, the court will set out its reasons within the order for directing such a report if it considers that such welfare analysis is required to determine the proceedings.

44. The court will order the local authority to prepare the section 7 report if: a) a child is the subject of an open and active statutory social work case with a local authority (normally under either sections 17 or 47 of the Children Act 1989) or b) in the last 12 weeks, before the section 7 is ordered, there has been a statutory social work assessment of a child's welfare in accordance with the Children Act 1989 (sections 17 or 47) or c) in the last 12 weeks, before the section 7 is ordered, the child has been the subject of a child in need or child protection plan. In the event of there being dispute between CAFCASS and the local authority as to which of them should prepare the report, they should enter into dialogue to resolve the issue but with the clear understanding that the court's timetable for filing of the report must be adhered to.

45. A local authority section 37 report is to be prepared within 8 weeks of order, unless the court directs otherwise, pursuant to section 37 (4) CA 1989.

46. CAFCASS will liaise with the local authority prior to making any recommendation for a section 37 report in accordance with agreed arrangements.

Rule 16.4 Appointment of a Children's Guardian

47. The local authority will notify and liaise with CAFCASS prior to making any recommendation for the appointment of a R 16.4 Children's Guardian and the local authority will make the court aware of the position taken by CAFCASS on the proposed appointment. The Local Authority will operate an internal procedure to ensure a senior manager considers the criteria for the making of a R16.4 Guardian before any such recommendation is made.

48. The Court will invite CAFCASS management to set out its views on whether the case meets the R 16.4 criteria in advance of making an order either on application of a party or under its own motion. CAFCASS will respond to the court's enquiry within 3 days or may choose to attend a hearing where the issue is to be considered.

49. The court will upon making a R 16.4 appointment set a timetable which provides for a case management hearing at week 8 and a final hearing at or before week 26 of the appointment. In cases which are sufficiently complex to require a R 16.4 appointment, there must be early and active consideration as to whether a fact finding hearing is required and the timing of this in relation to commencing work under the R 16.4 appointment.

Service of orders upon CAFCASS and Norfolk County Council

50. An approved order is to be sent by email to CAFCASS as soon as made by the court office unless a represented party has been instructed to do so. The email address for this purpose is bseast@cafcass.gov.uk
51. An approved order is to be sent to the local authority as soon as made by the court office unless a represented party has been instructed to do so. The email address for this purpose is cads@norfolk.gov.uk
52. The order should outline the applications before the court as well as the main issues for consideration by any reporting officer.
53. It is insufficient to notify a practitioner from the local authority of the making of an order. The local authority will require both a copy of the order and a bundle of relevant court papers which is to be provided by a represented party's solicitors or otherwise, when both parties are unrepresented, by the court office. In cases in which the parties are unrepresented, the judge issuing the order will advise the court office of which papers are relevant for the purposes of provision of a bundle to the local authority. These papers should be updated as the case progresses. Provision of an index will ensure the social worker knows what documents are before the court and what has been sent and what has not been sent.

Attendance of authors of reports at hearings

54. The author of a report should ordinarily give evidence first at a final hearing so that he/she can thereafter be released to attend to other professional obligations.
55. Where it is known that a Family Court Adviser/Social Worker is unable to attend a final hearing, it is likely to be satisfactory for a CAFCASS/ LA manager to attend in their stead and in which event the parties are to be directed to provide written questions not less than 14 days prior to hearing so that the manager can make any necessary enquiries and provide the best available evidence to the court.
56. A Family Court Adviser/Social worker should not usually be directed by the court to attend a Dispute Resolution Appointment (DRA) unless specific advantages of doing so are evident, including but not limited to the enhanced possibility of the proceedings being concluded at that hearing. The reason for directing the attendance of the Family Court Adviser/Social Worker should be set out within the order to enable the practitioner to attend the court hearing with a clear understanding of how they may assist the court with the resolution of the proceedings.

Statements

57. Statements should be focused on specific factual disputes requiring determination by the court or should address issues of welfare. In cases where the court has directed a section 7 report and both parties are unrepresented, the court may wish to delay the filing of statements until the parties have had the opportunity of exploring resolution at the DRA. If the court directs statements prior to the filing of a section 7 report, and whether a party is a LIP or represented, the expectation is that these will be limited to 4 pages by agreement of the parties. At the same time as the statement is filed with the court, a copy of that statement should be sent to Cafcass or the local authority with responsibility for preparing the section 7 report. Any statement ordered by the court should in accordance with best practice not generally exceed 15 pages, plus exhibits, and a statement should never in any event exceed 25 pages, plus exhibits, which is the limit set under FPR PD 27A. Practitioners and parties are asked to note the importance of proportionality when attaching exhibits to statements which, if excessive in amount, may not be reviewed by the court due to the time available for a hearing. A rule of thumb is that exhibits should not exceed the number of pages of the statement itself.
58. LIPs are encouraged to make use of the witness template (within the accompanying link to the President's Memorandum: Witness Statements) which is suitable for non-complex private law welfare cases since it focuses attention on the section 7 recommendations and the welfare checklist.
    a. https://www.judiciary.uk/wp-content/uploads/2022/07/PFD-memo-on-witness-statements-12112021.pdf

Family Law Act 1996 injunctions

59. Due to these applications often being related to ongoing Children Act proceedings, this PD addresses local arrangements in respect of these proceedings.
60. An application for a without notice order can only be listed before the District or Circuit Bench. An application by a person under 18 years must be listed before the District or Circuit Bench. Permission is required for issue of an application by a child under 16 years.
61. Practitioners are reminded of the test for whether a non-molestation order should be made without notice as set out at section 45 of the Family Law Act 1996 and

that High Court authority establishes that an order should only be made without notice in exceptional circumstances.

62. If a Judge decides that a hearing should be on notice, consideration will be given to allocation. An application is likely to be listed before the District or Circuit Bench in the following circumstances:

(i) where there are serious allegations and concerns that mirror concerns in the private law gatekeeping schedule (e.g. honour based violence, direct threats to kill, serious sexual assaults, capacity issues (this is not an exhaustive list));
(ii) The parties are already before a Judge in Children Act proceedings;
(iii) The proceedings include an application for an Occupation order which involves a transfer of tenancy or a decision about property ownership.

63. An application is likely to be listed before Family Justices in the following circumstances:

(i) Allegations and concerns that would, if in a private law case, lead to listing before Justices;
(ii) The parties are already before the Family Justices in Children Act proceedings;
(iii) The proceedings include an application for an occupation order which is restricted to seeking clarity about who can use which parts of the house and when (this may include a house under a tenancy).

64. A without notice application will be considered on the papers initially by whichever District or Circuit judge is first available and, if need be, will go before that judge for a short hearing if s/he is not satisfied that an order should be made on the papers. As such, an applicant for a without notice order must attend court in person on its issue. Any without notice order issued by the court will be listed ideally for a return date within 14 days but the court's volume of work may result in a hearing not being achieved for up to 28 days as provided for by the President's Practice Guidance note: Non-molestation issued in July 2023. The court will reallocate Family Law Act applications between the District or Circuit or Family Bench to try to ensure the earlies possible determination of the proceedings.
65. The listing of a first hearing or return hearing before the Family Justices will be for one hour.

Bundles

66. The required content of bundles is set out at PD27A FPR 2010.
67. If the applicant is a LIP and the respondent is represented, then the respondent's solicitor shall prepare the bundle. In the event of both parties being unrepresented, the court will prepare the bundle.
68. The court will accept e-bundles, but a paper witness bundle must be available for a contested and/or final hearing. An e-bundle must be provided to the other party,

whether represented or acting as a LIP. A LIP may request a paper bundle if he/she is unable to utilise an e-bundle.

69. If a LIP wishes to rely on additional documents which have not been included in the bundle, and which the other party contends are either not relevant or that inclusion of the same would be disproportionate, then the LIP may file with the court and send to the other party not less than 2 days prior to a hearing before the District or Circuit Bench and 3 days prior to a hearing before the Family Justices, a supplemental bundle containing those disputed documents for the court to adjudicate as to relevance.
70. Police disclosure will not be included in bundles sent to a LIP, but the Court must ensure that LIPs and QLRs can see police disclosure at Court. The standard arrangement will be for access to the police disclosure at court not less than 7 days prior to a hearing when such disclosure will be under consideration.

Approved by His Honour Judge North

DFJ for Norfolk