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Who Guards the Guardians?

Recent local practice guidance applying in the Central Family Court provides that children's guardians in public law proceedings, adoption proceedings, or private law proceedings in which a children's guardian has been appointed under the Family Procedure Rules 2010 (FPR), r16.4 – in effect, children's guardians who are legally represented – are only required to attend court to (i) give evidence, or (ii) hear parents or subject children give evidence. If the attendance of a children's guardian is thought to be necessary at other times, an order must be sought at an already listed earlier hearing, or by email to the judge before the hearing; and reasons must be given.

This guidance is described as having been produced in consultation with Cafcass management, the judges at the Central Family Court (CFC), and the Family Division Liaison Judge. Practitioners (principally lawyers and children's guardians) have not been consulted.

The role of children's guardians, and their legal representatives, at court The children's guardian and the solicitor for the child are appointed under the Children Act 1989, section 41. They are therefore both appointed by virtue of statute, and have statutory duties, as well as duties under the FPR, Part 16, and Practice Direction 16A (PD16A).

They work 'in tandem', each providing their own skill and expertise, to ensure the best possible results for children.

Importantly, under the Children Act 1989, the children's guardian's appointment is not an appointment to 'represent' the child, but is an appointment 'for the child' (s 41(1), (2)). It should be remembered that children's guardians were originally called 'guardians ad litem', because they are appointed on behalf of a party - a child - who lacks capacity to litigate, because if his or her age.

The children's guardian is under a duty to safeguard the interests of the child in the manner prescribed by the rules (s41(2) (b)). Guardians are appointed for the purpose and duration of the proceedings.

Of course, the views of a competent child may differ from those of his or her children's guardian in relation to the child's best interests. If so, the child's solicitor is under a duty to represent the views of the child (s41 (5)). In those circumstances, the children's guardian would have a wider role, i.e. to place before the court anything he or she considers to be in the best interests of the child – while still being required to establish the child's views and place them before the court.

With regard to attendance at court, PD16A says, at para 6.5, that:

'The children's guardian or the solicitor appointed under section 41(3) of the 1989 Act or in accordance with paragraph 6.2(a) must attend all directions hearings unless the court directs otherwise.'

Thus the children's guardian is no longer required to attend directions hearings if the children's solicitor attends. Previously (under FPR 1991 r 4.11A(4), FPC (CA 1989) r 11A(3)), the children's guardian was required to attend all directions appointments unless excused by the court.

The practical reality is that a great deal can happen at interim hearings, which are an opportunity for all the parties and their legal representatives to meet. The situation can develop quickly, and the children's guardian plays a crucial part in the discussions and negotiations that take place. The solicitor for the child can only act on the guardian's instructions; equally, the guardian will often require legal advice on the matters being discussed at court.

How have the courts interpreted the role of the children's guardian?
In Re K and Ors [2011] EWHC 1672 (Fam), a landmark judgment in the High Court, Sir Nicholas Wall, then President of the Family Division, emphatically underlined the independent status of the children's guardian. Adopting the argument put forward by the National Association of Guardians ad Litem (NAGALRO), he reminded Cafcass that only the court could appoint children's guardians, or remove them from a case. Neither should Cafcass substitute a corporate or managerial view for the court-appointed children's guardian's view of what will be in the best interest of the child. In the case of any such disagreement, Cafcass should apply to intervene and explain to the court the reasons for any dispute, for the court to adjudicate.

In his robust judgment Sir Nicholas stated:

"I yield to no-one in my view that the guardian's independence needs to be cherished."

He re-iterated how important it is for children that guardians exercise independent judgement when working with solicitors in the 'tandem model'.

Sr Nicholas's judgment specifically states that guidance should not inhibit a children's guardian from investigating issues that he or she sees as necessary to safeguard the welfare of children. Referring to the agreement then in place between the President and the Chief Executive of Cafcass, he stated that nothing in the agreement "fetters

the responsibility of the children's guardian independently to represent the interests of the child in accordance with the statute and rules."

In R & Ors v Cafcass [2012] EWCA Civ 853 the Court of Appeal (made up of Lord Judge CJ, the Lord Chief Justice of England and Wales, and Richards and McFarlane LJJ) made the following observations (per McFarlane LJ):

"[23] In surveying the statutory context under the CA 1989, the Divisional Court [at first instance] made the following observations at para [38]. The parties before us effectively endorse these observations and we have accepted them as being an appropriate and highly relevant summary of the importance of the issues raised in this appeal:

'No detailed analysis of this statutory regime is necessary. The provisions speak for themselves. All we need say is that the children's guardian is on any view pivotal to the whole scheme. The guardian is both the voice of the child and the eyes and ears of the court. As any judge who has ever sat in care cases will be all too aware, the court is at every stage of the process critically dependent upon the guardian. In a jurisdiction where the State is seeking to intervene – often very drastically – in family life, the legislature has appropriately recognised that determination of the child's best interests cannot be guaranteed if the proceedings involve no more than an adversarial dispute between the local authority and the parents. Parliament has recognised that in this very delicate and difficult area the proper protection and furthering of the child's best interests require the child to be represented both by his own solicitor and by a guardian, each bringing to bear their necessary and distinctive professional expertise.'

[24] Before this court, neither party has sought to argue that the description of the children's guardian as 'pivotal to the whole system' was in any manner overstated."

So how is the court to ensure that the children's guardian is able to fulfil that pivotal role?
Family judges have an inquisitorial role, with a duty to further the welfare of the child. Case management provides the court with a tool for achieving that, but within limits: it remains essential that the court provides a fair trial.

In Re C (Family Proceedings: Case Management) [2012] EWCA Civ 1489, [2013] 1 FLR 1089, Munby LJ (as he then was) set out the range of possible procedural approaches:

"The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue to explore the matters which one or other of

the parents seeks to raise. If there is or may be solid advantage to the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercise of his discretion so to decide and to determine that the proceedings should go no further."

Moreover, case management powers enable judges to limit the number of witnesses and the extent of oral evidence at a hearing (Re B (A Child) [2012] EWCA Civ 1545).

Turning to the manner in which a trial is to be conducted, to ensure the process is fair, the order of evidence is long established, and is a sequence that has to be adhered to unless the court directs otherwise, viz:
1.the applicant;
2.any party with parental responsibility for the child; 3.other respondents; 4.the children's guardian; 5.the child, if he is a party and there is no children's guardian (FPR 2010, r 12.21(2)).

However, the court may give directions as to the order of speeches and evidence at the hearing or directions appointments in the course of the proceedings (r 12.21(1)). For instance, the court may direct the parents to give oral evidence prior to hearing expert evidence in a fact finding hearing (subject to the court hearing and resolving any issues under ECHR, Art 6 that may be raised) (Lancashire County Council v R [2008] EWHC 2959 (Fam), [2010] 1 FLR 387).

A full hearing may not always be necessary, but any unfairness, at any stage of the proceedings (in or outside a hearing) may breach ECHR Art 8 and/or Art 6 rights, and – in the case of parties who are children – breach of UNCRC rights. Art 6 rights are, of course, absolute.

How does the recent local CFC guidance fit into this framework?
Designated Family Judges (DFJs) have no power to make practice directions. That is the prerogative of Parliament; whereas the President of the Family Division makes practice directions with the concurrence of the Lord Chancellor (something the Court of Appeal can also do).

Before the creation of the unified Family Court, Senior Family Judges could make local directions, with the President's approval, but this is no longer the case. It is not clear what power now enables DFJs to make local practice directions; and there is a risk that any local practice directions are ultra vires. DFJs can issue local guidance, a different concept.

Moreover, case management decisions cannot be allowed to undermine the discretion of the judge hearing the case, or the statutory framework – Children Act 1989, s41, the FPR, and the Children and Families Act 2014 – within which children's guardians work.

Children's guardians are generally well able to explain to the court the work they need to do, and the evidence they need to hear, to enable them to be the 'eyes and ears' of the court, and to play a pivotal role. This local practice guidance fundamentally undermines their ability to be closely involved in the court process, and to work flexibly and responsively to the needs of children, in accordance with their statutory duties and as they see fit. It also undermines the tandem model of practice, which relies on children's guardians and children's solicitors working closely together in children's best interests, including by attending court together.

Urgent reconsideration is needed, so that children's guardians can play the pivotal role required. The (possibly ultra vires) local practice guidance reverses the expectation that the children's guardian will attend hearings unless excused. For hearings to be effective, the children's guardian – the responsible individual appointed by the court 'for the child' – has to be able effectively to participate, and be 'the voice of the child and the eyes and ears of the court'. The children's guardian has a statutory duty to place before the court anything he or she considers to be in the best interests of the child – while still being required to establish the child's views and place them before the court . Crucially, and at every stage of the proceedings, the children's guardian has to provide the court with his or her independent opinion or recommendation – not those of his or her employing body/management.

In cases where interim decisions are contested, but where it is unlikely that any party would be asked to give oral evidence – for instance, case management decisions on assessments and/or choice of expert, or decisions about interim contact – the children's guardian's active participation in discussions and negotiation at court is needed to ensure the hearing is effective. That in turn helps the court and the parties keep to the timetable for the proceedings.

This is all the more so at hearings where any substantive decisions (final or interim) are to be made; and/or when expert evidence is to be heard. Given the reliance the court has to be able to place on children's guardians' opinions and recommendations, all parties have to have confidence that the children's guardian has been able to take into account all the evidence, and has reached a fair and balanced view, based on all the evidence.

Children's guardians are mature, experienced professionals, who can be trusted to inform the court if they can effectively participate without being physically present at any particular hearing. The interests of justice, the effective representation of

children, and the efficient management of proceedings, are best served by ensuring that decisions about attendance at hearings are made case by case, with due weight given to the children's guardian's own views on his or her presence at court

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