

## **Nagalro’s Guide to the Professional Time Guidance: how to interpret and lawfully apply Cafcass’ ‘Draft Guidance on the Use of Professional Time to Benefit Children’**

In July 2017, Cafcass and Cafcass Cymru published a version of a document entitled ‘Draft Guidance on the Use of Professional Time to Benefit Children’ (referred to as ‘the Professional Time Guidance’ below). Cafcass did not consult Nagalro or other interested organisations on the text of this document beforehand. It appears there was some limited and informal consultation with members of the judiciary.

The July 2017 version of the Professional Time Guidance had a number of problems with it and Nagalro was concerned it might well lead to unlawful and unfair decisions. Nagalro asked Cafcass to withdraw it and consult properly, but Cafcass decided not to do so. A judicial review claim was issued by Nagalro, challenging both the lack of consultation and the substance of the document. The claim was recently settled because Cafcass made modifications to the July 2017 document following discussions with Nagalro and agreed to the publication of solicitors’ correspondence clarifying certain aspects of it. However, Nagalro has ongoing concerns as do many practitioner groups and other stakeholders (see <http://www.nagalro.com/system/site/uploads/content/docs/2018%2004%2004%20Nagalro%20JPS%20with%20signatories.pdf> )

This ‘Guide to the Professional Time Guidance’ has been prepared so children's guardians, family court advisers and independent social workers can benefit from what Nagalro learnt during the judicial review proceedings about how the document is intended to be interpreted, to identify aspects of it that remain legally problematic and to recommend other material which may be helpful should problems arise. The latest version (still referred to as a ‘draft’) can be found on Cafcass’ website at <https://www.cafcass.gov.uk/about-cafcass/policies/>, but the text is reproduced below in a series of text boxes along with Nagalro’s comments on each.

25 July 2018

## Introductory paragraphs

The latest version of the Professional Time Guidance begins:-

### **DRAFT GUIDANCE ON THE USE OF PROFESSIONAL TIME TO BENEFIT CHILDREN**

We are issuing this guidance, with the approval and support of the President of the Family Division, in order to be clear about the best way in which children can be helped by Cafcass and Cafcass Cymru in the family courts throughout England and Wales, during a time of record levels of demand for our services. This is a national framework for local discussion and use.

The first of Nagalro's concerns is that the status of the Guidance Practitioner Time is not made clear on its face. Notwithstanding the "*approval and support*" for the "*issuing*" of the Draft Guidance, it was not signed by the then President of the Family Division, Sir James Munby. It is clearly a CAFCASS document, not judicial guidance.

Cafcass has told Nagalro "*[t]he status of the guidance remains clear. It has no statutory authority and is an internal tool which is intended to guide and support practitioners...*" adding helpfully "*[t]here is no question of the document representing a mandatory instruction and there is no question of any practitioner being disciplined for failing to comply.*" This last addressed Nagalro's concern that practitioners would be contractually bound to adhere to it notwithstanding any tensions between it and the statutory framework.

It continues:

We put the emphasis on flexibility, so that Cafcass and Cafcass Cymru practitioners in their various roles before the court can use their time to best effect.

We ask the judiciary at all levels to support such flexibility and to operate within this framework.

We will ensure the service we provide to children and to courts is not diluted as a result of these changes and that children's guardians retain their independence and professional discretion.

This guidance is directed to all staff and professionals within the family justice system and is intended to inform the judiciary who are making decisions about how Cafcass and Cafcass Cymru professional time is used.

These paragraphs include helpful changes made during the judicial review proceedings, most importantly, the reminder that the guidance does not override children's guardians' independence or professional discretion.

Cafcass has also reassured Nagalro the Practitioner Time Guidance is not intended to mark any change to policy or inhibition to the service provided to children and families. Cafcass'

intention is that the Guidance will work at a cultural level but not be binding in any particular case. Its solicitors' correspondence also stresses "*nothing in [the document] should be taken to compromise the independence of the children's guardian and that the advice to the court is subject to the direction of the court*" adding "[t]he judiciary of course are not bound by our internal guidance". Cafcass has also stated it is "*self-evident... that when a guardian is appointed the tandem model applies and the solicitor will of course be appointed.*"

### **KEY PRACTICE POINTS**

Children's guardians and family court advisers should keep in mind that the Practitioner Time Guidance is about the way in which they operate *within* the statutory framework and is not a licence to stray beyond it or to cut corners because of the pressures arising from limited resources. It does not replace any statute, nor the Family Procedure Rules or their Practice Direction, and neither does it override the case law on that legal framework, which stresses in particular guardians' role as in independent voice for children, working with solicitors within the tandem model (see in particular Sir Nicholas Wall's judgment in *A County Council v K and Others (By the Child's Guardian HT)* [2011] EWHC 1672 (Fam)). The Court and Cafcass managers should be aware of this too.

As far as children's guardians and family court advisers are concerned, the Guidance does not override their professional duties to the Court, nor any directions it gives in an individual case.

## **Case analyses and position statements in public law cases**

The Professional Time Guidance then lists a series of "*ways in which we [i.e. Cafcass' management] think Cafcass professional time should be used to benefit children most.*" The first is:

### **1. Flexibility about the use of case analyses and position statements in public law cases**

It is essential that children's guardians help the court and all parties to set a direction for the case which is consistent with the child's needs and the child's timescales. This means the children's guardian seeing the child, understanding the issues and, in consultation with the child's solicitor, providing advice about the best direction of the case until the final hearing, at a realistically dated Case Management Hearing (CMH). This will normally be held between 12 and 18 days from the receipt of the application, unless there are clear grounds for an urgent listing.

Depending on the issues at stake, the guardian may consider and the court may agree that this initial advice could appropriately be in the form of a position statement instead of an early case analysis (bearing in mind that a position statement is not evidence).

For example, while contested removal cases will normally need an initial analysis, it is more important that this early work is carried out and that clear advice is given to the court, than whether the write-up of the early work is in the form of a position

statement or an initial case analysis or whether evidence is given in person at the first hearing. Whatever form the written work or the evidence takes at the first hearing, the guardian will be in the driving seat and will ensure that their advice to the court is clear and focussed.

Flexibility applies for the duration of the case, the court deciding at each relevant point whether the guardian produces a written case analysis or a position statement via the child's solicitor or counsel. We would normally expect a definitive analysis to be produced for the hearing which is making the decisions about the child's permanence placement and contact framework, at whatever stage of the case this is.

Section 31 and secure applications will always have a position statement for every hearing where this is needed, so that each hearing can be effective.

Nagalro's position is that extra-statutory position statements and reports of this kind are not a substitute for what is statutorily required, but may usefully complement it in some cases. Cafcass has responded by stating "[t]he court is able, under section 7 of the Children Act, to ask an Officer of the Service to report to the court 'on such matters relating to the welfare of that child as are required'. The guidance refers to the court setting out the specific issues that it requires the report to address which reflects the Child Arrangements Programme. The guidance also refers to position statements being submitted, if the court agrees."

## **KEY PRACTICE POINTS**

As the Practitioner Time Guidance does not override the statutory framework, welfare reports (including s.7 reports) will still be required. Those reports and any advice given to the Court must still comply with the strictures of statute and the rules.

## **Pre proceedings work in public law cases**

The next section of the guidance is superficially innocuous, but may cause practitioners serious difficulties. It states:

### **2. Pre-proceedings in public law**

Where arrangements exist, we encourage the local authority and Cafcass/Cafcass Cymru to continue to work together and with the parents in the pre-proceedings phase so that only those cases which need to come to court do so and that, when such cases do come to court, the issues have already been clearly identified and, where possible, narrowed. This is good case management.

The Practitioner Time Guidance implies (and explicitly stated in earlier versions) that there will be circumstances in which a CAFCASS family court adviser acting under s12 Criminal Justice and Court Services Act 2000 has involvement in pre-proceedings discussions and then the same practitioner may later be asked to become, and is appointed as, a children's guardian under s41 Children Act 1989.

Nagalro has grave concerns about this. We see no practical way to avoid a risk of conflicts of interest arising. That is because, at the pre-proceedings stage any Cafcass family court adviser will be representing, and answerable to Cafcass: there is no legal basis for children's guardians to be appointed at the pre proceedings stage. There is also no statutory basis for a Cafcass officer to endorse proposed arrangements for a child as being appropriate whether on behalf of a child or otherwise.

Once the child becomes a party to care proceedings and a practitioner is appointed as a child's guardian under s.41 of the Children Act 1989, they will a Cafcass officer will be independent in fulfilling a separate statutory safeguarding role for the child, answerable to the Court. This is a very different role. What may have been said, and perhaps agreed to, in a pre proceedings role to '*narrow the issues*' may inhibit what the same person wishes to say later on when they have become a children's guardian. There is also the question of how their involvement in pre proceedings work will be perceived by the parents.

Cafcass' response to these concerns is to say "*[t]he work of Cafcass pre- proceedings has continued for some years in a number of areas and there have been no reports of any party raising a complaint about conflict of interest, or orders being the subject of appeal following the pre proceedings intervention. The projects are intended to divert cases away from proceedings if possible and the contribution of Cafcass is subject always to the consent of the parties to the proceedings. Whether the Cafcass officer is appointed as children's guardian is also subject to the consent of the parents/other parties and the court's approval. We consider that the child benefits from a separate independent view at the pre proceedings stage.*"

Whilst the indications that Cafcass involvement pre proceedings and the appointment of a particular guardian are both subject to parents' consent are welcome, Nagalro does not believe they satisfactorily addresses the conflict of interest risk it has identified.

It is questionable whether a consent given at a time of maximum parental stress and anxiety can be perceived as fully informed.

### **KEY PRACTICE POINTS**

Once appointed (under s.41), children's guardians have a fundamental duty to be independent in representing children's interests. That overrides anything they may have said at earlier stages in the proceedings, including on behalf of Cafcass.

Guardians should be mindful of potential and actual conflicts between their current and any past role and ready to decline a s.41 appointment, or step down, if their independence cannot be assured.

## Work following first hearings in private law cases

Next, the Practitioner Time Guidance forms of ‘intervention’ in such cases and the time anticipated as being necessary.

### 3. Defined interventions by Cafcass and Cafcass Cymru in private law cases after the First Hearing (FHDRA)

We think it is crucial that the work carried out by Cafcass and Cafcass Cymru before and at the First Hearing (FHDRA) continues unchanged e.g., the production of a safeguarding letter or report in every case and attendance at FHDRA’s, as now. This is in order to maximise the safe resolution of as many private law applications as possible at the earliest possible point.

The work of Cafcass and Cafcass Cymru after the first hearing will be streamlined and re-focussed, so this is the area of work we propose should be subject to most change.

Cafcass and Cafcass Cymru plan to deliver clearer and more defined interventions after the first hearing, either a three or four session casework intervention in the most complex cases such as Rule 16.4 appointments.

New child impact reports are being piloted for up to 6 months in Essex, York and North Yorkshire and North Wales. Each child impact analysis will include a structured professional assessment and recommendation by Cafcass/Cafcass Cymru and may also include some brief casework. The new template for this purpose is set out at the end of this guidance, though there may be further minor changes to the template to reflect operational differences between England and Wales. In other local areas, traditional s7 reports will be produced for the time being, pending the new proposed interventions being trialled and evaluated. Child impact reports are not a lighter version of a s7 report. They are a more intensive child focussed version.

In general, when directing a s.7 report, it would be helpful if courts can set out the specific issues they would like to be addressed in the Order, as set out in the Child Arrangements Programme (the CAP), with general requests for reports being avoided. Where an FCA is present in court, they should assist the court in deciding the scope of the report.

The trigger for asking Cafcass/Cafcass Cymru to carry out work beyond the first hearing should be a concern about significant child impact, not the fact that the parental dispute is continuing in court.

The first and most important point is that Cafcass has told Nagalro this section of the guidance is not intended to apply to private law cases where a child is separately represented and a children’s guardian has been appointed under the provisions of r16.4 Family Proceedings Rules 2010.

Secondly, on the “*three or four session*” intervention suggested for “*the most complex cases*”, Cafcass has also said in solicitors’ correspondence “*Cafcass is not suggesting a specific period of time for each case, and in any event as has been raised [Nagalro], Cafcass*

*does not dictate to FCAs the needs of each case, though we do exercise appropriate management oversight as would be expected of any organisation with our professional remit”.*

## **KEY PRACTICE POINTS**

This section is irrelevant when children have been made parties in private law proceedings and therefore does not apply to children’s guardians who are representing children and appointing a solicitor under the provisions of r16.4 FPR 2010.

Family court advisers’ work is directed by the Court and not limited to a specific number of hours or number of sessions. As noted above, s.7 reports and any advice given to the Court must still comply with the strictures of statute and the rules.

## **Contact Activity Directions**

The next section is uncontroversial.

### **4. Court-ordered Contact Activity Directions**

There will be no change to the current child contact interventions and commissioned services available to courts.

## **Additional reports in private law cases**

### **5. Second/addendum reports in private law cases**

We see no reason to ask Cafcass or Cafcass Cymru to deliver work outside of this framework which in itself reinforces the importance, integrity and principles of the Child Arrangements Programme (CAP). For example, second or addendum reports after the FHDRA should only be requested in exceptional circumstances. Where such a report is ordered, both the reason and the scope should be expressed clearly on the face of the order.

## **KEY PRACTICE POINTS**

Nagalro has been told that this section of the guidance is also not intended to apply to cases where a children’s guardian has been appointed. The language of ‘exceptionality’ is unhelpful in Nagalro’s view, but the overarching point is that the Court may have good reasons for seeking second and addendum reports which it remains free to seek.

## Court attendances to give evidence and for other reasons

The next section of the Practitioner Time Guidance states:

### 6. Attending court

Our view is that attendance by Cafcass and Cafcass Cymru practitioners at court should be kept to the necessary minimum, to allow them the maximum time to carry out the work with children and families that can lead to positive change for children. A half day spent unnecessarily in court together with the associated travel is a half day that can be spent with one or more children, the equation is that stark. We differentiate between wasted time and time spent in and around the courtroom with parties and lawyers resolving issues, which can be an important use of professional time.

Broadly speaking, Cafcass and Cafcass Cymru practitioners should attend court either to give evidence, when their evidence is critical to decision-making, or to hear evidence that is essential for them to hear if they are to be able to carry out their own work and to make effective recommendations to courts.

We do not expect Cafcass and Cafcass Cymru practitioners to be sitting through lengthy hearings of any description, unless this is necessary.

In public law cases, the child's legal solicitor or barrister will still be able to attend every hearing, having taken instructions from the guardian who will remain accessible by phone to the solicitor or barrister in the usual way. Guardians should actively invite the court to excuse their attendance where attendance by their solicitor will suffice.

Court attendance is ultimately a matter for the professional discretion of the practitioner in consultation with the court and, where appointed, the child's solicitor.

These issues have been debated by Nagalro and Cafcass at some length and the wording is much improved from that used in the July 2017 draft, which suggested children's guardians' attendance when not giving evidence should be 'exceptional'.

### **KEY PRACTICE POINTS**

The necessity of attendance at Court is a matter for the children's guardian. As well as attending to give evidence to the Court personally, it may well be necessary to hear others' evidence (and their representatives' arguments) and to give properly informed instructions to the child's solicitor throughout. Guardians should keep in mind that the advice they ultimately give to the Court on the child's views and interests needs to be fully informed.

# The trigger for reports to the Court and the role of local protocols

## 7. Advice to courts

A lot of work is asked of Cafcass and Cafcass Cymru because courts are apprehensive about taking decisions without advice, especially when neither party is legally represented. Rather than order a report from Cafcass/Cafcass Cymru, we think it is better if local arrangements are made between Cafcass/Cafcass Cymru, the judiciary and HMCTS, in order to ensure Cafcass/Cafcass Cymru advice is available to courts when it is most needed. This already happens in some courts e.g., requests to advise on a specific issue on the day or within a short period of time and the Hotline Protocol in place in Wales which ensures that courts always contact Cafcass Cymru prior to making a Rule 16.4 appointment. Cafcass and Cafcass Cymru are more able to respond to these requests in a timely way, than they are to directions to carry out work on cases where there are no safeguarding or serious welfare concerns. We ask for compliance with the national and local protocols in place about this, so that courts can receive the advice they need at the right time and in the most efficient way.

Essentially, this is Cafcass and Cafcass Cymru acting in a social work adviser role to court, as the social work equivalent of legal advisers.

## 8. Support for judicial initiatives

We will continue to support local judicial initiatives such as those on case progression, settlement conferences, FDAC's and facilitating children to meet judges as part of effective case management and resolution.

Nagalro has no objections to initiatives for effective case management provided they are clear and capable of being adapted bearing in mind what is needed in individual cases.

### **KEY PRACTICE POINTS**

None of these suggestions bind the Court (see above). It is important to keep in mind that advice and reports may be needed for cases where *“there are no safeguarding or serious welfare concerns”*. This is not a threshold that must be surpassed before a report can be sought nor does it replace the thresholds set out in the Children Act 1989.

## **Conclusion**

The Practitioner Time Guidance concludes *“[t]his guidance will be operational from 1 July 2017. Please let us know of any support needed with training or development”*.

Nagalro has been assured the Guidance will be kept under review and that CAFCASS has an ‘Open Door’ policy in relation to any practice issues which may arise. We are keen to hear about practitioners’ experiences, positive and negative, of how the guidance is used in practice and, should systematic problems arise we will take them up with Cafcass.