

Joint Position Statement on

'Draft Guidance on the Use of Professional Time to Benefit Children' (sent to NAGALRO on 6 November 2017 via Bindmans LLP)

Introduction

1. This document sets out the key substantive concerns that the organisations and individuals listed below as signatories have about this above guidance (on which CAFCASS sought views with the intention of making changes to the current, published version of July 2017).
2. The organisations and individuals below continue to have concerns about the process by which the current, published version came to be issued and in particular the lack of transparency around that process. Rather than producing a draft on which stakeholders were invited to make representations there was a closed consultation involving only with designated judges. The current, published version then appeared on the CAFCASS' website following this process. It has remained there ever since. The lack of transparency and consultation is unsatisfactory given the impact and potential importance of the issues. The difficulties which have followed subsequently seem to us to have been avoidable with a properly consultative and open process.
3. Whilst the draft version sent to NAGALRO on 6 November 2017 via Bindmans LLP is an improvement on the published version, in our view there are five fundamental problems that need to be addressed. It is our view and proposal that the constructive way to resolve this would be to withdraw the current published version and, if appropriate, republish it once the Family Justice Council review of pre-proceedings guidance, being led by Maud Davis and Melanie Carew, is completed.
4. If, however, the Guidance is to remain in use pending the review, there are several urgent changes that must be made.

Status

5. The status of the Guidance remains unclear for three reasons.
6. First, the President of the Family Division, Sir James Munby confirmed the proper ways for guidance to the Family Court to be formulated and disseminated in *B (A Child)* [2017] EWCA Civ 1579. The Guidance is addressed to the Family Court, but is not compatible with *B*. Tellingly, it is not signed by the President. His apparent 'approval' has never been explained.



7. Second, on the CAFCASS' website the Guidance is published as one of a series of "policies", yet NAGALRO has been told it is not a CAFCASS policy. NAGALRO has also been told that the Guidance is not prescriptive and does not bind anyone, yet it repeatedly uses mandatory, directive language (e.g. "should" and "expect" are used in an unqualified way at points).
8. Third, it is important that children's guardians (CGs) and family court advisers (FCAs) appreciate that the guidance is about the way in which they operate within the statutory framework. It does not replace the statute and is not an invitation to stray beyond it because of the pressures arising from resources or policy or working policies internally within the organisation. This fact should be spelled out in the Guidance so that it is clear to those at whom it aimed.
9. To correct these problems, the guidance needs to be revised to clarify that it:
 - is not judicial guidance to the Family Court (in the sense of *B*);
 - is not CAFCASS policy, and so does not bind CGs or FCAs;
 - does not override CGs' statutory duties (including the duties of each appointed CG to independently represent the interests of the child at the centre of care and related proceedings, within the tandem model and to be accountable to the Family Court); and
 - does not override FCAs' statutory duties either.

Scope

10. It is understood that certain of the numbered sections of the guidance are not intended to apply to cases where CGs have been appointed (e.g. sections 3 and 5) and one is not intended to apply to public law cases at all (section 3). However these points are not made clear on the face of the current, published version or even the latest draft. In cases where CGs are appointed, the tandem role needs to be made clear, as proposed in NAGALRO's revisions.
11. The guidance therefore needs to be revised to make clear:
 - which sections no longer apply once a CG is appointed;
 - that the tandem model still applies in cases where a CG is appointed; and
 - which sections apply only to private law cases.

Complementary, not substitutive

12. Extra-statutory reports and position statements are not a substitute for welfare reports (including s.7 reports) and advice required to comply with the strictures of statute and the rules.
13. This too needs to be clear on the face of the guidance.

Conflicts

14. The Guidance envisages there will be circumstances in which a CAFCASS officer has involvement in pre-proceedings discussions and is later asked to become, and is appointed as, a CG.
15. We see no practical way this can work without the serious risk of conflicts arising and actual conflicts of interest. Within the pre-proceedings stages the officer will be representing, and answerable to CAFCASS. Once appointed as a child's representative under s.41 of the Children Act 1989 the CG will be the child's independent representative fulfilling a statutory role and answerable to the Family Court. These are very different roles.

Constraints

16. It is helpful for addressees of the Guidance, whether CGs and FCAs or Family Court personnel (including judiciary), to be told what will often or generally be a useful, time efficient contribution for FCAs and, on occasion, CGs to make.
17. However, difficulties arise when guidance can easily be interpreted as constraining professional discretion, by prescribing a particular number of reports or contact hours or indicating that attendance at hearings, save for particular purposes, should be an "exceptional" course. This language should be removed from the guidance.

Conclusion

18. These proposals are made in the spirit of continued constructive engagement by the organisations below with the Service so as to ensure that any guidance can benefit from the input of stakeholders and service users. However the points which are set out in this letter are in our joint view the minimum required to avoid the guidance creating a real risk of unfairness and illegality.

Signed:

The Professional Association for Children's Guardians, Family Court Advisers and Independent Social Workers (Nagalro)

The Association of Lawyers for Children (ALC)

Article 39

The National Youth Advocacy Service (NYAS)

The British Association of Social Workers (BASW)

Coram/ British Association for Adoption and Fostering (BAAF)

The National Association of Independent Reviewing Officers (NAIRO)

Siblings Together

The Southwark Law Centre

The St. Michaels Foundation

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