29
BEDFORD ROW
CHAMBERS

SECTIONS 8 AND 11

OF THE CHILDREN ACT 1989

Procedure, tips and traps

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These notes deal with making private law Children Act applications, principally applications under section 8 of the Act (namely for contact, residence, specific issue and prohibited steps orders) but also with applications under section 11 for contact activity directions and conditions, and for enforcement. They do not deal with more specialist applications, such as those relating to child abduction or those relating to financial provision under Schedule 1 to the Children Act 1989, to which different procedural rules apply.

THE BASIC PRINCIPLES

1. The fundamental principles are set out in section 1 of the Children Act 1989. You must have these in mind whenever you are making any application under the Act. They act as the wide "umbrella" under which the court will exercise its discretion when deciding what orders to make.

The Paramountcy Principle

2. The fundamental principle is found in section 1(1) of the Children Act 1989:

   "When a court determines any question with respect to –

   (a) The upbringing of a child; or

   (b) The administration of a child's property or the application of any income arising from it,

   the child's welfare shall be the court's paramount consideration."

The Welfare checklist

3. In all applications under section 8 of the Act, the court will have regard to the welfare checklist (section 1(3)):

   (a) The ascertainable wishes and feelings of the child (considered in the light of his age and understanding);

   (b) His physical, emotional and education needs;

   (c) The likely effect on the child of any change in circumstances;

   (d) His age, sex, background and any other relevant characteristics.

   (e) Any harm suffered or at risk of being suffered;

   (f) The capability of parents and other relevant persons to meet the child's needs; and

   (g) The range of powers available to the court.

The delay principle

4. The court will also have regard to the general principle that delay is likely to prejudice the welfare of the child (section 1(2)).

The no order principle

5. It is important to remember "the no order principle" (section 1(5)):

   'where the Court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order … unless it considers that doing so would be better for the child than making no order at all.'

6. **TRAP:** Remember that the no order principle does not create a presumption either way. It merely demands of the court that it asks itself the question whether to make an order would be better for a child than making no order at all (*Re G (Children) [2006] 1 FLR 771*).

The Overriding Objective

7. The court must also have regard to the "Overriding Objective" to enable it *"to deal with a case justly, having regard to the welfare principles involved"* (paragraph 2.1 of the Revised Private Law Programme which is set out in full in PD12B of the Family Procedure Rules 2010). This requires the court, so far as practicable, to:
   (a) Deal expeditiously and fairly with every case;
   (b) Deal with a case in ways which are proportionate to the nature, importance and complexity of the issues;
   (c) Ensure that the parties are on an equal footing;
   (d) Save unnecessary expense; and
   (e) Allot to each case an appropriate share of the court's resources, while taking account of the need to allot resources to other cases.

8. **TIP:** When seeking a particular direction remember the overriding objective. It is a helpful starting-point upon which to build submissions.

9. **TRAP:** Remember there is a basic presumption that both parents should be involved in a child's life unless that involvement would not further the children's welfare. It is important when writing about child arrangements to remember that a child has a right to contact rather than one parent having the power to "permit" or "deny" contact. Phraseology can be revealing.

10. **TRAP:** Remember to advise your client about Parental Responsibility ('PR') and the need to not act unilaterally. Remind your client that decisions about issues such as the child's medical treatment, name and schooling need to be agreed between both parents and if it cannot be agreed then a specific issue application needs to be made. Remind the parent with whom the child lives that he/she needs to keep the other parent updated about the child.

11. A mother automatically has PR from birth, a father will usually have PR if named on the birth certificate or married to the child's mother. In terms of births registered in England and Wales if the parties were married when the child is born or if they've jointly adopted a child then they both have PR. An unmarried father can get PR in 1 of 3 ways:
    (a) jointly registering the birth of the child with the mother (from 1 December 2003);
    (b) getting a parental responsibility agreement with the mother;
    (c) getting a parental responsibility order from a court.

12. Same sex partners will both have PR if they were civil partners at the time of the treatment (eg donor insemination or fertility treatment). If same sex partners are not civil partners the second parent can obtain PR by:
    (a) applying for PR if a parental agreement was made; or
    (b) becoming a civil partner of the other parent and making a parental responsibility agreement or jointly registering the birth.

THE RANGE OF ORDERS THE COURT CAN MAKE UNDER SECTION 8

13. The court may make 4 types of order under section 8: (a) Contact orders; (b) Prohibited steps orders; (c) Residence orders (or shared residence orders); (d) Specific issue orders.

14. The considerations for the court when deciding whether to make any of the above orders are those set out in section 1 of the Children Act, specifically sections 1(1) and 1(3) – at paragraphs 2 and 3 above.

15. Section 9 sets out a number of restrictions on when a court may make an order under section 8. These include, for example, that a court shall not make a section 8 order, other than a residence order, with respect to a child who is in the care of the local authority (section 9(1)), and that a court shall not make any section 8 order (other than one varying or discharging an existing order) with respect to a child who has reached the age of 16, unless the circumstances are exceptional (section 9(7)).

16. **TRAP:** If a party is seeking a "lives with" order, remember that where a Child Arrangements Order sets out with whom a child should live, that person will be permitted to take him or her out of the jurisdiction for up to a month without the other parent's consent.

WHO CAN APPLY FOR A SECTION 8 ORDER?

17. A court may make a section 8 order:
    (a) on the application of a person who is entitled to apply as of right (section 10(1)(a)(i);
    (b) on the application of a person who has obtained leave (section 10(1)(a)(ii); or
    (c) of its own motion (section 10(1)(b)).

Entitled as of right for any order

18. The following persons are entitled as of right to make an application for any order --- Section 10(4):
    (a) Any parent, guardian or special guardian of a child;
    (b) A step-parent who has acquired Parental Responsibility; or
    (c) Any person in whose favour a residence order is in force with respect to a child.

Entitled as of right to make an application for a residence or contact order

19. The following persons are entitled as of right to make an application for a residence or contact order --- Section 10(5):
    (a) Any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family / Any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child is a child of the family;
    (b) Any person with whom the child has lived for a period of at least three years;

(c) Any person who –

(i) where a residence order is in force, has the consent of each of the persons in whose favour the order was made;

(ii) in any case where the child is in the care of a local authority, has the consent of that authority; or

(iii) in any other case, has the consent of each of those (if any) who have parental responsibility.

Applicants who need to obtain leave

20. If the prospective applicant is not one of those listed above, he or she will require the leave of the Court. This could be, for example, grandparents or other wider family members, or the child himself/herself.

21. The court will consider the matters set out in section 10(9) when considering whether to grant leave:

(a) The nature of the proposed application;

(b) The Applicant's connection with the child;

(c) Any risk there might be of that proposed application disrupting the child's life to such an extent that he would be harmed by it; and

(d) Where the child is being looked after by a local authority–

(i) the authority's plans for the child's future; and

(ii) the wishes and feelings of the child's parents.

22. Where it is the child himself/herself applying, the court must be satisfied that he/she has sufficient understanding (section 10(8)).

PROCEDURE WHEN MAKING SECTION 8 APPLICATIONS

23. When applying for a section 8 order, the application should be made on Form C100 (in fresh proceedings) or Form C2 (in existing proceedings, or where an application for leave to apply is being made).

24. The application should generally be made in the court local to where the child lives. This is for reasons of convenience for the child (and arguably also for the primary carer), but also because any CAFCASS involvement will require a CAFCASS officer to be appointed from the branch local to the child.

25. If the applicant believes that the child has suffered or is at risk of suffering any harm from domestic violence, violence within the household, child abduction or other conduct or behaviour by any person who has had contact with the child then a Form C1A should also be completed, summarising the harm suffered and the risks envisaged.

26. **TRAP:** Make sure a Form C1A is filed when the application is made (or when a C7 response is filed) if your client is contending that domestic abuse is relevant. It is very difficult to raise and rely upon allegations later if a C1A has not been filed.

27. **TRAP:** Do not file a statement at the time of issuing your application (unless it is an urgent *ex parte* application).

28. **TIP:** Focus on the application itself. The Court will not have any statements so the application is a key document at the first hearing. Make sure it is carefully composed.

29. An application for leave to apply for an application must be made on Form C2 and be accompanied by a draft of the application for which leave is sought (on a Form C100).

30. If your client wishes to withhold his/her address from the other party, he or she must complete a Form C8 and file this at the same time as the main application.

Service of the application

31. The rules relating to Service of the Application are set out in the FPR 2010 at Practice Direction 12C.

32. The Applicant must serve a copy of the application (together with Forms C6 and C7) on each Respondent at least 14 days before the first hearing, the First Hearing Dispute Resolution

Appointment ('FHDRA'), the date for which will be set by the court and notified to the applicant or his solicitors.

33. The Applicant must also serve the application with Form C6A on any non---parties who should be given notice (for example, persons caring for the child at the time the application is made).

34. The rules as to what constitutes service are set out in Part 6 of the FPR 2010, specifically at rules 6.23–6.39 (rule 6.36 provides for the court's power to dispense with service). The court also retains the power to abridge time for service (PD12 paragraph 3.5).

35. Applications for leave to apply for a section 8 order are governed by Part 18 of the FPR 2010 and the procedure set out therein. Once leave is granted, the procedure under Part 12 as summarised above comes into play.

Responding to an application

36. Within 14 days of service of the application, the Respondent must file and serve an acknowledgement of the application in Form C7 (and C1A if appropriate). (FPR 2010 rule 12.32). Again, do not file a statement at this stage.

Ex parte applications

37. An application for a section 8 order may be made ex parte (FPR 2010 rule 12.16). In the Family Division of the High Court, an application can be made out of hours in urgent cases (tel. 020 7947 6000).

38. You must file the application at the time the application is made, or where made by telephone, the next business day after making the application (rule 12.16(2)).

39. The application must be made on sworn evidence (i.e. by affidavit) which must explain why it was necessary to apply ex parte.

40. **TRAP:** Think carefully about whether the application really needs to be made ex parte as the Court will not look favourably on your client if it considers it not urgent and that it should have been listed on notice.

41. The application (and any order made) must be served on the other parties within 48 hours of the making of the order (rule 12.16(4) and (5)). **TIP:** If that is likely to be problematic for any reason then remember to seek alternative directions for service at the ex parte hearing.

42. As soon as possible following the hearing the applicant should also serve the other parties with a copy of the affidavit and exhibits and the notice of return date.

43. Where the court refuses the ex parte application, the application will usually be heard on notice (rule 12.12(7)).

44. **TRAP:** When making an ex parte application, you and your client must make full and candid disclosure of all relevant circumstances (*Re S (child: ex parte orders)* [2001] 1 FLR 308).

45. The Respondent is entitled to be given proper information as to what took place at the hearing, what documents were lodged with the court or shown to the court, and what legal authorities were cited. **TIP:** It is therefore vital to keep a proper attendance note of the proceedings and copies of all documents produced. The information should be volunteered without being requested (*C v C (without prejudice orders) [*2006] 1 FLR 936.).

46. **TIP:** No provision is made in the rules, but a procedure has evolved whereby *ex parte* applications are sometimes made on informal notice to the other party. However, many judges do not see this as any different from a straightforward ex parte application, and it is usually better to apply to abridge time for service of an on notice application.

47. **TRAP:** It is now much more difficult to urgently issue an application and get before a Judge in the Central Family Court due to gatekeeping. It is necessary to persuade the person behind the court issuing desk that it is an urgent application and that it is necessary to see a judge immediately. Ensure that you attend before 3.15pm and make sure you attend with a persuasive covering letter so that if the court worker takes it to a judge, the judge can be persuaded on the paper to make the order you seek.

After the application is made

48. After the application is made and prior to the first hearing (which should be within 4---6 weeks of the application having been issued), Cafcass are required to identify any safety issues, in line with the Revised Private Law Programme.

49. In practice, this means that Cafcass will carry out checks of local authorities and the police. They should also carry out telephone risk identification interviews with the parties, but are restricted to discussing matters of safety, and not the substantive issues in the case. Cafcass should not initiate contact with the child prior to the FHDRA.

50. At least 3 days before the hearing the Cafcass officer is required to report the outcome of the risk identification work to the court in the form of a short report called a Schedule 2 report. In practice, often the telephone risk identification interviews take place at Court by the Cafcass officer and the Schedule 2 report is completed at Court.

51. **TIP:** In my experience Cafcass often do not manage to complete the safeguarding in advance of the FHDRA. Ask your client in advance of the hearing if he/she has heard from Cafcass. If they haven't try and chase the issue in order to avoid the risk of the FHDRA being adjourned.

The First Hearing Dispute Resolution Appointment ('the FHDRA')

52. It is necessary to be familiar with the Revised Private Law Programme, at Practice Direction 12B of the FPR 2010, which sets out in detail the matters that the Court must consider at the FHDRA.

53. The parties and the Cafcass officer (along with a mediator at some courts) will attend the FHDRA. This hearing is not privileged.

54. The Practice Direction requires that where possible the Cafcass officer should speak to the parties separately at court and prior to the hearing. However, in many courts the practice is that the judge sitting with the Cafcass officer will see the parties first of all and the Cafcass officer may then see the parties separately (this is usually the case in the Central Family Court).

55. **TIP:** Be prepared in advance of the FHDRA.

56. **TRAP:** Some FHDRAs are now listed before a legal advisor (for example the West London family court). Make sure you advise your client of this because it means not very much can happen at that stage as legal advisors are not the decision makers.

57. The court must consider the following matters at the FHDRA:

(a) Safeguarding and fact-finding considerations

i. The court must inform the parties of the results of the checks carried out by Cafcass and consider whether a risk assessment is required and whether a fact---finding hearing is required to determine any allegations which are likely to affect the court's decision.

ii. **TRAP:** The Court cannot allow an order to be made by agreement or an application to be withdrawn unless both parties are at court, the initial safeguarding checks have been obtained and the Cafcass officer has spoken to the parties separately. The importance of the safety checks is emphasised in judicial training and no welfare decision can be made without them.

iii. **TIP:** It is important to establish at an early stage with your client whether you are contending that domestic abuse is a relevant consideration. If it is, consider whether a separate fact---finding hearing is necessary or whether it can be combined with the final hearing of the substantive issues. Consider whether evidence from the police and/or health services is necessary. If police evidence is necessary, follow the Police Disclosure Protocol in the first instance.

iv. When considering whether a separate fact---finding hearing is necessary, regard must be had to the President's Practice Direction of 14th January 2009 (set out in full at PD12J of the FPR 2010) and also to the President's Guidance on split hearings of May 2010. The May 2010 Guidance provides that it will be a rare case in which a separate fact---finding hearing is necessary.

v. **TIP:** Although *Re L; Re V; Re M; Re H (contact: domestic violence)* [2000] 2 FLR 334 requires the courts to take domestic violence seriously, most judges are now much more reluctant to list a separate fact---finding hearing, not least due to the significant delays involved.

(b) Dispute resolution

i. At the FHDRA the Cafcass officer (and possibly mediator) will seek to conciliate and explore with the parties the resolution of some or all of the issues. The court will actively consider whether the proceedings should be adjourned to allow the parties to attend mediation, where this looks to be a viable option, and the court will further consider whether the parties would be assisted by attending a Separated Parenting Information Programme ('SPIP') under section 11.

ii. **TIP:** Make sure you know what actually happens on a SPIP so that you can advise your client. Parties do not attend together. **TRAP:** a SPIP is only free if Cafcass directs it so make sure you include it in the order.

iii. **TIP:** Know what the provisions are for supported and supervised contact in your region – go and look at the facilities. More persuasive if you can say X centre has these opening hours, these provisions and costs X.

(c) Consent orders

i. Where an agreement is reached, the court must scrutinise that agreement before approving any order. The court may defer any order and adjourn the matter for up to 28 days while any safeguarding checks or risk assessment remains outstanding.

ii. **TRAP:** Even if there is an order agreed between the parties and neither raises any welfare concerns the court will still not approve the agreement until the safeguarding is complete. Remember to advise your client of this to manage expectations.

*(d) **Reports***

i. It is necessary to consider whether there are any welfare issues or other considerations which should be addressed in a report by Cafcass or the Local Authority. If a report is ordered, it should be directed towards specific issues and the court should state in the order the factual and other issues that are to be addressed.

ii. **TRAP:** It is important to consider whether a section 7 report really is necessary. Are there any welfare issues or issues concerning the children's wishes and feelings that require a report? Bear in mind that there will be a substantial delay before a report can be produced (typically 16 weeks and longer in some areas) and Cafcass have limited resources so the Court is unlikely to order a section 7 report unless there are genuine reasons for doing so. Sometimes it will be appropriate to simply list the matter for a Final Hearing in circumstances where parents cannot agree and there are no welfare concerns.

iii. **TIP:** It may, in some cases, be more appropriate for the Local Authority to produce the section 7 report, for example if they have already had significant involvement with the family. This is often considerably quicker. If the funds are available for the parties to pay privately, an independent social worker is likely to be able to report much quicker.

iv. **TRAP:** The court must consider whether there is a need for an investigation by the relevant local authority under section 37 of the Children Act (to consider whether it is necessary to instigate care proceedings). Client's who allege abuse and risk of harm to the child should be warned that the Court can order a section 37 report of it's own initiative.

v. The court will also need to consider whether any expert evidence is required. Do you need drugs/alcohol tests? Psychiatric or psychological reports? An independent social worker? What would the costs of those reports be? If you are likely to be requesting an expert report you must comply with the requirements of Practice Direction 25C of the FPR 2010 in preparation for the FHDRA (see below for details in relation to Part 25).

(e) Wishes and feelings of the child

i. It is necessary to consider how the wishes and feelings of the child are to be ascertained (if at all). This can be done at an early stage if the child is aged 9 or above, at which age they are usually invited to attend the FHDRA and speak with Cafcass away from both parents. Otherwise wishes and feelings can be ascertained as part of a full section 7 report, or by way of a (quicker) wishes and feelings report which involves only a short meeting with Cafcass, and no overall assessment of the merits of the application itself.

ii. It is also important to consider whether the child needs to be separately represented and joined as a party. Separate representation of children can be ordered where it is in the child's best interests (rule 16.2(1)), and guidance is given at FPR 2010 Practice Direction 16A, paragraphs 7.1 to 7.5, as to when this may be appropriate. 7.2 is as follows:

The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order:

(a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;
(b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;
(c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
(d) where the views and wishes of the child cannot be adequately met by a report to the court;
(e) where an older child is opposing a proposed course of action;

(f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;

(g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;

(h) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of an officer of the Service or Welsh family proceedings officer;

(i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;

(j) where there is a contested issue about scientific testing.

(f) Case management

i. The court must consider what issues are agreed, what are the key issues to be determined, and what other directions may be required to get the case ready for a full hearing. Aside from expert evidence and Cafcass involvement as discussed above, it is likely to be necessary to have statements from the parties, and potentially from any other third party witnesses.

ii. **TIP:** Consider in advance whether you think it would be helpful for the author of a report to have statements from the parties in advance of completing the report or whether it is the sort of case where statements will only be necessary if the matter cannot be resolved at the DRA and proceeds to a final hearing. For example where wishes and feelings are in issue it is usually best to have the report first whereas with cases involving allegations of abuse you may want Cafcass to have the allegations set out in detail before a report is undertaken.

iii. **TRAP:** remember statements tend to increase the heat in proceedings.

iv. **TIP:** Consider whether documents from previous/concurrent proceedings should be disclosed in the children proceedings and seek permission to do so.

v. The court must further consider whether there are any interim orders which can usefully be made. This might involve orders for supervised, supported or indirect contact. **TIP:** It is useful therefore to have made enquiries of contact centre availability prior to coming to court (particularly if you are acting for the party seeking contact at a contact centre as it will then reduce the delay before your client can have contact). It may be necessary in some cases to ask the court to list an interim contact hearing where matters have not been capable of agreement at the FHDRA.

(g) Transfer

i. The Revised Private Law Programme provides that the County Court should transfer the application to the Family Proceedings Court unless one of the following exceptions applies (Allocation and Transfer of Proceedings Order, articles 15 and 16). Some courts are more proactive as regards transfer than others, but it is useful to have your arguments in order on this point before going to court:

   (a) The proceedings can be determined more speedily in the County Court;
   (b) there is a real possibility of difficulty in resolving conflicts in the evidence of witnesses;
   (c) there is a real possibility of a conflict in the evidence of two or more experts;
   (d) there is a novel or difficult point of law;
   (e) there are proceedings concerning the child in another jurisdiction or there are international law issues;
   (f) there is a real possibility that enforcement proceedings may be necessary and the method of enforcement or the likely penalty is beyond the powers of a magistrates' court;
   (g) there is a real possibility that a guardian will be appointed;
   (h) there is a real possibility that a party to proceedings is a person lacking capacity within the meaning of the Mental Capacity Act 2005 to conduct the proceedings; or
   (i) there is another good reason for the proceedings to be transferred.

ii. **TRAP:** Sometimes a District Judge is desired because in practice they tend to take a more robust approach and are braver in terms of disagreeing with Cafcass'

recommendations etc. However, remember unless there is a good reason to transfer it is difficult to seek to transfer from the magistrates to a District Judge. The Courts are increasingly keen to keep private children disputes before a lay bench. The client needs to be advised of this.

The order at the FHDRA

58. The order should set out:
    (a) The issues about which the parties are agreed;
    (b) The issues that remain to be resolved;
    (c) The steps that are planned to resolve the issues;
    (d) Any interim arrangements pending such resolution, including arrangements for the involvement of children;
    (e) The timetable for such steps and, where this involves further hearings, the date of such hearings;
    (f) A statement as to any facts relating to risk or safety; in so far as they are resolved the result will be stated and, in so far as not resolved, the steps to be taken to resolve them will be stated;
    (g) If it be the case, the fact of the transfer of the case to the Family Proceedings Court with the date and purpose of the next hearing;
    (h) If it be the case, the fact the case cannot be transferred to the FPC and the reason for the decision;
    (i) Whether the parties are to be assisted by participation in mediation, Parenting Information Programmes or other types of parenting intervention and to detail any contact activity directions or conditions imposed by the court.

59. New CAP pro---forma orders have been issued called "CAP Master Orders" (you should have one attached to this hand---out – please do not hesitate to email me if you are unable to find the pro--- formas online and I will send them to you) – fortunately they are less clunky than the previous CAP forms!

60. **TIP:** Try to draft the order at Court with the other side at Court. This will save time and costs and if there are any drafting issues the Court can be asked to adjudicate on those issues.

PART 25 APPLICATIONS FOR EXPERT EVIDENCE

61. *Re C (A child) (Procedural Requirements of a Pt 25 Application)* [2015] EWCA Civ 539, the Court of Appeal sets out the statutory framework and procedure in bringing an application for permission to instruct an expert. Ryder LJ and Aikens LJ emphasise that section 13 of the Children and Families Act 2014 and Part 25 FPR 2010 now lay down firm statutory and procedural rules that must be applied in respect of expert evidence in family proceedings. It is duty of all family law practitioners and the court to learn, mark and digest these provisions and ensure they are applied rigorously.

62. **TRAP:** In children cases an expert cannot be instructed or a child seen by the expert without permission of the court.

63. The test for permission (FPR 25.4(3)) has changed from 'reasonably required' to 'necessary to assist the court to resolve the proceedings'.

64. It is necessary to make preliminary enquires of the expert in advance (PD25D 3.2) in good time for the information requested to be available for the hearing at which the Court will consider whether or not to give permission.

65. When Court decides whether to give permission the Court has regard to:
    (a) Any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in rule 25.4(2)(b) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed;
    (b) The issues to which the expert evidence would relate;
    (c) The questions which the Court would require the expert to answer;
    (d) What other expert evidence is available;
    (e) Whether evidence could be given by another person on the matters on which the expert would give evidence;
    (f) The impact giving permission would have on the timetable duration and conduct of the proceedings;
    (g) Any failure to comply with Part 25;
    (h) The costs of the expert evidence.

66. A Part 25 application should be made using the Part 18 application (attaching a draft order) --- it is a form FP2. The application needs to state the following:
    (a) The field in which the expert evidence is required;
    (b) The names of suggested experts;
    (c) The issues to which the expert evidence is to relate;
    (d) Whether the evidence can be obtained from a single joint expert;
    (e) The matters set out in PD 25C and D;
    (f) What the questions for the expert will cover.

67. The following Practice Directions are particularly helpful:
    (a) PD25A deals with experts and assessors in family proceedings;
    (b) PD25B sets out the duties of the expert, the expert's report and the arrangements for an expert to attend court.
    (c) PD25C sets out the detail that applies to instructions in children cases. **TIP:** this PD includes sample questions approved by the Family Justice Council for the instruction of a child mental health professional/paediatrician and for adult psychiatrists

68. **TIP:** The application should be made in advance of the FHDRA. However, if there is insufficient time to file an application notice in advance, inform the court and the other party as soon as possible (if possible in writing) of the nature of the application and the reason for it and provide the Court with as much of the info referred to in FPR 25.7 and PD25D 3.11. Then make an oral application at the hearing. (N.B. An oral application of this kind should be the exception reserved for genuine cases where circumstances are such that it has only become apparent shortly before the hearing that an expert opinion is necessary)

69. **TIP:** Ensure you are as prepared as you can be (with CVs and costs estimates etc) in advance of the FHDRA to argue for an expert. Remember the Court views Social Workers and Cafcass officers as experts.

CONTACT ACTIVITY DIRECTIONS AND CONDITIONS

Contact Activity Directions

70. When the court is considering whether to make an order for contact (or an order varying or discharging a contact order) it may at the same time make a contact activity direction (section 11A(1) and (2) of the Children Act 1989).

71. A contact activity direction is a direction requiring an individual who is a party to the proceedings to take part in an activity that promotes contact with the child concerned (section 11A(3)).

72. Activities which may be required by the court include programmes, classes and counselling or guidance to assist the person in establishing, maintaining or improving their contact with a child, or to address the person's violent behaviour to enable or facilitate contact (section 11A(5)).

73. **TRAP:** A party cannot be required to undergo medical or psychiatric examination or treatment, or to take part in mediation (section 11A(6)).

74. The welfare of the child is again the court's paramount consideration when considering whether to make a contact activity direction (section 11A(9)).

75. A number of restrictions and considerations as to when the court may make such a direction, and against who, are set out in sections 11B and 11E of the 1989 Act. These include, for example, that such a direction can only be made where there is a dispute between the parties on the issue of contact, and only where the activity is in an area to which the individual could reasonably be expected to travel.

Contact Activity Conditions

76. In any family proceedings where the court makes a contact order (or varies a contact order) the contact order may impose a condition requiring an individual to take part in an activity that promotes contact with the child concerned (section 11C(1) and (2)).

77. The court can impose such a condition on an individual if, for the purposes of the contact order, he is the person with whom the child concerned lives, or is to live, or if he is the person whose contact is provided for in the order, or if he is the child's parent or has parental responsibility (section 11C(3)).

78. The activities are the same as for contact activity directions and are set out in section 11A(5), subject to the limits of section 11A(6) regarding medical treatment and mediation.

79. Again, there are some further considerations for the court set out in section 11D and 11E, including that a contact activity condition may not be made against an individual not habitually resident in the jurisdiction.

80. The court can request a Cafcass officer to monitor the individual's progress in respect of a contact activity direction or condition, and to report back to the court on any failure to comply (section 11G(2)).

General Considerations

81. The impetus for a contact activity direction or condition will in most cases come from Cafcass or the court, and it will be rare for a party to make a stand---alone application for such. Usually it will arise in discussions in court, or may be recommended as part of a section 7 report.

82. If in any particular case there is the need to apply for such a direction, then whilst this could in theory be done by way of a C2 application in on---going proceedings, under Part 18 of the FPR 2010, it is likely that the most efficient way to raise this would be directly with the court at the next hearing.

THE DISPUTE RESOLUTION APPOINTMENT

83. The Court will list the application for a Dispute Resolution Appointment ('DRA') to follow the preparation of a section 7 or other expert report, or Separated Parenting Information Programme (SPIP), if this is considered likely to be helpful in the interests of the child. The author of the section 7 report will only attend this hearing if directed to do so by the Court.

84. At the DRA the Court will:

(a) Identify the key issue(s) (if any) to be determined and the extent to which those issues can be resolved or narrowed at the DRA;

(b) Consider whether the DRA can be used as a final hearing (**TRAP:** remember this and be prepared for oral evidence in case there is time for it to be used as a final hearing);

(c) Resolve or narrow the issues by hearing evidence;

(d) Identify the evidence to be heard on the issues which remain to be resolved at the final hearing;

(e) Give final case management directions including:

i. Filing of further evidence;

ii. Filing of a statement of facts/issues remaining to be determined;

iii. Filing of a witness template and / or skeleton arguments;

iv. Ensuring Compliance with Practice Direction 27A (the Bundles Practice Direction);

v. Listing the Final Hearing.

85. **TIP:** Make the most of a DRA. It is the best opportunity to settle before incurring the costs of a final hearing. It is often helpful to include in the FHDRA order provision for the parties to set out their proposals in Position Statements a few days before the hearing so that there is an opportunity for the parties to digest the proposals and negotiate effectively.

PRACTICAL TIPS FOR DRAFTING STATEMENTS

86. In an application for a section 8 order, statements and other documents upon which a party relies should not be filed or served unless the Court so directs (FPR 2010 rule 12.19), save for when making ex parte applications.

87. If you feel a statement is necessary (e.g. in urgent interim applications) bring copies to court and seek leave to file them on the day.

88. **TIP:** When drafting a statement, the following are useful points to consider:

(a) Use paragraph numbers and headings.

(b) It is helpful if, whenever possible, events are described chronologically.

(c) Throughout drafting, consider the welfare checklist – the welfare checklist can sometimes serve as useful sub---headings to give structure to a statement.

(d) Include sufficient history so as to give court a picture of family life both pre--- and post--- breakdown but keep it focussed and relevant.

(e) If there have been previous proceedings, summarise and explain what has happened since their conclusion.

(f) If particular points against your client are likely to be raised by the other side, deal with them. Recognising and dealing with them early on is more effective than trying to sweep them under the carpet.

(g) Try to use language that would be used by the maker of the statement.

(h) Include the client's proposals (particularly if the statement is drafted after the Cafcass report).

(i) Make sure that your client has read (and re---read) their statement and accepts it as accurate. The statement will stand as their evidence in chief.

(j) After drafting a statement re---read it. Does it tell someone who knows nothing about the case all the relevant and pertinent information they need to know? Is it clear what your client wants and why?

(k) Consider what exhibits may be useful.

89. **TRAP:** If you have obtained narrative directly from the client consider carefully which aspects from the client's narrative needs to be included – often raising issue with every aspect can appear hostile and there is a risk that if a client appears hostile judges will swing further against them than they would if the client had taken a slightly more reasonable approach.

90. **TIP:** If contact is problematic, advise clients to keep a diary. This can be incredibly useful when it comes to drafting a statement perhaps months later as it can form the basis for the narrative and/or can be exhibited as a contemporaneous record. Ensure your client keeps any relevant text messages / emails for the same reason.

91. **TIP:** If your client raises desires to relocate (either internally or externally) try to prepare the basis of a statement in advance of issuing, including extensive research into where the children can go to school, where your client is going to live etc. This is to avoid the risk of getting to a FHDRA, the other side not agreeing to relocation and the Court ordering that a statement is prepared in a short period of time. In relocation cases the statement and research undertaken to produce the statement are very important.

92. **TRAP**: Remember that a party cannot relocate without the consent of all holders of parental responsibility or the permission of the court. Relocating before obtaining consent, or an order from the court, could be seen as a pre---emptive step and there is a risk that the Court at the FHDRA could order a re---instatement of the status quo.

THE FINAL HEARING

93. If settlement has not been possible the matter will result in a final hearing at which both parties will give oral evidence along with the author of any report prepared in the proceedings if necessary.

94. The court is not bound by the recommendation of Cafcass/Local Authority but the recommendation is persuasive upon the court.

95. **TRAP:** It is an uphill battle if the report is against you. It is therefore helpful to go through the report in detail with your client if it is against your client's case in order to try and pick holes in the author's reasoning or point out any inaccuracies/anything they have failed to consider. This can then be used to assist you in persuading the Court that the author of the report has come to the wrong conclusion.

96. **TIP:** If you are asking for a review hearing remember that you will face judicial opposition. It is emphasised in judicial training not to order review hearings.

ENFORCEMENT PROVISIONS AND APPLICATIONS

Warning Notices

97. When the court makes or varies any contact order, it must attach to that order a warning notice, setting out the consequences of failing to comply with the contact order (s11I of the 1989 Act). This is on the new pro forma order at B5.

98. **TRAP:** The warning notice does not apply to contact arrangements set out in a recital to an order, or recorded as an agreement in a Schedule attached to an order. It is important this is remembered when drafting.

99. Where a contact order under section 8 has been made to which no warning notice has been attached, an application can be made (in Form C78) for a warning to be attached, and that application must be made without notice and may be dealt with by the court without a hearing (FPR 2010 rule 12.33). In practice it is unlikely to be determined by a court without giving the respondent the opportunity to reply.

100. Once a warning notice is attached, the order on its face will confirm the potential consequences of a breach:
    (a) An enforcement order (an unpaid work requirement);
    (b) An order compensating the other party for financial loss;
    (c) A fine or committal to prison for contempt of court.

101. It is only where the warning notice has been received by the respondent or he has otherwise been informed of its terms that enforcement proceedings can be brought (section 11K).

Enforcement for breach of contact orders

102. The court has a wide range of powers in the event of a breach of a child arrangements order without reasonable excuse. This range of powers includes (but is not limited to):
    (a) referral of the parents to a SPIP, or in Wales a WT4C, or mediation;
    (b) variation of the child arrangements order (which could include a more defined order and/or reconsidering the contact provision or the living arrangements of the child);
    (c) a contact enforcement order or suspended enforcement order under section 11J Children Act 1989 ('Enforcement order' for unpaid work);
    (d) an order for compensation for financial loss (under section 11O Children Act 1989);
    (e) committal to prison or
    (f) a fine.

103. The court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the order (section 11J(3)). The burden of proof on this issue rests with the person claiming to have reasonable excuse, and the standard of proof is the balance of probabilities (section 11J(4)).

104. Who can make an application for an enforcement order? This can be made by the person with whom the child lives, the person whose contact is provided for in the order, any individual subject to a contact activity condition, or the child himself (with leave).

105. An enforcement order may be suspended for such period as the court thinks fit (section 11J(9)).

106. Sections 11K and 11J of the 1989 Act set out further limitations on the court's ability to make such orders.

107. In particular, before making any order the court must be satisfied that the making of the order is necessary to secure the person's compliance, and that the likely effect of the order is proportionate to the seriousness of the breach (section 11L(1)).

108. The court will also, in most circumstance, have to request from Cafcass a report as to the availability of unpaid work requirements in the respondent's local area (section 11L(2)), and Cafcass will usually liaise with the National Probation Service for this information.

109. The court must also consider the likely effect on the respondent of making the order (section 11L(3)) and obtain information about him or her, including how any order would interfere with his or her employment (section 11L(4)). The court also has to take into consideration the welfare of the child involved, which may be an important consideration where the order is sought against the primary carer (section 11L(7)).

110. Cafcass may again be requested to report to the court on the compliance or otherwise with the enforcement order (section 11M).

111. The court may also make an order requiring an individual in breach of a contact order to pay compensation for financial loss caused as a result of the breach, for example if travel expenses have been incurred and the child has not been brought to contact (section 11O(1)).

112. Again, the court may not make this order where it is satisfied that the individual in breach had a reasonable excuse for failing to comply (section 11O(3)).

113. The amount of any compensation will be determined by the court, but will not exceed the amount of the applicant's financial loss (section 11O(9)), and the court will have to consider the financial circumstances of the person in breach (section 11O(10)).

Procedure

114. An application to enforce a contact order should be made in Form C79, and once made will be listed for initial directions to consider the need for a report from Cafcass and statements from the parties.

115. Enforcement proceedings remain "private law proceedings" and therefore it is once again Part 12 of the FPR 2010 which governs the procedure for service of the application and the filing of evidence (set out above).

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