Behind Closed Doors:

Diluting the Guardian's Independence, Circumventing the Role of the Court

Response of the Association of Lawyers for Children to the Cafcass/ADCS joint document: "*Agreement about how local authorities and Cafcass can work effectively in a set of care proceedings and pre-court proceedings in the English Family Courts*"

The Association of Lawyers for Children is deeply concerned by this latest joint document from Cafcass[1] and the Association of Directors of Children's Services. In putting its name to this document, Cafcass is losing sight of the importance of the independent role of the Children's Guardian in public law proceedings. That independence lies at the heart of what the Guardian service stands for – not least for children but also for parents and families and it is a cornerstone for public confidence in the service. The importance of this was eloquently summed up by the late President Sir Nicholas Wall:

> *I yield to nobody in my view that the guardian's independence needs to be cherished[2].*

We do not dispute that it is essential for guardians and local authority social workers to liaise closely and to co-operate to the greatest extent that their respective roles allow. This Agreement, however, goes far beyond that.

The advice given to guardians in this document by their own Chief Executive is misleading, and may result in guardians neglecting their legal duties under the Children Act 1989 and the Family Procedure Rules 2010. Guardians hold the ring as the independent person in, often bitterly contested, litigation between the local authority and the family. In many such cases the plan is for permanent removal and adoption with no face to face contact. In order to understand how incorrect this advice is, guardians should try substituting the phrase "*the parents*" for "*the local authority*". Imagine guardians receiving advice that they are to try their very best to agree with the family members as to the way forward in order to avoid lengthy care proceedings, even if it is a stretch to bridge the gap.

If we go back to the statutory authority for the creation of Cafcass[3], its core functions include:

> *In respect of family proceedings in which the welfare of children is or may be in question, it is a function of the Service to—*
>
> *(a) safeguard and promote the welfare of the children,*
>
> *(b) give advice to any court about any application made to it in such proceedings,*
>
> *(c) make provision for the children to be represented in such proceedings,*
>
> *(d) provide information, advice and other support for the children and their families.*

[1] CAFCASS stands for Children and *Family Court Advisory and Support Service (emphasis added).*
[2] *A County Council v K & Ors* (By the Child's Guardian Ht) [2011] EWHC 1672 (Fam) at para 112
[3] Criminal Justice and Courts Service Act 2000, s12

It is clear from the wording of the section that Parliament intended that these functions should be exercised in the context of court proceedings. We are aware that this has been extended in relation to the Cafcass Plus scheme. The Agreement goes much further than that by explicitly advocating the brokering by Cafcass of a 'consensus' with the local authority, in which the court is only involved if and to the extent that brokerage fails. The combination of the principle of achieving consensus with the proposed, unregulated, roll-out of the Cafcass Plus[4] scheme, means that there are likely to be situations where the *court* advisory service plays a decisive role in cases that *never* reach court. We cannot imagine that Parliament intended that Cafcass would use the powers given to it to undermine its own independence and, without parliamentary approval, effectively circumvent the role of the court. We are also concerned that the role of parents merits only the briefest mention (in paragraph 16). The emphasis is on agreement between Cafcass and the local authority. The parents are at the centre of child protection proceedings and failure to involve them is likely to infringe their Article 6 and/or 8 rights[5] as well as seriously undermining their confidence in the independence of the guardian. Where Cafcass is involved in brokering a consensus under the pre-proceedings protocol, the parents will of course have only very limited access to legal advice and the child will have none. The parents will be faced with a professional carrying the status and authority of the court, without the procedural safeguards that stem from the court process.

The same is likely to be true of older children if the guardian is perceived to be working with the local authority against what they see as their interests. That also raises the possibility of a breach of Article 12 of UNCRC, if the child considers that their view has not been adequately considered during the discussions leading to the consensus (bearing in mind that many children are represented separately from their Children's Guardian and may see this type of discussion between their guardian and their social worker as a threat). In the absence of their own legal representation, a young person may not even be aware that their future is being decided in this way.

In some cases, the Cafcass officer and the local authority will achieve a consensus, whether before or during proceedings, but the parents will reject it and the court will have to decide. The Cafcass officer, now acting as Children's Guardian, will be placed in the conflicting role of having to scrutinise, and possibly criticise an agreement to which they were a party. Even if they feel able to do this, there is a real risk of the appearance of bias.

We note that the Agreement was produced, so far as we can see, without any consultation with young people, parents, family members, judges and lawyers. This lack of consultation is evident in the way in which the proposals pay no meaningful attention to the positions of the parents and other parties.

More generally, the document appears to be based on a number of what we consider to be erroneous beliefs:

1) *If two different people are given the same training and the same information about the child and the family, they will analyse that information in the same way and can be expected to come to a consensus. A difference in perspective, legal role, or wider personal and professional experience is irrelevant.*

[4] Cafcass Plus enables Cafcass officers to become involved in cases at the pre-proceedings state.

[5] See the judgment of Munby J (as he then was) in *Re L (Care: Assessment: Fair Trial)* [2002] 2 FLR 730 for an illustration of the consequences of a local authority's failure to act fairly and openly throughout proceedings.

This simply does not reflect reality. Social work professionals may have similar professional qualifications, but they come to the profession from a wide variety of backgrounds and experiences. This guidance implies that it is only the former that counts, whereas in reality our members know that it is the life experience, special interests, and further training and research experience which add to the 'soft skills' that certain social work professionals bring to the case that often make a difference to the outcome. The same is true of lawyers. Achieving the kind of consensus that the Agreement envisages is likely to mean stripping away all the products of that additional expertise and relying on a much narrower evidence base than is available to an experienced social worker. This pared-back approach will work in some professional disciplines but not in social work, which is well-known for not seeking to produce 'right answers'.

We note the final sentence of paragraph 11, which states that differences of opinion are not to be considered as failure. The fact that this has to be expressly stated shows just how far the Agreement goes in creating an expectation of consensus and implies that, while not amounting to failure difference of opinion is undesirable: research evidence does not support that approach – indeed attention to differences of view, for example, regarding parental capacity to change, has resulted in substantial changes in outcomes for children. Difference of opinion should be an expected feature of the relationship between social worker and guardian: that is a key feature of the work and added value of children's guardian. In many cases, the social worker and guardian will be in broad agreement and that is entirely appropriate where it is based on genuine convergence of opinion – it is not acceptable when it arises from a corporately-led drive towards "*reaching agreement if possible*" (Agreement, Para 15).

The role of Cafcass is to assist the court. The judiciary have long acknowledged that cases concerning the welfare of children do not have right answers and that it is entirely appropriate for different judges to disagree – that is why appeal courts speak of judges having a wide range of discretion, within which disagreement is possible without the appeal court needing to interfere. We do not understand, therefore, why two social workers (one of whom is acting without the benefit of legal advice at the pre-proceedings stage) are expected to come to the same view when two judges, presented with the same evidence, are not.

2) *Local authorities are focused entirely on the welfare of the individual child and are free from systematic or unintended bias, from the tensions of managing shrinking budgets, increasing demand, and an inexperienced and unstable workforce.*
Again, this simply does not reflect the experience of our members or research. People would not go into social work with children and families if they did not want to secure the best outcomes for children, but it is naive to assume that they invariably achieve this. Workers sometimes simply make mistakes. More often they may have overlooked a key part of their enquiries such as locating and speaking to family members. In most cases they are constrained by lack of resources (human as well as financial) or other priorities. The average working life of a child protection social worker from qualification to leaving the profession is now only eight years (this compares poorly with the experience and additional expertise of guardians and ISWs at the top of their field). In many cases, there is a succession of agency social workers for the child during the life of the proceedings. Our members have worked

with social work teams where the only person not in the supported initial post-qualification year is the team leader. We have never needed the experience and consistent presence of senior independent guardians more.

3) *The most efficient way of conducting proceedings involving the most vulnerable children in society is to start by assuming that the most powerful party is right, try and find a way of agreeing with them, and only if that exceeds the bounds of plausibility should the guardian actually contribute some thought of their own or advise the court that some independent investigation/assessment is necessary.*
This is strongly-stated, but it reflects our view of the proposals. Whether in court or in pre-proceedings, the local authority is in the most powerful position. It is therefore highly dangerous to tell the Cafcass officer prior to his/her appraisal of the work of the local authority that agreement with the local authority is the best outcome. Officers are bound to feel disempowered and unable effectively to challenge the local authority.

The reference to the 'team around the child' is unhelpful. 'Team around the child' is a term of art:

> *TAC is a model of multi-agency service provision. The TAC brings together a range of different practitioners from across the children and young people's workforce to support an individual child or young person and their family. The members of the TAC develop and deliver a package of solution-focused support to meet the needs identified through the common assessment.*[6]

It is clear from this definition (e.g. the reference to the Common Assessment Framework) that the Team Around the Child concept is not relevant to cases that have reached the level of intervention where Cafcass is involved. It is at that point that the independence of the guardian is crucial.

4) *There is a 'right' answer to the question of how best to plan for the future of a vulnerable child's life. There is no room for pluralism.*
As we say above, there is rarely a single 'right' answer to a question about a child's welfare. The role of the court, assisted by the parties, is to try to find the answer that best meets the child's welfare needs. That will often involve evaluation of such factors as risk and parental capacity to maintain change and a proper assessment of the potential to care for a child of any extended family member. That involves a large element of judgment and the use by professionals of the widest possible range of knowledge, experience and expertise. This will, and *should* when appropriate, produce differences of view. We would like to contrast the words of paragraph 16 of the Agreement:

> *It would be unusual if an agreed evidence base led to different conclusions about the way forward...*

with the words of Sir Nicholas Wall P in the case cited above:

[6] *The team around the child and the lead professional: A guide for managers* Children's Workforce Development Council p28.

106. In my judgment, there is nothing unhealthy or wrong about a disagreement between professionals in care proceedings. As I have already stated, there is frequently no unequivocally right answer in such cases. .., a court will often welcome an elaboration of the issues, and the fact that two different minds have reached different conclusions on the same set of facts is not a matter of criticism.[7]

5) *'Gaps' in assessment should be bridged (i.e. moved beyond, leaving the gap in existence) rather than filled.*
   This concern arises from paragraph 14 of the Agreement, which appears to suggest that the guardian has the option of identifying '*clear gaps in the assessment*' and the local authority has the option of filling the gap (bearing in mind research evidence indicates that limited resources (expertise/capacity) in children's services may preclude it filling the gap). Presumably, if one party or the other does not/cannot take up the option available to them, the gap will simply remain at the point that the parties attempt to '*reach agreement if possible'* (Para 15).

6) *Differences in opinion or analysis should be resolved outside the court process, where possible, to avoid the court's requirement for neutral oversight or the just inclusion of all parties.*
   This is betrayed by paragraph 16 of the Agreement. Having said that differing conclusions should be '*unusual*' any differences that do occur should be resolved '*before referring the issue to the court'*. We have no objection to guardians discussing cases with social workers and, where there is a genuine meeting of minds, reaching agreement. To say, however, that this must always happen whenever possible is to put pressure on professionals to achieve consensus, even if by doing so they risk losing sight of the best interests of the child and in the absence of robust evidence of the capacity of parents to change/potential of wider family members to care for children.

7) *A set of guidelines that is highly suggestive of collusive attitudes and practices, worrying levels of interdependence and a lack of understanding of due process, can be saved by simply stating 'but everything needs to be independent and fair' at the end.*
   The Agreement refers at several points (e.g. paragraphs 8 and 11) to the independence of the guardian but this is generally as a qualifying statement (e.g. Para 8) or is itself then heavily qualified (e.g. Para 11 '*It is important to recognise that the independence... However, it is in the best interests of the child for the guardian to fully engage...*'). The references to independence smack of lip-service, while it is clear that that the thrust of the Agreement is pushing for consensus-building. At no point does the Agreement state how independence is to be attained, demonstrated – and open to challenge.

Guardians are specialist social workers with a unique socio-legal role and legal status. They are not merely offering a further social work opinion on the merits of the local authority's evidence and care plan. They are both the voice and the ears of the child in court, and also the "eyes and ears" of the judge. They must carry out their own independent

[7] In that case, the disagreement was between the Guardian and her manager, but the point applies with equal force to disagreements between local authorities and Guardians.

investigation of the family and the child. This does not mean duplicating the local authority's assessments (and that suggestion in the Agreement text is at best unhelpful, and severely out of date as an indication of what guardians now do), but it does mean taking an independent framework to the case, undertaking a critical analysis based on a sufficiently in-depth knowledge of the child and family to be able to form an independent view. The task is not to find a consensus with the local authority, who often get it wrong (almost half of all care proceedings do not conclude with care orders). Their job is to scrutinise the actions and evaluations of the local authority, as well as to understand the actions and dynamics of the family, and their impact on the individual child. They are appointed by the court to represent the child in litigation. Their primary duty is to advocate fearlessly for the child to the court – in the words of one extremely experienced guardian, '*to stick their noses in and their necks out'*.

The Blair administration's Cabinet Review on Adoption (July 2000 – i.e. shortly before the creation of Cafcass) noted that parents and their lawyers felt that many guardians were too local-authority minded, seeing things too much from a social work perspective. Fifteen years on, that perception remains in the minds of many parents. An agreement that directs guardians to try to agree with local authorities whenever possible is bound to give it substance.

In 2010, the NAGALRO survey "Time for Children found that:

"Some of the case examples in the survey indicate that the local authority case was being accepted uncritically, raising the fear that the wrong decisions may have been made and the options for the child not fully explored." (para 1.2) One of the more alarming aspects of this way of working is the extent to which it undermines the role of the court. Under this system, some cases will not reach court at all and, in others, issues that ought properly to be aired before the court will be settled outside between professionals with no legal oversight by lawyers for children. The reduction in the number and cost of care proceedings will appeal to many who have little knowledge of the role of the court and the essential features of the court process (in terms of equality of arms of parties, and due process) and rights of children to independent welfare and legal representation. It also flies in the face of transparency and public accountability for actions and decision making by the state where children are likely to be removed from their birth families.

The ALC is concerned that, in entering into this agreement, Cafcass, which was originally created by Parliament to support the independent role of guardians in supporting the work of the court, does not respect their independence and professional autonomy, or the fact that they owe their primary duty to the children they represent and to the court, rather than to Cafcass. That independence is their core value – to children, their families and to a democratic society……

The Association of Lawyers for Children (the ALC) is a national association of lawyers working in the field of child care law. It has over 1200 members – mainly solicitors and barristers, who represent children, parents and other adult parties and also local authorities; membership also includes other legal practitioners and academics. Its national Executive Committee members are drawn from a wide range of experienced practitioners in England and Wales with leading members also lecturing and writing leading texts on child law; several hold judicial office. The ALC exists to promote access to justice for children and young people through a range of activities (see http://www.alc.org.uk). It is an automatic

stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

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