Association of **Lawyers for Children**

Promoting justice for children and young people

Practice Guidance:
Standard Family Orders

Consultation, dated 13.3.18
This response dated 16.4.18

Response of the
Association of Lawyers for Children

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Details: The Association of Lawyers for Children (hereafter "ALC") is a national association of lawyers working in the field of children law. It has over 1,000 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children law, and hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

i. lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;

ii. lobbying against the diminution of such mechanisms;

iii. providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;

iv. providing a forum for the exchange of information and views on the development of the law in relation to children and young people;

v. being a reference point for members of the profession, governmental organisations and pressure groups interested in children law and practice; and

vi. funding or co-funding research where we perceive gaps in knowledge or evidence relating to changes in policy and practice in children proceedings.

The ALC is a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law, and welcomes this opportunity to provide its views in respect of the fostering system in England and Wales.

The ALC welcomes this opportunity to comment on this second batch of proposed standard orders. We did not respond to the consultation in relation to the first batch of orders, which related primarily to financial matters, because the subject matter falls outside our area of expertise. In relation to this consultation, we propose to make some brief general comments and then some specific comments about a

number of the proposed orders. In doing this, we will concentrate on public law Children Act proceedings, which represent our core business.

In general, we welcome the move towards having a menu of standard orders that can be used in the majority of cases, while always acknowledging that there will be some cases that need bespoke drafting. That said, we are concerned that some of the orders, especially the case management orders for public and private law (7.2 and 8.2) are now too extensive to be usable. It is not realistic to expect practitioners to work from a 20+ page/130 paragraph draft for every hearing, bearing in mind that most of the directions contained in the draft will not apply in most cases. As things stand, practitioners generally still have to work from printed copies of the forms, which at this length will be too unwieldy. In relation to public law proceedings, the burden will fall primarily on those who represent local authorities. We understand that some members of the Bar who do a lot of work for local authorities and who already spend a great deal of time drafting orders are concerned that the additional burden may make local authority work (which is not well-paid at the best of times) completely uneconomic.

Another disadvantage of the use of this form of order, when compared with the existing CMO, is that the organisation of the paragraphs means that the various directions will not run in chronological order. This makes the order more difficult to follow and increases the likelihood of key tasks being overlooked.

We are aware that, some years ago, members of the judiciary were provided with template orders; we believe this was initially in civil work and later in family. As we understand it, those templates were in the form of macro enabled Word documents. The order could be assembled using a series of pull down menus. Once the required selections had been made, for example in relation to number of parties, allocation to track, dates for filing etc, the macro would automatically generate the order. We think that it is necessary at least to consider making the longer forms available in that type of format. We fully understand that creating and testing documents of that type takes time and expertise, both of which are at a premium, but we think it is a necessary part of the approach that these standard orders represent..

We are pleased to note that the orders are generally drafted using plain language, for example “send to the court and to all the other parties” instead of “file and serve”.

This is important because, while parents are still generally represented in care proceedings, they are increasingly unable to secure representation in other forms of public law proceedings.

We see the benefit of consistency in drafting and, to this end, we would propose that there be an annex to which practitioners can refer if they need guidance on wording for specific paragraphs. For example, the proposed paragraphs 3 and 4 in respect of jurisdiction. In financial proceedings, there is (or was) an omnibus for final orders which is very useful and to which one could refer as needed (e.g. for specific wording for a pension sharing arrangement). A similar system could usefully operate for care practitioners, where there is a standard CMO and then a separate omnibus with set wording for other matters that crop up from time to time. For example, having defined wording for inviting the Official Solicitor, as per para 25 onwards, would certainly be useful.

Comments on specific orders

8.1

Paragraph	**Comment**
21(b)	The response document is intended to be filed in the first few days of the proceedings. While asking the parents to respond to threshold at this stage is now a well-established practice, asking them to form a view on the need for a final care or supervision order, when only limited evidence is available, is premature and unfair to parents who may be giving instructions on the first occasion that they have met their legal adviser.
28	The blanket prohibition on disclosing any information is different from the detailed provisions of FPR 2010 r12.73 and PD12G and is likely to cause confusion. It should refer to the Rule and PD.
37	The paragraph could usefully incorporate the form of production order put suggested by HHJ Sarah Davis in the case of *Re Z (A Child: Production Orders)* [2017] EWFC B92

	(http://www.bailii.org/ew/cases/EWFC/OJ/2017/B92.html). That order addresses the particular requirements of the relevant Prison Service Instruction and is intended to overcome some of the difficulties that courts have encountered with getting prisoners produced..

8.2

Paragraph	**Comment**
4	The proposed paragraph requires the local authority to make enquiries, but there is no provision for it to share the outcome of those enquiries with the court, or for the court to consider the implications of them.
6	In this paragraph, and in several other paragraphs throughout the order, there is reference to inserting the date of the next hearing. This should be expanded in each case to include both the date and time of the hearing.
13	Not all police forces require the details of the power of arrest to be given to the Domestic Violence Unit. It may have to go to a unit with a different name or possibly to the force control room. Local authorities generally know whom to contact in their local police, so the order should simply require the local authority to inform the relevant police force and leave it to them to contact the right department..
16	As we understand it, it is only possible to secure a change to the birth certificate if a formal application has been made under s55 Family Law Act 1986. If that is correct, then simply including a declaration in a CMO will not suffice and will lead to the need to make a further application.
18(d)	When local authorities send letters before proceedings, they generally include a list of local solicitors who are members of the Children Accreditation Scheme, to assist the parent in obtaining legal advice. It would be sensible for the local authority to be

	required to do the same in relation to a proposed intervener.
22	In many cases where capacity assessment is required, it is foreseeable that adoption may be one of the realistic options for long-term planning. In that context, it may be prudent to direct that the capacity assessment should also include capacity to consent to placement for adoption and/or the making of an adoption order. We refer to the case of *Re S (Child as parent: adoption consent)* [2017] EWHC 2729 (Fam) Cobb J for an illustration of the importance of distinguishing between litigation capacity and subject matter capacity in this context.
29(h)(ii)	This paragraph does not provide for who will pay for the cost of the transcript that is to be provided.
31(c)	The report from the Guardian on the issue of the child giving oral evidence should include consideration of whether any specialist assessment is required before the court can decide whether the child should give evidence.
34(c)	The paragraph requires the parents to include in their response documents their proposals for the long-term care of the children. These response documents are normally filed at a very early stage in the proceedings, at which time the short-term arrangements may well not have been settled. The order should make it clear that, where short-term care has not been resolved, then the parents must address it in their responses. We note that paragraph 21 of Order 8.1 includes this and suggest that it should be included here also.
35	This paragraph proposes that, if the parents do not respond to threshold, then they will be deemed to have accepted the basis of threshold put forward by the local authority. This is the language of civil proceedings and smacks of a default judgment. Determination of threshold, even if not disputed by the parents, is a matter for judicial determination. Instead of “accept”, the paragraph should refer to “do not dispute”.
37(a)	We are not convinced that the court has power to direct a local

	authority to pay legal costs that to be incurred by someone who is not a party to the proceedings. The current practice is often for the order to recite that the local authority has agreed to pay for advice, alternatively that the court considers that it should do so. We note that this paragraph uses the word "will" where is everywhere else in the document the imperative words "shall" or "must" are pretty much universal. We wonder whether this suggests that whoever drafted the paragraph may share our doubts?
37(b)	"Kinship" is a loose concept that covers a multitude of different arrangements. If this paragraph is intended to identify, as examples, the most commonly-used legal frameworks then it should refer to "special guardianship or connected person foster care". The latter expression is drawn from the Care Planning, Placement and Case Review Regulations 2010 and is therefore more precisely defined.
38(a)	As above, the notification should include a list of local solicitors who are members of the Children Accreditation Scheme.
39	These provisions of the order appear contradictory. The paragraph starts by directing that the local authority "shall forthwith" convene a conference, then it is to explain why it is not going to do so. If the intent is that the local authority shall *consider* whether to hold a conference and, *if appropriate*, hold one then it will be better to be explicit about this.
43	The reference to permission to apply to set aside the order should say "set aside or vary". In many cases the Hospital will wish to withhold specific information, or to have more time to disclose, rather than object to disclosure taking place at all.
45	It is not clear how this paragraph should be read alongside rule 24.3(2), which requires a party to obtain permission to issue a witness summons in certain circumstances. The wording of this paragraph could be read as implying that permission has already been granted, whereas presumably the court will want to consider the circumstances of the reported non-compliance before deciding

	whether to go to the lengths of issuing a witness summons against a public body.
46	This paragraph refers to disclosure of proceedings that have happened in the Family Court. The same could also apply in relation to previous proceedings in the Family Division.
63	This paragraph does not appear to take account of the judgment of Anthony Hayden QC in *Re F (Children)(DNA Evidence)* [2007] 3235 (Fam). In that case, the court held that DNA testing is not covered by section 38(6) CA 1989 and can only be ordered under section 20 Family Law Reform Act 1969. Assuming that that judgment is correct, then the order for DNA testing should refer to the 1969 Act. The court in that case also said that specific permission is needed for the sample to be taken from the child. The paragraph as drafted appears to imply that this can be done, because it says that the child shall be subjected to testing, but it does not specifically give permission for taking samples. The significance of this point in that case was that the initial sampling went wrong and repeated samples were taken from the child without the court being made aware..
67	This paragraph is headed "Section 38(6) assessment". The contents however appear to relate almost exclusively to residential assessments, which are no more than a subset of the assessments that can be ordered under section 38(6). It will be easier to follow if the heading was changed to "Residential or similar assessment under s38(6)"
75	While the primary focus of a sibling assessment is whether the children should be placed together, it should also address their needs for ongoing contact in the event that they are not placed together.
84	Paragraph 82 provides for parents to file position statements as an alternative to evidential statements. It would be appropriate to add a further paragraph after 84, providing the same option for the Children's Guardian

105-106	This paragraph is confusing. It is not clear whether the expression "special guardianship assessment" is referring to the report prepared for the court under regulation 21 or to the assessment for special guardianship support prepared under the Special Guardianship Regulations 2005. If it is referring to the former, then the local authority does not have the option of deciding not to carry out the assessment. If it is referring to the latter, then we are not sure that the Family Court has power to order the local authority to carry out a support assessment - that would be a matter for the Administrative Court. The Family Court could, of course, decline to approve the care plan in the absence of a support assessment, but that is not the same as making an enforceable order for it to be completed.
113	The inclusion of the 4pm deadline for the ADM decision is inappropriate. The ADM decision is not a step in the proceedings. In practice, the ADM is usually a senior manager within the local authority, who will be scheduling a meeting to discuss the case as part of a busy working day. Restricting the time of day when they can do this is onerous and, because it is not a step in the proceedings, unnecessary
.116e	We can see that, from the court's point of view, a combined care and placement report would be acceptable, but our understanding is that Cafcass policy is to prepare separate reports in any event, so this provision would appear to be redundant (we will of course defer to Cafcass if they say otherwise).
116	FPR Rule 14.16(7) provides that the court may direct that the child need not attend the final hearing. It would be sensible to include this in this section of the order, for the avoidance of doubt.
119	If it is desired to assist parallel planning by allowing family finding to begin, then the order needs to permit disclosure of information to agencies whose functions include family finding. We are aware of one court which gives permission in the following terms: 1. In the event that the plan for the Child/ren has been approved as one of adoption by the Local Authority Agency Decision Maker, permission is

	given to the local authority where appropriate to : a. Disclose any composite Child's Permanence Report/ Rule 14 Report, to any prospective adopters as part of the family finding process. If the report is disclosed before the making of any placement order, the names and addresses of the parents and children shall be removed. b. send anonymous details and a photograph of the child to 'Adoption Link' for publication in 'Be My Parent", c. send anonymous details and a photograph of the child to the Local Consortium of Adoption Agencies for publication. d. send anonymous details and a photograph of the child to the National Adoption Register for publication. This is on the basis that in order to prevent unnecessary delay in the planning for the child, it is appropriate to take either or all of these steps in order to identify potential suitable adopters for the child as soon as possible.

8.3

Paragraph	**Comment**
Heading	The heading refers the Adoption and Children Act 2002. Exclusion Requirements are made under s38A CA 1989, not under ACA 2002, so this part of the heading can be omitted.
	This type of order will invariably need a penal notice. To avoid the risk of an order being issued without a penal notice, it should be included in the template. One of our members had a recent experience of a DFJ giving directions for committal proceedings without realising that the order being enforced did not have a penal notice.
5	We refer to the point made above in relation to the requirement to serve on the police Domestic Violence Unit.

8.4

Paragraph	Comment
Heading	The heading refers the Adoption and Children Act 2002. Secure Accommodation Order are made under s38A CA 1989, not under

	ACA 2002, so this part of the heading can be omitted.
4, 7	The reference to "other *suitable* secure accommodation" is confusing. The accommodation has to be *approved* by the Secretary of State under regulation 3 of the Children (Secure Accommodation) Regulations 199. "other approved secure accommodation" would be more appropriate.

Association of Lawyers for Children

16 April 2018