WHAT ON EARTH DO I DO NOW?

A practical guide to the changes in the family division since 22nd April 2014

1. The Child Arrangements Programme
2. The short procedure for Schedule 1 claims and variation applications
3. Bundles

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A Lecture for Winckworth Sherwood

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The Child Arrangements Programme

Under the Children and Families Act 2014 we now have child arrangements orders, to replace residence and contact. s8(1) of the Children Act 1989 as amended provides for child arrangements orders to mean:

a) With whom a child is to live, spend time or otherwise have contact;
b) When a child is to live, spend time or otherwise have contact with any person.

So, whilst we no longer have contact orders, the word contact is still in use but beware when drafting orders as judges are trying to avoid using it where possible.

The statutes and statutory instruments governing the changes:

1. Child and Families Act 2014
2. Practice Direction 12B – The Child Arrangements Programme
3. Practice Direction 12J – Child Arrangements and Contact Order Domestic Violence and Harm

A Change of Ethos:

The focus is now very much on using non-court dispute resolution (N.B: no longer alternative dispute resolution) to settle matters and on the court intervening only to resolve the dispute which cannot be resolved away from the court, and then bowing out.

Whereas Baroness Butler-Sloss introduced the Private Law Programme which dealt with cases from issue to FHDRA, this is the next step, designed to run from start to finish and keep control of cases throughout. The aim is to be practical and the Child Arrangements Programme (PD12B) is designed to keep a case on track.

How has it changed on the ground?

1. s12 C&FA 2014: Residence and contact have now been replaced with Child Arrangements Orders
2. s10 C&FA 2014: Before making a relevant application the applicant "*must*" attend a MIAM
3. s11 C&FA 2014: There is a presumption that both parents will be *involved* but not that there will be shared care
4. CAP01 – CAP04: There are now precedents to assist with drafting at the appropriate stages. Whether or not they are helpful remains to be seen.
5. Change of vocabulary: This is helpfully set out in the glossary annexed to CAP.
6. C100 has changed.

THE CAP TIMELINE

CAP 2: On breakdown, parties are advised to seek advice ASAP

- 2.3: a list of all the services available (designed for LiPs)
- 2.4: The Parenting Plan: parties are encouraged to draw up a parenting plan, which should be annexed to any application if agreement cannot be reached

When dealing with litigants in person, it may well be worth referring them to CAP, particularly section 2 which provides the list of resources and also to the glossary of terms annexed to CAP.

CAP 5: The Requirement to Mediate

s10(1) C&FA 2014 makes this a requirement prior to making an application.

Whereas previously parties were encouraged to mediate, they now *must* do so [CAP 5.3], unless it is not safe or appropriate [CAP 5.1], in which case the parties can claim an exemption.

The new C100 (see attached) now has a section about a MIAM at section 2 which requires you to declare if a party is claiming an exemption from a MIAM or if a mediator has told them that they are exempt.

Section 13 then provides a long checklist dependent on the circumstances and section 14 is a certificate from an authorised family mediator that a MIAM exemption applies or mediation cannot continue for one of a specified number of reasons. **An application cannot be made without a MIAM unless an exemption applies [CAP 8]**.

The rule of 15: an appointment must be available in 15 working days and within 15 miles of their home. Otherwise the parties may claim an exemption.

Funding: Legal aid may still be available to pay for a MIAM. If neither party is eligible then any charge made will be the responsibility of the party/parties in accordance with any agreement made with the mediator.

Under CAP 6 the court will also consider at every stage whether to put the matter off to non-court dispute resolution and will adjourn matters to do so if necessary. If it does so, the court must give directions about the timing and method by which the parties are to keep the court informed as to developments.

CAP 8: Making an Application (example of the new C100 attached)

- The parties must have attended a MIAM unless an exemption applies.
- A parenting plan should be annexed to the C100 if one exists.
- The application should be processed by the court within 2 working days of issue [CAP 8.7].

- The Court will now serve the Respondent, unless the Applicant requests to do so or the Court so directs [CAP 8.8].
- The Court will serve CAFCASS with the C100 and C1a as appropriate within 2 working days of issue [CAP 8.9]. A safeguarding letter should be received within 17 working days of receipt of the application and in any event not less than 3 days before a hearing [CAP 13].

CAP 9: Allocation and Gatekeeping

At the desk, the court staff will check whether the C100 has been appropriately completed (i.e. the MIAM section completed). If not, it will be passed back. If so, it will go on to the next level of gatekeeping.

This is the nominated Legal Advisor and/or District Judge ("the Gatekeepers") and it should be received by them within one working day of issue. Allocation is done in accordance with the guidance in the following three resources:

1. President's Guidance on Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law Proceedings)
2. The Family Court (Composition and Distribution of Business) Rules 2014
3. The Allocation Schedule

How matters will be allocated – What to expect

Allocation will be done by the "gatekeeping team", under the Designated Family Judge (DFJ) in each hearing centre.

Matters may be listed in parallel or "back-to-back" lists where both lay justices and judges sit on the same day so that there can be change in allocation up to and including the day of the hearing itself (possibly in light of safeguarding disclosure). Applications will be issued the day after receipt and considered by the Gatekeepers on that day.

It is therefore vital that applications contain as much information as possible so that they are allocated appropriately, but remember that no evidence should be filed pre-FHDRA unless the matter is urgent or the other exceptions apply.

If you are not happy with an allocation decision, para 14 of the President's Guidance on Allocation and Gatekeeping for Proceedings under Part II of the Children Act 1989 (Private Law Proceedings) provides for an application for a review of an allocation decision.

Lay justices are not expected to hear anything lasting longer than 3 days.

Factors to be taken into account on allocation:

(a) The need to make the most effective and efficient use of the local judicial resource;

(b) The need to avoid delay;
(c) The need for judicial continuity;
(d) The location of the parties or of any relevant child; and
(e) Complexity.

According to the Schedule to the Allocation and Gatekeeping Guidance – Private Law, the general rule is to allocate to the lay justices UNLESS they are of the type set out in the table. Therefore, **if you feel that the matter has been listed before the wrong level of tribunal, you should cross check your application against this table** before applying.

The Gatekeepers may also make directions on issue [CAP01] which can include returning the matter for a MIAM, listing an accelerated hearing where necessary and, exceptionally, making directions for filing of evidence.

CAP 12: Urgent/Without Notice Hearings

Where a matter is urgent, it may be heard without a MIAM. The conditions for urgency are narrow and are as set out at FPR 3.8(c):

(i) There is risk to the life, liberty or physical safety of the prospective applicant or his or her family or his or her home; or
(ii) Any delay caused by attending a MIAM would cause
    a. Any risk of harm to a child;
    b. A risk of unlawful removal of a child from the UK, or a risk of unlawful retention of a child who is currently outside England and Wales;
    c. A significant risk of miscarriage of justice;
    d. Unreasonable hardship to the prospective applicant; or
    e. Irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence); or
(iii) There is a significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought by another state in which a valid claim to jurisdiction may exist, such that a court in that other state would be seised of the dispute before a court in England and Wales.

Without notice applications should also be made only in exceptional circumstances, as set out at CAP 12.3, summarised as:

(i) If the applicant were to give notice to the respondent(s) this would enable the respondent(s) to take steps to defeat the purpose of the injunction (very rare);
(ii) The case if of exceptional urgency i.e. there has been *literally* no time to give notice (by email, text, telephone or otherwise) before the injunction is required to prevent the threatened wrongful act; or
(iii) If the applicant gives notice to the respondent(s), this would be likely to expose the applicant or relevant child to unnecessary risk of physical or emotional harm.

If a without notice order is made, the order should specify:

(i) That the order has been made without notice;
(ii) The outline facts alleged and relied upon unless clearly contained in a statement in support; and
(iii) The right of the respondent to vary or discharge the order.

CAP 14: FHDRA

This should take place in week 5 following issue, but at the latest will take place in week 6.

The respondent should have not less than 10 days' notice of the hearing unless time is abridged for service and should file the response form C7/C1A not later than 10 working days before the hearing.

The advantage of the Family Court is that, if as a result of safeguarding or other disclosure (e.g. domestic violence) it transpires that the case has been allocated to an inappropriate level of tribunal, the intention is to have several levels of tribunal sitting so that there can be easy transfer *ideally without the parties knowing*.

The FHDRA is not privileged so matters discussed may be referred to later on.

Again, if the Court finds that the MIAM requirement has not been complied with, it can adjourn proceedings to enable a MIAM to take place.

Reports: there are no longer wishes and feelings reports as opposed to full s7 reports. There are instead focused welfare reports upon which the court should give specific directions as to the matters to be addressed. The issues to be considered should be stated on the face of the order. CAFCASS is encouraged to make stepped recommendations at this stage to avoid the need for further reports [CAP 15.4].

Any applications for expert evidence should be made at this hearing or before. S13 C&FA 2014 and Part 25 of the FPR should be complied with.

If no final order can be reached, an order for further directions should be drawn up in accordance with CAP02 (see attached). This makes plain the issues which are to be included but these can also be found at the end of CAP 14.

After the FHDRA

CAP 15: Timetable. The governing factor here is key events in the child's life (school holidays, birthdays, change in schools or any significant change in the child's family or social circumstances etc) so ensure that you have taken instructions on this for the listing of next hearings.

There should be no reviews unless absolutely necessary.

The FHDRA is the appropriate time to make orders about evidence.

CAP 20: If necessary, the court will order a fact-finding hearing.

CAP 19: Otherwise the court will direct that a Dispute Resolution Appointment takes place if appropriate (formerly an interim review hearing or PTR).

Where appropriate the court will list a final hearing.

CAP 20: Fact-finding Hearings

These are governed by **PD12J** which applies where it is alleged, admitted or there is reason to believe that "the child or a party has experienced domestic violence or abuse perpetrated by another party or that there is a risk of such violence of abuse."

Some relevant paragraphs from the PD:

(6) The need for a fact-finding should be identified at the earliest possible point and determined as early as possible.

(7) The court shall not make a child arrangements order by consent or give permission for an application to be withdrawn without all parties in court, safeguarding having been completed and CAFCASS having had the opportunity to speak to the parties separately except where it is satisfied that there is *no* risk of harm to the child in so doing.

(12) Where safeguarding is not completed, the FHDRA should be adjourned. The default position is not to make an interim child arrangements order unless it is to protect the child's safety.

(18) If a fact-finding hearing is not held to be necessary even though allegations have been made, the court should record the reasons for making that decision.

(20) When listing a fact-finding hearing, the court must at time same time list a Dispute Resolution Appointment to follow. Judicial continuity is important.

(22) s7 reports should come *after* a fact-finding hearing.

(25) Interim Orders before Determination: care should be taken to secure the safety of the child and the parent making the allegation.

CAP 19: Dispute Resolution Appointments

These take place post-section 7 reports and are in every other sense like a PTR. There is a focus on narrowing issues and attempting to resolve the matter.

This is yet another opportunity for the court to adjourn matters and direct the parties to non-court dispute resolution and to undertake SPIP. Otherwise, directions are to be made to set the matter up for final hearing in the form CAP03.

Final Hearing

The final order should be in (based on) the form CAP04.

This should be the end of the court's involvement, with greater use being made of the power to direct CAFCASS to monitor contact (s11H Children Act 1989) or Family Assistance Orders (s16 Children Act 1989) [CAP 15.5]

The general rule is that "cases should not be adjourned for review (or reviews) of contact or other orders/arrangements, &/or for addendum section 7 reports, unless such a hearing is necessary and for the clear purpose that is consistent with the timetable for the child and in the child's best interests" [CAP 15.3]

CAP 21: Enforcement

Should be listed before the same judge as previously.

Other Points of Note

CAP 17: No evidence should be filed until *after* the FHDRA unless:

(i) It has been filed in support of a without notice application;
(ii) It has been directed by the Court by the Directions on Issue [CAP01]; or
(iii) It has been directed by the Court for the purposes of determining an interim application.

CAP 10: Every effort will be taken to ensure judicial continuity.

Guidance on Continuity and Deployment (Private Law):

(9) No hearing at any stage should conclude without a date for hearing having been fixed for the earliest possible date, and communicated to the parties at court.

(10) Continuity of representation is important but lawyers will be expected to organise their diaries to ensure that cases are heard without delay.

Per Cobb J: this is likely to turn on the length of delay rather than being a blanket listing at the earliest possible date.

Query: will this be enforceable abroad without the use of "contact" and "residence"? Where this is likely to be in issue, consider putting something making this clear in a recital.

Overall

Will this feel any different to litigants on the ground? Probably not. But for those of us in practice the key points to remember are these:

1. Residence and contact have become who the child lives with and who the child spends time with.
2. The parties *must* now attend a MIAM and the matter will be adjourned for one to take place unless an exemption occurs. This can occur at the desk, at gatekeeping or at FHDRA.
3. The court is also now focused on encouraging non-court dispute resolution (previously ADR) at every stage.
4. Wishes and feelings reports and s7 reports have instead become focused 'welfare reports'.
5. There should be only three, or where separate fact-findings are necessary four hearings. Reviews are taboo. The court's role is to deal with the unresolvable and then to bow out.
6. Judicial continuity is key even in the magistrates.

Additional Resources

See the attached flowchart, C100, draft orders and allocation table.

A hub for all of the updating rules, precedents and commentary:
http://www.familylaw.co.uk/Family_Law_Reform

On private law children proceedings particularly:
http://www.familylaw.co.uk/articles/child-arrangements-programme-and-private-law-proceedings-materials

The consolidated FPR can be found here:
http://www.familylaw.co.uk/articles/consolidated-version-of-the-fpr-2010

The Shortened Financial Remedy Procedure

Used to apply only to DPMCA claims, now also applies to Schedule 1 and variation applications

Part 9 of FPR 2010 still governs financial remedy proceedings. Chapter 5 governs the shorter procedure for financial remedy applications which now apply to proceedings under:

1. The Domestic Proceedings and Magistrates Court Act 1978 (as before);
2. Schedule 6 of the Civil Partnership Act 2004;
3. Schedule 1 of the Children Act 1989;
4. Art 56 of the Maintenance Regulation;
5. Art 10 of the 2007 Hague Convention; and
6. All applications to vary a financial order.

Issuing an application

The application is issued and financial statements (the shortened version of the Form E) are exchanged 14 days after issue.

An application should be made as follows:

(i) **For Schedule 1:** Form A1
(ii) **For Variation:** Form A

NB: These forms have got a lot longer. The requirement to have attended a MIAM applies here too.

Within 4 days of filing the application, the court should:

(i) Serve a copy of the application on the respondent;
(ii) Give notice of the date of the first hearing to both parties; and
(iii) Send a blank financial statement in Form E1 for Schedule 1 or Form E2 for variation applications to both parties[1].

A first hearing will be listed between 4 and 8 weeks after the application is filed.

If the applicant wishes to serve the respondent, this should be indicated on filing the application and the following steps should be carried out within 4 days of receiving the application and notice of hearing back from the court:

(i) Serve a copy of the application on the respondent;
(ii) Serve a copy of the notice of hearing on the respondent;

[1] NB this does not apply for Maintenance Regulation cases, in which case Annex VII should be used, nor does it apply to applications under Hague Convention cases, in which case the Financial Circumstances Form should be used.

(iii) Send a blank financial statement in Form E1 for Schedule 1 or Form E2 for variation applications to both parties[2].

The applicant should also file a certificate of service at or before the first hearing.

The date fixed for the first hearing should not be cancelled without the court's permission and if so, the court will fix another date immediately.

The Financial Statements (effectively shortened Forms E) should be exchanged not later than 14 days from issue attaching only those documents required by the form and anything else necessary to clarify anything set out in the form.

If a party cannot provide a document at the time of exchange, this should be filed and served at the earliest opportunity, with a statement setting out why this document is late.

There is no provision for further disclosure or inspection between the filing of the application and the first hearing.

The aim is for the matter to be dealt with at that first hearing, but if this is not possible then the court will list further directions/direct further evidence/list a final hearing.

What if I don't want the matter to be dealt with under the shorter financial remedy procedure?

If in fact you want your case to be dealt with in the usual way (i.e. the Chapter 4 procedure), the application must state:

(i) that you are seeking a direction that the Chapter 4 procedure should apply; and
(ii) the reasons for seeking such a direction.

The court will determine this without notice to the parties and before the first hearing, and will notify the parties as to its decision and any consequential directions.

Examples of appropriate reasons to seek such a direction are set out in the new PD9A para 1.2 and include:

(i) Complexity;
(ii) Schedule 1 applications involving contested issues about settlements of property;
(iii) Variation applications in which a capital payment or pension share is proposed.

Useful Resources

Link to all of the updated court forms: http://www.familylaw.co.uk/articles/FPRForms-FullList

[2] NB this does not apply for Maintenance Regulation cases, in which case Annex VII should be used, nor does it apply to applications under Hague Convention cases, in which case the Financial Circumstances Form should be used.

Bundles – PD27A

A copy of the new practice direction can be found here: http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_27a

Which hearings does this apply to?

This applies to **all** family hearings except urgent hearings and "to the extent that it is impossible to comply with it". N.B: this now includes hearings listed for less than 1 hour.

Who should prepare the bundle?

The representatives for the applicant or, if there are cross-applications, the applicant first in time. If there are litigants in person then it is the responsibility of the first party who is *not* a litigant in person.

Litigants in person are not expected to prepare bundles, but if they do they must comply.

As before: paginated and agreed where possible.

What should go in the bundle? [PD27A para 4.1]

Relevant documents only, which the court should read or to which it will be referred.

The following should *not* be included unless specifically directed:

(a) correspondence (including letters of instruction to experts);*
(b) medical records (including hospital, GP and health visitor records);*
(c) bank and credit card statements and other financial records;*
(d) notes of contact visits;
(e) foster carer logs;*
(f) social services files (with the exception of any assessment being relied on by any of the parties);*
(g) police disclosure.*

BUT if it is directly relevant and the court should read it or will be referred to it then it MAY go in. (i.e. include relevant pages of documents and have the whole report to hand or relevant correspondence if they go to an issue/seeking costs)

** This is not in force until 31st July 2014.*

How should it be arranged?

Chronologically and in the following sections:

(a) preliminary documents and any other case management documents required by any other practice direction;
(b) applications and orders;
(c) statements and affidavits (which must be dated in the top right corner of the front page) but without exhibiting or duplicating documents referred to in para 4.1;
(d) care plans (where appropriate);
(e) experts' reports and other reports (including those of a guardian, children's guardian or litigation friend); and
(f) other documents, divided into further sections as may be appropriate.

All statements, reports etc must be copies of originals that are signed and dated.

What are the preliminary documents?

(a) An up to date case summary of the relevant background for the hearing and management of the case, limited to four A4 pages if possible;
(b) A statement of issues to be determined (1) at that hearing and (2) at the final hearing;
(c) A position statement by each party including a summary of the order or directions sought by that party (1) at that hearing and (2) at the final hearing;
(d) An up to date chronology, if it is a final hearing or if the summary under (i) is insufficient;
(e) Skeleton arguments, if appropriate;
(f) A list of essential reading for that hearing; and
(g) The time estimate.

All authorities must be in a separate composite and agreed bundle.

Each document should state the date of the hearing and the date that it was prepared. They should also cross-reference the page references in the bundle.

Where the proceedings relate to a child and are being heard by magistrates, these should be anonymised save for the names of the legal representatives. **Query: is this practicable where there is back-to-back listing?**

If a full bundle is not needed, the case summary should start with a statement that the bundle is not complete **but** documents can simply be removed and need not be repaginated.

When re-lodging a bundle, this should be updated and all superseded/irrelevant documents removed.

What format should the bundle take?

- **<u>One lever arch file only</u>** unless the court has specifically directed otherwise*
- 350 pages*
- Single sided photocopying
- 12 point, 1 ½ or double spaced
- Properly labelled on front and spine with case name, number, location of the hearing, bundle letter, judge's name if possible and the hearing date and time

**This is not in force until 31st July 2014. Currently each bundle is limited to 350 pages.*

What is the timetable for the bundle?

- Paginated index to be provided by the party preparing the bundle not less than 4 days before the hearing **<u>even if not agreed</u>**
- If counsel are instructed, the person instructing them shall deliver a paginated bundle not less than 3 working days before the hearing
- Bundles to be lodged not less than 2 working days before the hearing unless otherwise directed
- Preliminary documents to be lodged by email by 11am on the day before the hearing (and with the judge's clerk if in the High Court)

N.B: authorities to be lodged in hard copy.

Otherwise the bundles directions are the same.