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Sussex Protocol – a renewed focus

Introduction

This document should be read alongside the document entitled "Local Practice Note: Getting back to the Public law Outline on the South Eastern Circuit" to which HHJ Bedford, the author of this document and the Designated Family Judge for Sussex, is a signatory.
This document is intended to reflect the consensus reached between professionals involved in family justice in Sussex as to how the Practice Note might be supplemented in its application in Sussex. It should also be read in the context of the well documented approach taken in Sussex to the wellbeing of those working or otherwise involved in this field.
It is now recognised that proceedings in public law cases take too long. This has the potential to lead to unfairness for the children and the parents involved. Proceedings need to be better managed - all involved in the family justice system need to make changes. The overriding objective remains, which is to deal with cases justly. Established guidance such as Family Procedure Rules 2010 PD12J and PD3AA must be complied with and the question of vulnerability of those involved in proceedings must be at the forefront of our minds.

1. Pre- Proceedings

1.1 Effective pre- proceedings work is now a requirement. Local Authorities (LAs) must include in their initial social work statements what assessments, family group conferences (FGC)/ network meetings (FNM) and Pre- proceedings meetings have taken place. If such meetings have not occurred, the statement needs to clearly set out why - their absence will only be accepted in exceptional cases. FGC/FNM minutes and the PLO assessment plan should be included as part of the initial disclosure.

1.2 We have a pan- Sussex pre- proceedings protocol, and this should be promoted. We must not confuse the purpose of the pre- proceedings work. The focus of that should be on avoiding proceedings, not preparing for them. (It is appreciated that Cafcass are not involved at this stage).

2. Assessment of cognitive function/ litigation capacity

2.1 The gatekeeping order will require the parents' solicitors to meet with their clients prior to the CMH to assess whether they have learning needs which may require a cognitive assessment, and to form a view as to whether they have litigation capacity (an issue which the solicitors should also have in mind during pre-proceedings work).

2.2 Solicitors for the children must consider if any of the relevant children are "Gillick competent". This should also be part of the Children's Guardian's (CG) consideration in their initial analysis. This should remain under review as should the question as to whether there is a conflict between the CG and any of the children, as the proceedings unfold.

3. Initial Interim Care Order (ICO) hearings

3.1 LAs should give very careful consideration before bringing an ICO application to court where there is no available placement and should be mindful of the purpose of doing so, unless, for example, the LA seeks an ICO with a care plan of the children remaining at home. This guidance should not be interpreted as discouragement from bringing proceedings but as encouragement for careful analysis and planning in doing so.

3.2 ICOs should not be listed, save in a case of real urgency, where it can be anticipated that there will be a need for a further ICO hearing because the parents have been given insufficient notice.

3.3 LAs should come to court with placements in residential units/mother and baby foster placements identified whenever possible.

3.4 The Court should avoid listing initial hearings without four days' notice to the parents unless the Local Authority have explicitly applied for leave to abridge notice and have good cause for doing so. Any order abridging service must state the reasons for it having been granted.

4. Case Management Hearings (CMH)

4.1 As much case management as can fairly be achieved must be achieved at the ICO hearing and where possible the listing of a separate CMH should be avoided.

4.2 The listing of the CMH needs to allow proper time for the parties to prepare for the hearing. Listing at short notice will likely mean the parties cannot ensure that this is an effective hearing. Where the CMH is listed as per the PLO timeframe it is expected that parents will file full responses to the evidence and threshold prior to the CMH.

4.3 The parents' initial statements should include details of any alternative carers.

4.4 Statements need to be concise, avoid repetition and use straightforward language.

4.5 LA chronologies need to be concise and relevant to the issues in the case.

5. Alternative carers

5.1 A central task at the CMH is the effective identification of alternative carers. At the CMH it will be emphasised to the parents, and included in the order, that the time to propose assessments of family and friends is now, and that it is unlikely that the court will order assessments of people proposed later in the proceedings. The order should set out that proposed Special Guardians (SG) should receive legal advice on receipt of any proposed support plan and subsequently there should be a position statement from any such lawyer confirming whether the proposed SGs accept that plan or whether they wish to challenge the assessment/plan. Responsibility for identification of alternative carers does not fall exclusively to parents - LA's should be compiling family trees in pre- proceedings work, and should be exploring family and friends options. If a parent objects to disclosure of information this should be identified and determined at the CMH.

5.2 If a viability assessment (usually 2 weeks) is positive, the LA must proceed seamlessly to a full SG assessment. The agreed 12 weeks for a full assessment start as soon as the viability

is completed. In some cases, 12 weeks may not be required, however, if more than 12 weeks is required the LA will need to justify the timeframe at the CMH.

6. Arrangements for assessments of parents and alternative carers

6.1 The LA should provide a schedule of dates of appointments for each assessment so that the court can be sure that the LA has allocated resources appropriately and that the timetable can be adhered to.

7. Cafcass – initial analysis

7.1 Children's Guardians (CG) will be required to prepare a full initial analysis. Position Statements will only be accepted in exceptional cases and they will not stand as evidence. Early concise independent analysis is essential. Parents and the child/ren should be visited unless it is impossible to do so. The CG will be expected to attend hearings in person unless a timely request for remote attendance is made and the judge is satisfied that the parents will suffer no significant detriment as a result.

8. Experts

8.1 Experts will only be instructed where the test of necessity is met. Judges are likely to enquire carefully into the proposed instruction of psychologists and independent social workers and will require persuasion that the ambit of the proposed report could not be covered by the social worker or Children's Guardian.

8.2 The Practice Directions to Part 25 of the Family Proceedings Rules 2010 regarding experts must be followed. They include:
- page limits for expert reports,
- executive summaries in each report.

8.3 If an expert is appointed, the advocate must immediately after the hearing tell, or have their solicitor tell the expert of their appointment, the date for the report to be filed and the date of the final/fact finding hearing.

8.4 Letters of Instruction (LOI) must include as part of the instruction that the report must be filed on time, or on such other date set by the court, and that this is part of the contract with the expert. In other words, the report must be filed even if it is to say that the parent did not attend. The order will stipulate that a person's failure to attend for the appointment(s) with the expert on two occasions without good reason must result in the expert filing on the due date regardless of whether the work planned is complete or not. Any refusal of an expert to file in such circumstances must be brought to the attention of the court immediately.

8.5 The Court will subsequently consider whether any expert would give evidence at a final hearing rather than written questions being put to them. A request for the expert to give oral evidence will require justification.

8.6 Drug and alcohol testing should only be undertaken in cases where either there is prima facie evidence of drug or alcohol use and the parent disputes such use, the level of such use, or where previous drug or alcohol misuse has been established and the parent provides clear instructions that the testing would assist in establishing their abstinence. Testing where drug/alcohol misuse is admitted may be unnecessary, save for cases in the where baseline testing is necessary. The standard CMO template must be followed whereby parents specifically address this issue, and local authorities/guardians should not routinely seek testing when there is little to be learned from the results.

8.7 Early and informed applications are crucial. The court and parties need to focus on the questions that are being asked, which will inform why the issues go outside the expertise of the social worker and CG. The draft questions should be included within the Part 25 application which should be circulated to the parties prior to the advocates meeting. If applications are refused by the court, then reasoned decisions need to be given and recorded on the face of the order.

8.8 Parties requesting experts need to have dates to avoid (in the event that leave is given for the expert to attend) during dates at week 20-30.

9. Police Disclosure

9.1 Police disclosure must only be sought in accordance with the current protocol. It should be identified at the outset of proceedings and must be limited to that which is relevant and necessary. Careful consideration must given to the application by the parties and the court. The scope of the order must be fully justified before the court will be persuaded to order the police to commit the limited and stretched resources of their disclosure unit to providing the disclosure.

10. Threshold

10.1 Threshold documents need to be compliant with Re A [2015] EWFC 11. They must be concise and directly relate to the necessary factual basis and harm alleged. Replies should be as simple as possible. Evidence in relation to mitigation is to be confined to statements – the response to threshold is to be focussed on establishing what allegations are accepted or disputed and where partially accepted what alternative is proposed

11. List for IRH and Final Hearing at CMH

11.1 At the CMH, a final hearing will be listed in most cases where it is obvious there will be a contest. A 3 to 4 day hearing is the starting point – to be reduced or increased at the time it is first listed depending on objective features, and then refined at the IRH. Cases involving parents with learning issues, those that require interpreters, or cases which appear to have substantial factual disputes may require more time.

11.2 As the CMH will identify the IRH, final hearing and dates and times for advocates meetings, the court should strive to achieve Judicial continuity where possible.

12. Compliance with timetable

12.1 Directions MUST be complied with. Advocates must ensure that proposed timeframes are viable, and if they are instructed they are not, to place that argument before the Court.

12.2 In the event that evidence is not filed on time the court and parties should be notified immediately. Non-compliance must be clearly identified at each hearing, and the parties should expect rigorous judicial enquiry. Advocates are expected to have taken instructions so as to be able to answer predictable lines of enquiry. Absence of compliance in this regard is likely to lead to the introduction of compliance hearings where the conduct of the defaulting party will be scrutinised and may be subject to consequential orders.

13. Issues Resolution Hearings

13.1 Advocates meetings

Advocates meetings need to be more effective and focused. They must be 3 clear days before the IRH. They must be attended by the advocates who will appear at the hearing. They must focus on the issues that need to be determined; the witnesses required in order to achieve that, and a detailed witness template must be fully completed. The time and date of the advocates meeting should be fixed and recorded in the previous order, and should be treated in the same way as a hearing i.e. it cannot be rescheduled to suit individual convenience.
It is recognised that an effective advocates meeting will require advocates to be "trial ready". Advocates need to be those instructed for the final hearing (having a FH fixed at the CMH previously will make compliance with this requirement easier). Instructing solicitors must ensure counsel is instructed 7 days prior to the IRH.

13.2 PD Documents

Case Summaries of each party must be filed by 11 am the day before the hearing.

13.3 Clear determination of issues- focused witness templates

The Court will want to see each party has focused on the core issues to be determined. It will scrutinise the witness template, and advocates will need to justify their proposed timeframes.

13.4 The use of the IRH as an Early Final Hearing

The judge may decide to use the IRH as an early final hearing and all parties should be prepared for the same. The judge may decide that the case can be heard on submissions or that only certain witnesses need give evidence. If such can be achieved within the time

allocated to the IRH, then the case will be finalised at the IRH and all parties and advocates should be prepared accordingly.

His Honour Judge Robin Bedford
Designated Family Judge for Sussex
19 May 2023.