



Neutral Citation Number: [2019] EWHC 2369 (Fam)

Case No: LE18C00583

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/09/2019

**Before :**

**MR JUSTICE KEEHAN**

**Between :**

**A County Council**  
**- and -**  
**Cafcass**

**Applicant**

**Respondent**

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**Mr S Yeung (instructed by A County Council) for the Applicant**  
**Ms M Carew (instructed by Cafcass) for the Respondent**

Hearing dates: 30th August 2019  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**MR JUSTICE KEEHAN**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**The Hon. Mr Justice Keehan :**

Introduction

1. These care proceedings were issued by A County Council on 14 May 2018 in respect of one child, X, who was born on 11<sup>th</sup> May 2018. Her mother is Y and her father is Z.
2. In the usual course of public law proceedings a children’s guardian was appointed to represent the interests of X.
3. The local authority contends that the threshold criteria of s31(2) of Children Act 1989 (‘the 1989 Act’) are satisfied in respect of X. One of the matters relied on by the local authority in support of its contention that the threshold criteria are satisfied is an allegation made by a young person, AB, that the father had sexually abused her between 2011 and 2018. The father denies the allegation. A police investigation is ongoing.
4. AB and her mother were unaware that the local authority were relying on the allegation she had made against Z. AB and her family are supported by a social worker from A City Council.
5. Upon learning that the local authority were relying on AB’s allegation, an application was made on behalf of Z for AB to be called to give evidence. Accordingly, an issue arose as to who should undertake enquiries and work with AB “to assist the court in determining
  - i) whether a non subject child should be directly involved in these proceedings; and
  - ii) to undertake a Re W assessment of the child to assist the court to be taken in relation to the said allegation in the context of these proceedings.”
6. There were various options explored before the circuit judge including the work being undertaken by a social worker from the local authority and a social worker from A City Council who had previously been involved with AB and her family, or by an independent social worker.

7. On 18.03.19 the circuit judge to whom the case was allocated decided to direct Cafcass to undertake the role set out in paragraph 5 above, presumably by the appointment of an officer of Cafcass. It is important to note that this appointment was not directed to the guardian appointed to represent the interests of X in these proceedings.
8. Cafcass objected to the making of this direction on the ground that the direction was made in respect of a non-subject, non-party child and therefore fell outwith the statutory functions of Cafcass. Cafcass made written submissions to the judge setting out its position and inviting the court to discharge the direction.
9. Ultimately on 22.05.19, and in order to avoid any unnecessary delay in these proceedings, the judge discharged the direction made in respect of Cafcass and directed that the role should be performed by an independent social worker at the joint expense of the parties to these proceedings.
10. The order of 22<sup>nd</sup> May 2019 which made the above appointment of an ISW contained the following recital

“And upon the issue as to ‘whether it is within the power of the court to request Cafcass to assist the court to undertake an assessment (including a Re W assessment) of a child involved but not the [subject] children [act] proceedings’ being considered a matter of general importance in family proceedings and for that reason to be referred to a Judge of the Family Division.”

Hence the matter was allocated to me as the FDLJ of the Midland Circuit.

11. In the order of 22<sup>nd</sup> May Cafcass was joined as an intervenor and directions were given for the filing and serving of skeleton arguments. Only Cafcass and the local authority wished to make submissions on the issue set out above.
12. I have had the benefit of receiving written and oral submissions from Cafcass Legal and from A County Council. At the hearing on 30<sup>th</sup> August 2019 I reserved judgment.

## The Statutory Framework

13. The Children and Family Court Advisory and Support Service ('Cafcass') was established by the Criminal Justice and Court Services Act 2000. The principal function of Cafcass is set out in s.12 of the 2000 Act:

“Principal functions of the Service.

- (1) In respect of family proceedings in which the welfare of children [other than children ordinarily resident in Wales] 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.
- (2) The Service must also make provision for the performance of any functions conferred on officers of the Service by virtue of this Act or any other enactment (whether or not they are exercisable for the purposes of the functions conferred on the Service by subsection (1)).
- (3) Regulations may provide for grants to be paid by the Service to any person for the purpose of furthering the performance of any of the Service's functions.
- (4) The regulations may provide for the grants to be paid on conditions, including conditions—
  - (a) regulating the purposes for which the grant or any part of it may be used,
  - (b) requiring repayment to the Service in specified circumstances.
- (5) In this section, “family proceedings” has the same meaning as in the M1Matrimonial and Family Proceedings Act 1984 and also includes any other proceedings which are family proceedings for the purposes of the M2Children Act 1989, but—

- (a) references to family proceedings include (where the context allows) family proceedings which are proposed or have been concluded”

14. A family court may direct a report from an officer of the Service or a Welsh family proceedings officer pursuant to s.7 of the Children Act 1989. The section provides:

“Welfare reports.

(1) A court considering any question with respect to a child under this Act may—

- (a) ask an officer of the Service or a Welsh family proceedings officer; or

- (b) ask a local authority to arrange for—

- (i) an officer of the authority; or

- (ii) such other person (other than an officer of the Service or a Welsh family proceedings office] ) as the authority considers appropriate,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.

(2) The Lord Chancellor may after consulting the Lord Chief Justice, make regulations specifying matters which, unless the court orders otherwise, must be dealt with in any report under this section.

(3) The report may be made in writing, or orally, as the court requires.

(4) Regardless of any enactment or rule of law which would otherwise prevent it from doing so, the court may take account of—

- (a) any statement contained in the report; and

- (b) any evidence given in respect of the matters referred to in the report,

in so far as the statement or evidence is, in the opinion of the court, relevant to the question which it is considering.

(5)It shall be the duty of the authority or officer of the Service or a Welsh family proceedings officer to comply with any request for a report under this section.”

It is submitted that the power to make such an order is limited to the subject child of the proceedings.

15. Provision is made in s.41 of the 1989 act for the representation of a child and his interests in certain proceedings. The section provides:

“41 Representation of child

(1)or the purpose of any specified proceedings, the court shall appoint an officer of the Service or a Welsh family proceedings officer] for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

(2)The officer of the Service or Welsh family proceedings officer shall—

(a)be appointed in accordance with rules of court; and

(b)be under a duty to safeguard the interests of the child in the manner prescribed by such rules.”

‘specified proceedings’ are defined in s41(6) of the Act.

16. I note that s.41(10) provides as follows:

“Rules of court may make provision as to—

(a) the assistance which any officer of the Service or Welsh family proceedings officer may be required by the court to give to it;

(b) the consideration to be given by any officer of the Service or Welsh family proceedings officer, where an order of a specified kind has been made in the proceedings in question, as to whether to apply for the variation or discharge of the order;

(c) the participation of officers of the Service or Welsh family proceedings officers in reviews, of a kind specified in the rules, which are conducted by the court.”

I shall refer to the significance of this provision later in this judgment.

### The Family Procedure Rules

17. The provisions relating to the appointment of a children's guardian in family proceedings are set out in r.16.3 and r.16.4 of the Family Procedure Rules 2010 ("FPR"):

"Appointment of a children's guardian in specified proceedings or proceedings to which Part 14 applies

#### 16.3

(1) Unless it is satisfied that it is not necessary to do so to safeguard the interests of the child, the court must appoint a children's guardian for a child who is –

(a) the subject of; and

(b) a party to, proceedings –

(i) which are specified proceedings;  
or

(ii) to which Part 14 applies.

(Rules 12.6 and 14.6 set out the point in the proceedings when the court will appoint a children's guardian in specified proceedings and proceedings to which Part 14 applies respectively.)

(2) At any stage in the proceedings –

(a) a party may apply, without notice to the other parties unless the court directs otherwise, for the appointment of a children's guardian; or

(b) the court may of its own initiative appoint a children's guardian.

(3) Where the court refuses an application under paragraph (2)(a) it will give reasons for the refusal and the court or a court officer will –

(a) record the refusal and the reasons for it; and

(b) as soon as practicable, notify the parties and either the Service or the Assembly of a decision not to appoint a children's guardian.

(4) When appointing a children's guardian the court will consider the appointment of anyone who has previously acted as a children's guardian of the same child.

(5) Where the court appoints a children's guardian in accordance with this rule, the provisions of Chapter 6 of this Part apply.

Appointment of a children's guardian in proceedings not being specified proceedings or proceedings to which Part 14 applies

#### 16.4

(1) Except in proceedings under section 55A of the 1986 Act<sup>1</sup> and without prejudice to rule 8.42 or 16.6, the court must appoint a children's guardian for a child who is the subject of proceedings, which are not proceedings of a type referred to in rule 16.3(1), if –

- (a) the child is an applicant in the proceedings;
- (b) a provision in these rules provides for the child to be a party to the proceedings; or
- (c) the court has made the child a party in accordance with rule 16.2.

(1A) Without prejudice to rule 16.6, in proceedings under section 55A of the 1986 Act, the court must appoint a children's guardian for a child where—

- (a) the court has made the child a party in accordance with rule 16.2; and
- (b) the child is the person whose parentage is in dispute in those proceedings

(2) The provisions of Chapter 7 of this Part apply where the appointment of a children's guardian is required in accordance with paragraph (1) or paragraph (1A).

(‘children's guardian’ is defined in rule 2.3.)”

18. The powers and duties of a children's guardian appointed in specified proceedings (e.g. public law proceedings) pursuant to r.6.3 FPR are set out in r.16.20 FPR:

“Powers and duties of the children's guardian

#### 16.20



(1) The children's guardian is to act on behalf of the child upon the hearing of any application in proceedings to which this Chapter applies with the duty of safeguarding the interests of the child.

(2) The children's guardian must also provide the court with such other assistance as it may require.

(3) The children's guardian, when carrying out duties in relation to specified proceedings, other than placement proceedings, must have regard to the principle set out in section 1(2) and the matters set out in section 1(3)(a) to (f) of the 1989 Act as if for the word 'court' in that section there were substituted the words 'children's guardian'.

(4) The children's guardian, when carrying out duties in relation to proceedings to which Part 14 applies, must have regard to the principle set out in section 1(3) and the matters set out in section 1(4)(a) to (f) of the 2002 Act as if for the word 'court' in that section there were substituted the words 'children's guardian'.

(5) The children's guardian's duties must be exercised in accordance with Practice Direction 16A.

(6) A report to the court by the children's guardian is confidential.”

19. The powers and duties of a children’s guardian appointed in non-specified proceedings (e.g. private law cases) pursuant to r.16.4 FPR are set out in r.16.27 FPR which provide that:

“Powers and duties of children's guardian

16.27

(1) The children's guardian –

(a) has the powers and duties set out in Practice Direction 16A; and

(b) must exercise those powers and duties in accordance with Practice Direction 16A.

(2) Where the children's guardian is an officer of the Service or a Welsh family proceedings officer, rule 16.20 applies to a children's guardian appointed in accordance with this Chapter as it applies to a children's guardian appointed in accordance with Chapter 6.”

20. These rules are supplemented by the provisions of Practice Direction 16A ('PD16A'). For current purposes the relevant parts of the practice direction are set out in Part 3 and Part 4 of PD16A:

### Part 3

#### “Children's Guardian Appointed under Rule 16.3

How the children's guardian exercises duties – investigations and appointment of solicitor

##### 6.1

The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –

- (a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
- (b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained.

##### 6.2

The children's guardian must –

- (a) appoint a solicitor for the child unless a solicitor has already been appointed;
- (b) give such advice to the child as is appropriate having regard to that child's understanding; and
- (c) where appropriate instruct the solicitor representing the child on all matters relevant to the interests of the child arising in the course of proceedings, including possibilities for appeal.

##### 6.3

Where the children's guardian is authorised in the terms mentioned by and in accordance with section 15(1) of the Criminal Justice and Court Services Act 2000 or section 37(1) of the Children Act 2004 (right of officer of the Service or Welsh family proceedings officer to conduct litigation or exercise a right of audience),

paragraph 6.2(a) will not apply if the children's guardian intends to have conduct of the proceedings on behalf of the child unless –

- (a) the child wishes to instruct a solicitor direct; and
- (b) the children's guardian or the court considers that the child is of sufficient understanding to do so.

#### 6.4

Where rule 16.21 (Where the child instructs a solicitor or conducts proceedings on the child's own behalf) applies, the duties set out in paragraph 6.2(a) and (c) do not apply.

How the children's guardian exercises duties – attendance at court, advice to the court and reports

#### 6.5

The children's guardian or the solicitor appointed under section 41(3) of the 1989 Act or in accordance with paragraph 6.2(a) must attend all directions hearings unless the court directs otherwise.

#### 6.6

The children's guardian must advise the court on the following matters –

- (a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order;
- (b) the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
- (c) the appropriate forum for the proceedings;
- (d) the appropriate timing of the proceedings or any part of them;
- (e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and

- (f) any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed.

#### 6.7

The advice given under paragraph 6.6 may, subject to any direction of the court, be given orally or in writing. If the advice is given orally, a note of it must be taken by the court or the court officer.

#### 6.8

The children's guardian must –

- (a) unless the court directs otherwise, file a written report advising on the interests of the child in accordance with the timetable set by the court; and
- (b) in proceedings to which Part 14 applies, where practicable, notify any person the joining of whom as a party to those proceedings would be likely, in the opinion of the children's guardian, to safeguard the interests of the child, of the court's power to join that person as a party under rule 14.3 and must inform the court –
  - (i) of any notification;
  - (ii) of anyone whom the children's guardian attempted to notify under this paragraph but was unable to contact; and
  - (iii) of anyone whom the children's guardian believes may wish to be joined to the proceedings.

(Part 18 sets out the procedure for making an application to be joined as a party in proceedings.)”

### Part 4

“Appointment of Children's Guardian under Rule 16.4

Section 1 – When a child should be made a party to proceedings

#### 7.1

Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Service or a Welsh family proceedings officer to carry out further work or by making a referral to social services or, possibly, by obtaining expert evidence.

## 7.2

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.

### 7.3

It must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings. When deciding whether to direct that a child be made a party, the court will take into account the risk of delay or other facts adverse to the welfare of the child. The court's primary consideration will be the best interests of the child.

### 7.4

When a child is made a party and a children's guardian is to be appointed –

- (a) consideration should first be given to appointing an officer of the Service or Welsh family proceedings officer. Before appointing an officer, the court will cause preliminary enquiries to be made of Cafcass or CAFCASS CYMRU. For the relevant procedure, reference should be made to the practice note issued by Cafcass in June 2006 and any modifications of that practice note.
- (b) If Cafcass or CAFCASS CYMRU is unable to provide a children's guardian without delay, or if for some other reason the appointment of an officer of the Service of Welsh family proceedings officer is not appropriate, rule 16.24 makes further provision for the appointment of a children's guardian.

Section 2 – Children's guardian appointed under rule 16.4

## Duties of the children's guardian

### 7.6

It is the duty of a children's guardian fairly and competently to conduct proceedings on behalf of the child. The children's guardian must have no interest in the proceedings adverse to that of the child and all steps and decisions the children's guardian takes in the proceedings must be taken for the benefit of the child.

### 7.7

A children's guardian who is an officer of the Service or a Welsh family proceedings officer has, in addition, the duties set out in Part 3 of this Practice Direction and must exercise those duties as set out in that Part.”

21. The Family Procedure Rules make provision for the appointment of a litigation friend for a child: these are set out in rr.16.5, 16.6 and 16.7 to 16.15 FPR. Further provision is made for the appointment and duties of a litigation friend in Part 2 of PD16A. For current purposes I need only refer to two aspects of these rules:

- i) r.16.5(1) provides that a child must have a litigation friend to conduct proceedings, subject to the provisions of r.16.6, where a child is a party to proceedings but is not the subject of those proceedings; and
- ii) r.16.11 FPR provides that the court may appoint as a litigation friend:
  - a) the Official Solicitor;
  - b) an officer of the Service (ie Cafcass) or a Welsh family proceedings officer; or
  - c) some other person

but only if they consent to the appointment.

## The Submissions of the Local Authority

22. The local authority submitted that the court does have the power to make the direction given in this case in respect of a non-subject, non-party child and that

Cafcass would not be acting outwith its statutory functions. The issue is a matter, it is said, of the statutory construction of s.12 of the 2000 Act and of the relevant rules in the FPR.

23. In support of this submission the local authority rely on four aspects of the statutory and FPR provisions, namely:
  - i) s.12(1)(b) provides that it is a function of Cafcass to “give advice to any court about any application made to it in [family] proceedings”;
  - ii) r.16.20(2) provides that “the children’s guardian must also provide the court with such other assistance as it may require”;
  - iii) paragraph 6.1(b) of PD16A provides “obtain such professional assistance as is available which the children’s guardian thinks appropriate or which the court directs must be obtained”; and
  - iv) paragraph 6.6(f) of PD16A provides the children’s guardian must advise the court on “any other matter on which the court seeks advice”.
24. Counsel for the local authority referred me to three authorities. In *R v Cafcass* [2003] EWHC 253 (Admin) Charles J decided that s.12 of the 2000 Act did not impose on Cafcass a specific duty to individual children to allocate a children’s guardian nor does it set out a timetable within which it must do so: the duty is to appoint a children’s guardian as soon as reasonably practicable having regard to the resources of Cafcass.
25. In *R, E, J and K v Cafcass* [2012] EWCA Civ 853 the Court of Appeal recognised that Cafcass was under a statutory duty in general terms to provide a scheme for the representation of children in care proceedings in England but the duty did not extend to a specific obligation to ensure a particular child in an individual case is represented. The court rejected the submission that s.12(2) should be read so as to import the word ‘immediately’ in relation to the appointment of a children’s guardian.
26. In *Re B (Child: Evidence)* [2014] EWCA Civ 1015 the Court of Appeal considered the decision of a circuit judge in a private law case to direct a



Family Court Advisor (ie an officer of Cafcass) to meet with 13 year old girl, G, who was the step sister of the subject child. The mother had made allegations of domestic abuse and wanted G to be called to give evidence because it was asserted G had witnessed some of the violent incidents. The terms of the judge's direction are set out in paragraphs 3 to 6 of Black LJ's judgment, as she then was, namely:

“3.In response to F's application for contact, C's mother (M) asserted that F had been violent to her during their relationship. Her allegations, which F denied, were considered material to the issue of contact and it was directed that there was to be a fact finding hearing. M wanted her older child (a daughter, G, who was born in January 2001 so is now 13 years old) to give evidence at the fact finding hearing about some of the violent incidents, those in question having occurred during 2011, and her application to this end was considered by Judge Cameron on 12 February 2014. She ordered the involvement of a Family Court Adviser from CAFCASS ("the Adviser") who was to see G to explore matters further. It is against this that F appeals to this court, with permission of the judge herself.

4.The order that Judge Cameron made is detailed. The preamble set out that "before determining the issue of whether G should answer questions or whether G should give evidence it is necessary for the Court to obtain a report from a Family Court Adviser on the issues set out below". In the body of the order it was provided that the officer was to "meet G on probably 2 occasions" and then to provide "a section 7 report in accordance with the decision in Re W [2010] UKSC 12 and the Working Party of the Family Justice Council Guidelines December 2011 [2012] Fam Law 79 to assist the court as to whether (and if so how) G should answer questions put in writing and/or to give evidence at the fact finding by videolink".

5.In fact, the "consequential provisions" of the order which followed entrusted rather more discretion to the Adviser than these general passages imply and envisaged that she may actually proceed to put questions to G. The parties were directed to agree and provide to the Adviser "a list of proposed questions ...that they would seek to be put to G". The officer was then to meet G in a neutral venue and it was:

"left to the Adviser's professional judgment as how to conduct the interviews and whether or not the questions should or should not be put to G and if so the format and formulation of the questions or any additional questions the Adviser feels appropriate to the issues in Re W but the Court's provisional expectation would be that none of the questions proposed by the parties should be put on the first occasion or until the Adviser feels appropriate"

6.The order set out what the court wanted the report to cover, namely (1) whether it would be "appropriate and/or within G's best interests or potentially harmful for G" to answer any questions drafted by the parties and/or to attend court to give evidence and be cross-examined, whether by video-link or otherwise, at the fact finding hearing (2) whether G was willing to answer questions or attend a fact finding hearing to give oral evidence and (3) if the Adviser decided it was appropriate to put the questions to G, a report of her answers."

27. The father appealed the judge's decision on the basis that G's evidence was peripheral, it was not necessary for her to be called to give evidence and the judge had been wrong "to have embarked on the Family court Adviser path because it would (or should) lead nowhere as the shortcomings in G's evidence rendered that evidence of little value" [paragraph 30].
28. The appeal was dismissed.
29. Counsel for the local authority conceded that the issue of the court's power to direct Cafcass, by a Family Court Adviser, to undertake the role directed by the judge was not raised in *Re B* nor is there any reference to the same in the Court of Appeal's judgment. I note further that Cafcass was not a party to nor heard on the appeal.
30. Nevertheless, it was submitted that s.12 of the 2000 Act cannot be read to limit or restrict the functions of Cafcass to the subject child.
31. It was submitted that pursuant to s.12(1)(b) of the 2000 Act, namely "give advice to any court about any application made to it in such proceedings", the relevant 'application' in this case was the father's for AB to be called to give evidence at the fact finding hearing. Accordingly, it was within the statutory

functions of Cafcass to comply with the judge's direction and to appoint an officer of Cafcass to undertake work with AB for the purposes of the court making a Re W assessment.

#### The Submissions of Cafcass

32. It was submitted that the opening words of s.12(1), "in respect of family proceedings in which the welfare of children...is or may be in question" confirm the parameters of the role of Cafcass is limited to the subject child or children. Further, it was submitted that the subsections of s.12 of the 2000 Act should not be read disjunctively. The reference in s.12(1)(c), "make provision for the children to be represented in such proceedings", emphasises the point that the role of Cafcass is limited to the subject child of the proceedings.
33. The point is forcefully made that it is the function of local authorities' children services departments, and not Cafcass, to be responsible for the safeguarding of children generally. The duty of Cafcass to safeguard children is owed to those who are the subject of family proceedings.
34. The general nature of the powers and duties of Cafcass was noted by the Court of Appeal in *R and Others (Minors), R (ota) v The Child and Family Court Advisory and Support Service* [2012] EWCA Civ 853. McFarlane LJ, as he then was, observed,

"On its wording and in its immediate statutory context, the natural reading of s.12 is that it is concerned with establishing a general framework of operation for CAF/CASS, not with creating duties owed to individuals. The purpose of the section is to lay down the principal functions of the body established by s.11. By s.78, those functions include both powers and duties. By paragraph 9 of schedule 2, they are to be performed in accordance with any directions given by the Lord Chancellor (for Lord Chancellor now read Secretary of State – see note at paragraph 28 above). All of this is very general in nature. So too is the wording of the functions themselves. That is true not only of the functions in subsection (1), to "safeguard and promote the welfare of children", "give advice to any court ...", "make provision for the children to be represented ..." and "provide information, advice and other support ...",

but also of the duty in subsection (2) to "make provision for the performance of any functions conferred on officers of the Service ...". There is nothing in any of this to suggest a legislative intention that all or any of the duties created by s.12 are owed to the individuals for whose benefit the functions are to be performed. On the face of it, these are general public law powers and duties. Nor was our attention drawn to anything within the other parts of the CJCSA 2000 that might suggest a different view."

35. The Court of Appeal considered the approach of the court in undertaking a Re W assessment in *Re E (A Child)* [2016] EWCA Civ 473. At paragraph 61 McFarlane LJ, as he then was said,

"It is plainly good practice for the court to be furnished with a written report from the children's guardian and submissions on behalf of the child before deciding whether that child should be called as a witness. This court understands that it is, however, common-place for guardians to advise that the child should not be called to give evidence on the basis that they will or may suffer emotional harm as a result of doing so. Where such advice is based upon the consideration of harm alone, it is unlikely to be of great assistance to the court which is required to consider not only 'harm' but also the other side of the balance described in the *Guidelines*, namely the possible advantages that the child's testimony will bring to the determination of truth."

36. As in the case of *Re B*, the court in *Re E* was not considering the position in respect of a non subject child nor the role of Cafcass, if any, in relation to such a child.

37. In respect of decision in *Re B* the submission is made that Cafcass was not a party to nor heard on this appeal. Moreover, the power of the court to make a direction for a children's guardian to undertake work with a non subject child was not argued nor considered by the Court of Appeal in its judgment. The mere fact that there is a small number of reported cases where such a direction has been made and the appointed children's guardian or Family Court Adviser has complied with the same, sets no precedent because:

- i) in these cases the power of the court to make such an order was not raised nor considered;

- ii) none of the cases were referred to Cafcass legal; and
- iii) none of the courts in these cases heard argument on the point nor gave a judgment on the same.

I agree with this submission.

38. I was referred to the Practice Note of the Official Solicitor dated January 2017 and in particular to paragraphs 5 and 11 which respectively state:

“5. For the avoidance of doubt, the Children and Family Court Advisory and Support Service (CAFCASS) has responsibilities in relation to a child in family proceedings in which their welfare is or may be in question (Criminal Justice and Court Services Act 2000, section 12). Since 1 April 2001 the Official Solicitor has not represented a child who is the subject of family proceedings (other than in very exceptional circumstances). In cases of doubt or difficulty, staff of the Official Solicitor’s office will liaise with staff of CAFCASS Legal Services to avoid duplication and ensure the most suitable arrangements are made.’

At paragraph 12 of the Practice note of the Official Solicitor, the circumstances in which that office may consider it appropriate to act in family proceedings is set out,

‘Children who require a litigation friend in proceedings

11. Non-subject child: a child who is not the subject of family proceedings may nevertheless be a party and subject to FPR 2010 rule 16.6 (see paragraph 7), requires a litigation friend in family proceedings. The most common examples are:

(a) a child who is also the parent of a child, and who is a respondent to a Children Act 1989 or Adoption and Children Act 2002 application;

(b) a child who wishes to make an application for a Children Act 1989 order naming another child (typically a child arrangements order for contact with a sibling);

(c) a child who has been joined as an intervenor in a public law children case to respond to allegations;

(d) a child intervenor in financial remedy proceedings;

(e) a child party to applications for declarations of status under Part III Family Law Act 1986 other than section 55A applications;

(f) a child applicant for, or respondent to, an application for an order under Part IV (Family Homes and Domestic Violence) or Part 4A (Forced Marriage) of the Family Law Act 1996;”

It was submitted that the terms of this note support the submission of Cafcass that its role in family proceedings is limited to the subject child.

## Discussion

39. The interpretation of s.12 of the 2000 Act and the relevant rules contended for by the local authority, see paragraph 23 above, would effectively place no limit on the work or the role a court could direct Cafcass or an officer of the Service to undertake. Counsel for the local authority conceded this point but submitted that ‘common sense’ must be applied to limit the scope of what a court may require of Cafcass. I do not find this, to put it mildly, to be an attractive nor a persuasive submission: rather it undermines the local authority’s contention. I cannot accept that Parliament intended to create a statutory national body to advise and assist the court in family proceedings, and to represent the children who are the subject of those proceedings, without any restriction or limit on its function and roles. Still less would Parliament have intended that the restrictions or limitations on the role of the service would be determined by applying common sense.
40. The advocates were agreed, that according to the best of their respective researches, there is no reported authority on the interpretation of s.12 of the 2000 Act in respect of the scope of the function of Cafcass.
41. In respect of whether the subsections of s.12 should or should not be read disjunctively, I note that:

- i) the words ‘or’ do not appear after subsections (a), (b) or (c); and
- ii) neither does the word ‘and’ appear after subsection (c).

It is in my judgment, however, significant that s.12(1) reads “it is a function of the Service to” followed by subsections (a) to (d). If the subsections had been intended by Parliament to be read disjunctively, I would have expected the word ‘functions’ to appear in s.12(1). The use of the word ‘function’ in the singular leads me to conclude that subsections of s.12(1) are not to be read disjunctively but instead are to be read conjunctively. Since one part of that function is to ‘make provisions for the children to be represented in the proceedings’, I am persuaded that the function and role of Cafcass pursuant to s.12 of the 2000 Act is limited to the subject child or children of the proceedings.

- 42. Furthermore, I agree with and accept the submission made on behalf of Cafcass that the opening words of s.12(1), “in respect of family proceedings in which the welfare of children...is or may be in question” should be interpreted to mean that the role of Cafcass is limited to the subject child or children of those proceedings.
- 43. I am reinforced in coming to this conclusion by taking account of the following matters:
  - i) the appointment of the children’s guardian in public law proceedings under Part IV of the 1989 Act (‘specified proceedings’ as defined by s.41(6)) and the assistance it may be required to give to a court are subject to rules of court (s.41(10) 1989 Act);
  - ii) the appointment of a children’s guardian in public law proceedings is limited to a child who is the subject of the proceedings and is a party to the same (r.16.3 FPR);
  - iii) similar provision is made in respect of the appointment in private law proceedings (r.16.4 FPR);

- iv) the FPR make separate provision for a child who is not the subject of the proceedings but is a party to the proceedings, namely the appointment of a litigation friend (r.16.5 FPR); and
  - v) the powers and duties of a children's guardian whether in public law or private law cases set out in rr.16.20 & 16.27 and paragraphs 6 & 7 of PD16A must be read in the context of and in the light of the requirements of rr.16.3 and 16.4 FPR, namely the appointment is made in respect of the subject child.
44. I am in no doubt that a children's guardian, appointed to represent a child in public or private law proceedings, may be required to advise the court on the subject child's relationship with a non-subject child (eg a step-sibling) and the impact on the same depending upon the orders made by the court for the future placement of the subject child: see FPR r.16.20(2) & PD16A paras 6.6(f) & 7.7. Similarly, a children's guardian may be required to enquire into and advise the court about a wide range of matters and about a diverse group of people (eg relatives, friends and connected persons etc). This could include advising the court on the benefits/disadvantages of a non-subject child being called to give evidence in the proceedings. What is key, however, is that the objective and focus of these enquiries and of the advice is, and must be, establishing the welfare best interests of the subject child.
45. It is quite a different matter to seek to appoint an officer of Cafcass, whether a children's guardian or otherwise, to work with and advise upon a non-subject, non-party child. I have not been referred to any statute nor to any relevant rule of court which makes provision for such an appointment in these circumstances. I am satisfied such an appointment is outwith the statutory function and role of Cafcass.

#### Conclusion

46. I, therefore, conclude that the court has no power to require Cafcass to appoint an officer of Cafcass, whether a children's guardian or otherwise, to undertake any work with or play any role with AB.



47. The preparatory work directed by the judge ought properly to have been undertaken by a social worker from the local authority and/or a social worker from A City Council or, as was ultimately directed, by an independent social worker. The young person, if called to give evidence, would have been the local authority's witness on whose testimony it relied in seeking to prove relevant facts which, if found to be proved, would have satisfied the threshold criteria of s.31(2) of the 1989 Act.
  
48. I have not taken account of the potential adverse consequences for Cafcass, in terms of workload, if I had concluded the court had the power to make directions in respect of a non-subject child. Given, however, the increase of the workloads for all concerned in the child protection and family justice systems, now is not the time to consider widening the scope of the functions of Cafcass with its current resources.