



PRINCIPAL FAMILY COURT JUDGE'S CHAMBERS

**FAMILY COURT PRACTICE NOTE**

**LAWYER FOR THE CHILD: SELECTION, APPOINTMENT AND OTHER MATTERS**

**1 BACKGROUND**

- 1.1 The terms of this Practice Note have been settled in consultation with the Ministry of Justice and the Family Law Section of the New Zealand Law Society.

**2 CONTENTS**

- 2.1 The Practice Note covers the following matters.

- (a) Legislative provisions for the separate representation of children.
- (b) Process for appointment.
- (c) Review procedures under the Children, Young Persons, and Their Families Act 1989.
- (d) Reports.
- (e) Content of referral.
- (f) Process for selection.
- (g) Criteria for selection.
- (h) Review of the list.
- (i) Administration of the list.
- (j) Complaints.
- (k) Removal from the list.

**3 INTRODUCTION**

- 3.1 This Practice Note replaces all previous Practice Notes pertaining to the selection, appointment and payment of lawyer for the child.

**4 TERMS AND DEFINITIONS**

- 4.1 In this Practice Note:

- (a) COCA means the Care of Children Act 2004;
- (b) CYPTFA means the Children, Young Persons and Their Families Act 1989;
- (c) FCA means the Family Courts Act 1980
- (d) The term 'child' includes child as defined in COCA and both 'child', 'children' and 'young person' as those terms are defined in the CYPTFA.

- (e) References to 'the lawyer,' unless otherwise stated, means a lawyer appointed by the Court to act for a child.
- (f) References to 'report writer' means any social worker or report writer from whom a report has been requested under section 132 or 133 of COCA or under section 178, 186 or 187 of the CYPTFA. 'Specialist report' has a corresponding meaning.

## **5 SEPARATE REPRESENTATION OF CHILDREN**

5.1 Various of the Family Law Acts authorise the Court to appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings under that Act.

- (a) Sections 7(a) and (b) of COCA the Court may appoint a lawyer if the Court has concerns for the safety and wellbeing of the child and considers an appointment necessary.
- (b) Sections 162(1)(a) and (b) of the Family Proceedings Act 1980 authorises the Court to appoint a barrister or solicitor to represent any child who is the subject of, or who is otherwise a party to, any proceedings under that Act if the Court is satisfied that the appointment is necessary or desirable.
- (c) Section 159 of the CYPTFA requires the Court to appoint a barrister or solicitor to represent any child or young person who is the subject of any proceedings under Part 2 (Care and protection of children and young persons) or Part 3A (Trans-Tasman transfer of protection orders and protection proceedings) of that Act and, if the Court thinks desirable, for such other purposes as the Court may specify (including any other proceedings under that Act or any other enactment).
- (d) Section 81(1)(b) of the Domestic Violence Act 1995 authorises the Court to appoint a lawyer to represent the child in any proceedings on an application for a protection order made on the child's behalf or in any proceedings relating to or arising out of a protection order made on that child's behalf.
- (e) Section 37A of the Property (Relationships) Act 1976 authorises the Court to appoint a lawyer to represent children of the marriage, de facto relationship or civil union in any proceedings under that Act if there are special circumstances that render appointment necessary or desirable.
- (f) Sections 226(1)(a) and (b) of the Child Support Act 1991 authorises the Court to appoint a barrister or solicitor to represent any child who is the subject of, or who is otherwise a party to, any proceedings under that Act if the Court is satisfied that the appointment is necessary or desirable.

## **6 PROCESS FOR APPOINTMENT OF LAWYER FOR THE CHILD IN ANY SPECIFIC CASE**

- 6.1
- (a) Appointments must be made by the Court.
  - (b) The Judge is responsible for settling the brief for the lawyer.
  - (c) The brief will have regard to the role of the issues raised by the specific proceedings and will otherwise require the lawyer to carry out his or her task as prescribed by section 9B of the Family Courts Act 1980 and shall be settled as at the time of appointing the lawyer.

- (d) The initial brief (and any extensions approved by the Court) will cover the span of the appointment of the lawyer up until the time of any hearing unless the case is sooner resolved.

*COCA*

- (e) Unless any risks to the children are identified earlier, appointments under s 7 of the Care of Children Act 2004 generally will not be made until either a issues or settlement has identified that the appointment of the lawyer is necessary in resolving the dispute between the parties to the proceeding.

6.2 When allocating the brief to the lawyer, the Court will consider the following factors:

- (a) Match of skills to case requirements.
- (b) Availability of the lawyer.
- (c) Current workload of the lawyer.
- (d) Equitable distribution of work among lawyers on the list.

6.3 Every brief shall include:

- (a) A task to be carried out by the lawyer as set out above in paragraph 6.1 (b).
- (b) Any reporting requirements, both written and otherwise;
- (c) The time and funding allocated to carry out the brief; and
- (d) The timeframe for completion of the tasks.

6.4 The role of the lawyer is referred to in detail in the Law Society's Lawyer for the Child Best Practice Guidelines.

6.5 Once the Court has settled the brief for the lawyer, the Registrar will negotiate an estimate for time and cost for undertaking the outlined brief with the proposed lawyer. This will include payment of any disbursements. Once an acceptable arrangement has been reached, the Judge will sign a Minute of Appointment.

6.6 A bill of costs should be rendered in a form agreed to between the Ministry of Justice and the New Zealand Law Society. This will be set out in 6 minute time units calculated in accordance with an agreed hourly rate of remuneration.

6.7 Where, during the course of the work, it becomes clear that the estimate of time does not cover the work required for the proper discharge of the lawyer's task in the specific case, the lawyer should report that fact to the Court with reasons. The lawyer should use best endeavours to report before the estimate is exceeded.

6.8 Where the nature of the assignment changes and the lawyer believes a different payment level should apply, the lawyer should report to the Court as soon as practicable. Where the lawyer and the Registrar cannot agree on any additional cost, the matter should be resolved by the procedures set out in the legislation under which the lawyer has been appointed.

6.9 Upon delivery of judgment, the lawyer's appointment will continue:

- (a) for 28 days in order to advise on the merits of an appeal (s 9B(d) FCA) ; and
- (b) in COCA cases to comply with s 55(4).

6.10 Each Court will maintain a register listing each appointment of a lawyer, the date of appointment, the estimate of fees and actual fees paid, the type of case and the date on which the appointment terminates.

- 6.11 The record will be available for the regular monthly management meeting of each Family Court.
- 6.12 In larger metropolitan areas (such as Auckland and Wellington), where several Courts use one pool of lawyers, there should be inter-Court communication to ensure that, as far as possible, there is a spread of assignments to all listed lawyers.

## **7 CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989: REVIEW PROCEDURES**

- 7.1 The lawyer's appointment will continue after the initial proceedings have been finalised or have subsequently been reviewed, with a further review to follow.
- 7.2 Though the lawyer's appointment continues in this way, no active work is to be undertaken until the time of the review, unless specifically authorised by the Court or issues arise unexpectedly or urgently.
- 7.3 Because the appointment continues, the lawyer becomes a person who has to agree to the reviewed plan. Early consultation will be required by the person preparing the plan (refer ss 132(1)(b) and 135(3)(e) of the CYPTFA).
- 7.4 If there is no dispute about the reviewed plan and the direction in which the proceedings are to go, those preparing the reviewed plan should obtain the formal consent of all parties as required. The consent forms should indicate whether parties wish to attend a hearing or whether they consent to the review being conducted without a hearing. The Judge should be advised of any dispute when the plan is filed.
- 7.5 After filing, the plan will be placed before a Judge to consider release of the report and any other steps to be taken, and whether orders can be made on the papers.
- 7.6 The intention of this procedure is to reduce to a minimum any disruption to the lives of children, foster parents and others by having them attend the Court, but at the same time to protect all parties' rights under the CYPTFA. This is particularly appropriate where everyone agrees that the status quo should continue. It is also intended to lead to significant savings in time and cost.

## **8 REPORT FROM LAWYER FOR CHILD**

- 8.1 Reports are to be provided as specified by the brief or as otherwise directed by a Judge.
- 8.2 Copies of the reports must be forwarded to the lawyers for the parties or, if they are unrepresented, to the parties directly.
- 8.3 The report should summarise steps taken by the lawyer and results that have been achieved. It should then outline further steps to be taken or recommended. The report should be short, factual and informative, but should be couched in neutral terms and should not introduce any material that ought to come to the Court's knowledge only by way of evidence. Further steps recommended may include one or other of the following.
- (a) That the parties be referred to a Parenting Information Programme, or FDR.
  - (b) That a settlement or directions conference be held.
  - (c) That the matter proceed to a hearing.
  - (d) That the matter is transferred to a different track, or is classified as a complex case.

- (e) That a report be prepared under ss 132 or 133 of the Care of Children Act 2004 or ss 178, 186 or 187 of the CYPTFA. Reasons for such a report should be stated.
- 8.4 Because circumstances differ so much from case to case, Judges have been reluctant to approve a set form or model to be used as a basis for reports required from the lawyer. Nevertheless, the following draft is included as a useful guideline. It focuses attention on:
- (a) Relevant issues;
  - (b) The point that has been reached by the parties;
  - (c) The input to date by the lawyer; and
  - (d) Advice to the Court on initiatives that may be appropriate.
- 8.5 Reports should be comprehensive, but concise and to the point. In an appropriate case the lawyer may refer in a neutral way to issues settled or still to be determined.

The Registrar

Family Court

**Re: B Family – day/month/year**

Thank you for your letter of [date] advising of my appointment as lawyer for the children. This is my report of my attendance to date.

**Summary of issues:**

1. The future of Mr and Mrs B's marriage.
2. Day-to-day care of three children.
3. Occupation of a state rental home.

**Situation:**

1. Mr and Mrs B and their children presently occupy the home.
2. There are three children directly affected by the dispute:
  - (a) G – pupil Wellington College;
  - (b) R – pupil Wellington College; and
  - (c) P – a child with an Autistic Spectrum Disorder (ASD) and an intellectual disability. P attends a special school.
3. Mr and Mrs B have attended counselling.
4. A settlement conference was held on Friday 11 July. However, the problems have not been resolved, and an urgent hearing has been sought.

**My attendances on the child/ren to date:**

- 1.
- 2.
- 3.
- 4.

**Other attendances to date:**

1. Read Court documents.
2. Formulated an approach.
3. Spoke on telephone and attended on the parties' lawyer.
4. Conference with Mrs B.
5. Conference with Mr B.
6. Conference with Principal, Special School.
7. Conference with school counsellor, Wellington College.
8. Telephone conference, social worker, Wellington Hospital.
9. Attended mediation conference.
10. Conference with school Principal preparing affidavit.
11. Conference with school counsellor preparing affidavit.

It appears that the only and most appropriate means of resolution is an urgent Court hearing. I have, at this stage, decided to call witnesses to give evidence at the hearing and, to that end, am in the process of preparing affidavits.

I intend to speak to ..... from the Ministry of Education who has completed an assessment of P. I will also be speaking to G and R and intend to meet further with Mr and Mrs B and their solicitors prior to the hearing.

I have to date spent X hours on the case as detailed by my interim bill, which is enclosed.

Yours faithfully,

**9 PROCESS FOR SELECTION OF LAWYER FOR THE CHILD**

- 9.1 In each Court there will be a list of lawyers who are available to accept appointments from the Court as lawyer for the child and from which the lawyer may be appointed in individual cases.
- 9.2 The appointment of a lawyer on the list of lawyers available to undertake Family Court appointments is a judicial appointment, with the judge being the convenor of an appointment panel established in accordance with this paragraph.
- 9.3 The Registrar will convene a panel to consider applications for inclusion in the list of lawyers for the child available to undertake Family Court appointments.
- 9.4 This panel will consist of a Caseflow Manager or a Family Court Co-ordinator as chair, two nominees from the Family Law Section of the New Zealand Law Society, and a Family Court Judge nominated by the Regional Administrative Family Court Judge (Administrative Judge).
- 9.5 The panel should normally sit with four people, but a panel of three may be convened in some circumstances (for example, where an interview would be unable to be arranged within a reasonable timeframe).
- 9.6 Any panel of three must include a Family Court Judge, a nominee from the Family Law Section and the Caseflow Manager or Family Court Co-ordinator.
- 9.7 Panels will be convened as required, but no less than twice a year if there are applications waiting to be considered and a need for a lawyer to be appointed.
- 9.8 The following appointment process should be followed:

- (a) The lawyer must submit an application form to the Registrar in the Court region in which they wish to practise, nominating the particular Court or Courts where they wish to be on the list. The application is referred to a panel convened by the Registrar.
- (b) The application should be in form PSFC L4C 1 which is available from the Family Court website or any Family Court. The application should be accompanied by any references or testimonials that the applicant would like the panel to consider and the names of other referees who can provide professional, confidential comment.
- (c) The Registrar shall give copies of the application and any supporting documentation to the Administrative Judge who shall be given seven days to make any comments in writing relating to the application.
- (d) Panel members may make such enquiries as may be needed for them to be informed about the applicant's ability to meet the criteria, including enquiries of referees.
- (e) On completion of its enquiries, the panel may arrange an interview with the applicant at such time and place as may be determined by the Registrar.
- (f) Not less than seven days prior to the interview, the Registrar shall forward a report to the applicant detailing the enquiries made by the panel including details of any response that is adverse to the applicant. In the event of there being insufficient time available to consider the application, the panel may adjourn the interview or otherwise arrange a hearing to consider the application.
- (g) The Family Court Judge convening the panel makes the appointment to the list. The role of the other members of the panel is to advise the Judge.
- (h) An unsuccessful applicant shall be provided with reasons for not being included in the list.
- (i) The Registrar will advise of the recommendation in writing to the following people: the applicant, the Court, the Family Law Section and, in the event that the application is successful, the National Office of the Ministry of Justice.

9.9 The lawyer should meet the following criteria. They should have:

- (a) A current Practising Certificate;
- (b) The ability to exercise sound judgement and identify central issues;
- (c) A minimum of five years practice in the Family Court;
- (d) Proven experience in running defended cases in the Family Court;
- (e) A sound knowledge of COCA, CYPTFA, The Domestic Violence Act 1995 and the Family Courts Rules 2002.
- (f) An understanding of, and an ability to relate to and listen to, children of all ages;
- (g) Good people skills and an ability to relate to and listen to adults;
- (h) Sensitivity and awareness of gender, ethnicity, sexuality, cultural and religious issues for families;
- (i) Relevant qualifications, training and attendance at courses relevant to the role;
- (j) Personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
- (k) Independence; and

- (l) Knowledge, understanding, and a commitment to comply with the Law Society's Lawyer for the Child Best Practice Guidelines.

9.10 The lawyer will be able to transfer their approval from one Court region to another.

## **10 REVIEW OF LAWYER FOR THE CHILD LISTS**

10.1 A review of lawyer for the child lists must be undertaken at intervals of not more than three years. The Registrar in each Court must ensure that lists of approved lawyers are reviewed at such intervals. Where several Courts use one pool of lawyers, the Registrars in those Courts may choose to review the lists of approved lawyers together.

10.2 The Registrar shall give notice of the triennial review to all lawyers who are currently on the list. Such notice will include a requirement for all lawyers whose names appear on the list to indicate, within 28 days:

- (a) Whether they wish to continue to receive lawyer for the child appointments;
- (b) Whether they wish to withdraw from the lawyer for the child list; or
- (c) Whether they have any matters relating to present or past appointments which they wish to draw to the attention of the panel.

10.3 The panel shall meet as soon as practicable and reconstitute the list of lawyer for the child. The panel shall also consider any matters raised by a lawyer that relate to the administration of the list.

10.4 The name of a lawyer may only be deleted from the list at:

- (a) the lawyer's request,
- (b) as a result of the lawyer's failure to respond within the stipulated time, or
- (c) as the result of a review by the panel of the lawyer's ongoing suitability for the role.

10.5 The panel shall notify all lawyers on the reviewed list whether their names have been retained or deleted from the list, as the case may be, as well as specify the reasons for any deletion.

10.6 The Registrar shall send the reviewed list, with any revisions, to the National Office of the Ministry of Justice and the Family Law Section.

## **11 Remuneration**

11.1 Until regulations are made fixing the rate of remuneration, the rates paid to lawyers shall be agreed between the Ministry of Justice and the New Zealand Law Society.

11.2 The Ministry of Justice shall publish the rates on the following website: [www.justice.govt.nz/family-justice](http://www.justice.govt.nz/family-justice) and update the rates accordingly.

## **12 COMPLAINTS**

12.1 Any complaints about the lawyer are to be made in writing to the Family Court Registry where the proceedings are held



- 12.2 If the proceedings have not been concluded the complaint is made to the presiding Judge. If the proceedings have been concluded the complaint is made to the Administrative Family Court Judge responsible for the Court where the proceedings were filed.
- 12.3 Subject to any direction by the Judge handling the complaint, the Registry shall send copies of any complaint to the lawyer who is the subject of the complaint, any lawyers for other parties and any party not represented who is involved in the proceedings.
- 12.4 The Judge considering the complaint shall:
- a) make such directions from time to time as the circumstances require;
  - b) make such enquiries as he or she thinks fit;
  - c) ensure disclosure is made to the lawyer complained about of all relevant material;
  - d) set a timetable for the lawyer to respond to the complaint and for the complainant to respond to the lawyers reply;
  - e) otherwise observe the rules of natural justice;
- and then determine whether the complaint has substance or not.
- 12.5 If the Judge determines the complaint does not have substance, he or she shall dismiss it.
- 12.6 If the complaint has substance, the Judge may require the lawyer to do any or all of the following:
- a) formally apologise in writing to the complainant;
  - b) complete up to 6 assignments under the supervision of a named experienced lawyer for child;
  - c) have a named experienced lawyer for child as mentor for a period of up to 12 months.
- 12.7 If the complaint raises a substantial issue which the Judge considers is not able to be addressed as set out above, he or she shall refer the complaint to the Panel to determine whether the lawyer should be removed from the list. In that case the provisions of paragraph 13 shall apply.
- 12.8 The lawyer who is subject of the complaint, as well as any lawyers for other parties and any party not represented, shall be notified of the outcome of the complaint by the Registrar of the Court or the Panel as appropriate. The NZLS shall also be notified of the outcome of the complaint if it was the original recipient of the complaint.
- 12.9 Nothing in this Practice Note limits the Court's jurisdiction to do whatever it considers appropriate in the circumstances or otherwise limit the right of the Law Society or other statutory authority to consider any complaint about a lawyer.

### **13 REMOVAL FROM THE LIST OF LAWYER FOR THE CHILD**

- 13.1 The lawyer may be removed from the list and this shall occur by the same process used to select lawyers in paragraph 10, with all necessary modifications.
- 13.2 Grounds upon which lawyers can be removed shall be:
- (a) Professional misconduct in carrying out duties as lawyer for the child; or

- (b) Demonstrable failure to abide by the Lawyer for the Child Best Practice Document or other failure to carry out duties responsibly and competently; or
  - (c) Conduct which, in the opinion of the panel, is likely to bring the office of the lawyer into disrepute.
- 13.3 The panel shall advise the lawyer in writing that it is considering removing his or her name from the list.
- 13.4 The notice from the panel to the lawyer shall:
- (a) Specify the reasons why the panel is considering the removal of the lawyer from the list;
  - (b) State the right of the lawyer to make submissions or representations within 21 days from the date of service of the notice; and
  - (c) Set out the intention of the panel to consider removing the lawyer from the list after 21 days unless the lawyer indicates in writing that he or she opposes removal.
- 13.5 When the 21-day time period has expired, the panel shall convene to consider whether or not the lawyer should remain on the list. In the event that the lawyer has made submissions or representations opposing the removal, the Registrar shall convene a hearing.
- 13.6 At any defended hearing, the lawyer shall be entitled to be represented and shall be entitled to call witnesses in support.
- 13.7 The Registrar shall advise the Administrative Judge, the lawyer, the relevant Court, the Family Law Section and the National Office of the Ministry of Justice of the decision in writing.

#### **COMMENCEMENT DATE**

This revised practice note comes into operation on 3/4/2015

Judge Laurence Ryan

**PRINCIPAL FAMILY COURT JUDGE**

Dated 26/3/2015