

WESTGATE CHAMBERS



Family Proceedings – A general overview

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When we speak about the Family Court, and their role within the legal system, there are many strands to the role of the Family Courts and Judges. I have set out below what I view as the core areas, and the primary statutory acts that often arise within the areas and the type of cases often encountered.

<u>Public</u>	<u>Private</u>	<u>Quasi-Civil</u>
Children Act 1989	Children Act 1989	Schedule 1 CA 1989
Adoption and Children Act 2002	Family Law Act 1996.	Family Law Act 1996
		Matrimonial Clauses Act 1973
		TOLATA 1996

Types of case

<u>Public</u>	<u>Private</u>	<u>Quasi-Civil</u>
Interim orders	Contact disputes	Financial remedies
Care orders	Specific issues orders	Occupation order
Supervision orders	S8 orders	Orders for Sale
Emergency protection proceedings	Non-molestation orders	Schedule 1
	Special Guardianship	
	*Adoption Orders	

Current status of the Family Courts

As with many of the Courts, there is a serious and significant backlog which the Family Court are trying to work through. The current statistics show that nationally in the quarter between July and September 2022 there were 65,691 new cases started in the Family Courts.¹ There are a number of different initiatives, and new guidance that are in place for all professionals working within the Family Courts.

Most importantly, key guidance by the current president of the Family Division Sir Andrew McFarlane issued in March 2022 looks to ‘Make Every Hearing Count’.² In summary, this is guidance to all professional within the family justice system on how to make the most of every hearing listed, and to manage matters as effectively as possible outside of Court to limit the number of hearings.

Whilst this guidance focuses on public law proceedings, the idea of making every hearing count applies to all family proceedings, and in practice sits nicely with the

¹ <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2022/family-court-statistics-quarterly-july-to-september-2022>

² <https://www.judiciary.uk/wp-content/uploads/2022/03/Case-management-guidance-March-22.pdf>

Courts overriding objectives to deal with matters with a mind on costs and proportionately of recourses.

There has been a further relaunch of the Public Law Outline (PLO), which in public law proceedings created an onus on local authorities to undertake a significant amount of work prior to issue applications to the Court.³ The PLO is set out in the Family Procedure Rule PD12A.

General principles

The evidential basis of all Family Courts is to deal with the decisions on the balance of probabilities. It therefore follows that information is key. The Family Courts will often want to know; what information is available, if this is objectively supported, and the credibility of such information. Every Judge within the Family Court has a duty to regulate the evidence, and no evidence will be allowed into the Court bundle without permission.

Critically, in line with the requirement to have full information, within children act proceedings there is a ‘anti self-incrimination’ requirement. §98 of the children act is copied below, but this requires parents/ parties to be open and honest with the Courts, including admitting fault which would otherwise amount to criminal liability;

98. *Self-incrimination.*

(1) In any proceedings in which a court is hearing an application for an order under Part IV or V, no person shall be excused from—

(a) giving evidence on any matter; or

(b) answering any question put to him in the course of his giving evidence, on the ground that doing so might incriminate him or his spouse [F1 or civil partner] of an offence.

(2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse [F1 or civil partner] in proceedings for an offence other than perjury.

It is worth noting as per §92(2) above, that in making any admissions in the Family Courts that information cannot be used by any third party unless there is the suggestion and implication of perjury. The jurisprudence behind such an inclusion as a statutory

³ <https://www.judiciary.uk/courts-and-tribunals/family-law-courts/re-launch-of-the-public-law-outline-plo/>
<https://www.judiciary.uk/guidance-and-resources/a-view-from-the-presidents-chambers-november-2022/>

provision and requirement on the parties is due to the Family Courts focus on the welfare of the relevant child/children.

Privacy is therefore intrinsically linked to the above, and also at the core of the Family Courts. Many of you may be aware that within criminal proceedings, and representatives must ask for a §45 direction (being §45 of the youth justice and criminal evidence act) In criminal matters this applies a reporting restriction to the names of children and their information.

In the Family Court the opposite is the default, and so it follows there must be permission from the Court to disclose information about the parties or family proceedings to third parties. I have attached as Annex 1 a focused overview for how police may obtain information from family proceedings.

However, as with the criminal justice system, it is recognised there must be transparency for the public in understanding how the family court's function and how Judgments are reached. Recently there is further guidance on how members of the public, or the press may apply to attend family court proceedings.⁴

Time frames

Within public law proceedings there is a statutory time frame of 26 weeks from the date of the initial application for proceedings to be concluded. It is of note that unfortunately this rarely happens but as per the recent guidance (above) the Court are cracking down to comply with this and prevent delays.

Part of the guidance on 'making every hearing count' it is that there are only three core hearings within public law proceedings. These should be the Case Management Hearing (CMH) Issues Resolution Hearing (IRH), and Final Hearing. For reference an IRH may also become an Early Final Hearing (EFH) if appropriate.

Arguably the CMH is the most critical hearing in public law proceedings as this should be the hearing which determines the general time frame and issues for the proceedings as a whole.⁵ The CMH should not be listed before day 12 and no later than day 18. The IRH should be the next listed hearing which should also be between 4-6 weeks before any Final Hearing. In practice this outline of times allows practitioners to calculate timings for the standard directions required in the case.⁶

⁴ <https://www.judiciary.uk/wp-content/uploads/2021/10/Confidence-and-Confidentiality-Transparency-in-the-Family-Courts-final.pdf>

⁵ <https://resolution.org.uk/looking-for-help/parents-children-the-law/care-proceedings-and-adoption/common-court-orders-in-care-proceedings/>

⁶ <https://www.judiciary.uk/guidance-and-resources/message-from-mr-justice-mostyn-amendments-to-standard-orders/>

There are of course other hearings which fall outside of the above normal process, such as emergency protection orders (EPO) and urgent applications. In both circumstances, there must have been significant harm, or be an immediate significant risk of harm that necessitate the child's immediate removal from the parent's care, or LA intervention. However, after these hearings it is common for the usual process above to follow.

In practice there are currently many hearings listed between CMH and IRH due to significant issues that arise, and the need for further evidence which is outside the control of the parties in a case, police disclosure being such an example. This means practitioners need to be more alert than ever to what is 'necessary and proportionate'.

Working within the Family Courts

As set out above, there are many pressures within the Family Courts, and a dire need to limit the amount of Court time used. The requirements then shift to the practitioners to undertake significant amount of pre-hearing work such as;

- Advocates meetings: These should be arranged two days before most public law hearings to discuss the issues likely to be raised at the hearing.
- Position statements: These should be filed with the Court/ Judge no less than 24 hours prior to the listed hearing setting out that parties' views on the issues before the Court.
- Pre-hearing discussions: parties are required to attend 1 hour prior to the listed hearing to discuss/ negotiate/ narrow issues even further.

This calls for a fundamentally different approach to the advocacy and attitudes within the Family Courts. A practitioner's approach should be collaborative, rather than confrontational, for the most part. In my opinion, an advocate's role is therefore one of equal parts author, mediator, negotiator, and fierce representative for their client.

ANNEX 1

Disclosure from Family Proceedings to Police/ Third Parties

Of course, information sharing goes both ways, and there are ways in which information can be passed to parties not subject to family court proceedings. The leading authority on disclosure from family proceedings is *Re C [A minor] (Care proceedings: Disclosure)* [1997] 2 WLR 322 sub nom *Re EC (Disclosure of Material)* [1996] 2 FLR 725.

Overall, there are ten principles the Court must consider, which include; the interest of the child, the interest of the party, maintaining privacy for children, §98 of the Children Act 1989, and the interest of justice and the public.

These principles were recently reaffirmed in *Re H (Care Proceedings: Disclosure)* [2009] EWCA Civ 704, **and by the Court of appeal in *Re M (Children) (Disclosure to the Police)*** [2019] EWCA Civ 1364

Family Procedure Rule 12, specifically 12.73 also assists practitioners further. In short this is the general rule on communication of information from family proceedings, also assisted and governed by Practice direction 12G. It is these practice directions that are critical for the police in respects to disclosure from family proceedings.

The table that can be found at §2.1 of FPR PD12G specifically allows for a party to proceedings, to provide to a police officer a formal copy of the Judgment (or part of it) of a family court, for the purposes of a criminal investigation.

The next step below that allows any party or person legally in receipt of the information, to provide the same to the CPS, to enable the CPS to discharge its functions under any enactment. The combination of these practice directions and steps critically allows the Local Authority to undertake appropriate information sharing to the police.

However, *Re X and Y (Children: Disclosure of Judgment to Police)* [2014] EWHC 278 (*Fam*) is very clear at para 21 of the judgment that the information after sharing must still be carefully handled.

‘21. When a judgment is disclosed to the police and onwards to the CPS under rule 12.73 and Practice Direction 12G paragraph 2.1, the person receiving the information is not entitled thereafter to disclose the material onwards without the further permission of the family court. Thus the police and the CPS could not disclose either judgment, or any information contained therein, to any person without the permission of the family court judge.’

It is critical for any practitioner working with the police to understand that if information is shared by the LA or any other parties to proceedings under the

aforementioned practice directions, the police then become the information controller and whilst they can share this information with the CPS, if the information is to be used further orders from the family Court will be require. In summary, any information obtained that is to be used as evidence within a criminal matter should have an order from the Family Court allowing for its use in the public arena.