

**The Northern Ireland Funding Code will be underpinned by detailed decision-making guidance. Draft guidance in respect of public law children's cases is available for consideration below.**

**The Northern Ireland Legal Services Commission invites views and comments by Friday 19<sup>th</sup> January 2007.**

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## **Public Law Proceedings**

### **Special Children Order Proceedings**

#### **1.1 General Approach**

1. Special Children Order Proceedings are defined in section 2 of the Code criteria. These are public law cases which are not subject to either a means test or a merits test. These include proceedings under Article 50 of the Children (Northern Ireland) Order 1995 (for a care or supervision order), Article 62 (a child assessment order), Article 63 (an emergency protection order), Article 64 (extension or discharge of an emergency protection order) and Article 44 (secure accommodation order).

2. Due to the nature of Special Children Order Proceedings, Legal Representation will be granted provided the relevant criteria in section 4 of the Code criteria are satisfied. Funding will be granted therefore without reference to means, prospects of success or reasonableness.

3. Non means, non merits test cover for Special Children Order Proceedings may be applied for on behalf of the child, parent or those with parental responsibility in respect of Article 50, Article 62, Article 63 and Article 64 applications. Parental responsibility, within the meaning of the 1995 Order, will include delegated parental responsibility under Article 5(8) of the Order. Delegated parental responsibility is not required to be in written form but it is reasonable to expect it to be evidenced by a course of conduct on the part of the parent sufficient to confirm a delegation.

4. The non means, non merits test will not however be applied to any application to join proceedings by any party in proceedings under Article 50, Article 62, Article 63, Article 64 nor to an application by a parent or those with parental responsibility in respect of Article 44.

#### **1.2 Scope of certificate**

1. Usual steps involved in the conduct of the case, such as directions hearings, will be covered by the certificate. Other authorised steps include:

- (a) An interim order including an application for directions under Article 57(6) Children (Northern Ireland) Order 1995;
  - (b) Applying for directions and their variations;
  - (c) An application for a search warrant under Article 67 in emergency protection order cases;
  - (d) The extension or discharge of an emergency protection order in emergency protection cases.
- Certificates in Special Children Order Proceedings will not usually be limited in scope.

### 1.3 Amendment of certificates

1. Notwithstanding that a case may involve a number of different Children Order public or private law applications, separate certificates are needed for each. Any existing certificate cannot be amended. Separate application forms will therefore be required. No amendment will be required where a certificate in respect of a care order has been issued and; application for a supervision order is made or vice versa, as both concern Article 50 proceedings. Where proceedings are transferred to another court within the same jurisdiction no amendment of the certificate is necessary. However, if the proceedings are transferred from the Family Proceedings Court to the Family Care Centre or High Court, separate applications are required. A copy of the transfer order will be required. An existing certificate cannot be amended to include cover for an appeal. A separate application needs to be made. Applications for appeals from Special Children Order Proceedings should not include the financial form(s) as these are considered on a merits basis only. Lodgement of a notice of appeal in the relevant jurisdiction is however permitted on foot of the existing certificate.

### 1.4 Form of applications

1. The appropriate application forms will depend on the court jurisdiction in which the proceedings are ongoing, that is Magistrates Court or Non-Magistrates Court and are as follows:

<u>Public law Special Children Order applications</u>	<u>Parties</u>	<u>Conditions applied</u>	<u>Magistrates/Family Proceedings Court</u>	<u>County Court/Family Care Centre/High Court</u>
Secure accommodation order (Art 44) (Child only)	Child only	No means or merits Test	App 8	CO2 alone
Care & supervision orders (Art 50)	Child, parent, those with parental responsibility	No means or merits test	App8	CO2 alone

Child assessment order (Art 62)	Child, parent, those with parental responsibility	No means or merits test	App 8	Co2 alone
Emergency Protection order (art 63)	Child, parent, those with parental responsibility	No means or merits test	App8	CO2 alone
Exclusion or discharge of an Emergency Protection Order (Art 64)	Child, parent, those with parental responsibility	No means or merits test	App8	CO2 alone

2. On the basis that a correctly completed application for Special Children Order Proceedings is received within 7 working days of receipt of instructions to act, the certificate will be dated the date of receipt of instructions (when the forms were signed). Difficulty can often be experienced in cases where a Guardian ad Litem (GAL) is involved. In practice, the Commission will accept application forms signed by the Guardian Ad Litem Agency, not necessarily the guardian appointed to that particular case. If the child is a minor without a GAL or parent, the certifying solicitor and a partner in the firm should sign in the absence of a GAL or other family member. It should be noted that if a solicitor is acting on behalf of a GAL for more than one child of the family that separate application forms are required for each.

3. Extensions to the time for receipt of the form will only be granted with good reason e.g. postal strike. Oversight will not constitute a good reason. If the form(s) are received out of time (more than 7 working days from date of instruction) costs will only be covered from the date of issue of the certificate and not the time of instruction.

4. If the wrong application forms have been used and the case is not one which falls within the definition of Special Children Order Proceedings, then a non means, non merits tested certificate will not be issued and any costs incurred cannot be recovered. In such cases the Commission will advise the solicitor that a fresh application will be required.

### **1.5 Revocation or discharge of certificates**

1. A non means, non merits tested certificate can be:
  - (a) Revoked or discharged on grounds of conduct including where the client has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Fund , for example, if the client had unreasonably required more than one change of solicitor;
  - (b) Discharged on reasonableness (criterion 15.3);
  - (c) Discharged under criterion 15.5(i) (death of the client);
  - (d) Discharged under criterion 15.5 (iii) (consent of the client);

(e) Discharged under criterion 15.5 (iii) (all work completed).

2. However, save in exceptional cases including where a party no longer needs representation (see *Merton London Borough Council v K; Re K (Care Representation: Public Funding)* [2005] 2 FLR 422) the Commission does not envisage using its powers to withdraw funding on the basis that proceedings have been continued unreasonably because of the nature of such cases and of the safeguards contained in the Children Order itself against repeated applications to the court.

3. A certificate may be discharged, following the show cause procedure, where the solicitor is without instructions. This procedure refers to the requirement to give notice to a client that his certificate may be revoked or discharged, whereupon the client may show cause why it should not be revoked or discharged. Despite the nature of the proceedings, there may be cases where it is unreasonable for the cover to continue, for example, where the client has failed to engage over a lengthy period of time or has disappeared.

### **1.6 Related proceedings**

1. A client who has been granted Legal Representation in Special Children Order Proceedings may be granted Legal Representation in related proceedings also. These are proceedings which are being heard together with the Special Children Order Proceedings or in which an order is being sought as an alternative to an order in the Special Children Order Proceedings (criterion 11.8). Such related proceedings will require separate application(s) for a further certificate or certificate(s). The nature of the proceedings will determine whether a means and merits test is applied or not.

### **1.7 Other Public Law Children Cases**

1. Other public law children cases are defined in section 2.2 of the Code criteria. The definition of these proceedings excludes Special Children Order Proceedings and related proceedings. The fact that proceedings involve a Trust and concern the welfare of children will not, of itself, justify the grant of Legal Representation. The Standard Criteria and General Funding Code (as varied by section 11 of the Code) will apply. The proceedings include:

- (a) Appeals (whether against interim or final orders) made in Special Children Order Proceedings;
- (b) Representation for parties or potential parties to public law Children Order proceedings who do not come within the definition of Special Children Order Proceedings in section 2.2 of the Code criteria;
- (c) Other proceedings under Part V or VI of the Children (Northern Ireland) Order 1995. (Care and Supervision and Protection of Children);
- (d) Adoption proceedings;
- (e) Proceedings under the inherent jurisdiction of the High Court in relation to children.

2. These cases are means tested and also subject to merits testing (criteria 11.9). Legal Representation will be refused if alternative sources of funding are available and/or on the ground that representation is not necessary. Where Legal Representation is sought in respect of an appeal, representation will be refused if the prospects of the appeal being successful are poor. In respect of appeals from Special Children Order Proceedings cases, there is however no means test. Representation may be refused if, in all the circumstances including the importance of the case to the client, it appears unreasonable for funding to be granted (e.g. where the client's interests are substantially the same as another party, there is no need for them to be separately represented). The appropriate application forms for use are as follows:

<b><u>Other Public Law Children's cases</u></b>	<b><u>Parties</u></b>	<b><u>Conditions applied</u></b>	<b><u>Magistrates/Family Proceedings Court</u></b>	<b><u>County Court/Family Care Centre/High Court</u></b>
Representation in Art 44 (parties to be joined)	Parent, those with parental responsibility	Means & merits test	App7	CO1 CLA4 & A4 emergency
Application to join those already joined in proceedings under: Care & supervision Orders (Art 50)	Any	Means & Merit test	App7	CO1 CLA4 & A4 emergency
Child assessment Orders (Art 62)	Any	Means & Merits test	App 7	CO1 CLA4 & A4 emergency
Emergency Protection Order (Art 63)	Any	Means & Merits test	App 7	CO1 CLA4 & A4 emergency
Extension or discharge of an Emergency Protection Order (Art 64)	Any	Means & Merits test	App 7	CO1 CLA4 & A4 emergency
Application to vary or discharge a care or supervision order (Art 58)	Any	Means & Merits test	App7	CO1 CLA4 & A4 emergency

## **1.8 Merits Tested Applications regarding Public Law Proceedings under the Children (Northern Ireland) Order 1995, including Part V and VI appeals**

1. Where the client is making or supporting (rather than opposing) an application or appeal, Legal Representation will be refused if there are available alternative sources of funding. An application will be refused if it is unreasonable for funding to be granted. In considering this, regard must be had to the importance of the case to the client and all other circumstances including the issues at stake, the nature of the proceedings and relative positions of the parties having regard to the Human Rights Act 1998 and, where applicable, whether a reasonable private paying client would be advised to deal with the matter other than by way of making or supporting an application or appeal. Legal Representation will be refused also if the prospects of the application or appeal being successful (in the sense of achieving the outcome desired by the client) are poor in that they are likely to fail.

2. Cover for appeals must satisfy the same criteria as other merits tested applications under the Children (Northern Ireland) Order 1995. All appeals are subject to the merits test. When submitting an application for public funding, an opinion on the merits of the proposed appeal must be included. The opinion should be prepared by the solicitor/counsel who represented the applicant and should deal with what happened at the lower court, the magistrate's/judge's comments and give detailed consideration as to the merits of the appeal. It should be noted that the last step that can be taken on foot of the certificate covering the proceedings in the lower court is to lodge a notice of appeal with the appellate court. A copy of that notice of appeal must be submitted with the application for cover in respect of the proposed appeal. If the client is opposing an appeal, a copy of the notice of appeal must also be submitted with his/her application for cover. If the client holds a certificate in the Family Care Centre and proposes to pursue an appeal to the High Court, there is no need to submit any financial forms as the applications will be legally and financially linked. No such arrangement exists when you are appealing from the Family Proceedings Court to the Family Care Centre and financial forms must therefore be submitted. The appropriate application forms are as follows:

<b><u>Appeals in respect of Public Law cases</u></b>	<b><u>Parties</u></b>	<b><u>Conditions applied</u></b>	<b><u>Forms required</u></b>
Art 44 – child only Arts 50, 62, 63, 64	Child only Child, parent, those with parental responsibility	Merits test	CO1, A4, Copy Notice of Appeal NB Financial form(s) not required as test is merits test only

Applications to join in proceedings under Arts 50, 62,63,64	Any	Means & merits test	CO1, CLA4, A4 & copy Notice of Appeal
An application to discharge or vary care order or supervision order under Art 58 and any other Public Law appeals.	Any	Means & Merits test	CO1, CLA4, A4 & copy order

3. In the case of discharging a care order, in order to justify the grant of Legal Representation, the client would have to show prospects of succeeding in the particular circumstances of the case, having regard to all the circumstances including the time since the court last considered the issue, any recent developments and the availability of a complaints or review procedure of the Trust.

### 1.9 Adoption/Freeing for Adoption

1. Where proceedings are brought in the High Court or Family Care Centre, Legal Representation is unlikely to be granted where the application is uncontested (criterion 5.4.5).

2. Legal Representation for an applicant to make or support an application or appeal is unlikely to be granted if the prospects of success are poor (criterion 11.9.2). Although this forms the basis for a mandatory refusal, this is unlikely to apply to a natural parent opposing a freeing order. This is because as far as the birth parents are concerned once the freeing order has been determined it is unlikely that they will have any further involvement, save perhaps in relation to continuing contact. The nature of adoption proceedings and the desirability of a birth parent being represented may be sufficient to satisfy the criteria and justify the grant/continuation of representation to a parent, particularly having regard to the Human Rights Act 1998.

3. Where the application for funding is made by a step-parent, Legal Representation is unlikely to be granted unless in the particular circumstances the application to the court for an adoption order (rather than a special guardianship or residence order) is nonetheless likely to succeed (criteria 5.4.5 and 11.9.2)

4. Where it appears that the applicant may have access to alternative funding then Legal Representation may be refused.

5. Advice and assistance may be provided with regard to a parent or guardian's consent to or consent advance to adoption under Legal Help. If advance consent to adoption is given and a parent subsequently wishes to oppose the making of an adoption order, regard will be had to whether there

has been a change of circumstances such that leave of the Court is likely to be granted.

6. Where funding is sought to apply for an adoption order and the prospects of success are not entirely clear, the certificate is likely, if granted to be limited, in the first instance to obtaining Counsel's opinion on the prospects of success. Examples include applications with an immigration aspect and those where contact is likely to be sought after any adoption, but not agreed.

7. Proceedings of this nature are generally dealt with in the High Court or on occasion, in the Family Care Centre (following on from a care order application).

8. Legal Representation is likely to be granted to a child who is a party in proceedings. The child can be joined in adoption proceedings and can therefore apply for funding in his/her own name.

### **1.10 Inherent Jurisdiction (Wardship) (see also child abduction below)**

1. Following the introduction of the Children (Northern Ireland) Order 1995, wardship may now be unnecessary in many cases where the relief sought may be obtained under Article 8 of the Order. An application for Legal representation is, therefore, likely to be refused where any order in other proceedings, for example, under the 1995 Order, the Family Law Act 1986 or the Child Abduction and Custody Act 1985 would provide an appropriate remedy (criterion 5.4.5 and/or 11.9.3).

2. Wardship may, however still be appropriate in exceptional cases such as sterilisation of a person unable to give consent, other medical treatment issues or in an international abduction case where the provisions of the Child Abduction and Custody Act 1985 do not apply (criterion 11.9.3).

3. Legal proceedings must be likely to produce sufficient ultimate benefit to be warranted. The application must have sufficient prospects of obtaining an order but even where an order is likely to be obtained; Legal Representation is unlikely to be granted if any such order is likely to be ineffective, for example, if the child is abroad and any order obtained cannot be enforced effectively, for example, if there is no reciprocal judicial protocol (criterion 11.9.2 and 11.9.3).

3. Consideration should be given as to whether the matter could be more appropriately dealt with in another way, for example, writing a letter, involving the social services, using Interpol or the port alert system (criterion 11.9.3). Legal Representation is likely to be refused if more appropriate ways of dealing with the matter are available.

4. Applications for cover for Hague Convention proceedings are treated on a non means, non merits basis.

5. Where an application is to defend wardship proceedings, Legal Representation will be refused if the prospects of success are poor. It must also be reasonable for Legal Representation to be granted in the particular circumstances of the case having regard to the issues, the benefit to be obtained and the need for the applicant to be separately represented (criterion 5.4.5 and/or 11.9.3).

6. The appropriate application forms are as follows:

<b><u>Other Public Law Children Order cases</u></b>	<b><u>Parties</u></b>	<b><u>Conditions applied</u></b>	<b><u>Magistrates/Family Proceedings Court</u></b>	<b><u>County Court/Family Care Centre/High Court</u></b>
Adoption	Any	Means & Merits test	n/a	A1 CLA4 & A4 emergency
Wardship	Any	Means & Merits test	n/a	A1 CLA4 & A4 emergency
Freeing for adoption	Any	Means & Merits test	n/a	CO1 CLA4 & A4 emergency