



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 (Ministry) and the Family Law Section (FLS) of the New Zealand Law Society (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 in any specific case
 - (c) Review procedures under the Oranga Tamariki Act 1989 – Children's and Young People's Well-being Act 1989
 - (d) Reports of lawyer for child
 - (e) Process and criteria for appointment to the lawyer for child list
 - (f) Obligation to disclose
 - (g) Continuing legal education, professional supervision and mentoring
 - (h) Review of lawyers on lawyer for child list
 - (i) Remuneration
 - (j) Complaints
 - (k) Removal or suspension from lawyer for child 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) OT Act means the Oranga Tamariki Act 1989 – Children's and Young People's Well-being 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 OT Act;
- (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 OT Act. 'Specialist report' has a corresponding meaning.
- (g) References to 'psychologist' means a psychologist as defined in section 2(1) of the OT Act 1989 who is also on the Ministry's list of approved psychologists.
- (h) Reference to 'cultural advisor' means a person whom the court considers qualified for the purpose of preparing a cultural report under section 133(1B)(a) of COCA.
- (i) The term 'FLS' means the Family Law Section of the New Zealand Law Society.
- (j) 'FLS Best Practice Guidelines' means the FLS Lawyer for the Child Best Practice Guidelines.

5 SEPARATE REPRESENTATION OF CHILDREN

5.1 Various family law statutes 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 the relevant Act.

- (a) Sections 7(a) and (b) of COCA provides that the court may appoint a lawyer if the court has concerns for the safety and well-being of the child and considers an appointment necessary.
- (b) Sections 162(1)(a) and (b) of the Family Proceedings Act 1980 authorise 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 OT Act 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, including for a place of safety warrant) 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 166(1)(b) of the Family Violence Act 2018 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. Section 166(1)(c) of the Family Violence Act 2018 authorises the court to appoint a lawyer to represent the child in any proceedings on an application for a protection order made against a child or an application that a protection order be made against a child as an associated respondent, or in any proceedings relating to or arising out of a protection order made against that child.
- (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 authorise the court to appoint a barrister or solicitor to represent an applicant 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.
- (g) Section 19 of the Marriage Act 1955 authorises the court to appoint a lawyer to represent an applicant child who applies to the court for a Family Court judge's consent to an intended marriage if the court is satisfied that the appointment is necessary or desirable.
- (h) Section 20 of the Civil Union Act 2004 authorises the court to appoint a lawyer to represent an applicant child who applies to the court for a Family Court judge's consent to an intended civil union 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 of a lawyer from the lawyers on the lawyer for the child list.
 - (b) The judge is responsible for settling the brief for the lawyer.
 - (c) The brief will have regard to 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.
- 6.2 When appointing a lawyer, the court will consider the match of the lawyer's skills and/or competence to the specific case requirements, namely the court must, so far as practicable, appoint a lawyer who is, by reason of personality, cultural background, training and experience, suitably qualified to represent the child. Other factors will be considered, including:
 - (a) Availability of the lawyer.
 - (b) Current workload of the lawyer.
 - (c) Equitable distribution of work among lawyers on the list.
- 6.3 Every appointment shall specify:
 - (a) A timeframe for reporting to the court; and
 - (b) The time and funding allocated to carry out the brief.
- 6.4 An invoice should be rendered in a format acceptable to the Ministry. This will be set out in 6 minute time units calculated in accordance with the allocated hourly rate of remuneration.
- 6.5 Where, during the course of the work, it becomes clear that the allocated time is insufficient to cover the work required the lawyer shall seek an extension. The lawyer should use best endeavours to report before the estimate is exceeded.
- 6.6 Where 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 are unable to agree on the rate of remuneration and/or any additional cost, the file should be referred to the judge for direction.
- 6.7 When a final order has been made, the lawyer's appointment will continue:
 - (a) for 28 days in order to advise on the merits of an appeal (section 9B(d) of the Family Court Act 1980); and

(b) in COCA cases to comply with section 55(4).

6.8 The role of the lawyer is referred to in detail in the FLS Best Practice Guidelines.

7 ORANGA TAMARIKI 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 The lawyer's appointment continues in this way, unless specifically directed otherwise by the court.

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 to sections 132(1)(b) and 135(3)(e) of the OT Act).

7.4 The FLS Best Practice Guidelines set out in more detail the role of the lawyer in respect of OT Act reviews.

8 REPORT FROM LAWYER FOR CHILD

8.1 Reports, by way of memoranda, 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, highlight any relevant issues and outline further recommended steps to be taken.

8.4 Information on the content of reports from lawyer for child are included in the FLS Best Practice Guidelines.

9 PROCESS FOR APPOINTMENT TO THE LAWYER FOR CHILD LIST

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 chair of an appointment panel established in accordance with this paragraph.

9.3 The registrar shall give sufficient notice to the legal profession via the FLS that a panel will be convened to enable lawyers to apply for inclusion of the list.

9.4 The registrar will convene a panel to consider applications for inclusion on the list of lawyers for the child available to undertake Family Court appointments.

9.5 This panel must consist of a Family Court judge nominated by the regional liaison Family Court judge as chair, a manager or a family court co-ordinator, two nominees from the FLS, and a psychologist and cultural advisor where possible.

9.6 The registry must contact the FLS to confirm the FLS representatives to be included on the panel.

9.7 Panels will be convened no less than once a year, and more frequently if there are applications waiting to be considered and there is a need for lawyers 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 must 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. The application should include the names of two senior lawyers for children who would be willing to mentor the applicant if the application for appointment to the list is successful.
- (c) The registrar shall give copies of the application and any supporting documentation to the liaison 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) The panel shall arrange an interview with the applicant at such time and place as may be determined by the registrar.
- (f) If there is a matter raised at the interview adverse to the applicant and the applicant requests an adjournment, that adjournment should be granted to enable the applicant to respond to any adverse matter raised.
- (g) The Family Court judge convening the panel authorises the appointment to the list. The role of a psychologist or a cultural advisor is to advise other members of the panel.
- (h) An unsuccessful applicant shall be provided with reasons for not being included in the list.
- (i) All successful applicants shall be mentored by a senior lawyer for child, appointed by the panel, for the first 12 months following an appointment to the list.
- (j) The registrar will advise of the appointment in writing to the following people: the applicant, the court, the FLS, the mentor and the national office of the Ministry.
- (j) The Ministry must maintain a national list of lawyers for children. Each registry shall hold the national list and the local list of lawyers in that region. The Ministry shall send the national list to the FLS and provide regular updates of the list as required.

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, OT Act, Family Violence Act 2018 and the Family Courts Rules 2002 and section 9B of the Family Court Act 1980.
- (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) Knowledge of the impact of drug and alcohol abuse issues, the dynamics of family violence, child development, disabilities and mental health.

- (i) Understanding of tikanga Māori.
- (j) Sensitivity and awareness of different world views including gender, ethnicity, sexuality, cultural and religious issues for families;
- (k) Relevant qualifications, training and attendance at courses relevant to the role (including continuing professional development);
- (l) Personal qualities compatible with assisting negotiations in suitable cases and working co-operatively with other professionals;
- (m) Independence and strong advocacy;
- (n) Knowledge, understanding, and compliance with the FLS Best Practice Guidelines; and
- (o) A regulatory history compatible with the lawyer's suitability to act in the role of lawyer for the child.

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

10 OBLIGATION TO DISCLOSE INFORMATION

10.1 A lawyer must immediately disclose to the Principal Family Court Judge and to the Law Society details of any criminal conviction, criminal charges or Police investigations of which they are the subject

10.2 If a lawyer makes a disclosure under para 10.1, a panel must be convened within five days if the Principal Family Court Judge considers that given the issues involved the matter requires a determination of whether a lawyer is to be urgently suspended from the list on an interim basis. If the Principal Family Court Judge considers that given the nature of the issues involved suspension should be considered but the matter does not justify urgency, a panel must be convened within four weeks to determine whether or not the lawyer should be suspended or removed from the list. If a lawyer is suspended on an interim basis the matter shall be reconsidered once it is reasonable to do so to consider whether the interim suspension should be lifted or made permanent.

10.3 The process set out in para 15 of this practice note shall be followed.

10.4 If any Law Society complaint is upheld against the lawyer or the lawyer is referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, the lawyer has an obligation to notify the liaison judge of the court where they receive appointments of that complaint and/or action.

11 CONTINUING LEGAL EDUCATION, PROFESSIONAL SUPERVISION AND MENTORING

11.1 The lawyer must undertake professional supervision appropriate to the nature and extent of their lawyer for child practice.

11.2 The lawyer must undertake a minimum of five hours of active lawyer for the child practice and a minimum of five hours of verified continuing professional development (CPD) in areas specific to practising as a lawyer for the child within each CPD year as specified in paragraph 15 of the FLS best practice guidelines.

- 11.3 All lawyers newly appointed to the list must be mentored by a senior lawyer for child for 12 months from when they receive their first appointment. The panel will confirm the mentor to the lawyer at the time of appointment.

12 REVIEW OF LAWYER FOR THE CHILD

- 12.1 A review of all lawyers on the lawyer for child list must be undertaken at intervals of not more than three years, or earlier if the need arises. The registrar in each court must ensure that 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 approved lawyers together.
- 12.2 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 provide detail, within 28 days, on:
- (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;
 - (c) any matters relating to present or past appointments which they wish to draw to the attention of the panel;
 - (d) relevant continuing professional education undertaken since the last review; and
 - (e) regular professional supervision undertaken since the last review.
- 12.3 The panel shall meet as soon as practicable after the 28 days' notice of the triennial review has expired and arrange an interview with a lawyer at such time and place as may be determined by the registrar. In the larger registries, the panel should convene on an annual basis to interview a third of the lawyers on the list each year and ensure at the end of a three-year period that all lawyers have been interviewed.
- 12.4 The panel shall assess each lawyer against the appointment criteria in para 9.9 of this practice note.
- 12.5 Lawyers should be prepared to answer any questions from the panel in terms of the information provided under para 12.2, the criteria in para 9.9 and in addition in terms of:
- (a) any insights learned from practising experience and ongoing professional legal education since appointment or the last review;
 - (b) personal attributes the lawyer possesses that make them suitable to undertake the role;
 - (c) skills used in the role to promote and encourage settlement of issues; and
 - (d) what proportion of his or her practice is made up of work as lawyer for child.
- 12.6 The panel shall also consider any matters raised by a lawyer during the course of the review that relate to the administration of the list.
- 12.7 A lawyer may be removed from the list at:
- (a) the lawyer's request;
 - (b) as a result of the lawyer's failure to respond within the stipulated time;
 - (c) as a result of a review by the panel of the lawyer's ongoing suitability for the role;
 - (d) if the judge has upheld a complaint against a lawyer; or
 - (e) under the provisions set out in para 15 of this practice note.

Following this, the panel shall reconstitute the list of lawyer for the child.

- 12.8 A lawyer may be retained on the list subject to conditions, such as supervision and/or mentoring by an experienced lawyer for child and/or further education or training relevant to the role of lawyer for child.
- 12.9 The panel shall notify all lawyers on the reviewed list whether their names have been retained on the list, including whether any conditions have been imposed, or removed from the list, including the reasons for removal.
- 12.10 The registrar shall send the revised list to the national office of the Ministry and the FLS.

13 REMUNERATION

- 13.1 Lawyers will be paid at one of the hourly rates agreed between the Law Society and the Ministry.
- 13.2 Lawyers will be paid at the higher rate where two or more case characteristics listed in the Courts Operation Circular 09/01 are present.

14 COMPLAINTS

- 14.1 Any complaints about the lawyer are to be made in writing to the Family Court registry where the proceedings are held.
- 14.2 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 liaison judge responsible for the court where the proceedings were filed.
- 14.3 The lawyer who is the subject of the complaint will be sent a copy of the complaint to allow them to provide a written response for the judge to consider. The judge handling the complaint shall make a direction about any additional party who is to receive a copy of the complaint.
- 14.4 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) observe the rules of natural justice; and
 - (f) determine whether the complaint has substance or not.
- 14.5 If the judge determines the complaint does not have substance, he or she shall dismiss it.
- 14.6 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) undertake further training;
 - (c) complete up to six assignments under the supervision of a named experienced lawyer for child;

- (d) have a named experienced lawyer for child as mentor for a period of up to 12 months.
- 14.7 The judge may also, at his or her discretion, refer the complaint to the Law Society.
- 14.8 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.
- 14.9 The lawyer who is the subject of the complaint shall be notified of the outcome of the complaint by the registrar of the court or the panel as appropriate. The judge handling the complaint shall make a direction about any other party who is to be notified of the outcome of the complaint.
- 14.10 Nothing in this practice note limits the court's jurisdiction to do whatever it considers appropriate in the circumstances or otherwise limits the right of the Law Society or other statutory authority to consider any complaint about a lawyer.

15 REMOVAL OR SUSPENSION FROM THE LIST OF LAWYER FOR THE CHILD

- 15.1 A panel shall be convened on the referral of a complaint by a judge or a notification pursuant to para 10 of this practice note to consider whether or not a lawyer should be removed or suspended from the lawyer for child list.
- 15.2 In addition, a judge may also refer a matter to the panel for consideration where:
 - (a) a lawyer has repeatedly failed to abide by the FLS Best Practice Guidelines;
 - (b) there is a risk of harm or undue hardship to the child; or
 - (c) the court no longer has trust and confidence that the lawyer can effectively advocate for or represent the child's welfare and best interests.
- 15.3 The panel will comprise a Family Court judge, a Family Court manager and at least one nominee of the FLS.

Urgent interim suspension

- 15.4 In circumstances where the panel is considering an urgent interim suspension, the panel will issue a notice to the lawyer:
 - (a) advising that a panel will be convened within five working days to consider an interim suspension of the lawyer;
 - (b) specifying the reasons why the panel is considering an urgent interim suspension; and
 - (c) stating the right of the lawyer to make submissions or representations to the panel.
- 15.5 The lawyer shall be entitled to be represented at the panel's meeting and shall be given reasonable notice of the date, time and place of the meeting.

Suspension or removal from the list

- 15.6 The panel shall advise the lawyer in writing that it is convening to consider suspending or removing his or her name from the list.
- 15.7 The notice from the panel to the lawyer shall:
 - (a) specify the reasons why the panel is considering the suspension or 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 suspending or removing the lawyer from the list after 21 days unless the lawyer indicates in writing that he or she opposes suspension or removal.
- 15.8 When the 21-day time period has expired, or sooner on receipt of a response from the lawyer, the panel shall meet to consider whether or not the lawyer should remain on the list. If the lawyer has indicated that he or she wishes to be heard opposing the suspension or removal, the date for this meeting shall be arranged in conjunction with the lawyer.
- 15.9 The lawyer shall be entitled to be represented and to call witnesses in support at any such meeting.

Decision of panel

- 15.10 The registrar shall advise the liaison judge, the lawyer, the relevant Family Court(s), the Law Society and the national office of the Ministry of the decision in writing.
- 15.11 If the lawyer is suspended or removed from the list, the written decision must include a direction for the registrar as to the reallocation of the lawyer's current lawyer for child files.
- 15.12 If the panel decides that suspension or removal from the list is not necessary, it may:
- (a) require the lawyer to do any or all of the actions referred to in para 14.6 of this practice note;
 - (b) make a direction on whether or not some or all of a lawyer's files are reallocated; and/or
 - (c) refer the matter to the Law Society for further consideration.
- 15.13 When considering whether or not to reallocate a lawyer's files, the panel must have regard to the:
- (a) nature of the allegation;
 - (b) status of any current proceedings;
 - (c) issues in question in any current proceedings;
 - (d) whether or not reallocation of any, some or all of the files is necessary; and
 - (e) whether or not it might be appropriate for the lawyer to continue to act on some/all files subject to the imposition of appropriate conditions such as supervision and/or not meeting alone with a child.
- 15.14 A lawyer may appeal any panel decision to the High Court by way of judicial review.

COMMENCEMENT DATE

This revised practice note comes into operation on 19/06/2020



Judge Jacquelyn Moran

PRINCIPAL FAMILY COURT JUDGE

Dated 19/06/2020