Unit 6:

Children: Public Law Proceedings
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Unit 6
Children: Public Law Proceedings

Learning Outcomes

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| **1. Define Duty to Investigate** | **P1:** Explain the local authority’s duty to investigate children in need  
**P2:** Describe the process leading up to proceedings  
**P3:** Explain what is involved and how assessments are carried out |
| **2. Investigate Care and Supervision Orders** | **P4:** Explain what care and supervision orders are  
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In this Unit we shall consider ‘public’ law proceedings. Consideration of such proceedings follows private law proceedings. Some of the concepts from Unit 5, such as the welfare test, the no order principle and parental responsibility, are also relevant in public law proceedings.

Public law proceedings essentially involve the state’s (in the guise of the child’s local authority) intervention in the lives of children in its area.

Public law proceedings, which you will also hear described as ‘care proceedings’ are some of the most complex and demanding that you will encounter in your family law practice. The law in this area in particular is constantly evolving and you should try to keep up with these developments.

1. **Duty to investigate**

We have already considered in Unit 5 when a local authority may prepare a report under section 37 of the Children Act 1989 in
order to investigate, in broad terms, whether it is felt that the child in question may be suffering such harm that would require the making of a care or supervision order (to be considered later). The local authority should also consider whether the provision of other services would be appropriate or whether other action should be taken.

There is also a duty to investigate placed upon the local authority by section 47 of the Children Act 1989. Section 47 states as follows:

“Where a local authority –

(a) are informed that a child who lives, or is found, in their area -

(i) is the subject of an emergency protection order; or
(ii) is in police protection; or
(iii) has contravened a ban imposed by a curfew notice imposed within the meaning of Chapter I of Part I of the Crime and Disorder Act 1998; or

(b) have reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child’s welfare.

In the case of a child falling within paragraph (a)(iii) above, the enquiries shall be commenced as soon as practicable and, in any event, within 48 hours of the authority receiving the information.”

Such an investigation is specifically aimed at emergency situations that may arise. The investigation that takes place is to determine what action is needed to safeguard and promote the welfare of children within the local authority’s area. Determining whether a child is in the local authority’s area is a matter of geography.

When assessing whether a child is at risk of harm, all agencies involved in child protection should use the guidance provided by the Department of Health entitled Working Together to Safeguard Children. You may well hear this document abbreviated simply to ‘Working Together’.

**Task 1:**

Using the Department of Health website, www.dh.gov.uk, find the Working Together to Safeguard Children guidance. A document of some 200+ pages, you should download this and save it on your computer as it will be an important reference point.
Working Together defines the potential abuse and neglect that a child may face as follows:

“Abuse and neglect are forms of maltreatment of a child. Somebody may abuse or neglect a child by inflicting harm, or by failing to act to prevent harm. Children may be abused in a family or in an institutional or community setting, by those known to them or, more rarely, by a stranger. They may be abused by an adult or adults, or another child or children.”

Working Together gives useful definitions as to what constitutes the various forms of abuse and neglect which a child may face:

**Physical abuse**

Physical abuse may involve hitting, shaking, throwing, poisoning, burning or scalding, drowning, suffocating, or otherwise causing physical harm to a child. Physical abuse may also be caused when a parent or carer fabricates the symptoms of an illness in a child, or deliberately causes ill health.

**Emotional abuse**

Emotional abuse is the persistent emotional maltreatment of a child such as to cause severe and persistent adverse effects on the child’s emotional development. It may involve conveying to children that they are worthless or unloved, inadequate, or valued only insofar as they meet the needs of another person. It may feature age or developmentally inappropriate expectations being imposed on children. It may involve seeing or hearing the ill-treatment of another. It may involve serious bullying, causing children frequently to feel frightened or in danger, or the exploitation or corruption of children. Some level of emotional abuse is involved in all types of maltreatment of a child, though it may occur alone.

**Sexual abuse**

Sexual abuse involves forcing or enticing a child or young person to take part in sexual activities, including prostitution, whether or not the child is aware of what is happening. The activities may involve physical contact, including penetrative or non-penetrative acts. They may include non-contact activities, such as involving children in looking at, or in the production of, pornography including sexual online images, watching sexual activities, or encouraging children to behave in sexually inappropriate ways.
Neglect

Neglect is the persistent failure to meet a child’s basic physical and/or psychological needs, likely to result in the serious impairment of the child’s health or development. Neglect may occur during pregnancy as a result of maternal substance abuse. Once a child is born, neglect may involve a parent or carer failing to:

- provide adequate food, clothing and shelter (including exclusion from home or abandonment);
- protect a child from physical and emotional harm or danger;
- ensure adequate supervision (including the use of inadequate caregivers);
- ensure access to appropriate medical care or treatment.

It may also include neglect of, or unresponsiveness to, a child’s basic emotional needs.

Working Together also provides guidance in respect of the decision-making process that should be applied by the local authority. This is particularly useful to consider in public law proceedings when you receive the local authority’s evidence, as it will allow you to put it in context.

Referral

The referral is the process by which the local authority’s attentions are brought to the child concerned. The referral may be made by the child’s parent, a professional, such as the police, the child’s health visitor or teacher, or any other person such as a neighbour or family friend. On occasion, the referral comes from the local authority’s own social services department, where for example, a family about whom concerns have been expressed previously, has another child. Within 24 hours of receiving the referral, the local authority will attempt to clarify the referral, usually by checking with the person or agency that made it, and then decide what to do next.

Any initial action taken following a referral being made should be done with the permission of the child’s parents, unless this would put the child at risk. Following on from the referral, there will either be no further action taken, appropriate services or support may be provided for the family or there may be further investigation, including potentially a section 47 investigation.

Initial assessment

Following the referral, the guidance states that the local authority is expected to complete an initial assessment within seven days. The initial assessment must focus on establishing whether the child is in need, and whether the child is suffering, or is likely to suffer, significant harm.
An initial assessment should include meeting and speaking with the child and his or her family members and obtaining information from relevant professionals such as those listed above. The initial assessment should address the developmental needs of the child, whether the parents are able to respond appropriately to the child’s identified needs, whether the child is being adequately safeguarded from significant harm, and whether the parents are able to promote the child’s health and development and what impact the family functioning and history, the wider family and environmental factors are having on the parents’ capacity to respond to their child’s needs and the child’s developmental progress. The assessment must also address whether action is required to safeguard and promote the welfare of the child.

Next steps where harm or the likelihood of harm is suspected

Section 47 of the Children Act 1989 imposes an obligation on the local authority to investigate as set out above. This investigation will, in the vast majority of circumstances, take the form of a ‘core assessment’. The core assessment will be completed in line with the guidance provided in another document: Framework for the Assessment of Children in Need and their Families, and there is a 35-day time limit for completing the document. Any core assessment completed in a case that moves to care proceedings will usually be filed within the proceedings so understanding the process that should be followed when completing such an assessment will be of assistance to you.

Task 2:

Using the Department of Health website, www.dh.gov.uk, find the Framework for the Assessment of Children in Need and their Families guidance. This document is over 100 pages; again, you should download this and save it on your computer, as it will be an important reference point.

The Department of Health website also provides copies of the standard Forms used for recording initial and core assessments. The Forms differ depending on the child’s age; there being one for children aged: 0 – 2; 3 – 4; 5 – 9; 10 – 14; and 15 years or over.

A useful summary of the Framework for the Assessment of Children in Need and their Families can be found in Working Together at Appendix 2.

There are three areas of the Framework for the Assessment of Children in Need and their Families. These are:

1. the child’s developmental needs;
2. the parents’ or care-givers’ capacity to respond appropriately to those needs; and
3. the wider family and environmental factors.

**Task 3:**
These areas are set out in a very useful table form that can be found in the Working Together guidance at Figure 2. Print out Figure 2 and keep it with your file.

Next steps where harm or the likelihood of harm is not suspected

The local authority will not consider legal proceedings in such circumstances, but if the outcome of the initial assessment is that the child is 'in need' then a core assessment may still be carried out.

**Strategy discussion**

The strategy discussion is an opportunity for the local authority’s social services department to share information with other professionals involved with the child and accordingly, make better informed decisions about the child. The meeting will further discuss how quickly action is required to safeguard the child and what, if any, information should be provided to the family about the meeting.

**Decisions following section 47 inquiries**

It may be that after full inquiries have been undertaken, the concerns that prompted the referral are not substantiated. In such cases the local authority should still consider offering support to the family as and when is necessary. If there remain concerns of significant harm, but insufficient evidence for the local authority to instigate care proceedings, then the local authority may well adopt an approach of monitoring the child’s well-being and progress.

Where the result of the investigations is that the concerns arising from the referral appear to be substantiated and the child is considered to be at risk of suffering significant harm, then a child protection conference should be convened to allow for the child’s family and all relevant professionals to plan for the protection of the child.

**Initial child protection conference**

If an initial child protection conference is required then it should be called within 15 days of the strategy discussion. Working Together describes the purpose of the initial child protection conference as follows:

- to bring together and analyse, in an inter-agency setting, the information that has been obtained about the child’s developmental needs, and the parents’ or carers’ capacity to respond to these needs to ensure the child’s safety and promote the child’s health
and development within the context of their wider family and environment;

● to consider the evidence presented to the conference, make judgements about the likelihood of a child suffering significant harm in future, and decide whether the child is at continuing risk of significant harm; and

● to decide what future action is required to safeguard and promote the welfare of the child, how that action will be taken forward, and with what intended outcomes.

Those attending the conference must be there because they have a significant contribution to make. That contribution may be from their professional involvement with the family or their personal knowledge of the child.

Task 4:

Use Working Together and find the section entitled ‘Initial Child Protection Conference’. List the examples of potential attendees at the conference.

The attendance of the child’s parents is very important. The parents should be provided with information about how they may obtain information in order to obtain representation at the conference. The parents should also be provided with copies of reports prepared for the conference, including the core assessment, if it has been prepared.

The initial child protection conference will result in decisions being made in respect of the child. These decisions will include whether the child is at continuing risk of significant harm. In determining whether that is the case, the test as set out in Working Together is as follows:

● the child can be shown to have suffered ill-treatment or impairment of health or development as a result of physical, emotional or sexual abuse or neglect, and professional judgement is that further ill-treatment or impairment are likely; or

● professional judgement, substantiated by the findings of inquiries in this individual case or by research evidence, is that the child is likely to suffer ill-treatment or the impairment of health or development as a result of physical, emotional or sexual abuse or neglect.

If it is determined that the child is at continuing risk of significant harm, then the conference will decide what any child protection plan (considered below) should contain and what, if any, category of abuse under which the child should be placed.

Membership of the ‘core group’ will also be determined. The core group is made up of family members, including the child themselves where appropriate, and professionals who are charged with developing and implementing the child protection plan.
The initial child protection conference must also set the date for a review conference, to determine progress. The first of these review conferences must occur within three months of the initial conference, and thereafter no longer than six monthly intervals. The purpose of the review conferences is essentially to make sure that the case is not drifting, and positive steps are being taken for the child.

Following the initial child protection conference, including the child protection plan

The child protection plan will include the appointment of a ‘key worker’ for the child, who, in the majority of cases, will be a social worker from the local authority’s social services department. This key worker should be the link between the family and the relevant professionals involved in the child’s life.

The child protection plan has a very specific role, and *Working Together* sets out that it should:

- identify factors associated with the likelihood of the child suffering significant harm and ways in which the child can be protected through an inter-agency plan, based on the current findings from the assessment and information held from any previous involvement with the child and family;
- establish short-term and longer-term aims and objectives that are clearly linked to reducing the likelihood of harm to the child and promoting the child’s welfare, including contact with family members;
- be clear about who will have responsibility for what actions – including actions by family members – within what specified timescales;
- outline ways of monitoring and evaluating progress against the planned outcomes set out in the plan; and
- be clear about which professional is responsible for checking that the required changes have taken place, and what action will be taken, by whom, when they have not.

The Child Protection Plan

In the Working Together to Safeguard Children 2006 the Government announced that the maintenance of a separate Child Protection Register will be replaced in April 2008. The functionality of the Register will be replaced by the Integrated Children’s System (ICS) and more specifically through the existence of a Child Protection Plan.

With the new changes each child whose name was on The Child Protection Register will be subject to a Child Protection Plan. New cases which would have been added to the Register will still become
the subject of a Child Protection Plan. When cases are de-registered their Child Protection Plan will come to an end.

The Registers across England and Wales were phased out from 1/04/08 and replaced by the Child Protection Plan. When concerns about a child are raised and a referral is made the child protection process remains the same – i.e. an initial assessment – which may lead to s47 enquiries by means of a Core Assessment – and convening a multi-agency child protection meeting to formulate a Child Protection Plan.

The Plan will consider the area (s) of risk of harm — which may include physical abuse, emotional abuse, neglect and sexual abuse.

Please refer to Working Together section 5.93 -5.100 for further detail.

2. Care and supervision orders

Should the outcome of the investigations set out above be that the local authority seeks to commence proceedings, then, ultimately, the application will be for a care or supervision order. Both care and supervision orders are prescribed by the Children Act 1989. We shall consider these orders in tandem, but to begin with, with more emphasis on care orders. One point to note at the outset is that applications for supervision orders will still be referred to as ‘care proceedings’, even though the application is not for a care order.

An introduction to care orders

A care order is an order that places a child, in respect of whom an application for a care or supervision order has been made, in the care of the local authority. The making of a care order places a duty on the local authority to receive the child into the local authority’s care and to keep the child there while the order remains in force. There is also a duty on the local authority as a result of the care order to safeguard and promote the child’s welfare, together with a requirement to provide accommodation and maintenance during the time that the child is in care.

One of the most important initial aspects of a care order to be aware of is that it provides the local authority with parental responsibility (a concept that we considered in the last Unit) for the child. The making of a care order does not extinguish the parental responsibility of those who already hold it (such as parents), but it does mean that the local authority can determine the extent to which the child’s parents, or anyone else with parental responsibility may exercise their parental responsibility.
When a care order is made, the following orders are automatically discharged:

- any order made under section 8 of the **Children Act 1989** (considered in the last Unit);
- a supervision order;
- a school attendance order made under the **Education Act 1996**;
- an interim care order;
- an interim supervision order;
- an education supervision order;
- a custody order not made in this country.

**Application for care and supervision orders**

Under **section 31** of the **Children Act 1989**, the application for these orders can be made only by a local authority or ‘an authorised person’. An authorised person refers to anyone so authorised by the Secretary of State, which at present is only the NSPCC.

It can be seen, therefore, that the court cannot initiate care proceedings of its own motion. If the court has concerns that a child may be suffering significant harm, then it can order a report under **section 37** of the **Children Act 1989** (considered in the last Unit). Following receipt of that report, the court may make an interim care order (considered later in the Unit) or a supervision order, but the ultimate decision as to whether to begin care proceedings will rest with the local authority.

**Task 5:**

Using the website for the Office of Public Sector Information, www.opsi.gov.uk, find the **Children Act 1989**. Consider **section 31** of the Act. What is the age at which it is not possible for a child to be made the subject of a care or supervision order?

**Parties to care proceedings**

In the vast majority of cases the Applicant in care proceedings will be the local authority, although as we have already seen, it may possibly be the NSPCC. There are those who will automatically be Respondents to the application, and they are as follows:

- all those who the Applicant believes have parental responsibility for the child;
- the child;
- in a situation where the child concerned is the subject of a care order and the application is for a supervision order, all those who the Applicant believes had parental responsibility immediately prior to the making of the care order;
in a situation where the application is to extend, vary or discharge an order, all the parties who were parties to the proceedings when the original order was made.

There are others who may request to be joined as a party to care proceedings. If such a request is made by a person who has parental responsibility for the child, then the court must allow them to become a party. If the request comes from the child’s natural father who does not have parental responsibility, then the case of Re B (Care Proceedings: Notification of Father without Parental Responsibility) [1999] 2 FLR 408 should be applied. This determined that a natural father should be a party to care proceedings concerning his child, unless there are justifiable reasons for not joining him as a party.

An application from someone else, for example the child’s grandparent, to be joined as a party may be dealt with by way of a court hearing or simply as an exercise on paper.

**Representation of the child**

The court has a duty in public law proceedings to appoint a children’s Guardian unless it is satisfied that it is not necessary to do so to safeguard the child’s welfare. The child’s Guardian’s role is wide-ranging. The Guardian’s obligations include the following:

- to appoint a solicitor for the child (although this may already have been done prior to the Guardian’s appointment);
- to advise the court whether any person may have an interest in becoming a party to the proceedings or in making representations to the court;
- to attend all hearings unless their attendance is excused;
- to advise as to whether the child has sufficient understanding to conduct their own affairs;
- to advise the court as to the child’s wishes and feelings in respect of any relevant matter;
- to advise as to an appropriate timetable for the proceedings;
- to advise the court as to the options available for the child;
- to provide reports as the court requires; for the final hearing and on occasion interim hearings.

**The threshold criteria**

It is only possible for the court to make a care or supervision order if the threshold criteria are satisfied. The criteria are set out in section 31 of the Children Act 1989:

“(2) A court may only make a care order or supervision order if it is satisfied –
(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
(b) that the harm, or likelihood of harm, is attributable to –
   (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
   (ii) the child’s being beyond parental control.”

If the court is satisfied that subsections (a) and (b) are satisfied, it must also apply the tests in section 1 of the Children Act 1989 that we considered in the previous Unit, namely the paramountcy principle, any issues of delay, the welfare checklist and the no order principle, before determining whether it would be appropriate to make a care or supervision order.

Section 31(9) of the Children Act 1989 defines the relevant terms used in the threshold criteria as follows:

“harm” means ill-treatment or the impairment of health or development, including, for example, impairment suffered from seeing or hearing the ill-treatment of another;
“development” means physical, intellectual, emotional, social or behavioural development;
“health” means physical or mental health; and
“ill-treatment” includes sexual abuse and forms of ill-treatment which are not physical.
“is suffering significant harm”/“likely to suffer significant harm”

The date at which the child is suffering significant harm is determined to be the date on which the local authority began its procedures to take protection of the child, usually the date on which the local authority made its application to the court. It is possible, however, for the local authority, in seeking to make out the threshold criteria, to rely on events that took place before and after the relevant date.

Equating whether the child is likely to suffer significant harm involves the court considering the future, and that may be the short-, medium- or long-term future, and determining whether there is a real possibility that cannot be sensibly ignored that the child will suffer such harm. Again, the relevant date for determining whether a child is likely to suffer significant harm is the same as for determining whether a child is suffering significant harm, namely the date on which the local authority began its procedures to take protection of the child.

Significant harm

It is for the court to determine whether the harm that is suffered, or is likely to be suffered, is significant. ‘Significant’ is not defined by the Children Act 1989 and the court will take an objective view as to whether the harm would be significant if it occurred to any child.
The court will also look at the child’s individual characteristics, be they physical, mental, social or racial, for example, as to whether the harm is significant.

The harm is attributable to

For the second limb of the threshold criteria to be satisfied the harm must in the first instance be attributable to the care given to the child, or likely to be given to him or her if the order were not made. The word ‘care’ is not defined in the Children Act 1989 but it must include providing for the child’s health and total development, which includes physical, intellectual, emotional and social care.

The court determines whether the harm is attributable to a lack of reasonable care on an objective basis: the care not being what it would be reasonable to expect a parent to give him or her. The parent in question does not have to be acting deliberately in providing an insufficient standard of care. Sadly you may well come across parents who are providing the best care that they can, but that care is simply not good enough.

The second possible part of the test is that the child is beyond parental control; the court will consider that state in the past, present or future. Again, there is no requirement for this situation to have arisen as a result of the parents’ failings.

Proportionality

It is not correct that in every case that the court determines that there is a risk of significant harm to a child that a care order must be made. We have already considered that the court must apply the no order principle to all applications for care or supervision orders. It is also right that in applications for care orders, in particular where the local authority plans to remove the child from its natural family, the court must apply the principle of proportionality.

In the case of Re B (Care: Interference with Family Life) [2003] 2 FLR 813, Thorpe LJ held that when considering an application for a care order with a plan of removing the child from its natural family, the judge:

“…must not sanction such an interference with family life unless he is satisfied that it is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of children.”
Family placement

Where the local authority, following its investigations, is of the view that the child should be placed away from its parents, the local authority must demonstrate to the court that there are no other family members who could care for the child. The court must consider the child’s right to grow up in their own family, and if the court determines that the child cannot remain in a family placement, the risks that would be present must be spelt out.

Care plan

Whenever an application is made for a care or supervision order, the local authority must prepare a care plan setting out its plans for the long-term future of the child. A final care or supervision order cannot be made until the court has considered the care plan. There must be a separate care plan for each child, even when the children of the family have very similar needs.

The local authority must provide evidence to the court to support its care plan. In particular, if the plan is to place the child away from his or her family, then evidence as to the nature of the placement should be available to the court.

When the local authority makes an application for an interim order (which we shall consider below) an interim care plan should be prepared setting out what the local authority’s intentions are and the likely timescales for completion. Any interim care plan should include:

- the aim of the plan and a summary of the social work timetable;
- a summary of the child’s needs and how these are to be met;
- implementation and management of the plan.

If the final care plan presented to the court appears inchoate, or there are events that shall occur in the near future that will potentially alter the way that the case may progress for the child, the court should implement an interim rather than a final order, to enable all the relevant information to be before the court at the final hearing.

Detailed guidance as to the contents of a care plan was provided in the local authority Circular LAC (99)29 ‘Care Plans and Care Proceedings under the Children Act 1989’. There should be five sections set out as follows:
1. Overall aims
   - aim of plan and timetable

2. Child’s needs
   - the child’s identified needs (including those from race, culture, religion or language; special educational, health or disability needs);
   - the extent to which the wishes and views of the child have been obtained and acted upon;
   - the reasons supporting this, or explanations of why these wishes or views have not been given absolute precedence;
   - how those needs might be met;
   - arrangements for, and the purpose of, contact in meeting the child’s needs (specifying contact relationships), and proposals to restrict or terminate contact.

3. Views of others
   - the extent to which the wishes and views of the child’s parents and anyone else with a sufficient interest in the child (including representatives of other agencies) have been obtained and acted upon and the reasons supporting this or explanations of why these wishes and views have been discounted.

4. Placement details and timetable
   - the proposed placement (type and details);
   - the time that is likely to elapse before the proposed placement is made;
   - the likely duration of placement in the accommodation;
   - arrangements for health care (including consent to examination and treatment);
   - arrangements for education;
   - arrangements for reunification;
   - other services to be provided to the child and/or his or her family either by the local authority or other agencies;
   - support in the placement;
   - specific detail of the parents’ role in day-to-day arrangements;

5. Management and support by local authority
   - persons responsible for implementing the plan (specific tasks and overall plan);
   - dates of reviews;
   - contingency plan if the placement breaks down;
   - arrangements for input by parents, the child and others into the ongoing decision-making process;
   - arrangements for notifying the responsible authority of disagreements or making representations.
The care plan should be signed by a manager within the local authority’s social services department.

Twin-track planning

There will often be cases in care proceedings where even from an early stage it is clear that the care plan will give the option of rehabilitation of the child to the parents, or placement outside of the family.

To implement either of these plans would require a great deal of preparation and so, for practical reasons to avoid any potential delay for the child, the local authority should implement a twin-track plan (sometimes referred to as parallel planning), whereby both plans are actioned at the same time, in order to provide the court that shall make the final determination with as much information as possible.

Contact with a child in care

If, as a result of the conclusion of or during care proceedings, the child is removed from the care of his or her parents, then how often those parents and other significant people to the child will see the child will be a major concern. Should you be representing a parent whose child has been removed, then one of your most important tasks will be to secure for them the largest amount of contact possible with the child.

Section 34 of the Children Act 1989 set out that:

“(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section) allow the child reasonable contact with -

(a) his parents;
(b) any guardian or special guardian of his;
(ba) any person who by virtue of section 4A has parental responsibility for him; [i.e. a step-parent];
(c) where there was a Residence Order in force with respect to the child immediately before the care order was made, the person in whose favour the order was made; and
(d) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court’s inherent jurisdiction with respect to children, that person.”

Contact can mean all the types of contact that we considered in the last Unit, from the sending of a birthday card to having the child stay overnight.

You will have noted that section 34(1) of the Children Act 1989 uses the term ‘reasonable’ contact. Reasonable contact will usually be
agreed between the local authority and the child’s parents or others. In the absence of agreement then the court can be asked to determine the question and in such circumstances the court will consider what is objectively reasonable.

The child’s grandparents are missing from the list, but paragraph 15 of Schedule 2, together with paragraph 7 of Schedule 14 of the Children Act 1989 give a further, general, duty to the local authority to promote contact between a child that it is looking after (which will include a child in care) as follows:

“(1) Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and –

(a) his parents;
(b) any person who is not a parent of his but who has parental responsibility for him; and
(c) any relative, friend or other person connected with him.”

And:

“where, immediately before the care order was made, there was an existing order by virtue of which a person had custody or care and control of the child, that person.”

Grandparents are, therefore, covered in the definition of the child’s relatives, which further includes a brother, sister, uncle or aunt (whether full or half blood or by marriage or by civil partnership). It remains open, however, for grandparents to make an application to the court for leave to make an application for contact with a child that is in care.

The local authority does not have an obligation, but under paragraph 16 of Schedule 2 of the Children Act 1989 it may make payments to those listed in (a) – (c) above to cover the expenses of travelling to and from contact sessions. This will only normally be done if it appears that without the payments the contact session could not take place without undue financial hardship being suffered.

Contact Orders

The court can make any order in respect of contact that it considers to be appropriate. As has been set out above, it is possible for relevant parties to make either an application for contact or for leave to make such an application if it is not possible for agreement to be reached in respect of contact arrangements. The court can also make any order that it considers to be appropriate of its own motion.
Determining applications

The court will apply the welfare test to any application for contact with a child in care. In circumstances where there is an application for the child in care to have contact with another child, for example a sibling or other relative, the court will only consider the welfare of the child who is in care.

Variation/discharge of Contact Orders

Variation of a Contact Order made in respect of a child in care can be completed following an application made by the local authority, the person named in the Contact Order or the child him or herself.

Supervision orders

A supervision order appoints a ‘supervisor’ for the child and its meaning is set out in section 35 of the Children Act 1989:

“(1) While a supervision order is in force it shall be the duty of the supervisor -
(a) to advise, assist and befriend the supervised child;
(b) to take such steps as are reasonably necessary to give effect to the order.”

The supervisor must take such steps as are reasonably necessary to give effect to the supervision order. If the supervisor considers that the supervision order is not being complied with or in fact may no longer be necessary, then he or she should make an application to the court for either variation or discharge of the supervision order. A supervision order does not give the supervisor or the local authority parental responsibility for the child.

When a supervision order is made it will discharge any previous care or supervision order that was previously in force.

The supervision order will last for one year initially, but the supervisor may apply to the court to have the order extended for up to three years from the date on which the order was originally made. If the local authority considers at the end of that three-year period that a further supervision order is required it must demonstrate that the threshold criteria are still met.

A supervision order may be made if the threshold criteria are made out, and constitutes a less interventionist approach than the making of a care order. Where the balance between making a care or supervision order is equal, the court should make a supervision order, as it is the least interventionist approach.
3. **Interim orders**

We have already made passing reference to interim care orders above. Under section 38 of the *Children Act 1989*, an interim care or supervision order may be made in any proceedings arising out of an application for a care or supervision order where those proceedings are adjourned.

It is important to note that a local authority making application for a care or supervision order should not automatically assume that obtaining an interim order is a formality to continue until the conclusion of the case. An important case concerning the relevance of interim care orders is *Re G (Minors) (Interim Care Order) [1993] 2 FLR 839*. This case determined that an interim care order should be an impartial step and does not give any advantage to the local authority.

An interim order should be used by the court to protect the child’s welfare until such time as the court has sufficient information before it to determine whether to make a final order.

**Procedure**

Before the final hearing of an application for a care or supervision order, the court has the power to make an interim care order or interim supervision order. The court also has this power when directing an assessment to be carried out by the local authority under section 37(1) of the *Children Act 1989*.

The application must be made on notice to the other parties, unless the court grants leave to make the application at a directions appointment in the case without notice to the other parties. The notice period required to be given to the Respondents is two days, but this will not be required if the Respondents consent to the making of the interim care order.

**Grounds for interim care or interim supervision orders**

The court has the power to make an interim care order or interim supervision order where there are *reasonable grounds for believing* that the threshold criteria as set out in section 31 of the *Children Act 1989* are made out. The test ‘reasonable grounds for believing’ is clearly lower than the standard required for securing a final care or supervision order, but the test still requires the local authority to adduce clear factual evidence as to the threshold criteria being met.

As with the making of a final care or supervision order, the paramountcy principle, welfare checklist and no order principle apply. You may well encounter cases where all the parties to the proceedings agree that an interim order should be made. Even with this level
of agreement, the court must still be satisfied that the threshold is crossed to the required standard.

As we have considered above in relation to the case of Re G (Minors) (Interim Care Order) [1993] 2 FLR 839, the making of an interim order should be an impartial and neutral step.

Matters to consider

The case of Hampshire County Council v S [1993] 1 FLR 559 held that when considering an application for an interim care or interim supervision order, the court should consider the following factors:

- it will usually only be required of the court to establish a holding position at the interim hearing, pending the final hearing;
- the court must ensure that the hearing to determine the main issues takes place as soon as possible;
- the court should only very rarely make findings as to disputed facts at an interim hearing;
- the greater the making of an interim order alters the status quo, the greater the need for an earlier substantive hearing date;
- when the court considers that it may make an interim order leading to a substantial change, the court should allow oral evidence, limited to the issues which are essential at the interim stage;
- if possible, the court should have written evidence of the children’s Guardian, although in practice this is unlikely to be possible, and the Guardian should be at court to give oral evidence;
- the court must read all the documents filed and in cases in the Family Proceedings Court the magistrates’ clerk should record the magistrates’ reasons for any decision or any findings of fact made;
- if the magistrates are unable to complete their reasons, they should adjourn the application to a date when they are able to give their reasons.

Directions for assessment

Section 38(6) of the Children Act 1989 provides:

“Where the Court makes an Interim Care Order or Interim Supervision Order it may give such directions (if any) as it considers appropriate with regard to the medical or physical examination or other assessment of the child.”

Directions under section 38(6) of the Children Act 1989 are made with the purpose of furnishing the court with sufficient information to reach its decision.
Section 38(7) of the Children Act 1989 provides that:

“A direction under subsection (6) may be to the effect that there is to be –

(a) no such examination or assessment; or
(b) no such examination or assessment unless the court directs otherwise.”

These two subsections give the court the necessary jurisdiction to order or prohibit any assessment involving the child that will provide the court with necessary information to determine the case.

The purpose of these assessments, therefore, is to provide the court with necessary information that is not currently available. Commonly, this information may come in the form of an assessment of the parents’ ability to care for the child, from providing basic care such as food and clothing, to meeting the child’s emotional and developmental needs.

These kind of ‘parenting assessments’ are one of the most common ways in which assessments are ordered under section 38(6) of the Children Act 1989. Such parenting assessments are often carried out in a residential unit, involving the parents and child living in a specialist unit and all of their parenting skills being assessed, or in a community-based assessment, where the parents are assessed with the child either in their home or at specialist family centres, but in the majority of cases, without living with the child.

The case law in respect of such assessments has developed a great deal in recent times. We shall consider these assessments, particularly in the context of residential assessments, following the recent very important decision from the House of Lords in the case of Re G (A Minor) (Interim Care Order: Residential Assessment) (2005) 3 WLR 1166 HL.

The leading case prior to Re G (A Minor) (Interim Care Order: Residential Assessment) (2005) 3 WLR 1166 HL was Re C (A Minor) (Interim Care Order: Residential Assessment) (1997) 1 FLR, a decision of the House of Lords.

In this case, the child suffered extensive, non-accidental injuries whilst in the care of the parents. The allocated social worker recommended a residential assessment for the parents, on the basis that they had made improvements in their care of the child. The local authority opposed the placement, initially citing the high and disproportionate cost, then asserting any assessment would potentially cause harm to the child. The judge directed the parents be assessed.
The local authority successfully appealed to the Court of Appeal, challenging the legality of the court’s decision to order an assessment.

The parents appealed to the House of Lords. The leading judgment is that of Lord Browne-Wilkinson. The House of Lords took the opportunity to steer applications under section 38(6) of the Children Act 1989 into a much broader sphere.

Allowing the parents’ appeals, the House of Lords held that the court has the jurisdiction under section 38(6) of the Children Act 1989 to override the views of the local authority where it is necessary for the court to make such orders to discharge its investigative and decision-making function as to whether or not to make a final care order.

The salient points were as follows:

- The purpose of an assessment under section 38(6) of the Children Act 1989 is to enable the court to obtain information necessary for its own decision. The court can, therefore, override the views of the local authority so as to properly discharge its function deciding whether the local authority’s application for a care order should succeed.
- The court must decide what evidence is to go before it at the final hearing and not the local authority.
- The section only refers to assessment of the child but it is implicit that the child–parent relationship cannot be divorced and the interaction between the child and the parents is an essential part in making an assessment of the child.
- Section 38(6) of the Children Act 1989 should be broadly construed and should not be restricted to medical and psychiatric assessment alone. Any other assessment could be ordered as long as it fell in the scope of an assessment between parent and child.

The effect of the House of Lords’ decision in Re G (A Minor) (Interim Care Order: Residential Assessment) (2005) 3 WLR 1166 HL:

In this case, the mother had two children, J and R, born in 1995 and 1998 respectively, by two different fathers. When R was less than six months old he died of multiple non-accidental injuries. A care order was made in respect of J who was placed with her father as the judge held that either of R’s parents could have caused his injuries. In 2003, the mother gave birth to a third child, E, by her new partner. The local authority applied for a care order prior to E’s birth and the parents applied for an assessment under section 38(6) of the Children Act 1989 to be carried out at the Cassell Hospital. The parents and E were admitted to the Cassell Hospital for a six–eight week assessment. An extension of the assessment, opposed by the local authority was granted during which the mother began to address the issues surrounding her emotional neglect of R and his death. The
hospital recommended a further period of stay and offered ongoing assessment and rehabilitation with intensive psychotherapy for the mother. The local authority refused to fund a further period at the hospital. The judge, Mr Justice Johnson, decided that what was being proposed was therapy rather than an assessment and, therefore, he refused to grant the application.

The parents appealed from the order of Mr Justice Johnson to the Court of Appeal.

The leading judgment in the Court of Appeal was given by Lord Justice Thorpe. He stated that the essential question should always be whether what is sought by the parents can be broadly classified as an assessment to enable the court to obtain necessary information for its own decision.

Lord Justice Thorpe went on to state that a permissible assessment is likely to contain or may well contain the provision of a variety of services, supports and treatments, with or without accommodation.

Allowing the appeal, the Court of Appeal stated as follows:

- The whole period of assessment/therapy at the Cassell Hospital involved the psychotherapeutic engagement with the family over an extensive period and was an essential element of the assessment.
- The ultimate fate of the child depends upon the outcome of the application under section 38(6) of the Children Act 1989.
- For the parents the only realistic prospect of averting the care order is the successful completion of the referral directed under section 38(6) of the Children Act 1989.
- An application for an assessment under section 38(6) of the Children Act 1989 potentially engages both Article 6 and Article 8 of the European Convention on Human Rights.

In the House of Lords the leading judgment was given by the then Baroness Hale of Richmond.

The full judgment can be accessed on the Parliamentary website at www.parliament.uk

The decision, as well as considering in detail the role of the court in care proceedings, makes it clear that:

- A proposed assessment must be of the child if it is to fall within section 38(6) of the Children Act 1989. Any meaningful assessment of a child may need to include his or her parents. The main focus must be on the child.
- The principal purpose of sections 38(6) and (7) of the Children Act 1989 is to enable the court to control and therefore limit the number and type of examinations or
assessments that a child who has become the subject of care proceedings can be required to undergo.

- The court is concerned with the present capacity of the parents’ ability to meet their child’s needs. The capacity of the parents to change, to learn, and to develop may well be part of the assessment but it cannot be a proper use of the court’s powers under section 38(6) of the Children Act 1989 to seek to bring about change through training, counselling and education.

- A programme focused on the treatment and improvement of the parent(s) and their parenting skills to enable them to become ‘better parents’ cannot be regarded as an assessment of the child.

- The purpose of section 38(6) of the Children Act 1989 is not to ensure the provision of services either for the child or his family. It is not always possible to draw a hard and fast line between information gathering and service providing.

- Rights under Article 8 of the European Convention on Human Rights do not extend to being made a better parent at public expense.

- Any examination or assessment under section 38(6) of the Children Act 1989 should extend over a relatively short period of time.

- In many cases, the local authority should be able to make its own core assessment and the child’s Guardian can make an independent assessment of the child. Further or other assessments should only be commissioned if they can bring something important to the case which neither the local authority nor the Guardian can bring to the case.

In concluding her judgment Baroness Hale said:

“In short what is directed under section 38(6) must clearly be as examination of the child, including where appropriate the relationships with her parents, the risk that her parents may present to her, and ways in which those risks may be avoided or managed, all with a view to enabling the court to make the decisions which it has to make under the Act with the minimum of delay. Any services which are provided for the child and his family must be ancillary to that end. They must not be an end in themselves.”

Clearly, the House of Lords’ decision has halted the judicial development of section 38(6) of the Children Act 1989 as a vehicle for achieving a broader approach to assessments.

Remember to log in and attempt the multiple choice questions at www.paralegaldistancelearning.co.uk
It is now time to submit Assignment 2. You do this by emailing it to family@centlaw.com. Please ensure that along with your assignment you attach the paragraph to be found on the paralegal website confirming that the work is your own. Good luck with your assignment.

N.B. - Your assignment will be assessed on the basis of “competent” or not yet ready and no marks will be given. Feedback, however, will be given to assist you with identifying any development areas.