

PART B – PUBLIC LAW PROCEEDINGS
20.26 Special Children Act Proceedings

General Approach

1. Special Children Act proceedings are defined in s.2.2 of the Funding Code Criteria. They include proceedings under s.31 of the Children Act (for a care or supervision order), s.43 (a child assessment order), s.44 (an emergency protection order) and s.45 (extension to discharge of an emergency protection order).
2. Because of the nature of these proceedings Legal Representation will be granted provided the relevant Criteria in section 4 of the Funding Code are satisfied. This means that children, parents and those with parental responsibility (including delegated parental responsibility under s2(9) Children Act 1989) will be granted funding without reference to means, prospects of success or reasonableness. However, for applications made on or after 1st October 2007 criterion 5.4.5 (the Need for Representation) applies. This criterion ensures that parties are not unnecessarily separately represented – see paras 13 to 15 below. The same will apply to a child brought before the court under s.25 of the 1989 Act (use of accommodation for restricting liberty i.e. a secure accommodation order) who is not, but wishes to be, represented before the court. However, full representation will not be necessary if the child is already represented in criminal proceedings to which the s.25 application relates as the criminal legal aid order will cover those s.25 proceedings. Delegated parental responsibility is not required to be in written form but it is reasonable to expect it to be evidenced by a past course of conduct on the part of the parent sufficient to confirm a delegation. Where the solicitor is applying on behalf of a person to whom parental responsibility has been delegated they must attach to the application written details of the delegation, its timing and specific past exercises of the delegation so that it can be confirmed that the delegation has not been put in place merely to secure non means, non merits tested funding. A local authority will not be treated as having delegated parental responsibility by placing a child. Where a sufficient explanation of the past delegation is not submitted the application will be refused as it will not fall within the definition of Special Children Act Proceedings and, as a consequence, a non means, non merits tested certificate cannot be issued.
3. Non-means non-merits test cover is not available to those who are applying to be or have been joined in such proceedings nor to other Children Act proceedings (see para.20.27 regarding related proceedings and other Children Act proceedings).

Scope of certificate

4. Usual steps involved in the conduct of the case will be covered by the certificate eg attendance at directions hearings. As well as the application for which the certificate is granted a certificate also covers representation as to:

- a) an interim order including an application for directions under s.38(6) Children Act 1989;
 - b) applying for directions and their variation;
 - c) contact and the refusal of contact – on the making of an emergency protection or care order, but not subsequently;
 - d) an application for a search warrant under s.48 in emergency protection order cases;
 - e) the extension or discharge of an emergency protection order in emergency protection order cases;
 - f) proceedings in relation to an exclusion requirement, e.g. in the event of a power of arrest being exercised or a variation or discharge of the order being sought by the excluded person; and
 - g) defending an appeal against an interim order.
4. However, the certificate will not include applications under s.91(14) to restrict further applications without leave nor, after the principal proceedings have been concluded, representation on applications for contact or refusal of contact.

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6. Certificates in Special Children Act proceedings will not usually be limited in scope short of the final hearing in the substantive proceedings (e.g. for a care or supervision order). This reflects the absence of a merits test and an application for a fresh means and merits tested certificate would need to be made for any proceedings following a care or supervision order. The proceedings are governed by the Allocation and Transfer of Proceedings Order 2008 and will not specify the court covered although they must contain a costs limitation. Representation is therefore permitted in all levels of court in accordance with the Order.
7. If non-means, non-merits proceedings are followed by private law proceedings or other proceedings outside the definition of Special Children Act Proceedings (including any further consideration of the public law case by the court or any appeal) the existing certificate will not be amended. A separate means and merits tested application will be required as both the Criteria in s.4 of the Code, the General Funding Code (except for Criteria 5.7 and 5.4.6) and the Family Criteria in s.11 of the Code will be applied. In addition the public law proceedings will be kept separate from any operation of the statutory charge. If emergency protection order proceedings are followed by an application for a care order a separate non-means, non-merits tested certificate should be applied for. Where a subsequent application for a secure accommodation order is made the certificate may be amended to cover the second set of proceedings and no separate application for funding should be made (but see also para.20.28, sub para.3 below). No amendment will be required where a certificate for a care order has been issued and an application for a supervision order is made or vice versa.
8. Where proceedings are concluded with a different type of order, the certificate may also cover the proceedings (e.g. public law care proceedings are concluded with a private law s.8 residence order, applied for by another party or made on the court's own motion, or an application for a child assessment order is treated as an application for an emergency protection order). However, specific

cover (either in the certificate or by amendment) will be needed to make (but not oppose) an application by an individual party for a s.8 order in care or supervision proceedings.

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Amendment of certificates

9. An application for amendment may be refused if the proceedings for which cover is sought are not sufficiently closely related to the proceedings in respect of which non means, non merits tested funding is available (in which case a separate application must be submitted), see also para.20.27 below regarding related proceedings. A certificate also will not be amended to cover proceedings other than Special Children Act proceedings or related proceedings.
10. An amendment will be refused if it is for a change of solicitor which is not considered justified or which is sufficient to trigger the show cause procedure (Procedures C55.1) on the basis that the client is requiring the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the fund (Procedures C53.4). A certificate will also not be amended or a fresh certificate granted in circumstances where a child wishes to instruct a new solicitor direct unless the court has already considered this.
11. An existing certificate for Special Children Act Proceedings will not be amended to cover an appeal against a final order. An application should be made for a separate certificate so that the non means, non merits tested part of the proceedings is kept separate. Defending an appeal against an interim order is within the scope of an existing certificate but an amendment is required to appeal or cross appeal an interim order.

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Form of applications

12. Applications for Special Children Act Proceedings are made on a CLS APP5. Previous costs incurred for advice before the commencement of proceedings can be claimed under Legal Help and / or, in appropriate cases, Family Help (Lower) (see Family Specification para.10.36). If proceedings have been commenced before the solicitor receives instructions then they will not need to use Legal Help or Family Help (Lower) as cover will be immediate. Applications for Legal Representation cannot be made until proceedings have been issued.

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Devolved Powers

13. Unless otherwise notified by the Commission, the solicitor has the devolved power to grant Legal Representation in Special Children Act Proceedings (as defined at s.2.2 of the Funding Code) and related proceedings – see Family Specification paras 10.39 and 10.40. This devolved power replaces the previous deeming provision in relation to work done prior to the issue of a certificate. The solicitor must, of course, only exercise the devolved power when all relevant Funding Code Criteria are satisfied, including

whether separate representation is justified (Funding Code Criterion 5.4.5).

14. The devolved power cannot be exercised if Legal Representation has previously been refused for or withdrawn from the client earlier in the same proceedings.
15. Where the solicitor grants Legal Representation the Regional Office must be notified within five working days of the decision to grant in accordance with Funding Code procedures r.C17 and using CLS APP5 (see also para.20.26, sub-para.2 above regarding delegated parental responsibility). The solicitor should explain, where it is relevant, why it is appropriate for the client to be separately represented. This is likely to be of relevance where parents or other parties with parental responsibility would appear to have the same interests in the proceedings and, in the case of a couple, they are not living separate and apart. If separate representation is to be justified on the basis of a known conflict of interests brief details of the conflict must be given. If a conflict is anticipated the solicitor should explain why having regard to the particular circumstances of the case. It is unlikely that children who are the subject of proceedings will be in conflict at the commencement of proceedings (see also para.20.15 above).

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Revocation or discharge of certificates

16. A non-means, non-merits tested certificate can be:
 - a) revoked or discharge on grounds of conduct (Procedures C53) including where the client has required the proceedings to be conducted unreasonably so as to incur an unjustifiable expense to the Fund under C53.4, for example, if the client had unreasonably required more than one change of solicitor;
 - b) discharged on reasonableness (Criterion 15.3 and Procedures C53.4);
 - c) discharged under Criterion 15.5(i) (death of the client);
 - d) discharged under Criterion 15.5 (iv) (consent of the client);
 - or
 - e) discharged under Criterion 15.5 (v) (all work completed).
17. 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 the powers contained in C53.4 of the Procedures (requiring proceedings to be continued unreasonably) because of the nature of such cases and of the safeguards contained in the Children Act itself against repeated applications to the court. A certificate could, however, be subject to a scope limitation and related costs limitation. Furthermore, Funding Code criterion 5.4.5 applies to public law cases including Special Children Act Proceedings and a specific reporting obligation applies. This requires the solicitor to report to the Director where they become aware that the client's interest in the proceedings is no longer sufficiently distinct from that of any other party to justify separate representation. If the solicitor fails to

do so promptly the Commission has the right to reduce or disallow any costs which have thereby been unnecessarily incurred (see Family Specification 10.43).

Before a report is made the solicitor should consider, including with the other relevant solicitor(s), how the representation of the client should most reasonably proceed – including by an amendment of the certificate to show a change of solicitor.

18. A certificate may be discharged, following the show cause procedure, where the solicitor is without instructions. 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 period of time or has disappeared. It is reasonable to expect the solicitor to report where the client is not engaging, in particular later in the proceedings, including in relation to a threshold or final hearing, as the solicitor will not be able to conduct the case on behalf of the client in the absence of clear, continuing instructions.

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20.27 Related Proceedings

1. A client who has been granted Legal Representation in Special Children Act Proceedings may be granted Legal Representation in related proceedings. These are proceedings which are being heard together with the Special Children Act Proceedings or in which an order is being sought as an alternative to an order in the Special Children Act Proceedings (Criterion 11.8).
2. Proceedings will be “heard together” where they are dealt with together or immediately after the outcome of the principal proceedings as part of the same hearing, including any adjournment. An order will be “sought as an alternative” when it is intended to make an order under ss.31, 43, 44 or 45 unnecessary – this will extend to, for example, an application for a s.8 order in care or supervision proceedings but will not extend to, for example, a domestic violence injunction order or a financial order between parties.
3. Such related proceedings will not automatically be covered by the certificate. Specifically stated cover will be necessary to make an application in such proceedings or, where the application is made by a local authority, to oppose such proceedings (for example, to refuse contact or for a s.91(14) order). Specifically stated cover is not necessary to oppose an application by another individual who is a party to the proceedings.
4. Cover for related proceedings will be dealt with on a non means, non merits tested basis. However, if the proceedings are not related proceedings then cover for these proceedings cannot be included on the Special Children Act certificate. An application for a separate certificate would need to be made. A refusal of funding for related proceedings would not delay the issue of a certificate for Special Children Act proceedings which would be issued immediately.
5. Related proceedings extends to Legal Representation on an application for a placement order where that is dealt with together with the Special Children Act proceedings.

20.28 Other Public Law Children Cases

1. Other public law children cases are defined in s.2.2 of the Funding Code Criteria. The definition of these proceedings excludes Special Children Act Proceedings and related proceedings. The fact that proceedings involve a local authority 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 s.11 of the Code and including criterion 5.4.5) will apply. The proceedings include:
 - a) appeals (whether against interim or final orders) made in Special Children Act Proceedings;
 - b) representation for parties or potential parties to public law Children Act proceedings who do not come within the definition of Special Children Act proceedings in section 2.2 of the Funding Code – this includes a local authority application to extend a supervision order (which is made under Sch.3 of the Children Act 1989);
 - c) other proceedings under Pt IV or V of the Children Act 1989 (Care and Supervision and Protection of Children);
 - d) adoption proceedings (including applications for placement orders, unless in the particular circumstances they are related proceedings); and
 - e) proceedings under the inherent jurisdiction of the High Court in relation to children.
2. The definition also includes an application for a residence order which would, if successful, have the effect of discharging care order.
3. Applications for Legal Representation by parents to be represented in proceedings for secure accommodation orders may be refused on the basis that representation is unnecessary as representations will be made by both the local authority and on behalf of the child.

4. Applications for funding may be refused on the basis of the alternative funding criterion (Criterion 5.4.2 as applied by Criterion 11.9.1(i)), if representation is not necessary (Criterion 5.4.5, as applied by Criterion 11.9.1(ii)) or if it appears unreasonable for funding to be granted, having regard to the importance of the case to the client and all other circumstances (Criterion 11.9.3). The Court considered the test for deciding whether to grant party status to someone other than the parent grandparent or guardian in the case of *W (A Child) (Care Proceedings: Leave to Apply), Re* [2004] EWHC 3342 (Fam); [2005] 2 FLR 468 and held that the test was the same in both public and private law proceedings. It was necessary to make full enquiry having regard to arts 6 and 8 but ultimately the granting of leave was a matter of the court's discretion and further the test was the same whether or not the applicant was seeking or intending to seek a particular order. The Court found that as there was no difference between the aunt's case and a grandmother's case she could be a witness for the grandmother who was a party to the proceedings. Note also that a certificate may be discharged, following the show cause procedure, where a party no longer needs

representation (see *Merton London Borough Council v. K; Re K (Care Representation: Public Funding* [2005] 2 F.L.R. 422).

5. Any statutory requirement on a professional guardian appointed by the court to appoint a solicitor in certain specified Children Act proceedings (for which Legal Representation is available on a means and merits tested basis subject to the relevant Funding Code Criteria) does not of itself mean that the Funding Code Criteria are satisfied on an application for Legal Representation by the child. However, appropriate weight must be given to the judicial decision to appoint the guardian and the consequent obligation to appoint a solicitor so that a refusal will be justified only in exceptional circumstances. Certificates may, however, be limited as to scope and costs to reflect all the circumstances of the case including the involvement of a professional guardian (W and Others and The Legal Services Commission (formerly The Legal Aid Board), CA 20th July 2000).

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20.29 Merits Tested Applications regarding Public Law Proceedings under the Children Act 1989, including Part IV and V appeals

1. The merits criteria for appeals are set out in criteria 11.9 of the Funding Code. Cover for appeals, therefore, whether against interim or final orders, must satisfy the same criteria as other merits tested applications under the Children Act 1989. In addition, guidance on funding for appeals including appeals to the House of Lords is set out in s.24 of the Funding Code decision making guidance. In particular, appeals to the Court of Appeal will generally be limited to the application for permission on the papers only. The issue for the regional office is the ultimate prospect of the appeal being successful, not merely the prospect of permission being granted.
2. Where the client is making or supporting (rather than opposing) an application or appeal Legal Representation will be refused 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. An application may also be refused if it is unreasonable for funding to be granted (criterion 11.9.3). 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 an appeal. Clearly, the benefits likely to be obtained, the time appeal proceedings will take to be concluded and the likely costs involved are relevant factors. The availability of a local authority complaints procedure may also be relevant.

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3. A certificate granted to make or support an application or appeal, including proceedings to discharge a care order (whether directly or indirectly) or for contact with a child in care may, in the first instance, to be limited to consideration of the prospects of success. If so, they will be limited to a solicitor's report on the issues

and prospects of success (but will not cover issuing proceedings) and if extended, will be limited thereafter to all steps short of the final hearing. This will ensure that cases which are unlikely to succeed are not pursued with the benefit of public funding so as to cause unnecessary expense to other parties and, importantly, unjustified disturbance of the current position.

4. Cover for appeals (whether against interim or final orders) must satisfy the same Criteria as other merits tested applications under the Children Act 1989.
5. In the case of discharging a care order (including by way of a s.8 application) 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 local authority complaints or review procedure. However, there are cases where the purpose of the application is to refer the case back to the court for further consideration, in particular because an important element or elements of the care plan, have not been followed through. Local authorities are required to have an independent reviewing officer (IRO) who can seek to resolve the issue(s) with the local authority. If that fails the IRO can, as a last resort, refer the matter to CAFCASS Legal or CAFCASS Cymru who can take proceedings against the local authority on behalf of the child. Adults with sufficient interest (or children capable of giving instructions direct) can apply for funding in the usual way but will need to show that the case has been considered by the IRO and the issues not resolved before Legal Representation will be granted.

3C-439

20.30 Adoption / Placement Orders

1. Where proceedings are brought in the High Court or County Court 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 or a placement order or, where there has been no placement order, adoption proceedings. This is because as far as the birth parents are concerned once the freeing or placement order has been determined it is unlikely that they will have any further involvement, save possibly 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. Note, however, that once a placement order has been made a natural parent will require the leave of the court to oppose the making of an adoption order and that leave is unlikely to be granted unless the court is satisfied there has been a significant change in circumstances. Where the only issue is post adoption contact it should be noted that it is unusual for the

court to make an order where the adopters are not in favour of contact.

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).

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4. Where it appears that the applicant may have access to alternative funding then Legal Representation may be refused, e.g. from a local authority. Legal Representation is likely to be refused where no information is given on this point. Where only limited financial support is available Legal Representation may still be refused if it is nonetheless considered reasonable for others to fund the proceedings.

5. Advice and assistance may be provided with regard to a parent or guardian's consent to placement or advance consent 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 or the opinion of a solicitor with higher court advocacy rights 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.

3C-441

7. In the case of an application for an order, consideration must be given to the appropriate forum for the case. It is expected that proceedings will be commenced in the family proceedings court where it has jurisdiction and unless there is a particular reason to do otherwise. If there are insufficient reasons for commencing the proceedings in the County Court, as opposed to the family proceedings court (or the High Court as opposed to the County Court), then the application will be refused unless, in all the circumstances of the particular case, the grant of Legal Representation for proceedings in a lower court is available and justified. If so, the application would be granted to cover proceedings in the lower court (subject to a right of appeal against the partial refusal as to forum).

8. Legal Representation is likely to be granted to a child who is a party in proceedings. Note that the child will be a party in placement proceedings and can be joined in adoption proceedings. They can, therefore, apply for funding in those proceedings in his or her own name (rather than through a CAFCASS guardian, as previously).
9. Subject to the inclusion of a more restrictive initial limitation, imposed having regard to the circumstances of the particular case, certificates (save those issued to a child) will require a solicitor's report or, if the solicitor so advises, Counsel's Opinion (or opinion from a solicitor with higher court advocacy rights) in the event of an unfavourable reporting officer or guardian's report. This will ensure there is an opportunity to review the case and re-apply the Funding

Code (which may or may not lead to the show cause procedure being instituted).

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20.31 Inherent Jurisdiction (Wardship) (see also child abduction below)

1. Following the introduction of the Children Act 1989 wardship may now be unnecessary in many cases where the relief sought may be obtained under s.8 of the 1989 Act. An application for Legal Representation is, therefore, likely to be refused where any order in other proceedings for example under the 1989 Act, 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). For example, the use of inherent jurisdiction for “seek and find” orders is seldom likely to be necessary in the light of the range of orders available under the Children Act 1989 and the Family Law Act 1986. Wardship proceedings will also not be appropriate where the relevant child is subject to a care order (s.100 Children Act 1989) (Criterion 11.9.2).
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. In addition, the applicant must have sufficient interest to bring the proceedings and the issues must be sufficiently important for Legal Representation to be granted.

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4. 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).
5. Solicitors should also consider whether the matter could be more appropriately dealt with in another way, for example, writing a letter, involving the social services or the police or possibly 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.
6. Where an application is to defend wardship proceedings Legal Representation will be refused if the prospects of success are poor. Matters to be considered include whether the child’s age is such that the court would have significant regard to their wishes and whether those wishes are opposed to the applicant for funding (Criterion 11.9.2). 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).