A costly clash

Chris Pamplin looks at a case where the Legal Aid Agency thought it could override the will of the court

The decline and fall of the legal aid system in England and Wales has been seen in legal circles as one of the most lamentable episodes in law reform in recent years. Dubbed by *The Guardian* as "the forgotten pillar of the Welfare State", legal aid has been firmly in the firing line since 2010 when Kenneth Clarke, the then Justice Secretary, promised to cut civil legal aid by a further £350m by 2015.

What the Ministry of Justice calls "reforms" have seen whole categories of law taken out of scope for legal aid funding. One such category is family law, where legal aid is now only available with evidence of domestic violence, forced marriage or abduction. As a result, two thirds of parties to family law proceedings now represent themselves.

The debate rages on about how far this is a positive or negative change for our justice system. What is clear, though, is that parties denied professional legal representation or access to qualified expert opinion press on under their own steam. The undeniable effects of this are long delays and a thoroughly "clogged up" family court system.

Even for those cases for which legal aid is still, in theory, obtainable, the Legal Aid Agency (LAA) is under pressure to minimise costs to the Exchequer. Indeed, in some cases the LAA has refused to pay expert witness costs or has ruled that they be shared between the party in receipt of public funds and other parties who are not. In other instances, the LAA has declined to make interim payments of expert witness fees or has delayed payment until long after conclusion of the proceedings. It appears that the budgetary pressure had reached a point where the LAA had felt itself entitled to override the implied, or indeed expressed, wishes of the court or the strict interpretation of the court's orders.

A child instructs an expert

Those who have acted in publicly-funded family law cases will, no doubt, applaud the decision of the Court of Appeal that, in one case at least, the refusal by the LAA to pay an expert witness's fees in full was unlawful.

> *"What the Ministry of Justice calls 'reforms' have seen whole categories of law taken out of scope for legal aid funding"*

In *JG v The Lord Chancellor and Others* [2014] EWCA Civ 656, [2014] All ER (D) 192 (May), the Court of Appeal was asked to rule on the refusal of the LAA to pay for an expert witness report ordered for a child by the family court. The case involved an application under s 8 of the Children Act 1989 by a father for a child arrangements order stipulating when and with whom the child should live and have contact. The child lived with the mother. Neither parent had public funding and acted in person throughout the proceedings.

The child was joined as a party to proceedings, was granted a public funding certificate and was represented by a solicitor and a children's guardian. At the suggestion of the child's guardian, an expert psychotherapist was instructed to analyse the impact on the child of the ongoing dispute between the parents. The child's solicitor identified an expert witness, prepared draft instructions and served them on the parents.

Permission to adduce expert evidence

At a hearing in October 2008, the district judge gave permission for expert evidence to be put before the court. In the intervening period, the child's guardian went on long-term sick leave and a new guardian was appointed in January 2009. Further directions were given at a hearing in April 2009 directing parties to jointly instruct the expert witness to prepare a report about the child and the family dynamics. The new guardian was directed to lead the expert's instruction and the costs of the report were to be funded by the child. The psychotherapist duly produced the report and sent her bill to the child's solicitors, who then submitted a claim for costs, including the expert witness fee, to the Legal Services Commission (LSC; the predecessor of the LAA).

Payment is not forthcoming

While this was pending, the court directed the expert witness to produce an addendum report. It ordered that the costs of this report were to be met by the child's public funding certificate. However, the expert refused to undertake work on the addendum report until she had received payment for her first report.

The LSC declined to pay the expert witness costs in full claiming, instead, that they should have been shared between the parties because all parties benefited from the report. The LSC argued that any right to public funding conferred on the child should not affect the rights or liabilities of other parties to the proceedings or the principles on which the court's discretion is normally exercised under s 22(4) of the Administration of Justice Act 1999.

An impasse was reached, during which little or no progress could be made until the funding issue had been resolved.

Although the court noted the impact this was having on the child's welfare, the final hearing scheduled for June 2012 was vacated because it was clear that the case could not be concluded without the expert evidence requested. In the light of this, the child's solicitor applied for a judicial review of the LSC's refusal to fund in full the expert report ordered by the court. Both the Law Society and Lord Chancellor intervened in the proceedings.

Judicial review of LAA refusal

The judicial review was conducted by Mr Justice Ryder (*JG v The Legal Services Commission and Others* [2013] EWHC 804 (Admin), [2013] All ER (D) 254 (Apr)), who held, at first instance, that the costs should be shared and the LSC had been right to refuse to meet the entire costs of the expert report. The judge said that where a joint expert is instructed, the parties are jointly and severally liable for fees and expenses unless the court directs otherwise. It seemed to him that this was clearly the position in this case: all the parties could benefit from such evidence, it would inform their positions, and each had an interest in making it available to the court. While this principle of equal apportionment is not an absolute rule, Ryder J considered that the court should depart from it in exceptional cases only. It could not, he said, be right that in every case the state should bear the entire cost of expert evidence in which non-legally aided parties had an equal interest.

The child's solicitor appealed against this decision on two grounds:

i. the decision by the LSC had been fundamentally unlawful; and
ii. the child's solicitor had a reasonable expectation that the LSC would pay for the expert witness report in full.

At the Court of Appeal

Dealing with the first head of the appeal, the Court of Appeal noted that the court had given permission for expert evidence to be adduced at the directions hearing in October 2008. The suggestion of a psychological assessment had been made by the child's guardian and, on her instructions; the child's solicitors had drafted a schedule of issues for the expert to consider. The report was clearly intended to benefit the child, and there had been no input from or involvement by the parents. Had matters stopped there, there could be no objection to the cost of the report being attributable to the child's funding certificate because it would have been the child who sought the evidence, the child's solicitor who instructed the expert and the child who was placing the evidence before the court.

However, the subsequent direction given by the court at the hearing in April 2009 had confused matters. The Court of Appeal admitted to being somewhat puzzled by what had happened in the interim, and by what had led to the subsequent order that all three parties should jointly instruct the expert witness, with the guardian taking the lead role. There was nothing to suggest that either parent was seeking to have any involvement with the expert witness.

> *"Given the severe restriction of public funding in proceedings relating to children, the court was quick to recognise that its decision in this case was one that would be of 'very considerable importance'"*

The Court of Appeal decided that the proper interpretation of the order made in April 2009 was that this was merely intended to complete the process begun by the first guardian resulting in the earlier order of October 2008 for the expert evidence to be produced. It was apparent that the expert's report was ordered by the district judge at the guardian's request to consider issues that needed to be addressed in the interests of the child. The mere fact that the other parties to the proceedings had an input into the report did not convert it to their report or make them liable for its costs. The Court of Appeal was in no doubt that it was the substance of the events that mattered, and it was necessary to consider the driving force behind the report's commissioning, why it was required and whose purpose it was intended to serve. In this case it was clearly the child's guardian who was instructing the expert witness. Therefore it was entirely proper that the full costs should be met by the child's funding certificate. Consequently, the decision by the LSC, that the expert witness costs should be apportioned between the parties, was unlawful.

Having reached this conclusion, the Court of Appeal did not consider it necessary to rule in relation to the second head of the appeal.

General principles

Given the severe restriction of public funding in proceedings relating to children, the court was quick to recognise that its decision in this case was one that would be of "very considerable importance". It was a matter of some regret to the court that such an important issue had, at first instance, been dealt with by way of judicial review and that, consequently, the court's comments on the general question did not form part of the basis for the court's decision on the facts of the specific case. Nevertheless, the Court of Appeal took the opportunity to give some general guidance in relation to the payment of expert witness fees from public funds.

In reaching its decision, the Court of Appeal made it clear that when it comes to whether expert witness costs should be met from public funds, "everything will depend on the facts of the case under consideration". The case highlights that in coming to its decision a court should consider:

- who had first sought the instruction of the expert witness;
- the reasons the report had been requested; and
- whose purpose the expert evidence would serve.

Although the court has powers to require the appointment of a single joint expert (SJE), there is no requirement for it to do so. Had both parties sought an expert witness report on the same issues, then of course the court would have been entitled to make an order that the costs be shared and, no doubt, that an SJE be appointed.

This could not apply in the stated case because the expert evidence had been sought by one party, the child. So the full cost of the report was payable from the child's public funding and it was not open to the LSC to depart from this or to impose its own decisions in relation to whom else might have benefited from the report or whether or how the cost should be apportioned. **NLJ**

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