

Family Legal Aid – Does it have a Future?

Abstract: Vicky Ling outlines the Government's proposals to reform the legal aid scheme for family law. They would remove legal aid funding from many potential clients and threaten access to justice.

Keywords: legal aid; family law

Introduction – signs of strain

Legal aid was first established in 1949 to help people with divorce and matrimonial problems. At that time the majority of the population would have qualified for legal aid but now only people on means-tested benefits or with disposable income of less than £733.00 per month¹ are eligible and they may have to pay contributions. If money or property is recovered or preserved under legal aid funding, the client is likely to have to repay their legal aid through the operation of the statutory charge. In 2009–10 there were 289,781 'acts of assistance' in the family category of law. Thirty-four per cent of these were resolved to the benefit of the client through advice and negotiation, 25% went on to representation certificates in legal proceedings, 20% concluded without a specific benefit to the client² and in 21% of cases, the outcome was unknown.

The cost ranged from £162.00, for a petitioner divorce fixed fee, through a fixed fee of £548.00 for a divorce with financial and children issues, to an average certificate cost in private family proceedings of £3,285.00³. The number of solicitors' offices delivering family legal aid fell by 9% in 2009–10, compared to the previous year.

A New Start

The government issued a Green Paper in November 2010 which proposed that people should no longer be able to get legal aid for divorce, financial matters and issues concerning children, unless there is domestic violence⁴. For those who remain eligible financially, only mediation would be available under public funding. These changes could be applied in 2012, as long as primary legislation is passed to amend or repeal the Access to Justice Act 1999.



Vicky Ling

The Ministry of Justice says that it applied the following tests to determine whether an issue should remain within the scope of legal aid:

- The importance of the issue
- The litigant's ability to present their own case
- The availability of alternative sources of funding
- The availability of other routes to resolution

However, instead of applying factors to an individual applicant and their personal circumstances, all potential clients would be denied legal aid because of the subject matter of their case. Unsurprisingly, the proposals are controversial and the Ministry received over 5,000 responses to its consultation. Its response is expected sometime after Easter, when we will have a much better idea of the final details of the reforms.

It seems that the government's policy is that people should not resolve private disputes through the courts; but should use ADR (Alternative Dispute Resolution), mainly mediation instead. This seems like a 'no brainer'; but in practice things are not always straightforward and family law is complex. The law itself needs to be reformed, as well as the public funding scheme.

The role of family lawyers is often misunderstood. Many of those who make formal arrangements after relationship breakdown do so through negotiation by solicitors, avoiding the need for court action. Many cases settle outside the court process because solicitors advise their clients of the likely result and because skilled lawyers can focus on the key issues and encourage a settlement. Office for National Statistics findings indicate that 90% of separating parents make their own contact and parenting arrangements but some people need information and advice to persuade them that litigation is not what is needed. Unfortunately, mediation cannot work

where one party refuses to mediate. It works best in partnership with legal advice.

Case study – Mr G

Mr G has struggled to see his children since he and Ms P broke up. Ms P refused to attend mediation and Mr G was able to use legal aid to obtain a court order allowing him to see his children. However Ms P has continued to ignore the court order and he will need to take further action to enforce contact.

Under the new proposals Mr G would not be eligible for legal aid despite his ex-partner's refusal to attend mediation, but he would also be faced with having to represent himself in any further action to enforce the court order.

Family law remaining within scope of legal aid post reform

The following types of case would remain within scope, but even some of these categories are more restricted than one would expect:

- Domestic violence – The Ministry uses a very restricted definition, which does not include other forms of abuse
- Forced marriage cases
- Ancillary relief and other private family law issues where there have been domestic violence or forced marriage proceedings within the last 12 months
- Family mediation
- Legal advice to give effect to mediated settlements (£150 fixed fee)
- Public law cases
- Registration and enforcement of judgments under EU legislation
- Representation of children in rule 9.5 and 9.2A private law children cases
- International family maintenance
- International child abduction

Case study – Mrs C

Mrs C had learnt through a mutual friend that her Algerian husband intended to take their two children to Algeria during a regular contact visit and planned not to return them to her. Under the present legal aid system lawyers were able to obtain a “prohibited steps” order, preventing Mr C from taking the children out of the country.

Under the new proposals approval would have to be sought from the Legal Services Commission (LSC) for

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this matter to be considered an exceptional case. However, the Green Paper is silent on the process to grant that approval and the danger is that it will slow down and introduce delay to emergency cases.

If Mrs C is unable to prevent the children's removal, she faces potentially permanent separation from her children as Algeria is not a party to the Hague Convention on child abduction.

Hanging on the telephone

The paper proposes that people whose cases remain within scope should use telephone and online services based on the current Community Legal Advice helpline. The service is intended in future to act as a single gateway to civil legal aid and refer clients to suitable sources of advice. It would consist, as now, of an operator service and a second tier providing specialist advice to eligible clients. It is anticipated that most callers would be dealt with by the operator service.

It is envisaged that most clients would access legal aid services through the telephone service rather than approaching a face-to-face service direct. Unfortunately, if the reforms go through as proposed, there would be so little face to face work left in scope that it will not be viable for firms to undertake it. This would be a serious problem for people needing to take emergency court action, such as injunction proceedings.

Although no doubt the current Community Legal Advice helpline can boast many successful cases, including those in the Family category, conducted by telephone and post rather than face-to-face, it must be emphasised that the clients are currently people who choose to use this method of service delivery. It seems likely that many people will not get advice at all in future if they cannot use telephone services for any reason.

Further, many current legal advice service providers have a long history of commitment and integration with their local community. They have developed links with local advice, community groups and ethnic groups which have resulted in complementary referral systems. They often also have close links with local voluntary sector organisations, charities and refuges. These connections form the bedrock of local advice provision and successful referrals. The introduction of the advice line as a single gateway would destroy this complex network of trusted organisations, working together.

Alternative funding?

Conditional fee type arrangements appear unsuitable for family law as they encourage an aggressive, all or nothing approach to litigation. This is contrary to the interests of separating couples, the approach incorporated into the Family Law Protocol and that advocated by Resolution's Code of Practice. It is inappropriate in principle to talk in

terms of winners and losers in family law and it is also impossible in most cases even to attempt to define who has won and who has lost in most cases.

There has been some discussion of insurance for legal fees on marital breakdown. However, there are no such schemes on the market for those eligible for public funding and there is no evidence that the market will step in to plug the gap left by the proposals. People eligible for legal aid very rarely have insurance. It is difficult to imagine how a mother left in the matrimonial home with children, seeking to postpone the sale of the home until the children were older, would be able to afford the premiums for any policy.

It is possible that firms which are used to providing low-cost services to less well-off private paying clients, through legal aid, may be able to offer low cost private client fees in future. Such firms will need to work out the details of new services soon.

Impact on firms of solicitors

The first impact could be felt in October 2011, when it is proposed to reduce all fees for civil and family work by 10%, both work paid at hourly rates and fixed and graduated fees. Otterburn Consulting⁵ carried out some research for the Law Society of England and Wales which showed that, although most firms should survive the 10% fee cuts, the scope reductions would lead to a collapse in profits. Since most legal aid firms lack financial resources, many of the current suppliers would be unlikely to survive unless they can fundamentally change their business model.

Firms that do family legal aid will feel the effects of the government's proposals in different ways, depending on the type of work they do. So, those who specialise in public law cases, forced marriage and international cases and those who represent children in rule 9.5 and 9.2A

cases may be relatively unaffected. Private law practitioners would be advised to develop an expertise in domestic violence cases and mediation and other forms of ADR.

There are currently four organisations providing family law through the Community Legal Advice helpline. If legal aid is to be delivered through this medium to a greater extent, it may be an opportunity for some, as the LSC will need to increase the numbers of family law specialists providing the service.

Mediation may be a lifeline for firms, as the new Pre-Application Protocol, introduced in April 2011, requires all potential family litigants, not just those seeking public funding, to have their suitability for mediation assessed. Currently, there are insufficient mediators to meet anticipated demand. There is a strong argument that family solicitors are ideally placed to become mediators, as they are aware of all the relevant legal issues in addition to their mediation skills.

Recent research for the Solicitors Regulation Authority⁶ showed that members of the public want to see charges that are easy to understand and have no hidden extras. Legal aid firms are used to working within fixed fee regimes and this may be an advantage when seeking private client family law work in future. If practitioners can develop low cost family law services, they may be able to reach those who are not sufficiently poor to qualify for legal aid, but who cannot afford traditional private client fees.

Conclusion

The Government's Legal Aid reform programme presents many threats to both clients and solicitors. There are also some opportunities, but only time will tell whether the reforms will secure access to justice, particularly for the most vulnerable in society.

Footnotes

¹Disregarded income and allowances are limited. For example, council tax, water rates, insurance premiums and court fines have to be paid out of disposable income – *Legal Services Commission Manual, volume 2, part E*

²These are defined by the LSC, so that "client and partner reconciled" is considered to be a benefit to the client; but 'client referred to a non-funded service' e.g. counselling, is not.

³134,651 certificates in private family law were granted in 2009–10 – *Legal Services Commission Statistical Information – July 2010*

⁴It is also proposed that there should be a new limited funding scheme for exceptional cases that raise human rights or public interest issues – *Ministry of Justice – Proposals for the Reform of Legal Aid in England and Wales Consultation Paper CP12/10 November 2010, p. 20*

⁵Impact of the MOJ Green Paper proposals on legal aid firms' paper for the Law Society of England and Wales, Andrew Otterburn and Vicky Ling – February 2011

⁶Vision One Research for the Solicitors Regulation Authority – March 2011

⁷Resolution's 5,500 members are family lawyers committed to the non-adversarial resolution of family disputes. Resolution solicitors abide by a Code of Practice which emphasises a constructive approach to family problems and encourages solutions that take into account the needs of the whole family, and in particular, the best interests of children. Around two thirds of Resolution's members undertake legal aid work. Resolution's members work in around 1,500 firms who form the bulk of family legal aid contract holders in England and Wales. Resolution members provided the case studies in this article (for this footnote see: Biography).

Biography

Vicky Ling is a Member of the Chartered Institute of Quality Assurance and member of the Law Consultancy Network. She has worked in the voluntary sector, for local government and the Legal Aid Board. She was one of the first Liaison Managers appointed by the LAB to implement its Quality Assurance Standard, Franchising. She has worked with over 200 firms of solicitors on various legal aid, quality and contract issues. Vicky acts as consultant to Resolution⁷ on Legal Aid.

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Changing Face of Corporate Information Services – New Service Models and Partnerships

Abstract: Loyita Worley reports on the SLA Europe¹ seminar held in March 2011 on the impact of outsourcing in law firms. The panel included the perspectives of the provider companies and experiences of law firm information professionals who have already adopted outsourcing and those who are about to.

Keywords: outsourcing; law firms; legal information

Introduction – SLA Seminar

The SLA Europe Seminar on the *Changing Face of Corporate Information Services – New Service Models and Partnerships* held in London on 30 March 2011 was very well attended, no doubt because everybody was keen to hear what was going to be said about the latest outsourcing developments in the legal information world. The timing could not have been better as various new developments had been announced in the legal press after the seminar had been arranged and the speakers selected.

Participants

The evening took the form of a panel session chaired by Stephen Phillips of Morgan Stanley and comprising Liam Brown the CEO of Integreon, Greg Simidian the CEO of Perfect Information, Kate Stanfield, then Head of

Knowledge Management at CMS McKenna, and Sarah Fahy, the Head of Global Library Services at Allen & Overy. It was all the more interesting as from 1st April 2011 Kate became the Vice President of Knowledge & Research at Integreon and was therefore sitting next to her future employer.

The event was held under Chatham House rules, and so apart from information already in the public domain, most of the comments here are unattributed.

Experiences of outsourcing

Following introductions, each of the panellists was asked to share their experiences of outsourcing, where they thought it was going and why it was changing the face of corporate information services. Their responses provided the background to how their respective organisations related to outsourcing and, in some cases, implemented it. Each participant had a different perspective and Liam, in particular, commented on the dramatic changes that