State versus parents

Alice Twaite looks at 'hidden' litigants in person and practical safeguards for parents facing removal of a child

Alice Twaite is a solicitor (non-practising), a trainer, and a freelance advisor at Family Rights Group

'Parental efforts to challenge a refusal of legal aid, and aspects of the funding scheme, through judicial review are "stymied" by lack of costs protection, due to the very legal aid ineligibility they seek to challenge.'

Amid the cries of what to do about the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA 2012) created cohort of litigants in person in private family law proceedings, the decisions in *Re DE* [2014], *Re D* [2014] and *Re D (No 2)* [2015] have cast a spotlight on a group of more 'hidden' litigants in person in public children proceedings, whose position is if anything more pressing, with vulnerable parents facing removal of their child(ren), without automatic eligibility for legal aid, because their children have been living at home under a care order.

Re D

Much has been written by legal commentators on the speculative reasoning of the president of the Family Division, Sir James Munby, in *Re D* and *Re D (No 2)*, as part of an emerging line of case law on whether, when and how the courts might order the legal costs of litigants to be paid as an alternative to legal aid funding. The point remains untested in a public law children context for now. The president's comments about the particular plight of the parents in that case have reached national media. The parents were highly vulnerable, through learning disability, facing an application to remove their child and have him adopted, yet couldn't get legal aid for some eight months for a fair hearing on his future. Even with the exceptional dedication of a legal team acting pro bono and the president giving notice that he would decide on alternate funding routes if he had to, the president commented that:

> The parents can be forgiven for thinking that they are trapped in a system which is neither compassionate nor even humane.

Background

The child, D, lived with his parents under a care order, made by agreement in November 2012. The parents had learning disabilities and a package of support. The local authority involved the parents in a formal review of the care plan before giving notice, on 19 March 2014, of intent to remove D on 25 April. D's father re-instructed his former solicitors on an application to discharge the care order. They acted pro bono as he was refused legal aid on financial means. The local authority applied for a recovery order and the father's representatives sought an injunction on the day of hearing on the basis of Art 8 of Sch 1 of the Human Rights Act 1998 (as to the right to respect for private and family life). The injunction was refused, the recovery order made and D was removed.

Baker J allowed the father's appeal on 16 May 2014 (*Re DE*) on the basis that had the judge at first instance not misdirected himself, he would have granted the father's application for an injunction. Injunctive power existed, the merits of the discharge application were not relevant, and the local authority conceded that there was no emergency. Baker J still remitted the injunction decision, because the evidence hadn't been heard, but he set out the correct law on Article 8 injunctions and the legal test for interim removal under a care order.

On further hearing, the designated judge found, on the evidence, that at the time of the original injunction D's safety and welfare did require his immediate removal from his parents' care, making the removal lawful. Subsequently Black LJ refused leave to appeal this decision.

At a case management hearing on 29 July 2014, further assessment of D's parents by an independent social

worker was ordered. In September 2014, with this report recommending adoption, D's case was listed before the president as to funding.

Legal aid

Applications to discharge care orders under s39, Children Act 1989 (ChA 1989), for placement orders under s22, Adoption and Children Act 2002, and related proceedings are within the scope of the legal aid scheme (Pt 1, Sch 1, LASPOA 2012). However the regulations (Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, Reg 5 and Civil Legal Aid (Merits Criteria) Regulations 2013, Reg 65) exempt 'special' public law children proceedings (including care and supervision orders) and related proceedings from means and merits requirements, unlike all other public children proceedings, and it was this category that the proceedings in *Re D* fell into. 'Related' is narrowly defined as proceedings heard together with, or as alternative to, orders in special ChA 1989 proceedings. The funding scheme as drafted excludes 'in scope' applications from exceptional funding determination (s10(3), LASPOA 2012).

Judicial review

Both Baker J and the president noted that they saw no rationale for limiting automatic legal aid to the one group but not the other, since the application may be equally 'draconian'. The president added that parental efforts to challenge a refusal of legal aid, and aspects of the funding scheme, through judicial review are 'stymied' by lack of costs protection, due to the very legal aid ineligibility they seek to challenge.

Human rights analysis

On the first occasion the case was before the president (*Re D*), on 8 October 2014, he suggested (provisionally) that, since the parents faced a possible permanent loss of their child, they were wholly unable to represent themselves due to their learning disabilities/capacities, and they couldn't pay for their funding, leaving them to represent themselves would breach their Article 6 (right to a fair trial) and Article 8 rights and be 'unconscionable', 'unjust' and a 'denial of justice' (at para 31). The president analysed the court's own obligations in relation to fairness, justice and equality of arms in this situation, with particular regard to the parents' disabilities and the indirect effect of any breach of their rights on D's rights (paras 27-29).

The president then adjourned the case to 13 November 2014, on notice to interested parties that he would decide (if need be) whether and how the court should meet its obligations, by ordering alternate funding, by all or any of HM Courts and Tribunals Service, the local authority, or the legal aid fund via the child's funding certificate.

The legal aid scheme has long discriminated between 'special' ChA 1989 and other public ChA 1989 proceedings and parents regularly face removals of children living at home under care orders without means-tested legal aid.

Soon after this hearing, the Legal Aid Agency found the parents eligible after all (subject to a contribution). Full public funding certificates were granted just before the hearing on 2 December 2014. The president then confirmed there was no longer a need to decide the alternate funding point.

Wider practice importance

Both the president and Baker J highlighted an observation made by the local authority that more care cases are being resolved by care orders made where the child still lives at home, due to care proceedings being heard more quickly. This may also explain why the apparent incompatibility between regulations, limiting automatic eligibility for legal aid to parents who are facing removal applications in s31, ChA 1989 proceedings, has surfaced only now. The legal aid scheme has long discriminated between 'special' ChA 1989 and other public ChA 1989 proceedings and parents regularly face removals of children living at home under care orders without means-tested legal aid. It is also well documented that parents with learning disabilities are heavily represented among care applications.

Arguably it has taken a new post-LASPOA 2012 culture of scrutiny of the statutory legal aid scheme for this pre-LASPOA 2012 aspect to be looked at. Perversely, the funding consequence may discourage parents from seeking higher levels of local authority support through care orders, rather than supervision orders.

Practical suggestions

Measures to address the apparent incompatibility of the legal aid scheme with Article 8 rights, to introduce automatic legal aid for parents facing removal of a child under a care order, lie outside of the family courts. In the meantime, Baker J's highly practical guidance (in *Re DE*, at para 49), endorsed by the president, is an attempt to introduce safeguards.

At the point when the care order is made

Baker J's guidance makes former best practice obligatory: that in every case where a care order is made on the basis of a care plan providing that a child should live at home with their parents, it should be a term of the care plan, and a recital in the care order, that the local authority agrees to give not less than 14 days' notice of a removal of the child, save in an emergency.

Best practice might add the following reminders for family lawyers:

- advice given to parents on the advantages (and risks) of care orders with children at home (rather than supervision orders) needs to include the risk of not qualifying for legal aid in relation to any future applications as to removal or adoption, should the care plan change;
- advise parents that only if a supervision order is made will the local authority have to apply afresh for a care order to implement any later plan for adoption; and
- parents should be advised (in writing) on how and when to seek further legal advice in the future including in an urgent situation, highlighting the key consultation duties of a local

authority (particularly where a disability applies) with signposting for advice on care planning, review duties and the role of the independent reviewing officer (eg Family Rights Group advice service, advice sheet 11: 'Duties on children's services when children are in the care system' (see: www.legalease.co.uk/frg)

In review and care planning processes

Baker J's guidance specifically applies *Re B* [2013] and *Re B-S* [2013] to decisions to change a child's care plan to permanent separation under the care planning and review process, and requires the local authority to properly involve the parents in decision-making. This is essential reading for independent reviewing officers and their managers. At para 29 of his judgment Baker J (citing para 45 of *Re G* [2003]) restated that a local authority owes further duties as a public body to parents with disabilities affecting participation in its procedures, especially those leading up to proposed removal. In cases of decision-making about removal under care orders from parents with learning disabilities, this will include the opportunity to attend key decision-making meetings with their representatives.

Re DE also reaffirms the established requirement for 'proper consideration and assessment of all available evidence', before a fundamental care plan change, if it is to be lawful and proportionate (per *G v N County Council* [2008]).

On issue of application

Baker J's guidance requires parents to consider an application for an injunction under Art 8, from the outset, alongside discharge of the care order. As parents may be litigants in person, allocation gatekeepers must now check if there is an injunction application, or if there may need to be. If so, they must allocate the case to a circuit judge for case management as soon as possible. Injunction applications must be listed for early hearing.

Interim removal decisions

Once parents serve notice of an application to discharge a care order, the local authority must carefully consider and record decisions on immediate removal thresholds and meaningful involvement of parents. Anything less is likely to infringe both the parents' and the child's Article 8 rights (including procedural rights). *Re DE* confirmed that the test for immediate removal set out in *Re L-A* [2009] applies, whether that decision is under an interim care order, or a care order pending outcome of a discharge application. On that basis, the court should usually grant the injunction, unless the child's welfare requires their immediate removal. Baker J cited *Re S* [2002] (at para 31) as the authority for using injunctions under Art 8 for relief from unlawful removal under a care order.

When parents present as potential new clients

Responsibility to this group is easily missed. With no retainer, firms have fewer obligations, yet parents with disabilities face significant barriers at this point. It should at least be possible to:

- Refer all parents facing state removals of their children under final care orders, who are ineligible for legal aid, to:
  - the issue office of their designated family court centre (perhaps with a copy of Baker J's guidance for allocation gatekeepers);
  - the Bar Pro Bono Unit with urgency and any obvious Article 8 relevance flagged; or
  - the casework department at the Public Law Project as opposed to the exceptional funding project (on the basis that such cases may well fall within their stated casework strategy and priorities).
- Consider what other measures are warranted for those with disabilities affecting participation in relation to local authority procedures and any complex public law children proceedings, and duties of solicitors' firms themselves.

Solicitors have an obligation to have 'proper regard to capacity' and, as stated in the *Solicitors Regulation Authority Handbook*, to:

> ... make reasonable adjustments to ensure that disabled clients... are not placed at a substantial disadvantage compared to those who are not disabled...

It should be noted that 'client' is defined in the *Handbook* as 'including prospective and former clients where the context permits'.

Conclusions

There is no obvious policy rationale for parents with learning disabilities, facing state removals of a child under a care order, not to get non-means-tested legal aid. Where there is no alternative means of funding, such parties sit at the most deserving end of a wide spectrum of litigants in person. Other types of parties who cannot get non-means-tested legal aid in public children proceedings, and may not meet the criteria for means-tested legal aid, include working parents, parents seeking leave to revoke a placement order before a child is placed for adoption, on the basis of changed circumstances, and working parents applying to resume care, when a local authority has applied to revoke a placement order after changing a care plan away from adoption. In such cases eligibility for legal aid is means tested, thus there is no discretion to apply for an exceptional funding determination.

These cases are 'hidden' by a public perception that legal aid is available in public law children proceedings and such parents are not part of current research into the needs of family law litigants in person. ■

Re B (a child)
[2013] UKSC 33
Re B-S (children) (adoption: leave to oppose)
[2013] EWCA Civ 1146
Re D (A Child) (No 2)
[2015] EWFC 2
Re D (a child) (non-availability of legal aid)
[2014] EWFC 39
Re DE (a child)
[2014] EWFC 6
G v N County Council
[2008] EWHC 975 (Fam)
Re G (Care: Challenge to Local Authority's Decision)
[2003] EWHC 551 (Fam)
Re L-A (Children)
[2009] EWCA Civ 822
Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)
[2002] UKHL 10