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Litigants' Experiences of the post-LASPO Family Court: Key Findings from Recent Research

Jess Mant, *School of Law and Politics, Cardiff University*

In many ways, the implementation of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 has marked a fundamental shift in the ways in which different people are now able to access and use the processes of private family law. One challenge in particular arising from the withdrawal of legal aid is that of the cases that make it into the court process, more than 80% involve at least one litigant in person (LIP). As Sir James Munby explained in a keynote speech for the National Association of Child Contact Centres, the family court is 'an increasingly lawyer-free zone, with ever-increasing numbers of litigants having to appear unrepresented and without legal advice'.¹

This article sets out some of the key findings which emerged from a recently completed research project which was funded by the Economic and Social Research Council and undertaken as part of my doctoral studies at the University of Leeds. For this project, I examined the specific ways in which the cuts to legal aid have impacted on people's experiences of the family court process. As part of this, during 2017, I conducted in-depth interviews with 23 LIPs about the time they spent in the family court to resolve parenting disputes under s8 of the Children Act 1989. During these interviews, LIPs were able to describe their experiences of the process in detail – including their concerns, perceptions and interpretations of the process and those working within it. From these interviews, it became apparent that without legal aid, LIPs feel that they encounter significant barriers to justice during the court process – particularly in relation to the availability of legal and procedural support, as well as the way in which court hearings themselves are managed and conducted.

The Shift from Advice to Information

One of the major implications of withdrawing legal aid is the way in which LIPs now have difficulty finding and accessing free legal advice. Legal aid has traditionally provided individuals with a starting point from which to assess their practical options, as well as the means to pursue those options via mediation or adjudication if necessary. Nevertheless, despite the retention of funding for mediation, its uptake has dropped and self-representation in court has increased exponentially.² Without the crucial support that comes with early legal advice, therefore, many individuals are now practically excluded from the potential benefits of mediation. Instead, they must rely on the information they can find from other face-to-face services or through online resources.

¹ Sir James Munby (2018), *Keynote Address to Annual General Meeting/Conference of National Association of Child Contact Centres (NACCC) 24th November 2018*. Full text available from:

[<http://www.transparencyproject.org.uk/dealing-with-parents-conflict-and-unreasonable-behaviour/>]

² Ministry of Justice (2018) *Family Court Statistics Quarterly (April – June 2018)* London: The Stationery Office.

For those who do end up self-representing, free and bespoke legal advice about potential adjudicative solutions to their problems, or the legal principles which govern s8 proceedings, is limited to that which is provided pro bono. Many law firms and advice organisations around England and Wales make important contributions to the diminished availability of legal advice by offering free advice evenings or drop in sessions for LIPs. However, from the perspective of LIPs, the accessibility of this advice is sporadic, in the sense that it is often constrained by geographic location or only offered at specific times. As such, while these sources of advice are undoubtedly an invaluable resource for many LIPs who are able to rely upon them, the majority of interviewees struggled to locate, access or make use of them.

Rather, interviewees were largely forced to rely upon free information, rather than legal advice. This included making use of online sources such as information websites and social media forums set up by other LIPs, as well as more readily available face-to-face organisations like the Personal Support Unit, Citizens Advice Bureaux, Rights of Women and Women's Aid. The burden to facilitate participation in the family justice system is therefore falling to many underfunded, overburdened services in the third sector. Although usually unable to provide legal advice, these services are able to provide LIPs with general information about different kinds of court order, what to expect at court, and how the court process works.

In the absence of legal advice, this information was invaluable to interviewees who were attempting to prepare paperwork and understand what to expect before their court hearings. However, although more widely accessible, these resources were also characterised by barriers. During interviews, LIPs explained that a common difficulty that they had with both these sources of support is that they had to 'push' to access them, and 'jump' between different services to find different kinds of help. Often, face-to-face support is also limited by time and geographic location, which can mean fundamental difficulties for those with mobility issues and limited financial resources, as well as those with limited time to spare. The majority of interviewees were single parents balancing the care of young children alongside precarious working arrangements or other caring responsibilities. As a result, many interviewees explained that the only time they had to complete their court preparations was during the evenings and often well into the night. For many, this had severe consequences for their health and wellbeing, as well as limiting their ability to access many face-to-face sources of support.

Although online resources may be more helpful for people in these situations, these sources are also characterised by barriers such as access to the Internet and learning difficulties, as many people have difficulty processing written information. Existing research conducted by Pascoe Pleasance et al has already indicated the extent to which experiences of poverty, mental health issues, and isolation tend to intersect and compound each other.³ As a result, those who are no longer eligible for legal aid are in practice those who may have greater difficulty accessing this information, let alone legal advice. Despite increased availability of information and help from both online and face-to-face services, therefore, their accessibility is still extremely limited for many individuals who are unable to invest the time, energy and finances required to seek help from multiple sources. As a result, many LIPs may arrive at

³ Pascoe Pleasance, Nigel Balmer and Alexy Buck (2006), *Causes of Action: Civil Law and Social Justice* (2nd ed) London: The Stationery office.

court unprepared, and with varying levels of prior knowledge about what to expect from the process.

Self-Representation in the Family Court Process

In his keynote speech to the Family Law Bar Association Annual Conference in November 2017, which was published in the January 2018 issue of Family Law, The Honourable Mr Justice Cobb discussed at length the extent to which vulnerability is present in the family court. In this speech, he warned against underestimating the basic practical obstacles which now exist for individuals within the court process. The findings of my research reiterate his concern that LIPs often now arrive at court without information about ‘...the basic steps required to reach a point where a judge makes a decision about your case... getting to court, entering the courtroom, following the court hearing, and listening to and accepting the outcome.’⁴

The reality of the post-LASPO advice context outlined so far in this article means that people are now coming to court with very different levels and kinds of information. While some people may be able to get information or even a small amount of free legal advice before their hearing, others may simply turn up on the day with nothing more than all the paperwork they have received from the court. Without knowledge of the law that applied to their case, or the procedure they were expected to follow, it was impossible for many interviewees to put together an argument or even follow the conversations which take place in the courtroom.

An important consensus among interviewees was that, despite the best intentions and efforts of judges, there was little consistency in the way they dealt with LIPs. Judges appeared to vary in terms of the approach they took to explaining aspects of the process and balancing hearings where the other party was represented by a lawyer. A common aspect of these approaches was that legal representatives were often permitted to speak first, in order to outline the main issues of the hearing. However, this left LIPs feeling excluded from important conversations, without a lawyer to translate or contribute to legal negotiations on their behalf. Additionally, the extent to which LIPs were satisfied that legal principles and procedure had been explained to them appeared to substantially vary between interviewees and their interactions with different judges. An important point to note, therefore, is that limited guidance is available for judges on how to deal with these issues, particularly given the differing levels of knowledge and diverse circumstances of the LIPs now coming before them.

Even aside from the ways in which LIPs feel disadvantaged without access to legal knowledge, the practical barriers to participating in the court process also cannot be underestimated. For example, LIPs are expected to verbally advocate their position – to stand up in hearings and make coherent and reasoned arguments about inherently emotional and distressing issues. This requires LIPs to communicate their points in an unnatural and potentially inaccessible format – for example, many interviewees were unable to do this as a result of a range of different pre-existing issues like communicative problems, anxiety or learning difficulties.

⁴ The Honourable Mr Justice Cobb (2018), *Do the Vulnerable Have Effective Access to Family Justice?* Family Law 36.

Unfortunately, in addition to the problematic way in which eligibility for legal aid has been reformulated, there has also been limited investment by the government of finances or attention into the ways in which the court process may need to be adapted in order to ensure that LIPs with various communicative needs are both accommodated and included within this process.

On top of this, many interviewees were also required to participate in the process of cross-examination, both directly and indirectly. Despite multiple pledges to do so, the government is still yet to introduce provisions that would prevent cross-examination between alleged perpetrators and victims. In the original LASPO consultation, the government stated that family law was an area in which they did 'not routinely expect' issues to be too emotional or complex for self-representation. However, for these interviewees, their time in court was often wholly traumatic, and led most of them to explain that they would never return to the family court process even with representation, because of the ways in which the process itself had actually facilitated further experiences of abuse.

Conclusions

A concerning consequence of the post-LASPO context, therefore, is not only the challenges that LIPs face during their time in court, but also the ways in which these experiences may result in their potential exclusion from the family justice system altogether. It became apparent during this project that LIPs are now self-representing in a range of chaotic and intersectional circumstances which are not recognised under the current legal aid scheme. Further, by considering the perceptions and experiences that LIPs shared during interviews, it was possible to understand that despite the efforts of the professions, judiciary and third sector, the court process is struggling to anticipate and accommodate this variety of need. Due to the failure of policy to acknowledge the barriers to participation that exist for many individuals, it may be impossible for many to make meaningful use of the family justice system even if they are able to access it. Further, these findings also highlight the negative perceptions which may now exist about the capacity of the justice system as a whole. It suggests that the post-LASPO family court process may not only be unsuitable for many of its users, but importantly runs the risk of no longer being perceived as a route through which to obtain protection and resolution.