

Costs in fact-finding proceedings against the legally aided litigant

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In the climate of the revised PD 12J and the new Domestic Abuse Bill, this article explores the approach to costs orders in the context of fact-finding hearings under the Children Act and Family Law Act 1996. It goes on to specifically tackle the thorny issue of costs orders against the legally aided litigant, advocating the possibility of an order not against the impecunious litigant but against the Lord Chancellor on behalf of the body which facilitated such litigation. This is with a view to addressing the potential for unfairness in the Family Court, particularly with the new limitations to be introduced under the Domestic Abuse Bill, which this article considers and critiques.

The issue of costs is not one which frequently comes to mind in non-financial

family proceedings, principally Children Act and Family Law Act cases. However, with a new Bill restricting the accused from cross-examining their accusers (with generally only the accusers eligible for legal aid) and the still recent revised Family Procedure Rules ('FPR'), PD 12J highlighting the need for fact-finding hearings, this article will look at whether the issue of costs ought to be more at the forefront of litigators' minds in this context. From the author's experience, fact-finding are raised much more frequently and if one party benefits from legal aid with the other party in person, there is a real possibility of injustice occurring.

This article will consider the likely familiar principles applying to costs in fact-finding hearings, before considering the impact of the potential costs payor being a legal-aided party. Lastly, it will look at the Domestic Abuse Bill, specifically s 50 of the current draft, entitled 'Prohibition of cross-examination in person in family proceedings'. It should be noted that this article will consider fact-finding hearings both arising in Children Act cases and arising in cases under the Family Law Act 1996 in applications for non-molestation orders and occupation orders.

Costs in general

Unlike financial remedy cases, the 'no order' starting point (FPR, r 28.3) does not apply to Children Act and Family Law Act proceedings. They are governed by the 'clean sheet' approach, which applies the court's general discretion in FPR, r 28.1 in the vacuum of a set starting point. The case of *Gojkovic v Gojkovic (No 2)* [1991] 2 FLR 233 is frequently cited in support of the proposition that the court must have some starting point even on the clean sheet

approach, and that should be that costs follow the event. The applicability and distinguishability of that case is a topic for another article. In the context of children cases, Wilson LJ in the seminal case of *Re J (Costs of Fact-Finding Hearing)* [2010] 1 FLR 1893 observed at [17] that the general rule in children cases is no order as to costs.

Costs in fact-finding hearings

Re J is the starting point for any practitioner seeking to claim costs in a fact-finding hearing. It was heard in the context of a fact-finding hearing in private law children proceedings, but the reasoning applied by the Court of Appeal follows through to Family Law Act cases also. The principle applied was that a fact-finding hearing arises by virtue of an individual making allegations. But for those allegations, the fact-finding hearing would not be necessary. Therefore, it is possible to ring-fence the costs of and incidental to such a hearing from the general proceedings where costs are rarely in issue. This is clearly a broad-brush approach but on general application it holds firm.

In *Re J*, Wilson LJ retreated from the existing standpoint that there had to be unreasonable conduct for a costs order. As set out above, he held that where a party makes allegations of fact against another party, which prove to be unfounded, or who challenge allegations of fact that prove to be well-founded, they should be liable for the costs of resolving those issues. In terms of quantum, in *Re J*, M succeeded in proving two thirds of her allegations and so F was required to pay two thirds of her costs.

Re J remains the leading authority. The other frequently cited authority is that of *R v A (Costs in Children Proceedings)* [2011] EWHC 1158 (Fam), [2011] 2 FLR 672. In that case, a costs order was made as the applicants had made 'unpleasant and irrelevant allegations' against the respondent that he had been obliged to defend. This is a broader point and less applicable specifically to fact-finding hearings; it is a clear case of litigation misconduct. Related but distinguishable is the case of *Re T (Costs:*

Care Proceedings: Serious Allegation Not Proved) [2012] UKSC 36, [2013] 1 FLR 133, in which the Supreme Court considered an application for costs against the local authority in care proceedings. The case is clearly distinguishable as firstly it is in the context of care proceedings and secondly there is a clear public policy argument against making costs orders in general against local authorities.

Costs against the legally aided litigant

So far, the position appears relatively clear-cut; a claim can fairly be made for costs proportionate to the number of allegations one has successfully proved or defended. However, frequently the situation is complicated by virtue of the accuser benefiting from legal aid. Readers will be familiar with the eligibility criteria for legal aid, hence why it is almost inevitably the accuser that will be in receipt of legal aid. The machinations of legal aid funding remain somewhat a mystery even to practitioners; in a recent case of one of the author's, an accuser was legally aided initially on a Family Law Act application. This led to a fact-finding hearing at which the accuser lost on nearly all allegations. The respondent was in person. Despite losing this fact-finding thus not getting the protective injunction sought, the accuser was able to go on and make fresh allegations in closely linked Children Act proceedings against the same respondent and received funding for the fact-finding that arose in that case (which the accuser also failed at). There is a concern based on this anecdotal evidence that there is potential for litigation with impunity.

Enter the costs order. Frequently those seeking a costs order will simply seek an order against the accuser, not to be enforced without leave of the court. This is all very well and completely within the court's powers. However, practically it serves very little use for our clients; they are unlikely to ever be able to enforce such an order against a legally aided litigant who by definition has to be approaching impecuniosity. Considering the case briefly described above, the accuser should not have brought further,

ill-advised allegations, but the accuser was facilitated in doing so by the legal aid funding which they were receiving. After that first failed fact-finding hearing, that funding should have been brought to an end. There is an argument that the costs burden should be borne by public funding. This is an option which this article seeks to set out.

The relevant statute is the Civil Legal Aid (Costs) Regulations 2013 ('the Regulations') coupled with the infamous Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). Section 26 of LASPO provides for the possibility of a costs order against an individual in receipt of civil legal aid. However, this article has already touched on the lack of merit in seeking an order directly against the individual. Regulation 10 of the Regulations provides for an order to be made against the Lord Chancellor instead. Regulation 10 sets out criteria for making such an order, which in any event will only be made if it is reasonable and just and equitable in all the circumstances. The criteria are as follows:

- (1) any order made in the proceedings must be against the legally aided party and the amount, if any, which the legally aided party is required to pay under a costs order is less than the amount of the full costs;
- (2) the non-legally aided party must make a request for the order within three months of the date on which the s 26 order is made;
- (3) the proceedings must have been instated by the legally aided party;
- (4) the non-legally aided party must be an individual;
- (5) the court must be satisfied that the non-legally aided party will suffer financial hardship unless the order is made; and
- (6) the court must have regard to the resources of the non-legally aided party and of that party's partner (unless they have a contrary interest in the proceedings).

Regulation 15 allows sets out the following considerations, namely where:

- (1) but for cost protection, it would have made a costs order against the legally aided party; and
- (2) if so, whether, on making the costs order, it would have specified the amount to be paid under that order. The court must go on to specify the amount if it has sufficient information to do so.

Regard should also be paid to regs 13 and 14 which set out mechanisms for assessing a party's resources.

One issue arises from the above: point 3 below reg 10. If a non-legally aided party issues a C100 then the respondent secures legal aid and a fact-finding is directed, is this point fatal to a costs order against the respondent? To the authors' knowledge, there is no authority on this. However, the argument which falls to be made is that following *Re J*, fact-findings can be considered distinct from the substantive proceedings and thus one could apply that sub-section of the Regulation in the context of which party initiated the fact-finding hearing.

Therefore, there is an option to seek an order against the Lord Chancellor. Simply by virtue of there being an actual pot of money there, this represents a greater likelihood for the costs payee of actually having the costs order fulfilled. The Regulations are perhaps unsurprisingly relatively silent on procedure; best practice would suggest that if such an order is made, the Lord Chancellor be given the opportunity to respond to such an order. Whether or not there should be a more thorough assessment of the merits of a litigant's case before funding is granted is a subject for another article. However, it has to be right that where public funding facilitates litigation which could ordinarily give rise to costs liability, that the public body responsible takes on at least some of the litigation risk.

Domestic Abuse Bill

It has been raised above that one concern with the current legal aid rules are that there

is an inequality of arms and a perception (true or not) that the legally aided party can litigate with impunity.

The long-awaited Domestic Abuse Bill has been recently published, containing as promised a prohibition on the accused cross-examining their accusers directly. The disappointment is that this is as far as the Bill goes. It does not do what is common in criminal courts, namely to automatically appoint an advocate to cross-examine on behalf of the accused. Not only would this likely lead to more efficient court hearings, thus shorter time estimates thus freeing up court rooms, it would more adequately promote the article 6 rights of the accused. Instead, the court has to consider whether it is necessary in the interests of justice to appoint a qualified legal representative: proposed s 31V(5) Matrimonial and Family Proceedings Act 1984 ('MFPA 1984'). It remains to be seen what judicial guidance is sent out in relation to such appointments; strictly, it should always be in the interests of justice for there to be equality of arms, particularly when findings are being made which could carry over say into Children Act proceedings. However, lawyers will be all too familiar with the current government's attitude towards funding justice.

The fairness point arises particularly in the proposed new s 31S, MFPA 1984, namely that if an individual has the protection of an on-notice protective injunction, then they are prohibited from cross-examining their accuser. The difficulty with this is that particularly in Family Law Act cases it is not uncommon for the courts to err on the side of caution and grant an injunction on a without notice basis. Any junior advocate will have experienced a jam-packed return

date list; very few judges have the time or inclination to hear submissions on whether the order should remain in place or not, they will simply list it for trial or encourage undertakings to be given. The result being that an injunction made without the evidence being tested now deprives the accused of their ability to properly test that evidence in the event that they cannot afford privately paid representation, unless they can satisfy the court that it is in the interests of justice to appoint an *amicus curiae*.

Conclusion

The reference to the Domestic Abuse Bill may at first glance appear at odds with the rest of this article. Often fact-finding hearings with legally aided parties appear unfair to the privately paying or unrepresented litigant; they can make allegations and if they do not succeed then no harm done (clearly a broad generalisation). With the advent of the Domestic Abuse Bill, the perception of unfairness could rise. In this context, the court should not be slow to make costs orders against legally aided parties where necessary and if applicable, against the Lord Chancellor. In a climate where some feel that the new PD 12J almost encourages individuals to make allegations in private children proceedings, the threat of a costs order may go some way to curbing perceptions of unfairness in the Family Court.

The above being said, the authors must give a brief but vital caveat: legal aid funding is essential to our justice and in no way is the above advocated with a view to jeopardising the existence of that funding. It is simply that the starting point for justice has to be equality of arms and a level playing field.