

Family matters



Ben Rigby is the former editor of Costs Lawyer

The Legal Aid Agency must pay the full cost of expert reports ordered by the new family court, the Court of Appeal has decided. *Ben Rigby* reports

One bugbear familiar to costs lawyers practising in legal aid costs has been the reluctance of the Legal Aid Agency (LAA) to pay the full costs of expert reports ordered by the new Family Court, leaving it to be split between the parties and the LAA.

However, in a recent case the Court of Appeal decided that the Agency's approach was wrong, ruling against the LAA's predecessor, the Legal Services Commission (LSC).

The case followed the LSC's refusal to pay more than one-third of an expert's fees because it believed that the parents should have been required to pay the other two-thirds – leading to a Law Society intervention.

The Law Society intervened in the case of *JG v The Lord Chancellor* because of the need for solicitors to be clear from the start as to who is paying for the expert they instruct. The case also raised a 'question of general importance' about the lawfulness of the LSC's actions.

The court accepted the Law Society's argument that where an expert's report is sought by the child alone, it will be legitimate for the legal aid budget to bear the full cost. Moreover, the court went on to say that "it may not be all that infrequent" that this is the case.

The judgment means that, in future, the LAA must look at the facts of a specific case to decide whether it should pay the fees in full.

It also means that where unrepresented parents cannot afford to commission expert evidence, but the court and the child's guardian consider such evidence necessary, it may still be appropriate for the full costs to be borne by the child through his/her legal aid certificate.

Law Society president Nicholas Fluck said the LAA's position had "left many family cases at an impasse where expert evidence that the court has deemed necessary is not available".

Experts were quick to comment. From the

Bar, Mike Horton of Coram Chambers said the case was "a small silver lining to the very dark cloud created by LASPO's removal of legal aid in private law children disputes".

Horton noted that in difficult private law disputes, "the court may resort to appointing a guardian for the children, who may wish to instruct an expert", adding that "the Court of Appeal opens the door a little, but every case will depend on its own facts".

Tony Roe of Tony Roe Solicitors in Thame noted that the long and detailed judgment merited careful consideration, given changes to law and procedure since the facts of the case arose five years ago, highlighting Black LJ's comment that the procedural rules applicable were not the same as they are now and neither was the climate in which the parties and the judges were operating.

Jim Lines, partner at Harmans Costs, agreed with Fluck, saying: "It should mark the end of the Agency's approach of insisting that all of the parties should pay equal shares and that the LSC/LAA must look at the specific facts of the case under consideration."

The decision, Roe added, was based on very fact-specific grounds – something echoed by the ACL's Paul Seddon, who said: "In my opinion it by no means provides a *carte blanche* to fund experts when parents, who have the financial means to pay for them, simply refuse [to do so]."

Seddon added that the LAA's response to subsequent court decisions "remains to be seen", noting that the judgment recommended a prior authority should still be obtained. Lines agreed with Seddon, adding: "The Agency's response to the judgment and indeed to requests for prior authority will be interesting."

One practice management point highlighted by Roe is that costs lawyers should be sure to ask district judges to explain their reasons for each decision they take in a short judgment, and for their orders to be precisely spelled out. ■