Neutral Citation Number: [2012] EWHC 1442 (Fam)

Case No: NJ11C00189

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/05/2012

Before :

THE PRESIDENT OF THE FAMILY DIVISION

- -

Between :

A Local Authority	**Applicant**
- and -	
DS	**1st Respondent**
DI	**2nd Respondent**
DS (through a Children's Guardian)	**3rd Respondent**

- -
- -

Ranjit Singh (instructed by **A Local Authority Legal Department**) for the **Applicant**
Regine Dassa (instructed by **Johal & Co)** for the **1st Respondent**
Chris McWaters (instructed by **Mills Chody**) for the **2nd Respondent**
Sharon Love (instructed by **Carr Hepburn**) for the **3rd Respondent**
Michael Rimer appeared for the **Legal Services Commission**

Hearing dates: 3 May 2012

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Judgment

THE PRESIDENT OF THE FAMILY DIVISION

This judgment is being handed down in private on 31 May2012. It consists of 17 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Sir Nicholas Wall P:

1. This case reaches my court because the parties have asked me to give what guidance I feel able to give on the question of prior authority addressed to the Legal Services Commission (the LSC) in relation to expert evidence. I heard the application (which had been transferred up to me from the Family Proceedings Court (the FPC) via the Principal Registry of the Family Division (the PRFD) on 9 May. On that date, I directed that the case should be listed before the District Judge who transferred it, who will become the allocated judge for the case, and will, I anticipate, hear it through to its conclusion.

2. Nothing in what follows should be taken as any indication that I have formed a view either on the merits of the case generally, or on the merits of instructing the Independent Social Worker (the ISW) who is the subject of the application for prior authority. These, it seems to me, are matters for the district judge who will hear the case and adjudicate on its merits.

3. Furthermore, as the purpose of this judgment is to provide guidance to the profession and to the LSC, I propose to write it anonymously. Save as is contained within the judgment itself, therefore, nothing must be published which will identify any of the individuals in the case.

The facts

4. The ultimate issue in the case is whether or not a final care order should be made in favour of a local authority in relation to a young male child who is currently 16 months old, and whom I will call D. D is at present subject to an interim care order (ICO) in favour of the local authority initially made by a Family Proceedings Court (the FPC) on 2 December 2011, and subsequently renewed. This followed the institution of proceeding on 29 November 2011. D is currently living in a mother and baby foster placement in accordance with the local authority's interim care plan. As will be apparent, the FPC acted promptly, and I have a copy of the justices' reasons for making an ICO in my papers.

5. In accordance with the Public Law Outline (the PLO), the local authority, undertook a number of pre-proceedings activities. In particular, it obtained a report by a consultant adult psychiatrist dated 8 November 2011, a detailed report from a registered clinical psychologist dated 12 November 2011 and what is described as an "Interim" report from an ISW (not the ISW whose report is the subject of prior authority) dated 18 November 2011. These were, in broad terms, hostile to the mother and it was essentially these documents which led the local authority to institute care proceedings. For the reasons I have already given, I do not propose to outline the nature of the proceedings, the contents of these reports or the allegations made by the local authority, save to say that they are currently contested.

6. Suffice it, therefore, to say that on 22 December 2011, following the institution of proceedings on 28 November 2011 and the making of the ICO, there was a case

management conference conducted by the justices' legal adviser. It was the order made by consent on this occasion which brings the matter before this court. Paragraph 1 of the order reads as follows: -

> "There shall be permission to the parties to jointly instruct the ISW, who was named, to undertake *a parenting assessment* (emphasis mine) of the parents…..
>
> (d) The costs of the parenting assessment shall be shared by the local authority, the mother and the father (i.e. one third each) the court deeming this to be a reasonable and necessary disbursement on the certificates of the publicly funded parties….."

7. A number of directions were given as to the letter of instruction, the filing and service of the report, and permission for the ISW to see D for the purpose of the assessment. Nothing turns on these save that I think I should take the opportunity to endorse the approach of Bodey J in *Calderdale MBC v S and the LSC* [2005] 1 FLR 751 as to the split of the cost of a joint instruction.

8. Other directions were given which are not material to this application, save that the mother was given permission to instruct an adult psychiatrist to undertake an assessment of her, the cost to be borne by the mother's public funding certificate "the court deeming this to be a reasonable and necessary disbursement". By paragraph 15 of the order the matter was listed for an Issues Resolution Hearing on 11 May 2012. This was subsequently vacated and re-fixed for 21 June.

9. Unfortunately, apart from using the words "reasonable and necessary", in relation to the adult psychiatrist, the legal advisor appears to have given no reasons for the decision to grant the mother permission to instruct an ISW.

10. A named guardian was appointed on 17 January 2012. On 2 or 5 April 2012 (the date is not entirely clear and does not matter) the justices transferred the proceedings to the PRFD. According to the draft order in my papers, they did so for the following reasons: -

> (a) The court has directed various assessments in this case deemed to be in the best interests of and to promote the safety and welfare of (D) the majority of which have not commenced due to the LSC failing to provide prior authority for the funding of said assessments.
>
> (b) The parents' solicitors are considering seeking a judicial review of the LSC's failure.
>
> (c) The lack of funding for the assessments in this case has caused inordinate delay – the case is stalemated and this is not in (D's) best interests.
>
> (d) Due to the funding issues and potential satellite litigation, the matter is deemed to be too complex for the FPC.

11. The district judge at the PRFD in front of whom the matter came, referred it to one of the Family Division Liaison Judges for London, who in turn suggested that it should come before me. The district judge made an order that a senior representative of the LSC should attend the hearing before me, such attendance only to be excused by myself.

12. As the point seemed to me an important one, I offered, through my clerk. to allow the LSC to be represented at the hearing. I was, accordingly, considerably surprised on 9 May that not only was the LSC not represented, but that no representative of the LSC was present. Instead, I received a letter from the LSC offering to deal with the matter by a telephone call with myself. This was manifestly unsatisfactory, and I copied the letter to myself for the parties to read. Eventually, and following a telephone call from the guardian's counsel, a representative of the LSC appeared (the author of the letter to me) and informed me that the LSC received so many requests to attend court and explain themselves that, in effect, a policy decision had been taken not to attend court when asked. After some prompting from myself, the representative apologised for his non-attendance.

The application for prior authority

13. I have the curriculum vitae (the CV) of the ISW whom the mother wishes to instruct in my papers. This shows that 2006 she has been a/the (it is not clear which) director of a company in Milton Keynes, described as a Centre for Children and their Families. She has a diploma in Social Work from a provincial university. She is registered with the General Social Care Council. After working in various capacities for a local authority (not the local authority which had instituted these proceedings), she ended up from 2000-2002 as "Social Work Manager, providing outreach services to families including Parenting Assessments including those parents with learning disabilities supervised contact and preparing evidence for Court". She is a Children's guardian for CAFCASS and the National Youth Advocacy Service (NYAS) and a fully trained expert in using the Parenting Assessment Manual (PAMS). Her professional memberships comprise the British Association of Social Workers (BASW), NAGALRO and the chamber of commerce.

14. I agree with the representative of the LSC who addressed me, that the ISW concerned is a social worker, and would seem suited to provide a social work assessment.

15. The local authority wrote a letter of instruction to her on 20 January 2012. It was an agreed letter (apart from, that is, from the agreement of the father, which was awaited). It set out the relevant dates; it sent the ISW the documents (including an indexed and paginated bundle of the court documents filed to date); it set out the local authority's case and posed a total of some 18 questions "agreed with the parties". It is, on the whole, a perfectly good letter of instruction and warns the ISW against making findings of fact on disputed issues. However. it strikes me that the number of the questions posed is excessive, and some would appear to be out of the ambit of the ISW's expertise. It is apparent that the court had little or no input into the letter and whilst it is not usually the court's function to draft the letter of instruction, it is of the essence of good case management that the court should identify the issues on which it wants the expert to report.

The chronology and the correspondence between the mother's solicitors and the LSC

16. I have been provided with a bundle of the correspondence between the mother's solicitors and the LSC and a chronology provided by the LSC. These documents do not make happy reading. Given the nature of this judgment, it is, I think, necessary for me to go through them as neutrally as possible. It does not seem it is for me to attribute blame for the unhappy state of affairs in which the case finds itself. It remains the fact, however, that proceedings which were commenced in November 2011 remain unresolved – indeed have not even reached an IRH by May 2012. If cases are, in due course, to be completed in the time-scale envisaged by the Family Justice Review (FJR) and accepted by the Government, it is apparent that delays of the kind experienced by this case are unacceptable.

17. As I have already stated, the proceedings were commenced by the local authority on 29 November 2011. The mother and the father were issued with legal aid certificates on 29 and 30 November respectively.

18. Assessments were ordered by the Court on 22 December 2011. The application for prior authority was first made by the mother's solicitors on 3 January 2012 (over a month from the institution of proceedings) and received by the LSC two days later. Under the section "reasons for request", the mother's solicitor has written, in capital letters "prior authority for ISW to undertake ***parenting*** assessment". There is also reference to a psychiatric assessment which the LSC has authorised.

19. Under the heading "Reasons for request" there is written:

> "PARENTING ASSESSMENT – initially [a different name whose profession is not disclosed] was proposed to undertake the assessment, however, as the two parties live separately and some distance away from the social worker, it was agreed that [the chosen ISW] be instructed as she is able to travel to both parties at a lower cost."

20. It is not until much later in the form, in answer to the question "why is the expenditure necessary/justified?" that there is a reference to a risk assessment:-

> "Expert will undertake parenting risk assessment on both parents as ordered by the court. We looked at several experts, but this case is complicated with high risk elements such as sexual abuse, mental health and learning difficulties. This expert has expertise in each field".

21. The solicitor says that two alternative quotes had been obtained. The ISW selected could write a report for £4,800 made up as to 10 hours reading the relevant court papers at £50 per hour; 16 visits (8 to each parent) also at £50 per hour; 3.5 hours travelling on each occasion at £30 per hour (a total of £840; mileage at 45 pence per miles (£360) with 14 hours at £50 per hour in preparation and completion of her report. No figure is given for attending court. The alternative quotation which the solicitors had obtained was in the sum of £5229 plus VAT and the particular ISW was chosen because she is "local to the parties and therefore cheaper, and has the relevant expertise".

22. On 12 January 2012, the LSC wrote to the mother's solicitors rejecting the application and returning it to the mother's solicitors. On 26 January 2012 the mother's solicitors replied repeating the ISW's cost of travel and adding: -

> "This case is complicated as the mother herself is young and grew up in Care due to her parent's (sic) drug abuse, domestic violence and mother's prostitution. In addition there are questions over our client's mental health, possible depression and domestic violence by the child's father. The Court therefore needs a full and detailed assessment of the mother to determine whether she can safely parent her son who is the subject of those proceedings. Having looked at the various experts, the Court approved [the particular ISW] as she has the relevant experience and was also the cheapest quote."

23. Attached to the letter was a description of PAMS, which describes itself as a session based risk assessment process. A decision refusing prior authority having been taken by the LSC the mother's solicitors both telephoned the LSC on 2 February and on the same day wrote two letters (both marked urgent) to the LSC's appeal team in Cardiff, seeking in both to answer the LSC's assertion about the ISW's cost of travel and seeking to argue; (1) that the ISW was conducting a risk assessment, and (2) accordingly her charging rate (£50 per hour) was within the LSC's limits. In a faxed addition, the solicitors expressed concern about the delay, since work had been due to commence by the end of January.

24. According to the LSC the appeal was received in Cardiff on 8 February 2012 and on the following day the LSC in Cardiff acknowledged receipt of the appeal stating that the papers would be passed to the costs assessor.

25. On 18 February 2010 a Senior Caseworker from the LSC wrote to the mother's solicitors setting out the Independent Assessor's reasons for refusing the appeal, and pointing out that the hourly rate for ISWs was set by The Community Legal Service (Funding) (Amendment) Order of 9 May 2011.

26. Unfortunately, and for reasons which are unknown to me, the letter from the LSC dated 18 February was not received by the mother's solicitors until 8 March 2012. Four days later the mother's solicitors wrote to the LSC in Cardiff repeating the argument that the ISW's rates were within the LSC's limits and suggesting that the London office of the LSC had not provided Cardiff with copes of the relevant documentation. That argument was repeated in a follow up letter dated 21 March, which was written because the mother's solicitors had not heard from the LSC. That letter enclosed a letter from the local authority to the court, (inter alia) expressing concern about the delay.

27. On 11 April 2012 the LSC wrote to the mother's solicitors effectively repeating the terms of their letter of 9 February. On 16 April the mother's solicitors again wrote to the LSC in Cardiff stating that the note to the Assessor "wrongly states it is only a parenting assessment" and seeking again to argue that because it was a "risk" assessment the ISW's rate of charging was within the LSC's limits.

28. On 17 April the LSC says that the father's solicitors were "notified" (it is not said how) that the application for prior authority had been refused on the ground that the rates and hours catered for appeared excessive and that the rates sought exceeded the "codified" rate.

29. On 20 April District Judge Hess ordered the LSC to attend the hearing before me on 3 May 2012.

30. On 23 April 2012 the LSC wrote to the mother's solicitors granting prior authority "for a total amount not exceeding £290" to cover any preparation at a rate not exceeding £30. The authority and the rate were said to be "exclusive of VAT", although it is unclear how the figure of £290 was calculated and the LSC accepts that this figure is "clearly incorrect".

31. On 25 April, the mother's solicitors queried the figures and referred to the hearing in the PRFD, in relation to which the court had ordered "someone from the LSC to attend". The LSC says that on the same day it notified the mother's solicitors (the means are not specified: it appears to have been by letter) of the outcome of the cost assessor's decision.

32. On 30 April, the mother's solicitors wrote to the LSC enclosing the order of District Judge Hess listing the matter before me on 3 May 2012 and directing that a senior officer of the LSC attend the hearing to explain the LSC's decision to decline to fund the independent social worker's report and the father's drug testing "notwithstanding the clear direction of the court on 22 December 2011".

33. The chronology makes it clear that there were a number of unsuccessful telephone calls to the LSC, details of which I do not propose to relate save that on a number of occasions the mother's solicitor was kept "on hold" for an unconscionable length of time.

34. On 2 May 2012, as I have indicated, a senior legal adviser at the LSC wrote directly to myself. The LSC asserts that letter was simultaneously faxed to the solicitors for the parents. As none of the parties had seen the letter, however, I made it generally available. In the letter, which was expanded in subsequent submissions, the reasons for the LSC's refusal to fund the ISW at the rates proposed, was set out. The letter added: -

> "When the application was resubmitted, it was granted in part for 5 hours to read the papers, 10 hours to assess the parents (5 hours per parent) and 14 hours to draft the report. A claim by the solicitors from the legal aid fund in respect of [the ISW's] travel will have to be justified on assessment."
>
> In summary, the LSC has allowed 10 hours (rather than 32) for the ISW to visit and assess the parents. My instructions are that this figure could be increased by three hours to allow some observation of contact time with (D) (a parenting assessment). In any event if (the ISW's) work takes longer than the amounts which have been authorised in the partial grant of prior authority, and the additional work is justified when the

> solicitors clams for costs are assessed, then those additional amounts will be paid from the legal aid fund.
>
> Paragraph 7.176 of the Standard Civil Contract Specification (of the contact between [Name] & Co and the LSC (query a mistake for the mother's solicitors) provides "…. If independent social work expertise is claimed as a disbursement it may not be claimed at a rate in excess of such rates as we may from time to time specify on our website. Such rates will be comparable to the rates usually payable for such services by CAFCASS". The provision was added to the contract on 9 May 2011 by paragraph 3 of the Schedule 5 of the Community Legal Services (Funding) Order 2007 which was inserted into the Funding Order by SI 2011/1027. A FAQ document on the LSC website confirms that the rates are presently £30 an hour outside London and so it would be unlawful for the LSC to pay £50 as quoted.
>
> Consequently, the LSC cannot lawfully pay higher rates that those which are provided for in the CLS Funding Order 2007. If the solicitors disagree with the LSC's decision on their application for prior authority, they have the right to challenge the LSC's decision by way of judicial review if they consider the LSC's stance to be incorrect or otherwise unlawful.

35. Thus it was not until the letter of 2 May 2012 to myself that the mother's solicitors had a full explanation of why the LSC had only authorised part funding for the instruction of the ISW.

36. Since the hearing before me, further information has come to light. The ISW in question states in an e-mail that she has undertaken PAMS assessments where the main concern was risk to children, all of which were charged at £50 per hour. She names four local authorities from which she had had instructions "in recent months", all of which, she says, have attracted the £50 rate.

37. In riposte the LSC states that it has been unable to establish from its own record whether what the ISW asserts is correct: they say that they have contacted the firms identified by the ISW for details and will, in due course, provide a fuller explanation.

The Law

38. For present purposes, the law can be taken quite shortly. To the mind of the lawyer it remains curious that an administrative body can effectively render nugatory a judicial decision taken in what the court perceives as the best interests of a child. Where the party or parties who seek to instruct an expert are publicly funded, however, there is no doubt that the LSC has the power, given to it by Parliament, to refuse to fund the instruction or to fund the instruction in part only. Moreover, the LSC undoubtedly has the power, deriving from the same source, to cap the level of fees which may be expended by the expert at a given level. That is undoubted the law. Lawyers may complain that this is an unfair state of affairs, or that they cannot find experts who will work at the rates laid down. Their remedy, if they take the view that the decision

of the LSC is ***Wednesbury*** unreasonable or can be struck down for any other public law reason, is to apply for judicial review.

39. Schedule 5 of the Community Legal Services (Funding) Order 2007 came into force on 9 May 2011. It limits the payment by the LSC to an ISW to the rate of £30 an hour. The LSC does have a discretion which, for present purposes, is contained in paragraph 2 to section 2 of Schedule 6 which sets out the meaning of exceptional circumstances in article 5(2)(e)(ii), as follows –

> "……exceptional circumstances are where the expert's evidence is key to the client's case and either –
>
> a) the complexity of the material is such that an expert with a high level of seniority is required, or
>
> b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence."

40. Article 5(2)(e)(ii) of the Funding Order provides:

> "5(2) Any contract for the provision of funded services under section 6(3) of the [Access to Justice] Act - ... (e) must .. (ii) provide that the Commission may increase the fixed fees or rates set out in Section 1 of Schedule 6 if it considers it reasonable to do so due to exceptional circumstances as defined in Section 2 of Schedule 6"

41. It is, I think, also worthwhile citing paragraph 3(1), which provides that the costs and expenses relating to the expert are not payable by the LSC as a disbursement. "Costs and expenses" are defined and the maximum amounts that the LSC can pay for mileage and travelling are capped at 45p per mile and £40 per hour respectively. Paragraph 2 of Section 2 of Schedule 6 to the Funding Order is of no assistance, because the rates which are recoverable from the LSC in respect of the costs of an ISW are governed by paragraph 3 of Schedule 5 to the Funding Order, which is replicated at paragraph 7.176 of the Standard Civil Contract and there is no mechanism in the Funding Order which would allow the LSC to pay higher rates than those which are routinely paid for such services by CAFCASS.

Guidance

Discussion

42. In all the circumstances set out above, it does not seem to me sensible to decide whether or not the ISW should be instructed, and if so on what terms. This is not judicial side-stepping. In the first place, this is essentially a case management decision, to be made by the Tribunal which is going to hear the case. Secondly, additional material has emerged since the hearing before me, and the situation remains inchoate. Thirdly, in my judgment proper case management requires that the decision should not be taken by a third party to whom the case has been assigned for a specified purpose, but by the Tribunal which is to hear the case. I see my function as

providing guidance (if I can) both to the LSC and the parties, so that a decision can be taken by the DJ on the basis of that guidance. I do not see it as my function to decide whether or not there is a necessity for the ISW to be instructed for the proper resolution of the case. That is a matter, as I say, for the trial court.

43. I am also conscious of the fact that any guidance I see able to give should be realistic and not impose unreal burdens on an already hard pressed judiciary and legal profession. Much of what is set out below is predicated on the basis that the case will be managed by one Tribunal, who will, accordingly know the case and be able to make an informed decision about whether he, she or they need a particular expert to enable them to decide the case.

44. However, it needs to be said, I think, that in the High Court of the Family Division in London, the pressure of work is such that the judge simply does not have the time (as things are at present) to master the details of the documents in each case. I anticipate that the same situation applies in the lower courts. In these circumstances, (notably in care proceedings in which the parties are usually all represented) it seems to me that it behoves the advocates to explain to the judge why a particular expert is required. The court is not a rubber stamp, although the pressures imposed are in danger of turning it into one.

Guidance

45. In all the circumstances of this case, therefore, I feel able to offer the following general guidance:-

i) The words "the cost thereof is deemed to be a necessary and proper disbursement on [a named individual's] public funding certificate" (or words to equivalent effect) should no longer be used when the court orders a report from an expert. The words do not bind the LSC or, for that matter anybody else. In addition, there must be doubt about the court's power to make such an order. It is, in my judgment, far better to follow the words of the Regulations, particularly if the court is being asked to approve rates in excess of those allowed by the Funding Order. A copy of such an order is attached at the end of this judgment.

ii) The test for expert evidence will shortly import the word "necessary". The question which the court will have to ask itself is whether or not the report of the expert is necessary for the resolution of the case. FPR rule 25.1 will shortly be amended to insert the word "necessary" for "reasonably required" and there will be a new Practice Direction.

iii) It is the court which makes the order for the instruction of an expert, and this responsibility neither can nor should be delegated to the parties. It is of the essence of good case management that the court should identify the issues on which it wants the expert to report. It would thus be helpful and important for the tribunal to be able to say - if it is the case and the hard pressed Tribunal with a long list has had the time - that it has read all the (relevant) papers.

iv) If the court takes the view that an expert's report is ***necessary*** for the resolution of the case, it should say so, ***and give its reasons***. This can be done

by a preamble to the order, or by a short judgment, delivered at dictation speed or inserted by the parties with the judge's approval. I have considered this point carefully, and have come to the conclusion that this does not impose an undue burden either on the court or the profession.

v) There is no substitute for reasons. A consent order is still an order of the court: it is a judicial decision and must be supported by reasons. Equally, a decision by the LSC is a decision. It too should be supported by reasons.

vi) "Reasons" in circumstances such as these need not be lengthy or elaborate. They must, however, explain to anyone reading them ***why*** the decision maker has reached the conclusion he or she has particularly if the expert is seeking to be paid at rates which are higher than those set out in the table in Schedule 6 of the Funding Order

vii) Speed is of the essence in proceedings relating to children. An application for prior authority must be made at the earliest opportunity and, once again, must be carefully drafted and supported by reasons.

viii) By like token, it behoves the LSC to deal with such applications promptly and, particularly if the application is being refused, or only granted to a limited extent, to give its reasons for its decision. Once again, the reasons can be concise. Of course the solicitor seeking prior authority can go ahead regardless, and instruct the expert at the rates the expert demands, but such a suggestion, in reality, is unreal. The expert's contract is with the solicitor, and if he or she does not recover the expert's costs from the LSC, it is the solicitor who is liable. Given the exiguous rates of remuneration, this is a risk no solicitor is willing to take, particularly where the client is impecunious.

ix) Similar considerations to those set out above apply to any challenge to the LSC's ruling.

x) If a case is urgent, it should be so marked and the reasons for its urgency explained.

xi) Courts should familiarise themselves with Part 25 of the FPR and with Practice Direction 25A which supplements it. Specifically, they should be aware of paragraph 4.3(h) or its equivalent when amended which provides that the person wishing to instruct an expert must explain to the court why the expert evidence proposed cannot be given by Social Services undertaking a core assessment or by the Children's Guardian in accordance with their respective statutory duties. The Rule and the Practice Direction are being revised to make them (it is to be hoped) more practical and "user friendly". Practitioners should look out, in due course, for the amendments.

Generally

46. The Rules, the PLO and the Practice Direction lay down strict time-tables which are to be obeyed. One of the golden rules, however, is that the instruction of an expert should not, unless it is unavoidable, hold up the progress of a case, and in particular should not abort the final hearing. If, therefore, for any reason, an expert is

unavoidably instructed late in the day, he or she will need to be informed of the IRH and the likely final hearing date, with a view to his or her report being filed in advance of the latter, and, of course, preferably by the former.

47. It needs to be remembered. I think, that the LSC is a creature of Statute and that the rates of remuneration concerned have been laid down by Parliament. The LSC was at pains to remind me that the number of applications for prior authority had increased from 216 in November to 1,840 in March, and that the number of applications received in the period identified was 40% higher than for the same period in the previous year. I was also told that the LSC has set up a dedicated team in Cardiff to deal with all applications for prior authority for experts. It aims to process standard applications in 8 days and urgent application in 3 days.

48. As I have said several times in this judgment, there is no substitute for reasons. As I have said again, they need not be long or over-elaborate. For example, if the expert has to read 500 pages, all of which are relevant to his or her work, he or she should explain why they are relevant, and he or she can say that based on long experience on average he or she reads at the rate of one page a minute (or as the case may be), so that reading the papers is likely to take her a minimum of 8 hours. Similarly, if he or she needs to see the parent or the child more than once, he or she should explain ***why*** this is necessary in order to write a proper report. There is no substitute for reasons. It follows that if the expert's time frame is rejected by the LSC; (a) there is a rational basis for a challenge; and (b) if the LSC's refusal is manifestly unreasonable, there may be grounds for judicial review of the decision.

49. In the instant case, the mother's advisers pointed out, with some force, that the process for prior authority had begun at the beginning of January and it was now May. In that period the case had not advanced, and was no nearer resolution.

50. Research by Julie Brophy and others demonstrates that parents facing care proceedings often not only have multiple problems but are likely to come from the poorest and worst educated sections of society. Further research by Judith Masson and others shows that solicitors undertaking publicly funded child care work find it very difficult to work with such parents and earn only a fraction of the remuneration they could achieve in private practice.

51. We expect high standard from solicitors, and rightly so, since the work is critically important. But given the limited resources available, solicitors and the LSC must strive to ensure that time is not wasted and that decisions are made swiftly.

52. I would like to congratulate the local authority on its presentation of the case. It is clear and well ordered. Whether there should be a further parenting assessment of the parents, and, if so, on what terms I leave to the Tribunal which will decide the case. I repeat that nothing in this judgment should be taken as indicating my view one way or the other, save that the instruction if ordered and going ahead should not further delay the time-table of the case

53. This case is only about prior authority. It is not my function to engage in the broad criticism of the LSC which, anecdotally, I have heard from solicitors and the Bar – particularly in relation to payment for work done. I simply repeat that in cases involving children, speed is of the essence. Thus whether it is case management by

the judiciary, prior authority to instruct the expert or the payment of solicitors and counsel for the work that that they have done, systems must be devised and adhered to, which are speedy and efficient.

Coda

54. A suggested form of order, depending on the facts of the individual case, could be in the following terms: -

    a) The proposed assessment and report by X (as set out in paragraph 2 of this order) are vital to the resolution of this case.

    b) This case is exceptional on its facts.

    c) The costs to be incurred in the preparation of such reports are wholly necessary, reasonable and proportionate disbursement on the funding certificates of the publicly funded parties in this case.

    d) The court considers X's hourly rate of £y and the estimated costs of the assessment report to be reasonable in the context of (his) qualifications, experience and expertise.

    e) The field in which X practises, and the particular expertise which (he) brings to bear on cases involving (subject) are highly specialised. There is no realistic prospect of finding an alternative expert with the necessary expertise at lower fee.

    f) (The court considers that any further delay in order to give the LSC the (further) opportunity to consider an application for prior authority to incur the costs of the proposed amendment or report would be wholly outside the child(ren's) timescale(s).

55. Even such an order (which will need, of course, to be adapted to the facts of the individual case) should be buttressed by reasons as set out in the guidance which I have attempted to give.

Further note

56. Whilst this judgment was in draft, I have received two documents from the LSC. The relevant parts of the first of these are summarised below. Some of the points in the second document are dealt with in my judgment, some are not. For ease of reference, therefore, I am attaching the second document to this judgment since it sets out fully the LSC's position. My judgment should, therefore, be read with these matters in mind:

> "The reference to the Cardiff team (has been removed) because it is possible that additional staff may be involved in processing these applications in the future and they may not all be located in Cardiff …
>
> … the time taken to process them (applications for prior authority) is for a specific time period and that may of course

change. (The LSC) would be happy to update this monthly or quarterly.”

legal services COMMISSION

Applications to the LSC for Prior Authority for Experts - May 2012

Background

On 1 October 2011, as part of the legal aid reform programme, the Ministry of Justice (MoJ) enacted a new Funding Order that set maximum hourly rates and prescribed fees for certain types of experts. The Order does not prescribe the amount of time that may be spent by an expert on a case. The Order does allow for higher rates to be paid if specific exceptional criteria are met. The LSC is required to make funding decisions in accordance with the Order.

Solicitors may make an application to the LSC for prior authority for expert costs in certain circumstances.

Volumes of applications for prior authorities received by the LSC

Monthly applications	Nov	Dec	Jan	Feb	Mar	April
Applications for Prior Authority	216	492	784	1,140	1,840	1,855

The number of prior authority applications received overall in this period is significantly higher than the same period the previous year. It is difficult to predict whether the numbers of applications will continue to increase.

The LSC contract states that prior authority should only be sought where the request is for exceptional rates or where the costs sought are unusual or unusually high. The LSC agreed that as a transitional arrangement it would grant requests for standard expenditure for 3 months after the enactment of the Order to provide certainty for solicitors. The LSC is now working with the Law Society to discourage applications where no unusual costs are sought.

Time taken to process applications

The time taken to process applications as at March 2012 is set out below. The LSC is monitoring the volumes of applications and the time taken to process them.

Time taken to process	
Standard applications	8 days
Urgent applications	3 days

There are no specific criteria for urgent applications other than that the solicitor has stated that it is urgent, for example a Court hearing is imminent.

The time taken to process the applications is calculated from the date that all of the necessary information has been received from the solicitor and would exclude time taken waiting for additional information if this had been requested.

The above analysis does not include applications for experts in very high cost cases which are dealt with under individual high cost case contracts. In these cases it may take longer to authorise expert costs as the total costs of the cases need to be agreed. The number of these cases is small (around 1,950 of care certificates which represent 5% of the total number of care certificates granted). However these cases cost around £60 million taking up 20% of the public law spend.

The LSC is looking at how the system for approving costs in these cases can be made simpler for all parties and is currently piloting a new "events model" with some solicitor firms.

Decisions made

The LSC may grant, refuse or reject an application. The meanings of these decisions are:

(i) Where applications are granted the prior authority for hourly rates and/or hours is approved as requested;

(ii) Where the prior authority was refused it may be for a number of reasons e.g. the hours are excessive (following the introduction of the Order there has been a significant increase in the number of hours requested in some cases) or there are issues with apportionment of costs;

(iii) Where applications are rejected the solicitor has provided insufficient information to enable the LSC to make a determination e.g. requesting a global sum without a breakdown of the work to be done, the number of hours and the requested hourly rate. In these cases the solicitor is asked to re-submit the application with the relevant information.

There was previously a right of appeal against a funding decision by the LSC on a prior authority. Following the introduction of the new family contracts in 2012 there is no longer this right. Solicitors are able to re-submit their application where they have additional information that they wish to have considered.

A refusal of prior authority does not necessarily mean the cost of the expert will not be met. Refusals may take the form of telling the solicitor to "justify on taxation" i.e. as part of their usual application for payment at the end of the case. This applies in particular to cases where the assessor decides the case does not justify an exceptional rate.

Future data

The LSC is committed, as a member of the Family Justice System to improve the management information that it collects. One of the areas where more data is being collected is on prior authority requests. This data will be shared once a representative sample has been analysed and should be available by October 2012. It will look at things such as the:

- Types of experts for whom prior authority sought
- The nature of the authority i.e. in relation to rates or hours
- The number of applications that are refused or rejected.