



Neutral Citation Number: [2020] EWHC 1762 (Fam)

Case No: CV190C1058

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 03/07/2020

Before :

MR JUSTICE KEEHAN

Between :

Re C (Lay Advocates) (No.2)

SECRETARY STATE FOR JUSTICE

Applicant

- and -

A LOCAL AUTHORITY

1st Respondent

-and-

M

2nd Respondent

-and-

F

3rd Respondent

-and-

C

4th Respondent

**(A Child Represented through his Children's
Guardian)**

Mr J Holborn (instructed by **Government Legal Department**) for the **Applicant**

Miss L Summers (instructed by **Local Authority**) for the **1st Respondent**

Mr O Wraight (instructed by **Kundert Solicitors**) for the **2nd Respondent**

Mr J Lee (instructed by **Askews Legal LLP**) for the **3rd Respondent**

Mr J Turner (instructed by **Brethertons LLP**) for the **4th Respondent**

Hearing dates: 12th June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE KEEHAN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon Mr Justice Keehan :

Introduction

1. This judgment should be read with the judgment I gave in this matter on 13th December 2019: *Re C (Lay Advocates)* [2019] EWHC 3738 (Fam).
2. In that judgment I dealt with the issue of the funding of lay advocates for parents with intellectual impairments which required them to have professional support to understand the court proceedings and to participate effectively in the same.
3. In paragraphs 22 to 25 of the judgment I said as follows:

“22. In my judgment that there is no material difference between the services provided by an interpreter, an intermediary or a lay advocate insofar as they each enable and support parties and witnesses to communicate and understand these proceedings. HMCTS routinely pay for the services of interpreters and intermediaries, I cannot see any principled reason why it should not also pay for the services of lay advocates in an appropriate case.

23. Accordingly, I had enquires made of the relevant Court Service budget holder who agreed to fund the reasonable costs of a lay advocate for both parents.

24. Accordingly, I will appoint a lay advocate for the mother and a lay advocate for the father. They cost £30 per hour which I consider to be entirely reasonable. I have assessed the likely number of hours of work on this for the lay advocates to be 50 hours.

Further, I will make an order that HMCTS will pay for the costs of a lay advocate for the mother and for the father.”

4. My judgment and order reflected the position which I had understood to have been agreed by the HMCTS budget manager.
5. On 13th March 2020 the Secretary of State for Justice (‘SSfJ’) made an application for me to vary the order I had made on 13th December 2019. I gave directions for the SSfJ and the parties to these public law proceedings to file and serve skeleton arguments and I set the matter down for hearing.

The Application

6. I propose to set out some of the background which was not included in my judgment above. On 27th August 2019 the solicitors for the mother made an application to the Legal Aid Agency (‘LAA’) for prior authority to instruct a lay advocate. On 5th September the LAA refused the application on the basis that “the work of a lay advocate did not form part of legal representation” and “little detail has been given upon why the solicitor is unable to communicate with [its] client”.

7. On 12th September the mother’s solicitors sought a review of the LAA’s decision and set out the opinions of Dr. Gillett and the basis for seeking approval of the appointment of a lay advocate. The LAA replied on 10th October again refusing the application. The LAA asserted that the LAA’s Central Legal Team had written to them in respect of a different case and confirmed that the LAA “cannot fund [lay] advocates as they do not form part of legal representation”.
8. In October 2019 an application by the father’s solicitor to the LAA for prior authority to instruct a lay advocate was also refused.
9. Prior to the SSfJ’s application of 13th March 2020, I received an email from an official in the MoJ on 3rd March. This email was not included in the court bundle for this hearing but it was made available to all counsel during the course of the hearing. It contained the following extracts from an email sent on behalf of the LAA to the MoJ:
 - i) “In September [2019] we received an order [made by HHJ Watson] requiring the attendance of a representative [of the LAA] at the next court hearing if prior authority wasn’t granted for a lay advocate....Rather than attending, we wrote to the court explaining the LAA’s position (that we weren’t clear what a lay advocate was, but that it didn’t appear to form legal representation) and that we wouldn’t be attending”;
 - ii) “If there is any further work conducted by the lay advocates in assisting communication between the solicitors and client outside of the court, they should make a new application for prior authority, explaining fully what the role of the lay advocate is and why it is necessary for them to be instructed in the circumstances here....”;
 - iii) “Communication between a client and their legal advisor outside of the courtroom is a matter for the legal advisor. Funding in relation to this is covered by the contract between the LAA and the legal provider. Under the contract the cost of a communication professional that is required outside of the court room can be claimed, if justified and reasonable on the specific facts of the case, although legal aid providers, the nature of their work are likely to be used to communicating with vulnerable clients.”; and
 - iv) “where clients are required to attend professional meetings for example with the Local Authority, these do not form part of a client’s legal representation and cannot be funded as civil services under LASPO”.
10. As appears from paragraph 9(i) the LAA was not clear as to the role of a lay advocate. This lack of clarity appeared to persist and was referred in the skeleton filed on behalf of the SSfJ in the following terms:

“The first point to be grappled with is the role of the proposed ‘lay advocate’. Neither the LAA nor the SSJ are entirely clear, the term ‘lay advocate’ usually being used to describe a non-legally qualified individual who may represent an otherwise unrepresented party – in some contexts called a ‘McKenzie Friend’. [The] SSJ understands that the proposal to be that an individual with experience dealing with persons with learning

difficulties is made available to the mother and father both during Court proceedings to help explain what is going on, and at all meetings with the solicitor to help explain advice given and pass instructions. They would also meet with the mother and father to reinforce what they have been told by their solicitors and what they have heard at Court.

In respect of proceedings in Court, it therefore appears that their role is, in fact, largely the same as someone who would usually be described as an ‘intermediary’, although their role is broader than merely acting as such for the purposes of cross-examination (for which an intermediary is most commonly used).

Outside of Court, in meetings with the solicitor, it appears their role is to ensure advice is understood and instructions given.

As indicated by Keehan J in his judgment, the role therefore appears analogous to that of an interpreter, who will also act as intermediary in relation to cross-examination. It is highlighted that, as a matter of practice (and SSJ would submit, as a matter of law), it is the role of HMCTS to fund a translator for a party whilst they are at court. It is the role of the LAA to fund a translator out of court.”

11. To clarify the position:
 - i) a lay advocate does not provide legal services;
 - ii) a lay advocate is not a McKenzie Friend;
 - iii) a lay advocate is not an intermediary (albeit an individual may be qualified to act as an intermediary and as a lay advocate);
 - iv) the term ‘lay advocate’, for the purposes of this judgment, means a person who is qualified and/or has experience of assisting and supporting a party in proceedings who has an intellectual impairment or learning difficulties which compromises their ability to process and comprehend information given to them. The function of the lay advocate is to ensure that the party does understand the information provided and is able to respond to the same and thereby, is enabled to participate effectively in the proceedings. This assistance and support will be required both in court during the proceedings and out of court for the purposes of taking instructions and preparing the party’s case for the court proceedings.

12. The basis of the application by the SSfJ was that the regional budget manager made an error or miscommunication in agreeing to fund lay advocates for the 2nd and 3rd Respondents at court and for out of court appointments with their solicitors. It was submitted on behalf of the SSfJ that Her Majesty’s Courts and Tribunals Service (‘HMCTS’) does not and cannot be required to fund lay advocates out of court.

13. I note that in my judgment and order of 13th December 2019 I did not make a decision that I could and should require HMCTS to fund the appointment of lay advocates to support and assist the parents in their out of court appointments with their solicitors and counsel. I merely determined the application and made the order based on the agreement communicated to me by the regional budget manager.

Discussions

14. I am immensely grateful to counsel for their comprehensive and helpful skeleton arguments.
15. A number of points were in issue between the parties in their skeleton arguments but as this hearing progressed it emerged that there was a large measure of agreement on the outcome. Accordingly, I adjourned the matter for counsel to perfect a draft consent order and I fixed a further date for the matter to return to court in the event that an agreement on all substantive issues could not be achieved. The parties were able to agree the terms of a consent order.
16. The SSfJ agreed, on behalf of HMCTS and the LAA, the following:
- i) payment for lay advocates at hearings is a matter for HMCTS; and
 - ii) payment for lay advocates to assist with communication between the client and their solicitor out of court is, in cases benefitting from legal representation funded by civil legal aid, a matter for the LAA subject to the LAA being satisfied that it is a justifiable and reasonable disbursement in the course of the legal representation provided.
17. It was agreed further that:
- i) HMCTS would pay the costs of the lay advocates to date in the sums of £448 in respect of mother's lay advocate and £887.90 in respect of the father's lay advocate; and
 - ii) The LAA, applying the test as to whether a disbursement is justifiable and reasonable, would consider any further applications for the funding of lay advocates in this case that the solicitors of the 2nd and 3rd Respondent should choose to make (on the basis that an application for prior authority is appropriate where the disbursement being sought is unusual in its nature) to assist with communication between the client and their solicitors out of court.
18. I remain of the view, as set out in my previous judgment, that the appointment of a lay advocate for this mother and for this father was and is essential to ensure their Article 6 rights are not infringed and to ensure that they are enabled to participate fully and effectively in these public law proceedings.

Conclusion

19. Therefore, to the extent set out in paragraph 16 above, my previous judgment and order of 13th December 2019 are varied to provide that (a) HMCTS will fund the provision of a lay advocate, in appropriate circumstances, for a party at court hearings and (b) the LAA will fund the provision of a lay advocate, if satisfied that it is a justifiable and

reasonable disbursement, to support and assist a party in communicating with their solicitor and/or counsel out of court.

20. Further, I approved the parties, including HMCTS and the LAA publicising the terms of my order of 12th June pending this judgment being published given the potential impact upon other extant proceedings.