The Family Court in England and Wales: An Effective Safety Net?

Jessica Mant

Monash University

Abstract

This article contributes an insight into how the decline of legal aid in family law has transformed the role of the family court in England and Wales, and how this is, in turn, is affecting the sustainability of the family justice system as a whole. It will begin by setting out some of the pressures that have historically characterized the legal aid system in England and Wales, focusing specifically on how family law advice and representation has been uniquely and particularly targeted by a host of intersecting political efforts to minimize people's use of family lawyers and the family court when their relationships break down. The article will then turn to consider the consequences of this for the family court. Here, the article will reflect upon how these pressures have constrained capacity and altered working practices within the family court. In sum, it will examine how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis, and what the future may hold for family justice.

Keywords: legal aid; access to justice; family law; litigants in person.

[A] INTRODUCTION

When families break down, people often find themselves at a point of crisis. This is because the end of a relationship triggers a whole range of changes in a person's circumstances. Amidst this crisis, people need to navigate important decisions about things like where any children should live, how often they spend time with each parent, and how any property or assets should be divided. Although these decisions are often extremely difficult and come with tenuous emotional baggage, most parents work these issues out by themselves and do not need to rely on the legal system. Some families will use mediation, where a mediator will

help them to work through the issues and come to agreements. Others might instruct solicitors to negotiate arrangements on their behalf. However, this is not possible for all families, especially in situations where former partners are struggling to communicate effectively, contending with complex circumstances, high levels of conflict, power imbalances, or even safety concerns and allegations of domestic abuse. Traditionally, these would be the families most likely to find themselves in the family court. Although used by only a small proportion of families in England and Wales, the family court has always operated as a safety net for these kinds of scenarios. It does this by providing a formal environment where court orders can secure safe and appropriate arrangements in otherwise chaotic and difficult family circumstances. However, this safety net has been placed under significant strain by swathes of legal aid reforms, including the almost complete removal of eligibility for funded advice and representation for private family law problems under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) 2012. Now, approximately 80% of cases that reach the family court involve people who are representing themselves as 'litigants in person' (LIPs), and many of those arrive for their hearings without prior legal advice or an advocate to help them navigate the legal, procedural and cultural norms of the family court process.

This article will contribute an insight into how the decline of legal aid in family law has transformed the role of the family court, and how this is, in turn, affecting the sustainability of the family justice system as a whole. It will begin by setting out some of the pressures that have historically characterized the legal aid system in England and Wales, focusing specifically on how family law advice and representation has been uniquely and particularly targeted by a host of intersecting political efforts to minimize people's use of family lawyers and the family court when their relationships break down. The article will then turn to consider the consequences of this for the family court. Here, the article will reflect upon how these pressures have constrained capacity and altered working practices within the family court. In sum, it will examine how the decline of legal aid has impaired the extent to which the family court can effectively operate as a safety net for families in crisis, and what the future may hold for family justice.

[B] DECLINING LEGAL AID AND FAMILY LAW

For most separating couples, the main objective on both sides is usually to maintain a reasonable relationship with their ex-partner, especially if there are children involved. As such, without legal advice, there is an

inevitable risk that couples allow feelings of guilt or vindication to govern the decisions they make relating to their relationship breakdown. Rather than inflaming conflict between parties, family solicitors have traditionally assisted their clients in navigating private negotiations and ensuring that any agreements reached incorporate a practical understanding of their future needs and the future needs of their children, rather than the immediate trauma of the relationship breakdown (Wright 2007). As Ingleby (1992: 2) explains, family lawyers do not simply pick up the pieces by meeting the day-to-day needs of their clients, but they also put the pieces back together again by helping them to negotiate a final resolution which is forward-looking.

The accessibility of legal advice, however, has historically hinged on the availability of legal aid. Introduced under the Legal Aid and Advice Act 1949, legal aid is available through a judicare model, which involves providing state funding to private law firms for the purposes of supplying legal services to those who could not otherwise afford to instruct lawyers. Although the legal aid scheme was characterized by ambitious post-war aspirations of equitable access to law, it has never quite achieved these objectives. Rather, the expense of the judicare model has meant that the legal aid scheme was a common target for cost-saving measures, particularly as neoliberal ideas about the appropriateness and affordability of state-funded welfare provision began to take hold within public policy. Several successive government administrations introduced reforms to limit eligibility for the scheme through increasingly strict means testing.[1] This meant that even those eligible for legal aid have often been excluded from its benefits because they were expected to pay expensive and sometimes unaffordable contributions towards the cost of legal services (Hynes 2012; Hirsch 2018).

Beyond limiting eligibility of individuals, however, these cost-saving initiatives were also targeted at the providers of legal services themselves. This was because the cost of the scheme was inextricably linked with the growing demand for legal advice and representation. This is especially true in family law, where the law has necessarily become more complicated to keep up with the reality of modern family life. Greater acceptability of different family forms and relationships, as well as increasing numbers of families co-parenting across different households, all came with a greater demand for family dispute resolution and orders under the Children Act 1989. The corresponding increase in demand for legal aid raised government concerns about 'supplier-induced inflation' and a suspicion

[1] See eg Legal Aid Act 1988 and Access to Justice Act 1999.

that firms reliant on income from legal aid were not incentivized to provide services efficiently, especially compared to those motivated by private profits (Moorhead 2004). These concerns indicated a shift in the relationship between lawyers and the state, in which government policy became geared towards promoting efficiency, greater scrutinization of firms offering legal aid-funded services, and limiting renumeration for lawyers undertaking legal aid work. In short, the insufficient support for the legal aid sector meant that this work quickly became unprofitable and arduous. While some firms were able to offset the impact of this by taking on private clients alongside their legal aid clients, many organizations began to move away from legal aid work entirely.

In family law, concerns about expenditure were only one half of the story. In reality, the decline of legal aid in this area was also underpinned by another debate, where questions have been raised about whether the involvement of lawyers and the court in family disputes is in fact an appropriate way to reach resolutions at all. Under this logic, lawyers are not conceptualized as a means of understanding one's rights and entitlements, nor as facilitators of agreements. Rather, the involvement of lawyers is instead something that exacerbates and entrenches conflict, increasing the chances that families will end up in the family court, which should be avoided at all costs (House of Commons Public Accounts Committee 2007; Legal Services Commission 2007). This narrative aligns neatly with concerns about the spiralling costs of lawyers who provide publicly funded legal services through legal aid. Therefore, although other forms of dispute resolution exist, mediation has consistently been promoted as a one-size-fits-all, cheaper, quicker alternative to going to court which minimizes conflict between parents (Barlow & Ors 2017: 10-14).

However, the appropriateness and efficacy of mediation varies, and it has never been able to offer a universal remedy for all disputes. Moreover, the success of out-of-court resolution options like mediation can often depend on whether people are able to access legal advice in the first place. This is because many families who seek advice about their disputes have often not considered the potential benefits of mediation until a lawyer is able to offer them a bespoke understanding of their options, as well as the benefits and disadvantages of each of these choices (Ingleby 1992; Eekelaar & Ors 2000). Without this early intervention, many may pursue their cases to court unnecessarily without recognizing the potential value of alternative routes. As a result, despite the intentions of policy-makers, self-representation in the family court has always been a common phenomenon. Although there are, of course, some LIPs who pursue court proceedings because they are determined to have their day in court, LIPs

are not typically a population of litigious troublemakers. Rather, they are most often families caught in the gaps formed by the way these policies have disrupted the delicate ecosystem of family law.

In 2010, this became even more amplified. In that year, a fresh set of reforms to the legal aid scheme were proposed under a new statute now known as LASPO. Coming into force in April 2013, LASPO introduced sweeping cuts to several areas of law, the extent of which was incomparable to the incremental restrictions and constraints of previous policies. The four aims of LASPO, stipulated in the initial policy consultation, were to discourage unnecessary litigation, target legal aid at those who need it most, make significant savings to the cost of the legal aid scheme, and deliver better overall value for money for the taxpayer (Ministry of Justice 2010). These were to be achieved by withdrawing legal aid eligibility for several legal problems including social welfare law, employment law, and several issues relating to immigration, clinical negligence, debt, and housing law. Although public family law was to remain within scope, private family law disputes were to be entirely removed, with a narrow exception for those who can corroborate that they have experienced domestic abuse through prescribed forms of evidence. This meant that, in practice, disputing families on very low incomes would only be able to access public funding to support their participation in mediation, and, if they wanted to consult a solicitor or use the family court, they would need to do this at their own expense.

Almost all responses to the public consultation on LASPO argued that these reforms were unnecessary and would impede access to justice for the most vulnerable in society. Nevertheless, the then-government proceeded on the basis that large-scale withdrawal of legal aid was not only necessary from a financial perspective, but would be beneficial for the justice system and those who rely upon it:

> Legal aid has expanded far beyond its original intentions, available for a wide range of issues, many of which need not be resolved through the courts. This has encouraged people to bring their problems to court when the courts are not well placed to provide the best solutions … (Ministry of Justice 2011: 8).

In many ways, the further removal of funding for private family law under LASPO was merely an extension of previous reforms. After all, prior limitations on eligibility, renumeration for providers, and encouragements to try mediation and avoid court were all inherently linked to making savings and delivering value for money. However, the vast scale of the LASPO reforms distinguishes them from earlier policy initiatives. The default position is now one of non-eligibility, where individuals may not

expect state-funded legal support in relation to their family disputes, and use of the family court is generally stigmatized.

Predictably, given the trajectory of earlier reforms, this did not play out in the manner that the then-government had hoped. Although mediation is the only route for which public funding remains available for most families, rates of attendance at mediation fell significantly after LASPO. At the same time, rates of self-representation in the family court have increased exponentially (Ministry of Justice 2021a; 2021b).

Although LASPO contained nothing remarkably new in the way of policy rationale, it fundamentally altered the ways that people have traditionally engaged with family law. We are now living in a 'post-LASPO context', in which people are more frequently falling to the safety net of the family court not only as their last resort, but sometimes as their only option. Consequently, judges, legal professionals, and academics have accused the LASPO reforms of creating a false economy in which money saved from the legal aid budget has simply been displaced to the family court, which is now unsustainably strained under the additional costs and burdens that come with increased numbers of LIPs (Cookson 2013; National Audit Office 2014; Richardson & Speed 2019). In short, LASPO rapidly accelerated the decline of legal aid in family law, undermining the potential utility of out-of-court dispute resolution options, and channelling even greater proportions of families towards an overloaded family court process.

[C] LITIGANTS IN PERSON AND THE FAMILY COURT

As discussed so far, the family justice system has been significantly shaped by policies which have sought to not only reduce state expenditure on legal aid, but also reframe family disputes as personal affairs for which lawyers and the court system are not necessary. Underpinning these policies is an assumption that most individuals have the resources and capacity to manage these disputes by themselves, which has meant that certain population groups have disproportionately struggled to access legal services. For many, these fraught political efforts to limit reliance on lawyers have had the unintended consequence of forcing them into the family court process as LIPs.

Since the widespread withdrawal of state-funded legal representation that came with the implementation of LASPO, LIPs have been the rule rather than the exception. However, LASPO did not only result in more

LIPs. Rather, the blanket withdrawal of legal aid has added a whole new category of LIPs: those on the lowest incomes and with the fewest resources because their family disputes are now categorically excluded from scope.[2] In fact, emerging data suggests that, since LASPO, significant proportions of LIPs arriving at court include people who have accessed no prior advice, people with low levels of literacy, people without access to a phone or the internet, as well as many who do not speak English as a first language (House of Commons Justice Committee 2015; Lee & Tkakucova 2018). In the post-LASPO context, LIPs are now an even more diverse population of individuals who are potentially contending with an even more amplified range of marginalized circumstances, backgrounds and characteristics.

Yet, the family court process is not designed with LIPs in mind. Rather, it remains predicated on a 'full-representation model',[3] which presumes that every party has a lawyer with legal and procedural knowledge, as well a general understanding of how hearings work and how different people within the family court are supposed to interact with each other. In reality, when a lay individual is expected to navigate an unfamiliar legal process, it is likely that they will make mistakes, and judges and other professionals involved will need to take time to assist them and to demystify the process. As a result, cases are frequently more difficult and sometimes take longer when they involve LIPs.

This reality is already clearly demonstrated by a wealth of research studies that evidence the challenges associated with increased numbers of LIPs in family court processes across England and Wales, as well as akin jurisdictions such as Northern Ireland, Canada, Australia and New Zealand. Firstly, these studies have consistently linked the presence of LIPs with increased work for others within the court process, due to the problems that LIPs have in completing and submitting paperwork, the additional time that is required to explain things to LIPs, and the frequency with which hearings had to be adjourned (Dewar & Ors 2000; Moorhead & Sefton 2005; Trinder & Ors 2014; McKeever & Ors 2018). Secondly, when facing a LIP, lawyers and judges encounter difficulties in performing their traditional roles within the court process. For example, lawyers are frequently required to take on the extra work of preparing trial bundles and extending help to LIPs whilst also maintaining their ethical obligations and confidence of their own clients (Williams 2011; Bevan

[2] See, especially, Cusworth & Ors (2021) where researchers classified just under a third of LIPs in England as living in the most deprived quintile of England.

[3] This term is drawn from Trinder & Ors (2014: 53).

2013; Trinder & Ors 2014; McKeever & Ors 2018). Judges also sometimes need to change their approach, ranging from basic signposting, giving procedural leeway to LIPs, to acting on behalf of LIPs during key tasks like cross-examination, and even sometimes managing hearings in an entirely inquisitorial way (Dewar & Ors 2000; Moorhead & Sefton 2005; Trinder & Ors 2014; Corbett & Summerfield 2017). The inconsistency between these approaches stems from judicial anxiety about maintaining their traditional position of impartiality, as well as time and resource constraints (Moorhead & Sefton 2005; Moorhead 2007). Thirdly, there is evidence to suggest that many cases reaching the family court are, in fact, even more challenging and contentious than they were before LASPO, with more people needing to return to court to enforce contact arrangements which might otherwise have been addressed by solicitors (Cusworth & Ors 2021).

As such, people who end up as LIPs in the family court are now finding themselves within a context of diminished legal support, overwhelmed lawyers and advice services, and a strained court system attempting to maintain its important role as a safety net for those who rely upon it. In reality, there is deepening chasm between the experiences of those trying to find their way through the court process as LIPs, and those who can afford to instruct a legal representative to navigate this process on their behalf. For untrained and uninitiated LIPs, the procedural and legal rules that govern the court process are likely to pose a variety of barriers to meaningful participation. For instance, these rules and customs dictate when and how certain issues may be raised, what aspects of a family dispute are legally relevant, and who is permitted to discuss those issues within hearings. From completing court forms, to preparing paperwork, to participating in advocacy, LIPs are continually required to extract and translate specific aspects of their lives into stringently prescribed written and oral formats, without the assistance of a lawyer (Moorhead & Sefton 2005; Trinder & Ors 2014). The impact of this is likely to vary depending on the circumstances and characteristics of individual LIPs. Those who struggle with either written or oral forms of communication, for instance, are likely to face significant challenges when it comes to contributing to the discussions that will ultimately inform the decisions reached in their cases. The barriers that LIPs face within the post-LASPO family court process are also crucially likely to affect the experiences and perceptions that people have of the wider family justice system, and its ability to meet their needs in a time of crisis (Mant 2020). In other words, when LIPs have negative experiences of the family court, their attitudes and understandings may have wider implications for public perceptions of

the family justice system, and its efficacy for delivering justice to families in need of support.

The implementation of LASPO has therefore marked a significant turning point for this system. In many ways, it accelerated the decline of legal aid by delivering a final, definitive blow to many of the services that were already struggling to support families within a diminished advice sector. At the same time, it has fundamentally compromised the capacity of the family court, which is now struggling to support an increased number of LIPs who are arriving with an even more diverse range of needs and circumstances.

[D] WHAT NEXT FOR FAMILIES IN CRISIS?

The decline of legal aid, and subsequent displacement of people to the family court, is having ramifications not only for the families at the centre of those cases but also the resilience of the wider family justice system to cope with other cases. Of course, the majority of families do not need to employ the full panoply of law, nor endure a protracted court case in order to settle their arrangements after relationship breakdown. For many couples, out-of-court or alternative dispute resolution models such as mediation are an ideal method to negotiate and reach agreements in a neutral, supportive environment. However, without the early provision of legal advice, many separating couples may not be informed as to the potential benefits of these methods and may perceive court proceedings as their only option. For others, an absence of early intervention may mean that potentially resolvable disputes escalate into much more serious problems that necessitate reliance on the safety net of the family court. In turn, greater numbers of LIPs in the family justice system, as well as the increased complexity of their circumstances, are impacting the capacity of the court to provide this safety net.

Taking all of this together, this article has painted a rather dire view of the impact of LASPO on family justice. However, rather than conceptualizing LASPO as the end of the story of legal aid reform, I argue that LASPO may, in fact, mark a turning point at which people are finally asking questions about what might come next if legal aid is no longer available (Kaganas 2017: 181). Although it may be a controversial position to advocate, LASPO may in practice provide both the opportunity and the impetus to creatively respond to the tensions that have long characterized the relationship between family law, legal aid and the family court process. By exacerbating these problems to such a degree, LASPO has amplified the importance of finding solutions and instigating change, rather than

simply papering over the cracks of a family justice system that has always struggled to support its users.

Nevertheless, questions about what comes next and what might be done to support families facing the crisis point of family breakdown must be considered carefully. Care is needed because, firstly, the LASPO changes were not an isolated reform. Rather, they were implemented as part of an ever-delicate political context which is underpinned by specific ideas about whom family law is for, the appropriate role of the court process, as well as conflicting ideas about the extent to which government administrations are willing to extend state-funded support to its citizens. Any potential future for family justice that is geared towards supporting LIPs will need to be carefully negotiated so that it is capable of both addressing long-standing problems as well as garnering political support from policymakers.

Secondly, given this complexity, it is often difficult to disentangle the different voices that govern our understandings of these long-standing problems. For instance, while reinstating legal aid to pre-LASPO levels would do a great deal to improve the current situation, it would not necessarily provide a panacea which is fully capable of addressing the challenges and pressures that have historically characterized the legal aid scheme and framed differential experiences for those attempting to use family law. In reality, many people have always been practically excluded from the benefits of legal aid, and the different working conditions of publicly and privately funded lawyers meant that, even when eligibility was far broader, there was never quite equal access to quality legal help when comparing the experiences of those relying on legal aid and those who could afford to pay privately for legal services. To this end, it is important to remember that it is not only the absence of legal advice and representation which has created barriers for access to justice. Rather, it is also important to examine the system that exists without this support (McKeever & Ors 2018: 153-156). By cutting off access to advice and representation, LASPO has not only *created* barriers to the family justice system: it has additionally exposed the disadvantages that people experience within it due to the way that the system works.

In considering the question of what comes next, therefore, it is imperative for scholars, practitioners, and policymakers to take the devastation of LASPO carefully and consciously as a sobering opportunity to reflect upon the long-standing pressures that have characterized the relationship between family law, legal aid and the family court. After all, it is only from the ruins that it may be possible to ask questions about

what family law is for, why the processes of family justice should exist, and how it may be built anew to best serve those families at the crisis point of relationship breakdown.

About the Author

Jessica Mant is a Lecturer in Law at Monash University, Australia. Her research specialisms span access to justice, legal aid, technology, lay participation in court processes, family law, and socio-legal theory and empirical methods. Her forthcoming monograph Litigants in Person and the Family Justice System *(Hart 2022) is the first book to explicitly examine the relationship that litigants in person have with the family justice system. Her research has also appeared in journals including the* Child and Family Law Quarterly, Journal of Social Welfare and Family Law, *and* Social and Legal Studies. *She currently sits on the editorial board of the* Journal of Law and Society, *and often collaborates on research projects with practitioner-led organizations and charities such as the Access to Justice Foundation and the Legal Aid Practitioners Group.*

Email: jessica.mant@monash.edu

References

Barlow, A & Ors (2017) *Mapping Paths to Family Justice* London: Palgrave.

Bevan, C (2013) 'Self-Represented Litigants: The Overlooked and Unintended Consequence of Legal Aid Reform' 35 *Journal of Social Welfare and Family Law* 43-54.

Cookson, G (2013) 'Analysing the Economic Justifications for the Reforms to Social Welfare and Family Law Legal Aid' 35 *Journal of Social Welfare and Family Law* 21-35.

Corbett, N E & A Summerfield (2017) *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross Examination of Vulnerable and Intimidated Witnesses* London: Ministry of Justice.

Cusworth, L & Ors (2021) *Uncovering Private Family Law: Who's Coming to Court in England?* London: Nuffield Family Justice Observatory.

Dewar, J & Ors (2000) *Litigants in Person in the Family Court of Australia* Sydney: Family Court of Australia.

Eekelaar, J & Ors (2000) *Family Lawyers: The Divorce Work of Solicitors* Oxford: Hart.

Hirsch, D (2018) *Priced Out of Justice? Means Testing Legal Aid and Making Ends Meet* London: Law Society.

House of Commons Justice Committee (2015) *Impact of Changes to Civil Legal Aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012* HC 311 2014-15.

House of Commons Public Accounts Committee (2007) *Legal Services Commission: Legal Aid and Mediation for People Involved in Family Breakdown* HC 396.

Hynes, S (2012) *Austerity Justice* London: Legal Action Group.

Ingleby, R (1992) *Solicitors and Divorce* Oxford: Oxford University Press.

Kaganas, F (2017) 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' 39 *Journal of Social Welfare and Family Law* 168-188.

Lee, R & T Tkakucova (2018) *A Survey of Litigants in Person at Birmingham Civil Justice Centre* Birmingham: CEPLER Working Paper Series.

Legal Services Commission (2007) *Legal Aid Reform: The Way Ahead* Cm 6993.

Mant, J (2020) 'Placing LIPs at the Centre of the Post-LASPO Family Court Process' 32 *Journal of Social Welfare and Family Law* 421-444.

McKeever, G & Ors (2018) *Litigants in Person in Northern Ireland: Barriers to Legal Participation* Ulster: Ulster University.

Ministry of Justice (2010) *Proposals for the Reform of Legal Aid in England and Wales* London: Ministry of Justice.

Ministry of Justice (2011) *Reform of Legal Aid in England and Wales: The Government Response* London: Ministry of Justice.

Ministry of Justice (2021a) *Family Court Statistics Quarterly: October–December 2021* London: Ministry of Justice.

Ministry of Justice (2021b) *Legal Aid Statistics Quarterly: October–December 2021* London: Ministry of Justice.

Moorhead, R (2004) 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' 11 *International Journal of the Legal Profession* 159-190.

Moorhead, R (2007) 'The Passive Arbiter: Litigants in Person and the Challenge to Neutrality' 16 *Social and Legal Studies* 405-424.

Moorhead, R & M Sefton (2005) *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* London: Department for Constitutional Affairs.

National Audit Office (2014) I*mplementing Reforms to Civil Legal Aid* London: Ministry of Justice & Legal Aid Agency.

Richardson, K & A Speed, A (2019) 'Restrictions on Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Courts?' 41 *Journal of Social Welfare and Family Law* 135-152.

Trinder, L & Ors (2014) *Litigants in Person in Private Family Law Cases* London: Ministry of Justice.

Williams, K (2011) *Litigants in Person: A Literature Review* London: Ministry of Justice.

Wright, K (2007) 'The Role of Solicitors in Divorce: A Note of Caution' 19 *Child and Family Law Quarterly* 481-495.

Legislation

Access to Justice Act 1999

Children Act 1989

Legal Aid Act 1988

Legal Aid and Advice Act 1949

Legal Aid, Sentencing and Punishment of Offenders Act 2012