

THE FUNDING CRITERIA FOR CHILD CARE PROCEEDINGS

RESPONSE BY THE FAMILY JUSTICE COUNCIL

MERITS TEST

1. The Commission proposes to introduce a merits test for the funding of special Children Act proceedings. The application of that test is to be devolved to suppliers who will then have a duty to report to the LSC in circumstances which go beyond their present duties to report.
2. It is acknowledged by the Commission that these proposed new provisions will apply in relatively few circumstances. The Council is concerned that the new proposals will add to the burdens on suppliers; will give rise to quite complex discussion on the criteria proposed; will not make a significant difference to the costs of the proceedings.

Where the issues in the case have been identified and it has become clear that the client has no reasonable prospect of securing the outcome they seek in the case.

3. It is frequently the case that parents have no reasonable prospect of securing the outcome they seek in the case. Parents want their children back with them but it is often clear quite early on that this is unlikely. However, there are other aspects to the proceedings which are important both to children and parents: that other family members are identified and assessed, for example; that proper arrangements are put in place for contact; that proper arrangements are put in place for the children if they are not to live with their parents. There is a process for restricting the exercise of parental responsibility of parents and it is essential for the system of justice that parents are properly represented so that they can participate and understand the process even if their objects are not secured. It is also more efficient for the court to have parents represented

so that the task of explanation falls on their representatives rather than the judge during the proceedings.

Where the client no longer has a separate or sufficient interest in the proceedings to justify their representation.

Where the client's interest in the proceedings is no longer sufficiently distinct from that of the other parties to justify separate representation.

4. It is accepted that where parents live together and there is no conflict or likely conflict between them, they should be represented together. The instruction of a joint solicitor can also help to keep the focus on the interests of the child. It is accepted that those who are not parents/do not have parental responsibility should not be separately represented unless they have a separate case to put. However, our understanding of these paragraphs is that they apply to those who are at present entitled to non means/non merit tested public funding; there is already a test for those who are not parents.
5. There are certainly cases where parents are separately represented in circumstances where they live apart where the case they wish to put to the court is similar. It is difficult to see how this provision would apply. Which of the parents would be entitled to public funding? The point made in the previous paragraph applies here too. Each parent needs to be able to participate fully in the proceedings and to be guided through them with their own representatives.

Where the client has disengaged/ceased to give instructions for, say, 28 days.

6. There are already duties to report where clients disengage from the proceedings; we do not suggest that it should be otherwise, although it is a difficult rule to apply. As the LSC appreciates, a significant proportion of the parents in public law proceedings have mental health problems; learning difficulties; problems with alcohol and drug addiction (indeed, a competent parent is quite rare). They do sometimes disengage only to seek to engage again just before a final hearing or when, for example, contact is

restricted. Often, a solicitor reports the failure to engage before the final hearing, conscious that they cannot proceed without instructions, only to be telephoned by the court on the first day to say that their client has come to court. As is noted above, it is difficult for the court if parents are not represented, especially those with significant mental health or addiction issues. What small benefits there may be in saving money under public funding are likely to be lost in extra costs in the time taken to conduct cases at court with parties in person - this is particularly so since lawyers often help parties to compromise on the basis of what is reasonable and what the court can/will order in the case, rather than putting the case they would really like to put. Under the present fee regime solicitors have been able to maintain a skeleton service at very low cost for clients who have not engaged fully in the proceedings but who might well reappear. It is recognized that the new fee regime has implications for this situation. The Council takes the view that the new provision does not add significantly to the present requirements.

RESIDENTIAL ASSESSMENTS

7. The Council has grave concerns regarding the proposed withdrawal from funding residential assessments which it considers will jeopardise the appropriate funding of proceedings designed to protect some of the most vulnerable children in our society. The Council responds to the specific questions on this issue in the consultation document as follows:

Q 13. Do you agree that these assessments are outside the ambit of the legal aid budget as they are primarily about possible rehabilitation and are likely to involve treatment, therapy, and other rehabilitative work?

Answer: The Council does not agree with this proposition

Q14. Are there any costs of these assessments that rightly fall to the client and therefore should be funded from the legal aid budget. Please give examples.

Answer: Where there is an assessment which genuinely falls within s38(6) of the Children Act 1989 and which will provide important evidence enabling the court to reach properly informed decisions, then the legal aid budget should be responsible for a proportion of the cost.

Q15. Do you agree that these assessments generally add insufficient value to the outcome of proceedings to justify the delay and costs involved given the availability of community based assessment? If not can you give examples of the benefits to publicly funded clients from undergoing these assessments at the very significant costs involved?

Answer: The Council does not agree with this proposition.

8. Please find annexed to this response a Schedule summarising the 5 most recent care cases in which the Circuit Judge member of the Council has directed a residential assessment. These cases, which are typical of those regularly coming before a Care Judge, demonstrate the following:
- a) All of the assessments proceeded within a 12- 16 week timescale. None involved unnecessary or unreasonable delay.
 - b) All of the cases involved genuine assessment of the child with its parent/s, not therapeutic work. The LSC should not be unduly influenced by a small number of high profile cases involving the Cassel hospital. Since *Re G* [2005] UKHL 68 such assessments are, in effect, excluded from the ambit of s38(6)
 - c) All of the cases involved residential establishments where the costs were comparatively modest. One charged little more than the mother's state benefits.
 - d) Each of these cases represents a "high risk" situation where a court would be unable to authorise assessment of the child placed with a parent without 24 hour monitoring in the early stages.
 - e) All involved new born babies. In the absence of residential assessment the child would not have the opportunity to form secure bonds with a birth parent.

9. The consultation document appears to proceed on the assumption that the court's task is simply to decide whether to make a care order or not. As a matter of law the court is obliged to determine:
 - i. whether the threshold criteria are met. That was not an issue in any of these cases.
 - ii. whether the Local authority's care plan accords with the welfare interests of the child.
 - iii. which order is most appropriate to meet the welfare needs of the child? Both (b) and (c) require attention to and evidence-based findings upon the issues set out in the welfare checklist at s 1(3) of the Children Act 1989.
 - iv. (Usually) whether the court should make placement order permitting adoption which requires consideration of and evidence-based findings upon the issues set out in the welfare checklist at s1(4) of the Adoption and Children Act 2002.

10. Each of the assessments in the scheduled cases provides cogent evidence which is pivotal to the court's decision as to where the best interests of the child may lie in the future. Indeed, each of the cases has been, or is likely to be, resolved without a contested final hearing. In effect, the outcome of the residential assessment is a decisive influence on the next step taken in the case.

11. "Community based assessments" in such high risk cases are far less reliable and are more likely to generate delay. A parent who can manage a couple of hours observed contact at a family centre may not be a safe parent when required to provide 24 hour care. A residential assessment is a far more meaningful test of capability to meet the child's needs and provides more effective risk assessment and, therefore, provides the best basis for safeguarding the interests of the child.

12. As stated in the consultation paper, 70% of care cases result in a care order. However, the mere fact that a care order is ultimately made tells us little about the day to day circumstances of the child. Many will be placed with parents, some with family members under the aegis of a care order. In the

scheduled cases, care orders are the likely result in all 5 cases, although 3 of the children involved will be placed with parent/s.

13. It is not only the parent who is the "client". The critical "client" in each of these cases is the child. Children are surely entitled to the most careful and measured assessment if they are to be denied the opportunity of being brought up by their birth parents. In this context, it is astonishing that the consultation paper refers, at question 13, to issues of "possible rehabilitation" as being "outside the ambit of the legal aid budget". The central issue in each of these cases is whether it would accord with the child's welfare to be placed with its parent/s - whether that was safe and appropriate. In the Council's view, this is a forensic decision taken on the evidence within the context of care proceedings.
14. It is important to note that, in the scheduled cases, negative assessments were just as significant as positive assessments in enabling the court to reach a clear and timely finding as to where the best interests of the child may lie.
15. The Council suggests that simply because the LSC refuses to finance residential assessments, the need for such assessments in appropriate cases will not go away. The financial burden will, of necessity, shift back to the local authorities. The proposal amounts to little more than shifting expenditure from one publicly funded source to another. At the very least, the LSC should not unilaterally withdraw funding without discussion, and proper consultation, with other interested parties as to how residential assessments are to be paid for in an appropriate case. To do otherwise would be grossly lacking in an appropriate level of co-operation with other agencies and unbecoming conduct in a responsible public body and key player in the family justice system. The Council would urge the Commission to respect its obligations to other agencies in the family justice system and its wider obligations to the administration of justice.
16. In the Council's view, the proposed timescale is inadequate as it will not allow local authorities, and other agencies, sufficient time to address the issue of how residential assessments are to be funded when they are

ordered by the court. This risks a 'funding gap' which could seriously prejudice the interests of the children and parents involved. The Council considers that in the current proposal the Commission is exposing itself to the risk of judicial review and challenges under the Human Rights Act.

17. In care and adoption proceedings, the issues at stake for parents and children are of the greatest possible significance. As has recently been observed, to deprive a parent of her child is indeed a "life sentence". The privately paying parent of modest means, it is suggested, would be prepared to spend their last penny upon any assessment which might offer a realistic prospect of their child remaining in their care.
18. Residential assessments may be more costly but cannot, logically, be distinguished from other forms of assessment commonly funded by the LSC such as psychiatric or psychological assessment of a parent or child. In the right case they are an essential part of the forensic process.
19. In summary, it is the Council's view that there should be a stringent analysis of the need for a residential assessment since it is a very expensive resource. However, it is quite wrong to say that *"there is little evidence that these assessments add sufficient value to the legal process to justify the costs and delay"*. There will be cases, and it will be for the court to identify them, where a residential assessment will be the only way of gaining the information needed to enable the court to make a decision. The case for a residential assessment may be put by the parents or the child's guardian as their last hope for preserving their Article 8 rights. In the experience of the Members of the Council, the courts order residential assessments sparingly and demonstrate a keen awareness of the need to order them only in cases where they are appropriate. Case law provides a clear framework to guide the court's approach to residential assessments.
20. The fact that the Commission no longer wishes to shoulder the burden of funding these assessments is not a reason for saying that a residential assessment has no value. It is a matter of the utmost concern to the Council that the value of residential placements is not recognised by the Commission.

SCHEDULE

1. Previous child removed from mother - inadequate care, mother associating with serious Schedule 1 offender. During proceedings, second child born prematurely with significant health needs. Local authority unsure whether relationship between mother and offender continuing. Placement in residential unit (15 weeks) allowed mother and baby to develop a good attachment relationship, for the mother to demonstrate adequate child care skills, commitment to child, and that she had terminated the dangerous relationship. Child now placed at home under interim care orders. If progress maintained child will remain with mother probably under care order.

2. Parents had several previous children removed from their care. However pre-birth assessment re new baby identified some maturing and a number of positive features including a willingness to cooperate with further assessment. Assessment proved disastrous. Father was excluded when he assaulted another resident. Mother struggled to cope and indeed the child sustained injury, fortunately minor. Assessment terminated immediately and child placed with foster carer. No further assessment. Care order and placement for adoption.

3. Very young parents mother 16. Father 15. Problematic histories. No experience of child care and limited family support. Initial plan to place new baby and parents with a relative broke down within days. Family now placed at Cheshire house. Some professional pessimism as to success (to the extent that a provisional final hearing was listed within 10 weeks of assessment commencing). Interim report at 6 weeks reveals parents are coping extremely well. If, as seems likely, final assessment positive, child to be placed at home with parents, subject to careful monitoring and support. Likely order is a care order.

4. Young mother with learning difficulties. First child. No family support. No accommodation - living with "friends" from week to week. Residential placement failed within 6 weeks in the sense that she was unable to offer consistent care to the baby. Process allowed mother to accept the reality of her predicament and to consent to care and placement orders.

5. Mother's first child murdered by her partner. She was convicted in Scotland of a neglect/manslaughter offence but decision overturned on appeal. Second child removed at birth during criminal proceedings. Several years later new baby. Father with mild mental health problems. Level of risk too great to contemplate assessment of family in community. Residential assessment proceeded very well. Parents observed to work cooperatively and anxieties as to the stability of their relationship resolved. Baby thrived. Now placed at home with parents under interim care orders. Likely outcome - care order by consent.