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By email: Samantha.Watson@justice.govt.nz

Dear Samantha

Vulnerable children legislation – consultation on new legal aid fees

Thank you for inviting the New Zealand Law Society's comments on the proposed new legal aid fees necessary to implement changes brought about by the Vulnerable Children Act 2014 (VCA) and related amendments to the Children, Young Persons and Their Families Act 1989 (CYPF Act).

Legal Aid Services is consulting on changes to legal aid arising from the introduction of new orders and appeals under the new legislation, including:

- a new type of guardianship order (Special Guardianship) for children leaving State-funded care,
- a new care and protection ground for where the child's parent has previously had a child or young person removed due to abuse or neglect (Subsequent Children), and
- a new ability for the Chief Executive of the Ministry of Social Development to provide financial or other assistance to permanent caregivers, and appeals when this is declined.

We appreciate the opportunity to respond to the consultation paper and the proposed changes to the CYP fees schedule.

These changes give rise to new legal processes that have implications in respect of legal representation for parties. The schedules, as currently drafted, do not appear to fully appreciate some aspects of the new legal processes, so we have, where relevant, outlined them in some detail.

Special Guardianship – application for orders by permanent caregivers

We agree that the task of making an application for a special guardianship order should fall within the activity of "Declarations(s) and/or Other CYPF Act Orders".

We presume and have proceeded for the purpose of these submissions on the basis that the Ministry intends that the existing task of "responding to application for interim/final declarations (orders)" will extend to opposed applications for special guardianship orders and that for applicants and respondents all existing activities in respect of interlocutories, prehearing matters and defended hearings will apply. Please clarify if that is not the Ministry's intention.

We are uncertain why there is a reference to "notice of appeal" within that task given that appeals of the decisions of the Family Court are managed as non-fixed fee proceedings.[1]

Recommendation

That the Ministry clarify to what activity the task "notice of appeal" relates.

Special Guardianship – application to vary or discharge special guardianship orders

It is anticipated that applications to vary or discharge special guardianship orders are most likely to be made by parents and that permanent caregivers are most likely to be cast as respondents. It will be far less common for permanent caregivers to apply to vary or discharge special guardianship orders. However, in either case it is necessary to appreciate the process by which a special guardianship order is made and then the process to vary or discharge that order.

Special guardianship orders can be made at two junctures. First, whilst a child is the subject of a sole or additional guardianship order in favour of a natural person under the CYPF Act.[2] Or secondly in favour of a permanent caregiver who by definition is appointed as a guardian and has day to day care of a child under the Care of Children Act 2004 (COCA).[3]

The threshold (in part) for appointment whilst the child is the subject of a CYPF Act guardianship order is that the appointment is for the purpose of providing the child or young person with a long-term, safe, nurturing, stable and secure environment that enhances his or her interests.[4] It is anticipated that in most cases the Court will require evidence of a pattern of behaviour by birth parents or guardians over a period of time that has compromised the long term, safety, stability and security of the child's environment.

In the case of permanent caregivers they must first obtain leave to bring the application[5] which requires them to satisfy the Court that, inter alia, they have exercised all available mechanisms under COCA to resolve disputes with the parents or guardians.[6] This will ordinarily require the permanent caregivers to have made an application under section 44 of COCA for a direction about a dispute between guardians. To make that application they must first have attended a Parenting Information Programme and Family Dispute Resolution (if not otherwise exempted). If granted leave, they must then satisfy the Court that there is that pattern of behavior by the birth parents or guardians that prevents the permanent caregivers from effectively exercising their guardianship responsibilities.[7] Establishing a pattern of disruptive behavior by the parents or guardians will ordinarily require significant evidence of their actions over a period of time.[8]

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[1] Family Fixed Fees Guidelines, Ministry of Justice, 31 March 2012 at page 7.

[2] Section 113A CYPF Act.

[3] Section 110A CYPF Act.

[4] Section 113A(1)(a) CYPF Act.

[5] Section 110A(1) CYPF Act.

[6] Section 110A(2)(b) CYPF Act.

[7] Section 110A(4) CYPF Act.

[8] See paras 126-131 NZLS subs on the Vulnerable Children Bill

In the case of variation or discharge of special guardianship orders made whilst the child is the subject of CYPF Act sole or additional guardianship orders, leave must be obtained[9] before the application is made. Leave will only be given in the case of an application to discharge if there has been a significant change in the circumstances of the child and in the case of the variation if there has been a significant change in the circumstances of the child or the circumstances of his or her parent or guardian.[10]

It is apparent from this description of the process that the application to vary or discharge a special guardianship order is likely to be made a considerable time after the CYPF Act proceedings were commenced and, in the case where the special guardian is the permanent caregiver, a significant period of time after the CYPF Act proceedings have concluded.

Receiving instructions in these matters will require more than a "re-acquaintance with the file". Even if the lawyer has previously represented the party in the earlier CYPF Act proceedings the lapse of time will still require counsel to undertake all those tasks described under "Declaration(s)/ Application(s)/Orders(s)". That being the case the activity should come under "Declaration(s)/ Application(s)/Orders(s)" and attract the $620 fixed fee. The proposed fee of $430 is too low because there is no time saving by virtue of having acted in earlier proceedings.

Furthermore it is conceptually incorrect to place such applications in the "Review of Case/Plan" section of the schedule. An application for discharge or variation is the same as any other application for an order under the CYPF Act and will potentially involve interlocutories, pre-hearing matters and defended hearings and all the activities and tasks included in those sections of the schedules.

Similarly there will need to be corresponding activities and tasks relevant to the respondent (most likely being the permanent caregivers) to an application for variation or discharge of a special guardianship order. If the activity is placed within the "Declaration(s)/Application(s)/Orders(s)" section, the tasks therein apply to respondents.

Recommendation

That the activity "Application to vary or discharge a special guardianship order where section 125A(1A) and (1B) of the CYPF Act apply" come within the "Declaration(s)/Application(s)/Orders(s)" section and attract the $620 fixed fee. This will make it clear that all activities under the "Interlocutories", "Pre-Hearing Matters" and "Defended Hearing(s)" sections of the schedule apply and cover the tasks applicable to respondents.

Subsequent Children: Absence of fee schedule

The fee schedule has not been amended to accommodate Subsequent Children decisions, as the Ministry believes these "would only require legal representation when there was a judicial direction" (Q6, consultation paper). We disagree, for the reasons set out below. It is also unclear what the Ministry means by a "judicial direction" that parties are able to be legally represented. Recent amendments to the Care of Children Act 2004 introduced restrictions on legal representation in applications for parenting and guardianship orders under that Act. However, there is no restriction upon legal representation in CYPF Act proceedings.

[9] The exception being if the application is by the Chief Executive or social worker or other specified services or by consent: section 125(1A) CYPF Act.
[10] Section 125(1B) CYPF Act.

We presume the Ministry is referring to applications pursuant to section 18A(4)(b) by a social worker (having made an assessment of a parent of a subsequent child), for confirmation of his or her decision not to apply for a declaration that the subsequent child is in need of care and protection. It is an application, just like any other under the Act. It must be served on the parent[11] and the Court has a discretion to hear any person, including the parent, on the application in the same way it has on reviews of plan.[12]

Despite the social worker's decision not to apply for a declaration, the Court may determine to decline to confirm the social worker's decision.[13] The consequence is that the application for confirmation is treated as an application for declaration under section 67 on the ground in section 14(1)(ba). Potentially significant adverse consequences for a parent therefore arise from the making of section 18A(4)(b) applications.

It is also within the Court's discretion to dismiss the application if the Court determines that the parent is not in fact a person to which section 18B applies.[14] It is therefore important to ensure that there are necessary checks and balances on the actions of the applicant social worker which, in part, can only come from the parent of the child being represented. Being able to test the evidence against the statutory framework will ensure there is jurisdiction for the application.

Given the potentially significant adverse effect upon a parent arising from such applications it is important they have access to legal representation to explain the nature of the application and identify the factual and legal matters, to seek leave for them to be heard, to present or challenge evidence and to attend any hearing. We propose that such applications come within the activity "Declaration(s) and/or Other CYPF Act Order(s)" to which those associated tasks, as relevant, will apply.

There are unlikely to be other current proceedings when a section 18A(4)(b) application is made, given that a parent will not satisfy the social worker's safety assessment if he or she at that time has another child who is the subject of care and protection proceedings. It is our understanding that this situation will require a new application and therefore attract the $620 fixed fee.

Recommendations

That:

(a) if the Ministry is proposing to limit aid for legal representation to matters when there is a judicial direction, it needs to clarify the nature of the direction required and the jurisdictional basis for making such a direction; and

(b) the activity "Declaration(s) and/or Other CYPF Act Order(s)" apply to applications pursuant to section 18A(4)(b).

Requirement for pre-FGC/pre-proceedings advice in light of subsequent children amendments

Given the new concept of a "subsequent child" and the new care and protection ground in section 14(1)(ba), there are new and potentially adverse consequences for parents the first time a child is removed from their care. That situation may arise through Court proceedings under the CYPF Act or by agreement of a family group conference in the circumstances set out in section 18B(2). The same

[11] Section 18C(2) CYPF Act.
[12] Section 18C(3) CYPF Act.
[13] Section 18D CYPF Act.
[14] Section 18C(4)(c) CYPF Act.

consideration applies to a parent who has had a child removed in the circumstances set out in section 18B(2) but subsequently to whom section 18A(7) applies (that is, they have subsequently been determined as 'unlikely to inflict' or 'unlikely to allow' serious harm to be inflicted on the subsequent child).

Where there are proceedings a parent in these circumstances who is eligible for legal aid will be able to access advice, within the existing schedule. However where these decisions are being undertaken by a family group conference prior to the commencement of proceedings there is no provision in the schedule for legal representation (because proceedings need to be issued or contemplated before legal aid is granted). Many family group conferences occur without proceedings being contemplated or issued. The scheme of the Act now is such that decisions about whether a child can ever be returned to the care of his or her parent can, in certain instances, occur solely through the family group conference process.[15] A family group conference is a powerful legal entity and in respect of those conferences that take place independently of proceedings in the Family Court there is a marked inequality of arms.

Whether these determinations occur during proceedings or through a family group conference, the consequences for the parent are the same. Parents in each situation should therefore be treated equally in terms of access to justice. That can be achieved by the introduction of an activity to provide advice to parents in those circumstances prior to the family group conference. Although not an exhaustive list, we envisage the tasks would include: taking instructions and attending the client, preparing an application for legal aid, identifying legal and factual issues and merits (this would necessitate attendances with Child Youth and Family, support workers etc), advising the client as to the family group conference process and implications of any decisions arising from them, reporting to the client, reporting to and invoicing Legal Aid Services. The Interim Grant in the schedule for appeals against decisions not to grant or revoke a core children's worker exemption could provide a useful comparison.

We welcome further consultation with the Ministry regarding this matter.

Recommendation

That there be a schedule for family group conferences/pre-proceedings advice for parents who are the subject of an assessment (as to the need for care and protection of their subsequent children) under sections 18A – 18C.

Financial and other assistance for permanent caregivers

The provisions obliging the Chief Executive to provide permanent caregivers with financial and other assistance are new. As with special guardianship it is necessary to appreciate the process by which those decisions are made and appealed.

The Chief Executive must provide financial assistance to a permanent caregiver in the circumstances in section 338A(2) of the CYPF Act. A permanent caregiver who is dissatisfied with the Chief Executive's decision may apply for an internal review.[16] That review must be conducted in accordance with a process established by the Chief Executive and must confirm, modify or reverse

[15] See s18B(2): A family group conference makes the decision that the child is in need of care and protection on the grounds set out in s14(1)(a) or (b); it is agreed at the FGC that application will be made by the caregivers for parenting orders under the Care of Children Act and this occurs; the family group conference agrees that there is no realistic prospect of the child being returned to the parent's care.

[16] Section 389A(1) CYPF Act.

the original decision.[17] A permanent caregiver who has not received notification of the outcome of the internal review within three months of the application being lodged or who is dissatisfied with the outcome, may appeal to the Family Court.[18]

Significantly, the appeal to the Family Court "is by way of rehearing, and is to be heard and determined in accordance with section 389B and the rules of the court".[19] Upon a rehearing the Court may not receive further evidence except in limited circumstances.[20] Consequently, the crucial point at which a permanent caregiver requires legal advice and representation to ensure that the application for financial assistance is appropriate and supported by relevant evidence is at the time of the internal review. Legal representation at that point will avert ill-conceived appeals to the Family Court. Furthermore a perverse effect of a decision on internal review being made without appropriate evidence that was otherwise available is that an appeal is more likely to proceed on the basis that the decision was wrong or unreasonable because the Chief Executive did not take into account all the relevant information. That is likely to be avoided if there is legal representation at the time of the internal review.

Representation in respect of financial decisions does not fit conceptually or practically within the activities for "Declarations(s)/Application(s)/Order(s)" where it is currently placed. We suggest that a new category of "Permanent Caregiver: Applications/Appeal – Financial and other assistance" be created. Until such time as the Chief Executive establishes the process for internal review it is not possible to determine what tasks will be required in that respect. It may be appropriate for a fixed fee to be assigned to that aspect (when a process has been established) for appeal preparation to be by way of estimate and hearing time to according to the half hours as provided for in the draft schedule. We cannot however commit to a final position without clarity of the internal review process.

Recommendations

That:

(a) a new category of "Permanent Caregiver: Applications/Appeal – Financial and other assistance" be created;

(b) legal aid be available to permanent caregivers for advice and representation in respect of the internal review by the Chief Executive of the decisions to provide financial or other assistance as well as for appeals of those decisions to the Family Court; and

(c) Legal Aid Services obtain clarification from the Chief Executive as to the internal review process then undertake further consultation with the Law Society with regard to an appropriate schedule.

Consultation questions

To the extent that we have not responded above to the questions contained in the consultation document we respond as follows:

[17] Section 389A(2) CYPF Act.
[18] Section 389B(1) CYPF Act.
[19] Section 389B(6) CYPF Act.
[20] Rule 211 Family Courts Rules 2002.

Special Guardianship orders, Subsequent Children decisions, and appeals against financial decisions:

Q3: Whether any of these proceedings could be run concurrently with any other matter types and could affect other schedules

The associated amendment to COCA by insertion of section 29A (revocation of a permanent caregiver's guardianship and discharge of the parenting order that grants day to day care) means that those COCA applications will be run concurrently with applications by permanent caregivers for special guardianship.

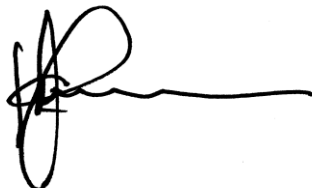
In our view, there are no other matters with which any of these proceedings could be run concurrently and no other schedules will be affected.

Q7: Whether these proceedings will require particular specialist provider experience such that there needs to be a change to existing family provider approvals to take these cases

The existing family provider approvals are appropriate to enable family legal aid providers to undertake these cases.

These comments have been prepared with assistance from the Law Society's Family Law Section. If you have any questions or wish to discuss the comments, please do not hesitate to contact the Section Chair, Dr Allan Cooke, through the Section Manager Kath Moran (kath.moran@lawsociety.org.nz / 04 463 2996).

Yours sincerely



Chris Moore
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