IS AN LIP A VIP?

THE RISE OF THE LITIGANT IN PERSON

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Legal aid is not available to the vast majority of separating couples. This is nothing new (as both family lawyers and the general public are only too well aware). The extensive legal aid cuts were introduced by the Legal Aid, Sentencing and Punishment of Offender Act as long ago as 2012. However, rising prices and the consequent economic pressures means that more people than ever before are representing themselves to deal with their divorce and the issues that flow from it. There can, of course, also be non-financial reasons why an individual may wish to represent themselves – they may distrust lawyers following a previous bad experience for example or feel it puts additional negotiating pressure on their spouse in some way. Some individuals may just not see the need or benefit of legal advice.

From 2013 to 2020, the number of cases in the family courts where neither party had a legal representative almost trebled – increasing from 13% to 36% (see The Law Society, Civil legal aid: a review of its sustainability and the challenges to its viability) and that trend is set to continue given the financial challenges many will be facing now.

The courts are therefore increasingly being faced with a number of hearings where one or both parties is in person. This presents challenges for both the court and for practitioners.

This article considers some of those challenges, what can be done to assist a litigant in person (LiP) and includes some tips for practitioners who represent the other spouse. Solicitors must be aware of what the court expects of them in their dealings with unrepresented parties and alive to the many ways it may impact their client when the other party is unrepresented.

Assisting a litigant in person

First and foremost, it is important not to use jargon, abbreviations, or unnecessarily complex legal language. At all times, it is important to spell out what you are asking the court to do, or what your client's case is, and why.

Whilst solicitors obviously cannot give a LiP advice, they can provide information. For example, the recent FRC Advisory Notice dated 19 April 2022 makes clear that the obligation to produce forms ES1 and ES2 applies equally to LiPs. Explaining this requirement, setting out the deadlines, and where documents should be filed will all help the court to have what it needs to progress matters at the hearing – which is clearly in both parties' interests. It is also sensible to explain what directions are being sought and what those directions actually mean (in plain and simple language). Where there is a reference to a particular practice direction, or authority, both providing a link to it by email and attaching a full version as a PDF will ensure that the LiP can refer to it if they wish.

Where one party is unrepresented the solicitor must also prepare the bundle, even where they act for the respondent (see paragraph 3.1 of PD27A).

The recent FRC Advisory Notice reiterates this in the context of electronic bundles, and confirms that if one party alone has a solicitor, then absent an agreement or order to the contrary, it is for the solicitor (and not the LiP) to prepare an electronic bundle.

It is important to serve position statements and evidence as early as possible. Re B (Litigants in Person: Timely Service of Documents) [2016] EWHC 2365 suggests that in any case where a party is unrepresented, the court should direct that they be sent position statements and any other practice direction documents at least 3 days before the final hearing. It is not advisable to insist on exchanging, particularly if the result would be that the LiP does not receive documents until shortly before the hearing. Failing to act in this way is likely to attract judicial criticism and may result in the hearing being adjourned.

It is also important to recall that it is mandatory to copy the LiP in on every email on matters of substance or procedure that may be sent to the court (see FPR rule 5.7)

Advising your own client

It is important to explain to clients at the outset that there are some additional steps that may have to be taken because the other party is unrepresented. Some of these steps (eg preparing the bundle as the respondent) will result in increased costs for your client. Other steps (eg serving position statements early and not pressing for them to be exchanged) may be interpreted by your client as the other party 'having an unfair advantage' or you 'doing their job for them' because they are unrepresented. Your client needs to be aware that you owe a duty to the court as well as to your own client. Ultimately, it is in your client's interests that the case is well prepared for trial, the judge has the right papers in the right format, and that the case is not adjourned at the eleventh hour.

If there is a possibility of your client being cross-examined by the other party in person, it is advisable to consider asking the judge to convene a 'ground rules' hearing (Family Procedure Rules 2010, Part 3A and PD 3AA) on the first day of the final hearing, or at the PTR, to determine what questions the LiP should be allowed to put, whether they should be put by the judge instead, and what protections are necessary for your client.

It is also sensible to prepare your client for the degree of lenience judges will give to a LiP at hearings, in contrast to a represented party. It will not affect the outcome but your client needs to be prepared for the judge to allow a LiP to 'say their piece' at length and uninterrupted, even where it is of little or no relevance to the issues, whilst a barrister instructed may be given less time, and will commonly be frequently interrupted by the judge.

Dealing with the 'difficult' LiP

Dealing with a difficult LiP can be extremely stressful, even for experienced practitioners. It is important to consider what practical steps can be taken to limit the impact of that stress.

For example, if they are abusive on the telephone, then state that you will only correspond via letter/email. If they send multiple emails throughout the day, or at unsociable hours, then consider diverting their emails to a separate folder so that you can deal with them at the same time, and at a time that suits you rather than in a piecemeal fashion. This can also be reassuring for your client who may well be concerned the LiP is intentionally increasing the client's costs by deluging you with irrelevant correspondence. Remember, there is no obligation to respond to every email and it might be better to send one combined response, dealing only with those points that you have not already dealt with. It can often be helpful to tell the LiP this is what you will be doing so that they are forewarned. It can also be sensible to take someone with you to take a clear note whenever you are having substantive or settlement discussions either on the telephone or in person at court.

Do also bear in mind the particular impact dealing with an impassioned LiP, and the barrage of correspondence that can sometimes ensue, can have on more junior members of your team. They may well be particularly front and centre to help keep costs down for your client as well, but if so it becomes even more crucial to ensure they are fully supported, that they have a regular chance to debrief (or just let off steam) and to know the partner will step in as and when needed.

Cases where the other party is unrepresented can bring with them particular challenges. It is hoped that this article provides some practical measures that can be taken to help smooth the waters. If you are not sure of your obligations in a particular situation, or are in need of any further advice, there are detailed Bar Council, Law Society and Resolution guides on dealing with LiPs. What is already palpably clear is that the courts will continue to be faced with many more LiPs going forwards and we, as practitioners, must be alive to the issues that this entails.